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Leaving Money on the Table

How Wisconsin policymakers can take full advantage of the Every Student Succeeds Act

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The Every Student Succeeds Act (ESSA) is the federal law on K-12 education, previously replacing No Child Left Behind.¹ ESSA is far from perfect. However the Every Student Succeeds Act “succeeds” in giving states more power – in exchange for federal funds – to set education policy.²

Last year, Wisconsin sent a plan to the United States Department of Education that was largely void of major reforms and opted against using new powers and federal dollars for K-12 education. Even though the ED approved Wisconsin’s state plan, Wisconsin’s new governor and legislature *still* have significant opportunities to utilize the tools of ESSA. Some of this can be done by changing existing law while others require submitting a new plan (which is permissible).

This memo outlines and recommends changes to Wisconsin’s state plan as well as what policymakers need to know about the federal law, heading into the new legislative session:

I. Wisconsin must implement the Every Student Succeeds Act starting this school year.

- *Wisconsin’s ESSA State Plan was approved by the U.S. Department of Education.*

ESSA is the federal education law that controls all federal funding for schools and students (Title I – Title IX funds). These Title funds support programs and services for low-income students with the highest need, professional development for teachers, services for English Language Learners, and more. In short, ESSA provides states the authority and flexibility to develop education policies based on federal requirements.

ESSA does require each state to submit a state plan to the U.S. Department of Education (ED) explaining how the Title funds will be used. The Wisconsin Department of Public Instruction

¹ WILL, “ESSA – What is it, and is Wisconsin missing opportunities?”
<https://www.youtube.com/watch?v=ZPJhBe6LksM&feature=youtu.be>

² For our previous work, please see Szafir, Sobic, “FAQ on the Every Student Succeeds Act,” <https://www.will-law.org/wp-content/uploads/2017/05/One-Page-Review-of-the-Every-Student-Succeeds-Act-combined-final.pdf>

(DPI) and State Superintendent Tony Evers submitted Wisconsin's state plan on September 18, 2017 and received approval from the ED in January 2018.³

- ***Education reformers, including WILL, believed Wisconsin's state plan was largely an extension of existing policy.***

Consider the following. ESSA requires the state to determine a nonacademic indicator on school quality or student success. This information will be used to create a federal accountability system for public schools. The Wisconsin state plan chose chronic absenteeism as the indicator.⁴ Other states choose more diverse indicators, such as college and career readiness for high school students; participation in advanced placement courses; school climate surveys for students, teachers and parents, etc.⁵ Although chronic absenteeism is a helpful metric, the plan's decision to limit the nonacademic indicator on school quality is a missed opportunity for additional accountability in Wisconsin's public schools.

The state plan also does little in the way of "rigorous intervention" for low-performing public schools. Wisconsin's state plan for rigorous intervention is limited to existing supports by DPI.⁶ Other states maximized the rigorous intervention requirement by selecting education reform-minded strategies. For example, the Louisiana plan includes permitting economically disadvantaged students at a low-performing school the opportunity to enroll in the state's public and/or non-public choice programs. New Mexico plans to require the school district to choose from four options, which include closure, reopening the school under a charter school operator, significantly restructuring and redesigning the school, or allowing students access to other programs, such as magnet schools, online learning, etc.

An independent review of the ESSA state plan by the Collaborative for Student Success and Bellwether Education Partners concluded "Wisconsin's plan largely continues processes and effort it has been pursuing for the last several years." Our op-ed in the Wall Street Journal⁷ took Superintendent Tony Evers to task on his process of developing the state plan and explained how it was a missed opportunity for Wisconsin.

- ***The Department of Public Instruction must implement the state plan for the 2018-2019 school year but has yet to promulgate any regulations to implement it. This could create legal problems.***

³ Letter from the U.S. Department of Education to State Superintendent Tony Evers regarding the Wisconsin State Plan, January 16, 2018.

<https://dpi.wi.gov/sites/default/files/imce/esea/pdf/1%2016%2018%20Approval%20Letter.PDF>

⁴ Wisconsin State Plan, nonacademic indicator on school quality or student success, chronic absenteeism based on student, group and school-level calculations. An individual is chronically absent if s/he misses more than 10 percent of all possible attended days. Similarly, a school or student group is negatively impacted if missed more than 10 percent aggregate possible days.

