Testimony on:
Next Steps for K-12 Education: Implementing the Promise to Restore State and Local Control

Subcommittee on Early Childhood, Elementary and Secondary Education
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By:
Selene Almazan, Esq.
Council of Parent Attorneys and Advocates (COPAA)

Chairman Kline, Chairman Rokita, Ranking Member Scott, Ranking Member Fudge and members of the committee, I am Selene Almazan, legal director for the Council of Parent Attorneys and Advocates and I am also a parent. Two of my three children have disabilities and attended Maryland public schools. COPAA is a national a nonprofit organization of parents, attorneys, advocates, and related professionals who work to protect the civil rights and secure excellence in education on behalf of the 6.4 million children with disabilities attending public school across the United States.

Over the past several years, COPAA has worked together with the disability, civil rights and business communities – across lines that often divide us on matters of public policy – to assure the Elementary and Secondary Education Act (ESEA), now known as the Every Student Succeeds Act (ESSA) included the provisions we all believed to be vitally important to our nation's future.

We know that the students our coalitions represent are the:

7.7 million Black students;
13.1 million Hispanic students;
25 million students from low-income families;
6.4 million students with disabilities; and,
4.5 million English Language Learners[i].

The effect of the law on these students is enormous and cannot be overstated.

Thanks to bipartisan leadership in both Chambers, the ESSA does provide more flexibility to states and school districts than its predecessor however; it gained COPAA's support because it also includes these essential provisions:

- Annual statewide assessment in reading and math of all students in grades 3-8 and once again in high school;

- A strict state cap at 1% *of all students by subject* on the use of alternate assessments aligned to alternate academic achievement standards for students with the most significant cognitive disabilities – which is appropriately reflective of current identification rates of students with intellectual and cognitive disabilities;

- Annual measurement of not less than 95 percent of all students and not less than 95 percent of all students in each subgroup;

- Transparent, accessible reporting of data — disaggregated by race, income, disability status, and English proficiency — at the state, district, and school levels;

- Statewide accountability systems that expect and include achievement and graduation goals for all groups of students, rate schools in large part on the academic performance of all groups of students, and require action when any group of students consistently underperforms;

- State support to districts in reducing bullying, harassment, overuse of disciplinary practices and use of aversives (e.g. seclusion and restraint);

- State and district engagement with all stakeholders, including parents and guardians as well as the requirement to communicate with parents in accessible formats and the parent right to ask a school for their child's teachers' qualifications;

- Responsible limits on the use of Pay For Success initiatives with federal funds; and,

- The Secretary of Education approves plans, ensures state implementation through oversight and enforcement, and assures states take action when schools and districts fail to meet their obligations to close achievement gaps and provide equal educational opportunity for all students.

The ESEA is a civil rights law and implementation of ESSA should preserve that legacy. The law's purpose is in fact: "*To provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps."* COPAA and the entire civil rights community has long recognized equal educational opportunity as central to our struggle to achieve equality for all Americans. Without a robust and thoughtful implementation of ESSA over the next decade, we will have missed a crucial opportunity and the students we collectively represent will continue to be denied the full protections they need and are entitled to under federal law. For today's students—whether a student with a disability, from a low-income family, a student who speaks English as a second language, Native American or a student of color —both the expectations and the stakes couldn't be higher. Their future is hugely dependent on the quality of the education they receive; there is no arguing this point.

Currently, students with disabilities represent over 13 percent of the total student population and have benefited greatly from the ESEA's focus on student outcomes which since 2001 has included students with disabilities as one of the four student subgroups included in state assessment, reporting and

accountability systems. As a result of the alignment between ESEA and the Individual with Disabilities Education Act (IDEA), more students with disabilities have been afforded the opportunity to learn and master grade level academic content and graduate high school with a regular diploma.

