National School Boards Association

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July 29, 2016

Meredith Miller
U.S. Department of Education
400 Maryland Avenue, SW
Room 3C106
Washington, DC 20202-2800

Re: Docket ID: ED—2016—OESE—0032
Title of Collection: *Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act—Accountability and State Plans*

Dear Ms. Miller:

The National School Boards Association ("NSBA"), working with and through our state associations to represent more than 90,000 local school board members nationwide, submits the following comments in response to the U.S. Department of Education's ("Department") Notice of Proposed Rulemaking, *Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act–Accountability and State Plans,* ED—2016—OESE—0032, published by the Department on May 31, 2016.[1] 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. Most importantly, NSBA members are responsible for the education of over 50,000,000 students nationwide. As such, 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.

NSBA applauds the historic reauthorization of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act ("ESSA"), and the law's clear directive to restore local governance and community ownership of public education. ESSA restructures the role of the federal

[1] Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act - Accountability and State Plans, 81 Fed. Reg. 34,540 (proposed May 31, 2016) (to be codified at 34 C.F.R. pts. 200 & 299) [hereinafter "Accountability NPRM"].

government in public education and reaffirms the role 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 at the local level, and will be directly involved in policy and operational decisions related to school and district accountability. Local school board members play an important role in the implementation of ESSA and are positioned to provide input that truly reflects the concerns and needs of local education leaders.

ESSA includes several provisions aimed specifically at limiting the role of the federal government in local- and state-level decisions. For example, 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 and assessments, curriculum, or program of instruction, as a condition of eligibility to receive funds under this Act."[2] The law includes similar language specifically relating to the role of the Department regarding the development and implementation of State accountability systems.

ESSA states that nothing in the Act shall be construed to "authorize or permit the Secretary [] when promulgating any rule or regulation . . . on the development or implementation of the statewide accountability system established under this section that would —

i. "add new requirements that are inconsistent with or outside the scope of this part;
ii. "add new criteria that are inconsistent with or outside the scope of this part; or
iii. "be in excess of statutory authority granted to the Secretary."[3]

The Secretary is prohibited from "requir[ing] a State to add any requirements that are inconsistent or outside the scope of [the law]" as a "condition of approval of the State plan."[4] Furthermore, ESSA addresses specific aspects related to State accountability systems for which the Secretary is prohibited from prescribing, including numeric long term goals or measurements of interim progress[5], indicators[6], the weight of any measure or indicator[7], or the methodology used to meaningfully differentiate schools within a State[8], just to name a few. **The intent of Congress is clear: decisions regarding the implementation of accountability systems are reserved for State and local education officials.**

Despite specific statutory prohibitions to the contrary, the Department's proposed accountability regulations nonetheless preserve a system of intrusive federal mandates by dictating specific aspects

[2] Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, sec. 5004, § 5301 (2015) (amending 20 U.S.C. § 7371).
[3] ESSA, sec. 1005, § 1111(e)(1)(A)(i)-(iii) (amending 20 U.S.C. § 6311).
[4] ESSA, sec. 1005, § 1111(e)(1)(B)(i) (amending 20 U.S.C. § 6311).
[5] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(I) (amending 20 U.S.C. § 6311).
[6] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(III) (amending 20 U.S.C. § 6311).
[7] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(IV) (amending 20 U.S.C. § 6311).
[8] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(V) (amending 20 U.S.C. § 6311).

of school accountability, identification and improvement. NSBA's primary concern is that the proposed accountability regulations are too prescriptive. The Department's proposed regulations define components of State accountability systems in a manner that infringes on the authority granted by ESSA to State and local educational agencies. The requirements in the proposed regulations strip authority from State and local education leaders by prescribing aspects of the accountability system reserved for State and local school district determination. 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 perpetuates the "No Child Left Behind"- like structure of maintaining rigid federal specifications for State accountability systems. This "top-down" approach has been and will be detrimental to local school districts, and will affect the successful implementation of ESSA. Below, we provide more details about our specific concerns regarding the prescriptive nature of the Department's proposed accountability regulations, as well as several issues of general concern.

