

NATIONAL
DISABILITY RIGHTS
NETWORK



Protection & Advocacy for Individuals with Disabilities

Deborah Spitz
U.S. Department of Education
400 Maryland Avenue SW, Room 3E306
Washington, DC 20202

Re: Docket ID ED-2015-OESE-0130

Dear Ms. Spitz:

The National Disability Rights Network (NDRN) is pleased to submit the following comments in response to the Department of Education's Request for Information to solicit advice and recommendations on regulations to implement programs under Title I of the Elementary and Secondary Education Act of 1965. NDRN urges the Department to expeditiously issue regulations to ensure that ESSA is implemented to meet its stated purposes and goals focused on ensuring all students receive equitable access to a high quality education.

NDRN is the national membership association for the Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies, the nationwide network of congressionally-mandated agencies that advocate on behalf of persons with disabilities in every state, the District of Columbia, Puerto Rico, U.S. territories (American Samoa, Guam, U.S. Virgin Islands, and the Northern Mariana Islands), and there is a P&A affiliated with the Native American Consortium which includes the Hopi, Navaho and Piute Nations in the Four Corners region of the Southwest. NDRN and the P&A / CAP network promote a society where people with disabilities exercise informed choice and self-determination. For over thirty years, the P&A / CAP network has worked to protect the human and civil rights of individuals with disabilities of any age and in any setting. Collectively, the P&A / CAP agencies are the largest provider of legally-based advocacy services for persons with disabilities in the United States.

While the No Child Left Behind Act (NCLB) was never able to reach its stated goal of 100% proficiency by 2014, students with disabilities made important gains under NCLB. As ESSA is implemented, it is paramount that those gains be maintained and that outcomes for students with disabilities be strengthened. The P&As and other civil rights stakeholders have an important role in state and local implementation including in the development of state plans.

The following are areas that NDRN asks the Department to prioritize as you work on issuing regulations and guidance:

1. State Plan Development:

The Department should issue guidance, similar to what was required in the waiver application package, addressing what States should do to ensure adequate stakeholder input as plans are developed, such as that the input should be meaningful and ongoing, not just when the plan is nearing completion, and that the State should ensure that a wide variety of stakeholder groups are included. The Department should also make clear that input from students and recent graduates, including youth with disabilities should be in the state plan development process. Additionally, ESSA states peer review process shall be designed to maximize collaboration. We recommend that the collaboration requirement in the peer review process be highlighted and formalized in regulation as input from varied stakeholders with varying experiences and expertise is vital to the implementation of a robust law.

2. Peer Review Teams

When establishing the peer review teams, the Department must make sure that the “community members “required by statute include members from the disability and civil rights communities.

3. Title I State and Local Educational Agency Report Cards:

NDRN urges the Department to issue regulations clarifying State and LEA report card requirements in the following areas:

- a. Reinforce the statutory requirements related to the State's accountability system, including specifying the methodology for determining "consistent underperformance" and "the time period used by the State to determine consistent underperformance" on the State report card. To ensure high expectations for all students and timely responses to their needs, our organizations believe the time period be no more than two years. More than two years will mean the LEA and the SEA are not responsive to the needs of subgroups of students.
- b. Align the LEA report card to reflect new LEA responsibilities in implementing; 1) the State's accountability system, specifically how LEAs will monitor a school that receives Targeted Support and Improvement, 2) number of years needed to determine if the school's plan has been unsuccessful and additional action that will need to occur and, 3) the LEA's role in determining this additional action. Again our organizations want to see short timelines so that interventions and supports provided to groups of students as they are needed and that cohorts of students are not denied the high quality education referred to in the stated purpose of ESSA.

- c. Further define the requirement that State report cards include the results on the State academic assessments in reading and mathematics in grades 4 and 8 of the National Assessment of Educational Progress compared to the national average of such results. Specifically, the results should be reported at the all student level and each of the student subgroups reported separately by NAEP. The students with disabilities subgroup should reflect the achievement of only students with IEPs and 504 Plans.

