



August 1, 2016

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

RE: ED-2016-OESE-0032

Dear Secretary King,

On behalf of The Leadership Conference on Civil and Human Rights and the 31 undersigned organizations, we write in response to the notice of proposed rulemaking (NPRM) published in the Federal Register on May 31, 2016 regarding accountability and state plan requirements in the Every Student Succeeds Act (ESSA). Given the civil rights legacy and purpose of ESSA, and the centrality of accountability and reporting requirements to ensuring that students are well served by the law, we appreciate the opportunity to offer our perspective on these proposed rules. The regulations the Department proposed in May are a good first step toward ensuring that all students are counted and that parents and communities can hold their schools accountable for meeting the needs of their students. We offer these comments regarding areas in which the regulations were appropriately strong and where they need to be strengthened. Many signers listed below will also be submitting comments on behalf of their own organization or alongside other partners.

In brief, we urge the Department to ensure in its final regulations that:

- States, districts, and schools must be required to consult in a timely and meaningful way with parents and families, community-based organizations, civil rights organizations, Indian tribes, teachers, and school leaders.
- Each individual group of students must count in accountability systems and “super-subgroups” must not be allowed.
- State accountability systems must provide a summative school rating for each school.
- Schools must be held accountable for the inclusion of 95 percent of all students, and of each subgroup, in the accountability system.
- The “other indicator of school quality or student success” must be related to student achievement, disaggregated at the student level, and the same for all schools.
- Student achievement and high school graduation must be the focus of the accountability system.
- Schools must be identified for targeted support and improvement after a group of students has been underperforming for no more than two years.
- State definitions of “underperforming” for any subgroup of students must be based on the statewide goals and interim progress targets.
- The minimum number of students needed to include a subgroup of students, the “n-size,” must be no more than 10 students.

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- The state-determined timeline for English learners to achieve English language proficiency must not exceed five years.
- A state’s “regular high school diploma” should only be one that is fully aligned with state standards and a state’s “alternate diploma” should only be one that is standards-based and meets all other criteria as required by the statute.
- The regulations should provide more direction on how states should assist local educational agencies with improving school environments for student learning.
- The regulations should make progress in ensuring the promise of resource equity.
- Data must be easily accessible and user-friendly.
- States must only be allowed to count students with disabilities who have exited special education in the disability subgroup for the school year in which they exited.
- Robust action must be taken to ensure equity in access to strong teachers.

***States, districts, and schools must be required to consult in a timely and meaningful way with parents and families, community-based organizations, civil rights organizations, Indian tribes, teachers, and school leaders.***

We support the draft §299.13 “Overview of State Plan Requirements,” §299.14 “Requirements for the Consolidated State Plan,” and §299.15 “Consultation and Coordination” because, taken as a whole, these three regulations require meaningful parent, family, and tribal consultation as a core component of drafting, revising and implementing state plans. The specific requirements in §299.13 (b) through (h) in particular did not exist in the regulations implementing No Child Left Behind, but are at the heart of ESSA’s emphasis on a real, collaborative dialogue in the creation of state plans. We applaud the draft regulations as consistent with the new statutory language in ESSA and appropriately specific to ensure meaningful consultation.

The specific requirements in §299.13 concerning the Overview of State Plan Requirements in subsection (b) “Timely and Meaningful Consultation” through (h) “Revisions” include a number of specific requirements that the civil and human rights community views as critical, including providing public notice of the initial state plan; a 30 day period for comments; specific assurances regarding high school students who are English learners; and a requirement for stakeholder engagement when amending the state plan. These requirements are consistent with and include priorities that are critical for the civil and human rights community: early and ongoing consultation that actively seeks the views of all key stakeholders.<sup>i</sup>

We also applaud “Requirements for the Consolidated State Plan,” §299.14, which requires that consultation and coordination is a major component of state plans for the first time, and draft regulation §299.15, “Consultation and Coordination” which identifies stakeholders who must be involved, including representatives of Indian tribes and civil rights organizations, including those representing students with disabilities, English learners, and other historically underserved students. Both draft regulations clarify that consultation is a critical part of ESSA and establish that state plans must be developed with the full parent and community engagement from those who have historically been underserved.

