

September 20, 2017

Office of the General Counsel

U.S. Department of Education

400 Maryland Avenue SW - Room 6E231

Washington, DC 20202

**Attention:** Hilary Malawer, Assistant General Counsel

**Comments on Existing Education Department Regulations (IDEA)**

**Docket ID:** **ED–2017–OS–0074**

The Council of the Great City Schools, the coalition of the nation’s largest central city school districts, submits the following comments on existing Education Department regulations relating to the Individuals with Disabilities Education Act (IDEA) in response to the August 11, 2017 notice in the Federal Register. The Council notes that it has already submitted comments on assessment regulations under the Every Student Succeeds Act (ESSA) and has inserted here those ESSA assessment comments that directly apply to students with disabilities as Appendices at the end of these comments.

Over the years, the Council has submitted multiple written comments and pointed out in numerous meetings that the U.S. Education Department often expands federal legislative requirements beyond what is specified in statute when it promulgates education regulations. This has occurred in elementary and secondary school-related regulations spanning multiple presidential administrations. The Council, therefore, supports the Department’s initiative to systematically review past administrative and regulatory actions. We also request that this review process consider not only regulations and guidance, but also Department policy letters.

The Great City Schools strongly supports universal access to public education for students with disabilities guaranteed by the landmark IDEA legislation 40 years ago. The Council also supports transparency and accountability for the educational performance of students with disabilities established in No Child Left Behind (NCLB).

In amending IDEA multiple times over the past 40 years new statutory requirements were added each time. In most instances, the IDEA amendments were followed by additional federal regulations, guidelines, policy letters, new state plans, revised state statutes, and additional state regulations, policies and procedures. After 40 years of layering special education requirements on top of each other, some regulatory reform at the federal level is warranted.

The current labyrinth of legal requirements in special education continues to grow, and requires highly trained compliance and content experts to navigate the maze. Substantial state and local school resources, including staffing, are devoted to compliance. And those resources -- at least in part – might be better utilized in strengthening instruction and support services.

The Council’s comments in this letter are focused on IDEA regulations that either have no basis in the statute, or unnecessarily dictate, require consideration of, or even discourage local actions or activities that more appropriately should be determined by school officials in collaboration with professionals, parents, other applicable stakeholders, and students. Please let us know if clarification is needed on any of these comments.

Sincerely,



Michael Casserly

Executive Director

**COUNCIL OF THE GREAT CITY SCHOOLS COMMENTS**

**ON EXISTING FEDERAL IDEA REGULATIONS**

**Free Appropriate Public Education (FAPE)**

**The Department’s Regulatory Definition of a Free Appropriate Public Education (FAPE) at 34 CFR 300.17 is Overly Expansive, Inconsistent with the 2004 IDEA Amendments, and Should Be Limited to the Specific Language of the Act**.

The Department’s IDEA regulations add a phrase to the statutory definition of FAPE which incorporates every federal IDEA regulatory provision as a component of FAPE compliance – something that the Act does not. Section 602(9)(b) of the Act specifies that special education and related services must “meet the standards of the State educational agency;” as one of four statutory requirements for the provision of FAPE. The Department’s regulations [34 CFR 300.17(b)], however, insert “meet the standards of the SEA**,** **including the requirements of this part**;” – encompassing every requirement of the Part 300 federal regulations (substantive, procedural, definitional, interpretative, financial, etc.). If read strictly, this major regulatory add-on phrase makes little operational sense. A violation of each provision of the federal IDEA regulation logically would not constitute a violation of a student’s right to a free appropriate public education as defined in section 602.9(b) of the Act. This IDEA regulation clearly exceeds the statute, and reflects the ongoing over-regulation of the Act by the Department from the earliest years of IDEA. The Council acknowledges that this particular over-regulation was included in the 1983 iteration of IDEA regulations [then 34 CFR Part 300.4(b)]. However, amendments to IDEA since 1983 make the Department’s over-regulation of the FAPE definition not only illogical but also unequivocally inconsistent with the current statute. Under current section 615(f)(3)(E) of the Act, for example, a FAPE violation must be substantive not procedural, unless a procedural violation rises to the level of a deprivation of a student’s educational benefits or a substantial impediment to a student’s or parent’s rights. In short, a minor or technical violation of any of the numerous procedural requirements of IDEA regulations is not a FAPE violation per se – as the current regulatory definition now reads. An omission from an IDEA notice requirement, a minor delay in a timeline, or an oral *versus* written explanation, for example, would not be a FAPE violation under the 2004 amendments to the Act. The regulatory definition of FAPE warrants correction.

