



**Achieving a Complete  
Understanding of Statewide  
Student Academic Achievement:**

*The Legal Aspects Concerning State Assessment  
Laws in the Every Student Succeeds Act*

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## **A Common Statewide Understanding of Student Academic Achievement: The Legal Aspects Concerning State Assessment Laws in the Every Student Succeeds Act**

### **Abstract:**

The Every Student Succeeds Act granted a great deal of authority to states in creating education standards for elementary and secondary students, and for the means of assessing whether those students were meeting the state determined standards. Notwithstanding this grant of authority, with few exceptions, Congress required school districts to utilize a single, statewide assessment across the state to measure whether students in schools across the state were meeting the standards. Among other policy rationales, this would permit parents to assess school performance and enable them, and state policy makers, to engage in true apples-to-apples comparisons of schools.

Recently, Arizona and New Hampshire passed laws permitting school districts to choose their own assessment or from a menu of assessments. These laws violate the requirement for a single, statewide assessment as mandated by the Every Student Succeeds Act. The U.S. Department of Education should inform these states that their education plans will not be compliant until these states revise their laws to be consistent with the federal standard. The Department should also provide sufficient guidance to ensure that other states do not pass similar laws.

### **Introduction**

In 2001, Congress reauthorized the Elementary and Secondary Education Act (“ESEA”) through the No Child Left Behind Act (“NCLB Act”).<sup>i</sup> Among other innovations, the NCLB Act amended Title I, which provides educational aid to assist disadvantaged students in elementary and secondary education, to include a test-based accountability regime to ensure students reach proficiency in the tested subjects. Specifically, the NCLB Act compelled states to conduct annual assessments in grades 3-8 and once in high school to identify schools that fail to make “adequate yearly progress” towards having all students reach proficiency in math and reading by the 2013-2014 school year.<sup>ii</sup> While the NCLB Act provided for state-developed academic achievement standards and state academic assessments, many criticized the law as inflexible and leading to many unintended consequences, such as providing incentives for schools to divert resources from important subjects that were not tested (such as art or history), and to focus instruction on the information and skills tested on the annual assessments.

In December 2015, Congress passed the Every Student Succeeds Act (“ESSA”) to reauthorize the ESEA and replace the NCLB Act.<sup>iii</sup> This reauthorization included many new provisions and, importantly, addressed many of the concerns related to the assessment regime

prescribed by the NCLB Act. The law provided states with much greater flexibility in adopting standards and assessments and permits states to use a wider range of indicators to determine the academic success of a school district.

Recently, New Hampshire and Arizona enacted laws to permit individual school districts to choose which assessments to administer during grades 3-8.<sup>iv</sup> These laws raise significant questions and contradict the ESSA provisions requiring states to establish the statewide assessment used to determine if students are meeting state-developed academic standards. This failure is important; the drafters of ESSA were mindful of parents’ rights to determine the quality of each school district and the ability to compare school districts using uniform criteria – such as performance on the same assessment – is necessary to realize that right. The drafters were also mindful of the need to retain statewide uniformity in order to allow for accountability on a state-by-state basis. That is why Congress rejected language in a House-approved version of the Bill that would have allowed school districts to choose their own assessments during grades 3-8.<sup>v</sup> Moreover, this was a conscious choice; Congress elsewhere granted school districts more flexibility with assessments – under limited circumstances – in high school.<sup>vi</sup>

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This paper reviews the legislative history of the provisions of ESSA dealing with flexibility on academic assessments in grades 3-8. This paper also reviews the laws in New Hampshire and Arizona and considers how those laws operate under ESSA. **This paper concludes that, as drafted, the Arizona and New Hampshire laws in question would render a state out of compliance with ESSA.**

