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Before the Subcommittee on Early Childhood, Elementary and Secondary Education

Committee on Education and the Workforce

United States House of Representatives

Hearing on **"Next Steps for K-12 Education: Implementing the Promise to Restore State and Local Control"**

February 10, 2016

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Chairman Rokita, Ranking Member Fudge, and other distinguished members of the subcommittee, it is a privilege to present testimony on the implementation of the Every Student Succeeds Act ("ESSA" or the "Act"). Thank you for the opportunity.

By way of background, in my past role as General Counsel one of my tasks was to advise the Secretary of Education on the contours of newly-enacted laws. In other words-- what are the boundaries or scope of the text? Boundaries in a given law are somewhat analogous to boundaries on athletic fields and basketball courts.

The process of advising the Secretary necessarily involves making judgments about whether proposed regulatory actions or other implementation decisions are within the scope of the words of the statute. This generally involves a close look at the particular text, as well as looking at the text in light of the whole.

One question that arises is what happens if a regulation is drafted in a manner that is outside the scope of the text. The answer is a department or agency risks a potential lawsuit and having the regulation set aside by a court. With this as context, I offer my comments on implementation.

My testimony will focus upon three things. First, the new law's broad shift of authority to states and school districts. Second, I will share a few thoughts on implementation, and third, I will conclude with a brief discussion of some of the prohibitions found in Title VIII's General Provisions.

With respect to the shift of authority to states and school districts, the new law provides states with authority to design accountability systems from the ground up. In effect, the states become design engineers operating within broad federal guidelines.

In addition to accountability, the law's shift of authority can be seen in the multiple affirmations of state-level direction over standards and assessments, and in the prohibitions placed upon federal involvement in standards, assessments, and curriculum. Though I will talk about prohibitions in a little more detail in a few minutes, I would note here that the new law prohibits the federal government from mandating, directing, or requiring Common Core State Standards, as well as any assessments aligned to such standards. Similarly, no funds may be used for developing, incentivizing, pilot testing, field testing, implementing, administering, or otherwise distributing any federally-sponsored national test, unless expressly authorized in law.

A third aspect of the shift to states and school districts can be found in the waiver authority. New language was added to section 8401 to make clear that the federal government may not disapprove a waiver request based on "conditions outside the scope of the waiver requested." Nor may the Secretary require, as a condition of waiver approval, an applicant to use Common Core standards, or use specific assessments such as those aligned to the Common Core, nor include in or delete from a waiver request specific elements of state academic standards, assessments, accountability systems, or teacher evaluation systems.

Turning now to implementation--were I providing advice to those charged with implementation--I would note the primary importance of the text in any interpretive challenge. Ultimately, fidelity to the text will prove critical in any dispute. Thus, in reading the text of the Every Student Succeeds Act, one should be aware of and distinguish between purpose statements, express program requirements, rules of construction, findings, and Sense of Congress provisions. Likewise, in thinking through implementation, one should be apprised of the various canons of construction. The "plain meaning" rule, the rule of non-retroactivity, and the

harmonization of disparate texts (where possible) are but three examples. One should also give attention to the use of "shall" versus "may," and such basic things as grammar and punctuation.

Separate and apart from consideration of the text is the legislative history. In order to provide as-complete-a-picture as possible to those implementing the law, I would recommend a careful review--prior to implementation and rulemaking--of relevant parts of committee reports, floor debates, and conference reports. They are particularly helpful in understanding the background and larger context.

Finally and to conclude, I would advise careful attention to Title VIII's General Provisions, understanding they deal with discrete, and sometimes controversial topics. They include prohibitions, limitations, and commentary on a host of issues. Some have been in the law for years. Others are new, or variations of current law. Most are straightforward and unequivocal.

For example, officers or employees of the federal government—whether through grant, contract, or cooperative agreement—are prohibited from mandating, directing, or controlling a state, school district, or school's instructional content, curricula, programs of instruction, or standards or assessments. This prohibition includes any requirement, direction, or mandate to adopt the Common Core Standards, or any other standards common to a significant number of states, as well as tests or curricula aligned to such standards. Nor can a state be penalized by the federal government for withdrawing from the Common Core.

In a similar vein, Department dollars may not be used for any purpose relating to a mandatory nationwide test or certification of teachers, principals, or other school leaders.

One last example is the prohibition on getting standards approved or certified by the federal government. No state is required to do so.

The unifying theme—at least for many of these provisions--is a concern about the appropriate role(s) of the federal government, states, and school districts. The same was true in 1979, the year of enactment of the Department of Education Organization Act. One of the key findings of that enabling statute stated "[I]n our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States." In like manner, Congress reaffirmed one of its purposes for creating the Department, which was "to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education."

Thank you. I would be pleased to respond to any questions.