THE SCHOOL SUPERINTENDENTS ASSOCIATION

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Ms. Hilary Malawer
U.S. Education Department
400 Maryland Avenue SW.
Room 6E231
Washington, DC 20202.

RE: Evaluation of Existing Regulations (ED-2017-OS-0074)

September 19, 2017

Dear Ms. Malawer:

On behalf of AASA, The School Superintendents Association, representing more than 13,000 of the nation's public school superintendents, we write to provide input related to the U.S. Education Department (USED) effort to review regulations. The school superintendents we represent work hard each day to ensure the students they serve have access to high quality public education. Federal education programming—including the Every Student Succeeds Act (ESSA), the Individuals with Disabilities Education Act (IDEA), the Carl D. Perkins Career & Technical Education program, Impact Aid, and the Rural Education Achievement Program, among others—provide schools and students with resources, programming and supports that are critical to student learning and achievement.

These federal laws, while sometimes written prescriptively, do not always include the level of detail necessary to support implementation at the local level. To that end, the agency of jurisdiction—USED, in this instance—will make use of policy tools like regulation, guidance and technical assistance to provide additional information. AASA acknowledges the important role of these federal tools as a complementary stet of information but balances it with a concern when and where regulations, which are 'binding', add requirements and clarifications that go beyond the scope of the underlying statute or unnecessarily complicate the work of implementation. To that end, we submit the following feedback.

As the department moves forward with its evaluation of existing regulations, it is important to focus on substance and relevance, and the extent to which the final regulations are consistent with the intent of the underlying statute. An exercise like this requires a scalpel—not a meat cleaver—and USED would be well advised to focus more on improvements and revisions as opposed to complete repeal.

Every Student Succeeds Act (ESSA): Accountability Regulations

Summative Indicator: AASA is concerned with USED's regulation (200.18) related to state plan inclusion of one summative rating from at least three distinct rating categories for each school. The statute requires evaluation of LEAs and schools on academic and non-academic factors, but stopped short of requiring each to be rated by a single indicator. This step away from reducing a school to a single letter or number score is important and provides flexibility and support for more nuanced state and district reporting, including the use of data dashboards. Reliance on a summative indicator mirrors current reporting requirements, blurs the nuance that comes from multiple and varied indicators, unnecessarily hinders the ability of state and local education agencies to consider new approaches and increases the likelihood of states just maintaining the status quo of the broken NCLB. AASA urges USED ensure the regulation—whether revised or through enforcement—better mirrors the underlying statute,

which preserves the flexibility to implement a variety of data indicators (sometimes referred to as a dashboard), which would allow state and local education agencies to provide intervention and continuous improvement supports with greater accuracy. The state must retain discretion in determining whether to use a data dashboard or a single summative indicator. The final regulation addressed some of these concerns, but there is room to better align the regulation with the statute.

Previously Identified Child with a Disability: AASA resubmits our initial response to the proposed accountability regulations, which were not addressed in the final regulations. When a student no longer requires an IEP, it does not mean the student the student no longer has a disability—it simply means they no longer require specifically designed instruction from special education personnel. The student may still very well be a struggling learner and need
interventions to be successful. Additionally, the first two years after being exited a student is transitioning. When students are in special education and receiving services to support academics, the students are receiving a lot of scaffolding and accommodations to support their learning. Modifications in strategies, content and time are made to focus on the most critical skills for learning. When the student exits, those accommodations can change and students need to make adjustments. AASA believes it would be beneficial though, to align the subgroup criteria to English learners which would mean allowing districts to include former students with disabilities in the subgroup for up to four years. We urge USED to revisit this regulation to allow a state to include the scores of students previously identified with a disability for up to four school years following the year in which the students exit from special educations services.