## **I. Relevant Federal Statutory and Regulatory Provisions**

The ESSA was signed into law on December 10, 2015. Effective for the 2017-18 school year, ESSA amended Section 1111 of ESEA, 20 U.S.C. § 6311<sup>vii</sup> (“Section 1111”) in a number of important ways. Pursuant to Section 1111(a)(1), each State educational agency is required to file a plan with the Secretary of Education for the U.S. Department of Education (“Department”) that is developed in consultation with the Governor, members of the state legislature and state board of education, local educational agencies, representatives of Indian tribes located in the state, teachers, principals, other school leaders, charter school leaders, specialized instructional support personnel, paraprofessionals, administrators, other staff, and parents (“State Plan”). Through the State Plan, the State educational agency is required to demonstrate that the agency, in consultation with local educational agencies, “has implemented a set of high quality student academic assessments in mathematics, reading or language arts, and science”.<sup>viii</sup> School districts must administer these assessments in mathematics and reading or language arts one time in each of

grades 3-8 and once in high school.<sup>ix</sup> In the case of science, school districts must administer these assessments not less than one time during grades 3-5, grades 6-9, and grades 10-12.<sup>x</sup>

Although ESSA did provide states with a broad degree of flexibility in determining academic standards and the assessments used to assess whether students and school districts were meeting those standards, Congress limited that flexibility in two important ways relevant to this paper. First, with few exceptions<sup>xi</sup>, ESSA mandates that each State educational agency applies the same academic assessments to all public elementary school and secondary school students within the state. ESSA also requires that these assessments are administered through either a single summative assessment or through multiple statewide interim assessments that result in a single summative score.

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a. ESSA Mandates Student Assessments be Uniform Statewide

ESSA mandates that each State educational agency applies the same academic assessments to all public elementary school and secondary school students within the state. Specifically, as amended by ESSA, Section 1111(b)(2)(B), provides:

- (B) REQUIREMENTS.—The assessments under subparagraph (A) shall—
- (i) except as provided in subparagraph (D), be—
    - (I) the same academic assessments used to measure the achievement of all public elementary school and secondary school students in the State; and
    - (II) administered to all public elementary school and secondary school students in the State . . . <sup>xii</sup>

This explicitly requires states to use the “same” assessment to judge whether the state schools are meeting the state-established academic standards. In addition, the relevant regulatory provisions require that these assessments must “be the same assessments used to measure the achievement of all students.”<sup>xiii</sup>

There are three exceptions to the requirement that states utilize the same test to assess academic achievement under ESSA. These exceptions are extremely limited in scope. For example, Section 1111(b)(2)(D) provides that states may provide alternate assessments for students “with the most significant cognitive disabilities.” Additionally, Section 1111(b)(2)(E) provides an exception to this statewide uniformity requirement in the extraordinarily rare case that a State educational agency can show that “neither the State educational agency nor any other State

government official, agency, or entity has sufficient authority, under State law, to adopt challenging State academic standards, and academic assessments aligned with such standards, which will be applicable to all students enrolled in the State’s public elementary schools and secondary schools.”<sup>xiv</sup> In this circumstance, the State educational agency may remain in compliance with ESSA if it either (1) adopts standards and assessments that meet the requirements under ESSA and apply them statewide but only to students receiving aid under Title I, or (2) adopts and implements policies that ensure local education agencies receiving aid under Title I adopt standards and assessments that meet the requirement under ESSA and apply those standards to all students in that local educational agency.

The last exception to the statewide uniformity requirement permits a local educational agency to administer a locally-selected assessment in lieu of the state-designed academic assessment “if the local educational agency selects a nationally-recognized *high school* academic assessment that **has been approved for use by the State.**”<sup>xv</sup> Use of a nationally-recognized high school academic assessment may only be done by a local educational agency in the administration of the assessment of mathematics and reading or language arts in grades 9-12 and the assessment of science in grades 10-12. Further, the local educational agency must utilize a state-approved assessment, the selection of which complies with ESSA. Indeed, if a State educational agency chooses to make a nationally-recognized high school assessment available for selection to local education agencies, the State educational agency must:

- establish technical criteria to determine if the assessment meets the requirements of ESSA;<sup>xvi</sup>
- conduct a review of the assessment<sup>xvii</sup>; and
- submit evidence that the assessment meets the requirements of ESSA and formally approve of the assessment.<sup>xviii</sup>

If a local educational agency requests the use of an assessment, the State educational agency must ensure it meets all the requirements of ESSA, including that the assessment:

- is “aligned to the State’s academic content standards”<sup>xix</sup>;
- provides “comparable, valid, and reliable data on academic achievement, as compared to the State-designed assessments, for all students and for each subgroup of students”<sup>xx</sup>;
- meets the technical requirements established by the state<sup>xxi</sup>; and
- provides “unbiased, rational, and consistent differentiation between schools within the State.”<sup>xxii</sup>