4. "N" - Size:

Although the Department is not permitted to prescribe minimum N-sizes, the size of subgroup cell is especially important in rural areas and smaller LEAs in order to consider school effectiveness with children whose background and characteristics indicate they may need additional support and intervention (e.g., children who may be in multiple categories such as living in poverty and having a disability). N-sizes must be as small as possible to balance the need to protect student privacy with the need to obtain the most information as possible about as many schools as possible and the sub-group performance of children in those schools. It is critical that states receive the technical assistance from the U.S. Department of Education to ensure that data is gathered in a manner that will ensure that this balance is maintained. We believe the Department may consider whether an N-size proposed in a State Plan is consistent with current research on what is the minimum number in a subgroup necessary to protect personally identifiable information in both the Peer Review and State plan approval processes. From work at the Institutes of Educational Sciences and our own research, we believe that the N-size should be no greater than 10 students.

Additionally, the Department should explicitly prohibit the use of super-subgroups. The statute requires States consider accountability for each subgroup separately. We believe this means that establishing super-subgroups, which by definition combine more than one subgroup, would be contrary to this requirement as written.

5. Assessments:

- a. Opportunity to meaningfully participate in assessments:

NDRN urges the Department to issue regulations and guidance ensuring students with disabilities fully participate in all assessments. Ensuring students with disabilities are allowed to use other alternative formats and the assistive technology they regularly rely on in the classroom when accessing the general education curriculum, is a significant consideration in ensuring students with disabilities are able to demonstrate their learning in the assessment process.

The availability of alternative formats and interoperability of assessment design is necessary to permit students, who require the use of alternative formats and/or assistive

technology, to demonstrate their content knowledge. Effective and meaningful access to assessment allows students who use alternative formats and/or who use assistive technology, including students with the most significant cognitive disabilities, to demonstrate their academic achievement relative to the challenging State academic content standards or alternate academic content standards.

Lack of availability of alternative formats and assessment interoperability results in students either not being able to access the assessment or not being able to demonstrate content knowledge accurately during the assessment due to the undue burden of taking the test while using unfamiliar technology. NDRN believes the Department must recognize the barrier created for students with disabilities when assessments are designed without consideration for alternative formats and interoperability.

NDRN also urges the Department to withdraw the regulations issued on April 9, 2007, 72 Fed. Reg. 17748, which limited the accommodations available for all general State and district-wide assessments under the IDEA. These regulations were issued without notice and comment and require each State to determine which accommodations would “invalidate” a test and prohibit an individualized education program (IEP) Team from recommending such accommodations on these assessments. Given the increased reliance on assistive technology, and the increased use of principles of universal design in instruction and assessments stressed throughout ESSA, NDRN believes students with disabilities should be able to use the same accommodations they use for learning curriculum content as they participate in the general State and district-wide assessments as determined by the IEP Team.

- b. Alternate Assessments aligned to Alternate Achievement Standards (AA-AAS): We urge the Department to clarify and reinforce, through regulation, the following requirements related to the AA-AAS:
 - i. Reinforce the statutory requirement of a statewide cap not to exceed 1% of the total number of students in a state who are assessed, the consequences for exceeding such cap, and the criteria for requesting a Secretarial waiver to exceed the 1% cap, such as that issued on December 3, 2003, 68 Fed. Reg. 68697;
 - ii. Reaffirm students without the most significant cognitive disabilities will participate in the general assessment at their enrolled grade level;
 - iii. Emphasize parents will be informed, through the development of an individualized education program, about the impact of having their child participate in the AA-AAS;
 - iv. Ensure participation in the AA-AAS should not preclude a child from attempting to complete the requirements for a regular high school diploma;
 - v. Reinforce that students participating in the AA-AAS should have access to and be instructed in the general education curriculum;

- vi. Strongly encourage the use of Universal Design for Learning in the assessment process; and
 - vii. Reinforce the need to build the expertise of educators in determining when and how to administer the alternate assessment and promoting the highest expectations of students at all times
- c. Grade-level assessments

As established under NCLB, students with disabilities are to be assessed using the assessments for their enrolled grade. Our organizations urge that this requirement be upheld in ESSA. Thus the Department should explicitly state that practices such as "out-of-level," "below-level," and/or "instructional level" assessments do not satisfy the accountability provisions of the Act. Students not assessed at their enrolled grade level must be counted as non-participants.

- d. Computer-adaptive assessments may measure the student's level of academic proficiency and growth using items above or below the student's grade level. The Department should make clear that the use of out-of-grade-level scores may be used to measure growth, but may not be used to determine the student's academic level of proficiency.
- e. Local Education Agencies may use locally selected assessments, including nationally-recognized high school assessment in lieu of the State-designed academic assessment. The Department should make clear and formalize that locally selected assessments must be utilize accessible to students with disabilities.

