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May 24, 2016

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

Re: NSBA Public Comments Relating to the Issuance of Non-Regulatory Guidance

To Whom It May Concern:

The National School Boards Association (“NSBA”), working with and through our state associations, represents nearly 14,000 school districts and more than 90,000 local school board members who are responsible for the education of more than 50 million students nationwide. NSBA serves as the unified voice, representing the interests and viewpoints of a uniquely diverse constituency of local school board members who are directly responsible for the leadership of our nation’s public schools. NSBA welcomes the opportunity to comment on issues for which non-regulatory guidance is needed to assist states and local school districts in implementing provisions of the Every Student Succeeds Act (“ESSA”).

We urge the U.S. Department of Education (“Department”) to focus on the process it utilizes in issuing non-regulatory guidance. First and foremost, the Department must consult with stakeholders on any matter the Department deems it must issue non-regulatory guidance. That consultation is essential to ensure meaningful engagement prior to the issuance of non-regulatory guidance. Finally, the Department must not exceed the statutory parameters in determining areas for which non-regulatory guidance is needed, as required by ESSA. Simply put, the Department must adhere to the authority that has been restored to states and local school districts.

The historic reauthorization of the Elementary and Secondary Education Act of 1965 includes a clear directive to restore local governance and community ownership in public education. Congress, in passing Title VIII, Part F § 8541, clarified the appropriate federal role in education by ensuring that stakeholders directly responsible for local governance of public schools, such as local school board members, have a strong voice in the regulatory and non-regulatory process. The tri-partisan amendment, cosponsored by Senator Angus King (I-ME), Senator Jon Tester (D-MT) and Senator Deb Fischer (R-NE), clarified that nothing in ESSA should be construed to allow the Department to:

- 1) “exercise any governance or authority over school administration, including the development and expenditure of school budgets , unless authorized by [ESSA];
- 2) issue any regulation without first complying with the rulemaking requirements [under federal law]; or

- 3) issue any non-regulatory guidance without first, to the extent feasible, considering the input from stakeholders.” ESSA, Title VIII, Section 8541 (20 U.S.C. § 7921)

On February 18, 2016, the authors of the provision wrote a letter to then-Acting Secretary King to underscore the intent of § 8541, which is to “strengthen the role of local voices in the federal process” and to “create a better, healthier, more robust dialog between the folks on the ground and the Department.” The importance of engagement was reaffirmed by President Barack Obama at the ESSA signing ceremony held at the White House on December 15, 2015. The President remarked: “Laws are only as good as the implementation. And that means that we’re going to have to be engaging with schools and communities all across the country, educators, school leaders, families, students, elected officials, community leaders, philanthropies—all to make the promise of this law a reality.”

The intent of the law is clear. ESSA requires the Department to engage with stakeholders directly responsible for the governance of public schools and consider such input prior to the issuance of non-regulatory guidance. School board members are a distinct and unique group of stakeholders. As public officials, they are selected and appointed by their communities to oversee and lead local public schools. As the Department identifies areas for which non-regulatory guidance is needed and drafts guidance, local school board members are stakeholders and elected officials who must be continuously engaged in the process to contribute to the Department’s ESSA implementation efforts.

I. The Department must consult with school board members on any matter the Department deems it must issue non-regulatory guidance.

In the publication soliciting this public comment, the Department noted that non-regulatory guidance “is intended to help the public understand the law, how ED is interpreting the law, and to provide clarification and examples of best practices.” As the Department engages in the issuance of non-regulatory guidance, it is vitally important that the Department engage with school board members throughout the development of non-regulatory guidance. Section 8541 provides, in part, that the Secretary cannot “issue any regulation without first complying with the rulemaking requirements [under federal law],” or “issue any non-regulatory guidance without first, . . ., considering input from stakeholders,” such as local school boards and state school board associations. As such, the law requires, to the extent feasible, the Department to develop non-regulatory guidance with the input from stakeholders, such as local school board members.

The benefits of engaging with school board members throughout the development of non-regulatory guidance are numerous. Engaging with school board members will aid in providing clarity to the implementation process. In short, meaningful engagement is a means to ensure consistent implementation of the law. As the Department gathers input, challenges typically associated with implementation efforts can be identified and addressed. Additionally, engagement will minimize administrative frustrations that come with transition and implementation efforts. Most significantly, continuous engagement allows for targeted, specific input from stakeholders on individual issues. Engagement with school board members is a way to obtain feedback from stakeholders who are directly responsible for determining how ESSA will be implemented at the local, school district level. The Department benefits from such engagement, in that it provides an opportunity for the Department to support local school districts with compliance concerns and the implementation process by providing

ongoing technical assistance. The result of continuous engagement is improved outcomes for public schools and the students they serve.

II. Consultation with school board members is essential to ensure meaningful engagement prior to the issuance of non-regulatory guidance.

The most significant issue moving forward is the process utilized by the Department to engage school board members in the development of non-regulatory guidance. Meaningful consultation, at a minimum, includes two distinct phases: 1) first, it must include an opportunity to discuss specific issues, provide detailed input, and have substantive discussions with Department staff; 2) second, it must include an opportunity to review proposed guidance in draft form and provide feedback or offer suggestions on proposed language.

Engagement must involve sharing guidance in advance with stakeholders, including school board members, to allow for input before guidance is issued in final form. The process utilized by the Department must differ from the formal public comment period utilized under the Administrative Procedures Act for the promulgation of federal regulations, whereby the public is provided a general opportunity to comment on proposed regulations, but uninvolved in the development of regulatory language. Furthermore, the process utilized by the Department should consist of more than the general practice of providing an open forum for the expression of general comments and wide-ranging concerns. In order for “engagement” to be useful, it must be meaningful. True meaningful engagement occurs when stakeholders are a part of the drafting and development process, and given an opportunity to provide specific feedback on proposed non-regulatory language. Meaningful engagement, the act of gathering input from stakeholders means including school board members and providing an opportunity to react, in real time, to the draft guidance the Department intends to issue.