I. § 200.15 Participation in Assessments and Annual Measurement of Achievement

ESSA requires States, school districts, and school sites to "[a]nnually measure the achievement of not less than 95 percent of all students, and 95 percent of all students in each subgroup of students, who are enrolled in public schools on the assessments [required by ESSA]."[9] The law also requires States to "provide a clear and understandable explanation of how the State will factor the requirement of [testing 95%] into the statewide accountability system." The plain language of the statute allows the State to determine, without limitation, how and to what extent the 95 percent participation requirement will be included in the accountability system.

However, the requirements of proposed regulation § 200.15(b)(2) prescribe the specific ways in which a State **must** "factor the requirement for 95 percent student participation in assessments. . . into its system of annual meaningful differentiation . . . ."[10] Specifically, the proposed regulations require States to factor the requirement in a way that "results in at least one of the following actions" for a school that fails to meet the 95% threshold for all students or any subgroup:

i. "A lower summative rating in the State's system of annual meaningful differentiation [under the proposed rules];
ii. "The lowest performance level on the Academic Achievement indicator in the State's system of annual meaningful differentiation under [the proposed rules];
iii. "Identification for, and implementation of, a targeted support and improvement plan consistent with the requirements under [the proposed rules]; or
iv. "Another equally rigorous State-determined action described in its State plan under section 1111 of the Act that will result in a similar outcome for the school in the system of annual

[9] ESSA, sec. 1005, § 1111(c)(4)(E) (amending 20 U.S.C. § 6311).
[10] Accountability NPRM, 81 Fed. Reg. at 34,599 (proposed rule 34 C.F.R. § 200.15(b)(2)).

meaningful differentiation and will improve the school's participation rate so that the school meets the requirements under [this proposed rule]."[11]

The proposed regulations also require that any school site or any district "with a significant number of schools that fail to assess at least 95 percent of all students or 95 percent of students in each subgroup," must develop and implement an improvement plan aimed at improving participation rates in the school or district.[12] The rule includes specific requirements related to monitoring and implementing the plan.[13]

The requirements of the proposed rule are problematic because they exceed the Department's statutory authority with regard to how and to the extent a State considers the participation rate in its system of meaningful differentiation. Specifically, the proposed regulations restrict the manner in which the 95 percent participation rate **must** be included in the State's accountability system to those which yield certain prescribed results for schools that failed to meet the requirement. ESSA is clear that the Secretary is not authorized to prescribe, as a condition of approving a State plan, "the **way in which** the State factors the requirement [to test 95% of students] into the [State's] accountability system . . . ."[14] Additionally, there is no statutory basis to require school sites or districts to implement an improvement plan to increase their participation rate. To the contrary, the determination to require a school or district to implement such a plan would be a state-level decision made in consultation with stakeholders such as local school board members.

> **Recommendation**: Amend subsection (c)(1) and (c)(2) of proposed regulation §200.15 to eliminate the actions a State must take involving schools and districts that fail to assess at least 95 percent of all students and students in each subgroup. The mandatory outcomes prescribed in subsection (b)(2) that dictate the manner in which the State will factor the 95 percent participation rate into the State's accountability system should similarly be eliminated. Instead, the State, through meaningful consultation with local school boards, should independently determine how it should factor the 95% threshold. Also, Departmental review of a State's proposal should be limited to the peer review process based solely on statutory compliance with ESSA.

II. § 200.18 Annual Meaningful Differentiation of School Performance

ESSA requires that States "[e]stablish a system of meaningfully differentiating, on an annual basis, all public schools in the State, which shall [] be based on all indicators in the State's accountability system [required by the law], for all students and for each subgroup of students, consistent with the requirements [of this section]."[15] Additionally, ESSA requires States to give academic indicators in the system "substantial weight," and, "in the aggregate, much greater weight than is afforded [non-

[11] Accountability NPRM, 81 Fed. Reg. at 34,599 (proposed rule 34 C.F.R. § 200.15(b)(2)(i)-(iv)).
[12] Accountability NPRM, 81 Fed. Reg. at 34,599 (proposed rule 34 C.F.R. § 200.15(c)(2)).
[13] Accountability NPRM, 81 Fed. Reg. at 34,599 (proposed rule 34 C.F.R. § 200.15(c)(1)(iii)-(iv)).
[14] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(XI) (amending 20 U.S.C. § 6311) (emphasis added).
[15] ESSA, sec. 1005, § 1111(c)(4)(C)(i) (amending 20 U.S.C. § 6311).

academic indicators]."[16] However, in consultation with local school board members, ESSA defers to the State to determine the indicators in the system, the overall mechanism used to meaningfully differentiate, and the weights given to various accountability indicators.