6. School Quality Indicator:

School climate indicators are key to ensuring that children and youth with disabilities, particularly those of color, receive a quality education in a consistent and healthy environment. ED must provide guidance to states both about the importance of including a school climate indicator in states with low graduation rates, high removal rates, and high drop-out rates (particularly those impacting discrete sub populations), and additionally, how to craft such an indicator in a manner that will result in meaningful change.

P&As continue to see cases in which the basic protections of the IDEA and Section 504 are misunderstood or poorly implemented, resulting in harm to children. The focus on school climate in ESSA emphasizes this need, and adds to its urgency.

Proposed School Climate Indicator Language:

If any sub-group measures 5% above the state average for out of school suspension for all students in that grade, the state will take immediate steps in accordance with its state plan to rectify this disproportionality.

Definitions Used For This Indicator:

"Group:" These are the same data points (Sex, Race, LEP, IDEA, Section 504) currently collected for the Civil Rights Data Collection (CRDC).

"Out of School Suspension:" As defined by the CRDC as excluding a student from school for disciplinary reasons for one school day or longer. For IDEA eligible students, this additionally includes an instance in which a child is temporarily removed from his/her regular school for disciplinary purposes to another setting (e.g., home, behavior center). This includes both removals in which no IEP services are provided because the removal is 10 days or less as well as removals in which the child continues to receive services according to his/her IEP.

This indicator does not require the collection of any new data. The state average should improve over time and states are not compared with one another.

7. Overuse of Discipline Practices

Each state plan must describe how the SEA will support LEAs in reducing the overuse of discipline practices that remove students from the classroom and/or educational services.¹ The data continues to show that students with disabilities, especially students with disabilities of color, are subject to school removals at an alarming rate. These removals are both formal (suspension and expulsion) and informal (shortened school days, "sent homes" and transfers to alternative education). Research also shows that discipline practices have dire consequences academically and increase referrals to the juvenile and criminal justice systems.

In light of this requirement, we urge the Department to issue guidance on the legal requirements related to discipline of students with disabilities. SEAs and LEAs need greater clarity about how certain disciplinary practices (e.g. informal removal) violate the law, the need to comply with the disciplinary protections of Section 504 and the IDEA, and the inclusion requirements of the IDEA, Section 504 and the ADA.

In *Dear Colleague Letter*, [114 LRP 1091](#), 8 GASLD 20, (OCR/DOJ 2014), ED explained the manner in which discipline can constitute discrimination on the basis of race, color, or national origin. A footnote to that letter stated that ED intended to issue additional material on discipline of students with IEPs. "The departments are developing resources to assist schools and support teachers in using appropriate discipline practices for students with disabilities." In addition to resource materials, specific guidance akin to the letter above, which sets out how SEAs and LEAs may meet the legal requirements of IDEA, Section 504 and ADA is sorely needed --even moreso now that this new requirement is included in ESSA.

¹ In some cases, students are moved within the school building (e.g. to in school suspension or an empty classroom) for multiple school days without access to IEP services or the general curriculum. Although already included in the law, ED should reinforce in regulation that these constitute "suspension" and a "removal" as the student does not have access to his or her program.

8. Small Schools

ESSA allows high schools with a total enrollment of less than 100 students to forego implementation of improvement activities if identified due to graduation rate of less than 67 percent. Depending upon how States define/configure alternative schools, this provision could allow such schools to escape improvement activities, disproportionately impacting students with disabilities.

ED should further define “high schools with a total enrollment of less than 100 students” as limited to traditional public high schools, in order to ensure that small high schools serving large numbers of students who are the subject of disciplinary removals, over age and/or under credited are subject to improvement activities. This clarification will be in keeping with both the letter and the spirit of the statute, which did not intend a loophole to remove these students from the accountability system.

9. Students at Risk of Dropping Out

State plans shall describe how the SEA will support LEAs to decrease the number of students at risk of dropping out.

This report language is both much needed and encouraging:

Report Language: “It is the Conferees’ intent that States describe how the unique needs of students are met, particularly those students in the middle grades and high schools. The Conferees intend that States will work with local educational agencies receiving assistance under this part to assist in identifying students who are at-risk of dropping out using indicators such as attendance and student engagement data, to ensure effective student transitions from middle to high school, including by aligning curriculum and student supports, and to assist in effective transitions from high school to postsecondary education through strategies such as partnerships between local educational agencies and institutions of higher education. Such strategies to improve transitions may include integration of rigorous academics, career and technical education, and work-based learning. In order to accomplish these priorities, the Conferees intend that States will provide professional development to teachers, principals, other school leaders, and other school personnel to ensure that the academic and developmental needs of middle and high school students are met.”

