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Regulating the Every Student Succeeds Act Pages 1-7

Regulating the Every Student Succeeds Act

Glenn Cook

As an assistant superintendent for instruction in a small, rural South Carolina school district, David Mathis says he and other administrators were caught off guard after Congress passed the No Child Left Behind (NCLB) Act in 2001.

"We didn't know what to expect, and all of a sudden, the regulations were thrown in our laps," says Mathis, now superintendent of Saluda County Schools in South Carolina. "We didn't know what had been discussed before it happened, and we were told to implement a law that was so punitive right then and there. Constantly we had to make changes on the fly, and it felt like we always were trying to change the tire on the car while it was still rolling."

Mathis and other educators are hoping for a much smoother implementation process with the Every Student Succeeds Act (ESSA), the long-awaited reauthorization of the nation's largest federal K-12 education program. Signed into law by President Obama last December, ESSA is the latest iteration of the Elementary and Secondary Education Act (ESEA) that was first passed by Congress in 1965.

After 14 years of federal education policy dictated by NCLB, the last eight of which came while Congress haggled over a replacement, the enactment of ESSA represents a long-awaited reprieve for school leaders. But with the Obama administration leaving in January, the celebration has been short-lived. The focus now is on developing regulations for the law, and the clock is ticking.

"The excitement of a bill signing takes your breath away until you realize what's left to be done," says Sally Katzen, who teaches administrative law and the regulatory process at New York University. "The signature on the paper is the first step, but only the first step, and the agency still has to implement Congress's will as much as it can discern. Until then, you do not have the operative features of a functioning program."

Barmack Nassirian, director of federal relations and policy analysis for the American Association of State Colleges and universities, says regulations expand on legislative language by explaining what the law is and how it must be executed. Removed from the inherent drama and theater that comes in debates over legislation, however, the regulatory process often flies under the radar.

"The regulatory process is sometimes more important than the legislative outcome because, in many cases, Congress can only articulate the ends," Nassirian says. "Where the issues come is in the means to those ends, and those are reflected in the regulations, not the legislation. Regulations matter because they have the force of law."



Built-In Flexibility

Valerie Truesdale was in charge of the policy division for the South Carolina department of education when NCLB was passed. As the law was being implemented, she became a district superintendent and saw firsthand the challenges practitioners faced.

"The implementation of the federal intent is very simple, but a single phrase can become 1,000 pages of regulations," she says, pointing to NCLB's provision for a highly qualified teacher for every student. "Any educator absolutely agrees with that, but the regulations became so complex that you had a bureaucratic system of licensure that really boxed people in to the point where they would not be able to use good judgment. There has to be some flexibility."

Amit Narang, regulatory policy advocate for Public Citizen—a nonprofit organization that advocates for citizen interests—says the regulations developed depend on how prescriptive Congress is in passing the legislation. NCLB was broad in its intent, ultimately giving the U.S. Department of Education great latitude in developing the accountability program for teachers and students. ESSA, on the other hand, limits the department's authority to create regulations administratively and gives states more flexibility to propose their own accountability systems within broad guidelines.

This pleases administrators such as Sara Shubel, superintendent of Michigan's East Grand Rapids Public Schools.

"I think the work that is going to happen right now is really critical, both at the state and federal level," she says. "As administrators, we need to start having the conversations about what the standards are going to be, what the planning process for implementing aspects of the law will look like. A smart district should already be planning for what's coming next, not creating something as you go along, which happened in a lot of cases with NCLB."

Jack Jennings, a longtime congressional staffer who founded the Washington, D.C.-based Center on Education Policy, a think tank that analyzes the impact of federal legislation on K-12 schools, calls the newly reauthorized bill "'NCLB lite' ... and that's not a bad thing, necessarily."

Jennings, a longtime critic of NCLB, says much of that legislation's complexity was "built into the law, and there was not much that could be done about meeting the requirements at the regulatory level." He says that does not appear to be the case with ESSA, in part because the new law is "more realistic in its expectations" while limiting the power of the Department of Education in the implementation.

Regulation: How It Works

Developing rules to enforce federal law is, by design, prescriptive. Regulations are broken down into the following four steps: (1) initiating events, also known as the pre-rule process; (2) publishing the proposed rule; (3) soliciting public comments; and (4) publishing the final rule. (See "[Implementing a Law](#).")

As important as it is to be engaged in the legislative process, educators should be even more attentive as the regulations are being developed, especially during the pre-rule and public comment periods when changes can still be made before a final regulation is written.

"If the Education Department is empowered to make an important decision in interpreting the law—which is less so in the case of ESSA but still significant—it is crucial for advocates to be making their policy preferences and the justification for those preferences known," Narang says. "This gives the Education Department the amount of information they need to proceed upon, and it helps in ensuring the regulation is the most effective for a strong policy."

In the pre-rule process, the Department of Education writes proposed regulations for ESSA. The regulations are

published in the *Federal Register*, followed by an open comment period. Public hearings were also held in Washington, D.C. in January and California in early February of this year.

ASCD's comments to the department focused on areas that need further consideration and clarification during the implementation process, says David Griffith, senior director of government relations. For instance, ASCD would like clarification on terminology used in the statute, such as the requirement that academic performance receive "much greater weight" compared to other indicators, and the meaning of "consistently underperforming" in regard to student subgroups and accountability determinations. (See "[ASCD Comments on ESSA](#).")

Behind the scenes, the Department of Education also submits the regulations to OMB and OIRA for review and approval. This independent "clearance" process includes a cost-benefit analysis and ensures that the regulations align with the administration's overall approach to the law. OIRA can make changes in the rule depending on the administration's preferences and its own cost-benefit analysis.

