



**NATIONAL INDIAN EDUCATION**  
Advancing Excellence for All Native Students

September 9, 2016

The Honorable John King  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave., SW  
Washington, DC 20202

***Re: Secretary's Proposed Statewide Assessment System Regulations***

Dear Secretary King,

Thank you for the opportunity to provide feedback on the Department of Education's (the Department) Proposed Statewide Assessment Regulations. The National Indian Education Association (NIEA) works to ensure that all Native students receive a high-quality academic and cultural education. NIEA looks to the Department as an extension of the federal government charged with fulfilling the federal trust responsibility to tribes. This includes allowing tribes the flexibility and providing the support necessary to develop high-quality assessments to improve instruction and prepare Native students to succeed in college or a career.

**The Federal Trust Relationship**

Since its inception, NIEA's work has centered on reversing negative trends within Native education, a feat that is possible only if the federal government upholds its trust responsibility to tribes. Established through treaties, federal law, and U.S. Supreme Court decisions, this relationship includes a fiduciary obligation to provide parity in access and equal resources to all American Indian and Alaska Native students, regardless of where they attend school. It is important to state that under the federal government's trust corpus in the field of Indian education, the obligation is shared between the Administration and Congress for federally-recognized Indian tribes.

**NIEA's Top Priority: Stay True to the Spirit of Negotiated Rulemaking**

NIEA wishes to commend the Negotiated Rulemaking Committee, which reached agreement, despite significant challenges, with real input from stakeholders, including Chairman Aaron Payment and tribal representative Leslie Harper. As we implement the Every Student Succeeds Act (ESSA), Native communities must be part of implementing the assessments that will be used to measure the progress of Native students. The way assessments have been imposed by states without real input from tribal leaders must change. Respect for Native languages and culture is a prerequisite to Native students' improved outcomes on assessments. True consultation—true

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dialogue and real compromise as occurred in the negotiated rulemaking process—is NIEA’s top priority on assessment.

### **Section 200.2: State Responsibilities for Assessment**

NIEA supports the draft regulations for state assessments in Section 200.2 with respect to the new requirement for (1) fairness in assessments, (2) computer adaptive assessments, and (3) the provision of assessment results in a language Native parents can understand. We have one recommended edit to improve state responsibilities—require tribal input in the development of assessments—that we will describe below.

- (1) NIEA supports the new requirement in Section 202.2(b)(4)(i) of the draft regulations that assessments must be fair to all students. The addition is consistent with ESSA: Section 1111(b)(2)(B)(iii), which states that tests must not “...evaluate or assess personal or family beliefs and attitudes...” NIEA has seen test items that unfairly require context that Native students don’t have. Research conducted during the mid-1990s and, more recently, by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education supports this critical addition to the statute and its inclusion in the regulations.<sup>1</sup> We applaud the Department for this critical addition.
- (2) NIEA also supports the computer adaptive assessment regulations in 200.2(c), which clarify that computer adaptive tests must first and foremost assess grade level skills. Native students are less likely to have access to broadband internet service at home than non-Native students: less than 10 percent of Indian Country has access to broadband and Native students are often at a disadvantage with respect to access to computers. The rollout of computer-based versions of the PARCC and Smarter Balanced assessments has encountered major problems in states across the country, including states with high Native student populations such as South Dakota and Oklahoma. Computer adaptive assessments should be fully vetted before use to provide the comparable data necessary to ensure historically underserved students, such as Native students, receive the instruction and education they deserve.
- (3) Providing assessment results in Native languages is a third critical addition in the statute that we believe must be included in the regulations. Section 200.2(e) describes how assessments must be explained to students. ESSA requires in statute 1111(b)(2)(B)(x) that results must be either provided to the extent practicable in languages that parents can understand, or provided orally to parents. The addition of the regulatory language requiring oral translation of results is critical for Native parents. If results are not in a language that parents can understand, the information at the heart of assessments will not be useful. NIEA is committed to making sure tests are useful, and this critical addition will help make that the case for many more students and parents.

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<sup>1</sup> Issues in Cross Cultural Assessment: American Indian and Alaska Native Students. Far West Laboratory: San Francisco, 1995, Issue 12 by Elis Trumbull Estrin and Sharon Nelson-Barber.

