



## **10 Things Everyone Must Know About the Every Student Succeeds Act (ESSA)**

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Passed by Congress in December 2015 with bipartisan support, the Every Student Succeeds Act (ESSA) is the new –and massive – federal law governing K-12 education, replacing No Child Left Behind. Because it touches nearly every aspect of education and schools – such as federal funding, accountability, report cards, school choice, and state education policy – it is essential for every Wisconsin policymaker, school leader, and concerned citizen to understand the new law. This memo will help explain ESSA and its impact on Wisconsin. Some of the topics include:

- An explanation of the Every Student Succeeds Act (ESSA) and how it differs from No Child Left Behind (*pg 2*).
- In exchange for federal Title funds, states must develop a “state plan” (*pg 3*). The state plan includes mandates for making decisions on numerous policies, such as a statewide report card system, creating academic standards, and how to intervene in low-performing public schools (i.e. charter school conversion or choosing new leadership) (*pg 4-6*). Wisconsin must submit its plan to the U.S. Department of Education by September 18, 2017.
- ESSA requires the state plan to be created with “*meaningful consultation from the state legislature and the Governor.*” To date, the Wisconsin Department of Public Instruction (“DPI”) is making unilateral decisions on ESSA’s state plan with very little consultation with Governor Walker and the legislature (*pg 7-8*).
- ESSA requires the creation of an ombudsman position to monitor and enforce the requirement that public schools provide Title services to private school students (*pg 8-9*). If independent from DPI, the ombudsman has *potential* to greatly empower children at private schools by giving them easier access to federal services from the Local Education Agency (LEA) (a public school district) that often acts as a gatekeeper for those services.
- What we know about ESSA today could change as the Trump Administration (and Congress) have the opportunity to improve it (*pg 10-11*).

In the Badger State, ESSA could present opportunities to improving education (especially for children at private schools) but there are significant obstacles to overcome. Because Superintendent of Public

Instruction Tony Evers has historically been an opponent of school choice and education reform, there is a risk that ESSA implementation here will be less than optimal with respect to the empowerment of parents and the development of new and varied approaches. The state legislature must ensure that does not happen.<sup>1</sup>

ESSA goes into effect in July 2017.<sup>2</sup> It is an enormous law, totaling over 1,000 pages with hundreds of additional pages of regulations, guidance, and proposed regulations. As Wisconsin DPI finalizes its state plan, we will follow the law and continue to serve as a resource.<sup>3</sup> For now, we have highlighted 10 of the most important items on ESSA every Wisconsinite should know.

## **1. The Every Student Succeeds Act (ESSA) is the new federal law for education and regulates Title funding for Wisconsin’s traditional public, public charter, and private schools.**

In December 2015, in a bipartisan effort, Congress passed ESSA, replacing No Child Left Behind, as the new federal education law that controls federal funding for schools and students (Title I – Title IX). 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 2015, the U.S. government sent \$23.3 billion to the states in Title funding.<sup>4</sup> Wisconsin, for example, received about \$204.3 million in Title I-A funding alone for school year 2016-2017.<sup>5</sup>

The U.S. Department of Education has regulatory authority over ESSA.<sup>6</sup> ESSA goes into effect in July 2017 for the 2017-2018 school year but states, including Wisconsin, are already starting to draft the state

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<sup>1</sup> In other states, while the state plans are being drafted, there has been conversation about the role of state legislatures, school board members and superintendents in crafting the state plan. For example, these conflicts have been raised in Colorado, Louisiana, Indiana, and California. See Daarel Burnette II, *In Some States, a Tug of War Over ESSA Plans*, Education Week, December 13, 2016, available at <http://www.edweek.org/ew/articles/2016/12/14/in-some-states-a-tug-of-war.html>

<sup>2</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311 footnote 5 (Sec. 1111(c)) (2015), available at <http://www2.ed.gov/documents/essa-act-of-1965.pdf> ([Section 1111 subsection (c) and (d)] “shall take effect beginning with school year 2017-2018. The school year for 2017-2018 begins on July 1, 2017.”)

