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Updated December 15, 2016

Elementary and Secondary Education Act: Potential Options for Altering Regulations Issued by the Obama Administration

Following the comprehensive reauthorization of the Elementary and Secondary Education Act (ESEA) by the Every Student Succeeds Act (ESSA; P.L. 114-95) on December 15, 2015, the U.S. Department of Education (ED) has acted to promulgate regulations to accompany the new statutory provisions. ED has focused its ESEA regulatory actions primarily on Title I-A of the ESEA.

Title I-A of the ESEA authorizes aid to local educational agencies (LEAs) for the education of disadvantaged children. Title I-A grants provide supplementary educational and related services to low-achieving and other students attending pre-kindergarten through grade 12 schools with relatively high concentrations of students from low-income families. Title I-A has also become a vehicle to which a number of requirements, such as accountability requirements, affecting broad aspects of public K-12 education for all students have been attached as a condition for receiving Title I-A grants.

Since the passage of the ESSA, there are four primary areas in which ED has proposed ESEA regulations: (1) Title I-A accountability, state plans, and data reporting provisions (hereinafter referred to as accountability provisions); (2) Title I-A assessment provisions; (3) Title I-B Innovative Assessment Demonstration Authority; and (4) Title I-A supplement, not supplant (SNS) provisions.

The proposed accountability regulations and Title I-B regulations were developed by ED and posted in the *Federal Register* for public comment on, respectively, May 31, 2016, and July 11, 2016. As required by law (ESEA, Section 1601), regulations related to the Title I-A assessment and SNS provisions were considered through a negotiated rulemaking process (NRMP) during March and April 2016. During these sessions, the negotiated rulemaking participants reached agreement on the proposed assessment regulations but not on the SNS regulations. As a result, the proposed assessment regulations published in the *Federal Register* on July 11, 2016, mirrored those agreed upon during the NRMP. However, agreement was not reached on the SNS regulations. In the event of a lack of consensus, the NRMP provisions authorize ED to offer its own version of proposed regulations, and ED proposed such regulations for SNS in the *Federal Register* on September 6, 2016.

The Obama Administration published final regulations related to the Title I-A accountability provisions on November 29, 2016, and the Title I-A and Title I-B assessment provisions on December 8, 2016. It has until the end of its current term to publish any additional final regulations.

Recently, there has been congressional interest in options for modifying or rescinding any final regulations issued by ED. Assuming that ED promulgates final regulations in any of these four areas, there are likely several options available to Congress and the new Administration for altering or repealing the regulations, including making changes through appropriations acts, invoking the Congressional Review Act, taking other legislative action, or making changes administratively. Each of these options is discussed briefly below.

Appropriations Acts

The Labor, Health and Human Services, and Education, and Related Agencies (LHHS) bill provides discretionary appropriations for programs administered by ED. Congress could include language in the LHHS bill to prohibit ED from using any of the fiscal year's funds to implement the aforementioned regulations, should they be finalized. Such action would prevent ED from enforcing the regulations during the fiscal year covered by the appropriations bill. This approach, however, would not officially rescind or modify the regulations. It would only prevent ED from implementing the regulations during the relevant fiscal year. If Congress wanted to also rescind or modify the regulations, this could be done through additional provisions in the LHHS bill or through other legislative action (see below).

Congressional Review Act (CRA)

The CRA is an oversight tool that Congress (with the approval or a veto override of the President) may use to overturn a rule issued by a federal agency such as ED. The CRA can be used only to invalidate final rules in their entirety. For example, Congress would not be able to retain some of the finalized accountability regulations and eliminate others through the use of the CRA. When a CRA resolution meets certain criteria, it cannot be filibustered in the Senate. CRS estimates that agency final rules submitted to Congress—as required by the CRA—after June 2, 2016, may be subject to disapproval under the CRA in 2017. (The House and Senate Parliamentarians make the final determination on the applicable date.) Thus, any final regulations issued by ED prior to the end of the Obama Administration could be subject to disapproval under the CRA in the next Congress. If the CRA were used successfully to block a rule, the rule would not take effect, and ED would be prohibited from issuing a substantively similar rule.

