

ESSA Regulatory Machinery Starting to Crank Up

By Alyson Klein

Congress managed to finish the hard work of writing and passing the Every Student Succeeds Act, but the U.S. Department of Education's task of regulating to carry out the new law is just beginning.

The Obama administration has just a year left in office. But in that time, it can help set the course for implementation of the newest edition of the Elementary and Secondary Education Act. The law will go fully into effect in the 2017-18 school year, well after the acting U.S. secretary of education, John King, and his team have departed.

ESSA's regulatory process may be particularly tricky. The law seeks to strike a delicate balance between handing power over to the states and reining in the Education Department, on the one hand, while also ensuring there some "guardrails" are in place to help struggling schools and traditionally overlooked groups of students.

And plenty of weedy—but important—provisions in ESSA may be explored or clarified through the regulatory process, such as just at what point states must flag schools where traditionally underperforming subgroups of students are struggling.

It's unclear at this point how far the department can or will go in filling in the blanks for states. The law includes new curbs on the education secretary's authority, and it could take some time before it becomes clear how those provisions are going to play out politically—and maybe even legally.

King, who took over his new duties late last month, said that the department still has plenty of leverage, and that equity will be a key focus going forward.

"This new law preserves the federal levers to withhold funds from states or put them on high-risk [status]. And our Justice Department will be leaning in to make sure folks honor their obligation to promote equity," King said in a short speech addressed to the NAACP and the U.S. Chamber of Commerce.

Restrictions on Authority

But Sen. Lamar Alexander, R-Tenn., the chairman of his chamber's education committee and a lead architect of ESSA, **said "there are specific prohibitions" on the department's authority.**

What's more, he said, Congress will be watching to ensure that regulation and implementation are proceeding as intended. He and his Democratic counterpart, Sen. Patty Murray of Washington, are planning for "at least three major" oversight hearings on implementation over the next year.

The Education Department is wasting no time in getting started on the regulatory process. In late December, it outlined some steps for transitioning to the new law from the previous version of the ESEA, the widely criticized No Child Left Behind Act, as well as from the Obama administration's NCLB waivers.

The new law already makes it clear that regulations for three areas—standards, assessments, and "supplement not supplant" rules (which govern how federal aid can or can't replace state and local funds)—need to go through "negotiated rulemaking," which calls for education advocates and the department to get in a room and try to hash out an agreement.

If that process fails, which it often does, ESSA allows Congress to review the regulations in those three areas before they take effect. That unusual requirement is designed to further restrict the federal role, a Senate GOP aide said.

The Education Department is asking for ideas and input on assessments and the supplement-not-supplant rules, as well as Title I, the part of the law that deals with accountability more generally. Importantly, accountability doesn't have to go through negotiated rulemaking; the process can be more streamlined.

More broadly, the department is seeking input from state schools chiefs, teachers' unions, the civil rights community, and others. Two public meetings, one in Washington and one in Los Angeles, will be held this month for educators and others to express their views.

Advocates Weigh In

Noelle Ellerson, the associate director of policy and advocacy for AASA, the School Administrators Association, which enthusiastically supported ESSA, said she sees a theme in the new law that she hopes will be carried through the regulatory process.

"One of the framing principles of ESSA was to rein in the regulating authority of the Education Department," Ellerson said. "It seems pretty shortsighted that a department would try to regulate to the max on everything they can. Just because they can doesn't they mean they should."

But Liz King, the director of education policy for the Leadership Conference on Civil and Human Rights, which gave ESSA a measured endorsement, has a different take.

"I think the text is pretty clear that there are limitations on the limitations," King said. And the prohibitions were crafted with care to ensure a continued federal role in looking out for equity, she added.

The secretary, she said, "retains a reasonable authority to regulate and enforce the law. ... The straitjacket people are looking for doesn't really exist."

Waivers on Way Out

ESSA also makes it clear that waivers from the No Child Left Behind law will be null and void on Aug. 1. So the Obama administration is focusing the last few months of waiver implementation on the pieces that most closely resemble where states will go under ESSA—school improvement, and standards and assessments—while stepping back on federal enforcement in a big way on teacher evaluation through student outcomes, which won't be required under the new law.

But states that had issues with school improvement or standards still must get the department information it has requested. And ESSA is clear that states must keep focused on fixing foundering schools and those with big achievement gaps during this transition time.