<sup>3</sup> There are several thorough long manuals about ESSA. For more information, we recommend: WCRIS “ESSA & Private Schools” available at <https://www.wcris.org/essa-private-schools/>; Council in American Private Education (CAPE) “Private Schools and the Every Student Succeeds Act,” available at <http://www.capenet.org/pdf/ESSACAPE.pdf> (published before ESSA regulations were finalized); Excel in Ed “Federal law: The Every Student Succeeds Act” resources, available at <http://www.excelined.org/principles-2015-reauthorization-elementary-secondary-education-act/>

<sup>4</sup> U.S. Department of Education, *Fiscal Year 2016 Budget Summary and Background Information*, page 13, available at <http://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf>

<sup>5</sup> Department of Public Instruction, *2016-2017 FINAL ESEA Formula Allocations – Titles I, II, III*, Excel Document, available at <http://dpi.wi.gov/esea/new-items-interest>

<sup>6</sup> For example, the Department of Education is currently drafting the final regulations on “supplement-not-supplant,” a provision in ESSA that requires states to demonstrate that federal funds only supplement state and local funds (not supplant them). See Elementary and Secondary Act of 1965 20 U.S.C. § 6691 (Sec. 2301) (2015). The proposed regulations have been a point of contention between U.S. Senator Lamar Alexander, a co-author of ESSA, and the Department of Education. See also Andrew Ujifusa, *Proposed ESSA Spending Rules Unveiled*, Education Week, August 31, 2016, available at [http://blogs.edweek.org/edweek/campaign-k-12/2016/08/details\\_of\\_draft\\_essa\\_spending\\_rules\\_emerge.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/08/details_of_draft_essa_spending_rules_emerge.html)

plan to comply with ESSA.<sup>7</sup> ESSA – like No Child Left Behind – mandates that states do certain things in order for schools and students to receive federal Title funding.

## **2. While ESSA keeps some requirements from No Child Left Behind, it also creates new opportunities for Wisconsin.**

Under No Child Left Behind, the U.S. Department of Education set the standards for states' public schools and students as well as the sanctions if the school failed to meet the federal standards. If a state could not meet the standards, it was forced to ask the U.S. Department of Education for a waiver in order to avoid sanctions. Because the No Child Left Behind standards were unrealistic, waivers were commonplace.

ESSA changes this by returning more power to the states and removing federally mandated standards and sanctions. States now have the freedom to set their own standards for public schools<sup>8</sup> and students. According to U.S. Senator Lamar Alexander, co-author of ESSA, the intent of ESSA was to give states and local governments more responsibility.<sup>9</sup>

## **3. ESSA requires Wisconsin to create a state plan with “meaningful consultation from the state legislature and the Governor” and submit it to the U.S. Department of Education by September 2017.**

But states are not entirely free agents. Each must create a “state plan” that encompasses certain education policies required under ESSA.<sup>10</sup> Some of the many requirements for the state plan include:

- Develop a statewide report card system for public schools and students (including charters) (*see section 4 of report*)
- Define “challenging academic standards” for public schools (including charters) and students including testing to those standards,
- Identify low-performing public schools (including charters) (*see section 5*)
- Create state and school district intervention plans for low-performing public schools (including charters) (*see section 5*),
- Create a plan to help school districts identify and help children with disabilities, students who are economically disadvantaged, students from each major racial or ethnic group, and children who are English-language learners, and
- Detail the methods to measure teacher and school leader effectiveness.

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<sup>7</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86076 (November 29, 2016) (to be codified at 34 C.F.R. §§ 200.12-200.19), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-11-29/pdf/2016-27985.pdf> (“These regulations [regarding the state plan] are effective January 9, 2017.”)

<sup>8</sup> Unless otherwise stated, “public schools” in this paper will mean Wisconsin traditional public schools, independent public charter, and district public charter.

<sup>9</sup> Brad Bowman, *U.S. Sen. Alexander briefs state committee on federal education act*, The State Journal, September 12, 2016, *available at* <http://www.state-journal.com/2016/09/12/u-s-sen-alexander-briefs-state-committee-on-federal-education-act/> (“This is a rare opportunity for Kentucky and every state. The consensus was (in crafting the act) we would keep the test so parents, students and legislators and others could know how kids are doing. But then we would move all the responsibility for what to do about the test where it belongs to the states, local school boards and local classroom teachers.”)

