



NATIONAL INDIAN EDUCATION
Advancing Excellence for All Native Students

August 1, 2016

The Honorable John King
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Re: Secretary's Proposed Accountability and State Plan Regulations

Dear Secretary King,

Thank you for the opportunity to provide feedback on the Department of Education's (ED) Proposed Accountability and State Plan Regulations. The National Indian Education Association (NIEA) works to ensure that all Native students receive a high-quality academic and cultural education. NIEA looks to ED as an extension of the federal government charged with fulfilling the federal trust responsibility to tribes. This includes ensuring that Native students are provided an equal opportunity to be academically successful.

The Federal Trust Relationship

Since its inception, NIEA's work has centered on reversing negative trends within Native education, a feat that is possible only if the federal government upholds its trust responsibility to tribes. Established through treaties, federal law, and U.S. Supreme Court decisions, this relationship includes a fiduciary obligation to provide parity in access and equal resources to all American Indian and Alaska Native students, regardless of where they attend school. Under the federal government's trust corpus in the field of Indian education, it is important to state that the obligation is a shared trust among the Administration and Congress for federally-recognized Indian tribes.

As the country transitions to conform to the new law—the Every Student Succeeds Act (ESSA)—states will take on more responsibility for educating Native students in exchange for greater transparency regarding how policy decisions are made. This exchange—and the unique and continuing federal trust obligation—makes the Department's regulatory role more essential than ever before. And, for Native students, no area of regulation is more important than how states consult with tribes.

NIEA's Top Priority: Timely and Meaningful Consultation

NIEA appreciates the opportunity to comment on the draft regulations in the order in which they were published as requested, but we would like to first call attention to what we see as the most

National Indian Education Association
1514 P Street, Suite B Washington, DC 20005
Ph. (202) 544-7290 Fax (202) 544-7293
Email: NIEA@niea.org
NIEA.org

critical part of the draft: the requirements for the submission of state plans and “timely and meaningful” consultation that are contained in Sections 299.13 through 299.15. Tribal leaders, Native communities, and Native students know from decades of experience that education in Indian country without significant, sustained family and community engagement has failed. We have suggestions for a number of areas that we see as critical to improving outcomes for Native students, but want to be clear: **Getting consultation right is our top priority.**

Sections 200.12 to 200.14: Single Statewide System, Goals, and Indicators:

NIEA supports the structure for accountability systems established in Section 200.12 and the goal and indicator regulations in Sections 200.13 and 200.14. For the more than 90% of American Indian and Alaska Native students that attend public schools—as opposed to Bureau of Indian Education schools or privately run schools—the statewide accountability systems, goals, and indicators that measure and drive student achievement are critical. Each of the draft regulations makes sense for NIEA: annual determination of progress on goals, focus on closing the gaps in student proficiency, and making sure each indicator is comparable across groups of students.

Section 200.13: —Goals for English Language Learners

NIEA is committed to preserving Native languages as part of tribal heritage and culture. We will comment in response to the proposed assessment regulation on the importance of Native language immersion schools and the critical cultural role language plays for tribes and Native communities.

For this set of draft regulations, we focus on Native students who are learning English, and join our partners at the National Council of La Raza in urging the Department to include a maximum timeline of five years for goals for reaching English proficiency in Section 200.13. The average time to reclassification is under four years¹ for children under grade 5. Moreover, ESSA adds much needed reporting requirements for English learners who have not reclassified within five years. We believe this timeline will be consistent with the Long Term English learner definition signaling that more than five years is excessive and students should be making progress with the supports they need to become proficient in the English language within a reasonable timeline.

Section 200.15: Participation in Assessments and Annual Measurement of Achievement

NIEA supports ED’s draft regulations Section 200.15 regarding 95% participation in assessments, which reasonably gives meaning to the statutory language in Section 1111(c)(4)(E) of ESSA and makes sure that state education systems prioritize the academic proficiency of all students, including American Indian, Alaska Native, and Native Hawaiian students (AI/AN/NH).” The statute requires that states annually measure achievement via assessment of 95% of all students and 95% of each subgroup of students in determining proficiency on the academic achievement indicator. Draft Section 200.15 proposes options for (1) “how the state will factor” the participation rate for each subgroup into the state accountability system and (2) how states will meaningfully address low participation rates for schools that do not assess 95%

¹ Greenberg Motamedi, J. (2015). Time to reclassification: How long does it take English learner students in Washington Road Map districts to develop English proficiency? (REL 2015–092). Washington, DC: U.S. Department of Education, Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, Regional Educational Laboratory Northwest. Retrieved from <http://ies.ed.gov/ncee/edlabs>.

of students. NIEA supports both sets of options as consistent with the statute and critical to making sure all Native students count.

