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November 21, 2016

Jessica McKinney  
U.S. Department of Education  
400 Maryland Avenue, SW  
Room 3W107  
Washington, DC 20202

Re: Docket ID: ED-2016-OESE-0053  
Title of Collection: *Title I-Improving the Academic Achievement of the Disadvantaged-Academic Assessments*

Dear Ms. McKinney,

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 to 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-Academic Assessments*, ED-2016-OESE-0053, published by the Department on July 11, 2016.

NSBA, working with and through our state associations, represents more than 90,000 school board members and nearly 14,000 school boards from every region and almost every State in the country. Additionally, NSBA members are responsible for the education of over 50,000,000 students nationwide. On behalf of our membership, NSBA submitted formal public comment in response to the proposed regulations on September 9, 2016. (See attached.) NSBA's public comment identified specific concerns in the proposed regulations and expressed general concern that provisions in the rules are outside of the scope of the law, creating administrative requirements that limit the authority of State leaders and local school board members.

Today, NSBA reiterates the specific concerns in the public comments submitted on September 9, 2016, and requests that the Department amends the proposed regulations to fully restore local governance by eliminating prescriptive, rigid components of federal oversight. NSBA urges the Department to accept the proposed recommendations, particularly those that allow local school districts and State leaders to fully exercise the authority and flexibility granted by the Every Student

Succeeds Act (ESSA). Currently, the rules prescribe specific components of academic assessment systems that State leaders, in consultation with local school board members, are responsible for determining. Furthermore, the proposed regulations should be amended to reinforce and reaffirm the statutory requirement that State educational agencies engage in meaningful consultation with local school board members to determine, on a case-by-case basis and within each individual State, issues that are currently prescribed by the proposed regulation.

Of particular concern are the scope and the breadth of proposed regulations pertaining to the assessment of students with the most significant cognitive disabilities. The regulations will result in State-imposed local district caps on the assessment of students with the most significant cognitive disabilities. Additionally, the proposed regulations are so broad that school districts that did not actually exceed the 1% testing cap may be subject to oversight by the State educational agency.

Finally, the proposed assessment regulations should be reevaluated to ensure that State leaders are engaging with local school board members in the development of the State plan as it relates to the implementation and development of assessment systems. The limited implementation timeline is effecting thoughtful, innovative evaluation of existing assessment system, causing States to "adopt" existing systems.

We urge the Department to promulgate regulations that support the authority granted, through ESSA, to local school board members, as locally elected officials, to participate in the process of determining the type of assessments that are administered at the local level. We urge the Department to remove provisions of the proposed regulations that exceed the scope of ESSA and minimize the emphasis on federal compliance by providing opportunities for State leaders and local school board members to focus on the academic success of students. The Department should delete provisions in the proposed rule that are unnecessary, outside the scope of ESSA, and establish regulatory requirements that limit the authority of State leaders and local school board members.

Thank you for meeting with us today and for consideration of NSBA's comments and recommendations.

Sincerely,

A handwritten signature in dark ink, reading "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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September 9, 2016

Jessica McKinney  
U.S. Department of Education  
400 Maryland Avenue, SW  
Room 3W107  
Washington, DC 20202

Re: Docket ID: ED–2016–OESE–0053  
Title of Collection: *Title I–Improving the Academic Achievement of the Disadvantaged–Academic Assessments*

Dear Ms. McKinney:

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. Most importantly, NSBA members are responsible for the education of over 50,000,000 students nationwide. On behalf of our vast and diverse 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–Academic Assessments*, ED–2016–OESE–0053, published by the Department on July 11, 2016.<sup>1</sup>

NSBA advocates for equity and excellence in public education through school board leadership. The historic reauthorization of the Elementary and Secondary Education Act, 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 implementation at the

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<sup>1</sup> Elementary and Secondary Education Act of 1965, Title I–Improving the Academic Achievement of the Disadvantaged–Academic Assessments, 81 Fed. Reg. 44,928 (proposed July 11, 2016) (to be codified at 34 C.F.R. pt. 200) [hereinafter “Assessment NPRM”].

local level. The administration of academic assessments is an issue of great concern to local school board members; one that drastically affects local school districts administratively and logistically.