The Department's proposed regulation at § 200.18(b) usurps the State's authority by prescribing the specific structure States must use in developing the system of meaningful differentiation. Most notably, the regulations require States to establish a system of meaningful differentiation that "[r]esults in a single rating from among at least three distinct rating categories for each school, based on a school's level of performance on each indicator . . . ."[17] As such, the rule prescribes the type of system States must utilize to meaningfully differentiate public schools, including specifying the "rating categories" that must be included in the system.

The proposed rules also conflict with statutory restrictions on the Department's power by establishing federal regulatory requirements that dictate the framework of a system that each individual State is authorized, within the parameters of ESSA, to establish. The law is clear that the Secretary shall not be authorized to prescribe, as a condition of approving a State plan, "the specific methodology used by States to meaningfully differentiate or identify schools . . . ."[18] Yet, by limiting the scope of the system and requiring a minimum number of levels of differentiation for the chosen indicators and a minimum number of indicators to produce a school's summative performance, the Department is inherently prescribing the methodology States must utilize in developing a system of differentiation.

> **Recommendation**: Amend proposed regulations to allow States to choose the specific method by which meaningful differentiation occurs, absent federal regulatory restrictions or requirements. To ensure meaningful differentiation occurs within a State, the Department may utilize the peer review process or existing review procedures to ensure a State's system of meaningful differentiation meets ESSA requirements and results in actual differentiation of public schools based on indicators in the accountability system. However, the State should determine, through meaningful consultation with local school board members, how to best "meaningfully differentiate" schools, without federal limitation or restriction.

III. § 200.17 Disaggregation of Data/N-Size Restrictions

ESSA requires States to meet specific requirements with regard to the disaggregation of data and to describe in its State plan "the minimum number of students that the State determines are necessary to be included to carry out such requirements and how that number is statistically sound, which shall be the same State-determined number for all students and for each subgroup of students in the State."[19] In determining the "N-Size," States must describe "how such minimum number of students was determined by the State, including how the State collaborated with teachers, principals, other

[16] ESSA, sec. 1005, § 1111(c)(4)(C)(ii) (amending 20 U.S.C. § 6311).
[17] Accountability NPRM, 81 Fed. Reg. at 34,601 (proposed rule 34 C.F.R. § 200.18(b)(4)).
[18] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(V) (amending 20 U.S.C. § 6311).
[19] ESSA, sec. 1005, § 1111(c)(3)(A)(i) (amending 20 U.S.C. § 6311).

school leaders, parents, and other stakeholders" and "how the State ensures that such minimum number is sufficient to not reveal any personally identifiable information."[20]

The regulations proposed by the Department seek to place restrictions on the N-Size a State may choose by instituting an approval process for States that opt for an N-Size of 30 students or more. Specifically, the proposed rules provide that a State's N-Size "[m]ust not exceed 30 students, unless the State provides a justification for doing so in its State plan under Section 1111 of the Act consistent with [proposed rules]."[21] As such, if a State requests to establish an N-Size of 30 students (or greater), the State must submit to the Department data on the number and percentage of schools that would not be held accountable for the results of students in each subgroup in the accountability system and information "that explains how a minimum number of students exceeding 30 promotes sound, reliable accountability determinations."[22]

The restrictions included in the proposed rule limiting the selection of a State's N-Size to no more than 30 students has no statutory basis. This limitation on the N-Size selected by a State conflicts with ESSA's clear directive that the Secretary is not authorized to prescribe, as a condition of approving a State plan, "a minimum number of students established by a State," provided the State meets the statutory requirements of ESSA.[23]

> **Recommendation**: Amend proposed regulations to remove limitations on the N-Size selected by States. The State, through meaningful consultation with local school board members, should determine an appropriate N-Size for school districts in the State, without federal regulatory limitation or restriction.