Many students with disabilities drop out of school due to inadequate identification and poor programming. As such, the P&As have a significant interest in this issue. We ED to issue regulations encapsulating the information set out in the Conference Report.

10. Seclusion/Restraint:

The Department must issue regulations and guidance on the requirement that State plans will robustly and effectively ensure that SEAs support LEAS to reduce the use of aversive behavioral interventions including the restraint and seclusion. All aversive

interventions compromise the health and safety of students. The Conference Report further clarifies that the use of aversive behavioral interventions include the use of restraint and seclusion, and that the State plan should describe how it will support the reduction of these practices. The organizations strongly support the issuance of regulations and guidance from the Department, beyond the Resource Document issued by OSEP.

11. Potential Loophole Regarding Youth Entering and Returning from the Juvenile Justice (JJ) System²

State plans under Title I, Part D-Neglected And Delinquent Children (Section 1401 Et Seq.) must examine youth transitions to and from correctional facilities and locally operated programs, including the attainment of a regular high school diploma and timely re-enrollment in public school.

As disability is disproportionately represented in the juvenile justice population, this fact is of great concern to the P&A network. P&As see cases of students who are pushed out of the school system into group homes and juvenile institutions that provide little or no education to them. They may be placed in settings that do not provide any educational program, provide one that does not meet their disability specific needs, and/or one that doesn't produce transferable credit. It is not uncommon to hear of youth who are in the system for months and attend school but who do not obtain credit for their work upon release.

We recommend that the Department clarify that students should only be removed from the cohort if (a) a student has transferred to a prison or juvenile facility for a year or more *and* (b) the student has an opportunity to earn a diploma in the prison or juvenile facility to which he/she transfers. This definition is consistent with another exception ESSA allows for removal from the graduation cohort: transfer to another school or program from which the student is expected to earn a high school diploma. In addition, the Department must further clarify that when a youth returns to a local educational agency within the one year, he/she must again be included in the graduation cohort.

Failing to count students who transfer to prisons or juvenile facilities for even a short time creates an unintended perverse incentive for districts to push struggling students into the juvenile or adult justice system and undermines the strengthened emphasis on reentry supports in Title I, Part D. ED should regulate in a manner that closes this potential loophole that could permit lower standards and accountability with regard to youth involved in the juvenile justice system.

² NDRN has signed onto comments filed today submitted on behalf of a coalition of national organizations. The filing itself is under the name of the Children's Defense Fund. These comments provide useful details about the manner in which ED should regulate with regard to Juvenile Justice and Foster youth. For ease of reference, we have copied some of that material into our comments here on those two specific topics. We wish to properly credit their fine work.

12. Youth Entering and Returning from the Juvenile Justice System: In General³

ESSA strengthens protections for juvenile justice system-involved youth in Title I, Part D. Positive changes to the law include smoother education transitions when students enter juvenile justice facilities, educational assessments when practicable upon entry to a facility, increased emphasis on connecting young people to an appropriate education or career and technical education program upon reentry, smooth record sharing and credit transfer, timely and appropriate re-enrollment, and supportive reentry programs. Additionally, the reauthorized law prioritizes attainment of a regular high school diploma, and includes a new option to use funding to support and serve youth touched by both the child welfare and juvenile justice systems.

Needed Regulations

We urge ED to enact regulations to ensure the provisions described above in Title I, Part D of ESSA are robustly implemented and enforced. Specifically, we urge the Department of Education to:

a. Broadly interpret and clarify when conducting an education assessment upon entry is “practicable.”

ESSA provides that States accepting funding should describe the procedures they will use to assess students’ educational needs. They must do so upon entry to a correctional facility “to the extent practicable.” This is a critical step of ensuring appropriate education at the correct grade level while youth are in custody. It also represents a key point to intervene and begin to make a positive difference in the youth’s education—for example, by illuminating for the first time that a student should be referred for a special education evaluation. We urge the Department to describe what constitutes “to the extent practicable” so that as many States as possible institute this initial assessment. For example, “to the extent practicable” could be defined as “whenever possible unless facilities are prevented from doing so due to circumstances beyond their control.”

b. Ensure that upon reentry, students are immediately re-enrolled in appropriate quality education programs and not automatically sent to alternative schools or placed in GED or Adult Basic Education (ABE) programs that do not meet their needs.

