



August 1, 2016

Ms. Meredith Miller
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Docket ID ED-2016-OESE-0032

Dear Ms. Miller:

The Consortium for Citizens with Disabilities (CCD) – a coalition that works together to advance the rights of adults, children, and youth with disabilities and their families – appreciates the opportunity to respond to the proposed regulations for selected programs under Title I of the Elementary and Secondary Education Act, now known as the Every Student Succeeds Act (ESSA).

This is an important time for the U.S. Department of Education (the Department) to be proactive in supporting states and school districts as they implement ESSA, particularly through the Department’s promulgation of regulations, non-regulatory guidance and technical assistance. However, as we saw under the No Child Left Behind Act (NCLB), non-regulatory guidance without corresponding regulations was not adequate to ensure implementation. The Department’s voice is critical to ensuring ESSA meets its goal, ‘to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.’ As we all know and agree, every student with a disability deserves this opportunity.

Through the proposed regulations, the Department has an opportunity to ensure families, educators and policymakers have clear and transparent information about how students with disabilities are faring in our nation’s schools. Most important, ESSA, as implemented through the Department’s regulations, will shine a light on schools where students with disabilities are thriving as well as identify those where they are underperforming, providing a framework and support for improvement.

Our community recognizes the lasting impact of the ESSA regulations and the need for strong protections within them, as these regulations will be guiding federal education policy for years to come. As such, CCD urges the Department to preserve and strengthen provisions of the proposed regulations outlined below.

We have provided general and specific recommendations. These recommendations conclude with specific responses to selected questions posed by the Department in the preamble of the proposed regulations not addressed in other areas of the response.

CCD GENERAL RECOMMENDATIONS

EMPHASIS ON STAKEHOLDER ENGAGEMENT

CCD Recommendation: Retain all of the proposed provisions in the final ESSA regulations that require stakeholder engagement, including but not limited to provisions relating to State Report Cards, LEA Report Cards, State Plans, 95% participation rate, and Identification of Schools (including both schools receiving Comprehensive and Targeted Support and Improvement).

Additionally, the final regulations should align to Secretary King’s Dear Colleague letter issued on June 23, 2016¹ which outlines specific recommendations to remove barriers and provide strategies for meaningful stakeholder engagement.

Lastly, the Department should expand the list of stakeholders in the final regulations to specifically name Specialized Instructional Support Personnel to ensure all professionals in schools are engaged.

Rationale: CCD strongly believes that developing partnerships between stakeholders, educators and policymakers will be critical to the successful implementation of ESSA. However, these partnerships cannot be formed unless all stakeholders are meaningfully engaged and included in the process.

CCD appreciated Secretary King’s Dear Colleague letter issued on June 23rd which provided concrete examples to enhance stakeholder participation, such as by holding meetings or hearings at varying times during the day, including after the work or school day or on the weekends and, if possible, offering child care, so that working parents, teachers, school leaders, and other professionals are best able to participate.

Additionally, while ESSA renamed the category of school-based qualified professionals from *pupil services personnel* to *specialized instructional support personnel*, and it appears a number of times in ESSA, there are still some sections of the law where engagement of stakeholders groups does not specifically list SISPs.

Therefore, CCD strongly urges the Department to (1) maintain all of the provisions included in the proposed regulations that reference stakeholder engagement; (2) align the final regulations to Secretary King’s June 23rd Dear Colleague letter by adding specificity; and (3) expand this list of stakeholders to specifically include Specialized Instructional Support Personnel.

ENSURING PARTICIPATION OF STUDENTS WITH DISABILITIES IN ASSESSMENT & ACCOUNTABILITY SYSTEMS

CCD Recommendation: Retain all of the 95% participation rate requirements outlined in the proposed regulations in the final ESSA regulations.

¹ <http://www2.ed.gov/policy/elsec/guid/secletter/160622.html>

Rationale: CCD strongly supports requirements referencing the 95% participation rate requirement in the proposed regulations because this inclusive policy, first implemented under the No Child Left Behind Act, has resulted in families, educators, and policymakers receiving more information about the academic achievement of students with disabilities than prior to the implementation of the 95% participation rate policy.