We support draft regulation §200.30 “Annual State Report Card,” which requires a state to prepare a state report card and share it to the extent practicable in a language that parents can understand, including Native and spoken languages, that are present in parent and community members in a state.

Underrepresented parents will benefit from this provision because they will be better able to understand how their student is doing in school and how their school is doing for all students. Easy access to this data will help all parents be active participants in the education of their children.

We applaud the language in §200.21 and §200.22, which requires that notice be provided in a language that parents can understand, including Native and spoken languages, which are present in parent and community members in a state. In addition, we request that the Department consider adding culturally responsive approaches in school support and improvement strategies for underserved students to the non-exhaustive list in §200.21(d)(3) of strategies that schools may use. This recommendation comes from the belief that parents and community members know their students best and often know how to support schools through relevant strategies.

We want to highlight our support for three of the specific requirements under §299.13 (b) that define “timely and meaningful” and recommend one additional specific step that we see as critical. The (1) public notice of the processes and procedures; (2) outreach during the design, submission, and revision of a state plan and (3) publication of how comments and consultation occurred are all requirements we see as critical. We applaud these requirements and look forward to the states’ rigorous adherence to them as well as the Department’s enforcement of them.

However, our experience with consultation—through tribal government-to-government consultations as well as the civil rights community as a whole—is that without agendas developed with stakeholders and written, clear follow up, consultation is often ineffective. We recommend an additional subsection to §299.13(b) to ensure that agendas and written follow up to participants is required in state plans. The addition of the phrase “timely and meaningful” in §1111 of ESSA and the state plan peer review subsection in §8541 support this recommendation. Moreover, the longstanding purpose of the Elementary and Secondary Education Act (ESEA) as expressed in ESSA as well as the history of exclusion of the civil rights community, low-income people, people with disabilities and people of color support our recommendation as a critical step to ensure ESSA truly marks a new era of real, inclusive collaboration that is reflected in state plans.

***Each individual group of students must count in accountability systems and “super-subgroups” must not be allowed.***

We support the clarification that a State must include each of the required subgroups of students separately in the state’s accountability system as stated in §200.16. Relying on a combined subgroup or a super-subgroup of students masks subgroup performance and conflates the distinct academic needs of different groups of students, inhibits the identification of schools with one or more consistently underperforming subgroups of students for targeted support and improvement, and limits information available to the public and parents, which is contrary to the statutory purpose to increase transparency, improve academic achievement, and hold schools accountable for the success of each subgroup.

***State accountability systems must provide a summative school rating for each school.***

We support the inclusion of the requirement in §200.18(b)(4) that state accountability systems must provide a summative rating for each school which takes into account the performance of all students and each group of students on each of the indicators included in the accountability system. The law requires summative ratings by creating a system which requires: at least four indicators of school performance; specific weights to be applied to those indicators; and school rankings. It has been suggested that there

exists a tension between summative ratings and the need for transparency about school quality. Dashboards—one option for displaying multiples pieces of information about schools—and summative ratings are not mutually exclusive. Indeed, the highest quality and most transparent summative systems include a clear explanation based on each indicator of school performance. We share the goal of transparency, but because the law requires the use of summative ratings in the accountability system, it would *go against* the goal of transparency to purposefully exclude these required summative ratings from public disclosure.

***Schools must be held accountable for the inclusion of 95 percent of all students, and of each subgroup, in the accountability system.***

We support the language in §200.15(a) of the draft regulations which would incorporate the ESSA requirement that States annually measure the achievement of at least 95 percent of all students, and 95 percent of all students in each subgroup of students under proposed §200.16(a)(2), who are enrolled in each public school. Participation rates would be calculated separately on the assessments in reading/language arts and mathematics required under section 1111(b)(2)(B)(v)(I). Proposed §200.15(b)(1) would incorporate the statutory requirements related to the denominator that must be used for calculating the Academic Achievement indicator under proposed §200.14 for purposes of annual meaningful differentiation of schools, while proposed §200.15(b)(2) would establish minimum requirements for factoring the participation rate requirement for all students and each subgroup of students into the State accountability system. The participation rate requirement, first included in the No Child Left Behind Act of 2001, was in direct response to the routine exclusion of certain groups of students from the assessment system. Without *both* the inclusion of historically marginalized students *and* the inclusion of historically advantaged students in the assessment system, low student performance will be hidden and remain unaddressed and disparities will be ignored and dismissed. The inclusion of all students is central to the accountability system and should be robustly enforced.