<sup>10</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(1)(A) (Sec. 1111(1)(A)) (2015)

While ESSA requires the adoption of these policies, it does not dictate the details of the policies. States such as Wisconsin must submit their plans to the U.S. Department of Education by September 18, 2017.<sup>11</sup> The plan will then go through a peer review process and must ultimately receive approval by the Department of Education.<sup>12</sup> We do not know yet the criteria the Department of Education will use when evaluating and approving the state plans.

The development of a state plan will present different challenges for different states. Some Wisconsin laws already comply with ESSA's requirements for the state plan. However there are other policies Wisconsin must create in order to comply. In the next two sections, we highlight two of the big policy issues Wisconsin will have to confront in the creation of its state plan: the updating of its report card and the creation of intervention plans for low-performing schools.

**4. ESSA requires each state to track public schools' performances with a report card system. Because Wisconsin already has a report card, state policymakers will have to determine what changes – and how – need to be done to comply with ESSA.**

ESSA requires that states have a reporting system that tracks and ranks how public schools (including charters) are performing in an academic year.<sup>13</sup> This requirement would be satisfied by a statewide report card for each school and school district. ESSA requires the report card to contain specific information such as the per-pupil local, state, and federal dollars spent at each school and school district,<sup>14</sup> three academic indicators, and one non-academic indicator.

The four indicators (three academic and one non-academic) are likely to get the most attention when creating the report card system. ESSA specifies that the three academic indicators are proficiency in Reading/Language Arts/Mathematics, graduation rates, and achievement in English Language.<sup>15</sup> But states get to choose their own non-academic indicator so long as it relates to school climate or student success.<sup>16</sup> Examples of non-academic indicators could be school safety or post-secondary readiness. In addition,

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<sup>11</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86193 (November 29, 2016) (“Accordingly, the Department will adjust the submission deadlines [of the state plan] to April 3, 2017 or September 18, 2017.”)

<sup>12</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(a)(4) (Sec. 1111(a)(4)(A)) (2015)

<sup>13</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(b)(2)(A) (Sec. 1111(b)(2)(A)) (2015), See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86222 (November 29, 2016) (to be codified at 34 C.F.R. § 200.12(a))

<sup>14</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86240 (November 29, 2016) (to be codified at 34 C.F.R. § 200.35)

<sup>15</sup> The first Academic Achievement indicator must measure proficiency in reading/language arts and mathematics. The second academic indicator must measure the four-year adjusted cohort graduation rates for high schools. For elementary and secondary schools that are not high schools, the second academic indicator measures student growth. The third academic indicator measures achievement in English language proficiency indicator. See Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86223 (November 29, 2016) (to be codified at 34 C.F.R. § 200.14(b))

<sup>16</sup> The non-academic indicator must include one or more indicators of School Quality or Student Success that may vary by grade span. The regulations provide examples, including postsecondary readiness, school climate and safety, student engagement, or indicators selected by the State. See Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86223 (November 29, 2016) (to be codified at 34 C.F.R. § 200.14(5))

states must create three tiers for each indicator to measure school performance.<sup>17</sup>

Wisconsin already has a report card system for public schools but it does not contain all of the information required under ESSA. For example, Wisconsin's report card does not have a non-academic indicator or information about taxpayer expenditures. Therefore Wisconsin could do one of the following for the state plan to comply with ESSA:

1. *Create a second report card.* Wisconsin's state plan could create a second report card that includes information not currently collected under the existing state report card, i.e. non-academic indicators and taxpayer expenditures. This would result in essentially two report cards – one already existing under Wisconsin law and a new one for ESSA – that would be submitted under the state plan. Policymakers would have to determine what, if any, relationship there would be between the two report cards and which would have what – if any – consequences. The existing report card, moreover, applies to certain private schools participating in the State's various parental choice programs. ESSA would not require its report card to apply to any private schools.
2. *Amend the existing report card.* The Wisconsin legislature could pass a new law that amends the existing report card to include all the information required under ESSA, such as the non-academic indicator, that current report card lacks. Again, because ESSA's requirements apply only to public schools, the legislature would have to determine whether to require private schools participating in any of Wisconsin's choice programs to report on the ESSA requirements.

Fully addressing the report card requirement in ESSA requires much more discussion and debate.