"The bulk of the ESSA regulations will go through that process," Nassirian says. "Where the bulk of the attention is focused is on specific topics within the legislation that are subject to a process known as negotiated rulemaking. This is where things can slow down."

Negotiated Rulemaking = More Voices

Negotiated rulemaking, which started in the 1980s, is a process in which various stakeholder groups are brought in to reach consensus over controversial sections of a law. In this case, ESSA sessions were held on the issue of the "supplement-not- supplant" requirement (making sure funds to implement the new law are not taking away from other programs) and a variety of issues related to assessments.

"Normally, when you put together a group for negotiated rulemaking, you have some agreement and some very strong disagreement on an issue," Katzen says. "The question that comes up in times like these, when you have a short window before the administration changes hands, is 'Do we want to get what we can agree on and leave the rest for the next administration, or do we want to hang in there and get the complete and total package?'"

Jennings says negotiated rulemaking is designed to "open up the process to the public." Because the ESEA was originally designed as part of the 1960s-era War on Poverty, those who are part of the process often represent minority and economically disadvantaged students and not necessarily the traditional education associations.

"When it comes down to particular items, negotiated rulemaking is done carefully. It has to be," Jennings says. "Ultimately, the decisions on regulations are up to the federal department or secretary of education, but negotiated rulemaking gives others an opportunity to have a voice."

The ESSA negotiating rulemaking committee started work in late March. Committee member Liz King, senior policy analyst and education policy director for the Leadership Conference on Civil and Human Rights, says the process is "an adventure" and a "really interesting, intense, and long intellectual exercise."

"Our goal is to make sure that, first, the process is inclusive," says King, who spent 2015 working with 47 national organizations to ensure that civil rights interests were included in ESSA. "We want to ensure that the policy outcomes as the different implementation decisions are made drive toward equity."

Katzen, who ran OIRA from 1993 to 1998 and now is a senior advisor to the Podesta Group in addition to her NYU work, says the final months of the Obama presidency gives the committee an incentive to come to consensus.

"There's nothing like a deadline to focus your attention," she says. "Some of these things drag on and on and on, but the fact that the administration is ending soon suggests strongly that people care about trying to accomplish as much as humanly possible in the time frame available, and they will not take kindly to delay tactics."

Katzen says that even though negotiated rulemaking often slows down the regulatory process, it works because "you don't know what the alternative is" to seeking public input.

"It's critical to get the right people to the table and to get the right issues before them to see if you can get some concurrence," she says. "If they can agree, then you can put it out in a fairly tight time frame."

Even with a deadline to have the law in place before the election, federal agencies often miss statutory deadlines, Narang says. "The more important the rule, the more that it benefits the public—unfortunately, means it usually takes longer in the regulatory process," he says. "It's unlikely for an important rule to go through this whole process in under a year. It doesn't happen often."

The ESSA negotiated rulemaking panel was unable to agree on the "supplement-not-supplant" issue, but did agree on several issues regarding the assessment requirements. The panel decided to allow states to define "severely cognitively disabled" (with certain parameters), and to allow computer adaptive tests to include questions above and below a student's grade level. Additional issues on which the committee reached consensus include district use of alternate high school tests, alternate tests for advanced 8th grade math students, and testing for English language learners.

"Thoughtful, inclusive, and speedy don't always go together, but there is a sense that this is long overdue in the pace of the implementation," King says. "We want to move quickly, and we realize the excitement and urgency of things, but we can't let it come at the expense of the kids who will be most profoundly affected by these regulations. We'll see what the actual timeline looks like."

No matter the outcome, Nassirian sees great value in the process. "Negotiated rulemaking provides an enormous amount of information to all parties," he says. "If you don't come to consensus, people think the process is a general failure, but it's not. The general rule is that the regulation turns out better and has improved whether there is a consensus or not."

State and Local Responsibilities

Once the federal regulations are issued, it then falls to states and local school districts to implement them, a process that is complicated in its own right. Add to that what Shubel calls "reform fatigue," and it's easy to understand the temptation to slow down the implementation process, election or no election.

"If we're smart as a state, then Michigan should already be looking at this, not standing on the sidelines waiting for something to happen in November," Shubel says. "We've struggled for so many years with multiple school reforms that had to be implemented under NCLB that we should take what we've already done, determine what worked, why it worked, and how we can replicate it."

Truesdale says ESSA "almost feels personalized" when compared to NCLB. She says the new law is "stretching us up" by focusing on college and career readiness as opposed to the minimum proficiency standards of its predecessor.

"It seems more open, more adaptable to states' individual needs," she says. "Personalized learning is all over the legislation, and there are lots of student achievement measures that are not only adaptive but also tech-enhanced so that student progress is being measured more accurately. As long as we can do what's necessary to implement it properly at the state and local level, I think we'll be fine."

Mathis says he has concerns about how ESSA will be interpreted in South Carolina. "What we've said is, we want to merge the state and federal systems as much as we can so we don't have two systems to serve. How can we do this in a way that informs parents, educators, the employers, and the public what our progress is? And how do we consider the effects of poverty and what impact that has?"

These issues, Mathis and others hope, will be addressed during the regulatory process, with sufficient guidance from the Department of Education so that states and districts can implement the law more smoothly.

"Hopefully, NCLB is behind us and now we can focus on student growth instead of saying everyone has to meet the same benchmark," he says. "I still shake my head when I think about the things we went through. I hope we never have to go through them again."

Glenn Cook is a freelance writer and photographer who lives in Northern Virginia.

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