In fact, before the 95% participation rate policy was implemented as a component of adequately yearly progress, only one state – Kansas – tested 95% or more of their students with disabilities in the 2000-2001 school year, according to the National Center for Educational Outcomes (despite the IDEA requirement that all students with disabilities be included in state and district-wide assessment). By 2005, 46 states and the District of Columbia reformed their practices and included students with disabilities at this rate. This data provides reliable evidence about the academic performance of students with disabilities in each of our nation’s schools.

Improving outcomes for students with disabilities – including providing schools with the support needed to implement evidence based practices – starts by having actionable data.

CCD’s SPECIFIC RECOMMENDATIONS

PROMOTING TRANSPARENCY ABOUT SCHOOL PERFORMANCE FOR FAMILIES, EDUCATORS AND POLICYMAKERS

CCD Recommendation: Retain §200.18(b)(3) and (4) which describe the process for meaningful differentiation between schools that provide the public with both an overall summative school rating and information about how a school performed on each indicator within its accountability system, as measured for all students and each subgroup.

Rationale: CCD believes the goal of a State accountability system should be rooted in transparency. Accountability systems should recognize the value of providing the public with both a summative rating as well as information about how all students – and subgroups of students – fared on individual indicators, and allow families, educators and policymakers to have a more complete understanding of how schools are serving students, where support is needed, and where students are thriving.

It is important that both the summative rating and the performance on individual indicators be presented to the public together, as they represent important ways to analyze school performance. Furthermore, it is important for the public to understand how summative ratings were derived, including how individual indicators were weighted, in a clear and easy-to-understand way. By being explicit and transparent about the methodology used to construct a summative rating, the public, including students with disabilities and their families, can gain a sense of how the school and school district are prioritizing indicators, focus areas, and better understand what is valued in their school.

Most importantly, an accountability system must prompt swift action and meaningful improvement in schools where all students – or a subgroup of students –are underperforming.

Furthermore, an accountability system should reinforce the importance of improving academic outcomes for all students and student subgroups.

Indeed, the ESSA statute was clear that some indicators must be a more significant factor in the State accountability framework than others. In fact, the statute goes into detail to describe the relationship between the indicators and how they should be ‘weighted’ in the accountability system. The proposed regulations operationalize the framework outlined in the statute by including summative ratings for schools and reinforcing the need to disaggregate subgroup performance on each of the indicators.

EMPHASIZING INDICATOR(S) OF SCHOOL QUALITY AND STUDENT SUCCESS ARE TO BE LINKED TO IMPROVING ACADEMIC ACHIEVEMENT

CCD Recommendation: Retain §200.14(d) which states:

“(d) A State must demonstrate in its State plan that indicators of Academic Progress and School Quality or Student Success are supported by research that performance or progress on such measures is likely to increase student achievement or, for measures within indicators at the high school level, graduation rates.”

Rationale: CCD recognizes that the ESSA statute requires State accountability systems to include – along with several academic indicators – at least one indicator of school quality or student success. This additional indicator, when chosen carefully and implemented well, can provide actionable information to families, educators and policymakers that can help improve educational outcomes for all students, including students with disabilities.

To help ESSA meet its goal “to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps” it is important that this additional indicator be supported by research showing how the indicator is connected to improving academic achievement and graduation rates, and it must be able to withstand the significant – sometimes unintended – consequences of being included in an accountability system, rather than being used simply for reporting purposes.

CCD Recommendation: Retain §200.18(d)(2), which states: *“(d) To show that its system of annual meaningful differentiation meets the requirements of paragraph (c) of this section, a State must . . .*

(2) Demonstrate that performance on the indicator or indicators of School Quality or Student Success may not be used to change the identification of schools that would otherwise be identified for targeted support and improvement under §200.19(b), unless such a school is also making significant progress, for all students for each consistently underperforming or low-performing subgroup of students, on at least one of the indicators described in paragraph (c)(1) of this section . . .”

