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December 13, 2016

James Butler
U.S. Department of Education
400 Maryland Avenue, SW
Room 3W246
Washington, DC 20202

Re: Docket ID: ED-2016-OESE-0056 Title of Collection: Title I-Improving the Academic Achievement of the Disadvantaged-Supplement Not Supplant

Dear Mr. Butler:

Pursuant to Executive Order 13563 - *Improving Regulation and Regulatory Review*, which supplements Executive Order 12866 - *Regulatory Planning and Review*, the National School Boards Association ("NSBA") requests the opportunity provide additional information and input on the U.S. Department of Education's ("Department") Notice of Proposed Rulemaking, *Title I-Improving the Academic Achievement of the Disadvantaged-Supplement Not Supplant*, published on September 6, 2016.

NSBA, working with and through our state associations to represent more than 90,000 local school board members nationwide, submitted formal public comment in response to the proposed regulations on November 2, 2016. (See attached.) NSBA advocates for equity and excellence in public education through school board leadership. Article I, Section I of NSBA's Beliefs & Policies state that education leaders at the Federal, State, and local levels must work to "provide the highest **quality education for each child, and equal educational opportunity for all children.**"¹ With this equity goal in mind, NSBA reiterates the clear and unambiguous provisions in the Every Student Succeeds Act (ESSA) concerning the requirement that school districts utilize Title I funds to supplement and not supplant State and local funds.

Congress expressed clear limitations on the both Federal and State authority by amending ESEA, through ESSA, to restore authority to local education leaders in demonstrating compliance with supplement not supplant requirements. NSBA reiterates specific concerns submitted on November 2, 2016, and requests that the Department amend the proposed regulations in a way that will restore

¹ NAT'L SCH. BDS. ASS'N, BELIEFS & POLICIES OF THE NATIONAL SCHOOL BOARDS ASSOCIATION 9, (2016), available at https://cdn-files.nsba.org/s3fs-public/file/2016_Beliefs_Policies_Adopted_by_DA-4-8-16.pdf

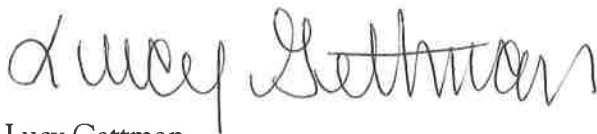
and reinforce the authority of State and local education leaders. NSBA urges the Department to accept the proposed recommendations, particularly those related to the prescription of specific methodologies in the proposed regulation.

NSBA contends that the Department's proposed regulation will not adequately further priorities relating to ensuring equity. To the contrary, the establishment of specific methodologies and federal "tests" will undermine ongoing efforts by local school board members to increase opportunities for students most in need and prevent the innovative creation of programs that further ensure equity. *The proposed regulation narrowly focuses on certain funding allocations and discounts alternative funding sources, special programs, and additional services that cannot be quantified through a districtwide formula.* The proposed regulation disregards existing funding procedures utilized by local school boards, and fails to recognize State and local limitations on school funding systems.

Additionally, the proposed regulation directly conflicts with provisions in ESSA that limit the authority of the Department and authorize local school districts to independently and individually choose a methodology for demonstrating compliance with supplement not supplant requirements. Most importantly, the Department's proposed regulation must be amended to allow school districts to use ESSA's existing data reporting requirements to demonstrate compliance with the supplement not supplant requirement. The use of existing data reporting requirements will maximize district resources, reduce administrative burdens, and allow district leaders to focus on building resources within the district. However, the standard in the proposed rule must be amended to reflect ESSA's statutory requirement: this data must demonstrate that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funding.

We urge the Department to ensure restoration of local governance of public education and amend the proposed regulations, per NSBA's recommendations. Thank you for meeting with us today and for consideration of NSBA's comments and recommendations.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lucy Gettman". The signature is fluid and cursive, with the first name "Lucy" and last name "Gettman" clearly distinguishable.