While the performance of all student groups has risen dramatically between 2000 and 2012,[ii] the achievement gap is still far too large between White students and students of color. And, students with disabilities continue to lag far behind on substantive outcomes that we know predict future success. For instance, only:

- 37 percent of 8th grade students with disabilities scored at or above basic in reading on the National Assessment of Education Progress (NAEP), compared with 81 percent of students without disabilities;[iii]

- 63% of students with disabilities graduate from high school as compared to 82 percent of students without disabilities;[iv] and,

- 19.1% of people with disabilities are participating in the U.S. Labor force as compared to 68.2% of people without disabilities.[v]

Also, as shared in testimony before this Committee in 2011 by a parent, we wish to remind you that:

> Prior to the passage of No Child Left Behind [in 2001], most parents of children with disabilities had no idea where their child's performance stood in reading and math as compared to their child's peers. Most states had ignored a 1997 requirement in IDEA law "to develop guidelines for the participation of children in alternate assessments for those children who cannot participate in State and district-wide assessments…" which was intended for students with the most significant cognitive disabilities. Therefore, most students with disabilities were not included in state assessment systems. Unfortunately, once NCLB was passed, pervasive low expectations for students with disabilities led some schools and districts to react negatively to the new requirements of NCLB – the thought that students with disabilities should be expected to achieve meaningful academic progress seemed completely unattainable by some school professionals. Mainly, this was due to the fact that until NCLB's passage in 2002, schools had not provided curriculum to these students that focused on state standards. It was the rare parent that had been able to ensure that their student with a [learning] disability was included in the core work and making progress with the additional support that special education is intended to provide. (Kaloi, 2011, Testimony, U.S. House Subcommittee on Education and the Workforce)

With this sobering information in mind, my testimony today intends to accomplish two priorities:

1. Explain why federal regulations are essential to the full implementation of the ESSA; and
2. Advocate for specific Title I regulations that will assure states implement plans that fully support all students.

Priority 1: Explain why federal regulations are essential to the full implementation of the ESSA

The Administrative Procedures Act, from 1946, is the federal statute that governs the way that administrative agencies of the federal government may propose and establish regulations. The role of the US Department of Education is vital in the implementation of the ESSA and its provisions. The Supreme Court addressed the issue of whether to grant deference to a government agency's interpretation of a statute that it administers. In this case the ESSA. *Chevron v. Natural Resources Defense Council* states:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. Rather, if the statute is silent or ambiguous with respect to the specific issue, question for the court is whether the agency's answer is based on a permissible construction of the statute. *— Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984), 842–843.*

The Secretary has the full authority to define, monitor, and enforce the law. The U.S. Department of Education (ED) has the authority to interpret statutory law and promulgate regulations as an integral part of the Constitutional design for the separation of powers. ED has the regulatory authority to make regulations which would be entitled to *Chevron* deference as they are a proper exercise of ED's regulatory authority, and they cannot be "arbitrary, capricious, or manifestly contrary to the statute."[vi]

In turning back to *Chevron*, a court first looks to whether Congress has "directly spoken to the precise question at issue. *Chevron.,* 467 U.S. at 842-43. If it is silent or ambiguous, "the question ... is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron* at 844. A court "'need not conclude that the agency construction was the only one it permissibly could have adopted' or even that we would have interpreted the statute the same way the agency did." It seems beyond cavil that this is within the agency's reasonable implementation of the ESSA provisions. The next arm of *Chevron* is whether this is a reasonable choice. *Id.*, at 843. This includes a review of the consistency of approach and interpretation. *United States v. Baxter Int. Inc.*, 345 F.3d 866, 887 (11th Cir. 2003).