**5. Another major policy decision required in the state plan is how to identify and intervene in low-performing public and charter schools.**

ESSA requires the identification of the lowest performing public schools in each state.<sup>18</sup> According to ESSA, low-performing public schools are those that fall under any of the following categories:

1. *The lowest five percent of all public schools receiving Title I funds (federal dollars for schools with high percentage of low-income students),*

States must identify the lowest five percent of schools receiving Title I funds as measured by the ESSA report card requirements<sup>19</sup> for the 2017-2018 school year (*see section 4 above*). Because public charters are included in the base, this will likely be around 60 public schools in Wisconsin.<sup>20</sup>

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<sup>17</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86227 (November 29, 2016) (to be codified at 34 C.F.R. § 200.18(a)(2)) (“at least three distinct and discrete levels of school performance”)

<sup>18</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(c)(4)(D) (Sec. 1111(c)(4)(D)) (2015); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86228-86235 (November 29, 2016) (to be codified at 34 C.F.R. §§ 200.19-200.24)

2. *Any public high school that fails to graduate 1/3 or more of their students,*<sup>21</sup> or

ESSA requires each state to “calculate a four-year adjusted cohort graduation rate for each public high school.”<sup>22</sup> Any public high school with a graduation rate at or below 67% is considered low-performing. In 2014-2015, there were 55 schools in Wisconsin with a 4 year graduation rate at or below 67%, according to the Department of Public Instruction. Of those 55 schools, 31 of the schools were outside of Milwaukee Public School District. Furthermore, of the 55 schools, 25 schools were public charter schools.

It is worth noting that ESSA currently does not provide exceptions to specialty high schools that may have 5 or 6 year programs.<sup>23</sup> In addition, it could create an incentive for schools to graduate students who are not ready.

3. *“Chronically underperforming subgroups of students” in Title I schools*

ESSA requires states to track subgroups of students’ performance on the ESSA report card system. The subgroup of students includes students with disabilities, English-language learners, economically disadvantaged students, and students from every major racial and ethnic group.<sup>24</sup> By comparing a subgroup at a school to the same subgroup at a different school, states can benchmark how the subgroup is performing. States have the flexibility to choose in the state plan what “chronically underperforming” means, i.e. to determine what gap in performance in comparison to other subgroups over a specific period marks a school as “low-performing.”

Starting in the school year 2018-2019, all low-performing public schools must undergo interventions to improve performance. At first, the school and school district will work together to develop and implement plans to improve performance in the area that the school is low-performing. This raises at least two questions for Wisconsin’s public charter schools. Wisconsin independent charter schools are their own Local Education Agency (LEA) and are not affiliated with any school district, so who do they work with to develop an intervention plan? Conversely, there are non-instrumentality district charter schools that retain

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<sup>19</sup> Elementary and Secondary Act of 1965, 20 U.S.C. §6311(c)(4)(D) (Sec. 1111(c)(4)(D)(i)) (2015); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86229 (November 29, 2016) (to be codified at 34 C.F.R. § 200.19)

<sup>20</sup> DPI Listening Session in Pewaukee, Wisconsin, Statement by DPI representative, June 30, 2016.

<sup>21</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86228 (November 29, 2016) (to be codified at 34 C.F.R. § 200.19(a)(2)) ; See also 81 Fed. Reg. 86076, 86239 (November 29, 2016) (to be codified at 34 C.F.R. § 200.34(a)) (“A State must calculate a four-year adjusted cohort graduation rate for each public high school.”)

<sup>22</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(h)(1)(C)(iii)(II) (Sec. 1111(h)(1)(C)(iii)(II)) (2015); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86239 (November 29, 2016) (to be codified at 34 C.F.R. § 200.34)

<sup>23</sup> For example, Carmen Schools of Science and Technology require high schools students who are below a 73 (a “C”) to re-do work until it is mastered, which could include retaking the class or a semester. This policy causes some students to graduate in five years, to ensure the student fully understands the material and is ready to move on to college. Carmen Schools of Science & Technology, *Academics/Academic Policies*, available at <http://www.carmenhighschool.org/academics-hs.html>.

<sup>24</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86225 (November 29, 2016) (to be codified at 34 C.F.R. § 200.16(a)(2))

some independence even though they are schools in the school district. Will ESSA's requirement put these charter schools at risk of losing their autonomy by requiring them to develop intervention plans with their authorizer (i.e. Milwaukee Public Schools)?