Lucy Gettman
Chief Advocacy Officer
Federal Advocacy and Public Policy



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November 2, 2016

James Butler
U.S. Department of Education
400 Maryland Avenue, SW
Room 3W246
Washington, DC 20202

Re: Docket ID: ED–2016–OESE–0056
Title of Collection: *Title I–Improving the Academic Achievement of the Disadvantaged–Supplement Not Supplant*

Dear Mr. Butler:

The National School Boards Association (“NSBA”), with and through our state associations, represents more than 90,000 local school board members and nearly 14,000 school boards from every region and almost every State in the country. NSBA members are responsible for the education of over 50,000,000 students nationwide. NSBA advocates for equity and excellence in public education through school board leadership. Article I, Section I of NSBA’s Beliefs & Policies state that education leaders at the Federal, State, and local levels must work to “provide the highest quality education *for each child, and equal educational opportunity for all children.*”¹ NSBA members believe that “[p]ublic schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, sexual orientation, ethnic background, English proficiency, immigration status, socioeconomic status, or disability.”² With these equity goals in mind, and on behalf of our membership, NSBA submits the following comments in response to the U.S. Department of Education’s (“Department”) Notice of Proposed Rulemaking, *Title I–Improving the Academic Achievement of the Disadvantaged–Supplement Not Supplant*, ED–2016–OESE–0056, published by the Department on September 6, 2016.³

¹ NAT’L SCH. BDS. ASS’N, BELIEFS & POLICIES OF THE NATIONAL SCHOOL BOARDS ASSOCIATION 9, (2016), available at https://cdn-files.nsba.org/s3fs-public/file/2016_Beliefs_Policies_Adopted_by_DA4-8-16.pdf

² *Id.* at 26.

³ Elementary and Secondary Education Act of 1965, Title I–Improving the Academic Achievement of the Disadvantaged–Supplement Not Supplant, 81 Fed. Reg. 61,148 (proposed September 6, 2016) (to be codified at 34 C.F.R. pt. 200) [hereinafter “SNS NPRM”].

The historic reauthorization of the Elementary and Secondary Education Act (“ESEA”), as amended by the Every Student Succeeds Act (“ESSA”), provides a unique and unprecedented opportunity to restore local governance and community ownership of public education. The passage of ESSA represents Congress’ clear directive to restructure and realign the federal government’s role in public education. The law restores the authority of State and local education officials, including local school board members, as the leaders best positioned to improve public education. School board members, as elected officials who govern local school districts, are accountable for ESSA compliance, including fiscal compliance at the local level.

On February 4, 2016, the Department published a Notice in the Federal Register announcing its intent to conduct negotiated rulemaking and identified the areas in which it intended to develop or amend regulations implementing ESEA. The Department established a negotiating committee to consider the requirement under section 1118 of ESEA that Federal funds be used to supplement, and not supplant, State and local funds. Throughout the negotiated rulemaking process, negotiators expressed concerns over the breadth and scope of the Department’s proposed supplement not supplant requirements. At the conclusion of negotiations, members of the negotiating committee were unable to reach a consensus on the Department’s proposed supplement not supplant regulatory language. The negotiating committee’s failure to reach a consensus authorizes the Department to proceed in promulgating a formal regulation, without adherence to committee negotiations. While it is clear that the Department considered concerns expressed by negotiating committee members, the Department’s proposed rule does not address concerns expressed throughout the negotiated rulemaking process.

ESSA includes clear and unambiguous provisions concerning the requirement that school districts utilize Title I funds to supplement and not supplant State and local funds. Congress expressed clear limitations on the both Federal and State authority by amending ESEA, through ESSA, to restore authority to local education leaders in demonstrating compliance with supplement not supplant requirements. For example, Congress amended ESSA to reduce administrative burdens by no longer requiring districts to identify that a specific service or cost is supplemental.⁴ Additionally, Congress clarified that school districts shall not be required to provide services through a “particular instructional method or in a particular instructional setting” to demonstrate compliance with supplement not supplant.⁵ Significantly, ESSA authorizes local school districts to individually determine the methodology it will utilize to demonstrate compliance with federal supplement not supplant requirements.⁶ These provisions were intended to equip local education leaders with the flexibility necessary to better educate and meet the needs of their students, and to better ensure equity and the academic achievement of all students.

NSBA agrees with the Department’s assertion that ESEA seeks to “ensure that every child, regardless of race, national origin, socioeconomic status, background, or zip code, receives the support needed

⁴ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, sec. 1000, § 1118(b)(3)(A) (2015) (amending 20 U.S.C. § 6321).

⁵ ESSA, sec. §1000(4), § 1118(b)(3)(B) (amending 20 U.S.C. § 6321).