While Section 1111(e) of ESSA includes specific limited restrictions on federal prescription, COPAA and its civil rights and business coalition partners are confident that the provisions therein are specific and limited enough as to not erode the regulatory authority of ED. The statutory language acknowledges that regulations will be promulgated. In so doing, the Secretary of Education will issue regulations that clarify and interpret statutory provisions to help schools and districts in implementing the law and to protect the rights of all children – without exceeding the scope of the statute and without being inconsistent

with the statute. This regulatory action is necessary and appropriate to fulfill the requirements of the law. It is clear that ED has the correct regulatory authority to develop regulations for implementation, as noted in the beginning of Section 1111(e)(1)(A). At no time has the Secretary of Education had the authority to promulgate regulations that are inconsistent with or outside the scope of federal law.

We know from past history regarding civil rights laws that we need regulations in order to ensure the law is implemented. The effect of no regulations means that courts must adjudicate the intent of the statute. An example is the turmoil that happened when the Section 504 statute of the Rehabilitation Act was passed in 1973 and there were no regulations issued. In order for this law to become effective, regulations had to be issued defining who was a 'person with a disability' what did 'otherwise qualified' mean, what constituted 'discrimination' and 'nondiscrimination' in the context of disability etc. Enforcement timelines had to be developed as well as an administrative enforcement mechanism. The regulations would provide a consistent, coherent interpretation of 504's legal intent rather than leaving it up to any judge who heard a 504 case to interpret what the law meant. There was much delay; the disability community filed a lawsuit in federal court; the judge ruled that regulations must be issued but not when. After much back and forth with the Carter Administration, regulations were finally issued in 1977. History has taught us that the courts are not set up to be experts.

We also know that states' provisions that restrict entitlements established by federal statutes are void under the Supremacy Clause of the Constitution. The Supreme Court has applied this principle in cases regarding benefit programs in which the federal government provides funding to states on the condition that they comply with the terms of the federal program, the same arrangement that exists for special education under IDEA. The Court held that the state was not free to adopt a definition that restricted benefits in a way the federal statute did not specifically authorize.

In its simplest form, regulation allocates responsibility to implement statutory law. Our Founding Fathers were insightful in their separation of powers. The members of the Judicial Branch are experts in judging the law, Congress maintains the knowledge in making laws and the Executive Branch holds the expertise in implementing the laws. Where we get in trouble is where one branch tries to do the job of another.

Priority 2: Advocate for specific Title I regulations that will assure states implement plans that fully support all students

COPAA takes seriously the impact Title I implementation has on the outcomes of students with disabilities and other disadvantaged students. As stated, we understand states will have more discretion in carrying out ESSA, however, COPAA, along with our partners in the business, civil rights and disability community have and will continue to work to prevent efforts to water down expectations, avoid full transparency, diminish the importance of honest measures of the academic progress of all children in school accountability systems, or delay interventions when any group of students is struggling academically.

Unfortunately, past history shows that states often set expectations for schools far too low which leads directly to low student achievement impacting our most disadvantaged students. States have set graduation goals as low as 60 percent, allowed as little as .1 percent of annual growth to count as progress against state goals and have set reading and math proficiency standards so low that high school graduates, deemed eligible for the state's regular diploma required remediation upon entering college. Recently, we've also seen how easily states can allow the focus of accountability to shift away from student learning. This is unacceptable.

To reinforce our belief – that when trained and qualified teachers provide well-designed instruction, appropriate services, accommodations and interventions *every* student can achieve high standards – COPAA submitted comprehensive formal recommendations to the U.S. Department of Education (ED) on ESSA Title I implementation. Our full comments are attached.

