

BRIAN E. FROSH
Attorney General



ELIZABETH HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

FACSIMILE NO.
(410) 576-7036

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.
(410) 576-6327
asnyder@oag.state.md.us

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Via First Class Mail & Electronic Mail

The Honorable Eric G. Luedtke
15114 McKnew Road
Burtonsville, Maryland 20866

Dear Senator Luedtke:

You ask whether the State Board of Education must consider both academic and non-academic factors when identifying the lowest-performing public schools that require “comprehensive support and improvement” under Maryland’s “Protect Our Schools Act,” 2017 Md. Laws, ch. 29, and the federal “Every Student Succeeds Act,” 20 U.S.C. § 6311. Although reasonable arguments can be made either way, I conclude that the better reading of the relevant provisions is that the State Board must consider both types of factors.

Background

A. Federal Law – The Every Student Succeeds Act (ESSA)

In 2015, Congress enacted the Every Student Succeeds Act, or “ESSA,” as the successor to the No Child Left Behind Act. No Child Left Behind was intended to provide school system accountability, part of which involved requiring states to identify the schools that struggle to meet academic standards. The No Child Left Behind Act came to be criticized, however, for placing too much emphasis on test scores in identifying struggling schools. ESSA was enacted in part to address that criticism.

ESSA provides states with additional flexibility in designing school accountability systems. Under ESSA, a State’s accountability system must measure at least two academic indicators and one non-academic “school quality” indicator. 20 U.S.C. § 6311(c)(4)(B). “School quality” indicators are intended to measure school characteristics that, while not directly tied to academic outcomes, nevertheless are



Hon. Eric G. Luedtke
August 9, 2017
Page 2

believed to be correlated with student success.¹ Examples of such indicators include student engagement, postsecondary readiness, and school climate and safety. *See* 20 U.S.C. § 6311(c)(4)B)(v). After selecting the indicators that it will use, the state must then establish a “system of meaningfully differentiating” between public schools. The system of meaningful differentiation must be “based on all indicators in the State’s accountability system”—academic and non-academic—but must, in the aggregate, give “much greater weight” to academic indicators. 20 U.S.C. § 6311(c)(4)(C).

Based on its system of meaningful differentiation, each state must establish a “State-determined methodology” to identify schools that require “comprehensive support and improvement.” The identified schools must include the “lowest-performing 5 percent of all schools” that receive Title I funding, all public high schools that fail to graduate one third or more of their students, and schools where any subgroup of students consistently underperforms. 20 U.S.C. § 6311(c)(4)(D)(i).

B. State Law – The Protect Our Schools Act

During the 2017 legislative session, the General Assembly enacted the “Protect Our Schools Act” to implement ESSA’s requirements. The Act envisions a four-step process for the State and local boards of education to implement federal law: the State Board must (1) develop an “educational accountability program,” Md. Code Ann., Educ. § 7-203; (2) establish a “composite score” that provides for “meaningful differentiation of schools” under the accountability program, *id.*, § 7-203(c)(2)(v)1; and (3) identify the public schools that require “comprehensive support and improvement,” *id.*, § 7-203.4(a)(1); and then (4) the local boards must “develop and implement a Comprehensive Support and Improvement Plan” for each identified school in their respective jurisdictions, *id.*

The State law provides detailed guidance for how the State and local boards must carry out the first, second, and fourth steps in this process. Each of those steps requires the relevant board to consider non-academic factors. *See* § 7-203(c)(2) (requiring that the accountability system include “at least three school quality indicators”); § 7-203(c)(2)(v)(2)(A) (requiring that the composite score, among other things, “[i]nclude both academic and school quality indicators”); § 7-203.4(a)(2)(ii) (requiring that the

¹ I will use the terms “school quality indicators” and “non-academic factors” interchangeably throughout this letter.

improvement plan developed by the local board include “the school quality indicators” included in the accountability system).

The statute says next to nothing, however, with respect to the third step in the process: identifying the public schools that are in need of comprehensive support and improvement. The only reference to that step comes in setting forth the local boards’ obligation to develop improvement plans “[f]or each public school identified by the Department [of Education] for comprehensive support and improvement.”