At this initial stage, the State has a very large – and discretionary - role in crafting policies to improve low-performing schools. The State can develop school-level intervention policies – such as charter school conversion or choosing new school leadership – and force the school district to choose from a list of those policies.<sup>25</sup> Whatever choices a state makes will go far to set parameters on what the district can do to help low-performing schools.

For those schools that continue to struggle, ESSA then requires states to determine when and how to perform a rigorous state intervention on the school.<sup>26</sup> Therefore, in the state plan, Wisconsin must develop comprehensive plans to fix low-performing schools, based upon evidence-based interventions.<sup>27</sup> Intervention plans could include choosing someone else to run the school's budget, removing the school from the school district, closing the school,<sup>28</sup> or converting it into an independent public charter school. The state plan must specify how rigorous the state interventions will be.

**6. The state plan must be developed with “*meaningful consultation with the Governor and members of the State legislature.*” ESSA does not define “*meaningful consultation*” but, to date, the Department of Public Instruction has done very little consultation.**

As explained in sections 3-5, the creation of ESSA's state plan has requirements that will have a significant impact on Wisconsin education policy for years to come. This is why ESSA requires the State Education Agency (in Wisconsin, the DPI) to have “*meaningful consultation with the Governor and members of the state legislature*” during the development of the state plan and prior to submitting it to the U.S. Department of Education.<sup>29</sup>

In summer 2016, DPI started the process of developing a state plan by holding public listening sessions across the state. Starting in August 2016, DPI began convening the Equity in ESSA Stakeholder Council, although the location and date of these meetings was, initially, not made public.<sup>30</sup> The 30 member Council includes appointments from the Speaker of the Assembly, Assembly Minority Leader, Senate Majority

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<sup>25</sup> Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86234 (November 29, 2016) (to be codified at 34 C.F.R. § 200.23(c)(2)); See also 81 Fed. Reg. 86076, 86230, 86232 (to be codified at 34 C.F.R. § 200.21(d)(3)(vi) and 34 C.F.R. § 200.22(c)(4)(iv))

<sup>26</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(d)(3)(A) (Sec. 1111(d)(3)(A)) (2015)

<sup>27</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 7801(21)(A) (Sec. 8101(21)(A)) (2015); See also U.S. Department of Education, “Non-Regulatory Guidance: Using Evidence to Strengthen Education Investments,” September 16, 2016, available at <https://www2.ed.gov/policy/elsec/leg/essa/guidanceuseinvestment.pdf>

<sup>28</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(d)(3)(A)(i)(I) (Sec. 1111(d)(3)(A)(i)(I)) (2015) (“more rigorous state-determined action”); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86234 (November 29, 2016) (to be codified at 34 C.F.R. § 200.23(c)(2))

<sup>29</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(a)(1)(A) (Sec. 1111(a)(1)(A)) and 20 U.S.C. § 7919 (Sec. 8540) (2015); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86244 (November 29, 2016) (to be codified at 34 C.F.R. § 299.15)

<sup>30</sup> Department of Public Instruction News Release, *Evers schedules ESSA listening sessions, appoints Equity Council*, May 17, 2016, available at [http://dpi.wi.gov/sites/default/files/news-release/dpinr2016\\_59.pdf](http://dpi.wi.gov/sites/default/files/news-release/dpinr2016_59.pdf)

Leader, Minority Leader, and Governor's office.<sup>31</sup> While DPI gives the Council items to discuss relating to ESSA, the Council is advisory only, has no voting authority, and cannot set their own agenda.<sup>32</sup> Furthermore, Superintendent of Public Instruction Tony Evers has made clear that the state plan is his alone.

After DPI has drafted the state plan, ESSA requires that they release it for public comment and give the Governor 30 days to review it.<sup>33</sup> ESSA does not specify if DPI has to make changes based upon comments from the Governor. In Wisconsin, the state plan must be submitted to the U.S. Department of Education by September 18, 2017.

It is unclear whether the "meaningful consultation" standard is met by DPI's Equity in ESSA Stakeholder Council and giving Governor Walker 30 days to review the state plan – which is already required under ESSA. More information is required to make this determination.