***The “other indicator of school quality or student success” must be related to student achievement, disaggregated at the student level, and the same for all schools.***

We support the important guardrails placed around the indicator of “school quality or student success” in §200.14. While we recognize the value of measures of school quality in addition to student achievement (as measured by the statewide annual assessment) and high school graduation, it is important that additional measures included in accountability systems support the focus on student achievement and meaningfully hold schools accountable for the experience of all students in the school. The requirement that the indicator of school quality or student success be supported by research finding that performance or progress on a such measure is likely to increase student academic achievement or high school graduation is important to ensuring that schools support student success and fully consistent with the text of the law.

***Student achievement and high school graduation must be the focus of the accountability system.***

We support the regulation’s focus on student academic achievement by prohibiting in §200.18 the removal of identification of schools as needing support and improvement simply due to progress on the “other indicator of school quality or student success”. The proposed regulations mirror section §1111(c) of the statute in requiring that the system of annual meaningful differentiation gives substantial weight to the indicators of academic achievement, academic progress, graduation rates, and progress in achieving English language proficiency, and must be afforded much greater weight in the aggregate to the indicator

or indicators of school quality or academic success. To comply, the proposed regulations require that states demonstrate that the indicator or indicators of school quality or academic success cannot be used to: (1) change the identification of school as in need of comprehensive support, unless it is also making significant progress, for all students on one of the indicators with substantial weight; and (2) change the identification of school as in need of targeted support unless it is also making significant progress for each low-performing subgroup on at least one of the indicators with substantial weight.

***Schools must be identified for targeted support and improvement after a group of students has been underperforming for no more than two years.***

We support the definition of “consistently” in §200.19(c) to mean no more than two years. Because the academic career of a student is so limited, every year counts. If a problem facing a school for a group of third grade students isn’t even identified until those students have moved on to middle school, it is unlikely that students will benefit from needed support and improvement strategies. We cannot wait to identify areas where supports are needed and to make changes to support student learning. The stakes are too high for every single student and even more so for those who have been historically marginalized as a group.

***State definitions of “underperforming” for any subgroup of students must be based on the statewide goals and interim progress targets.***

The definition of “consistently underperforming subgroup” is critical to ensuring that all schools are held accountable for how they are serving all groups of students. To serve this purpose, this definition must include not just the lowest performing schools for a group of students, but schools anywhere along the performance spectrum that are not making progress for one or more groups.

We support the proposed regulatory requirement that states, in defining consistent underperformance, must consider schools’ performance for each student group over no more than two years (§200.19(c)(1)). However, we are concerned that several of the options for identifying consistent underperformance in section §200.19(c)(3) – specifically options §200.19(c)(3)(ii) through §200.19(c)(3)(iv)—would result in methodologies that would flag only the lowest-performing schools for intervention and support.

Instead of allowing states to base definitions of consistent underperformance on the size of achievement gaps with statewide averages, or thresholds based on these averages, we urge the Department to require states to base their methodology for identifying consistently underperforming schools on state goals and progress targets.

Additionally, we recommend requiring that this definition be more expansive than the definition of “low performing subgroup.” Specifically, we recommend striking section §200.19(c)(3) and replacing with: “§200.19(c)(3) Define a consistently underperforming subgroup of students in a uniform manner across all LEAs in the state such that this definition (i) Is based on the state’s long-term goals and measures of interim progress, as established under §200.13; and (ii) Includes more schools than the definition of “low-performing subgroup” under §200.19(b)(2).”

***The minimum number of students needed to include a subgroup of students, the “n-size,” must be no more than 10 students.***

Although the proposed regulations in §200.17(a)(2)(iii) and §200.17(a)(3)(v) do not require states to set a specific N-size, they do say that if a state sets an N-size above a threshold of 30, they have to justify why, including identifying the number and percentage of schools that would not be held accountable in their system. The Department is justified in exercising its statutory authority to include a threshold N-size and ensure that states meet the requirements under §1111 (c)(4)(D)(III) and (d)(3)(A)(i)(II) to meaningfully differentiate among school performance as it applies to subgroups and school identification. However, the threshold is set far too high. We urge the Department to lower the threshold to 10 students, while maintaining the language within the proposed regulations that allows states to set a higher threshold if they can provide justification, including data on the number and percentage of schools that would not be held accountable for the results of students in each subgroup in the accountability system and that explains how a minimum number of students exceeding 10 promotes sound, reliable accountability determinations.