Analysis

The question at issue here involves two parts: Whether ESSA requires the Department² to consider non-academic factors in identifying the lowest-performing schools and, if not, whether Maryland’s Protect Our Schools Act so requires. This second question requires consideration of what to make of the General Assembly’s relative silence on how the State Board is to identify the schools that are lowest-performing.

A. Whether ESSA Requires States to Use Non-Academic Factors to Identify the Lowest-Performing Schools

ESSA does not specifically address how states are to identify low-performing schools or whether they must use non-academic factors in doing so.³ The relevant portions of ESSA require that the State include at least one non-academic factor in its “system of meaningfully differentiating” public schools and then, “based on the system of meaningful differentiation,” the State must “establish a State-determined methodology to identify” low-performing schools. One could read these provisions as requiring that states must consider non-academic factors when identifying low-performing schools because that system must be “based on” an accountability system that itself includes non-academic factors.

² I will use the terms “Department,” “MSDE,” and “State Board” interchangeably throughout this letter.

³ It is my understanding that the U.S. Department of Education has not issued guidance on this issue and that its review of the systems and methodologies submitted by other states has not progressed far enough to shed light on the issue. And, due to the press of time, I have not had the opportunity to review the legislative history surrounding the passage of ESSA to see whether it provides helpful interpretive information.

The specific formulation used in the federal law, however, includes two terms that suggest states might have greater flexibility to decide which factors are most appropriately used to identify the low-performing schools within their jurisdiction. First, the phrase “based on” has consistently been interpreted as meaning something other than “following precisely.” Instead, cases construing the term in other contexts have concluded that a methodology is “based on” something if the methodology uses that something as a “starting point” or “foundation,” as opposed to a prescription. *See, e.g., McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) (and cases cited therein). For example, in *McDaniel*, a federal appellate court concluded that the requirement within a retirement plan that benefits be “based on” a particular mortality table did not prohibit the plan administrator from adjusting the life expectancies within that table to account for the gender make-up of the company’s employee population. In reaching that conclusion, the court noted that, “[i]n the context of statutory interpretation, courts have held that the plain meaning of ‘based on’ is synonymous with ‘arising from’ and ordinarily refers to a ‘starting point’ or a ‘foundation.’” *Id.* at 1111; *see also Nevada v. Hutchings*, 106 Nev. 453 (1990) (requirement that salaries must be “set based upon” prevailing rates did not mean that salaries would be set “at” prevailing rates). In other words, the federal law could be read to require only that the State’s “system of meaningful differentiation” serve as a *starting point* for its formulation of a methodology.

Second, the term “methodology” itself connotes a potentially complex set of procedures, or, as a dictionary defines the term, “a body of methods, rules, and postulates employed by a discipline.” Webster’s Ninth New Collegiate Dictionary at 747 (1989). The complexity inherent in the term suggests that Congress probably did not intend that the states’ methodologies would have to mimic their “systems” of meaningful differentiation one-to-one. Instead, the federal terminology is better read as leaving room for the states to develop their methodologies using their systems of meaningful differentiation as a framework or starting point.

There are, however, considerations that cut the other way. All of the cases I have read that construe the phrase “based on” involve situations where the agency *adjusted* the underlying factors or considered *additional* factors; none addressed whether the agency could *disregard* some of the factors on which it was supposed to “base” its action. Allowing a state to exclude, when identifying the lowest-performing schools, *all* of the indicators that federal law requires in a system of meaningful differentiation would obviously stretch the term “based on” beyond its commonly-understood meaning. It is difficult to identify, however, how much a state may stray from the underlying factors

before its methodology of identifying struggling schools is no longer “based on” its system of meaningful differentiation.

Ultimately, this is the type of interpretive call that the U.S. Department of Education will have to make when reviewing Maryland’s program under ESSA. At this point in the process, absent federal guidance, I can only say that ESSA does not clearly address whether the State Board must consider non-academic factors when identifying low-performing schools.⁴

B. Whether the Maryland Protect Our Schools Act Requires that the State Board Use Non-Academic Factors to Identify the Lowest-Performing Schools

Given that federal law does not expressly require the State Board to consider non-academic factors in identifying low-performing schools, the analysis turns next to the requirements of the Protect Our Schools Act and how best to interpret its provisions.