What is clear is that the state legislature, as having the vested constitutional "legislative power," could compel the Department of Public Instruction to involve them in the development of the state plan.<sup>34</sup> This could mean that the state legislature passes a law to require that the state plan, prior to submitting it to the U.S. Department of Education, be approved by the state legislature, education committees, or Joint Finance Committee. It is possible the state legislature could even take it upon itself to write its own state plan or parts of it and require DPI to submit it on their behalf. According to Wisconsin Supreme Court precedent, there is no question that the state legislature has authority over the Superintendent of Public Instruction for education policy.<sup>35</sup>

**7. ESSA requires the creation of an ombudsman position to monitor and enforce the requirement that public schools provide Title services to private school students. This is a big opportunity for school choice but its implementation must be monitored carefully.**

ESSA requires public school districts to consult with private schools regarding the provision of Title funded services.<sup>36</sup> The idea is that private school students who are entitled to the funded services should receive these services without delay. Historically this process has been difficult and complex for private schools. ESSA attempts to address this by requiring each state to create an ombudsman position who would serve as a resource for private schools to ensure the students are receiving their equitable share of Title funded services. The ombudsman position has the authority to monitor the consultation process between public

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<sup>31</sup> DPI Equity Council, *available at* <http://dpi.wi.gov/statesupt/equity-council>

<sup>32</sup> DPI Equity Council, August 31, 2016 meeting agenda, *available at* <http://dpi.wi.gov/statesupt/equity-council/meeting-materials>

<sup>33</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(a)(8) (Sec. 1111(a)(8)) (2015) and 20 U.S.C. § 7920(b) (Sec. 8540(b)); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86242-86243 (November 29, 2016) (to be codified at 34 C.F.R. § 299.13(b)(2)(ii) and 34 C.F.R. § 299.13(b)(4))

<sup>34</sup> Wis. Const. Art. IV, § 1

<sup>35</sup> *Coyne v. Walker*, 368 Wis.2d 225, 444 (2016); see also *Thompson v. Craney*, 199 Wis.2d 674 (1996)

<sup>36</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6320(a)(3)(B) (Sec. 1117(a)(3)(B)) and 20 U.S.C. § 7881(a)(3)(B) (Sec. 8501(a)(3)(B)) (2015)

school districts and private schools and serve as the enforcement mechanism of the law. The position will be funded by Title dollars from the percentage of administrative ‘skim’ by DPI.<sup>37</sup>

In Wisconsin, the ombudsman position should be independent from DPI. Otherwise if the position is chosen by DPI, it likely conflicts with the intent of this provision of the law. Private schools have been at a disadvantage when consulting for Title services with public schools. The ombudsman position is an attempt to level the playing field when private schools negotiate for services that their staff and students are entitled to but public schools are hesitant to share. We question whether this would occur if the position is housed in – and chosen by – the DPI, which has historically been hostile to private schools in the choice programs.

ESSA states that the State Education Agency (i.e. DPI) must “designate” the ombudsman position and “direct” the ombudsman to enforce the law.<sup>38</sup> But nothing in federal law prevents the state legislature from compelling the DPI to involve them in the creation of the selection process. The power of the DPI to accept federal funds for education was a decision by the state legislature so it is well within its right to curb how the DPI uses those funds.<sup>39</sup>

## **8. ESSA removes the educator evaluation systems requirement from No Child Left Behind.**

ESSA removes the No Child Left Behind educator evaluation system requirement that tied student test scores to teacher performance. Now, states can create their own evaluation systems without the formal approval of the content by the U.S. Department of Education.<sup>40</sup>

Based on the mandatory, rigid requirements of No Child Left Behind, Wisconsin has an educator effectiveness system for public and charter school principals and teachers.<sup>41</sup> According to the Milwaukee Journal Sentinel, the system has “caused widespread confusion and concern” and a “majority of teachers said they couldn’t complete it and many felt it was taking time from teaching and lesson planning.”<sup>42</sup> But, because ESSA does not require that states update their systems, Wisconsin is free to review, and change if needed, its current system.