³ NDRN has signed onto comments filed today submitted on behalf of a coalition of national organizations. The filing itself is under the name of the Children’s Defense Fund. These comments provide useful details about the manner in which ED should regulate with regard to Juvenile Justice and Foster youth. For ease of reference, we have copied some of that material into our comments here on those two specific topics. We wish to properly credit their fine work.

Prohibit blanket policies that force returning students to enroll in alternative schools.

ESSA leaves open the option that young people involved in the juvenile justice system may transition back into alternative education programs upon reentry. However, some jurisdictions have implemented policies or practices requiring that **all** young people reentering from the juvenile justice system return to an alternative school as opposed to an educational program that best meets each young person's individual educational needs. This practice creates a type of "dumping ground" in alternative schools for reentering students; from there, many youth drop out of school instead of making it back into an appropriate community school or career path. The Department of Education's regulations should prohibit blanket policies that force reentering students to enroll in alternative schools, which often fail to adequately address the educational and reentry needs of young people returning to the community.

Define the process for determining which school or educational program, including both which curricula and other supports needed for educational success, best meet a young person's needs upon reentry into the community.

Related to the issue described in (a) above, ESSA requires States receiving Title I, Part D funds to establish procedures to ensure timely re-enrollment into the education program or career and technical education program **that best meets the needs of the student**. The Department should clarify the process for determining how to assess which school or educational program, including which education reentry supports, best meets the student's needs, including:

- Who makes the decision and within what time frame;
- Requiring that the decision be based on individual student-centered considerations, driven by the expressed wishes of the student and family after meaningful discussion, consistent with Title I, Part D's new emphasis on family engagement;
- What specific factors the decision-maker should consider, including:
 - the student's education record prior to and during placement,
 - educational assessments, and
 - other types of records, including consultations with experts; and
- What type of dispute or appeals process should be available to young people and their families or advocates.

Define "timely" re-enrollment.

The Department should clarify that "timely" re-enrollment means immediate re-enrollment. Re-enrollment should occur immediately and in no case later than 3 business days after the local educational agency receives notice of the

student's discharge from a correctional facility. The Department also should clarify that re-enrollment includes enrollment of young people into new schools or educational programs that they have not yet attended, but that best meet their needs. Finally, the local educational agency should be prohibited from preventing enrollment or re-enrollment of students because of administrative issues beyond a young person's control, such as lack of a proper mailing address.

Early, thoughtful, youth- and family-driven re-entry planning across state and local educational agencies, the juvenile justice system, and correctional facilities, is fundamental to ensuring youth are immediately re-enrolled in an appropriate educational program. School choice decisions and transfer of records and credits must occur before the youth is discharged from custody and local education agencies should be notified of a student's re-enrollment no later than two weeks prior to discharge whenever possible. The Department should emphasize and require this robust re-entry planning through regulation, in order to ensure States receiving Title I, Part D funds will indeed be able to carry out the assurances they must now make in their application for funding.

c.Ensure that state educational agencies emphasize credit-bearing secondary and postsecondary coursework, and career and technical education.

ESSA requires States receiving Title I, Part D funding to establish “opportunities for students to participate in credit-bearing coursework while in secondary school, postsecondary education, or career and technical education.” The Department should clarify that all three options should be available to students involved in the juvenile justice system. Specifically, although career and technical education is extremely important to engage students and build skills towards family-sustaining careers, youth in the juvenile justice system should have equal access to traditional coursework that leads to recognized academic credit. In order to effectuate access to credit-bearing coursework, secondary schools and programs must align with a State's current academic curriculum standards as set forth in state statute, regulations and/or guidance.

Since ESSA does not specify whether this provision applies to youth in correctional facilities, the community, or both, we urge the Department to interpret this provision to ensure youth have access to these critical opportunities both while in custody as well as upon reentry into the community.

d.Define when a youth has “come into contact with both the child welfare and juvenile justice systems.”