Recommendation: In 34 CFR 300.17(b) strike “, including the requirements of this part”.

**IEP and Evaluation Related Regulatory Issues**

**There is No IDEA Statutory Requirement for Extended School Year Services**.

Extended School Year Services (ESY) is not mentioned in the IDEA statute. Nonetheless, the Department has inserted specific ESY regulatory provisions in the IDEA rules [34 CFR 300.106(a)(1) through (3) and (b)(1) & (2)]. The Department references a general FAPE provision of the Act [section 612(a)(1)] as its legal “authority” despite no mention of ESY in that provision or any other section of the Act. The Department’s IDEA regulations require a school district to “ensure that extended school year services are available”, using the term “must ensure” [34 CFR 300.106(a)(1)] in a manner that is indicative of a federal requirement. Because of this provision, numerous States have required ESY as part of their statewide IEP form or part of their State-level regulations. And, although paragraph (a)(2) of the regulations notes that ESY is only required upon an IEP team determination of necessity on an individual student basis, this additional paragraph does little to temper the previous “must ensure” provision. The Department should not draft federal regulations that have the appearance of regulatory requirements, even though technically permissive – particularly when there is no basis is the statute for the regulation, as is the case with ESY.

Recommendation: In 34 CFR, strike section 300.106 entirely, and reserve.

**Transition Plans**

The 2004 IDEA Amendments repealed the earlier IDEA age 14-16 transition plan requirements, adding new statutory language for transition plans “not later than the first IEP to be in effect when the child is 16” [sec. 614(d)(1)(A)(i)(VIII)]. The 2005 regulations, nonetheless, inserted the unauthorized regulatory requirement for transition plans “when the child turns 16, or younger if determined appropriate by the IEP Team” [34 CFR 300.320(b)] replicating the identical language now repealed from the 1997 IDEA amendments, and thereby improperly continuing the requirements of the amended legislative iteration of IDEA. This regulatory requirement is also inconsistent now with section 614(d)(1)(A)(ii)(I) of the Act, specifying that no additional information is required in an IEP other than what is explicitly required by the statute itself. This regulation should directly reflect the amended language of the Act.

Recommendation: In 34 CFR 300.320(b), strike “, or younger if determined appropriate by the IEP Team,”.

**Alternative Means of IEP and Other IDEA Meeting Participation**

The 2004 IDEA amendments provided for alternative means of IDEA meeting participation, including for IEP Team members [section 614(f)]. Congress recognized that technology provided for active participation by parents, parental representatives, and school personnel in multiple administrative matters under IDEA without necessitating a formal in-person meeting of all participants – including IEP team and placement meetings, as well as mediation, resolution, and certain administrative due process meetings. Physical attendance now is not required with alternative participation, providing greater convenience and comparable productivity. The 2005 regulations, however, include language that appears to discourage alternative means of participation. The Council recommends removing the negative connotations in the current regulations concerning alternative means of participation.

Recommendations:

* In 34 CFR 300.322(c), strike “the public agency must use other methods to ensure parent participation” and insert “the public agency may use other methods to facilitate parent participation”.
* In 34 CFR 300.322(d), strike “if the public agency is unable to convince the parents that they should attend.”, and insert “if the public agency is unable to arrange for a parent to attend.”
* In 34 CFR 300.501(c)(3), strike “If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.”, and insert “If neither parent can attend a meeting in which a decision is to be made relating to the educational placement of their child, the public agency may use other methods to facilitate parent participation, including individual or conference telephone calls, or video conferencing.”

**Transferred Students**

To make the 2005 regulations more workable in relation to developing IEPs for transferred students, a few clarifications are needed. Some disabilities will not be immediately obvious in the school enrollment process or even in the first days of school attendance. Moreover, school districts need to have a reasonable basis to suspect that a disability exists, and to initiate the IDEA process and determine if a transferred student is a student with a disability. This may include a records transfer from the previous district or input from the parent or the student’s new teacher(s). The comparable service requirement for a transferred student, however, can only be addressed if the receiving district has been notified of the content of the previous IEP or that a previous IEP exists.