***The state-determined timeline for English learners to achieve English language proficiency must not exceed five years.***

We urge the Department to include in §200.13 a maximum timeline of five years for goals for reaching English proficiency. The average time to reclassification is under four years<sup>ii</sup> for children under grade 5. Moreover, ESSA adds much needed reporting requirements for English learners that have not reclassified within five years. We believe this timeline will be consistent with the Long Term English learner definition signaling that more than five years is excessive and students should be “making progress” with the supports they need to become proficient in the English language within a reasonable timeline.

***A state’s “regular high school diploma” should only be one that is fully aligned with state standards and a State’s “alternate diploma” should only be one that is standards-based and meets all other criteria as required by the statute.***

In §200.34(c) the definitions for “regular high school diploma” should be changed to ensure that, as required under ESSA, neither a regular nor alternate high school diploma is based, wholly or in part, on meeting IEP goals, even if those goals are fully aligned with the State’s grade level academic content standards. Specifically, the definition of “regular high school diploma” should be amended to read: “Regular high school diploma” means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in §1111(b)(1)(E) of the ESEA, as amended by the ESSA; and does not include a general equivalency diploma, certificate of completion, certificate of attendance, or any similar or lesser credential, such as a diploma based on meeting individualized education program (IEP) goals.

***The regulations should provide more direction on how states should assist local educational agencies with improving school environments for student learning.***

We believe that §299.19 should define or list the types of disciplinary actions that would remove students from the classroom, building on the examples of out-of-school suspensions and expulsions to also include referrals to law enforcement, and school-based arrests. The “overuse” of discipline practices should include the imposition of discipline for subjective, nonviolent conduct, such as disrespect of authority and disorderly conduct and also the disproportionate application of disciplinary actions to subgroups of students. The regulations should also provide a definition for aversive behavioral interventions, such as

involuntary confinement or the use of restraints, including handcuffs, which would prevent students from moving freely.

In addition, §200.21 and §200.22 of the proposed regulations should require local educational agencies and schools that have been identified as in need of comprehensive or targeted support and improvement to include in their needs assessments measures of school climate, such as bullying and harassment, and exclusionary and disproportionate discipline. Support and improvement plans resulting from the needs assessment should address any inequities in measures of school climate and inequities in resources that would positively impact school climate, such as funding for school counselors and evidence-based programs, as required by ESSA.<sup>iii</sup>

***The regulations should make progress in ensuring the promise of resource equity.***

We strongly support the clarifying language to identify and address resource inequity under the development of both Comprehensive and Targeted Support and Improvement Plans found in §200.21 and §200.22. In addition to addressing school discipline and climate, as mentioned above and per-pupil funding and teacher equity as included in the draft regulation, we also strongly support the suggestion to identify and address other resource inequities such as the access and availability of advanced coursework, preschool programs, and instructional materials and technology. We suggest that the Department add a healthy school climate, access to specialized instructional support personnel (including paraprofessionals, guidance counselors and social workers), and access to high-quality preschool programs and full-day, five-day-a-week kindergarten to this list of resource inequities. It may also be instructive for schools to show that they provide access to core academic subject courses that are prerequisites for a regular high school diploma.

We strongly support the proposals in §200.23 that would require a periodic review of resource allocations in each LEA serving significant numbers of identified schools for comprehensive or targeted support and improvement. This review must also consider allocations between LEAs and between schools, and require states to take action to address the resource inequities identified during this review. We strongly support the proposed regulations in §200.35 requiring states to develop a single, statewide procedure for LEAs to utilize to calculate and report LEA- and school-level per-pupil expenditures of federal, state and local funds. These data are essential to identifying and addressing resource inequities that may exist.