⁶ ESSA, sec. §1000(4), § 1118(b)(2) (amending 20 U.S.C. § 6321).

to succeed in school.”⁷ ESSA states the clear intended purpose of “provid[ing] all children significant opportunity to receive a fair, equitable, and high-quality education, and to close achievement gaps.”⁸ The manner in which school districts use Federal, State and local funds aligns with and supports important equity goals. NSBA “believes that full funding of federal public education programs is an essential step in improving educational opportunities for all children.”⁹ While the Department’s proposed regulation attempts to ensure the equitable distribution of State and local funds, sections of the regulation are in conflict with the statutory provisions in ESSA. Significantly, the proposed regulation will have the effect of reducing opportunities for local school districts to innovatively or effectively improve resource inequities because the proposal requires local school board members to focus exclusively on implementation of and continuing compliance with the methodologies established in the rule.

Below, we provide more details about specific areas of concern regarding the Department’s proposed supplement not supplant regulation.

I. The Proposed Regulation is Inconsistent with ESSA and Limits the Authority Congress Explicitly Granted to Local School Districts

ESSA establishes clearly defined parameters that inform how States and local school districts will be required to demonstrate that Federal funds are used in a supplemental, additive manner. First, ESSA includes a clear legal directive that States and districts “shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal funds, be made available from State and local sources for the education of students participating in the programs assisted under this part, and not to supplant such funds.”¹⁰ Significantly, ESSA specifies the legal standard by which States and local school districts can demonstrate compliance with the Title I supplement not supplant requirement:

(2) “COMPLIANCE.—To demonstrate compliance with paragraph (1), a local educational agency shall demonstrate that the methodology used to allocate State and local funds to each school receiving assistance under this part ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under the part.”¹¹

As such, the law establishes the standard by which a local school district must demonstrate compliance: each Title I school must receive all of the State and local funds it would otherwise receive if it received no Title I funding. Additionally, the law authorizes local school districts to determine the methodology used to demonstrate compliance with this standard. ESSA not only grants individual school districts the authority to determine methodologies for compliance, but includes Secretarial restrictions that specifically *prohibit* the Department from prescribing any

⁷ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule Executive Summary, Supplementary Information, Pg. 61,149)

⁸ ESSA, sec. 1001, § 1001 (amending 20 U.S.C. § 6301).

⁹ NAT’L SCH. BDS. ASS’N, *supra* note 1, at 20.

¹⁰ ESSA, sec. §1000(4), § 1118(b)(1) (amending 20 U.S.C. § 6321).

¹¹ ESSA, sec. §1000(4), § 1118(b)(2) (amending 20 U.S.C. § 6321).

methodology school districts must use to demonstrate compliance with ESSA. The law states, “[n]othing in this section shall be construed to authorize or permit the Secretary to prescribe the specific methodology a local educational agency uses to allocate State and local funds to each school receiving assistance under this Part.”¹² Despite this restriction, the Department’s proposed regulation *prescribes at least three methodologies from which a school district must choose to use to demonstrate compliance*. Providing “choices” for school districts is *directly* contrary to unambiguous congressional intent because it limits options to districts and the specific methodologies districts may utilize to demonstrate supplement not supplant compliance. Congress reserved the authority to local school districts, not the Department, to select a methodology to demonstrate compliance with supplement not supplant. The Department’s proposed regulation violates that authority. Furthermore, the proposed regulation focuses more on specifying methodologies for school districts than on the funding outcome, or ensuring that Title I schools receive State and local funds to which they are entitled, as required by ESSA.

Recommendation: Amend subsections (b)(1)(ii)(A)-(C) to directly align with the statutory provisions in ESSA. There is no statutory basis in ESSA that allows the Department to limit the methodologies available to local school districts as long as a district can demonstrate that an individual school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funds. The prescription of specific methodologies runs afoul of congressional intent to restore governance to local education leaders. The failed system of rigid federal specifications must be abandoned and the regulation should be amended to focus on whether the district has achieved Title I neutrality. Furthermore, the methodology outlined in (b)(1)(iii) does not accomplish this purpose because it mandates equalized per-pupil funding in violation of ESSA.