IV. § 200.23 State Responsibilities to Support Continued Improvement

One of the most significant shifts from the requirements of No Child Left Behind (NCLB) is the authority granted to local school districts to develop and implement improvement plans and choose evidence-based interventions that work best for that individual school district. ESSA authorizes each local school district identified by the State, for either comprehensive support and improvement or targeted support and improvement, to "develop and implement" a "plan for the school to improve student outcomes, that . . . includes evidence-based interventions."[24]

However, the Department's proposed regulations permit a State to "[e]stablish an exhaustive or non-exhaustive list of State-approved, evidenced-based interventions consistent with the definition of evidence-based [under ESSA] for use in schools implementing comprehensive or targeted support and improvement plans under [the proposed regulations]."[25] The establishment of "an exhaustive

[20] ESSA, sec. 1005, § 1111(c)(3)(A)(ii)-(iii) (amending 20 U.S.C. § 6311).
[21] Accountability NPRM, 81 Fed. Reg. at 34,601 (proposed rule 34 C.F.R. § 200.17(a)(2)(iii)).
[22] Accountability NPRM, 81 Fed. Reg. at 34,601 (proposed rule 34 C.F.R. § 200.17(a)(3)(iv)-(v)).
[23] ESSA, sec. 1005, § 1111(e)(1)(B)(iii)(VIII) (amending 20 U.S.C. § 6311).
[24] ESSA, sec. 1005, § 1111(d)(1)(B)(ii), (d)(2)(B)(ii) (amending 20 U.S.C. § 6311).
[25] Accountability NPRM, 81 Fed. Reg. at 34,607 (proposed rule 34 C.F.R. § 200.23(c)(2)).

list" infringes on the authority of local school districts to identify and implement evidence-based interventions to remedy the basis for such an identification and improve student outcomes within the school district.

ESSA permits a State educational agency to "establish alternative evidence-based State determined strategies **that can be used by local educational agencies to assist a school**" identified for improvement.[26] This option, however, is permissive and does not authorize a State to create an "exhaustive list" of State-approved evidence-based interventions.[27] There is no clear statutory provision that permits an SEA to limit the evidence-based interventions a district may opt to implement through an approved improvement plan. The absence of specific statutory language, in addition to the specific provisions in ESSA authorizing the local school district to implement evidence-based interventions, support eliminating the proposed regulatory language and clarifying that the authority granted to States in this instance applies only in circumstances where a school district has implemented an improvement plan, but failed to meet the State-established exit criteria. Furthermore, the rule should be clarified to reaffirm the statutory language that allows local school districts **the option** of utilizing State-approved strategies.

> **Recommendation**: Amend the proposed regulations to remove the authority granted to States to develop an "exhaustive list" of State-approved interventions. States should not have the authority to limit school districts in selecting and implementing evidence-based interventions and/or improvement plans aimed at increasing student achievement or attaining school improvement. There is no statutory basis for limiting the evidence-based interventions a local district may choose to implement. The proposed regulations should encourage and permit local school districts to implement evidence-based interventions without restriction or limitation.

In addition to the specific concerns expressed above relating to the overly prescriptive nature of the Department's proposed regulations, NSBA has identified three additional areas of general concern.

V. § 299.13 Overview of State Plan Requirements: Foster Care Transportation Requirements

ESSA underscores the need to provide educational stability for both homeless students and students in foster care. The emphasis placed on serving these students aligns directly with NSBA's mission statement, and NSBA agrees that ensuring educational stability for these students is of significant importance. In fact, Article I, Section I of NSBA's Beliefs & Policies state specifically that education leaders at the Federal, State, and local levels must work to "provide the highest quality education for

[26] ESSA, sec. 1005, § 1111(d)(3)(B)(ii) (amending 20 U.S.C. § 6311) (emphasis added).
[27] Accountability NPRM, 81 Fed. Reg. at 34,607 (proposed rule 34 C.F.R. § 200.23(c)(2)).

each child, and equal educational opportunity for all children."[28] Further, that same section stresses the need to "eliminate barriers to learning through policies that coordinate all services for youth at all government levels and enable schools to meet the needs of young people more effectively."[29]

To this end, ESSA reiterates the importance of ensuring that a student in foster care remains in the school of origin when it is in the child's best interest. ESSA clarifies that if there is an additional cost involved in providing transportation to allow the student to remain in the school of origin, the "[school district] will provide transportation . . . if:

I. "the local child welfare agency agrees to reimburse the local [district] for the cost of such transportation;
II. "the local educational agency agrees to pay for the cost of such transportation; or
III. "the local educational agency and the local child welfare agency agree to share the cost of such transportation."[30]

ESSA also includes heightened requirements for the coordination between local school districts and State and local child welfare agencies in acknowledgement that both entities are jointly responsible for ensuring educational stability for students in foster care.[31] NSBA supports the collaboration of agencies to "develop programs and adopt youth policies that coordinate delivery of services to students such as counseling, health, nutrition, family support, and juvenile justice."[32] NSBA's Beliefs & Policies state that "services must be coordinated and focus on the total needs of the child."[33]

However, the Department's proposed regulations require each SEA, in the State plan, to ensure that local school districts "will provide children in foster care transportation, as necessary, to and from their schools of origin, consistent with procedures developed by the LEA in collaboration with State and local child welfare agencies under section 1112(c)(5)(B) of the Act, **even if the LEA and the local child welfare agency do not agree on which agency or agencies will pay any additional costs incurred to provide such transportation.**"[34] Simply put, the proposed regulations do not reflect the legal requirements established in ESSA. The proposed regulations expand legal obligations of local school districts by placing the cost of transportation squarely on the local school district. This may have a significant financial impact on school districts, particularly because the district responsible for transportation is receiving neither State nor federal funding to assist in covering transportation costs. Furthermore, the proposed regulations weaken the responsibility of local child welfare

[28] 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.
[29] *Id.* at 10.
[30] ESSA, sec. 1006, § 1112(c)(5)(B)(ii)(I)-(III) (amending 20 U.S.C. § 6312).
[31] ESSA, sec. 1006, § 1112(c)(5)(A) (amending 20 U.S.C. § 6312).
[32] NAT'L SCH. BDS. ASS'N, *supra* note 28, at 11.
[33] *Id.*
[34] Accountability NPRM, 81 Fed. Reg. at 34,615 (proposed rule 34 C.F.R. § 299.13(c)(1)(ii)) (emphasis added).

agencies to collaborate with local school districts by creating a potential incentive for disagreement between local child welfare agencies and local school districts.

Additionally, expenditures for transportation expenses are often dictated by State law. The proposed regulations disregard State policies and statutes that govern the transportation of students outside of district boundaries and state-level transportation funding provisions.

The Department's regulations should encourage educational stability by recognizing the need for constructive and cooperative relationships between school districts and child welfare agencies; however, these regulations should not be used as a means of imposing new expenses on school districts. Local school board members are committed to the success of all students. NSBA recognizes the importance of providing increased educational opportunities and educational stability for all students, particularly at-risk populations such as students in foster care. Nevertheless, the proposed regulation expands statutory requirements and diminishes the responsibility of State or local child welfare agencies by weakening legal obligations to collaborate with local school districts.

> **Recommendation**: Amend the proposed regulations to reflect the statutory requirement that child welfare agencies collaborate with local school districts to determine how transportation costs will be covered. The proposed regulations should also be modified to require collaboration with local child welfare agencies, and, if appropriate, the school of origin. The regulations should expressly state that such collaboration or consultation is not a basis for requiring school districts to incur transportation costs not otherwise authorized under State law.

VI. § 299.13 Overview of State Plan Requirements: Meaningful Consultation with Stakeholders

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 in the development of a State plan.[35] 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.[36]

The Department's proposed regulations outline requirements for developing, revising, or amending State plans and require State educational agencies to "engage in timely and meaningful consultation with stakeholders."[37] Section 299.13(b) of the proposed rule requires a State educational agency to:

[35] ESSA, sec. 1005, § 1111(a)(1)(A) (amending 20 U.S.C. § 6311).
[36] ESSA, sec. 1005, § 1111(a)(8) (amending 20 U.S.C. § 6311).
[37] Accountability NPRM, 81 Fed. Reg. 34,614 (proposed rule 34 C.F.R. § 299.13(b)).

1) Provide public notice of processes and procedures;
2) Conduct outreach to and solicit input from individuals and entities listed in the law:
    i. During the design and development of the plan;
    ii. Prior to submission of the plan for a 30-day public comment period; and
    iii. Prior to the submission of revisions or amendments;
3) Describe how the consultation and public comment were taken into account in the development of the plan, including:
    i. How the SEA addressed issues and concerns that were raised; and
    ii. Changes made as a result of the consultation.[38]

While the proposed regulatory language establishes positive, initial steps for ensuring continued and ongoing meaningful consultation with stakeholders in the development of a State plan, this requirement is key to ensuring successful implementation of ESSA at the state level. As such, the regulations 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.