Four-Year Graduation Rate: AASA supports flexibility as it relates to calculation of graduation rates. In a time of increased personalized education, coupled with the realities of legal obligations for high school experiences that last more than four years, and the realities of schools doing great work to support struggling students, we are concerned about the requirement that only the four year graduation rate be used to determine which high schools must be identified for interventions if the rate falls below 67 percent. This regulation seems in direct conflict with ESSA language, which is clear to identify state and local control as critical for success. State and local education agencies must have the ability to accommodate extended learning timelines for especially at risk students, students with disabilities and English language learners. AASA urges USED to revise its position and ensure section 200.13 maintains state discretion and authority to determine and use a graduation rate beyond four years.

Every Student Succeeds Act (ESSA): Supplement, Not Supplant Regulations

ESSA requires USED to issue regulations related to the 'supplement, not supplant' provision of the law. If and when USED moves forward with this effort, we reiterate our deep opposition to the overly prescriptive and complicating approach of the Obama administration, and encourage USED to focus on the underlying statute, which provides the information SEAs and LEAs need to implement the law and be compliant with the requirement. To the extent that additional information is deemed necessary, the latest guidance issued by USED in July 2015 (available here: http://www.theotx.org/wp-content/uploads/2016/02/Title-I-Schoolwide-Guidance-July-2015.pdf) is a very common sense approach.

Every Student Succeeds Act (ESSA): Assessment Regulations

200.6 (Academic Assessments for Languages Other Than English): AASA encourages USED to rewrite its regulation to ensure that when it comes to state work in developing assessments in languages other than English, USED is focused on the provision of technical assistance, rather than state demonstration of effort. State, district and school leaders across the nation are committed and already working to identify and address the specific needs of English Learners. We are concerned that the related requirements of 200.6 (including requiring the state to account for the reasons it has not completed test development and to describe its process for gathering meaningful input) focus more on compliance rather than the provision of effective technical assistance, an

important disconnect that will undermine the effort to expand the number of assessments available in languages other than English.

200.6(b): This provision would require that a State's academic assessment system provide appropriate accommodations for each student with a disability. Accommodation determinations would be made on an individualized basis and would direct the IEP team, 504 placement team, or school personnel charged with ensuring compliance with Title II of ADA to be engaged in making this determination. It requires the State to ensure that general and special education teachers, paraprofessionals, SISPs and other appropriate staff receive necessary training to administer assessments and know how to administer assessments, including alternate assessment, and how to make use of appropriate accommodations during assessments. The regulation also requires that the State ensure a student with a disability who uses an accommodation on an assessment that is intended to meet Title I requirements is given the full benefits afforded to other students regarding reportable scores.

AASA is doubtful that the State has the capacity to organize professional development focused on how to provide individualized accommodations for students with disabilities that will reach this large population of school personnel. Our concern is that the LEA will be tasked with fulfilling this mandate and demonstrating to the State that the various personnel have received training. The regulation does not take into account that various school personnel may have limited engagement with test administration practices at the school/district generally or limited interaction with students with disabilities who require accommodations on assessments. AASA urges the Department to rewrite this broad provision more narrowly to require only those school personal charged with administering the assessments, including alternate assessments, to receive training to make use of the appropriate accommodations.

AASA is pleased to see the requirement that students who receive accommodations for purposes of taking assessments associated with Title I Part A are ensured all benefits of those students taking Title I Part A assessments who do not require accommodations.

200.6(b)(3): AASA urges USED to revise their regulation to include language detailing that accommodations for students with a disability are provided in a manner that ensures the validity, reliability and predictability of the test scores. While appropriate accommodations are essential, it is of no value to the student or to the educational institution to provide accommodations that lead to invalid results.