1. The Text and Context of the Protect Our Schools Act

As discussed above, the Protect Our Schools Act is virtually silent on how the State Board must go about identifying the public schools that are in need of comprehensive support and improvement. The only reference to that step in the school accountability process is this:

For each public school identified by the Department [of Education] for comprehensive support and improvement, the county board shall develop and implement a Comprehensive Support and Improvement Plan to improve student outcomes at the school.

§ 7-203.4(a)(1). There are two competing ways of interpreting this sentence: Either the General Assembly intended to leave it to the Department’s discretion to identify low-performing schools and the factors it considers when doing so, or it intended for the

⁴ My understanding is that federal regulations in place under the Obama Administration prohibited states from using non-academic factors to *remove* a school from its list of failing schools but did not specifically address whether states must consider those factors when placing a school on the list in the first place. In any event, those regulations were rescinded by the Trump Administration and thus provide no meaningful guidance on how these provisions of ESSA would be applied by the current U.S. Department of Education.

Department to use the same factors—academic and non-academic—that it required the Department to use for the other three steps in the process.

There are good reasons for interpreting the Protect Our Schools Act as leaving it to the State Board to decide how best to identify the schools in need of additional support. There is no question that the statute anticipates that the State Board would be the agency that would make the determination of which schools are lowest-performing; § 7-203.4(a)(1) makes that clear by implication. Although the provision does not affirmatively *grant* the Department the authority to identify low-performing schools, it is not unreasonable to assume that the General Assembly left it to the Department to do so. After all, the State Board has “comprehensive” and “exclusive” power over educational policy and public school administration. *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 137 (2000). When the General Assembly is silent on a matter of educational policy, it thus presumably falls to the State Board to determine that policy under its broad “visitatorial” powers. *See* Md. Code Ann., Educ. § 2-106 (stating that the “Department has authority over: (1) Matters of elementary and secondary education that affect this State; and (2) The general care and supervision of public elementary and secondary education”); *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ.*, No. 25, SEPT.TERM, 2016, 2017 WL 2991769, at *16 (Md. July 14, 2017) (stating that the State Board “has very broad statutory authority over the administration of the public school system in this State, [and] that the totality of its statutory authority constitutes a visitatorial power of such comprehensive character as to invest the State Board with the last word on any matter concerning educational policy or the administration of the system of public education”).

And here, the Legislature’s silence seems intentional. After all, the statute contains detailed provisions on what the State and local boards must consider when developing the accountability program, the composite score, and the improvement plans, so the Legislature knew how to enact measures that would govern how the State Board goes about identifying low-performing schools. Given that the actual identification of low-performing schools is arguably the most public and controversial step in the school accountability process, one would expect the General Assembly to address that step if it intended to limit the State Board’s discretion in some way. Its failure to do so thus could be read as leaving the default rule in place: The State Board determines matters of educational policy, including which factors—academic or non-academic—to consider when identifying low-performing schools.

That conclusion, however, is hard to square with the Act’s overall structure and purpose. *See Nesbit v. Gov’t Employees Ins. Co.*, 382 Md. 65, 76 (2004) (observing that

statutory language is not to be read “in isolation or out of context [but] in light of the legislature’s general purpose and in the context of the statute as a whole”). The Protect Our Schools Act cabins the State Board’s discretion in a number of different ways. It contains detailed provisions on establishing the accountability program, generating the composite scores, and developing the improvement plan. *See generally* §§ 7-203(c)(2), 7-203.4(a)(2). Having done so, it seems unlikely that the Legislature would have granted the State Board seemingly unfettered discretion with respect to the determination of what is a low-performing school—again, arguably the most important and publicly-visible aspect of this law.