## **9. ESSA ends the federal requirement of Common Core and gives states flexibility on testing.**

ESSA keeps the requirement that states test students in reading/language arts and math annually in grades 3-8 and once in high school. Students must also be tested in science at least once in elementary, middle

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<sup>37</sup> U.S. Department of Education, “Non-Regulatory Guidance: Fiscal Changes and Equitable Services Requirement under ESSA, November 21, 2016, available at <https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf>

<sup>38</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6320(a)(3)(B) (Sec. 1117(a)(3)(B)) (2015)

<sup>39</sup> Wis. Stat. 115.28(9)

<sup>40</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6601 (Sec. 2001) (2015) (there is no mandated teacher evaluation system in the law); See also Stephen Sawchuk, “ESSA Loosens Reins on Teacher Evaluations, Qualifications,” Education Week, January 5, 2016, available at <http://www.edweek.org/ew/articles/2016/01/06/essa-loosens-reins-on-teacher-evaluations-qualifications.html>

<sup>41</sup> Department of Public Instruction, *The WI Educator Effectiveness System*, available at <http://dpi.wi.gov/ee>

<sup>42</sup> David Umhoefer and Sarah Hauer, *Schools face tougher task in finding teachers*, Milwaukee Journal Sentinel, December 21, 2016, available at <http://projects.jsonline.com/news/2016/12/21/schools-face-tougher-task-in-finding-teachers.html>

and high school.<sup>43</sup> But ESSA removes the U.S. Department of Education’s ability to mandate the use of specific tests, such as tests aligned to the Common Core standards.<sup>44</sup>

Under ESSA, Wisconsin can select the assessments (i.e. tests) which must be “consistent with relevant, nationally recognized professional and technical testing standards, objectively measure academic achievement, knowledge, and skills.”<sup>45</sup> Because in 2015 the Wisconsin state legislature removed the requirement that Wisconsin school districts use the Common Core standards, the issue of testing standards is a local one.<sup>46</sup>

ESSA permits a small number of states to move away from a big, summative test at the end of the year and apply for permission to use smaller, interim assessments that result in a single, summative score on a pilot basis.<sup>47</sup> Although this would be a huge undertaking for a state, it is an opportunity for Wisconsin to review the current testing systems and evaluate its effectiveness. ESSA also permits states to apply for a federal grant to fund an audit of the tests required in public schools throughout a school year. This audit could help Wisconsin identify what testing requirements are repetitive and could streamline testing in Wisconsin.<sup>48</sup>

## **10. What we know about ESSA today will likely change under the Trump Administration and the new Republican-controlled Congress.**

ESSA will be impacted by the Trump Administration with the likely appointment of Betsy DeVos as the new Secretary of Education, who is a staunch supporter of school choice, and new Republican-controlled Congress.

Because the U.S. Department of Education is responsible for overseeing and promulgating regulations pertaining to ESSA, President-elect Trump’s appointment of Betsy DeVos will create an opportunity to mold ESSA to her liking. Assuming she is confirmed, she will play a large role in the reviewing and approving of state plans and has to determine what criteria she will use for both.

DeVos can review the existing guidance that has been released from the Department of Education and release alternative guidance to highlight her priorities. For example, she could encourage states to utilize

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<sup>43</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(b)(2)(B) (Sec. 1111(b)(2)(B)) (2015); See also Department of Education ESSA – Accountability and State Plans, 81 Fed. Reg. 86076, 86224 (November 29, 2016) (to be codified at 34 C.F.R. § 200.15)

<sup>44</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 79063a (Sec. 8527(b)) (2015) (“[N]o funds provided to the Department under this Act may be used by the Department, whether through a grant, contract or cooperative agreement, to endorse, approve, develop, require, or sanction any curriculum, including any curriculum aligned to the Common Core State Standards developed under the Common Core State Standards Initiative or any other academic standards common to a significant number of States, designed to be used in an elementary school or secondary school.”)

<sup>45</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6311(b)(2)(B)(iii) (Sec. 1111(b)(2)(B)(iii)) (2015); See also Department of Education – Title I, Part A, 81 Fed. Reg. 88886, 88931 (December 8, 2016) (to be codified at 34 C.F.R. § 200.2(b)(3)), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-12-08/pdf/2016-29128.pdf>

<sup>46</sup> Wis. Stat. 115.293(3) (“Beginning on July 14, 2015, the state superintendent may not take any action to adopt or implement any academic standard developed by the Common Core State Standards Initiative, and may not direct any school board to adopt or implement any such standard.”)