II. The Proposed Regulation is Unnecessary and Constitutes the Type of Federal Overreach Congress’ ESSA Language Specifically Prohibits

Congress amended the statutory provisions in ESSA relating to supplement not supplant to establish a specific standard for demonstrating compliance. As the Department acknowledges, this is the first time that ESEA has included a directive relating to *how* individual States and school districts demonstrate compliance with supplement not supplant.¹³ Every school district must show that the methodology used to allocate State and local funds to each Title I school ensures that the school “receives all of the State and local funds it would otherwise receive if it were not receiving assistance” under Title I of ESSA.¹⁴ *To be clear, ESSA, and not the Department, establishes the legal test for compliance while authorizing local school districts to determine how they demonstrate compliance with the legal standard.*

The legal standard established in ESSA must serve as the guide, the baseline, for any rule promulgated by the Department. The proposed regulation represents a clear departure from the

¹² ESSA, sec. §1000(4), § 1118(b)(4) (amending 20 U.S.C. § 6321).

¹³ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule Executive Summary, Supplementary Information, Pg. 61,149)

¹⁴ ESSA, sec. §1000(4), § 1118(b)(2) (amending 20 U.S.C. § 6321).

statutory test for compliance. *The law establishes a “funds based” test narrowly tailored to examine the distribution of State and local funds at the individual school site level. The regulatory threshold must exclusively examine whether a Title I school is receiving all of the State and local funds it would receive if it were not receiving federal financial assistance.*

However, the methodologies included in the proposed regulation significantly expand the “funds based” statutory test provided in ESSA in a way that undermines local decision-making and discounts the unique nature of individual schools and the needs of students. Two of the methodologies included in the proposed rule ignore the statutory threshold for compliance. The rule includes a methodology that allows a district to demonstrate that State and local funds are distributed based on a “consistent districtwide per-pupil formula based on the characteristics of students in each school” that results in each Title I school receiving all the funds it is entitled under the formula.¹⁵ The proposed regulation also prescribes a methodology that is based on “the actual distribution of funds”—*all funds*—for equalized personnel and nonpersonnel expenditures.¹⁶ Neither test, however, examines or allows school districts the option of demonstrating, based on the totality of State and local funds distributed, that a Title I school is receiving all of the State and local funds to which it is entitled.

In fact, the only methodology in the rule that focuses on the total allocation of State and local funds, as required by ESSA, inappropriately mandates equalized per pupil spending. The proposed regulation prescribes a methodology that mandates equalized per pupil spending by requiring schools to “spend an amount of State and local funds on a per-pupil basis in each title I school that is equal to or greater than the average per-pupil amount spent in non-title I schools.”¹⁷ This test constitutes the most egregious departure from the provisions of ESSA for two reasons: 1) First, there is no statutory basis for an equalized per-pupil spending mandate;¹⁸ and 2) Second, the proposed regulation distorts Title I’s existing data reporting requirements by requiring the result of equalized per pupil spending, as detailed below.¹⁹

Title I mandates the reporting of “per pupil expenditures of Federal, State, and local funds, including actual personnel expenditures and actual nonpersonnel expenditures of Federal, State and local funds, disaggregated by source of funds, for each local educational agency and each school in the State for the preceding fiscal year.”²⁰ Local school districts could easily use this existing, mandatory data reporting requirement to demonstrate supplement not supplant compliance. (That is, whether a school is receiving all of the State and local funds it would receive if it were not receiving Title I funding, as required by ESSA.) The Department’s proposed regulation undermines this reasonable, existing option, by requiring that the data result in equalized per pupil spending.

¹⁵ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. §200.72(b)(1)(ii)(A)).

¹⁶ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(ii)(B)(1)-(2)).

¹⁷ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(i)(B)).

¹⁸ ESSA, sec. §1501, § 1605 (amending 20 U.S.C. § 7372).

¹⁹ ESSA, sec. §1005, § 1111(h)(1)(C)(x) (amending 20 U.S.C. § 6311).

²⁰ ESSA, sec. §1005, § 1111(h)(1)(C)(x) (amending 20 U.S.C. § 6311).