ESSA requires States receiving Title I, Part D funding to note when a youth has had “contact” with both systems. It also allows funds to be used to support

services for these youth. The Department should clarify through regulation what constitutes “contact” to avoid confusion and promote consistent data collection across jurisdictions. We recommend the following definition, which includes youth who are dually-adjudicated and have other contact with the systems but is not so broad as to overburden jurisdictions in obtaining the information: *Youth who have concurrent involvement (diversionary, formal, or a combination of the two) with both the child welfare and juvenile justice systems.*⁴

Other Requested Activities to Support Full Implementation of ESSA

In addition to developing regulations to address the issues described above, the Department of Education should take the actions described below to support access to quality education for students in and returning from the juvenile justice system.

Specifically:

- Hire a dedicated staff person or team to focus on issues impacting vulnerable youth, including those involved in the juvenile justice or foster care systems, as well as dual status youth;
- Highlight models from jurisdictions that currently provide excellent access to quality education for young people involved in or returning from the juvenile justice system;
- Provide technical assistance and grant discretionary funding to jurisdictions to help provide the resources needed to successfully implement aspects of Title I, Part D impacting young people involved in or returning from the juvenile justice system, dual status youth, and young people in the foster care system;
- Assess and address barriers to improve youth success in obtaining a traditional high school diploma that leads to post-secondary education or career and technical training; and
- Devote more resources to help jurisdictions implement the December 2014 correctional and reentry education guidance package—juvenile justice and education stakeholders report that additional dissemination, education and enticement/enforcement activities are needed.

13. Meeting the Needs of Children with Disabilities in Foster Care⁵

Children in foster care are some of the country’s most educationally disadvantaged

⁴ See definition of “Dually-involved Youth” in Tuell, John et al., Robert F. Kennedy Children’s Action Corps, Dual-Status Youth - Technical Assistance Workbook 4 (Models for Change 2013), <http://www.modelsforchange.net/publications/515>.

⁵ “Foster Care” can imply to the reader children who are placed in foster care with a family and assigned foster parents. Children and youth with disabilities who are wards of the state or county are often placed in institutional settings (e.g. residential schools and group homes) rather than family based foster care and their care is overseen by social workers and educational “surrogate parents” who are not located on site.

students and there are disproportionately also individuals with disabilities. Studies show students in foster care are more likely to be suspended or expelled, score lower on standardized tests in reading and math, have higher rates of grade retention and drop-out and are far less likely to attend and graduate from college.⁶

For the first time, the Every Student Succeeds Act (ESSA) now contains key protections for students in foster care to promote school stability and success, and requires education agencies to collaborate with child welfare partners.

Because of the dual-agency responsibility for the educational success of students in foster care, and the tight timelines around the foster care provisions of the law, it is critical that state and local education and child welfare agencies receive prompt information and support around implementation.

Needed Regulations

Some of the new assurances and protections for students in foster care in Title I must be in effect by December 2016, within one year after enactment of ESSA. At that time, a key protection for children in foster care previously available in some states under the definition of “awaiting foster care placement” in McKinney-Vento will disappear for most states. Therefore, it is critically important that guidance for improving educational stability and success for children in foster care be included in the Department of Education’s first set of regulations.

Furthermore, because this is the first time that provisions related to students in foster care are included in federal education law, and because of the need for the State Education Agency (SEA) and Local Education Agency (LEA) to collaborate with state and local child welfare agencies in a timely manner, it will be critically important for the statutory language for the foster care provisions to be emphasized within regulations.

At a minimum, the following should be addressed:

a. Definitions

With the passage of ESSA, both education and child welfare agencies at the state and local levels must collaborate with each other to help maintain school stability for students in foster care. Two definitions are needed to ensure consistent implementation between these two agencies. The suggested definitions below are drawn from those used currently by child welfare agencies that are to collaborate with education agencies.

“School of origin”: Child welfare law makes clear that the need to maintain school of origin when in a child’s best interest exists both when a student enters foster care, and also at any subsequent change in living

⁶ Research Highlights on Education and Foster Care, National Working Group on Foster Care and Education (2014) http://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=1279&Command=Core_Download

placement.⁷ Therefore, to ensure consistency between child welfare and education law, regulations should define the term ‘school of origin,’ as referenced in 20 U.S.C. 6311(g)(1)(E)(i) and 20 U.S.C. 6312(c)(5)(B)(i), to include: *“(A) The school in which the child was enrolled prior to entry into foster care; and (B) The school in which the child is enrolled when a change in foster care placement occurs or is proposed.”*