***Data must be easily accessible and user-friendly.***

Section 200.30 outlines the format, accessibility, dissemination, timing, and substance of state report cards. Although the proposed rule stipulates that academic achievement data may be cross-tabulated, the proposed rule does not adequately outline what states must do if they choose not to include cross-tabulated data on their report cards. Additionally, the proposed rule fails to outline guardrails to ensure that new categories are reported in a manner that is easily accessible and user-friendly. The Department should amend §200.30(c) to set minimum “easily accessible” requirements that require information on report cards, including information that is or can be cross-tabulated, to be publicly downloadable for all visitors to an SEA’s website. The Department should also prohibit the SEA from setting as a condition to accessing the information any significant barrier to getting the data, such as a requirement that users contact the SEA or pay a fee.

The Department should also amend §200.30(d) to set minimum “user-friendly” requirements for a state that chooses to release information that can be cross-tabulated, rather than perform the cross-tabulation

itself. In this case, the state must make this information available in a downloadable format that can be easily manipulated, such as an Excel spreadsheet or comma delimited file, and must not report this information in a format that cannot be easily manipulated, such as a Portable Document Format (PDF).

Additionally, although we appreciate that the proposed rule clarifies that the SEA must make LEA report cards available on its website, the final rule should also promote the ability of parents and stakeholders to compare their individual school performance to other schools, as well as see how their school compares district- and statewide. Therefore, §200.30(d) should also be amended to require SEAs to segment this data in a way that allows users to view and compare data at the state, LEA and school level.

***States must only be allowed to count students with disabilities who have exited special education in the disability subgroup for the school year in which they exited.***

In response to the Department's guiding question on the counting of students who have exited special education, we ask that states only be allowed to count those students within the disability subgroup during the year in which they are exited. In each subsequent school year that a student with a disability is not receiving special education, the student should be counted with all students, as well as within any other relevant subgroup. Students who no longer need special education services should no longer be included in the disability subgroup, which is defined as students with disabilities who receive services through the IDEA. However, for reporting ease, we support the proposal that students who have exited from special education in the middle of a school year may still be counted in the disability subgroup for the school year in which they exited.

***Robust action must be taken to ensure equity in access to strong teachers.***

There are certain areas of the proposed regulation that we strongly support and believe are critically important to ensuring equity in access to strong teachers. In particular, we appreciate the regulation's requirement that state plans must: include timelines and funding sources for strategies to address inequitable access to strong teachers; identify and clarify specific policy levers that states can use to push LEAs to act to address inequities; and meaningfully and consistently define teacher quality indicators in §299.18 and §200.37. As the regulation is finalized, we encourage the Department to: set stronger expectations for what "progress" means (i.e. clear goals, including timelines and progress targets) and ensure meaningful analyses of disparities between and within LEAs and within schools.

For too long, students of color, low-income students, English learners, students with disabilities and other historically marginalized students have been denied the equal educational opportunity that is their right and our collective responsibility. The measure of this regulation, as with any other action taken to implement the Every Student Succeeds Act, must be whether or not it advances the interest of these American students. We appreciate your consideration of these comments. For any questions or additional information, please contact Liz King, Leadership Conference Director of Education Policy, at [king@civilrights.org](mailto:king@civilrights.org).

Sincerely,

The Leadership Conference on Civil and Human Rights  
American Association of University Women (AAUW)  
American-Arab Anti-Discrimination Committee



Children's Defense Fund  
Council of Parent Attorneys and Advocates  
Democrats for Education Reform  
Disability Rights Education & Defense Fund (DREDF)  
Easter Seals  
Education Law Center - PA  
Education Reform Now Advocacy  
Judge David L. Bazelon Center for Mental Health Law  
Lawyers' Committee for Civil Rights Under Law  
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NAACP  
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National Women's Law Center  
New Leaders  
PolicyLink  
Southern Poverty Law Center  
Teach For America  
Teach Plus  
The Education Trust  
TNTP (The New Teacher Project)  
UNCF

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<sup>i</sup> Executive Order 13175, “Consultation and Coordination with American Indian and Alaska Native Tribal Governments”

<sup>ii</sup> Greenberg Motamedi, J. (2015). Time to reclassification: How long does it take English learner students in Washington Road Map districts to develop English proficiency? (REL 2015–092). Washington, DC: U.S. Department of Education, Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, Regional Educational Laboratory Northwest. Retrieved from <http://ies.ed.gov/ncee/edlabs>.

<sup>iii</sup> §1111(d)(1)(B)(iv).