Rationale: Under ESSA and the Department’s proposed regulation, both academic indicators and the indicator(s) of school quality or student success identified in §200.14(d) influence whether a school will be identified for targeted support and improvement because one or more subgroups of students, including students with disabilities, are “consistently underperforming” or low-performing, based on the state’s methodology for measuring performance. CCD provides extensive feedback and recommendations regarding a State’s methodology on pages 5-6 of this

document. As CCD states below, the academic performance of any subgroup, including students with disabilities, should be a primary factor in determining whether a school is identified for targeted interventions. CCD supports the inclusion of this proposed regulation, which would ensure that only in schools where subgroups of students are making significant progress on at least one indicator of academic performance would a high rating on the school quality/student success indicator(s) mean that the school would not implement targeted interventions.

ENSURING CONSISTENTLY UNDERPERFORMING SUBGROUPS PROMPT TIMELY ACTION TO IMPROVE ACHIEVEMENT

CCD Recommendation: The final regulations must be written in a way that assures a State definition of “consistently underperforming subgroups” will: (1) appropriately identify student subgroups that are underachieving; and (2) spur timely action to implement evidence based interventions to improve academic achievement of such subgroups.

Rationale: Over 6 million students with disabilities are being educated in schools across the country. In many instances, students with disabilities are underperforming in schools where students without disabilities are performing adequately. To address such situations, the final regulations must reinforce the importance of providing targeted support and improvements to schools where any subgroup of students is underperforming, with the goal of supporting schools to improve student achievement.

CCD Recommendation: Retain §200.19(c)(1) which states that a State’s methodology for determining “consistently underperforming subgroups” must consider the school’s performance over no more than two years.

Rationale: CCD strongly supports a robust methodology for identifying “consistently underperforming subgroups.” A State’s methodology should reinforce the notion of timely recognition of student subgroups that are underachieving. Building an accountability system that promotes this timely recognition – such as over the course of two years, as noted in 200.19(c)(1) – should result in actions, support, and evidence-based practices to increase student achievement.

CCD Recommendation: Revise §200.19(c)(3) by requiring those States that select (c)(3)(iii) and (c)(3)(iv) from the list of methodologies for defining ‘a consistently underperforming subgroup of students’ to also take into account (i) a subgroup of students that is not meeting the State’s measurements of interim progress or is not on track to meet the State-designed long-term goals under §200.13.’

Rationale: This revision would ensure States do not rely solely on a relative comparison to define ‘underperformance’ for subgroups. The importance of getting the methodology right for “consistently underperforming subgroups”, including students with disabilities, cannot be overstated. Not only does it provide transparency, but it is the mechanism within ESSA that prompts targeted resources for schools to develop and implement a plan to improve achievement.

Specifically, CCD believes, in determining whether student subgroups are underperforming, it is important for States to consider: (1) whether the subgroup is meeting the State defined long-term goals and interim progress measures; and (2) the performance of the subgroup in relation to higher performing groups of students.

By considering only how subgroups of students are performing relative to other students without also taking into account whether they are meeting/missing the State defined long-term goals and measures of interim progress, numerous unintended consequences can occur. These unintended consequences include providing perverse incentives for States in establishing truly ambitious long-term goals and interim progress measures. It could also result in creating a scenario where “underperformance” is only shown when achievement levels are extremely low. By using this relative comparison to define ‘underperformance’ there is a real possibility that student subgroups who are truly underperforming will not be identified simply due to poor methodology, not because they are thriving. The “masking” impact of such a methodology that relies solely on a comparison – rather than on whether subgroups are meeting/missing State-established long-term goals and interim progress measures – may hide disparities in academic achievement of students with disabilities and other subgroups. Although progress has been made to increase the transparency of student achievement among subgroups, the Department’s regulations must ensure that such progress is maintained and interventions are implemented where appropriate.

Therefore, CCD strongly urges the Department to strengthen its approach to a State’s methodology of identifying consistently underperforming subgroups by requiring any State that proposes to use a comparative methodology (such as those outlined in §200.19(c)(3)(iii) and (iv)) to also take into account standards-based measures (such as those outlined in §200.19(c)(3)(i) and (ii)).

CCD Recommendation: Modify §200.24(c)(4)(i) to allow LEAs to determine which schools – those identified for comprehensive support and improvement and targeted support and improvement – receive funding during circumstances of insufficient school improvement funds to award a grant of sufficient size to each LEA that submits an approvable application.