Under the proposed regulation, if a district wants to utilize Title I's existing reporting options, the district must demonstrate that it is "spending an amount of State and local funds on a per-pupil basis in each title I school that is equal to or greater than the average per-pupil amount spent in non-title I schools."²¹ For purposes of supplement not supplant compliance, the Department, through this proposed regulation, amends, by administrative rule, what this data must show. There is no statutory requirement that data reported under Title I result in equalized per pupil spending. ESSA does not require equalized per pupil spending. Local school districts should be able to use this data to demonstrate compliance with supplement not supplant, and pursuant to ESSA, must demonstrate that Title I schools are receiving just as much in State and local funds absent federal financial assistance.

The proposed regulation is unnecessary because ESSA includes existing data reporting requirements that can be used to demonstrate compliance with supplement not supplant. The proposed rule also represents a significant departure from the basic, statutory requirements of ESSA by requiring equalized per-pupil spending. As such, the regulation constitutes unwarranted federal overreach and complete disregard for Congress' clear intent. The Department's regulation must preserve the authority of the local school district and avoid the adoption of an unnecessary federal regulation that exceeds the scope of the law, as Congress stated in ESSA in no uncertain terms.

Recommendation: Amend the proposed regulation to allow school districts to use ESSA's existing data reporting requirements to demonstrate compliance with the supplement not supplant requirement *if the data reported demonstrates that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funding.* The proposed regulation should accurately align with ESSA's provisions relating to supplement not supplant compliance.

III. Identified Methodologies in the Proposed Rule Lack Clarity

The Department's proposed rule outlines three "tests" for districts to utilize to demonstrate compliance with the supplement not supplant fiscal requirement, and allows for the possibility of a fourth option developed by the State educational agency.²² The specific tests included in the proposed rule require local school districts to either "distribute almost all State and local funds available to the LEA in a way that meets" one of the three specific tests—or, more generally, requires districts to distribute state and local funds in any manner that "results in the LEA spending an amount of State and local funds per pupil in each title I school that is equal to or greater than the average amount of State and local funds spent per pupil in non-title I schools."²³

NSBA opposes the prescription of specific methodologies school districts must utilize to demonstrate compliance with supplement not supplant. However, if the Department proceeds with

²¹ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(iii)).

²² SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(ii)(A)-(C) and (b)(1)(iii)).

²³ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(ii) and (b)(1)(iii)).

the proposed regulatory framework, notwithstanding the objections cited above and prescribes specific methodologies school districts must utilize, the specific “tests” in the rule must be amended to clearly articulate the expectations for compliance. Furthermore, amending the regulation to grant authority to local school districts to determine the manner in which the district will demonstrate compliance is the most effective way to establish clear expectations in a way that supports local autonomy.

The first test, outlined in proposed regulation §200.72(b)(1)(ii)(A), allows a local school board to distribute State and local funds through a “consistent districtwide per-pupil formula based on the characteristics of students in each school” and demonstrate that each Title I school receives all the funds to which it is entitled under the formula.²⁴ However, the test does not take into account *all* sources of State and local funds a school site may receive that increases per-pupil funding. (The focus on funding for “groups of students . . . associated with educational disadvantage” allows no consideration of funding sources received to meet the needs of other student populations or generally, all students in the school.) The criteria should be amended to allow local school districts the option of including, in the districtwide per-pupil formula, additional State and local funds generated to serve all underserved populations of students in the school, even if the funds are not associated with educational disadvantage. Additionally, the proposed test emphasizes the importance of funding allocations in a way that disregards the benefits of special programs, alternative funding allocations and additional services that cannot be quantified through a districtwide formula.

The second test, outlined in proposed regulation §200.72(b)(1)(ii)(B), allows a local school board to distribute State and local funds based on a “consistent districtwide personnel and non-personnel resource formula” that includes the sum of “the average districtwide salary for each category of school personnel” and “the average districtwide per-pupil expenditure for non-personnel resources.”²⁵ This option does not clarify categories of employees that *must* be included nor does it address how or whether a school district accounts for short or long-term employees (substitute teachers) in the formula. Furthermore, the proposed rule does not specify how a school district weighs, in the formula, district employees assigned to multiple sites, or who serve both Title I and non-Title I schools in the district. Significantly, the methodology is not an option for school districts with collective bargaining agreements, as the terms of such agreements render school boards unable to take necessary, affirmative steps to achieve compliance with the districtwide personnel formula.²⁶

The “Special Rule,” outlined in proposed regulation §200.72(b)(1)(iii), allows a local school board to utilize any methodology that “results in the LEA spending an amount of State and local funds per pupil in each title I school that is equal to or greater than the average amount of State and local funds spent per-pupil in non-Title I schools.”²⁷ Of each of the tests included in the proposed rule, the Special Rule most runs afoul of Congress’ clear intent. ESSA states that “[n]othing in [the law] shall be construed to mandate equalized spending per pupil for a State, local educational agency, or

²⁴ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(ii)(A)(1)-(2)).