⁵ Examples of the nonacademic indicator on school quality or student success are from Delaware, D.C., and Illinois state plans.

⁶ For example, external evaluations by DPI; training for family and community involvement; professional development, and expanded educational design to promote positive school climates and academic performance.

⁷ Szafir, Sobic. "Wisconsin educators have a proposal – but it's dull and conventional." Wall Street Journal. August 18, 2017. <https://www.wsj.com/articles/wisconsin-educrats-have-a-proposal-but-its-dull-and-conventional-1503092052>

ESSA implementation is an on-going process which began with a transition year in the 2017-2018 school year. By the end of this school year, most states will fully implement ESSA, including the accountability systems and reporting requirements. DPI has begun implementing parts of ESSA, including requiring school districts to complete a consolidated plan for the district's use of the federal funds.⁸

However, the Wisconsin Institute for Law & Liberty (WILL) and DPI disagree over the implementation of ESSA in Wisconsin.⁹ DPI claims to have implicit authority to create new regulations to implement ESSA.¹⁰ However, state law requires agencies to have explicit authority, which is granted by the legislature, to create regulations.¹¹ Without the proper authority, any rules proposed or promulgated by DPI are subject to a legal challenge because they are invalid.

To date, DPI proposed two emergency rules relating to the implementation of ESSA in Wisconsin, but has not completed the administrative rulemaking process to enforce the proposed regulations.¹² Why emergency rules were necessary remains unclear.

DPI should only rely on explicit authority for any rulemaking and if DPI lacks the authority, it must ask the legislature to grant it. Furthermore, DPI must follow state law in its regulatory rulemaking process. WILL raised concerns over DPI's use of the emergency rulemaking process for the two proposed regulations.¹³

There are potential legal ramifications if DPI continues to violate state law in creating regulations. For instance, the proposed regulations are subject to a legal challenge and if the challenge is successful, DPI will have to begin the process over, delaying the implementation of the ESSA.

⁸ Department of Public Instruction, ESSA LEA Plan, <https://dpi.wi.gov/esea/essa-lea-plan>

⁹ WILL testimony for DPI's proposed regulations, SS 033-18 and SS 040-18, April 19, 2018, <http://www.will-law.org/wp-content/uploads/2018/04/2018-04-19-comments-on-proposed-scope-statements.pdf>

¹⁰ Department of Public Instruction, Scope Statement 033-18, "Pursuant to s. 115.28 (9), Stats., the State Superintendent has a duty to accept federal funds for any function over which the State Superintendent has jurisdiction, and act as the agent for the receipt and disbursement of such funds. Under 227.11 (2) (a) (intro.), Stats., "[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation." See also, *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Comm'n*, 2018 WI 17, ¶ 42 ... Federal funds appropriated for the State under the ESEA as amended by the ESSA are, in part, conditioned upon compliance with 20 USC 6823(b)(2). This section requires the Department to establish and submit as part of its state plan standardized entry and exit procedures for designating and serving EL pupils for SY 2018-19 and beyond. As such, a rule to implement ESSA-compliant designations for EL pupils is necessary for the receipt and disbursement of federal funds under the ESEA."

¹¹ Wisconsin Institute for Law & Liberty, Comment on proposed DPI scope statements 033-18 and 040, April 19, 2018, <http://www.will-law.org/dpi-proposed-essa-rules-violate-state-law/>

¹² Department of Public Instruction, SS 033-18 and SS 040-18

¹³ WILL letter to State Superintendent Tony Evers, April 10, 2018, <http://www.will-law.org/wp-content/uploads/2018/04/2018-04-10-letter-to-dpi-and-doa-with-marked-appendices.pdf>

II. But despite the legal uncertainty, there is hope. There are plenty of opportunities for the governor and state legislature to assert their constitutional authority. Here’s what they can do – without requiring a new state plan.

