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January 6, 2016

The Honorable Lamar Alexander  
Chairman  
Senate HELP Committee  
428 Senate Dirksen Office Building  
Washington, D.C. 20510

The Honorable Patty Murray  
Ranking Member  
Senate HELP Committee  
428 Senate Dirksen Office Building  
Washington, D.C. 20515

Re: DeVos Confirmation Hearing

Dear Chairman Alexander and Ranking Member Murray:

The National School Boards Association (“NSBA”), working with and through our state associations, represents more than 90,000 local school board members and nearly 14,000 school boards from every region and almost every State in the country. On behalf of our membership, we write to encourage members of the Senate Health, Education, Labor and Pensions Committee to engage in a meaningful and deliberative manner as the Committee considers the nomination of Ms. Betsy DeVos for the position of Secretary of Education.

The start of a new Administration provides an exciting opportunity for policymakers and education leaders to work together to set new goals and launch a new education agenda. NSBA is excited for the opportunity to collaborate with new leadership at the U.S. Department of Education (ED) to share our vision for education that focuses on local governance and empowering local decision-making. However, leaders must identify the priorities they believe must be attended to, and offer solutions for addressing them. As such, we urge you to focus on the following education priorities throughout the confirmation process:

1. **Implementation of the Every Student Succeeds Act (ESSA):** As the new Administration moves forward with ESSA implementation, it is exceedingly important that any regulations and non-regulatory guidance accomplish what Congress sought through the reauthorization: to restore significant decision-making impacting education to the local level and recalibrate the federal role in education.
  - a. How will the nominee approach the proposed supplement not supplant rule promulgated by the U.S. Department of Education?
  - b. Will the nominee seek to rescind or revise finalized accountability regulations to address concerns previously raised by NSBA?

- i. For example, ESSA requires States, school districts, and school sites to “[a]nnually measure the achievement of not less than 95 percent of all students, and 95 percent of all students in each subgroup of students, who are enrolled in public schools on the assessments [required by ESSA].”<sup>1</sup> The law also requires States to “provide a clear and understandable explanation of how the State will factor the requirement of [testing 95%] into the statewide accountability system.”<sup>2</sup> The plain language of the statute allows the State to determine, without limitation, how and to what extent the 95 percent participation requirement will be included in the accountability system. However, final regulations proposed by the Department prescribe the four specific actions States *must* take regarding school and districts that fail to assess 95% of all students and students in each subgroup, including a fourth “state determined” option, which must be sufficiently rigorous to improve the participation rate.
- ii. ESSA authorizes each local school district identified by the State, for either comprehensive support and improvement or targeted support and improvement, to “develop and implement” a “plan for the school to improve student outcomes, that . . . includes evidence-based interventions.”<sup>3</sup> The Department’s final regulations permit a State to establish an exhaustive or non-exhaustive list of State-approved, evidenced-based interventions for use in schools implementing comprehensive or targeted support and improvement plans, thus limiting the improvement interventions local school leaders may choose to implement.
- c. How will the nominee ensure States engage in meaningful consultation with stakeholders, including local school board members, in the development of State and local plans?
- d. How will the U.S. Department of Education restore significant decision-making authority to the local level and work with stakeholders to ensure successful implementation of ESSA?

**2. Department of Education & Federal Overreach:** As the new Administration identifies areas for policy development and matters that require executive action, leaders must be cognizant of the legal limitations that have been placed on the U.S. Department of Education.

- a. What is the nominee’s view on the appropriate role of the federal government in education? What role should the federal government play in education?
- b. Will the nominee eliminate the practice of creating federal, programmatic obligations from which there is no clear statutory authority?
- c. How will the U.S. Department of Education, under the supervision of the nominee, use non-regulatory guidance? What is the nominee’s view on the appropriate use of non-regulatory guidance?

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<sup>1</sup> ESSA, sec. 1005, § 1111(c)(4)(E) (amending 20 U.S.C. § 6311).

<sup>2</sup> *Id.*

<sup>3</sup> ESSA, sec. 1005, § 1111(d)(1)(B)(ii), (d)(2)(B)(ii) (amending 20 U.S.C. § 6311).