ESSA includes provisions aimed specifically at limiting the role of the federal government in local- and state-level decisions. For example, relating to the administration of academic assessments, Congress expressed a clear limitation on the authority of the federal government by prohibiting certain activities, such as “funding the development, pilot testing, field testing, implementation, administration, or distribution of any federally sponsored national test in reading, mathematics, or any other subject, unless specifically and explicitly authorized by law.”<sup>2</sup> Conversely, ESSA emphasizes State and local governance over decisions relating to academic assessments and the implementation of assessment systems by providing States and local school board members with flexibility to develop a statewide assessment system that meets the unique needs of students within each State or school district.

For example, States may utilize computer adaptive tests<sup>3</sup> (CAT’s), use single, summative assessments or multiple assessments throughout the year that result in the calculation of one summative score,<sup>4</sup> set target limits on the aggregate amount of time devoted to the administration of assessments,<sup>5</sup> or participate in the innovative assessment pilot program.<sup>6</sup> Additionally, school district leaders may opt, in certain circumstances, to utilize a nationally recognized assessment in lieu of state-mandated high school assessments<sup>7</sup> or exempt eighth-grade students in advanced mathematics courses from double-testing requirements.<sup>8</sup> These flexibilities were intended to equip State and local education leaders with the tools necessary to better educate and meet the needs of their students, and to better determine how to measure the academic achievement of students. As such, Federal regulations promulgated by the Department should foster and support this flexibility.

NSBA applauds the Department for the transparency demonstrated throughout the negotiated rulemaking process. Although the consensus-based proposed assessment regulations agreed to by the members of the negotiated rulemaking committee reflect certain statutory components of ESSA, the proposed regulations also include several provisions and requirements that exceed the scope of the law. As such, NSBA’s primary concern with the proposed regulations is that they will require local school board members to focus more on compliance with federal regulations and “checking the boxes” to meet federally created regulatory requirements than on the academic success of students.

Secondarily, ESSA states that nothing in the Act “shall be construed to authorize or permit the Secretary [ ] as a condition of approval of the State plan, or revisions or amendments to, the State

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<sup>2</sup> Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, sec. 8041, § 8549A (2015) (amending 20 U.S.C. § 7930).

<sup>3</sup> Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, sec. 1005, § 1111(b)(2)(j) (amending 20 U.S.C. § 6311).

<sup>4</sup> ESSA, sec. 1005, § 1111(b)(2)(B)(vii) (amending 20 U.S.C. § 6311).

<sup>5</sup> ESSA, sec. 1005, § 1111(b)(2)(L)(amending 20 U.S.C. § 6311).

<sup>6</sup> Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, sec. 1204, (20 U.S.C. § 6364).

<sup>7</sup> ESSA, sec. 1005, § 1111(b)(2)(C)(amending 20 U.S.C. § 6311).

<sup>8</sup> ESSA, sec. 1005, § 1111(b)(2)(L)(amending 20 U.S.C. § 6311).

plan. . . require a State to add any requirements that are inconsistent with or outside the scope of this part.”<sup>9</sup> Congress reaffirmed this limitation by including language clarifying that “[t]he Secretary shall not, through regulation. . . promulgate a definition of any term used in this part, or otherwise prescribe any specification for any such term, that is *inconsistent or outside of the scope* of this part or [is in violation of this paragraph].”<sup>10</sup> Despite this restriction, provisions inserted by the Department into the proposed rule are unnecessary, outside the scope of the law and create administrative requirements that effectively limit the authority of State leaders and local school board members. Finally, the Secretary should ensure that provisions in proposed regulations are consistent with existing federal education law.<sup>11</sup>

Below, we provide more details about specific areas of concern regarding the Department’s proposed assessment regulations.

#### I. § 200.6 Inclusion of All Students: 1% Cap on the Assessment of Students with the Most Significant Cognitive Disabilities

ESSA requires each State to ensure that “for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed 1 percent of the total number of all students in the State who are assessed in such subject.”<sup>12</sup> The law clarifies, however, that “[n]othing in this subparagraph shall be construed to permit the Secretary or a State educational agency to impose on any local educational agency a cap on the percentage of students administered an alternate assessment [under this paragraph].”<sup>13</sup> As such, the statutory language of ESSA specifically prohibits the implementation of a local 1% cap on the assessment of students with the most significant cognitive disabilities.