In addition, if a local educational agency wants to use a nationally-recognized high school assessment, it must notify parents “of its request to the State educational agency for approval to administer a locally-selected assessment”<sup>xxiii</sup> and, if such request is approved, notify parents at the beginning of each school year that the local educational agency will be administering a different assessment.<sup>xxiv</sup>

The statutory language shows Congress intended that states utilize the same assessment through the state to judge the performance of its local educational agencies. Given Congress created three narrow exceptions to the requirement to use a uniform assessment, Congress clearly was aware of the option to permit the use of different assessments in a state. What is just as clear is Congress severely restricted the opportunities for a state to employ different assessments.

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b. States Must have a Single Process for Administering Uniform Student Assessments

ESSA also requires states to select a single process for the administration of the student assessments. Pursuant to Section 1111(b)(2)(B)(viii), each state must administer the student assessments through either: (i) a single summative assessment; or (ii) multiple statewide interim assessments that result in a single summative score. Moreover, statewide consistency in the student assessments is further mandated by requiring that the single summative assessment or interim assessments produce a score capable of being disaggregated by state, local educational agencies, and schools based upon: major racial and ethnic group; economically disadvantaged students; children with disabilities; English proficiency status; gender; and migrant status.<sup>xxv</sup>

## II. Legislative History Supporting the Statewide Uniformity Requirement

On February 3, 2015, U.S. Representative John Kline (R-MN) introduced U.S. House of Representatives Bill 5, referred to as the “Student Success Act,” which proposed to reauthorize the programs under ESEA through fiscal year 2019.<sup>xxvi</sup> On April 30, 2015, U.S. Senator Lamar Alexander (R-TX) introduced U.S. Senate Bill 1177, initially referred to as the “Every Child Achieves Act,” which proposed to reauthorize ESEA to ensure that every child achieves.<sup>xxvii</sup> The Student Success Act was passed by the House of Representatives on July 8, 2015 and was received and read by the Senate on July 13, 2015, though no further action was taken on this Bill. The Every Child Achieves Act was passed by the Senate on July 16, 2015 and passed by the House of Representatives on November 17, 2015. On December 10, 2015, the Every Child Achieves Act was signed into law in its current form as ESSA. The legislative history that arose from the introduction of the Student Success Act and the Every Child Achieves Act through the adoption of ESSA in December 2015 further supports the position that ESSA was intended to mandate statewide uniform student assessments in grades 3-8 and once in high school, unless a local educational agency chooses to administer a locally-selected, nationally-recognized high school academic assessment that has been approved for use by the state.

In the original versions of the ESEA reauthorization Bills, namely the Student Success Act, as introduced on February 3, 2015, and the Every Child Achieves Act, as introduced on April 30, 2015, the Bills mandated that each state administer a uniform state-wide academic assessment to measure the academic achievement of all public school students within the state.<sup>xxviii</sup>

Throughout the legislative process, two primary attempts were made to remove this statewide uniform assessment requirement. On February 26, 2015, U.S. Representative Bob Goodlatte (R-AZ) introduced House Amendment 5 to the Student Success Act,<sup>xxix</sup> which proposed the inclusion of the following language as Section 1111(b)(2)(G):

(G) Locally Designed Assessment System. – Nothing in this paragraph shall be construed to prohibit a local educational agency from administering its own assessment in lieu of the State-designed academic assessment system under this paragraph, if –

- (i) the local educational agency obtains approval from the State to administer a locally designed academic assessment system;
- (ii) such assessments provide data that is comparable among all local educational agencies within the State; and
- (iii) the locally designed academic assessment system meets the requirements for the assessment under subparagraph (B), except the requirement under clause (ii) of such subparagraph.