Rationale: CCD recognizes the important role of investing in all schools that are identified for both comprehensive support and improvement as well as all schools identified for targeted support and improvement. Adequate investments are necessary to create, implement and monitor comprehensive and targeted improvement plans. During circumstances where States have insufficient funding to support all such schools, CCD believes that the LEA should have the ability to decide how they fund comprehensive and targeted improvement schools.

ENSURING ALL STUDENTS ARE COUNTED IN ASSESSMENT, ACCOUNTABILITY, REPORTING SYSTEMS

CCD Recommendation: Modify §200.17(a)(2)(iii) to read:

“(iii) Must not exceed ~~30~~ 10 students, unless the State provides a justification for doing so in its State plan under section 1111 of the Act consistent with paragraph (a)(3)(v) of this section;”

Rationale: The cornerstone of ESSA is to ensure every student has the opportunity to receive a high quality education. To achieve this goal, students must count and be recognized and visible in the educational system. This transparency ensures families, educators and policymakers know how all students and subgroups of students are faring and can spur action, interventions and supports to increase achievement.

At the crux of this transparency is ensuring States establish an appropriate “n-size”, the number of students in a subgroup above which schools must report academic achievement data to the state. The proposed regulation that sets an upper limit n-size of 30 will strongly suggest to States that 30 is an acceptable minimum group size when, in fact, there is little evidence to support this. Under the No Child Left Behind Act, many states set n-sizes higher than necessary to avoid the consequences of missing Adequate Yearly Progress. A report referenced by the Department in its proposed regulations specifically noted that “while raising the minimum n-size is an effective means of increasing the passing rates of schools, it does so at a considerable cost to special education students in terms of being excluded from the accountability system.” [Page 34553]

In order to ensure that, to the maximum extent practicable, each student subgroup is included in the accountability system, the Department should lower its proposed N-size from 30 to 10 students in the final regulations. Even at a level of 10, subgroups of students in many schools will not be addressed, no matter how poorly they may be faring. This n-size will not risk student privacy, as the proposed regulation offers sufficient protections against disclosure of student-identifying information. (The IDEA offers additional protections to students with disabilities). Equally important, the Department should retain the requirement that States must submit information regarding the number and percentage of all students and all student subgroups for whose results schools would not be held accountable in the accountability system.

For these reasons, CCD strongly urges the Department to lower the threshold included in §200.17(a)(2)(iii) to 10 students in the final regulations.

CCD Recommendation: Retain §200.16(a)(2) related to subgroups of students which specifically requires that States measure performance on each indicator, differentiating schools for all students and *for each subgroup, separately.*

Rationale: In alignment with the statute, the regulation must prohibit States from measuring the performance of a super-group of students in place of individual student groups. In recent years, as more and more States have been designing their own accountability systems, many have chosen to base their school ratings either solely on school-wide average performance or on schools’ performance for students overall and for a super-group of students. As a result, in most States, school ratings tell parents and community members little about how schools are performing for individual groups of students. Schools that are doing fairly well on average, but are performing poorly for, for example, poor students, or students with disabilities, are allowed to ignore this underperformance.

CCD Recommendation: Add § 200.17 (a)(2)(v) to read:

“(v) Information regarding the number and percentage of all students and student in each subgroup described in 200.16 (a)(2) for whose results school would not be held accountable in each indicator of the State accountability system for annual meaningful differentiation under 200.18”

Rationale: The information required in § 200.17 (a)(2)(iv) must be provided for each indicator of the State accountability system regardless of whether the minimum group size being proposed is the same for all indicators or differs across indicators in order to provide stakeholders with complete information on the impact of the proposed group size(s).

CCD Recommendation: Add a new §200.17(a)(3)(vi) to read:

“(vi) Information regarding the number and percentage of schools that would not be held accountable for the results of students in one or more subgroups described in §200.16(a)(2) in the accountability system for each indicator described in §200.14.”

Rationale: The intent of ESSA was clear in conveying the importance of transparency when student subgroups are excluded from the State’s accountability system due to n-size. The language above would ensure that the spirit of transparency translate into a critical aspect of the State accountability system: performance on each specific indicator.