²⁵ *Id.*

²⁶ *Id.*

²⁷ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(i)(B)).

school.²⁸ Nonetheless, the final methodology offered to local school districts requires just that; equalized per pupil spending. Just as troubling, the rule provides no clarification on the factors a district would be required to include in the calculation of per-pupil spending, nor does it clearly identify the entity responsible for identifying such factors.

Recommendation: Amend proposed regulation (b)(1)(ii)(A) to allow local school districts to include any source of State and local funding that positively impacts students most in need. Amend proposed regulation (b)(1)(ii)(B) to clarify that local school districts have the authority, pursuant to ESSA, to: 1) determine the categories of employees that must be included in the districtwide formula; 2) determine how it will factor short and long-term substitutes into the formula; and 3) determine all issues related to the proportional inclusion of employees assigned to multiple Title I and non-Title I schools. Finally, while NSBA supports the approach reflected in the “Special Rule” outlined in §200.72(b)(1)(iii) because it defers to the individual school district to select *any* methodology, it must be deleted from the proposed regulation because it contradicts the clearly stated Congressional intent of ESSA, at 20 U.S.C. § 6576.

IV. The Proposed Regulation Contains Vague Language that Will Create Significant Compliance Challenges

NSBA opposes the prescription of specific methodologies school districts must utilize to demonstrate compliance with supplement not supplant. However, if the Department proceeds with the proposed regulatory framework, notwithstanding the objections noted herein and prescribes specific methodologies school districts must utilize, the specific “tests” in the rule must be amended to clearly articulate the expectations for compliance. Amending the regulation to clarify that local school districts have the authority, pursuant to ESSA, to interpret unclear and ambiguous terms included in the rule is the most effective way to ensure school districts fully provisions in ESSA that grant authority to local school districts to determine the methodology for compliance.

The Department’s proposed regulation includes vague and unclear terms that will create confusion and unnecessary challenges for districts attempting to demonstrate compliance with the Department’s regulation. For example, proposed regulation §200.72(b)(1)(ii) states that an “LEA must distribute *almost all* State and local funds available to the LEA in a way that meets one of the following tests.”²⁹ Additionally, proposed regulation §200.72(b)(1)(iii)(C)(1), which addresses how districts can demonstrate compliance with the special rule outlined in §200.72(b)(1)(iii), includes a limited exception for schools that “receive additional funding to serve *a high proportion*” of certain student populations. Both terms fail to adequately convey a clear standard or expectation for compliance; the proposed regulatory language is too ambiguous.

²⁸ ESSA, sec. §1501, § 1605 (amending 20 U.S.C. § 7372).

²⁹ SNS NPRM, 81 Fed. Reg. at 61,148 (proposed rule 34 C.F.R. § 200.72(b)(1)(ii)).

State and local education leaders must clearly understand the standard of compliance established in the rule. How will a school district demonstrate that it has distributed “almost all” State and local funds in an acceptable manner? What constitutes a “high proportion” of certain student populations? Most importantly, the use of vague and unclear terms creates the likely scenario that school district compliance will be determined based on individual State educational agency interpretations of the rule. This will result in confusion and inconsistent application of the rule nationwide.

Recommendation: Amend subsections (b)(1)(ii) and (b)(1)(iii)(C)(1) of the proposed rule to clarify that local school districts have the authority, pursuant to ESSA, to define terms related to compliance with supplement not supplant at the local level.³⁰ The inclusion of vague regulatory language will result in inconsistent and ineffective implementation of the rule. Lack of a clear standard for compliance with no recognition of local autonomy will negatively affect student populations most in need and ultimately render school districts incapable of taking effective steps to ensure equity.

