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August 25, 2017

Comments on Existing Education Department Regulations
Docket ID: ED–2017–OS–0074

Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington D.C. 20202

Attention: Hilary Malawer, Assistant General Counsel

The Council of the Great City Schools, the coalition of the nation's largest central city public school districts, submits the following comments on existing Education Department regulations in response to the June 22 extended Federal Register notice. This initial set of regulatory comments on the *Every Student Succeeds Act's* (ESSA) final assessment regulations were previously submitted to the Office of Elementary and Secondary Education (OESE) based on a May 31 request for comments. Additionally, the Council now has included a few other comments on the June 30 IDEA final regulations (34 CFR 300) that replicate a number of the ESSA assessment regulations and appear to incorporate others by reference, specifically the overly expansive ESSA translation regulations and the unauthorized ESSA regulatory requirement that every State establish a definition of students with the most significant cognitive disabilities. These two additional comments can be found on pages 4 and 6 and are noted with an asterisk (*).

The Council notes that many of the proposed ESSA rules developed by the Negotiated Rulemaking Committee have little or no basis in the Act and have now been incorporated by reference into the IDEA final regulations. The result is unnecessary and unwarranted federal requirements for the development and implementation of ESSA-related assessments, as well as in other areas not directly related to assessments. The Council requests that the Education Department exercise the leadership and direction that were lacking during Negotiated Rulemaking, and revise the assessment regulations in direct conformity with the provisions of the Act.

Moreover, the Council disputes any thought that the final ESSA assessment regulations from December 8, 2016 cannot be revised without reconvening a Negotiated Rulemaking Committee. First, it is specious to assume that subsequent administrations could not undertake notice and comment rulemaking on any set of final regulations, particularly when it took some 14 years to complete the last ESEA reauthorization. Second, the 2015 Neg Reg process appears to satisfy the ESSA section 1601 requirement for assessment regulations. And finally, the Secretary retains clear statutory authority in section 1601(c) to determine that Neg Reg is unnecessary, or the Secretary could determine under section 1601(c)(3) that there is an emergency need to have revised assessment regulations prior to the spring 2018 state testing period.

The following comments by the Council of the Great City Schools recommend revisions to the ESSA and IDEA assessment regulations, including the unauthorized requirement on the use of the ESSA 8th grade advanced math testing flexibility provision; the overregulation of provisions related to alternative assessments and state waiver conditions; and several other overly expansive assessment regulations.

Unauthorized Regulatory Requirements to Utilize the 8th Grade Advanced Math Testing Flexibility Provision under ESSA sec. 1111(b)(2)(C).

To prevent "double testing," ESSA allows an 8th grade student enrolled in advanced math classes to take a higher-level math assessment without being required also to take the regular 8th grade statewide math assessment. The assessment regulations [34 CFR 200.5(b)(4)], however, convert this narrow flexibility provision designed to avoid "double testing" into a federal mandate for statewide strategies "to provide **all** students in the State with the opportunity to be prepared for and to take advanced mathematics coursework in middle school" (emphasis added). In effect, this regulatory provision, drafted by the Department during negotiated rulemaking, imposes mandatory State-level policies to provide any middle school student universal access to prerequisite middle school advanced math coursework and to the advanced 8th grade math assessment--if the State opts to use this ESSA flexibility. This rule regulates statewide instructional course offerings, in contrast to the ESSA statute, which solely addresses a math assessment option. The regulation far exceeds the "double testing" flexibility specified in the Act, and propels the U.S. Department of Education into the arena of requiring additional State instructional coursework. Moreover, it is entirely unclear whether the requirement on "advanced mathematics coursework in middle school" would apply to Algebra 1, Algebra 2, Geometry, other advanced math courses, or all the above.

The somewhat ambiguous language developed during Negotiated Rulemaking on "strategies to provide all students … advanced mathematic coursework" does not absolve the state or its school districts from having to provide access to universal advanced middle school math coursework or the substantial costs that would result. Although many districts (including large urban districts) are actively expanding their advanced courses, requiring advanced math coursework for all middle school students in a state – apparently at each student's option -- is extremely cost-prohibitive for most school districts and would be difficult to staff due to shortage of qualified math teachers. Besides, this may not even be a good idea instructionally. And finally, the universal advanced math coursework provision, if enforced, would have a chilling effect on States seeking to exercise the flexibility to avoid 8th grade math double testing. This excessive and unauthorized regulatory add-on should be deleted from the final regulation.