Recommendation: In 34 CFR 300.323(e) and (f), strike “If a child with a disability” and insert “Subject to subsection (g), if a child with a disability”.

**Basis of a Parent’s Disagreement with the School District’s Evaluation Should Be Provided Prior to Obtaining an Independent Educational Evaluation at Public Expense.** The current IDEA regulation [34 CFR 300.502(b)(4)] established in 1999 allows a parent of a student with a disability to “disagree” with a school district’s evaluation and obtain an independent educational evaluation at public expense without providing any basis for the disagreement with the school’s evaluation. Under this regulation, a parent can trigger a substantial public expenditure for a private independent evaluation without providing any reason why the school’s evaluation is not appropriate. The school district then must file and prevail in a due process proceeding to prove that their evaluation is appropriate, and not be financially responsible for the cost of an independent evaluation. The regulation allowing for a parental disagreement with the public agency’s evaluation resulting in a public expenditure for an independent evaluation was included in the 1983 IDEA regulations referenced in the Act. The 1999 IDEA regulations, however, expand this earlier regulatory requirement to the point of absurdity – despite no statutory changes -- by allowing the basis for the parent’s disagreement with the current evaluation to be entirely undisclosed. Moreover, the 1999 regulation effectively requires the school district to file for a due-process hearing without any allegation or indication of noncompliance, inappropriateness, or error in the public agency’s evaluation. The Council offers a common-sense recommendation that the basis of the parent’s disagreement with a public evaluation be provided to the public agency in a timely manner.

Recommendation: In 34 CFR 300.502(b), strike paragraph (4) and insert “(4) If a parent requests an independent education evaluation at public expense under paragraph (b)(1), the parent must provide the basis for the disagreement or objection to the public evaluation to the public agency in a timely manner.”

**Withdraw or Modify the 2016 *Jennifer Carroll* Policy Letter on Independent Evaluations**. The 2016 Carroll policy letter provides for an independent educational evaluation at public expense at any time when a parent’s disagreement with the public agency’s evaluation indicates that the school district “did not assess the child in all areas related to the suspected disability”. During the three-year period between the last public evaluation and the next required reevaluation, a student may manifest other areas of disability not suspected earlier by the school or the parent. The Carroll policy letter appears to indicate that in all circumstances, an independent evaluation at public expense can be obtained, apparently including even newly manifested conditions or where there was no concurrent disagreement by the parent with the public evaluation. The Council believes that before a school district is required to shoulder the substantial additional public cost to pay for an independent evaluation for a newly suspected condition, that a public reevaluation should be allowed in an expeditious manner. The Council acknowledges that if the public agency or the parent had indications of a suspected area of disability that was not assessed during the evaluation, then the Carroll policy letter would be applicable.

Recommendation: Withdraw or modify the Jennifer Carroll policy letter in accordance with the above circumstances.

**State Complaint Process**

**Unnecessary and Unauthorized State Complaint Rules Included in IDEA Regulations.**

There is no authorization in the Individuals with Disabilities Education Act (IDEA) for the state complaint procedures inserted in 34 CFR 300.151 to 300.153. In fact, it is the General Education Provisions Act (GEPA at 20 USC 1221e-3 - The General Authority of the Secretary) that is cited as the basis for these particular IDEA regulations, not IDEA itself. Moreover, the State complaint rules have been included, then removed, then reinserted again into the IDEA regulations over the decades. And, the state complaint rules -- when removed from the IDEA regulations in 1979 -- were not included in the 1983 regulatory protections adopted by statutory reference [sec. 607(b)].

In short, the state complaint regulations should be part of the general compliance framework of regulations for all federal education programs under the Education Division General Administrative Regulations (EDGAR), rather than as a set of unauthorized IDEA regulatory requirements. These pages of unauthorized state complaint regulations are so expansive as to duplicate the resolution and mediation procedures [34 CFR 300.152(a)(3)(i) and (ii)] that are only authorized under the due process provisions of section 615(d)(2)(E) and (e) of the Act. Finally, the state-complaint regulatory provisions of IDEA [34 CFR 300.151(b)(1)] provide for the award of compensatory services or monetary damages without any statutory authority, and without any guaranteed access to a neutral tier of facts.