200.6(c)(4): AASA has serious concerns about the regulations in 200.6(1) given that in the 2013-2014 school year, 38 states exceeded a 1.0 percent cap for participation in the alternate assessment measuring reading/language arts achievement and 37 states exceed a 1.0 percent cap for participation in the alternate assessment measuring mathematic achievement. The statute clearly realized the high probability that a State would need a waiver in light of this data and permits the State to receive a waiver. However, the regulations would make it very difficult, if not impossible, for some states to receive a waiver. In particular, AASA believes two criteria for the waiver application will lead to few states, if any, receiving a waiver: 1) the 95% participation requirement and 2) the requirement to address disproportionality. If a state does not receive a waiver, the State risks noncompliance with Title I and a loss of federal funds. Ensuring that a reasonable waiver request can be granted should be a top priority for policy makers and regulators given the aforementioned participation data by states and the carefully negotiated language of the underlying statute, purposefully designed to more accurately reflect both the realities of participation rate and the need to maintain state and local flexibility

The regulation would prohibit a State from receiving a waiver if less than 95% of all students or less than 95% of students with disabilities participate in federally required assessments. The organic, highly-localized backlash against standardized testing that has occurred across the country cannot be effectively or quickly managed by a State or district. A State should not be denied a waiver regarding the alternate assessment especially given that ESSA explicitly allows parents the right to opt their children out of assessments. As highlighted most prominently in New York State, which is considered the "hot-bed" of test refusal activism, in 2016 only 5% of districts statewide

had test participation at or above 95%. While the Department's accountability regulations require the State to develop a system for sanctioning districts with low-participation rates, it is unclear what those sanctions will be and what impact they will have in improving state-wide test participation. It could be a few years before a State develops an effective strategy to ensure 95% of students with disabilities are assessed or 95% of all students are assessed. In the meantime, a state like New York would be unable to be granted a waiver for the alternate assessment even if they were in total compliance with all other waiver provisions. This is totally unreasonable and conflates student test-participation on the alternate assessment with a distinct cultural and educational shift that must be addressed separately from participation on the alternate assessment.

AASA disagrees with the ED's decision to require states to address any disproportionality in the percentage of economically disadvantaged students, students from major racial and ethnic groups, or English learners who are assessed using alternate assessment aligned with alternate academic achievement. If a district is appropriately applying State guidelines for making determinations as to which students with significant cognitive disabilities should be assessed using the alternate assessment, then there is no need to separately address disproportionality. The best-available
empirical evidence[1] repeatedly indicates that white children are more likely to receive special education services than otherwise similar racial or ethnic minority children. As research and commonsense dictates, living in poverty increases children's exposure to many of the known risk factors for disability, such as environmental toxins, being born with low birthweight, and attention regulation issues. Currently, almost 40% of black children live in poverty compared to 10% of white children.

The regulation would require a State to provide assurances that every LEA "will address any disproportionality in percentage of economically disadvantaged students, students from major racial and ethnic groups, or English learners who are assessed using alternate assessments aligned with alternate academic achievement standards." Why should a district that finds itself in the position of appropriately following IDEA and ESEA when determining that a child would benefit from an alternate assessment be forced by the federal government to take steps "address" a finding that a disproportionate number of poor, minority students may be qualifying for and participating in the alternate assessment? Is the policy goal in this regulation to ignore the impact of race and poverty on disability status and instead incentivize district personnel to direct a proportionate number of students in each racial, ethnic and economic group to take the alternate assessment? It is not clear to AASA how disproportionality in this context will be defined. Is the definition used in IDEA for significant disproportionality? Is it the definition in IDEA for disproportionate representation? Is it a new definition of disproportionality that states will develop on their own? Given that the word disproportionate does not even appear in the statute, we are opposed to this proposal and see it only as a clear attempt to limit any state from receiving a waiver.

IDEA already requires States to address disproportionality for students in three different contexts: placement, discipline, and identification. The inclusion of disproportionality in the ESSA regulation creates a scenario where a district may be addressing significant disproportionality or disproportionate representation for a subgroup of students in the context of discipline under IDEA and under ESSA regarding the alternate assessment. However, there may be no overlap in the subgroup of students who are being disproportionately disciplined or being disproportionately assessed using the alternate assessment. Yet, a district under IDEA will have to focus on disproportionality for this subgroup in one context, and in ESSA it will have to address disproportionality in a separate context. The appropriate place to address disproportionality for special education students is within IDEA, not ESSA. AASA strongly implores the Department of Education to remove this regulation on disproportionality.