House Amendment 5 was agreed to by the House on February 26, 2015 and included in the version of the Student Success Act that was passed by the House of Representatives on July 8, 2015 and read by the Senate on July 13, 2015. A version of House Amendment 5 was then included as Section 1111(b)(2)(H) of ESSA. However, the version that received Congressional approval placed further emphasis on Congress' intention to mandate statewide uniform assessments in grades 3-8. As set forth above, Section 1111(b)(2)(H)'s exception to the statewide uniform assessment requirement is limited to allowing the administration of a nationally-recognized high school academic assessment in lieu of the state-designed academic assessment for the assessment of mathematics and reading or language arts in grades 9-12 and the assessment of science in grades 10-12. This assessment must be approved for use by the state and meet stringent technical criteria requirements set forth in Section 1111(b)(2)(H)(v). The fact that Congress narrowed the original exception under House Amendment 5 to only allow locally designed assessments in high school shows that the statewide uniform assessment requirement in grades 3-8 was both deliberate and necessary for the ultimate approval of ESSA.

In addition, on July 15, 2015, U.S. Senator Ted Cruz (R-TX) proposed the adoption of Senate Amendment 2180 to the Every Student Achieves Act,<sup>xxx</sup> which provided, in part, to include the following discretionary language related to state oversight and accountability regarding student assessments:

- (2) Assessments. - A State may include in the State plan a description of, and may implement, a set of high-quality statewide academic assessments.
- (3) Accountability. – A State may include in the State plan a description of, and may implement, an accountability system.

On July 16, 2015, the Senate rejected Senate Amendment 2180. As noted by U.S. Senator Chuck Grassley (R-IA), “[t]he bill retains the requirement that states test annually in grades 3-8, which I understand was necessary to get bipartisan agreement.”<sup>xxxi</sup> Indeed, this Amendment made

assessments and accountability entirely optional, which ran counter to the compromise that made ESSA possible. Given the final language of Section 1111(b)(2), it appears that mandatory statewide uniform student assessments, was an integral part of the law.

“The bill [ESSA] retains the requirement that states test annually in grades 3-8, which I understand was necessary to get bipartisan agreement.”

Senator Chuck Grassley (R-IA)

### III. The Arizona and New Hampshire State Assessment Legislation

On April 4, 2017, Arizona Governor Doug Ducey signed Arizona Senate Bill 1098 into law.<sup>xxxii</sup> Senate Bill 1098 amends Sections 15-741 and 15-741.02 of the Arizona Revised Statutes to read, in relevant part, as follows:

Sec. 15-741. A. The state board of education shall:

...

2. Adopt and implement a statewide assessment to measure pupil achievement of the state board adopted academic standards in reading, writing and mathematics in at least four grades designated by the board....

3. Ensure that the tests prescribed in this section are uniform throughout the state.

Section 15-741.02. The state board of education shall adopt a menu of locally procured achievement assessments to measure pupil achievement of the state academic standards. . . . Beginning in the 2019-2020 school year, each local education agency that offers instruction in grades three through eight may select from that menu an achievement assessment that is locally procured to administer to the pupils in that local education agency instead of the test to measure pupil achievement adopted by the state board of education pursuant to section 15-741.

(“Arizona Act”).

On June 7, 2017, New Hampshire Governor Chris Sununu approved New Hampshire House Bill 166.<sup>xxxiii</sup> House Bill 166, which has an effective date of August 4, 2017, amends Section 193-C:6 of the New Hampshire Revised Statutes to read, in relevant part, as follows:

Assessment Required. A statewide assessment shall be administered in all school districts in the state once in an elementary school grade, once in a middle school grade, and one grade in high school. For those years in grades 3 through 8 in which the school district does not administer the statewide assessment, the school district, in consultation with the department and as part of the statewide education improvement and assessment program, shall develop and administer its own

assessment or shall administer a standardized assessment that identifies a pupil's range of learning and yields objective data to use in improving instruction and learning.

(“New Hampshire Act”).

#### **IV. The Arizona and New Hampshire Acts Violate ESSA**

The Arizona Act and the New Hampshire Act violate Section 1111 of ESSA. Indeed, given the language of these state laws, it does not seem possible that these State plans could demonstrate that the State educational agency has implemented assessments that are consistent with ESSA’s requirements that the assessments be uniform throughout the state.