Recommendation: Strike sec. 200.5(b)(4).

Multiple Areas of Federal Overregulation of Alternate Assessments and Conditions for State Waivers

ESSA Assessment Regulations Impose Unrelated and Unauthorized Requirements and Conditions on Receiving a Waiver of the 1% Statewide Alternate Assessment Cap in Direct Contradiction of ESSA Section 8401(b)(1)(E) and (b)(4)(D), and Are Designed to Circumvent Local IEP Team Determinations under IDEA.

The ESSA assessment regulations for the statewide 1 percent alternate assessment waiver option [ESSA sec. 1111(b)(2)(D)(ii)(IV)] add multiple requirements and conditions that are unrelated to alternate assessments for students with significant cognitive disabilities, and are in direct violation of ESSA prohibitions [sec. 8401(b)(1)(E) and (b)(4)(D)] on imposing unrelated

information requirements and "external conditions outside the scope of the waiver request". These regulations also attempt to negate the ESSA prohibition [ESSA sec. 1111(b)(2)(D)(ii)(II)] aimed at preventing both the Education Department and SEAs from imposing additional limitations on decisions made by local IEP teams in determining which individual students will be provided with an alternate assessment regardless of any state-level percentage caps. The extensive conditions and requirements in the assessment regulations [sec. 200.6(c)] for the submission and approval of a federal waiver of the statewide 1 percent cap were drafted originally by the Department during the 2016 negotiated rulemaking process to force states into limiting school district and IEP team determinations on the use of alternate assessments. In effect, the Department's regulation establishes a "back door" cap on LEA determinations of alternate assessments by conditioning state access to a statewide 1 percent waiver on the states' establishing policies that would reduce the use of local alternate assessments--despite ESSA prohibitions cited above.

In addition, the following unrelated regulatory requirements and conditions are prohibited under ESSA sec. 8401(b)(1)(E) and sec. 8401(b)(4)(D), but were nonetheless included in the December 8, 2016 alternate assessment waiver rules. Each of these unwarranted and unauthorized regulatory add-ons should be modified or deleted according to the following Council recommendations:

1. The unnecessary data requirement in sec. 200.6(c)(4)(ii)(A) regarding the numbers and percentages from <u>each separate subgroup</u> of students taking an alternate assessment is unrelated to whether each <u>individual student</u> would qualify to be alternately assessed based on the decision of the IEP team.
   <u>Recommended Revision:</u> *In sec. 200.6(c)(4)(ii)(A), strike "in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act";*

2. The unnecessary data requirement in sec. 200.6(c)(4)(ii)(B) to demonstrate compliance with the 95 percent testing participation requirement is a separate issue unrelated to the number and percentage of students determined to need alternate assessments by their IEP team.
   <u>Recommended Revision:</u> *Strike sec. 200.6(c)(4)(ii)(B) and renumber appropriately.*

3. The unnecessary state assurance to verify assessment numbers even for LEAs that have <u>not</u> exceeded the permissible 1 percent of locally assessed students has no basis in the Act [sec. 200.6(c)(4)(iii)].
   <u>Recommended Revision:</u> *In sec. 200.6(c)(4)(iii)) strike "the State anticipates".*

4. The unnecessary regulatory language referencing "each" State guideline is excessive [sec. 200.6(c)(4)(iii)(A)].
   <u>Recommended Revision:</u> *In sec. 200.6(c)(4)(iii)(A) strike "each of".*

5. The expansive regulatory requirement to address low-income, racial and ethnic, and English learner subgroup disproportionality in alternate assessments is likely to contravene the role of the IEP team in making individual (rather than subgroup) decisions on assessments and other services [sec. 200.6(c)(4)(iii)(B)].

Recommended Revision: *In sec. 200.6(c(4)(iii)(B) strike "Will address" and insert "Reviewed"*

6. The reference to the unauthorized regulatory requirement for a new state definition of students with the most significant cognitive disabilities has no basis in the Act (see comment below), and includes another unauthorized rule apparently requiring the State to meet the 1 percent statewide cap in future years despite no statutory limitation on subsequent year waivers [sec. 200.6(c)(4)(iv)(A)].
   Recommended Revisions: *Strike sec. 200.6(c)(4)(iv)(A) and insert the following: "(A) The State will review the implementation of its guidelines under paragraph (d), including reviewing any disproportionality in the percentage of students taking alternate assessments aligned with alternate achievement standards for any LEA under subparagraph (iii); and"; and strike clause (C).*