For school districts that do assess more than 1% of students with the most significant cognitive disabilities, as applied to the State, ESSA provides that the district “shall submit information to the State educational agency justifying the need to exceed such cap.”<sup>14</sup> ESSA also permits the State educational agency to provide “appropriate oversight, as determined by the State, of any local educational agency that is required to submit information to the State” for *exceeding* the 1% cap.<sup>15</sup>

The proposed regulations outline a process whereby States that are likely to exceed the 1 percent cap may request a waiver from the Department and set forth specific information States must include in

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<sup>9</sup> ESSA, sec. 1005, § 1111(e)(1)(B)(i) (amending 20 U.S.C. § 6311).

<sup>10</sup> ESSA, sec. 1005, § 1111(e)(2) (amending 20 U.S.C. § 6311). (Emphasis added)

<sup>11</sup> For example, the Individuals with Disabilities Education Act (IDEA, 20 U.S.C. §1414) requires “individual appropriate accommodations” while ESSA and proposed regulations reference “appropriate accommodations.” (See ESSA, 20 U.S.C. § 6311). To avoid confusion, the terms should be reconciled to clarify that the proposed language does not constitute a change to existing IDEA provisions.

<sup>12</sup> ESSA, sec. 1005, § 1111(b)(2)(D)(i)(I) (amending 20 U.S.C. § 6311).

<sup>13</sup> ESSA, sec. 1005, § 1111(b)(2)(D)(ii)(II) (amending 20 U.S.C. § 6311).

<sup>14</sup> *Id.*

<sup>15</sup> ESSA, sec. 1005, § 1111(b)(2)(D)(ii)(III) (amending 20 U.S.C. § 6311).

the waiver request.<sup>16</sup> The proposed regulations require States to provide certain assurances relating to the oversight of school districts that are likely to exceed the 1% cap, *and* “and any other LEA that the State determines will significantly contribute to the State’s exceeding the cap.”<sup>17</sup>

The breadth of the proposed language not only exceeds the statutory authority under ESSA, but creates a possible scenario whereby a district that *does not actually* exceed the 1% cap is subject to State oversight because it “significantly contribute[d]” to the State exceeding the 1% cap.<sup>18</sup> This is particularly troublesome, given that districts subject to State oversight for “significantly contribut[ing]” to the State’s violation of the 1% cap may be required to take affirmative steps to demonstrate compliance and/or meet specific State guidelines in the absence of any statutory violation.<sup>19</sup> The proposed language creates an administrative burden on districts that do not actually exceed the 1% cap and triggers State oversight of districts *that have not actually violated the law*. Most significantly, the overbreadth of the proposed rule will effectively result in State-developed “caps” instituted at the local level. (Primarily because the institution of local caps will be the only way States can comply with the proposed rule.) The proposed language represents a blatant disregard of the statutory provisions in ESSA prohibiting the imposition of a local cap and is entirely outside the scope of ESSA.

Additionally, ESSA specifically states that “[t]he Secretary shall not, through regulation. . . . promulgate a definition of any term used in this part, or otherwise prescribe any specification for any such term, that is inconsistent or *outside of the scope of this part* or [is in violation of this paragraph].”<sup>20</sup> Expanding the scope of State oversight to schools deemed to have contributed to the State exceeding a 1% cap is arbitrary and clearly outside the scope of the law.

Finally, the criteria established in the proposed rule for States that request a waiver from the Secretary for exceeding the 1% cap are onerous and excessive. For example, a State must demonstrate, in the application for a waiver, that it met the 95% test participation requirement,<sup>21</sup> or that it will ensure that identified districts address disproportionality in the administration of assessments.<sup>22</sup> These requirements exceed the plain statutory language of ESSA and are outside the scope of the requirements of Section 8401 of ESSA, which indicate that the waiver application “includes only information directly related to the request.”<sup>23</sup> Furthermore, the waiver requirements in the proposed rule create administrative challenges. For example, a State must submit an application for a waiver at least 90 days prior to the start of the assessment testing window.<sup>24</sup> The

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<sup>16</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(c)(4)).