“Child in Foster Care”: To ensure consistency between child welfare and education agencies, and to clarify which students are covered by these provisions, it is important to define this term. To align it with the corresponding federal child welfare law related to school stability, the term should be defined as: *“Children and youth whose care and placement are the responsibility of the State or Tribal agency that administers a State or Tribal plan under part B or E of title IV of the Social Security Act (42 U.S.C. 621 and 670 et seq.), without regard to whether foster care maintenance payments are made under section 472 of such Act (42 U.S.C. 672) on behalf of such children and youth.”* This will help make clear that the obligations in this law apply to all children in foster care, not just those for which the federal government is providing a financial contribution.

b.State Title I Plan

Because many state and local education agencies may not be familiar with children in foster care or the new state and local plan requirements on their behalf, we propose reemphasizing in regulations the statutory language outlining the various obligations in the Title I State Plan related to foster care, with some clarification as noted below. State agencies will also need to make sure local agencies are familiar with their obligations.

c.SEA Point of Contact for Students in Foster Care. State Education Agencies must identify someone to serve as the point of contact to oversee and implement the foster care requirements of the state plan. This person must not be the same as the McKinney-Vento State Coordinator to ensure that each individual will have the capacity and resources to support their respective group of vulnerable students.

d.School Stability Process. State Education Agencies will have to work with child welfare agency partners to create a process to ensure that every Local Education Agency (LEA) has policies to support school stability and continuity for students in foster care. This includes ensuring a presumption that students will be maintained in the same school, unless not in his or her best interest; ensuring that LEAs are consulted as part of the best interest decision-making process;⁸ ensuring that LEAs together with state or

7 42 U.S.C.A. 675(1)(G)(i).

8 42 U.S.C.A. 675(1)(G)(ii). Child welfare guidance (U.S. Dep’t of Health and Human Servs. Admin. for Children and Families, Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008, 19 (July 9, 2010) (hereinafter “ACF Guidance”), available at

http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm underscores that it is the duty of the

local child welfare agencies will develop by December 10, 2016, local transportation plans that resolve how transportation will be provided, arranged, and funded, when necessary for students to remain in their school of origin to ensure school stability; and outlining the process for ensuring immediate enrollment and transfer of records when a new school is necessary because remaining in their school of origin is not in a child's best interest. In addition, SEAs should clarify for LEAs how they can obtain any state funding to support school stability. SEAs should also clarify obligations regarding the continuing implementation of any pre-existing state laws that effectively ensure school stability and how they conform with new federal mandates.

e. Local Title I Plan

Given the large number of school districts, and the requirement that LEAs and child welfare agencies must work together to develop transportation plans for students in foster care by December 10, 2016, and the accompanying process that will need to be addressed to ensure transportation plans can be implemented successfully, we encourage regulations to restate the foster care provisions of the ESSA, with some clarification, noted below:

f. LEA Point of Contact for Foster Care: LEAs can always designate a point of contact for children in foster care, but must do so if the responsible child welfare agency notifies the LEA that it has a designated point of contact for the LEA. To ensure consistent implementation, regulations should clarify that the Local Title I Plan must include timely appointment of LEA points of contact in response to written notification from a child welfare agency, and clarification that the LEA point of contact will often be serving children from multiple child welfare agencies.

g. Local Transportation Plans: To ensure the best possible collaboration between child welfare and education in ensuring school stability, regulations should restate the provisions relating to the need for procedures related to proving, arranging, and funding school transportation for students in foster care. Specifically, by December 10, 2016, LEAs must collaborate with state or local child welfare agencies to develop and implement "clear written procedures governing how transportation to maintain children in foster care in their school of origin when in their best interest will be provided, arranged, and funded for the duration of the time in foster care." The procedures must also "ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner and in accordance with section 475(4)(A) of the Social Security Act (42 U.S.C. 675(4)(A))."⁹

In addition to restating the statutory requirements, regulations should make clear that

child welfare agency to make this decision, noting that the "agency should determine if remaining in the same school is in the child's best interests." The child welfare agency is well-positioned to make school stability decisions as it can assess non-educational factors such as safety, sibling placements, the child's permanency goal, and the other components of the case plan. The child welfare agency also has the authority, capacity, and responsibility to collaborate with and gain information from multiple parties, including parents, children, schools, and the court in making these decisions.