While the Department has worked to establish open channels of communication throughout the implementation process, meaningful engagement can occur only when school board members, as elected and appointed officials, are involved throughout the drafting process and offered an opportunity to provide input on specific questions, concrete non-regulatory text, or actual draft guidance considered by the Department.

III. The Department must not exceed its statutory authority in determining areas for which non-regulatory guidance is needed, as required by ESSA.

ESSA includes clear limitations on the authority of the federal government to intervene in certain matters that are reserved to states and local school districts. For example, Title V, Part C § 5301 of ESSA clarifies that “[n]othing in this title shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school’s specific instructional content, academic standards, or assessment, curriculum, or program of instruction, as a condition of eligibility to receive funds under this Act.”¹

¹ 20 U.S.C. § 7371

Additionally, ESSA clearly states that nothing in the Act shall be construed to “authorize or permit the Secretary. . . . to issue new non-regulatory guidance that”–

- i. “in seeking to provide explanation of requirements under this section for State or local education agencies, either in response to requests for information or in anticipation of such requests, provides a strictly limited or exhaustive list to illustrate successful implementation of provisions under this section; or
- ii. purports to be legally binding;” ESSA, Title I, Section 1111(e)(1)(C) (20 U.S.C. § 6311)

These examples, to name a few, illustrate Congress’ mandate limiting the ability of the Department to intervene in areas specifically reserved for state and local education officials. The limitations on the authority of the federal government were implemented to restore flexibility and local decision-making authority, and to create an opportunity for local school districts to innovatively approach accountability and school improvement. As the Department considers issuing “technical assistance” in the form of guidance documents, Dear Colleague letters, FAQ’s, or “best practice manuals,” the federal government must refrain from using non-regulatory guidance to interfere with the operations of individual school districts or intrude upon the authority ESSA provides to state and local education officials. As noted in the White House Executive Report the “Every Student Succeeds Act: A Progress Report on Elementary and Secondary Education,” issued in December 2015, the Administration acknowledged that ESSA will “[e]mpower states and local decision-makers to develop their own strong systems for school improvement based upon evidence, rather than imposing cookie-cutter federal solutions like No Child Left Behind (NCLB) did.” Non-regulatory guidance that strips local-decision makers of authority to govern would be detrimental and significantly impede local school districts’ ability to utilize, to the fullest extent, the opportunity and flexibility authorized by ESSA.

The Department has used non-regulatory guidance to expand legal requirements outside of the scope or intent of existing provisions of law. Such “overreach” has been widely interpreted as a means to create “executive legislation” in areas or relating to topics for which Congress has been unwilling to act. The practice of using non-regulatory guidance to “implement” or “modify” legal requirements is impermissible and exceeds the Department’s executive authority. Although the Department noted in its solicitation request that non-regulatory guidance “is not binding and does not impose any new requirements beyond those in the law and regulations,” such guidance is frequently used as a mechanism to determine school district compliance with federal law. Non-regulatory guidance has been used to establish new or modify existing legal standards and hold schools accountable to meeting the “legal requirements” of non-regulatory guidance. This type of overreach leads to confusion and lack of clarity in the law, and therefore makes non-regulatory guidance less effective or useful to schools. This confusion results in significant costs to public schools, who are required to spend limited dollars clarifying legal requirements of laws in court, or to defend lawsuits brought by parties misapprehending the state of the law.

The statutory guardrails established by Congress in ESSA are clear, and creating federal programmatic obligations from which there is no clear statutory authority to do so is not permitted. Non-regulatory guidance should truly reflect the intent of the law and should strictly reflect existing statutory parameters. The Department cannot use non-regulatory guidance to expand, modify, or amend the legal requirements of ESSA or infringe upon the statutory rights that have been reserved for local school officials.

IV. Conclusion

This is an opportunity for the Department to develop non-regulatory guidance in a cooperative and engaging manner that will not only assist states and school districts implement provisions of ESSA, but reaffirm ESSA's clear directive to restore local governance and community ownership in public education. This directive is significant; it is a devolution of federal authority and an opportunity for local leaders to assume a new role in public education. Allowing local school board members to undertake this responsibility preserves the integrity of ESSA, while maintaining clarity and consistency in the implementation of the law. ESSA provides a platform for local school board members to be directly involved in the development of non-regulatory guidance. This is the intent of the law, and Section 8541 certainly requires such engagement.

In order for engagement to be meaningful, in order for local school board members to truly affect non-regulatory guidance issued by the Department, the process the Department utilizes must be collaborative, with opportunities for reciprocal engagement. Local school board members, as stakeholders and elected officials, want to be engaged and involved in the development of non-regulatory guidance.

Additionally, the Department can use the non-regulatory guidance to promote a balanced "federal-state-local partnership" whereby the Department not only actively seeks input from local school boards, but encourages states to work with local school districts. The use of non-regulatory guidance can be used to provide appropriate flexibility to local school districts and to support local districts with compliance. Local school board members can provide unique input, and productively assist in the development of non-regulatory guidance in a way that truly reflects the concerns and needs of local, elected leaders.

There is no better way to ensure that the non-regulatory guidance issued by the Department to implement provisions of ESSA reflect the concerns of local school board members than to rely on the national association which represents the nation's local school board members. It is our hope that the Department will opt to engage in a productive and collaborative process that affords school board members, through the NSBA, the opportunity to engage and actively participate in the development of non-regulatory guidance.

Sincerely,



Thomas J. Gentzel
Executive Director