For a more detailed discussion of the CRA and how it functions, see CRS Report R43992, *The Congressional Review Act: Frequently Asked Questions*, by Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis, and

CRS Insight IN10437, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, by Christopher M. Davis and Richard S. Beth.

Other Legislative Action

Congress always has the option to pass legislation that could change the ESEA or clarify how Congress intends for the ESEA to be implemented. For example, Congress could rescind a specific ED rule, rescind part of a specific ED rule, limit ED's authority to reissue a rule in a particular area, or withdraw ED's authority to regulate in a particular area. Such legislation would take precedent over any regulations issued by ED, should there be a conflict. If Congress acted to modify or rescind any finalized regulations, depending on the legislative language, ED may not have to officially delete or modify the specified regulations.

Administrative Action

The new Administration could act to modify or rescind any finalized regulations issued under the Obama Administration. ED could not, however, simply announce that a particular finalized regulation or set of regulations had been modified or rescinded. Instead, ED would be required to follow the same notice and comment rulemaking procedures that it used to issue the regulations.

In addition, the negotiated rulemaking provisions of the ESEA require that unless the Secretary determines that the NRMP is "unnecessary"—a term that has been narrowly construed in the administrative law context—the process shall follow the Negotiated Rulemaking Act (NRA). The NRA authorizes negotiated rulemaking and, in turn, adopts the Administrative Procedure Act's definition of rulemaking, which states that "'rule making' means agency process for formulating, amending, or repealing a rule." Thus, with respect to the Title I-A regulations, it appears likely that ED would have to reengage in the NRMP to repeal or modify any final assessment or SNS regulations.

Issues to Consider

Should Congress or the new Administration choose to act in some way to modify or repeal any final regulations issued by the Obama Administration with respect to Title I-A accountability, assessments, or SNS provisions, there are some issues to consider. In order to receive a grant under Title I-A for FY2017, state educational agencies (SEAs) are required to submit a state plan in the first half of 2017. As part of this plan, the SEA is required to describe the educational accountability system it will use and the assessments that will be administered. If the Obama Administration were to promulgate final rules and Congress or the next Administration were to modify or repeal any of those regulations, it could cause confusion among the SEAs with respect to what they are required to include in their state plans, assessments, and accountability systems. This confusion could be minimized if Congress were to act quickly to enact clarifying legislation, if the new Administration were able to rapidly promulgate new or revised regulations, or if the new Administration were to issue non-regulatory guidance to assist the SEAs in preparing their state plans and designing their accountability systems.

Issues may also arise if Congress or the Administration rescinds an entire set of final regulations. Under the CRA, Congress is only able to consider final regulations in their entirety. For example, if Congress successfully rescinded finalized accountability regulations through the CRA, the regulations pertaining to Title I-A would revert back to the regulations that predate the amendments made by the ESSA. That is, the regulations in place prior to the enactment of the ESSA would continue to be in effect as long as there were a statutory basis for the regulations. For example, while regulations pertaining to adequate yearly progress (AYP) would no longer be relevant, there may be other regulations that could continue to apply to Title I. Thus, ED would have to review each regulatory provision to determine whether it was still valid or not.

It is possible that there may be parts of any final ESEA regulations promulgated since the enactment of the ESSA that Congress would be interested in maintaining. If this were the case, it could make more sense to address the issue through a separate bill rather than the CRA. If Congress needed time to develop a separate bill, it could prohibit ED from using funds to implement the regulations in the meantime. If this approach were taken, however, SEAs may lack information needed to prepare their state plans and design their accountability systems. One option would be to delay the implementation of the ESSA provisions until changes to the regulations are finalized and the SEAs have time to process the new requirements. Another option would be for ED to issue guidance to assist SEAs in developing their state plans and accountability systems.

Congress or the new Administration could also act to modify or rescind the proposed SNS regulations if they become final. There are currently no SNS regulations in force, so rescinding any final rules promulgated by the Obama Administration or making changes to the regulations would not result in older regulations remaining in effect. In addition, the new SNS provisions are not statutorily required to take effect until December 2017, so LEAs may have some time to adjust to any new requirements in this area if changes are made in early 2017.

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