Furthermore, the requirement for the LEA to address disproportionality will greatly undermine the explicit authority of IEP teams stated in both ESSA [1111(b)(2)(D(ii)(I)] and IDEA to select the appropriate assessment for a

[1] P. L. Morgan, G. Farkas, M. M. Hillemeier, R. Mattison, S. Maczuga, H. Li, M. Cook. Minorities Are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions. Educational Researcher, 2015; DOI: 10.3102/0013189X15591157

child with a disability based on state and federal guidelines. The statute clearly highlights that a decision about an alternate assessment made by an IEP team should be given deference regardless of how it may impact the district's count of students who participate in an alternate assessment and any related impact this has on statewide compliance with the 1% participation cap. ED should re-emphasize a regulation that as long as the IEP team has determined, through the application of State guidelines, that a student with significant cognitive disability should take the alternate assessment, then any increase in participation of students on the alternate assessment at the LEA level be unchallenged by the SEA, and the district should not be required to address any disproportionality in which students are assessed using the alternate assessment.

200.76(b)(2) and 200.77(b): ESSA Section 1111(b)(2)(J) allows states to use computer adaptive assessments that include items above or below a student's grade level without seeking innovative assessment demonstration authority. To the extent that a parallel flexibility is not built into the innovative assessments developed under the demonstration authority, AASA urges USED to revise its regulation to clarify that the innovative assessments may include items above or below a student's grade level, provided the assessment measures the student's grade-level proficiency.

Individuals with Disabilities Education Act (IDEA)

IDEA was last reauthorized in 2004. This means a special education student who began kindergarten in 2004 has graduated from high school without any changes in law or regulations. In light of the extended periods of time between reauthorizations, the Department should carefully review what is working in the regulatory framework today and what needs to be fixed in order to ensure school personnel spend as much time providing direct, evidence-based instruction that empowers students with disabilities to access and meet meaningful educational standards and be economically independent, contributing members of our society.

As we look ahead to IDEA reauthorization in Congress we see numerous issues with regulations ED has issued as a barrier to more efficient and effective special education programs. Two of AASA's major IDEA reauthorization priorities center on reforming the special education dispute mechanisms and reducing the number of independent educational evaluations (IEE) at public expense. One regulation that we would like ED to review and rescind connects to both reauthorization priorities.

In recent years, parents have increasingly requested IEEs without specifying any specific concerns with the district's evaluation or providing any justification for the evaluation request. Sometimes these requests occur months after the district's initial evaluation when the IEP program has been in place for a significant period of time. These evaluation requests may be sought because parents are dissatisfied with the current services or placement that their child is receiving, or are optimistic that a new or different evaluation will provide contradicting information resulting in different services or a new placement for their child.

According to the regulation at 34 C.F.R. §300.502(b)(2)(i) the obligation to pay for the IEE falls on the district unless the district objects and moves forward with a due process complaint filed against the parent. However, the current due process system is a highly adversarial, expensive, and time-consuming process and one that district leaders prefer to avoid at all costs. AASA believes IEEs are essential to provide to parents when they have sensible objections to the district's evaluation, but the statute is silent on when a district can reject an IEE request. However, the regulation at 34 CFR §300.502(b)(2)(i) states that if a district wishes to deny the request for an IEE because it believes the evaluation conducted to determine a student's eligibility for special education generally or for a particular special education program is appropriate then the district must file for due process. As documented in our report, Rethinking Due Process, we believe the special education due process system is an outrageously expensive process for districts to pursue and many districts avoid hearings strictly for cost reasons. School leaders believe it is more prudent to acquiesce to parental demands, whether they be for specific services, placements, or in the context of this specific regulation requests for an independent educational evaluation than it is to move forward with a highly adversarial and expensive dispute resolution process.