When ESSA was passed with bipartisan support in 2015, leaders emphasized the flexibility and return of authority to states. The federal law includes several provisions that allow states to maximize the federal funds received. These options do not require each state to submit a new state plan for approval, instead the state can choose to “opt in” and implement these provisions in accordance with federal law. To do so, the state legislature could pass laws to direct the Department of Public Instruction to “opt in” to these provisions.

➤ *Flexibility with federal funds allows states to focus on specific programs.*

While most of the federal funds under ESSA are earmarked for specific purposes, ESSA permits states to transfer some of the Title funds to other programs that better address state and local needs.¹⁴ This option helps states maximize the federal funds by transferring them from an underutilized program and using the funds to supplement a different program.¹⁵

The state can transfer all or part of the federal funds (not including administrative funds allocated for Title II, Part A and Title IV) to be used for specific programs.¹⁶

Federal funding flexibility	
<i>Specific Federal Programs</i>	<i>Examples</i>
Title I, Part A	Academic support for students
Title I, Part D	School dropout prevention program for at-risk students
Title V, Part B	Rural school programming for student achievement
Title IV, Part A	Grants to support programs for well-rounded education for students

The transferability option does not require the ED’s prior approval. But the state must engage in timely and meaningful consultation with private school officials if the transfer of funds provides for the participation of students at private schools. The state must also ensure that any private school students and teachers receive equitable services under the program to which and from which the funds are transferred. The state must also notify the ED at least 30 days before the

¹⁴ Every Student Succeeds Act, 20 U.S.C. 7305b, See also

<https://www2.ed.gov/about/offices/list/oese/oss/transferabilityfundsltr102517.pdf>

¹⁵ Every Student Succeeds Act, 20 U.S.C. 7305b permits SEAs to transfer funds allocated for state-level activities from the following programs: supporting effective instruction state grants (Title II, Part A); student support and enrichment grants (Title IV, Part A); and 21st Century Community Learning Centers (Title IV, Part B).

¹⁶ Other programs included in Section 5103(a)(2) include Education of migratory children (Title I, Part C); state grants for English language acquisition and language enhancement (Title III, Part A); supporting effective instruction state grants (Title II, Part A), and 21st Century Community Learning Centers (Title IV, Part B).

effective date of each transfer¹⁷ and submit an updated copy of the State's modified plan to the ED.

If the state legislature would direct DPI to take advantage of this option, the transferred federal funds could support districts, like Milwaukee, with low-income students. For instance, some federal funds may be transferred to Title I, Part A, funds dedicated to improving school district programming. But the transferability provision is not limited to low-performing schools. The state legislature could determine what the unique needs of Wisconsin students are and direct the funds to be used in support corresponding programs.

➤ *Create a pilot for student-centric funding in certain low-performing districts.*

ESSA grants Secretary DeVos the authority to enter into an agreement with school districts to permit the district to consolidate eligible federal funds with state and local funds and create a student-centered funding system.¹⁸ Since the pilot was introduced, school districts in several states¹⁹ and Puerto Rico have applied for the pilot.

The ED recently announced²⁰ that Puerto Rico was granted the ability to create a student-centered funding system to equitably allocate local, state, and federal funds based on student needs.

ESSA provides for 50 school districts to pilot a student-centered funding system that will allocate substantially more funding to support low-income students, English language learners and other disadvantaged groups. The deadline for the 2019-2020 school year was July 15, 2018.

The legislature should consider requiring low-performing school districts to submit a proposal to run a similar pilot. This pilot is separate from the state plan and would not require the state plan to be updated.

III. There is nothing preventing the state legislature from changing the state plan and, through new laws, commanding the State Superintendent of Public Instruction to submit a new, revised plan.

The federal law does not prohibit state legislative involvement in the development of the state plan, and several legislatures across the country were involved with their ESSA state plans.²¹ The Wisconsin legislature could write a new state plan and direct the Department of Public Instruction and the State Superintendent to submit it for approval by the ED.