- (1) The options for making sure the state will factor the 95% participation requirement into school accountability ratings will help ensure Native students are not overlooked or masked. Rigorous state-determined actions, such as those identified in Section 200.15 (b)(2)—lower summative ratings, the lowest performance level on academic achievement, and identification for targeted support and improvement—are consistent with NIEA’s commitment to making sure states are held accountable for Native student performance by preventing them from hiding it in school averages at the state, local education agency (LEA), or school level.

The facts about where Native students attend public schools makes 200.15(b)(2) critically important. Native students often make up less than 50% of the students in a school and often have been ignored or overlooked in evaluation of school performance.² Making sure Native students in every school receive the instruction they need to achieve requires knowing how well they are progressing in meeting state standards. Without participation in assessments, Native parents, tribal leaders, and students will not be able to know whether Native students have these skills. As a means to obtain this critical information, NIEA supports 200.15 (b)(2)’s state options or the “equally rigorous State determined action” allowed in the regulations.

- (2) NIEA also supports the options ED has drafted for improving low assessment participation rates in 200.15 (c) and (d), but recommends that the list of stakeholders who must be engaged in 200.15(c)(1) specifically include tribal leaders. The requirements in (c)(1) that states must articulate strategies for addressing low participation rates, that the LEA approves a plan before it is implemented, that the LEA monitors the plan, and that LEAs that oversee multiple schools have a plan commensurate with the problems they face, all strike a good balance between requiring action and not prescribing how to take action. We suggest that tribal representatives should be added to 100.15 (c)(1)(i). Doing so is consistent with Sections 1111 and 8538 of ESSA: “Consultation with Indian Tribes and Tribal Consultations,” which is applicable to these draft regulations through language in both Section 1111 and Section 8538 that requires that the development of plans include tribal representatives.

Section 200.16: Subgroups of Students

NIEA supports the clarification in draft Section 200.16 that a state must include each of the required subgroups of students separately in its accountability system as stated in Section 200.16. This clarification is particularly important for Native students because they are often distributed across many schools and because they have a unique culture and history that is distinct from those of other subgroups of students. Relying on a combined subgroup or super-subgroup of students masks subgroup performance and conflates the distinct academic needs of different groups of students. It also inhibits the identification of schools with one or more consistently underperforming subgroups of students for targeted support and improvement and limits

² The 2011 National Indian Education Study showed that more than 50% of Native American and Alaska Native students at the 4th and 8th grade levels attend schools in which fewer than 25% of students are NA/AN.

information available to the public and parents, which is contrary to the statutory purpose of increasing transparency, improving academic achievement, and holding schools accountable for the success of each subgroup.

Section 200.17: Disaggregation of Data

The disaggregation of data in the No Child Left Behind Act resulted in significantly more information about Native student achievement. In light of this, and because we believe every Native student must count, we strongly supported the continuation of disaggregation in the ESSA. Therefore, we support ED’s draft regulation 200.17, and recommend that n-size be lowered so that even more students—and especially Native students—count in state accountability systems.

Allowing schools with Native student populations of less than 30 to avoid reporting their academic achievement would enable many schools to avoid accountability and ensure many Native students do not count for accountability purposes. Many public schools in states across the country have small percentages of Native students. Even in states with a large population of Native students, such as Washington State and Arizona, the students are dispersed over multiple schools, making a small n-size critical for Native students. In these states, students would not receive as much educational consideration if n-sizes of up to 30 students are permitted without Secretarial review. The draft of 30 would allow too many Native students attending public schools not to count, for purposes of accountability.

The draft regulation could have the unintended consequence of encouraging states that have an n-size lower than 30 to increase their n-size, allowing them to omit reporting related to even more Native students. Currently, 29 states have an n-size below 30 students. These states would have an incentive to increase their n-size to avoid accountability, and significant historical evidence suggests they are likely to do so. States can hold schools accountable for the outcomes of each subgroup of students, including Native students, while protecting student privacy. Significantly lowering the n-size threshold will help ensure that Native students do not fall through the cracks.