### **Section 200.2: Include Tribes in the Development of Assessments**

NIEA recommends one addition to Section 200.2(a) that is consistent with the spirit of the successful negotiated rulemaking for this set of regulations. Tribal leaders should be included in the development of assessments along with local education agencies (LEAs). Specifically, tribal leaders should be added to the LEAs in 200.2(a)(1) as entities that states must consult before implementing systems of high quality assessments. The text of the Every Student Succeeds Act (ESSA) and the definition of an LEA in the Elementary and Secondary Education Act (ESEA) support this addition to the regulations. Section 8538 of ESSA requires that LEAs consult tribes when the LEA receives more than \$40,000 in federal funds. A reasonable interpretation of LEA involvement would include tribes in the development of assessments. The definition of LEAs in Section 9801 of the ESEA, as amended by ESSA, supports the additional requirement in Section 202(a) of tribal consultation in the development of assessments.

### **Section 200.3: Locally Selected, Nationally Recognized Assessments**

NIEA supports the Department's draft regulations on locally selected, nationally recognized assessments in Section 200.3, but recommends that the regulations be amended to allow tribes the option of seeking approval to offer locally selected, nationally recognized tests. Eliminating the redundancy of taking both a state assessment and a college entrance test such as the ACT or the SAT makes sense for Native students, so we support the Department's draft regulations in Section 203 (a) and (b).

Section 203(c) should be amended to allow tribes to apply for the same opportunity offered to school districts. Opening up the opportunity to local education agencies without allowing tribes to apply to use a nationally recognized assessment that provides comparable data on Native student achievement ignores the federal trust relationship and a fair reading of the definition of an LEA in Section 9801 of ESEA. NIEA respectfully requests the option for local assessments for tribes under Section 200.3.

### **Section 200.6(a)–(e): Inclusion of All Students & Native Language Assessments**

NIEA stands with the National Center on Learning Disabilities and the Council of Parent Attorneys and Advocates in support of Section 200.6(a)–(e). Native students are overrepresented amongst students identified as having disabilities, so we want to be clear that NIEA supports the 1 percent cap on students with severe cognitive disabilities and the Department's regulatory efforts to uphold it. Without this critical limit and the detailed draft regulations that seek to faithfully implement it, Native students would be at risk of being underserved, as were so many students with disabilities in the not-too-distant past.

### **Section 200.6(f): English Learners**

NIEA strongly supports the development of assessments in Native languages as a critical means for valuing Native cultures and improving academic achievement and the draft language in draft Section 200.6 (f), which seeks to achieve this goal. The regulations build on the statutory language in Section 1111(b)(2)(F) of ESSA, which includes the new requirement that states deliver assessments to the extent practicable, as opposed to language in NCLB that placed less responsibility on states and on the Secretary to assist in the development of assessments.

The Department's draft Section 200.6(f) takes a critical additional step to support Native languages and language learners more generally, by requiring that states articulate a definition of the languages that are present to a significant extent. NIEA cannot emphasize enough how critical it is for Native students that states and the Secretary of Education work together to develop assessments in Native languages. With assessments in Native languages, students will see their identity valued. NIEA strongly supports the draft regulations and encourages the Department to partner with tribes to develop assessments in Native languages.

**Section 200.6(g): Students in Native American Language Schools or Programs**

NIEA appreciates that the Department has interpreted Section 1111(b)(2)(B)(ix) of ESSA to allow a limited Native language exception, but believes that students in Native language medium schools who are below 8<sup>th</sup> grade should not be required to take the reading/language arts assessment or the math assessment in English. NIEA also recommends that the Department include language that allows flexibility in the peer review process for assessments in Native languages.

Preserving Native languages is an indispensable part of tribal heritage and culture. Native languages go to the heart of Native identity, and their use helps Native students thrive. Native language medium schools play a key role for tribes and Native communities that is recognized in ESSA and has been highlighted consistently over the last century (and increasingly over the last decade) by tribal leaders, Native educators, and NIEA. Language medium schools serve the dual-purpose role of increasing academic achievement and guaranteeing that a student's language will be carried forward for generations.