Unfortunately, the unauthorized state complaints rules within the IDEA regulations also tend to confuse stakeholders given the similarity to numerous other IDEA due process notice, complaint, hearing, resolution, and appeal procedures, which are specifically authorized in the Act. A state complaint process was designed to provide a basic opportunity to identify and correct issues of systemic local violations of grant-in-aid requirements under any state-administered federal education program, and was not intended for the adjudication of individual rights and benefits that are remediable under the separate due process procedures of IDEA.

The three references to state complaints in the Act were added in 2004 -- two of which were added to clarify any confusion between these state complaints previously inserted into the IDEA regulations for violations of IDEA grant requirements and the statutory due process complaints filed under the detailed procedures of section 615 of the Act. The other reference in the Act provides for the use of state set-aside funds by state officials for investigating complaints of noncompliance. EDGAR requirements are the appropriate regulatory location for general federal grant complaint and resolution procedures for state-administered federal education programs under the GEPA authority of the Secretary.

Recommendation: In 34 CFR 300, strike 300.151 through 300.153 regarding state complaint procedures, and make any associated conforming changes in other regulations.

**Additional and Unauthorized Procedural Safeguard Notice for State Complaints Inserted in IDEA Regulations**.

In addition to the above set of IDEA state complaint procedural regulations having no statutory authority under IDEA, an additional procedural safeguard notice for state complaints has been inserted in the IDEA regulations at 34 CFR 300.504(a)(2) without any basis in the Act. Section 615(d)(1)(A)(ii) of the Act requires a procedural safeguards notice “upon the first occurrence of the filing of a complaint under subsection (b)(6)”. A “subsection (b)(6) complaint” in section 615 is solely a due process complaint and, in fact, includes a specific cross reference to the Impartial Due Process hearing timeline in section 615(f)(3)(D). The statutory procedural safeguard notice requirements, therefore, do not apply to state complaints, and neither should the regulation’s requirements.

Recommendation: In 34 CFR 300.504(a)(2), strike “of the first State complaint under sections 300.151 through 300.153 and upon receipt”.

**The Resolution Process Applies to a Due Process Complaint and Not to a State Complaint** **as Misconstrued in the IDEA Regulations [34 CFR 300.504(c)(5)**].

Prior to an Impartial Due Process Hearing under section 615(f)(1) of the Act, an “opportunity to resolve” meeting must be convened by the school district. There is no mention of the state complaint process regarding the resolution process in the Act, therefore, there is no basis for expanding the regulations to the state complaint process. The Council, nonetheless, supports retaining the required explanation of the difference between due-process procedures and the state complaint process in the procedural safeguards notice to minimize confusion among stakeholders regarding the complexities of special education procedures as referenced above.

Recommendations:

* In 34 CFR 300.504(c)(5), strike “and State complaint”.
* In 34 CFR 300.504(c)(5)(i) and (ii), insert “due process” prior to “complaint”.
* In 34 CFR 300.504(c), redesignate 300.504(c)(5)(iii) as 300.504(c)(6), and renumber current paragraphs (c)(6) through (c)(13) as (c)(7) through (c)(14).

**Misinterpretation of the Section 615(f)(3)(F) “Rule of Construction” in the Existing IDEA Regulations [34 CFR 300.513(b)].**

The Education Department entirely misinterpreted section 615(f)(3)(F) of the Act, which sought to clarify that filing a state compliant is not precluded by the multiple requirements of the IDEA due process procedures. This provision of the Act has nothing to do with appealing due process hearing decisions in a two-stage administrative hearing structure. This new statutory subparagraph in 2004 directly followed another new revision of the Act requiring due process hearing officers to make decisions on substantive grounds, not technical procedural violations [sec. 615(f)(3)(E)(i)]. This Rule of Construction [sec. 615(f)(3)(F)] was included to clarify that the state complaint process provides an opportunity for parents to identify and correct procedural violations that did not rise to the level of a substantive due process violation or denial of FAPE in filing a state complaint--in the same manner that any state complaint could be filed on an alleged violation of ESEA or other state-administered federal grant program requirement. This erroneous IDEA regulation should be corrected.