As the Learning First Alliance stated in its recent publication, *Learning First Alliance Principles on Stakeholder Engagement as Required in ESSA*, the process of stakeholder engagement "should be sustained, with stakeholders participating in discussions at the decision-making, implementation and evaluation stages."[39] The guidance encourages states to adopt a process that "goes beyond gathering input into an overall plan; stakeholders are also discussants for the implementation process and how and what data is used to evaluate the implementation."[40] The Department's regulations should require the same level of continued involvement.

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 accountability system 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. For example, proposed regulatory provisions relating to the establishment of exit criteria, the limitations on a State's ability to utilize innovative school quality and success indicators, and the criteria enumerated in the rule that States must consider in defining "consistently underperforming" subgroups can be eliminated. Instead, the proposed regulations should defer to States to develop components of their accountability system

[38] *Id.*
[39] LEARNING FIRST ALLIANCE, LEARNING FIRST ALLIANCE PRINCIPLES ON STAKEHOLDER ENGAGEMENT AS REQUIRED IN ESSA 1 (2016) (emphasis omitted), *available at* http://www.learningfirst.org/sites/default/files/assets/LFAStakeholderEngagementPrinciples.pdf.
[40] *Id.*

through the process of meaningful consultation and with increased levels of stakeholder engagement.

> **Recommendation**: Amend the proposed regulations to affirmatively state the need for increased consultation at the state level to ensure meaningful stakeholder involvement and encourage continued communication with local school board members. Furthermore, increased and consistent consultation between State leaders and local school board members diminishes the need for overly prescriptive federal regulations. The proposed regulations should be amended to secure additional and consistent opportunities for stakeholder engagement.

VII. § 200.19 – Implementation Timeline

ESSA establishes the specific timeline in which new requirements of the law are to be fully implemented.[41] Specifically, with regard to accountability system requirements, the law states, in part, "subsections (c) and (d) of section 1111 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311) as amended by this Act, shall take effect beginning with school year 2017-2018."[42]

The Department's proposed regulations require States to identify school sites for comprehensive support and improvement beginning in the 2017-2018 school year, with an exception for districts with chronically low-performing subgroups.[43] Additionally, the proposed regulation requires States to identify schools that have "low-performing subgroups" for targeted support and improvement at least once every three years beginning with the 2017-18 school year.[44] The identification during the 2017-2018 school year will be based on 2016-2017 data; data likely calculated, configured, and considered pursuant to requirements of a previous, unrelated accountability system. Additionally, given the short transition timeframe, it is likely that States will not have each component of their accountability systems fully operational by the beginning of the 2017-2018 school year. Amending the regulation to include additional time for States and school districts to meet the requirements of ESSA will also provide an opportunity for States to address technical challenges that are likely to arise with the transition to new accountability systems.

The proposed regulations include two application dates for States to submit State plans to the Department for approval.[45] ESSA requires that the Department approve or disapprove the plan within one-hundred and twenty (120) days after submission.[46] If the Department's proposed timeline is approved, a State may be required to identify districts for comprehensive or targeted support and improvement under a new accountability system before its State plan has even been approved by the

[41] ESSA, sec. 5(e)(B).
[42] *Id.*
[43] Accountability NPRM, 81 Fed. Reg. at 34,603 (proposed rule 34 C.F.R. § 200.19(d)).
[44] *Id.*
[45] Accountability NPRM, 81 Fed. Reg. at 34,614-16 (proposed rule 34 C.F.R. § 299.13).
[46] ESSA, sec. 1005, § 1111(a)(4)(A)(v) (amending 20 U.S.C. § 6311).

Department. The same scenario may apply to local school districts. An identified district may be required to develop an improvement plan prior to the formal approval of its respective State plan.

Additionally, the proposed timeline will stifle creativity and innovation, detrimentally affecting the ability of a State to re-think, determine, and establish state-level policies. The timeline in the proposed regulations will require States to continue current accountability and differentiation practices, and deprives State and local leaders of the opportunity to benefit fully from the flexibility and autonomy provided by ESSA.