<sup>17</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(c)(4)(iii)). (See also § 200.6(c)(4)(iii)(A)-(C)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> ESSA, sec. 1005, § 1111(e)(2) (amending 20 U.S.C. § 6311). (Emphasis added)

<sup>21</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(c)(4)(ii)(B)).

<sup>22</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(c)(4)(iii)(C)).

<sup>23</sup> Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, sec. 8013, § 8401(b) (2015) (amending 20 U.S.C. § 7861).

<sup>24</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(c)(4)(i)).

overly burdensome and arduous requirements in the proposed rule required of a State to obtain a waiver from the Secretary will undoubtedly result in State-driven over-enforcement of the 1% cap at the local school district level.

**Recommendation:** Amend subsection (4)(iii) of proposed regulation §200.6 to exempt from State oversight districts that “will significantly contribute to the State’s exceeding” the 1% cap. The overbreadth of the proposed rule will result in a “de facto” 1% cap at the local school district level *in school districts that have no record of exceeding the 1% cap*. Additionally, the Department should amend the waiver criteria in the proposed rule to include only information specifically related to the waiver request, namely the 1% assessment cap.

## II. § 200.3 Locally Selected, Nationally Recognized High School Academic Assessment: Transition Flexibility

ESSA permits local school districts to request to administer a nationally recognized high school assessment to high school students in lieu of the state-administered high school assessment. Specifically, ESSA states:

“[N]othing in this paragraph shall be construed to prohibit a local educational agency from administering a locally-selected assessment in lieu of the State-designed academic assessment [required by ESSA], if the local educational agency selects a nationally recognized high school assessment that has been approved for use by the State as described in [this Section].”<sup>25</sup>

The Department’s proposed regulations go significantly further in establishing requirements and criteria that apply to school districts seeking to utilize this statutory option. For example, proposed regulation §200.3(a)(2) requires a district that seeks to administer a nationally recognized assessment “administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA consistent with the requirements [in proposed rules],” with an exception for students with the most significant cognitive disabilities who are assessed with an alternate academic assessment.<sup>26</sup> The lack of flexibility in the proposed rule will create administrative and logistical challenges for the governing boards of large school districts seeking to utilize a nationally recognized academic assessment.

**Recommendation:** Amend subsection (a)(2) of proposed regulations to allow for a time period of up to two years for a school district to administer the same locally selected, nationally recognized academic assessment to all high school students in the district. The flexibility will assist large school districts in transition from State-designed academic assessments to the locally selected, nationally recognized assessment.

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<sup>25</sup> ESSA, sec. 1005, § 1111(b)(2)(H)(i) (amending 20 U.S.C. § 6311).

<sup>26</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.3(a)(2)).

### III. § 200.3 Locally Selected, Nationally Recognized High School Academic Assessment: State Approval of a Nationally Recognized High School Academic Assessment

ESSA provides that a local school district may opt to utilize a locally selected, nationally recognized high school assessment “if the local educational agency selects a nationally recognized high school assessment that has been approved for use by the State.”<sup>27</sup> Specifically, ESSA includes “technical criteria” a State must consider in determining whether local school districts may administer a locally selected nationally recognized assessment.<sup>28</sup> For example, the State must determine whether the national recognized high school assessment is aligned to the State’s academic content standards, provides comparable, valid and reliable data on achievement of students for all students, meets general requirements of the law, and allows for meaningful differentiation among schools in the State.<sup>29</sup> Simply put, the State educational agency will determine if a locally selected, nationally recognized academic assessment meets specific technical criteria before a local school district will be permitted to offer the assessment.

Additionally, provisions in ESSA promote openness and transparency in the decision-making process. For example, ESSA requires State educational agencies to ensure that academic assessments are of “adequate technical quality for each purpose [in the Act] and consistent with the requirements of this section, the evidence of which shall be made public, including on the website of the State educational agency.”<sup>30</sup> The Department’s proposed rule includes similar requirements.<sup>31</sup>

To further promote the “spirit of the law,” and because the State’s determination will directly impact whether a local school district may select and administer a nationally recognized academic assessment, the proposed rule should be amended to require the technical review process conducted by the State to be made public so that school districts directly affected by the review may observe the review process and possibly contribute to the discussion.