Section 200.18: Annual Meaningful Differentiation of School Performance

A key function of a school accountability system is to communicate to parents and community members how well a school is doing in meeting state expectations. We believe this critical function is likely to be best done through a summative rating, as proposed in Section 200.18(b)(4). Of course there can—and absolutely should—be reporting of all the data that goes into this summative rating, as well as of additional data to inform the improvement planning process. Further, without seeing the specifics of a state rating system, we do not rule out the possibility that a state system could accomplish the goal of clearly communicating how a school is doing in meeting state expectations. However, simply reporting school performance metrics in a data dashboard, with no clear signal of whether the school is meeting expectations, leaves parents and community members to do all the work of interpreting the data and limits schools’ incentive to improve.

Section 200.19: Timeline for Implementation

NIEA supports delay in implementation of state accountability systems for one year, from the 2017-2018 school year to the 2018-2019 school year. We believe obtaining state support for well-thought-through plans is sound policy: It will help stakeholders engage in the creation of plans and better serve Native students by making state accountability systems more transparent to tribal leaders and stakeholders across states.

We support the definition of “consistently” in Section 200.19(c) to mean no more than two years. Because the academic career of any student is so limited, every year counts. If a problem facing a school for a group of third grade Native students isn’t even identified until those students have moved on to middle school, it is unlikely the students will benefit from needed support and improvement strategies. We cannot wait to identify areas where supports for Native students are needed and to make changes to support student learning; the stakes are too high for every single student and even more so for Native students, who have been historically marginalized as a group.

Sections 200.21 & 200.22: Comprehensive and Targeted Support and Improvement

NIEA applauds the wording of Sections 200.21 and 200.22, which requires that notice be provided “to the extent practicable” in a language that parents can understand or, if not practicable, be translated orally to the parent. We request that the languages practicable under Sections 200.21 and 200.22 include American Indian, Alaska Native, and Native Hawaiian languages. In addition, we request that the Department consider adding culturally responsive modifications and adjustments to school interventions for underserved students to the non-exhaustive list in 200.21(d)(3). This recommendation comes from the knowledge that Native parents and community members know their students’ culture best and, as a result, often know what interventions will work best for Native students.

NIEA also supports the clarifying language to identify and address resource inequity under the development of the Comprehensive and Targeted Support and Improvement Plans found in Sections §200.21 and 200.22. Specifically, NIEA supports the suggestion to identify and address other resource inequities such as access to and availability of advanced coursework, preschool programs, and instructional materials and technology. We suggest that the Department add to this list of resource inequalities a healthy school climate, access to specialized instructional support personnel (including guidance counselors and social workers), and access to high-quality preschool programs and full-day, five-day-a-week kindergarten. It may also be instructive for schools to show that they provide access to core academic subject courses that are prerequisites for a regular high school diploma.

Section 200.30: Report Cards

NIEA supports draft regulation Section 200.30, the “Annual State Report Card,” which requires a state to prepare a report on the performance of the state’s schools and share it “to the extent practicable” in a language that parents can understand. We request that the languages practicable under Sections 200.21 and 200.22 include American Indian, Alaska Native, and Native Hawaiian languages. Underrepresented parents will benefit from this provision because they will be better able to understand how their children are doing in school. Easy access to this data will help all parents be active participants in the education of their children.

NIEA also supports the regulatory changes in draft Section 200.30 that require states to report on students in foster care consistent with Section 1111(h) of ESSA. American Indian and Alaska Native children are four times more likely than white children to be placed in foster care.³ Due in part to this disturbing statistic, NIEA applauds the clarification of “child in foster care status” as established by regulations. This clarification maintains the meaning of “foster care” as defined in 45 CFR 1355(a), which means 24-hour substitute care for children placed away from their parents and for whom the title IV-E agency has placement and care responsibility. NIEA appreciates the fact that the definition specifically includes tribal agencies. We look forward to working with ED to better support Native students in foster care.

We have one recommendation for how to improve Section 200.30. The proposed rule fails to outline guardrails to ensure that new categories are reported in a manner that is easily accessible and user friendly. The Department should amend Section 200.30(c) to set minimum “easily accessible” requirements that require information on report cards to be publicly downloadable for all visitors to a State Education Agency’s (SEA) website. Easy access to this data will help all parents be active participants in the education of their children. The Department should also prohibit the SEA from setting as a condition to accessing the information any significant barrier to getting the data, such as a requirement that users contact the SEA or pay a fee.