Requiring through Department Regulations a State Definition of Students with the Most Significant Cognitive Disabilities Has No Basis in ESSA and Does Not Reflect the Statutory Role of Each Individual IEP Team in Determining the Instructional Strategies, Services and Support for Each of These High-Need Students.*

The regulation [sec. 200.6(d)(1)] requiring a State definition of students with the most significant cognitive disabilities (SCD) fails to acknowledge the decision-making role of the student's IEP team, regarding the selection of assessments, instruction, and supports. No federal definition of SCD has ever been required in ESEA or IDEA, and a prior attempt in 2005 to establish a national definition through proposed federal regulations to IDEA failed. In 2016 the Department again tried and failed to establish a federal SCD definition during negotiated rulemaking, but succeeded in mandating that each state establish its own SCD definition – despite ESEA and IDEA operating without a SCD definition for decades. While states likely have the inherent authority to establish their own SCD requirements consistent with federal law, this federal regulatory mandate to establish a statewide SCD definition represents a major and unnecessary expansion of federal regulatory authority over ESSA, and an intrusion on state and local decision-making, as well as on the operation of IEP teams.

Recommendation:
In sec. 200.6(d)(1) strike "Such guidelines must include a State definition of "students with the most significant cognitive disabilities" that addresses factors related to cognitive functioning and adaptive behavior, such that – ", and insert "Such guidelines must ensure that – "; and
In sec. 200.6(d)(1)(i) insert "and" at the end of the subparagraph; and
In sec. 200.6(d)(1)(ii) strike "and" at the end of the subparagraph; and
In sec. 200.6(d)(1) strike subparagraph (iii).

*IDEA Regulation Revision: The changes in the June 30 IDEA final regulation appear to have included -- by a vague cross-reference -- the unauthorized ESSA regulatory requirement mandating that each State establish a State definition of students with the most significant cognitive disabilities (SCD). As underscored in the Council's ESSA comment above, a definition of SCD has never been required in federal law under ESEA or IDEA, including the failed attempt in the 2005 IDEA Notice of Proposed Rulemaking--again without a statutory basis. Moreover, the ESSA regulations require consideration of cognitive functioning and adaptive behavior factors similarly without statutory basis. The Council recommends eliminating

the vague Title I cross-reference to the unauthorized SCD definition requirement from the IDEA June 30 regulations.

IDEA Recommendation: In 34 CFR 300.160(c)(2), strike "under Title I of the ESEA".

Remove the Restrictive Language in the ESSA Alternate Standards Regulations to Properly Reference the Purposes of the Rehabilitation Act.
Sec. 200.2(b)(3)(ii)(B)(2) of the final regulations imposes a new restriction not found in the ESSA relating to the adoption of state alternate academic achievement standards. ESSA requires alternate achievement standards to be aligned to postsecondary education coursework or employment skills, including those consistent with the "purposes" of the Rehabilitation Act. The regulation, however, narrows the statutory authority by referencing only the "competitive integrated employment" purpose of the Rehabilitation Act, rather than the multiple purposes in the various titles of the Act. In sum, if Congress had wanted to narrow the application of the Rehabilitation Act to only include competitive integrated employment, Congress could have done so, but did not. Since the Rehabilitation Act merely seeks to "maximize" competitive integrated employment, the Act is clearly acknowledging that other employment experiences are acceptable, even though not necessarily desirable in every case. It remains uncertain whether this restrictive regulatory provision will result in states ultimately having to undertake revisions to their current alternate standards due to the specific federal regulatory focus on competitive integrated employment. The final regulation, therefore, should directly reflect the language of the Act without expansion or restriction.

Recommendation: In sec. 200.2(b)(3)(ii)(B)(2), strike "competitive integrated". [In the alternative, strike "competitive integrated" and insert "gainful".]

Miscellaneous Assessment Regulations for Reconsideration

Expanded Translation Requirements for Parent Notices and Reporting Exceed the Requirements of the Act, and Are Costly and Impractical to Implement. *****
ESSA includes multiple notice and reporting requirements in order to provide parents with information on the programs, options, and performance of the district, school, and their students. These ESSA statutory requirements include consistent translation responsibilities across the various sections of Title I to provide parents with applicable information "*in an understandable and uniform format, and to the extent practicable, in a language the parents can understand*". School districts, particularly large school districts, typically enroll students with over a hundred different language backgrounds. Written translations of some of these multiple languages are often impractical and at times impossible. The ESSA assessment regulations, however, require written translations or oral translations, as well as alternative formats. The cost of written translations typically ranges from 12 to 22 cents per word depending on how common or uncommon the language may be. Moreover, the required LEA and individual School Report Cards also will be much lengthier under ESSA because of new reporting requirements in the law. The broad, new regulatory provisions of the Department are an unwarranted expansion of ESSA, which denigrates the "to the extent practicable" flexibility built into the Act. The ESSA assessment regulations should directly reflect the language of the Act without expansion.