CCD Recommendation: Modify § 200.17 (a)(3)(v) to read:

“(v) Information regarding the number and percentage of schools that would not be held accountable for the results of one or more student subgroups in each indicator of the State accountability system for annual meaningful differentiation under 200.18.”

Rationale: States should be required to submit these data in support of the proposed minimum group size for each indicator in order for stakeholders to be fully informed.

CCD Recommendation: Modify §200.21 Comprehensive support and improvement to clarify for LEAs the unintended consequences of denying protected subclasses of students their rights under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act (IDEA), and Title VI. Also clarify that if a school with a low graduation rate that is identified under § 200.19(b)(2), also meets the criteria for identification under § 200.19(a)(1) or (a)(2) or (b), the LEA must implement the comprehensive or targeted support and improvement activities under this section or § 200.22.

Rationale: CCD believes this provision needs clarification in order to prevent unintended consequences. Proposed regulation § 200.21(g)(1) allows the State to permit differentiated improvement activities for any high school identified for comprehensive support and improvement due to a low graduation rate as part of the comprehensive support and improvement plan, including schools predominantly serving high school drop-outs or students who are so off track as to be unable to accumulate sufficient credits to graduate. Subparagraph (2) refers to [and] “In such a school that has a total enrollment of less than 100 students,” the State may permit the LEA “to forego implementation of the required improvement activities.”

Therefore, CCD supports first, clarifying that under § 200.21(g)(2), the reference to “such a school...” does not refer to either type school described by (g)(1)(i) or (ii), but under § 200.21(g) a “high school in the State identified for comprehensive support and improvement under § 200.19(a)(2)” -- most likely a rural high school. ED should clarify that it is the intent of proposed regulation § 200.21(g)(1) to permit LEAs to use differentiated improvement activities with respect to the two types of schools described by (g)(1)(i) and (ii) but NOT to forego implementation of improvement activities with respect these schools that are likely most in need. Because high schools with less than 100 students may be serving a high number of students with disabilities, ED should urge States and LEAs to use their discretionary authority “to forego improvement activities” sparingly so as not to deprive these students their rights to equal educational opportunities and to receive aids, benefits and services under the civil rights laws.

In addition, it should be made clear that this reference to schools identified is only to schools identified under § 200.19(a)(2) regarding low graduation rates, and that if such a school *also* meets the criteria for identification under § 200.19(a)(1) or (a)(3), the improvement activities required under this section for a comprehensive support and improvement must be implemented. Similarly, if such a school also meets the criteria for identification under § 200.19(b), the activities required for targeted support and improvement under § 200.22 must be met.

CCD Recommendation: Modify §200.21 and §200.22 to include all subgroups, including students with disabilities, that LEAs are required to address when examining the disproportionate distribution of ineffective, out-of-field and inexperienced teachers for schools that are identified as chronically underperforming because of one or more subgroups.

Rationale: The regulation indicates that when a school is identified as having persistently underperforming subgroups, the LEA must address the equitable distribution of teachers, but only for low income and minority students. For example, if students with disabilities are the subgroup which has caused the school to be identified as chronically underperforming, districts need to know what the distribution of ineffective, inexperienced and out-of-field teachers is for this subgroup so it can be addressed, as the proposed regulation requires.

HIGH SCHOOL GRADUATION RATE

CCD Recommendation: Delete the following text within §200.34(c)(2), the definition of “regular high school diploma”:

“(2) “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 section 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 ~~that are not fully aligned with the State’s grade-level academic content standards.~~”

Rationale: CCD strongly urges the Department to delete the language indicated above because it allows for the unintended consequence of allowing a ‘regular high school diploma’ to be defined to include a diploma that is based on meeting IEP goals that *are* fully aligned with the State’s grade-level academic content standards.

