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September 20, 2013

The Honorable Tom Harkin
Chairman
The Honorable Lamar Alexander
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John Kline
Chairman
The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Education and Department of Health and Human Services: Final Priorities, Requirements, Definitions, and Selection Criteria; Race to the Top—Early Learning Challenge*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Education and Department of Health and Human Services (the Departments) entitled “Final Priorities, Requirements, Definitions, and Selection Criteria; Race to the Top—Early Learning Challenge” (RIN: 1810-AB18). We received the rule on September 5, 2013. It was published in the *Federal Register* as final priorities, requirements, definitions, and selection criteria on August 30, 2013. 78 Fed. Reg. 53,964.

The final rule announces priorities, requirements, definitions, and selection criteria for the Race to the Top—Early Learning Challenge (RTT-ELC) program. The Departments may use one or more of these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2013 and later years. The Departments conducted the first competition under the RTT-ELC program in FY 2011 and awarded grants to nine states. In FY 2012, the Departments funded the five next highest-rated applicants on the slate of high-scoring applications from the FY 2011 competition. In order to maintain the overall purpose and structure of the FY 2011 RTT-ELC competition in future competitions, these final priorities, requirements, definitions, and selection criteria are almost identical to the ones used in the FY 2011 competition, with the exception of small language clarifications and eight substantive changes from the prior competition.

The final requirements are effective September 30, 2013. The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day delay requirement, any rule that the

agency for good cause finds that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. § 553(d)(3), 808(2). Accordingly, the Departments believe there is good cause for making the final requirements effective on September 30, 2013. The Departments must award funds under this authority to qualified applicants by December 31, 2013, or the funds will lapse. Even on an expedited timeline, the Departments believe it is impracticable to adhere to a 60-day delayed effective date for the final requirements and make grant awards to qualified applicants by the December 31, 2013, deadline. When the 60-day delayed effective date is added to the time the Departments will need to receive applications (approximately 45 days), review the applications (approximately 21 days), and finally approve applications (approximately 28 days), according to the Departments, it will not be able to award funds authorized under the Department of Education Appropriations Act, 2012 to applicants by December 31, 2013. The Departments have therefore determined that, pursuant to section 808(2) of the CRA, the 60-day delay in the effective date generally required for congressional review is impracticable, contrary to the public interest, and waived for good cause.

Enclosed is our assessment of the Departments' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the Departments did not include an analysis for the applicable requirements of the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the Paperwork Reduction Act, or Executive Order 13,132 on Federalism.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Michael Gross
Assistant General Counsel for Regulatory Services
Department of Education

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF EDUCATION AND
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ENTITLED
"FINAL PRIORITIES, REQUIREMENTS, DEFINITIONS, AND
SELECTION CRITERIA; RACE TO THE TOP—
EARLY LEARNING CHALLENGE"
(RIN: 1810-AB18)

(i) Cost-benefit analysis

Under Executive Order 12,866, the Departments have assessed the potential costs and benefits of this regulatory action and have determined that these requirements will not impose significant costs on eligible states. According to the Departments, states that applied for a grant under the FY 2011 RTT–ELC competition reported that they found the application process to be useful in organizing their early childhood planning efforts because the priorities, requirements, definitions, and selection criteria provided them with direction and structure for developing a High-Quality Plan for a State Early Learning and Development Program. Several unfunded states then used their prepared application as their state’s strategic early learning plan. In addition, the final priorities, requirements, definitions, and selection criteria, in particular those related to maintaining conditions of reform required under the FY 2011 RTT–ELC competition, require continuation of existing commitments and investments rather than the imposition of additional burdens and costs for applicant states. The Departments state that those states that previously applied but did not receive funding will incur minimal costs in developing an application. In addition, because the Departments are maintaining the priorities, requirements, definitions, and selection criteria of the FY 2011 competition, states that did not previously apply can draw upon the posted applications and reviewer comments from the FY 2011 competition. The Departments believe that these resources will minimize burden for all applicants.

The Departments believe therefore that the benefits of developing an application for this competition outweigh the costs. According to the Departments, states will significantly benefit from the application process because it will require them to build strong relationships between state agencies and early learning non-profit organizations and consider how to use federal, state, and local funding streams to best support early learning. A further benefit is that the final priorities, requirements, definitions, and selection criteria are expected to result in the selection of high-quality grantees that are most likely to successfully implement RTT–ELC grants in the manner that the Departments believe will best enable the program to achieve its objective of creating the conditions for effective reform in state early learning systems. The final priorities, requirements, definitions, and selection criteria clarify the scope of activities the Secretaries expect to support with program funds. The pool of eligible applicants is limited to state applicants that have not previously received an RTT–ELC grant. Potential applicants need to consider carefully the effort that will be required to prepare a strong application, their capacity to implement projects successfully, and their chances of submitting a successful application. Program participation is voluntary. The Secretaries believe that the costs imposed on applicants by these final priorities, requirements, definitions, and selection criteria are limited to paperwork burden related to preparing an application and that the benefits of implementing these proposals outweigh any costs incurred by applicants. The costs of carrying out activities

associated with the application will be paid for with program funds. Thus, the costs of implementation will not be a burden for eligible applicants, including small entities.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

In its submission to the Comptroller General, the Departments did not include an analysis of the final requirements under the Act.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

In its submission to the Comptroller General, the Departments did not include an analysis of the final requirements under the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Departments published a notice of proposed priorities, requirements, definitions, and selection criteria (NPP) for this program in the *Federal Register* on May 20, 2013. 78 Fed. Reg. 29,500. The NPP contained background information and the Departments' reasons for proposing the particular priorities, requirements, definitions, and selection criteria for the RTT—ELC program. Thirty-six parties submitted comments. The Departments summarized and responded to those comments.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

In its submission to the Comptroller General, the Departments did not include an analysis of the final requirements under the Act.

Statutory authorization for the rule

The final rule is authorized by sections 14005 and 14006 of the American Recovery and Reinvestment Act of 2009, as amended by section 1832(b) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, and the Department of Education Appropriations Act, 2012 (Consolidated Appropriations Act, 2012, Division F, Title III).

Executive Order No. 12,866 (Regulatory Planning and Review)

The Departments determined that the final rule is “economically significant” and subject to review by the Office of Management and Budget under section 3(f)(1) of Executive Order 12,866.

Executive Order No. 13,132 (Federalism)

In its submission to the Comptroller General, the Departments did not include an analysis of the final requirements under Executive Order 13,132.