V. Conclusion

NSBA recognizes that equity in funding is critical. Local school board members, as elected community leaders, strive to ensure and maintain equity throughout their school system and NSBA supports efforts to further this important mission. Article III, Section II of NSBA’s Beliefs and Policies best describes NSBA’s position on this important issue:

“NSBA believes education funding should be of the highest federal priority to ensure that our nation’s students have the opportunity to meet the challenge of world-class standards and responsible citizenship through [certain] priorities,” such as:

- “Improving equity in educational opportunity by making schools with significant indices of poverty a high priority for increased federal aid;”
- “Ensuring that the requirements of the Elementary and Secondary Education Act (ESEA) are fully funded as authorized in the law;”
- “Ensuring that school districts serving immigrant students or Limited English Proficient/English Language Learners (LEP/ELL) are provided with the necessary resources for those students as they make the transition into our society;”
- “Relaxing burdensome regulatory and paperwork mandates, and enabling districts to use a combination of federal programs in order to target these funding streams to significant local concerns.”³¹

With these important goals in mind, NSBA contends that the Department’s proposed regulation will not adequately further these priorities. To the contrary, the establishment of specific methodologies and federal “tests” will undermine ongoing efforts by local school board members to increase opportunities for students most in need and prevent the innovative creation of programs

³⁰ ESSA, sec. §1000(4), § 1118(b)(2) (amending 20 U.S.C. § 6321).

³¹ NAT’L SCH. BDS. ASS’N, *supra* note 1, at 20-21.

that further ensure equity. *The proposed regulation narrowly focuses on certain funding allocations and discounts alternative funding sources, special programs, and additional services that cannot be quantified through a districtwide formula.* The proposed regulation disregards existing funding procedures utilized by local school boards, and fails to recognize State and local limitations on school funding systems. Regulations promulgated by the Department must focus more on the quality and effectiveness of the services school districts provide to students most in need. The proposed regulation should focus on the amount of State and local funds distributed to Title I schools, as required by ESSA, and less on the methodology utilized by the school district. Establishing a system that recognizes the primary goal of achieving equity but still maintains flexibility for school districts to best utilize resources is a necessity.

Additionally, the proposed regulation directly conflicts with provisions in ESSA that limit the authority of the Department and authorize local school districts to independently and individually choose a methodology for demonstrating compliance with supplement not supplant requirements. NSBA opposes the prescription of specific methodologies school districts *must* utilize to demonstrate compliance with supplement not supplant. However, if the Department implements the proposed regulatory framework, notwithstanding the objections noted herein and prescribes specific methodologies school districts must utilize, the three specific “tests” in the rule must be amended to clearly articulate the expectations for compliance. Furthermore, the proposed rule is vague and lacks clarity. Although the legal standard is clear, the use of unclear regulatory terms will result in confusion as to the basic legal requirements a school district must meet to demonstrate compliance with supplement not supplant provisions in ESSA.

To address these concerns, the proposed regulation should be amended to clarify that local school districts have the authority, pursuant to ESSA, to interpret ambiguous terms and establish compliance standards. Amending the regulation to allow school districts to locally interpret unclear terms in the rule is the most effective way to establish clear expectations in a way that supports local autonomy and the ability of locally elected school board members to make the best decisions for their district and their students. To this end, Federal administrative requirements that limit the flexibility or authority of local decision-makers to govern will be detrimental and significantly impede local school districts’ abilities to utilize, to the fullest extent, the opportunity and flexibility authorized by ESSA.

Most importantly, the Department’s proposed regulation must be amended to allow school districts to use ESSA’s existing data reporting requirements to demonstrate compliance with the supplement not supplant requirement. The use of existing data reporting requirements will maximize district resources, reduce administrative burdens, and allow district leaders to focus on building resources within the district. However, the standard in the proposed rule must reflect ESSA’s statutory requirement: this data must demonstrate that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving Title I funding.

NSBA urges the Department to amend the proposed regulation to support and strengthen local governance of public education, consistent with the language in ESSA. The proposed regulation must be amended to avoid federal overreach, whether it be through the promulgation of formal regulations, the issuance of non-regulatory guidance, or through the peer review process. We look forward to working with the Department to further this overarching goal, and continuing to serve as a resource throughout the ESSA-implementation process.

Sincerely,

A handwritten signature in black ink, reading "Thomas J. Gentzel". The signature is written in a cursive, flowing style.

Thomas J. Gentzel
Chief Executive Officer and Executive Director