The Department's draft reasons for the regulations in Section 200.6(g) recognize ESSA's explicit commitment to the federal trust relationship and Native languages and culture, but the text of (g) itself does not give Native language medium schools the deference consistent with the Department's rationale. In addition to the federal trust relationship and the Native American Languages Act (NALA), the Department mentions the discretionary grant program in Section 6133 and the purpose of Native education as including cultural and language in Section 6111 of ESSA.

The actual draft subsection (g) requires that Native immersion students take English learner tests before the 8<sup>th</sup> grade and math tests in English. Both requirements are inconsistent with the Department's own rationale, tribal sovereignty, and the success of Native language medium schools. Successful programs such as the Niiganne Ojibwemovin and Rough Rock English-Navajo Language Arts Program should be allowed to continue their work without being forced to give English assessments or math assessments in English while students are young.

Deference is provided to Puerto Rico in statute, a fact that tribal leaders and NIEA consider inconsistent with the federal trust obligation, which has been long been expressed in law. As a partial and reasonable accommodation, NIEA respectfully requests that the Department revise the regulations to reflect the intent of the two tribal negotiators that Native language medium schools be provided a full exemption prior to 8<sup>th</sup> grade. Only once critical Native cultural and linguistic concepts are learned in the younger grades in Native language medium schools should students be required to take assessments in English and to take the math assessment in English.

Tribal leadership and language medium schools have shown success with this approach and should be shown this deference, at a minimum.

NIEA's last request with respect to Section 600.6(g) is that the Department allow states flexibility with respect to the peer review process on Native language assessments in recognition of the likelihood that the Department lacks the expertise to evaluate Native language assessments. The federal trust relationship and Congressional intent with respect to ESSA supports the flexibility that we recommend. Section 6111 of ESSA identifies language and culture as the purpose of Indian education. Section 6133 authorizes a new discretionary grant program to be led by Native education experts. These two parts of ESSA along with Section 6205, which identifies the benefits of Native Hawaiian education, and Section 6304, which makes grant funds available for Alaska Native Languages. Based on these parts of ESSA, our familiarity with Native language expertise, and the deference due tribal leaders through the federal trust relationship, we share the recommendation of the Native Hawaiian Education Council that the regulations should allow states to implement quality assurance elements when developing assessments in Native American languages.

#### **Section 200.6(h): The Definition of Native American Used in the Regulations**

NIEA recommends that Section 200.6(h) be rewritten to prevent a new definition of "Native American" in the regulations, which would cause unnecessary confusion. During the course of the negotiated rulemaking, there was discussion of the importance of making sure the term "Native American" included Alaska Natives and Native Hawaiians. NIEA believes the discussion by the negotiators in the midst of a busy session led to a misunderstanding about the definitions. We respectfully request that a new definition of Native American not be created.

To spell out our reasoning, the definition in draft Section(h) states:

(h) Definition. For the purpose of this section, the term "Native American" means, "Indian as defined in section 6151 of the Act, which includes Alaska Natives and members of federally recognized tribes or state recognized tribes; Native Hawaiian; and Native American Pacific Islander."

The above language would create a new definition of Native American that will be added to the many others in various statutes and, thereby, negatively impact Native communities.

Instead, NIEA recommends using a definition that already exists, is clearer, and is inclusive of American Indians, state recognized tribes, Alaska Natives, Native Hawaiians and Native American Pacific Islanders. The NALA states in Section 103(1): "The term 'Native American' means an Indian, Native Hawaiian, or Native American Pacific Islander." This definition is clear and links ESSA and NALA, so we recommend:

(h) Definition. For the purpose of this section, the term "Native American" has the meaning given to such term under section 103(1) of the Native American Languages Act of 1990 (25 U.S.C.2902).

Using the above definition from NALA will prevent confusion, a problem that has come up time and time again in NIEA's experience. Native people in the United States have a history of being misclassified based on their ancestry. For consistency and clarity, we strongly recommend the above change to the draft regulation.

### **Conclusion**

Through the recommendations listed here, the final regulations, and the implementation of the transition to ESSA, NIEA looks forward to working alongside the Department to drive federal resources to the only students that the federal government has a direct responsibility to educate—Native students. If you have any questions, please contact Ahniwake Rose, NIEA Executive Director, at [arose@niea.org](mailto:arose@niea.org).

Sincerely,



Patricia L. Whitefoot  
President