- d. Will the U.S. Department of Education, under the supervision of the nominee, use non-regulatory guidance to expand, modify, or amend the legal requirements of ESSA or infringe upon the statutory rights that have been reserved for local school officials?
  - e. Will the nominee commit to full and meaningful consultation with representatives of state and local school leaders *prior to the issuance* of any future regulatory or non-regulatory guidance?
  - f. What is the nominee’s view on the appropriate role of the Office for Civil Rights (OCR) and the investigative approach OCR has implemented since 2009?
  - g. Will the nominee seek to rescind or revise previously issued non-regulatory guidance to address concerns previously raised by NSBA?
    - i. For example, in a November 12, 2014, Dear Colleague Letter on effective communications issued jointly by the Department of Education (OCR/OSERS) and the Department of Justice, the agencies inappropriately applied nationwide an erroneous legal standard issued in a court decision by the 9th Circuit in the *Tustin* case, and the intersection of the Individuals with Disabilities in Education Act and the Americans with Disabilities Act, with respect to rights and responsibilities of students and schools.
    - ii. An October 10, 2010, Dear Colleague Letter regarding bullying and school climate issued by the Office for Civil Rights significantly expanded the standard of liability as set forth in *Davis v. Monroe*, by broadening school districts’ obligations to recognize and respond to harassment. In particular, OCR deviates from the “actual knowledge” standard under *Davis*, by expanding it to “knows or reasonably should have known” which goes beyond the Court’s ruling.
3. **Federal Education Investment:** Federal education investments help school districts increase student achievement, preparation for postsecondary education and the workforce, and school operation and performance. From Title I grants for disadvantaged students that help raise proficiency levels in reading, math, and other subjects to the Individuals with Disabilities Education Act (IDEA) state grant program that helps educate students with special needs, critical federal investments provide more than \$35 billion each year for K-12 programs.
- a. How will the nominee work with Congress to develop a budget proposal for federal education programs that prioritizes education investments, particularly regarding funding for IDEA and Title I of the Elementary and Secondary Education Act?
4. **Career and Technical Education:** The Carl D. Perkins Career and Technical Education Act (CTE) provides over \$1 billion each year to secondary and postsecondary institutions in all 50 states to support career and technical education. Career and technical education can provide students with the academic and technical skills needed to succeed in postsecondary education or the workforce.

- a. How will the nominee support CTE programs that strengthen both the academic and technical skills of students through a combination of core academic subjects and integrated career pathways?
  - b. How will the nominee support opportunities for advanced courses with an occupational focus that lead to credentialing, including through work-based learning opportunities, dual enrollment, or proactive career and guidance counseling?
5. **Educational Choice:** Many of our nation’s public school districts currently provide numerous options for educational choice that promote success in student achievement and school performance, thereby preparing our students for college and careers. NSBA believes that public funds *should be used within public schools* to advance curricula and choice, including charter schools authorized by local school boards.
- a. Will the nominee support the range of *existing* choice options that are offered by our nation's public school districts, which educate more than fifty million students? (As examples, local magnet schools and charter schools authorized by local school boards to public specialty schools, such as military academies and those offering specialized curricula for science, technology, engineering and mathematics (STEM), operated by many of our nation’s public school districts provide several options for the success of our students.)
  - b. Will the nominee encourage and advance a balanced dialogue on evidence-based choice options to help inform our nation’s efforts to assure every child is prepared for college, careers and citizenship?
  - c. Will the nominee commit to full accountability of the use of any public funds used for school choice programs?
  - d. Will the nominee “level the playing field” so that all public schools may benefit from the flexibilities offered to public charter schools and so that performance can be adequately and appropriately compared?

A federal agenda that supports innovation at the State and local level and empowers local leaders to make decisions to address the unique needs of their students will have a positive impact on our nation’s schools. NSBA appreciates the opportunity to provide information to members of the Committee as they engage in these important deliberations. We look forward to working you throughout the 115<sup>th</sup> Congress to ensure the success of America’s public schools.

Sincerely,



Thomas J. Gentzel  
Executive Director and Chief Executive Officer