¹⁷ 5103(d)(1)(C)

¹⁸ U.S. Department of Education, Press Release: Secretary DeVos announces new student-centric funding pilot program." February 2, 2018. <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-student-centered-funding-pilot-program>

¹⁹ School districts in Arizona, California, Indiana, Oregon and Pennsylvania have applied. <https://www2.ed.gov/policy/elsec/leg/essa/scfp/submissions.html>

²⁰ U.S. Department of Education, Press Release: Puerto Rico to pilot new student-centric funding system." July 2, 2018. https://www.ed.gov/news/press-releases/puerto-rico-pilot-new-student-centered-funding-system?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

²¹ See <http://www.will-law.org/will-press-release-will-responds-eversdpi-essa-claims/>

The federal law requires that the state’s educational agency – in Wisconsin it is the Department of Public Instruction – to submit the state plan to the ED. But this is purely an administrative requirement – as seen in other states when the state legislature directed the SEA to write specific provisions in the state plan through amendments to state law.²²

➤ ***Fully implement Direct Student Services to use federal funds to support instructional choice.***

Direct Student Services is a provision in ESSA that gives states the option to focus specific federal funds on programs that provide students with more access to instructional choice.²³ This provision allows states to set aside 3% of their Title I funds to create grants for school districts. These grants empower districts to use the funds to expand student access to advanced coursework and instructional options, such as personalized learning. The state is required to prioritize the distribution of the grants to school districts with the highest number of low-performing schools (as defined by ESSA).

Two states, Louisiana and New Mexico, included the Direct Student Services option in their ESSA state plans. In New Mexico’s plan,²⁴ the state will use the funds to create competitive grants for school districts to expand students’ instructional choice, including advanced placement courses, personalized learning, student transportation, and extended learning time opportunities for some students. The grants are prioritized to assist low-performing school districts. New Mexico planned to make a total of 50 awards to school districts during the 2017-2018 school year for implementation in 2018-2019.²⁵

Louisiana will use the direct student services funds to create grants for geographically diverse and low performing school districts to help students gain access to academic courses, credentials, and services currently unavailable.²⁶ The funds can be used for courses such as advanced STEM, Advancement Placement, International Baccalaureate courses or opportunities to earn industry-based certificates in high-wage career sections. Louisiana will require school districts to specifically budget these funds to be used only for direct student services.²⁷ Louisiana’s plan for the direct student services funds ensures that a district will not lose Title I funds while also requiring the district to support more instructional choice for students.

²²See Pennsylvania 24 § 1-126 (2017) directing the department to draft the state plan with consultation of specific legislative committees. See also Arkansas, 2017, Act 744, § 1, eff. August 1, 2017 (H.B. 1608) Findings of the General Assembly relating to ESSA, the accountability system and state plan.

²³ Every Student Succeeds Act, 20 U.S.C. 6303b

²⁴ New Mexico State Plan, approved by the ED August 9, 2017, <https://www2.ed.gov/admins/lead/account/stateplan17/map/nm.html>

²⁵ ESSA in New Mexico, <https://webnew.ped.state.nm.us/wp-content/uploads/2018/01/Frequently-Asked-Questions-Regarding-CSI-DSS-and-Evidence-based-Interventions-1.18.2018.pdf>

²⁶ Louisiana State Plan, approved by the ED August 8, 2017, <https://www2.ed.gov/admins/lead/account/stateplan17/lastateplan882017.pdf>

²⁷ Louisiana Direct Student Services 2017-18 Planning Guidance, <https://www.louisianabelieves.com/docs/default-source/school-redesign/dss-quick-guide.pdf?sfvrsn=4>

Chiefs for Change, an organization for school district and state education leaders, issued a report in 2016 about the Direct Student Services option under ESSA. The report estimated Wisconsin could reserve over \$6 million²⁸ for Direct Student Services, if the state opted in.²⁹

Wisconsin's state plan did not opt into this provision. It is unclear why since Wisconsin has several existing programs that would likely benefit from the Direct Student Services option. And there are many Wisconsin students who would benefit from access to more instructional choice.³⁰

If the state legislature took action and required DPI to implement the Direct Student Services grants, the department would likely need to update the existing state plan and resubmit it for approval to the ED.