This specific regulation is outside the bounds of the statute and puts districts in a terrible predicament: pay for what they view to be unnecessary and even inappropriate evaluation requests by a parent or move forward with an expensive and often litigious process to affirm that the district evaluations are appropriate. We believe the regulation should be rescinded, so that a parent still has a right to an independent educational evaluation, but the district does not have to file for due process to reject a request for an independent educational evaluation. To demonstrate, the recent case of *Seth B. v. Orleans Parish School Board*, 810 F.3d 961 (5th Cir. 2016) demonstrates clearly how difficult this provision is to implement in any consistent fashion and how contradictory the regulation is to the statute. In *Seth B*., for instance, the court not only repudiated an earlier letter of interpretation from OSEP as being *ultra vires* but ruled that the school district was not even bound by the very rule which other courts have applied differently in similar situations. Id. at 96869. OSEP, in fact, continues to issue interpretative letters on these regulations concerning IEE which are highly contradictory to other judicial opinions, furthering the confusion and needless expense on the part of school districts. *See* Letter from Ruth E. Ryder, Acting Director, Office of Special Education Programs, to Jennifer Carroll (Oct. 22, 2016), available at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/carroll-iee-policy.pdf; Letter from Melody Musgrove, Director, Office of Special Education Programs, to Debbie Baus (Feb. 23, 2015), available at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-14-012562r-baus-iee.pdf, both cited in *Northside Indep. Sch. Dist.,* 117 LRP 3037 (Tex. SEA Dec. 5, 2016). Other cases have demonstrated how controversial this regulation is in practice. See, e.g., *A.A. v. Goleta Union Sch. Dist*., 2017 WL 700082, at *5, n.11 (C.D. Cal. Feb. 22, 2017) (noting that requiring districts to file for hearing to defend evaluations can "unnecessarily multiply[] IDEA proceedings and frustrating the purpose of the Act").

Another IDEA regulation we hope ED reviews and amends is focused on the child's educational placement during the pendency of a dispute between a parent and district. There are numerous examples in IDEA case law where parents may file for due process seeking a new educational placement option for their child and the district loses at the hearing officer level but is ultimately successful in defending its placement choice in district or appellate court. However, if a parent is seeking a change of placement for their child and the parent is successful in a due process hearing, regulation 34 C.F.R. § 300.518(d) states that the hearing officer's decision automatically changes the "stay-put" placement of the child to the placement requested by the hearing officer and the child must be maintained at such placement at district expense during the pendency of any appeals pursued by the district, regardless of the final outcome and even if the final court rules the placement to be inappropriate for the child. This regulation provides the hearing officer with considerable unchecked power during on-going litigation that could cost the district tens of thousands of dollars while the appeal process proceeds and disregards the entire purpose of appellate review. We do not believe that Congress anticipated allowing a hearing officer to have control over a placement in the manner set forth by the regulation and we would argue that while the hearing officer may agree with the parent about the appropriate placement for a child, he is not authorized anywhere to require the district to pay for the placement while the appeals process continues. Thus, we recommend that 34 CFR 300.518(d) be struck and a clarifying regulation be issued stating that the only placement that can occur at district expense during the pendency of the appeal should be the last agreed-upon placement between the parent and LEA.

We also urge the Department to consider repealing the revised IDEA regulation on significant disproportionality issued on December 12, 2016, as it will have profound financial implications for districts in a time of decreased federal and state investment in special education. This regulation attempts to re-write the statute of IDEA pertaining to findings of significant racial and ethnic disproportionality in special education. While AASA believes significant disproportionality is critically important, we think that the prior Administration misinterpreted what the statute says and that amended the regulations in ways that are not legally sound. First and foremost is the presumption in the new regulation that the Department is empowered to impose a specific methodology on States mandating how they determine which districts have significant racial and ethnic disproportionality. We do not think they have the authority to force States to use one methodology versus another. Setting aside this major disagreement with the regulation, we want to call your attention to two specific provisions of the significant

disproportionality regulation that will identify many new districts as having significant disproportionality. Absent a complete repeal of this regulation we kindly request removal of these regulatory provisions:

- The rebuttal presumption that a minimum cell size of no greater than 10 and n-size of no greater than 30 are reasonable. We can find no evidence in the statute or in report language that ED can pressure States to adopt a certain n size or cell-size and this aspect of the regulation is wholly inappropriate.
- The extended focus on significant disproportionality in discipline rates. The regulation clarifies that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities. We see no grounds in the statute for this expansion.