Also, the *way* in which the Legislature cabined the State Board’s discretion suggests that the State Board is required to use non-academic factors in identifying low-performing schools. The General Assembly expressly required the State Board to consider non-academic factors at each step of the process, namely, in establishing the accountability program, § 7-203(c)(2), generating the composite scores, § 7-203(c)(2)(v)(2)(A), and developing the improvement plan, § 7-203.4(a)(2)(ii). Having required the State Board to consider non-academic factors throughout the accountability process, it seems unlikely that the General Assembly would have intended to allow the State Board to ignore those factors when taking the critical step of identifying the low-performing schools that would receive additional funding.

Excluding non-academic factors from the process of identifying low-performing schools would also create significant logical tension with how the improvement plan provisions of the statute are implemented. Those provisions expressly require that improvement plans “include the school quality indicators.” § 7-203.4(a)(2)(ii). But if MSDE identifies low-performing schools by academic factors alone, some of those schools could, at least theoretically, have fairly high scores on the school quality factors. In that circumstance, it would seem odd for the Legislature to require the State Board to include those non-failing school quality factors in the improvement plans. Of course, schools with high school quality factors likely correlate fairly well with those with higher levels of academic success, so this circumstance may not occur in practice, but logically it suggests that the General Assembly intended or at least assumed that school quality factors would be considered when identifying low-performing schools.

Ultimately, the question is how to interpret the General Assembly’s silence on how the State Board is to go about identifying low-performing schools. It might well be that the Legislature felt that it had already addressed this topic by requiring the State Board to generate a composite score for each Maryland public school. My understanding is that other states have approached this aspect of the process differently, some using

color schemes or a number of stars to differentiate between schools. Those types of approaches might require an additional methodology to identify the lowest-performing 5 percent of schools, which is what federal law requires. *See* 20 U.S.C. § 6311(c)(4)(D)(i).

Maryland’s use of a composite score, by contrast, does not require any additional methodology to identify the lowest 5 percent. Instead, one need only prepare a ranked list all of the schools and their scores, calculate what 5 percent of the total number of schools on the list comes to, and then draw a line over the schools that fall within the bottom 5 percent. It is a simple accounting measure.⁵ Accordingly, the General Assembly may well have understood that, when it required the State Board to use a composite scoring system to meaningfully differentiate between schools, it *was* determining how the State Board would identify the schools in need of comprehensive support. That seems a more plausible explanation for the Legislature’s silence on this issue than an intent to leave it to the State Board’s discretion to identify low-performing schools in any way it saw fit—an outcome that, as discussed above, would be inconsistent with the statute’s purpose and structure.

2. The Legislative History of the Protect Our Schools Act

When a statute is silent on a topic, it is considered ambiguous and courts turn to the legislative history for indications of legislative intent. *Nesbit*, 382 Md. at 77 (stating that, “when a statute is silent as to a particular issue, it is appropriate for the Court to consider legislative history”). The legislative history, while not crystal clear, tends to support the conclusion that the General Assembly intended that the State Board identify low-performing schools by using the same factors—academic *and* school quality—that went into generating the composite score.

First, there are several instances in the floor debate where legislators described the bill’s requirements in terms that at least assumed that school quality factors would be used in identifying low-performing schools. For example, Senator Pinsky—the bill’s sponsor in the Senate—was asked about the calculation of the composite scores and what happens if a school fails. In response, he said: “Well, it is my understanding, and I believe this comes from the law itself, I do know the State Department is saying that after

⁵ In the event that multiple schools within the lowest-performing 5 percent had the *same* composite score, the task of those that are entitled to the additional support would be more than a mere accounting exercise. But given that federal law requires the State’s accountability system to “meaningfully differentiate” among schools, 20 U.S.C. § 6311(c)(4)(C)(i), it seems unlikely that ties would be common.

the bill passes they will put the system in place to find out which are the lowest performing schools *using these calculations.*” Transcript of Floor Debate at 4.⁶ Later in the debate, Senator Pinsky was asked what the point of the legislation was when federal law already gave states flexibility to have an accountability system that places less reliance on testing. Senator Pinsky responded,

Well, the point is the Federal law says you have to determine the 5% of your lowest Title 1 schools, you have to determine those schools that have a lower graduation rate, and take subcategories—English language learners, special education, students coming from foreign, free and reduced lunch—and if they are significantly lower, there had to be intervention. *But they have to figure out a calculation to even decide which ones to intervene in. That’s what this bill does, that’s what the ESSA directive does. That’s what we’re trying to do with this bill.*

Transcript at 16 (emphasis added). Senator Pinsky’s response tends to support the conclusion that the General Assembly understood that, by requiring the State Board to calculate a composite score, it *was* addressing how the lowest-performing schools would be identified. In Senator Pinsky’s words, it is the “calculation” of the composite score that “decides which [schools] to intervene in.”