**Recommendation:** Amend the proposed regulation to require State educational agencies to conduct technical reviews of locally selected, nationally recognized assessments in an open, transparent process. Amend proposed regulations to require the review to be made public and posted on the State’s website. Additionally, amend the proposed rule to require State educational agencies to publicly disclose the criteria by which locally selected, nationally recognized academic assessments will be reviewed and to specifically disclose to requesting school districts why the nationally recognized academic assessment does not meet the State’s technical criteria, when applicable, and/or the results of the technical review.

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<sup>27</sup> ESSA, sec. 1005, § 1111(b)(2)(H)(i) (amending 20 U.S.C. § 6311).

<sup>28</sup> ESSA, sec. 1005, § 1111(b)(2)(H)(iii) (amending 20 U.S.C. § 6311).

<sup>29</sup> ESSA, sec. 1005, § 1111(b)(2)(H)(v)(I)-(IV) (amending 20 U.S.C. § 6311).

<sup>30</sup> ESSA, sec. 1005, § 1111(b)(2)(B)(iv) (amending 20 U.S.C. § 6311).

<sup>31</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.2(b), § 200.2(b)(5)).

#### IV. § 200.6 Identification of “Languages Other Than English that are Present to a Significant Extent in the Participating Student Population”

ESSA requires that each State, in the State plan developed in consultation with local school board members, to “identify the languages other than English that are present to a significant extent in the participating student population of the State and indicate the language for which annual student academic assessments are not available and are needed.”<sup>32</sup> The law is silent as to the factors a State must consider and does not specifically prescribe the way in which a State identifies such languages.

The Department’s proposed regulations require States to consider three specific factors in defining “languages other than English that are present to a significant extent in the participating student population.”<sup>33</sup> The factors included in the proposed rule are overly prescriptive and define matters that are reserved to the State, to be determined through meaningful consultation with local school board members. The factors a State *must* consider in determining such languages are:

- A. “Ensure that its definition of “languages other than English that are present to a significant extent in the participating student population” encompasses at least the most populous language other than English spoken by the State’s participating student population;”
- B. “Consider languages other than English that are spoken by distinct populations of English learners who are migratory, English learners who are not born in the United States, and English learners who are Native Americans; and”
- C. “Consider languages other than English that are spoken by a significant portion of the participating student population in one or more of a State’s LEA’s as well as languages spoken by a significant portion of the participating student population across grade levels.”<sup>34</sup>

There is no statutory basis in ESSA for the inclusion of such factors. The prescription of specific factors a State *must* consider in the identification of such languages strips authority from State and local education leaders by mandating the process a State must utilize in identifying languages other than English. State leaders, in consultation with local school districts, are authorized to determine how such languages are identified. The overly prescriptive nature of the proposed regulations not only runs afoul of congressional intent to restore governance to State and local education leaders, but maintains the current system of rigid federal specifications.

Additionally, ESSA specifically states that “[t]he Secretary shall not, through regulation. . . . promulgate a definition of any term used in this part, or otherwise prescribe any specification for any such term, that is inconsistent or *outside of the scope of this part* or [is in violation of this

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<sup>32</sup> ESSA, sec. 1005, § 1111(b)(2)(F) (amending 20 U.S.C. § 6311).

<sup>33</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(f)(iv)(A)-(C)).

<sup>34</sup> *Id.*

paragraph].”<sup>35</sup> Specifically prescribing the factors a State **must** take into account is outside the scope of the law.

**Recommendation:** Amend the proposed rule to remove specific criteria that States must consider in identifying “languages other than English that are present to a significant extent in the participating student population.” States are authorized to independently determine, in consultation with local school board members, how to identify and define languages for which assessments must be developed. Furthermore, the standards or criteria utilized by the State to identify “languages other than English that are present to a significant extent in the participating student population” should be made publicly available and/or posted on the website maintained by the State educational agency.