We also ask that if the regulations remains in place that ED exempts districts that are found to have significant disproportionality from setting aside 15% of their early intervention funding if they meet one or more of these criteria 1) an exceptionally low student population where the addition or subtraction of a few students results in meeting/not meeting the State's risk ratio, 2) the presence of a school serving a specific subgroup of students with disabilities, 3) a highly regarded special education program for students with disabilities that attracts students from across the State or region, 4) the presence of residential facilities or group homes within the district, 5) a recent environmental catastrophe specific to the region that has substantially impacted the health of children throughout the district, 6) very low rates of special education identification, restrictive placements or exclusionary discipline for all students when compared to state averages and 7) a highly mobile student population.

A regulation quickly issued in the waning days of the Obama Administration that costs (by ED's own estimate) between $300 and $500 million dollars warrants thoughtful reconsideration by the Trump Administration. We believe that this regulation is not aligned with Congressional intent in the 2004 reauthorization and greatly oversteps the agency's authority generally and must be rescinded or significantly amended.

Student Data and Privacy

As it relates to student data and privacy, AASA aligns itself with comments as submitted by Future Policy Forum. Federal education policy relates to student data and privacy has largely been shaped by federal law (and related regulations) known as the Family Educational Rights and Privacy Act (FERPA) and Protection of Pupil Rights Amendment (PPRA). Given the significant leadership of state policy and state legislative chambers on student data and privacy, we believe it to be unwise to change current federal regulations. States are working to implement and comply with recent state law changes, and could soon also fact change related to reauthorizations in federal legislation. As written by Future Policy Forum in their comments, "…this does not mean the Department does not have an essential role in student privacy. The Department's Privacy Technical Assistance Center (PTAC) has played a vital role since it was created in 2010 in providing technical assistance and best practices to states, districts, companies, and privacy advocates. PTAC has been especially useful as states have changed their laws in helping stakeholders determine how their laws and practices work with FERPA and other federal privacy laws….[we suggest] that additional resources be made available to PTAC so they can expand and continue providing this invaluable technical assistance and best practice guidance."

Non-Regulatory Guidance Documents

Outside of the regulatory scope, we have identified several pieces of non-regulatory guidance that we think should be repealed or substantially amended.

Ensuring Educational Stability for Children in Foster Care

As stakeholders intimately engaged in the statutory debate over educational stability for students in foster care, particularly regarding transportation and cost considerations, AASA believes the guidance does not accurately reflect Congressional intent. Specifically, there are three provisions in this guidance document that we think are not supported by law.

First, the guidance states "Transportation costs should not be considered when determining the child's best interest, which is consistent with the program instruction released by HHS subsequent to the passage of the Fostering Connections Act." To reiterate concerns brought by our school boards colleagues, the statute does not negate that cost cannot factor into determining placements; in fact, cost is always a factor when determining appropriate educational placement for a child. To suggest otherwise in the guidance is impractical and puts unrealistic restrictions on stakeholders during negotiations.

Next, the guidance states that determination of the best interest of the child should be a collaborative effort but that "the child welfare agency should be the final decision-maker." ESSA does not give more weight to the opinion of the child welfare agency than the state or local education agency. What is most disturbing about this statement is that it effectively removes the LEA from the dispute resolution process. If the LEA determines the educational needs of the child requires one placement but the child welfare agency disagrees than the LEA has no recourse as the child welfare agency has the final say. Nowhere in the statute is it clear that a child welfare agency is authorized to decide the educational placement if there is a conflict.