Section 200.34: High School Graduation Rates

NIEA supports standardizing the high school graduation rate criteria for all subgroups of students. Graduation rates are a particularly high priority for the American Indian and Alaskan Native communities because Native graduation rates remained flat at 69.9% in 2013-2014, while overall graduation rates reached an all-time high of 82%.⁴ States, local education agencies, tribal leaders, Native communities, and Native students all must work together to close this gap. Comparable information on graduation rates at the state level would help.

NIEA also believes that high school graduation criteria should be standardized for students in foster care and for students with disabilities, of which Native students make up a larger share than each respective student population as a whole. With respect to students with disabilities, we support the joint recommendation of the Consortium for Citizens with Disabilities and National Center for Learning Disabilities to ensure that students’ individualized education program (IEP) goals do not replace regular high school diplomas. Specifically, Section 200.34(c)(2) provides a definition of “regular high school diploma,” which allows the unintended consequence of IEPs affecting graduation rates. IEPs provide critical information on specific goals, special education and related services, and accommodations as necessary. However, they are not the equivalent of a high school diploma and should not be seen as such.

Per Pupil Expenditures: Section 200.35

NIEA supports draft regulation Section 200.35 requiring that states and LEAs report individual per-pupil expenditures. We are pleased that the regulation requires disaggregation of the funding source by federal and state sources. And, at the LEA, local funding provided to schools. We also fully support the “uniform procedures” in subsection (c), since knowing exactly how

³ Hill, R. B. Casey-Center for the Study of Social Policy Alliance for Racial Equity in Child Welfare, Race Matters Consortium Westat. (2007). *An analysis of racial/ethnic disproportionality and disparity at the national, state, and county levels*. Seattle, WA: Casey Family Programs).

⁴ The Department of Education’s National Center for Education Statistics (NACES) recently published a study that summarized the increasing graduation rate of high school students in the United States.

expenditures are calculated will enable Native parents and tribal leaders to better hold states, school districts and schools accountable for ensuring that Native students receive the resources they need, consistent with the federal trust responsibility.

Educator Qualifications: Section 200.37

NIEA supports draft regulations Section 200.37 as a means to minimize disproportionality in experience, credentials, and out-of-field educators in schools and communities with high vs. low-poverty populations. Native students are disproportionately low-income, so the draft regulations will help identify challenges that Native students have experienced for decades. NIEA would also like to ask ED to recognize the challenges that result from employing teachers who are inexperienced at teaching Native students. NIEA has found that experience with Native cultures is critically important to whether or not a teacher is effective. As a result, we recommend that ED recognize and support community-based educators (e.g., elders as well as Native and cultural artisans and practitioners) and educators with experience teaching Native languages in Section 200.37. We believe experience with Native language and culture is a reasonable interpretation of Section 1111(h)(C)(ix) and critically important for the success of Native students.

Family and Community Engagement: Section 299.13 to 299.15

NIEA strongly supports the family and community engagement requirements from Section 299.13 to 299.15, and makes two recommendations to better implement ESSA. As we do so, we draw on the decades of experience that American Indian and Alaskan Native leaders have through government-to-government consultation.

Based on this experience NIEA recommends two critical provisions in ESSA. The draft regulations partially reflect these provisions through:

- the inclusion for the first time of “representatives of Indian tribes in the state” in state plans and the requirement that stakeholder engagement in state plans must be “timely and meaningful” and the specific inclusion in Section 1111(a) of ESSA;
- the new language in Section 8538 “Consultation with Indian Tribes and Tribal Organizations” that requires tribal consultation.

Stakeholder Engagement

Section 299.13 “Overview of State Plan Requirements”: subsections (b) through (h) did not exist in the regulations implementing No Child Left Behind, but are now at the heart of ESSA’s emphasis on stakeholder engagement. Subsections (b) “Timely and Meaningful Consultation” through (h) “Revisions” require: (1) public notice of the initial state plan, (2) a 30-day period for comments, (3) specific assurances regarding high school students and English learners, and (4) a requirement of engagement when there are significant amendments of a state plan. We were pleased to see that these requirements fit with the priorities identified in Executive Order 13175, “Consultation and Coordination with American Indian and Alaska Native Tribal Governments”: early and ongoing consultation that actively seeks the views of all key stakeholders.