Wisconsin programs that could benefit from the Direct Student Services grants:

- Course Choice program allows public school students to take courses outside of their local public school. The Direct Student Services grant could be used to expand this program for both public and private school students who qualify for Title I.
- Early College Credit Program permits all Wisconsin high school students to take classes at colleges and universities for both high school and college credit.

➤ ***Update the “rigorous interventions” for low-performing public schools.***

ESSA continues the previous federal requirements to identify low-performing public schools defined by the law:

- a) Comprehensive support schools are defined as the lowest five percent of schools receiving Title I funds; any high school that fails to graduate 1/3 or more of its students, and “targeted support” schools that fail to improve after a state-determined amount of years.³¹ In Wisconsin, the five percent of schools receiving Title I funds amounts to about 60 schools.³²
- b) Targeted support schools are defined as schools with consistently underperforming subgroups of students (as defined by the state).

If a public school in either category fails to improve, the state must implement the “rigorous interventions” on the school and district. The existing state plan cites evaluations by DPI, training for family and community engagement, professional development for teachers and staff, and expanded educational design for the school.

²⁸ The report calculated this number using the 2017 Title I projected amounts for Wisconsin.

²⁹ *Expanding Equity: Leveraging the Every Student Succeeds Act to provide Direct Student Services*, April 2016, <http://chiefsforchange.org/wp-content/uploads/2016/04/Chiefs-for-Change-Direct-Student-Services-April-2016.pdf>

³⁰ A WILL peer-reviewed study found that some rural schools perform worse than urban districts on the Forward Exam in both math and reading. <http://www.will-law.org/wp-content/uploads/2018/04/apples-to-apples-2-april-2018.pdf>

³¹ 34 CFR 200.19

³² DPI Listening Session, Statement by DPI representative, June 30, 2016.

Other states have embraced the requirement for rigorous intervention. For example, the Florida legislature passed the bill, Schools of Hope,³³ to incentivize successful charter school operators to open charter schools in areas with low-performing public schools. This legislation was included in the Florida state plan³⁴ – public schools that do not earn a “C” grade or higher after two years must close or turn over operations to a charter or external operator.

The state legislature could update the rigorous interventions requirement by amending the existing state law on low-performing school districts and interventions.³⁵ If the amendments specifically referenced the requirements under ESSA and the state plan, this would trigger an updated state plan to be submitted to the ED.

- ***Expand the ESSA accountability nonacademic indicator for student success or school quality to include more under-reported categories.***

ESSA requires that the state create a federal accountability system that tracks how public school students are performing academically, the graduation rates, and a nonacademic indicator on school quality or student success.

The Wisconsin state plan identifies chronic absenteeism as the nonacademic indicator. The Wisconsin plan defines chronically absent as a student who misses more than 10% of all possible days.

While chronic absenteeism is a popular choice for the nonacademic indicator, it does not have to be the only indicator.³⁶ Other states, like Michigan, created a four-part nonacademic factor that included chronic absenteeism and other factors like time spent in fine arts, music, physical education, advanced coursework, and postsecondary enrollment rates.³⁷

The legislature should consider requiring the nonacademic indicator to expand beyond chronic absenteeism. As recent reports have indicated, student turnover is a major issue for students in Milwaukee – and across the country.³⁸ The state legislature should pass a law to require the DPI to establish additional nonacademic indicators as a means to find out further information about the chronically absent – and likely highly mobile – students in our state.

³³ Florida HB 7069, Florida Statutes 1008.33(4)(b)

³⁴ Florida State Plan, approved September 2018, <https://www2.ed.gov/admins/lead/account/stateplan17/flconsolidatedstateplanfinal.pdf>

³⁵ Wis. Stat. 118.42

³⁶ <https://www.the74million.org/article/37-states-are-using-their-essa-plans-to-crack-down-on-chronic-student-absences-so-how-will-they-do-it/>

³⁷ Michigan state plan, approved December 2017, <https://www2.ed.gov/admins/lead/account/stateplan17/miconsolidatedstateplan.pdf>

³⁸ Erin Richards, “Student turnover slows academic growth, but many states aren’t tracking the churn,” October 10, 2018, <https://projects.jsonline.com/news/2018/10/9/student-mobility-numbers-not-tracked-by-many-states.html>