Finally, the guidance states that if a dispute arises over which agency will cover the cost of transportation, "the LEA must provide or arrange for adequate and appropriate transportation to and from the school of origin while any disputes are being resolved." The law clearly says states that the LEA will provide transportation if the child welfare agency agrees to pay the costs, the LEA agrees to pay the costs or the costs are shared. This guidance defeats ESSA's requirement that LEAs and child welfare agencies develop transportation procedures collaboratively. It removes any incentive for child welfare agencies to collaborate or contribute to costs by creating a default position that permits, and even encourages, child welfare agencies to avoid costs simply by failing to come to an agreement. The guidance harms children in foster care, by removing incentives for child welfare agencies to place students near their schools of origin, so students can maintain connections to their community.

Unless child welfare agencies pay for or share transportation costs, they have no financial incentive to reduce foster youth's residential mobility and place students near their school of origin. The result is additional disruption in the lives of children in foster care, exacerbating their educational, social, and emotional challenges. Congress considered these concerns in crafting ESSA's cost-sharing language. This guidance destroys this delicate balance and violates Congressional intent.

Placement and transportation cost issues are interrelated. If the LEA determines the school of origin is not in the best interest of the child and the child welfare agency as the "final decision-maker" determines it is, according to the guidance the LEA has no way to appeal the decision and, even if it did, would be required to transport the child and absorb at the least the initial costs during the dispute resolution process.

We urge the federal agencies involved to remove this guidance or at the very least amend it to clarify the following: 1) Child welfare agencies are not the final decision-maker, 2) costs can be considered during a best-interest determination and 3) the district is not required to provide transportation to a child to their school of origin unless there is an agreement regarding who will be paying for transportation.

Free Appropriate Public Education

AASA believes it is essential to ensure that students with disabilities are held to appropriately high standards. However, this document portends that every district should be using standards-based IEPs for students, including those with significant cognitive disabilities (who are held to alternate standards, but grade-level standards

nevertheless). Specifically, the guidance states the following: "In order to make FAPE available to each eligible child with a disability, the special education and related services, supplementary aids and services, and other supports in the child's IEP must be designed to enable the child to advance appropriately toward attaining his or her annual IEP goals and to be involved in, and make progress in, the general education curriculum based on the State's academic content standards *for the grade in which the child is enrolled.*"

The Supreme Court in its recent decision, *Endrew v. Douglas County,* chose not to reference the OSERS guidance when clarifying what it means to provide FAPE. Instead, the Court created a new standard that is intentionally not linked to standards-based IEPs. This standard is that a school district must offer an IEP "reasonably calculated to enable a child to make progress in light of the child's circumstances." Moreover, the Court specifically rejected the idea that an IEP be linked to grade-level curriculum. "A child's IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child's educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom."

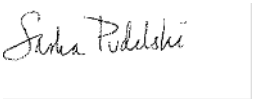
The OSERS guidance should then be rescinded since it determined that "the same curriculum as for nondisabled children" is the curriculum that is based on *a State's academic content standards for the grade in which a child is enrolled* and that FAPE is denied if a child, regardless of their extenuating disability, is not given IEP goals linked to their grade-level. The guidance even goes so far as to say that even students with the most significant cognitive disabilities must have their alternate academic standards "aligned with the State's grade-level content standards. The standards must be clearly related to grade-level content, although they may be restricted in scope or complexity or take the form of introductory or pre-requisite skills."

This policy document also contains a much more robust academic standard for FAPE than OSERS own regulations on IDEA which state that general education general education curriculum is "the same curriculum as for nondisabled children."[2] These OSERS regulations, written with stakeholder input, do not attempt to define that the curriculum be linked to the grade-level for the child.

Please have your staff contact us if you have any questions or need additional information. Thank you for the opportunity to provide input on this important manner.

Sincerely,

Noelle Ellerson Ng
Associate Executive Director



Sasha Pudelski
Assistant Director

[2] 34 CFR §300.320(a)(1)(i)