Stakeholder engagement is also part of Section 299.14, “Requirements for the Consolidated State Plan,” which for the first time requires that consultation and coordination is a major component

of state plans, and draft regulation Section 299.15, “Consultation and Coordination,” which identifies stakeholders who must be involved, including representatives of Indian tribes. Both draft regulations clarify that family and community engagement is a critical component of state plans and state obligations under ESSA.

Tribal Engagement

NIEA has one recommendation that we think is consistent with Section 1111(a) of ESSA but is not reflected in the regulations. States should be required to engage with tribal governments above and beyond stakeholder engagement. The sovereign status of tribal nations under federal law strongly support clarifying in Section 299.15 that “representatives of Indian tribes located in the State” should mean that elected or appointed tribal government leaders should be consulted. The addition of Native representatives is critical and strongly supported by NIEA—but should not be named as surrogates for tribal government representation. We ask that 299.15(a)(5) be amended to clarify that the tribal elected or appointed representatives must be consulted.

Critical Elements of the Section 299.13 and a Recommendation

NIEA wants to highlight our support for three of the specific requirements under 299.13(b) that define “timely and meaningful”: (1) the public notice required regarding state plan processes and procedures; (2) outreach during the design, submission, and revision of a state plan; and (3) publication of how comments and consultation occurred. We applaud these regulations and look forward to the states’ adherence to them as well as the Department’s enforcement of them.

However, our experience with tribal government-to-government consultations is that without agendas developed with stakeholders and written, clear follow up, consultation is often ineffective. We recommend an additional subsection to 299.13(b) to ensure that clear, pre-agreed-upon agendas and written follow up to participants are required in state plans. The Department of Education’s guide to “Consultation and Coordination with American Indians and Alaska Native Tribal Governments” and a guide created by the Council of Chief State School Officers, NIEA and numerous other stakeholders both identify agendas and written report-outs to stakeholders.⁵ The addition of the phrase “timely and meaningful” in Section 1111 and the state plan peer review subsection in Section 8541 strongly support this critical recommendation.

Tribal Consultation

NIEA advocated strongly throughout the consideration of ESSA that the law should include a requirement that LEAs consult with tribal representatives on decisions that impact Native students. Section 8538, “Consultation with Indian Tribes and Tribal Organizations,” is the result of that advocacy and Congressional recognition of the importance of consultation with tribal leaders and tribal organizations. The language in Section 8538 applies to an LEA’s “submission of a required plan or application for a covered program under this Act.” Under this language, the LEA plans discussed in the draft accountability regulations should be amended to clarify that states must require that LEAs consult with tribal representatives whenever LEAs are required to act under the regulations in Section 200.12 et seq. and Section 299.13 et seq. For example, under Section 200.19, “Identification of Schools”; Section 200.21, “Comprehensive Support and

⁵ “Let’s Get This Conversation Started: Strategies, Tools, Examples and Resources to Help States Engage with Stakeholders to Develop and Implement their ESSA Plans,” June 2016. CCSSO, NIEA, AASA, AFT, The Leadership Conference on Civil and Human Rights, NEA, NASBE, NCLD, the National PTA, the National Urban League, et al.

Improvement”; Section 200.22, “Targeted Support and Improvement”; and Section 200.24, “Resources to Support Continued Improvement”; LEAs have an affirmative obligation to consult with tribal representatives. The draft regulations should add tribal representatives explicitly to make sure states and LEAs recognize tribal representatives.

The tribal consultation at the LEA that we seek is not universal, but it is critical. Under Section 8538, LEAs have this obligation only when more than 50% of the students in the LEA are Native students. For such LEAs, we believe the Department should amend the regulations regarding state accountability plans to make sure all Native students benefit from tribal engagement in identification of schools and interventions to improve education for Native students. This additional step is clearly envisioned by Section 8538 and is consistent with the government-to-government recognition that tribal leaders deserve as representatives of sovereign nations.

Conclusion

Through the recommendations listed here, the final regulations, and the implementation of the transition to ESSA, NIEA looks forward to working alongside ED to drive federal resources to the only students that the federal government has a direct responsibility to educate—Native students. If you have any questions, please contact Ahniwake Rose, NIEA Executive Director, at arose@niea.org.

Sincerely,



Patricia L. Whitefoot
President