> **Recommendation**: Reconsider the implementation timeline to ensure a fair and streamlined transition to ESSA accountability system requirements, and continue discussions and meaningful consultation with stakeholders, including local school board members, to determine transition options that ensure the successful implementation of ESSA.
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> The Department should provide for a multi-tiered implementation of newly approved State accountability systems beginning in the 2017-2018 school year, with the first ESSA-based identification and meaningful differentiation of schools occurring at the beginning of the 2018-2019 school year, based on data collected in the 2017-2018 school year. Operationally, this would provide that all schools and districts are fully implementing support and improvement plans, as required by ESSA, at the beginning of the 2018-2019 school year.
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> For the 2017-2018 school year, the Department should offer States the following options: 1) "Freezing" current lists of priority and focus schools and maintaining current identifications; or 2) Exiting schools and identifying new priority and focus schools based on more recent data, similar to the options provided to States during the 2016-2017 school year.
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> If the Department opts to maintain the timeline in the proposed regulations, it should, at a minimum, **require** States to allow identified schools to have a planning year to prepare for the implementation of an improvement plan that meets the requirements of ESSA, to be fully implemented in the 2018-2019 school year.

VIII. Conclusion

The regulations issued by the Department must not impede the authority granted 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 state 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."[47] Federal

[47] EXEC. OFFICE OF THE PRESIDENT, EVERY STUDENT SUCCEEDS ACT: A PROGRESS REPORT ON ELEMENTARY AND SECONDARY EDUCATION 1 (2015), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/ESSA_Progress_Report.pdf.

regulations should empower State and local leaders to make decisions. 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 must take a different approach that avoids past mistakes by abandoning overly prescriptive federal requirements and instead defers to State and local leaders to determine what is best for public education in each State. 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.

NSBA represents nearly 14,000 school boards from every region and every State in the country. Our membership consists of rural and urban board members. Our members are geographically distinct, multi-cultural, and racially diverse, and understand the unique challenges of local school governance. NSBA represents the Council of Urban Boards of Education (CUBE), and the National Hispanic Council, National Black Council, and National Caucus of American Indian/Alaskan Native board member groups. As such, NSBA represents many perspectives of school board members from across the nation.

Local school board members are uniquely positioned and will be directly affected by the Department's proposed accountability regulations. NSBA believes that school boards should concentrate on raising student achievement by focusing on these five key areas, including accountability. Specifically, NSBA's Beliefs & Policies state, in part:

> Effective school boards ensure high academic standards, transparency, and accountability. True accountability depends on open decision making, community engagement and support, and receptivity to new ideas and constructive criticism.[48]

As locally elected officials, school board members should be given more authority to determine how accountability systems will be developed and implemented. The Department's prescriptive regulations strip State and local decision-makers of the opportunity to take new, innovative approaches to accountability and meaningful differentiation.

Together, with one voice, NSBA urges the Department to acknowledge, by amending the proposed regulations, that ESSA's provisions restore the authority of local and State leaders to govern public schools. The prescriptive nature of these proposed regulations prevent this restoration and ignore the clear intent of Congress to authorize State leaders and local school districts to develop the

[48] NAT'L SCH. BDS. ASS'N, *supra* note 28, at 14.

accountability mechanisms best for their individual States.[49] ESSA prohibits the Secretary from prescribing aspects of statewide accountability systems; the Secretary is prohibited from adding requirements or criteria to the accountability system inconsistent with or outside the scope of the law.[50] Nonetheless, the proposed regulations significantly restrict the authority of State and local leaders to establish a state-level accountability system that meets the unique needs of each State, respectively.

It is our hope that the Department will ensure restoration of local governance of public education and amend the proposed regulations and the peer review process to allow State and local education leaders the flexibility and authority to make decisions regarding the accountability system that best meets the needs of the districts within their State. NSBA looks forward to continuing to work with the Department and serve as a resource throughout the regulatory and non-regulatory development process.

Sincerely,

Thomas J. Gentzel
Executive Director

[49] *See* ESSA, sec. 1005, § 1111(e) (amending 20 U.S.C. § 6311).
[50] ESSA, sec. 1005, § 1111(e)(1)(A) (amending 20 U.S.C. § 6311).