Awarding a regular high school diploma based on whether a student has met his or her IEP goals – whether they are aligned to grade-level standards or not – is wholly inappropriate for the following reasons:

- IEPs are not designed to be qualifying documents for obtaining a regular high school diploma. Rather they are intended to be child-centered documents individually developed to provide information on specific goals, special education and related services, and needed accommodations.
- IEPs often do not include goals aligned to every standard that might be appropriate for graduation. Additionally, it is very likely a goal could be based on a standard, but still not reflect what the student would need to meet the graduation requirement.
- It would revert back to a time when the performance of students with disabilities was based solely on whether or not they met their IEP goals, which has resulted in a lowering of expectations and goals for students with disabilities.

CCD Recommendation: Delete § 200.34(e)(4)(ii):

“(ii) Annually update the four-year adjusted cohort graduation rates, and, if adopted by the State, extended-year adjusted cohort graduation rates reported for a given year to include in the numerator any students with the most significant cognitive disabilities who obtain a State-defined alternate diploma within the time period for which the State ensures the availability of a free appropriate public education.”

Rationale: See recommendation and rationale immediately below.

CCD Recommendation: Add subsection (f) to § 200.34 to require States and LEAs to disaggregate the number and percentage of students with disabilities reported in the four-year adjusted cohort graduation rate (ACGR) into two categories:

- Those students with disabilities earning a regular high school diploma at the conclusion of their fourth year, or during a summer session immediately following their fourth year; and
- Those students with the most significant cognitive disabilities earning a state-defined alternate diploma, as defined in Sec. 8002(23)(A)(ii)(I)(bb) of ESSA, within the time period for which the State ensures the availability of a free appropriate public education under section 612(a)(1) of the Individuals with Disabilities Education Act (20 U.S.C. 1412(a)(1)).

Rationale: The proposed regulations spell out a rather complex manner in which students with the most significant cognitive disabilities who are awarded the state’s alternate diploma are to be reported in the ACGR.

Given that students with the most significant cognitive disabilities earning a state-defined alternate diploma may now be reported as having earned a regular high school diploma in four years, data must be provided on the number and percentage of students with disabilities in the ACGR in this new subset. This information is essential for transparency and also to protect students from inappropriately being dismissed from special education.

At §200.34(e)(4) States are directed to annually update the ACGR reported for a given year to include any students from the same cohort (i.e., started 9th grade together) who obtain the alternate diploma. Given most students taking the alternate assessment on alternate achievement standards and eligible for a state's alternate diploma will in all likelihood "age out" of services under the IDEA, generally at age 21, this provision would typically mean States would go back 3-4 years to make the appropriate data entry and, thus, "adjust" their four-year ACGR.

While it can be understood that, in theory, this reporting procedure results in students earning an alternate diploma upon exiting to be counted as a four-year graduate in their appropriate cohort (i.e., the cohort in which they began 9th grade), the result is that States, districts and high schools will only get credit for such students retroactively. More importantly, decisions regarding high school graduation rates – including whether the school graduated at least 67% percent of its students in four years, met or did not meet the state measurements of interim progress for graduation rates, and has a consistently underperforming subgroup – are made on the latest (i.e., most current) four-year ACGR data.

We believe the legislative intent of the provision allowing students awarded an alternate diploma to be counted as four-year graduates in the ACGR was to allow States, districts, and high schools to take credit in the most recent year – not 3-4 years later. This would mean that when a student was awarded his or her alternate diploma, the student would be counted in the four year ACGR data for that year, and not for the actual cohort year in which he or she was an original member (i.e., typically 3-4 years earlier.) While allowing such students to count in the most recent ACGR would result in a somewhat inaccurate reporting with regard to their precise "cohort," we believe this would more accurately reflect legislative intent. Furthermore, it would provide an incentive for States to develop an alternate diploma that meets the statutory requirements and would also discourage schools from inappropriately ending IDEA services to students earlier than their rights under IDEA allow.

STATE & LEA REPORT CARD

CCD Recommendation: Modify § 200.30 Annual State report card to include the following information related to the minimum subgroup size: *"The number and percentage of all students and students in each subgroup for whose results schools are not held accountable in the State accountability system for annual meaningful differentiation."*

Rationale: CCD believes the final regulations should require annual State report cards to be transparent about information related to subgroups of students who were not included in the State accountability system for meaningful differentiation. By adding this information to the State report card, the public, including students with disabilities and their families, will have

greater access to transparent information critical to understanding how subgroups are included in accountability systems.