#### V. § 200.2 State Responsibilities for Assessments: Data Reporting/Disaggregation Requirements

ESSA establishes requirements for States and local school districts to collect and report on three additional subgroups that include students who are homeless, students who are in foster care, and students with a parent who is a member of the armed forces.<sup>36</sup> Proposed regulations reflect these statutory changes and specify that State assessment systems must disaggregate data and report performance data on the new subgroups, which include military students, students with parents in the National Guard, students in foster care, and student who are homeless.<sup>37</sup>

**Recommendation:** Amend subsection (b)(11) of proposed regulations to provide additional flexibility for State or local school districts additional time to make necessary changes to existing data systems to allow for the collection and reporting of students with parents in the Armed forces, students with parents in the National Guard, students in foster care, and students who are homeless.

#### VI. § 200.2 State Responsibilities for Assessments: Valid, Reliable and Fair Assessments

ESSA establishes specific requirements that apply to State assessment systems and the assessments administered by local school districts. As an example, ESSA requires that assessments be “valid and reliable, consistent with relevant, nationally recognized professional and technical testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs or attitudes.”<sup>38</sup>

However, the Department’s proposed regulations exceed the statutorily established requirements by requiring that State assessments “[b]e valid, reliable, **and fair** for the purposes for which the

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<sup>35</sup> ESSA, sec. 1005, § 1111(e)(2) (amending 20 U.S.C. § 6311). (Emphasis added)

<sup>36</sup> ESSA, sec. 1005, § 1111 (h)(1)(C)(ii) (amending 20 U.S.C. § 6311).

<sup>37</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.2(b)(11)(vii)-(ix)).

<sup>38</sup> ESSA, sec. 1005, § 1111(b)(2)(B)(iii) (amending 20 U.S.C. § 6311).

assessments are used.”<sup>39</sup> The inclusion of the fairness requirement is outside the scope of ESSA, and more significantly, adds confusion and misunderstanding to the statutory requirements. ESSA specifically states that “[t]he Secretary shall not, through regulation. . . . promulgate a definition of any term used in this part, or otherwise prescribe any specification for any such term, that is inconsistent or *outside of the scope of this part* or [is in violation of this paragraph].”<sup>40</sup> Including additional requirements, absent statutory authorization, is outside the scope of the law.

**Recommendation:** Amend proposed regulations to delete the fairness requirement from §200.2(b)(4)(i). There is no statutory basis for the inclusion of the “fair” and the additional requirement creates confusion.

## VII. Reinforcement of the Requirement to “Meaningfully Consult” with Local School Board Members

Because the development of the State plan is integral to the ESSA implementation process, the law establishes certain requirements to ensure stakeholders have the opportunity to engage in the process. Importantly, ESSA requires each State educational agency to meaningfully consult with specific stakeholders, including local school board members, in the development of a State plan.<sup>41</sup> Additionally, Section 1111(a)(8) requires that States make the draft State plan available for public review for at least 30 days prior to submission to the Department.<sup>42</sup>

The requirement for meaningful consultation is key to ensuring successful implementation of ESSA at the state level. As such, all regulations promulgated by the Department must focus more on continued stakeholder involvement **throughout** the development and implementation process to ensure all stakeholders, including local school board members, have the opportunity to provide meaningful input regarding the manner in which ESSA is implemented.

Furthermore, the Department should use the process of “meaningful consultation” as a means to lessen the prescriptive nature of the proposed regulations. Instead of establishing prescriptive requirements, the Department should require a heightened threshold of stakeholder consultation, so that States will use the process of meaningful consultation to develop components of the assessment systems with input from local school board members and other stakeholders. Such an approach would reduce federal overreach and the over-prescription of federal rules, and restore State and local decision-making in the manner Congress intended.

The Department’s proposed regulations require States to describe, in the Title I State plan, strategies to provide all students in the State the opportunity to be prepared for and take advanced mathematics coursework in middle school, or the eighth grade.<sup>43</sup> Additionally, the proposed

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<sup>39</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.2(b)(4)(i)).