To be sure, the Arizona Act acknowledges the ESSA statewide uniform assessment requirement.<sup>xxxiv</sup> The menu options, which apply to students in all grades<sup>xxxv</sup>, violate Section 1111(b)(2)(B)(i). By permitting local educational agencies to choose different assessments to measure the achievement of all public elementary school students, the Arizona Act violates the requirement that all assessments in grades 3-8 be the same throughout the state. In fact, the Arizona Act explicitly applies the menu to students in grades 3-8. This not only denies parents and policymakers the ability to compare academic performance across local educational agencies in a state – an explicit goal of ESSA – but stands as a flagrant violation of the law. Notably, Arizona has not apparently sought to have this law fall within any statutorily-provided exception.

By permitting local educational agencies to choose different assessments to measure the achievement of all public elementary school students, the Arizona Act violates the requirement that all assessments in grades 3-8 be the same throughout the state.

In addition, the Arizona Act could result in a violation of ESSA’s requirement that states must administer either a single summative assessment or multiple statewide interim assessments that result in a single summative score. Currently, it is not clear exactly what assessment methodologies will be made available to the local educational agencies through the state board of education’s menu of options. In order to comply with Sections 1111(b)(2)(B)(viii) and (xi), however, the state must have the ability to administer a single summative assessment or provide a single summative score that results in data that has the capability of being disaggregated by state, local educational agencies, and schools. Because the Arizona Act will provide for variation in the assessment methodologies used by Arizona local educational agencies, the data obtained by one local educational agency will likely be inconsistent with (and therefore, not directly comparable to) the data obtained by another local agency. This incomparability will result in a violation of the singularity and disaggregation requirements under Sections 1111(b)(2)(B)(viii) and (xi), as Arizona’s statewide assessments will not result in data that has the capability of being disaggregated into the three mandated tiers – the State, its local educational agencies, and its schools.

The New Hampshire Act not only violates the assessment uniformity provisions, but even violates the requirement that a state assessment be given annually.

The New Hampshire Act not only violates the assessment uniformity provisions, but even violates the requirement that a state assessment be given annually. The New Hampshire Act only requires a state assessment “once in an elementary school grade, once in a middle school grade, and one grade in high school.”<sup>xxxvi</sup> This is explicitly at odds with the requirement in ESSA to, in the case of mathematics and reading or language arts, administer an assessment “in each of grades 3 through 8; and at least once in grades 9 through 12.”<sup>xxxvii</sup> Moreover, during those years in which the state does not administer an assessment, New Hampshire local educational agencies are merely required to “administer a standardized assessment that identifies a pupil’s range of learning and yields objective data to use in improving instruction and learning.” Whatever this assessment is, in addition to not being likely to comply with the various requirements for assessments in ESSA, or permit the data disaggregation and comparisons called for by ESSA, these assessments will not be uniform throughout the state.

The Arizona Act and New Hampshire Act violate the assessment uniformity provisions of ESSA. Arizona’s law is very likely to result in violations of the singularity and disaggregation of data requirements. New Hampshire’s law explicitly violates the annual assessment mandate.

## V. Conclusions and Recommendation

There is no question that Congress attempted to provide states with additional authority to administer elementary and secondary level education. This was no doubt a reaction to the restrictions contained in the NCLB Act and, by all accounts, Congress succeeded in providing greater flexibility for states in ESSA. Yet, Congress did not abandon the space entirely. In fact, Congress required State educational agencies ensure that local educational agencies administered the same state assessment throughout the state annually in grades 3-8 (and once in high school). Perhaps this was recognition of the valuable contributions the NCLB Act had on better informing parents and policy makers with data on student educational performance. Moreover, such requirements will enable parents to make education choices for their children and permit policymakers to make better informed decisions on what is working and how to remedy problems in our schools.

The Arizona Act and New Hampshire Act disturb the balance created by Congress and frustrate objectives of getting better and easily comparable data from schools throughout a state. While I am sympathetic to providing greater flexibility to states in education, there can be little questions that these state laws are wholly inconsistent with ESSA. Indeed, these laws violate the assessment uniformity provisions of ESSA. Arizona’s law is very likely to result in violations of

the singularity and disaggregation of data requirements. New Hampshire’s law explicitly violates the annual assessment mandate.

Given the foregoing, the Secretary should inform those states that these laws need to be revised to come into compliance with ESSA. In addition, the Secretary should also offer additional guidance to states submitting State Plans on ways state law might conflict with ESSA and how to avoid such conflicts.

### ***About the Authors***

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<sup>i</sup> Elementary and Secondary Education Act, 20 U.S.C. § 6301 *et seq.*; No Child Left Behind, Pub. L. No. 107-110 (2002).