Recommendation: In 34 CFR strike 300.513(b), and insert a new subsection (b) as follows: “(b) Construction Clause. Nothing in sections 300.507 through 300.513 shall be construed to affect the right of a parent to file a compliance complaint with the State educational agency.”

**Disproportionality Regulatory Requirements and Methodologies from 2016 Should Be Withdrawn and Re-Promulgated Due to a Lack of Discernable Standards or Criteria, as well as Questionable Impact Analysis.**

Over-identification of students from various racial and ethnic backgrounds for special education services and for disciplinary action is a longstanding national issue. The implementation of current law clearly has been inadequate. While the nation’s Great City Schools have a responsibility to improve local policies and practices to correct disparities, we believe that the U.S. Department of Education has a responsibility and a legal mandate under IDEA to better address this national issue. Yet, even with nearly three years of federal information collection and deliberation, the Department’s December 19, 2016 regulatory action on disproportionality was inadequate and indefinable.

Under the 2016 regulations, States are required to establish new “thresholds” for identification, placement, and discipline among students of color in special education based on a methodology that no state is currently using (see Federal Register statement at 81 FR 10993). Nearly half of the states currently use a weighted risk ratio that is now prohibited under the 2016 regulations -- apparently because of its complexity and lack of public understanding, rather than a specified weakness in the methodology itself. More importantly, instead of providing the customary compliance criteria for the newly-required and simplified risk ratio or offering acceptable compliance ranges or parameters, the 2016 disproportionality regulation establishes monitoring and enforcement based on an unspecified standard of “reasonableness” determined at U.S. Education Department discretion. And, without specific criteria or a defined standard of reasonableness, the Department’s national impact estimate seems purely speculative and insufficient to justify the regulation. Moreover, with some $1.8 billion in expenditures at issue, the nation’s school districts deserve a better thought-out and less ambiguous set of regulations.

The Council suggests rolling back the disproportionality determination methodology and new requirements from the December 19, 2016 regulations – particularly since compliance is not required until July 2018 -- while maintaining the increased flexibility provided under the comprehensive coordinated early intervening services (CCEIS) regulations and the progress-based local disproportionality safe-harbor.

Recommendations:

* In 34 CFR 300.646:

1. In subsection (a)(3) strike “removal from placement” and reinsert “actions” from earlier regulations;
2. Strike subsection (b) and renumber subsection (c) as subsection (b);
3. In redesignated subsection (b), strike “, including disciplinary removals”, and strike “and (b)”;
4. In redesignated subsection (b)(1), strike “annual”, and strike “in particular education settings, including disciplinary removals,”;
5. In redesignated subsection (b)(2), strike “paragraph (c)(1)” and insert “paragraph (b)(1)”;
6. Renumber subsections (d), (e), and (f) as subsections (c), (d), and (e); and make any necessary conforming changes; and

* Strike 34 CFR 300.647, and issue new proposed regulations for public comment.

**APPENDIX A**

**Council of the Great City Schools**

**Conforming IDEA Regulation Comments Submitted on August 29, 2017**

**In ESSA Assessment Regulation Review Comments**

**Department Regulations Requiring 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”.*

**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)”.*

**APPENDIX B**

**ESSA Comment on Imposition of State Alternative Assessment Waiver Conditions**

**(For Information Purposes Only -- No IDEA Regulation Revision Recommended)**

**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.

Recommendations:

1. The unnecessary data requirement in sec. 200.6(c)(4)(ii)(A) regarding the numbers and percentages from each separate subgroup of students taking an alternate assessment is unrelated to whether each individual student would qualify to be alternately assessed based on the decision of the IEP team.

Recommended Revision: *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”;*

1. 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.

Recommended Revision: *Strike sec. 200.6(c)(4)(ii)(B) and renumber appropriately.*

1. The unnecessary state assurance to verify assessment numbers even for LEAs that have not exceeded the permissible 1 percent of locally assessed students has no basis in the Act [sec. 200.6(c)(4)(iii)].

Recommended Revision: *In sec. 200.6(c)(4)(iii)) strike “the State anticipates”.*

1. The unnecessary regulatory language referencing “each” State guideline is excessive [sec. 200.6(c)(4)(iii)(A)].

Recommended Revision: *In sec. 200.6(c)(4)(iii)(A) strike “each of”.*

1. 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”*

1. 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).*