CCD Recommendation: Modify § 200.31 Annual LEA report card to include the following information related to the minimum subgroup size:

- The number and percentage of all students and students in each subgroup for whose results schools in the LEA are not held accountable in the State accountability system for annual meaningful differentiation;
- The number and percentage of schools in the LEA not held accountable for one or more subgroup of students in the state accountability system.

Rationale: CCD believes the final regulations should make clear that this information must be provided for all students and for each subgroup of students required under § 200.16 (a)(2).

ENGLISH LANGUAGE PROFICIENCY

CCD Recommendation: Modify §200.13(c)(2)(ii) to add a new (F) “disability.”

Rationale: CCD supports adding “Disability” to the list of student characteristics for consideration as a factor. A student’s disability (as identified under the IDEA Section 504) can have a significant impact on the student’s ability to achieve proficiency in English and should therefore be one of the listed characteristics for consideration.

STATE PLANS

CCD Recommendation: Modify §299.19(a)(1)(iii)(C) to read: *“The use of aversive behavioral interventions, strategies, techniques and policies that compromise student health and safety, such as seclusion and restraint.”*

Rationale: The ESSA Conference Report states: “It is the Conferees’ intent that each State describes how it will support local educational agencies and schools by providing resources and guidance, professional development, and technical assistance to reduce techniques, strategies, interventions, and policies that compromise the health and safety of students, such as seclusion and restraint.”ⁱ On January 25, 2016 President Obama issued an executive order banning solitary confinement for juveniles in the federal prison system, based on the recognition of the extreme harm and potential for “devastating, lasting psychological consequences” from the imposition of this kind of tactic.ⁱⁱ Seclusion, as defined, is solitary confinement of a different name, and has no evidence of effectiveness, and ample evidence of harm. These facts, combined with the school-reported data showing that of the more than 100,000 students placed in seclusion or involuntary confinement or physically restrained at school, *more than 67,000 were students with disabilities*ⁱⁱⁱ demonstrate that ED must include such specificity in the regulation to assure that States do in fact reduce occurrence and address the overuse and abuse of these egregious practices by schools.

CCD Recommendation: Modify §299.19(a)(1)(vii) to read: *“Other State-identified strategies such as training in IDEA, Title VI, Title IX, the ADA, Section 504 compliance and the use of positive behavior intervention and support and other evidence-based, culturally responsive practices that promote reducing the need to remove students from the classroom that enable the student to meet the school’s behavioral rules and to progress academically.”*

Rationale: Students with disabilities in K-12 public schools are more than *twice as likely to receive one or more out of school suspensions (11%) as students without disabilities (5%)*. Boys of color with disabilities (American Indian, Native Alaskan/Hawaiian, black and multi-racial) *are twice as more likely than white boys with disabilities to be suspended.*^{iv} While students receiving special education services represent just 12% of students nationally, they represent 25% of students receiving multiple out of school suspensions. It is important to ensure that all schools receiving federal funds with high rates of disciplinary action are identified and provided with assistance and training to reduce exclusionary practices, including both in school and out of school suspensions that remove students from the general education classroom. Such schools, particularly those with zero tolerance discipline policies, may have a tendency to unfairly target students with disabilities. The impact of school removal is striking. Three million students lost instructional seat time.^v Research is clear that lack of access to the classroom environment impacts learning. In addition, suspensions are the leading indicators of whether a child will drop out of school; which increases risk of future incarceration.

CCD is concerned about the use of restraints, seclusion and aversive interventions as part of educational programs for children with disabilities. Restraints, seclusion and aversive interventions are neither educational nor effective. Instead, their harms and dangers are well-documented. Inappropriately used, they amount to child abuse and a denial of a free, appropriate, public education as required by IDEA. Children should receive effective positive behavior supports developed within a comprehensive, professionally-developed plan of behavioral accommodations, supports, and interventions that address the underlying causes of dangerous behavior and prevent the use of restraint or seclusion. But, too often school personnel who have not been thoroughly trained in research-validated methods for promoting positive behavior change and crisis de-escalation resort to inappropriate abusive methods. Abusive methods not only place the student at risk of serious physical and psychological harm, but also violate his or her dignity and right to be free from abusive treatment. Therefore, we believe it is critical that any regulations make clear that ESSA also provides the professional development resources for district and school staff to receive training, strategies, and guidance on interventions which create inclusive, culturally responsive environments for students and educators which take into account input from the parents and communities they serve.