<sup>47</sup> Alyson Klein, *Rules Proposed for ESSA’s Innovative Assessment Pilot*, Education Week, July 6, 2016, available at [http://blogs.edweek.org/edweek/campaign-k-12/2016/07/essa\\_innovative\\_assessment\\_regulations.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/07/essa_innovative_assessment_regulations.html)

<sup>48</sup> Elementary and Secondary Act of 1965, 20 U.S.C. § 6362 (Sec. 1202) (2015)

the set aside option to fund programs for online courses.<sup>49</sup> She could also oversee the creation of the ombudsman position to ensure that it is implemented with the intent of the law (*see section 7*). She could also write guidance clarifying what “meaningful consultation” means and help determine whether DPI is satisfying it (*see section 6*).

In addition, the U.S. Department of Education could decide to promulgate new regulations for ESSA, replacing the old ones. For example, the Department of Education could promulgate new regulations to further support public charter schools by recognizing their uniqueness and autonomy.<sup>50</sup> The Department could also decide not to enforce specific regulations or guidance or even create waivers for states to opt out of certain burdensome requirements – similar to No Child Left Behind.

Furthermore, a Republican majority in the House and Senate could also reform ESSA. It is unlikely that ESSA would be fully repealed since it was passed with bipartisan support (including Speaker Paul Ryan),<sup>51</sup> but Congress could pass new law that would amend ESSA or rollback its existing regulations. Congress could use the Congressional Review Act (CRA) to overrule regulations submitted by the U.S. Department of Education in the last 60 legislative days.<sup>52</sup> The Senate Republican Policy Committee has included some ESSA regulations on their list of regulations to be repealed under the CRA.<sup>53</sup> Specifically, they are targeting the November 29, 2016 regulations regarding the report card measures (*see section 4*).

Congress could pass laws that would amend ESSA to make it friendly to school choice, such as making Title I funds portable. Instead of being distributed under a complex formula to fund services at schools, Title I portability would enable federal money to follow each low-income student to whatever school he or she chooses, such as traditional public, public charter, or private. This provision was originally in ESSA, supported by Betsy DeVos, but was ultimately taken out at the committee stage.<sup>54</sup> Perhaps it will be politically possible with the new Republican majorities.

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<sup>49</sup> ESSA permits states to “set-aside” a portion of the Title I funds as an additional revenue for school districts. These funds can be used for competitive grants to school districts for purposes such as online course access, expanded access to college-career readiness, etc. See Elementary and Secondary Act of 1965, 20 U.S.C. § 6303(a)(1) (Sec.1003(a)(1)) (2015)

<sup>50</sup> ESSA requires that promulgated regulations go through a negotiated rulemaking process, prior to the U.S. Department of Education releasing proposed regulations. See Elementary and Secondary Act of 1965, 20 U.S.C. § 6751(b)(1) (Sec. 1601(b)(1)) (2015)

<sup>51</sup> Alyson Klein, *ESSA Architect Q&A: Sen. Lamar Alexander, R-Tenn*, Education Week, June 13, 2016, available at [http://blogs.edweek.org/edweek/campaign-k-12/2016/06/essa\\_architect\\_q\\_a\\_sen\\_lamar\\_a.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/06/essa_architect_q_a_sen_lamar_a.html) (“Alexander added that Rep. Paul Ryan, R-Wis., the Speaker of the House, played a key role in getting the bill passed through Congress.”)

<sup>52</sup> 5 U.S.C. § 802; See also *The Congressional Review Act: Frequently Asked Questions*, Congressional Research Service, November 17, 2016, available at <https://fas.org/sgp/crs/misc/R43992.pdf>

<sup>53</sup> Senate Republican Policy Committee, *Reigning in Obama Regulatory Overreach*, December 6, 2016, available at <http://www.rpc.senate.gov/policy-papers/reining-in-obama-regulatory-overreach>; See also Alyson Klein, *GOP Lawmakers Put ESSA Accountability, Teacher-Prep Regulations on Hit List*, Education Week, December 13, 2016, available at [http://blogs.edweek.org/edweek/campaign-k-12/2016/12/gop\\_essa\\_accountability\\_teacher\\_prep\\_hit\\_list.html](http://blogs.edweek.org/edweek/campaign-k-12/2016/12/gop_essa_accountability_teacher_prep_hit_list.html)

<sup>54</sup> Lindsey Burke and Brittany Corona, *ESSA and What it Means for School Choice*, EdChoice, February 16, 2016, available at <https://www.edchoice.org/blog/essa-and-what-it-means-for-school-choice/>