We advocate for ED to exercise its full legal authority to promulgate regulations that assure State Title I plans must, in summary, provide:

a. rigorous and consistent standards inclusive of all student groups;

b. school differentiation or ratings that primarily reflect how all students are doing with prohibition on the use of aggregated subgroup data (e.g. super subgroups);

c. strict state limit of 1% of all students, by subject, in the use of alternate assessments on alternate academic achievement standards for students with the most significant cognitive disabilities, with flexibility only at the district level and the application of strict criteria for any state waiver;

d. valid and reliable assessment of English language proficiency and the inclusion of English learners in content assessments, with appropriate accommodations;

e. clear requirements for identification, intervention and exit criteria for schools in each of the three categories identified in the law—the bottom 5 percent, schools with graduation rates below 67 percent and schools with consistently low performing groups of students; and assure evidence-based intervention systems focused on raising achievement are initiated whenever any school is underperforming for *all* students or for *any* student group so that students don't languish year after year without help;

f. definitions and/or parameters set for new statutory terms – specifically for new terms: *'meaningful differentiation*', '*substantial weight*' and '*much greater weight;*'

g. specifications that the 95 percent participation requirement is included in the accountability system so the performance of students matters, provide federal guidance on options for doing so and define consequences for failure to meet the requirement;

h. recommendations for an acceptable range for statistically significant N sizes to measure subgroup performance so that as many students are included in school, district and state accountability metrics as possible;

i. assurances for support to districts to reduce bullying, harassment, use of disciplinary practices (e.g. suspension and expulsion) and use of aversives (e.g. seclusion and restraint), all of which disproportionately impact students with disabilities and students of color;

j. promote universal access in all data reporting; cross-tabulate data and expand on the availability of data disaggregated by Asian American and Pacific Islander categories;

k. clarity that supplement not supplant provisions presume and ensure an equal base of actual per-pupil funding before any federal funds are considered supplemental.

The test of regulations, guidance, technical assistance and other implementation activities must be *whether or not they advance educational equity and serve the interests of all students*. Low-income students, students of color, students with disabilities, English learners, and Native students deserve no less than robust and thorough regulation by ED to close opportunity and achievement gaps. Throughout regulations, ED should reinforce the non-discrimination responsibility of schools, districts and states under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act and Title II of the Americans with Disabilities Act.

As noted, the ESEA is our nation's most important civil rights law for promoting educational achievement and protecting the rights and interests of students disadvantaged by discrimination, poverty, disability, race, language and other conditions that may limit their educational opportunity. With its reauthorization, the responsibility continues to rest with the ED to provide comprehensive, detailed and clarifying rules to ensure that states and school districts implement the new law in a way that not only honors the purpose of the law but also holds states accountable for access over $15 billion in federal funds. Despite claims to the contrary, federal funds are still conditional thorough compliance with the law. ESSA is a new law, that includes new flexibility as well as requirements – the bright-line provisions the civil rights community helped support – and the Secretary has the authority to define, monitor, and enforce the law.

COPAA expects ED to exercise full authority to interpret the statute and promulgate regulations because this is an integral part of the Constitutional design for the separation of powers. We, and our civil rights partners have said throughout the entire reauthorization process, that federal authority is the essential element to protect the rights and needs of students. Student rights and educational opportunity must not be compromised by politics that seek to ignore the foundational tenant of administrative law.

We want to help states and districts create new evidence-based opportunities to accelerate student progress, especially among the most vulnerable groups of children such as students with disabilities. We also want to help ensure that the voices of families, advocates and the business communities are heard throughout the implementation process. The future of our economy, the stability of families; and, the achievement of the American dream for millions of students rests upon us all. We must work together to assure every student graduates high school ready for post-secondary education, career training and the ability to live an independent and meaningful life.

I appreciate the opportunity to speak to you today and look forward to your questions.

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[i] National Center on Education Statistics retrieved at: http://nces.ed.gov/fastfacts/#

[ii] National Center on Education Statistics, National Assessment of Educational Progress (NAEP), 2015, retrieved at http://nces.ed.gov/nationsreportcard/pubs/main2013/2014451.aspx

[iii] Ibid.

[iv] National Center on Education Statistics, 2013-2014, retrieved at http://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2013-14.asp

[v] U.S. Department of Labor, 2015 retrieved at www.dol.gov

[vi] *See Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1*, 554 U.S. 447, 558 (2008); *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162, 1174-75 (9th Cir. 2014).