Second, the context in which the Legislature took up consideration of the Act suggests that legislators were reacting to the State Board’s draft plan and a concern that it relied too heavily on academic factors. Testifying as the bill’s sponsor in the House of Delegates, you told the House Ways & Means Committee that the key issue before the Committee was “how do we judge when a school is failing?” You spoke of making sure that test scores are not the “sole arbiter” for identifying low-performing schools. The President of the Maryland State Education Association underscored your remarks, stating that Maryland needed to get away from the “test and punish culture” and an “obsession with testing” that characterized No Child Left Behind and instead consider a variety of school quality inputs—class size, attendance, access to a well-rounded curriculum—in determining whether schools are struggling. In addition, Mr. Steven Hershkowitz, Press

⁶ All citations to the floor debate are to an unofficial transcript that was prepared by the division of our Office that represents the State Board and the Department. A copy of the transcript is on file with the author.

Secretary and Policy Research Specialist for the Association, testified that the bill required “four testing indicators” as well as “opportunity indicators”—presumably school quality indicators—and that the State Board would “use these indicators to identify certain schools as low-performing.” *See* 2017 Gen. Assembly, House Ways & Means Comm. (Feb. 28, 2017). If the purpose of the bill was to reduce reliance on test scores, an interpretation of the bill that would allow the State Board to ignore non-academic factors would not advance that purpose.

Third, the General Assembly rejected amendments that would have increased the importance of academic factors and it overrode the Governor’s veto, which echoed the sentiments of those who had advocated for those amendments. *See* Transcript at 17 (opponents of the bill expressing the view that limiting academic factors to 65% of the overall composite score is too low); Letter from Gov. Hogan to The Honorable Michael E. Busch (April 5, 2017) (stating that the bill weights non-academic factors too heavily and that the “prioritization of these non-academic factors is designed to hide what is really happening in failing schools and is not correlated to student achievement in any way”).

Although the legislative history contains many statements expressing the view that the bill is not intended to micro-manage the State Board’s efforts to comply with ESSA, none indicates that the Legislature understood that the bill granted the State Board unlimited discretion to identify low-performing schools. Instead, the thrust of the legislative history is that the bill was intended to provide a framework within which the State Board would have discretion to make the necessary decisions. That framework requires the State Board to consider non-academic factors in the first, second, and fourth steps in the accountability process. There is no indication in the legislative history that the General Assembly intended to authorize the State Board to exclude non-academic factors when it came to identifying the low-performing schools that would receive additional attention.

Conclusion

ESSA does not clearly address whether the State Board may disregard non-academic factors when identifying schools in need of comprehensive support. Although the text of the Protect Our Schools Act does not address that issue either, the Act’s larger structure and legislative history indicate that the General Assembly intended to require the State Board to consider both academic and non-academic factors when identifying low-performing schools and that it believed it had done so by requiring the State Board to generate a composite score for each public school. Accordingly, it is my view that the

Hon. Eric G. Luedtke
August 9, 2017
Page 11

better reading of the statute is that the State Board must consider the same mix of academic and non-academic factors throughout the school accountability process, from developing the accountability system, to calculating the composite score, to identifying low-performing schools, and, ultimately, to the local boards' development of improvement plans for the low-performing schools. Although the matter is not free from doubt, I believe that interpretation best reflects the Act's structure and purpose.

Sincerely,



Adam D. Snyder
Chief Counsel, Opinions & Advice

**ADVICE OF COUNSEL
NOT AN OPINION OF THE ATTORNEY GENERAL**