<sup>ii</sup> No Child Left Behind, Pub. L. No. 107-110, § 111(b)(3)(C) (2002).

<sup>iii</sup> Every Student Succeeds Act, Pub. L. No. 114-95 (2015).

<sup>iv</sup> Ariz. Rev. Stat. §§ 15-741, 15-741.02; N.H. Rev. Stat. § 193-C:6.

<sup>v</sup> 161 Cong. Rec. H1257 (Feb. 26, 2015) (House Amendment 5).

<sup>vi</sup> Every Student Succeeds Act, Pub. L. No. 114-95 (“ESSA”), § 1111(b)(2)(H) (2015).

<sup>vii</sup> The Section 1005 of ESSA contained the amendments to Section 1111.

<sup>viii</sup> ESSA § 1111(b)(2)(A).

<sup>ix</sup> See ESSA § 1111(b)(2)(B)(v)(I).

<sup>x</sup> See ESSA § 1111(b)(2)(B)(v)(II).

<sup>xi</sup> Discussed infra at 3-4.

<sup>xii</sup> ESSA § 1111(b)(2)(B)

<sup>xiii</sup> 34 C.F.R. § 200.2(b)(1)(i).

<sup>xiv</sup> ESSA § 1111(b)(2)(E).

<sup>xv</sup> ESSA § 1111(b)(2)(H) (emphasis added).

<sup>xvi</sup> See ESSA § 1111(b)(2)(H)(ii).

<sup>xvii</sup> See ESSA § 1111(b)(2)(H)(iii)(I).

<sup>xviii</sup> See ESSA § 1111(b)(2)(H)(iii)(II).

<sup>xix</sup> ESSA § 1111(b)(2)(H)(v)(I).

<sup>xx</sup> ESSA § 1111(b)(2)(H)(v)(II).

<sup>xxi</sup> See ESSA § 1111(b)(2)(H)(v)(III).

<sup>xxii</sup> ESSA § 1111(b)(2)(H)(v) (IV).

<sup>xxiii</sup> ESSA § 1111(b)(2)(H)(vi)(I).

<sup>xxiv</sup> See ESSA § 1111(b)(2)(H)(vi)(II).

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<sup>xxv</sup> See ESSA § 1111(b)(2)(B)(xi). In addition, the scores must be disaggregated according to “homeless status, status as a child in foster care, and status as a student with a parent who is a member of the Armed Force.” ESSA § 1111(h)(1)(C)(ii).

<sup>xxvi</sup> See H.R. 5, 114<sup>th</sup> Cong. (as proposed Feb. 3, 2015).

<sup>xxvii</sup> See S. 1117, 114<sup>th</sup> Cong. (as proposed Apr. 30, 2015).

<sup>xxviii</sup> See H.R. 5, 114<sup>th</sup> Cong. § 1111(b)(2)(B) (as proposed Feb. 3, 2015); S. 1117, 114<sup>th</sup> Cong. § 1111(b)(2)(B) (as proposed Apr. 30, 2015). The Every Child Achieves Act also provided for limited exceptions to this statewide uniform assessment requirement. See H.R. 5, 114<sup>th</sup> Cong. § 1111(b)(2)(C)

<sup>xxix</sup> See 161 Cong. Rec. H1257 (Feb. 26, 2015).

<sup>xxx</sup> See 161 Cong. Rec. S5098 (July 15, 2015).

<sup>xxxi</sup> 161 Cong. Rec. S5123 (July 15, 2015).

<sup>xxxii</sup> See Ariz. Rev. Stat. §§ 15-741, 15-741.02.

<sup>xxxiii</sup> See N.H. Rev. Stat. § 193-C:6.

<sup>xxxiv</sup> Ariz. Rev. Stat. § 15-741(A)(3).

<sup>xxxv</sup> This provision might be permissible if limited to high school assessments only. Nonetheless, even if so limited, the State would need to comply with ESSA in selecting the assessments that could be used by local educational agencies in assessing high school students.

<sup>xxxvi</sup> N.H. Rev. Stat. § 193-C:6.

<sup>xxxvii</sup> ESSA § 1111(b)(2)(B)(v)(I).