9 20 U.S.C. 6312(c)(5)(B)(i).

some school districts may need to engage multiple child welfare partners, because there may be multiple child welfare agencies placing students in a school in the LEA. All children in foster care in the LEA, regardless of what county or state child welfare agency is responsible for the child, need to be accommodated by the plan.

Regulations must clarify that once a best interest determination is made by a child welfare agency or court after consultation with LEAs, that LEAs are obligated to ensure school stability or immediate enrollment for the student. Further, regulations should clarify that written policies published by LEAs will help ensure timely implementation of transportation, immediate enrollment, and prompt transfer of records, and ensure that schools, parents, students and social service providers are notified of the procedures.

h.Data Reporting

Need to Identify Students in Foster Care: To disaggregate high school graduation and academic achievement based on a student's status in foster care, it will be necessary for State Education Agencies (SEAs) to have access to information about which students are in foster care. Regulations must clarify that, as part of this requirement, SEAs must work together with child welfare agencies to identify students in foster care. This requires working with child welfare agencies to develop a process for sharing timely and accurate information.

Consistent Definitions and Timelines Across States: To ensure that the data maintained and reported on students in foster care is consistent both within, and across, states, regulations should be clear about the definition of "child in foster care," as detailed above. Furthermore, because of the need to work across state and local child welfare and education systems to identify students in foster care for purposes of disaggregation, regulations should be clear about consistency of timelines and methods for identifying students in foster care and the scope of academic achievement reporting required.

Unique Considerations for Students in Foster Care: When developing regulations and guidance related to the report cards it is important to remember that the "data definitions" and requirements are critical. For example, requiring the collection of data for children who have spent any time in foster care during a particular timeframe should be considered, given the temporary nature of foster care. Also, because many students in foster care are not graduating on time, it would be useful to specify that high school graduation rates could also reflect those students graduating in 5 years.

i.Removal of "awaiting foster care placement"

The intent of the foster care provisions of the new law is to create a mechanism for education agencies and child welfare agencies to work together to support the school stability and success of all students in foster care. For over a decade, the McKinney-Vento program has been serving many students in foster care, including ensuring that

they receive prompt transportation to ensure school stability, and have access to school district liaisons. Therefore, to ensure smooth transition from the McKinney-Vento program to the newly-enacted provisions, prompt guidance to SEAs and LEAs is essential. Regulations need to stress the urgency of the timelines around developing both State and Local Title I Plans related to students in foster care so activities and supports can be put in place, or at least begin to be put in place, with a timetable for completion, before the removal of “awaiting foster care placement” takes effect.

Other Guidance and Activities to Support Full Implementation of ESSA

In addition to developing regulations to address the issues described above, the Department of Education should take the actions described below to support access to quality education for students in foster care.

Specifically:

- Issue joint guidance between the U.S. Department of Education and U.S. Department of Health and Human Services on the new law, the need for inter-agency collaboration to support the educational stability and success of students in foster care, and how Title I funds can be used to promote implementation of these new protections for students in foster care;
- Hire or designate a dedicated staff person to focus on students in foster care, with a specific goal of mirroring at the federal level the type of cross-agency collaboration that is needed around implementation at the state and local level. This staff person should be the point of contact for overseeing the new foster care provisions of the law, and work collaboratively with the U.S. Department of Health and Human Services to support the educational stability and success of students in foster care;
- Provide technical assistance and training to state and local education agencies around implementation of the foster care provisions of the law, including support around the required data collection and reporting and how to collaborate with child welfare agencies;
- Highlight models from state and local jurisdictions that currently provide, in collaboration with child welfare agencies, school stability and excellent access to quality education for children in foster care;
- Provide grant funding to jurisdictions to help provide the resources needed to successfully implement the foster care provisions of the law, and support evaluation of programs and interventions to support replication.

14. Other Concerns

ED should make clear that students receiving an alternate diploma must not be counted in the IDEA’s Section 618 data collection as “graduated with a regular high school diploma.”

Thank you for considering the developmental disabilities network’s recommendations for

implementation of Title I programs under the Every Student Succeeds Act. We would be happy to discuss our comments further or answer any questions you may have. For additional information, please do not hesitate to contact:

Amanda Lowe, Public Policy Analyst, NDRN at Amanda.lowe@ndrn.org

Sincerely,

A handwritten signature in blue ink, appearing to read "Curt Decker".

Curt Decker, J.D.
Executive Director