<sup>40</sup> ESSA, sec. 1005, § 1111(e)(2) (amending 20 U.S.C. § 6311). (Emphasis added)

<sup>41</sup> ESSA, sec. 1005, § 1111(a)(1)(A) (amending 20 U.S.C. § 6311).

<sup>42</sup> ESSA, sec. 1005, § 1111(a)(8) (amending 20 U.S.C. § 6311).

<sup>43</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.5(b)(4)).

regulations detail State obligations relating to the assessment of English learners, including the use of appropriate accommodations, identification of languages other than English, the identification of assessments in languages other than English that are not available and are needed, and the development of a plan and timeline for developing assessments in other languages.<sup>44</sup> These elements of the State plan *must* be developed in consultation with local school board members and the proposed regulations should be amended to reiterate and reaffirm that requirement.

Separately, additional provisions of the Department's proposed regulations should be amended to underscore the need and benefits of State-led meaningful consultation with stakeholders. For example, the Department's proposed regulations require the State to ensure that educators, including paraprofessionals, specialized instructional personnel, and other appropriate staff receive training to administer assessments to students with disabilities and know how to make use of appropriate accommodations.<sup>45</sup> Additionally, the proposed regulations require States to adopt guidelines for IEP teams to use when determining, on a case-by-case basis, which students with the most significant cognitive disabilities should take an alternate academic assessment aligned with alternate academic standards.<sup>46</sup> The State-developed guidelines must include a definition for "students with the most significant cognitive disabilities."<sup>47</sup> Local educational leaders should be engaged in the development of such guidelines in order to ensure that the perspective of local leaders are represented in State-developed guidelines.

**Recommendation:** Amend the proposed regulations to reinforce and reaffirm the statutory requirement that State educational agencies engage in meaningful consultation with local school board members on all issues included in the State plan. Additionally, proposed regulations should be amended to secure additional opportunities for stakeholder engagement.

## VIII. Conclusion

Federal regulations should empower State and local leaders to make decisions. Flexibility in the hands of local decision-makers, best equipped to determine how to support and help students succeed, will further public education. Conversely, requirements that strip local decision-makers of the authority 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.

This is an opportunity for the Department to promulgate federal regulations that assist States and school districts in implementing provisions of ESSA and to reaffirm ESSA's clear directive to restore local governance and community ownership of public education. The Department's regulations should promote a balanced "federal-state-local partnership" that encourages States to work with local school districts, promotes flexibility, and ends the current "top-down" approach to education that has proven so ineffective.

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<sup>44</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(f)(1)(ii)).

<sup>45</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(b)(2)(ii)).

<sup>46</sup> Assessment NPRM, 81 Fed. Reg. at 44,928 (proposed rule 34 C.F.R. § 200.6(d)(1)).

<sup>47</sup> *Id.*

Federal regulations should support the authority granted, through ESSA, to local school board members, as locally elected officials, to participate in the process of determining the type of assessments that are administered at the local level. Additionally, States must meaningfully engage with locally elected officials, such as local school board members, to determine how statewide assessment systems can foster student success and growth.

NSBA serves as the unified voice, representing the interests and viewpoints of a uniquely diverse constituency of locally elected school board members who are directly responsible for the leadership of our nation's public schools. NSBA advocates for equity and excellence in public education *through* school board leadership. We believe education is a civil right, necessary to the dignity and freedom of the American people, and all children should have equal access to an education that maximizes his or her individual potential.

On behalf of our membership, NSBA requests that the Department amend the proposed regulations to remove provisions and requirements that exceed the scope of the law and minimize the emphasis on federal compliance by providing an opportunities for State leaders and local school board members to focus on the academic success of students. The Department should delete provisions in the proposed rule that are unnecessary, outside the scope of ESSA, and establish regulatory requirements that effectively limit the authority of State leaders and local school board members.

Full restoration of local governance can only occur if prescriptive, rigid components of federal oversight are eliminated. It is our hope that the Department will amend the proposed regulations to support and strengthen local governance of public education. 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 fluid and cursive, with the first name "Thomas" and last name "Gentzel" clearly legible.

Thomas J. Gentzel  
Chief Executive Officer and Executive Director