Recommendation: In sec. 200.2(e)(1) insert "and" at the end of the paragraph; and in sec. 200.2(e)(2) and (3) strike "written" in the first instance that it appears, and strike everything after "understand", and add a period. And, make appropriate conforming revisions in other sections of part 200.

*IDEA Regulation Revision: The parent information-sharing responsibilities under IDEA, including assessment results, are much more extensive than under ESEA, and often involve hundreds of pages of documents, evaluations, reports, IEPs, notes, etc. The overly expansive ESSA translation regulations relating to assessments (see above comment) create new, unauthorized, and costly requirements for school districts that could be readily generalized or misinterpreted to apply to any or all special education functions based on the June 30 IDEA final regulation changes. The Council strongly recommends returning to the actual language of the ESSA statute without embellishment, and cross-referencing the actual statutory provision [see ESEA sec. 1111(b)(2)(B)(x)] within the IDEA assessment regulations [34 CFR 300. 160(e)], rather than the current ESSA regulatory cross-referencing.

IDEA Recommendation: In 34 CFR 300.160(e), strike "consistent with 34 CFR 200.2(e)" and insert "consistent with sec. 1111(b)(2)(B)(x)".

Unnecessary Regulatory Requirement Allowing Only a "Districtwide" Option of Using a Locally Selected, Nationally Recognized High School Assessment.
ESSA provides the local option of using a locally selected, nationally recognized high school academic assessment in lieu of the regular statewide high school assessments -- but only with state approval. However, the "districtwide" implementation requirement added during negotiated rulemaking may be particularly impractical for large school districts with dozens of high schools. Large school districts rarely make instructional decisions without piloting a new initiative in a few schools to determine its efficacy. This "all or nothing" districtwide regulatory requirement – not required by the Act – eliminates the potential of piloting a nationally recognized high school assessment. Moreover, districts with a wide variety of high schools – comprehensive, CTE, magnet, themed, alternative, examination, etc. – may want to use a nationally recognized high school assessment for only certain types of high schools and not others. Since state approval is required in any case, districts should have the flexibility to propose to their SEA how best to use this national high school assessment option.

Recommendation: In sec. 200.3(a)(2), strike "all high school students in the LEA" and insert "all students in the high school". And, make appropriate conforming revisions in other sections of part 200.

Unwarranted Expansion of the Regulatory Definition of an Assistive Technology Device by Referencing Unspecified Nationally Recognized Accessibility Standards.
IDEA sec. 602(1) and 34 CFR 300.5 provide the operational definitions of assistive technology devices for school districts. The final ESSA assessment regulations [sec. 200.6(b)(1)], however, expand that definition by inserting a reference to being consistent with unspecified "nationally recognized accessibility standards". Such non-federal, third-party standards can readily change over time without any review, control, or input from Congress or the Department of Education, and without notice to the nation's school districts. The Council suggests that it is inappropriate

for a federal agency to effectively delegate regulatory criteria or authority to third parties, and to hold school districts responsibility for compliance with such unspecified and variable external standards.

Recommendation: In sec. 200.6(b)(1), strike "consistent with nationally recognized accessibility standards,".

Unclear Regulatory Reference to Students with a Disability Under an Act Other Than IDEA.

ESSA refers to students with a disability "under an Act other than IDEA" under sec. 1111(b)(2)(B)(vii)(II) only in the context of appropriate accommodations. For all other purposes, ESSA references the IDEA sec. 602(3) definition of a child with a disability, and does not include other Acts. The ESSA assessment regulations [sec. 200.6(a)(1)], however, include other Acts for all assessment purposes, rather than solely for accommodations. The implications of this regulatory expansion to other Acts are difficult to predict, but nonetheless should be clearly restricted to only the accommodations specified in ESSA.

Recommendation: In section 200.6(a)(1)(iii), insert "for accommodations purposes only," before the word "including". And, make any other conforming changes in other provisions.

Please let us know if there are questions at mcasserly@cgcs.org or at jsimering@cgcs.org. Thank you.

Sincerely,

Michael Casserly
Executive Director