CCD Recommendation: Add NEW §299.19(a)(2)(iii) to read: *“States must develop and implement policies and procedures to ensure seclusion and restraint are only used when there is a threat of imminent danger of serious physical harm to the student or others, and lasts only as long as necessary to remove the threat of serious physical harm, and protects the safety of all children and adults at school.”*

Rationale: Students with disabilities disproportionately experience use of restraint and seclusion in public schools. States must take action to reduce the inappropriate use of these approaches in schools. In order to help States address this serious problem, in 2012, the Department, in partnership with the Substance Abuse and Mental Health Services Administration, issued significant guidance for schools in this area, including 15 principles for whether, when, and how

restraint or seclusion should ever be used in schools². States should be encouraged to utilize this valuable resource in developing policies and procedures regulating these practices. CCD urges the Department to take seriously the need to call on all States, local school districts, preschool, elementary, and secondary schools to reduce and eliminate the use of seclusion and restraint.

PROMOTING EXCELLENT TEACHERS FOR ALL STUDENTS IN STATE PLANS

CCD Recommendation: Amend §299.18 (b)(iv) which requires state plans to expand access to effective teachers for low income and minority students to include all subgroups outlined in ESSA, including students with disabilities.

Rationale: Students with disabilities are one of the lowest performing subgroups. It is critical that they have equal access to effective experienced teachers who can meet their needs. The shortage of special education teachers in multiple states is inviting states to lower their standards for special educators, and in some case all teachers, in order to address the supply. It is our nation's most vulnerable students who will pay the price for this in the long run, as the key to improved academic results is effective teaching.

CCD Recommendation: Amend §299.18 (c) which requires state plans to demonstrate whether low income and minority students are disproportionately taught by ineffective, out-of-field, or inexperienced teachers so that students with disabilities are included as a subgroup.

Rationale: Students with disabilities are significantly behind their peers without disabilities. States are increasingly looking to lower standards for special education teachers and others in shortage areas due to the pressure of the shortage. This solution is short sighted and will not result in increasing the academic performance of students with disabilities. Long terms strategies are needed that invest in building the pipeline of well -prepared teachers who enter the classroom profession-ready.

CCD Recommendation: Amend §299.18 (c)(i), (ii) and (iii) which requires states to define ineffective teacher, out-of-field teacher and inexperienced teacher to ensure that students with disabilities will be taught by teachers who are effective in teaching them. Specifically, the definition of "ineffective" teachers should address whether or not a teacher is effective in working with students with disabilities, which may include passage of a performance assessment. The definition of "inexperienced" should include any teacher with less than three years of experience. And the definition of "out-of field" teacher should include anyone designated as a special education teacher who has not completed a preparation program in special education or at least three years of success as a special education teacher.

Rationale: In order to raise the academic performance of students with disabilities, they must have access to effective, experienced teachers.

² *Restraint and Seclusion: Resource Document*, U.S. Department of Education, Washington, D.C., 2012, retrieved at: <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>

CCD Recommendation: Amend the remaining portions of §229.18 to reflect the recommendations noted above.

Rationale: The additional relevant provisions in this section relate to rates, disproportionate rates and use of Title II funds to address inequitable distribution.

SEA AND LEA WEB SITE ACCESSIBILITY

CCD Recommendation: Modify the following proposed regulations to ensure accessibility for individuals with disabilities to both access the content provided online and in any dissemination tools that are utilized by the State, LEA or school:

- § 200.30 Annual State report card.
- § 200.31 Annual LEA report card.
- § 200.32 Description and results of a State’s accountability system.
- § 299.13 Publication of State plan.
- § 299.18 Supporting excellent educators.
- § 200.21 Comprehensive Support and Improvement

Rationale: The proposed regulations include numerous references to the Web site of SEAs and LEAs as an acceptable means by which to meet the requirement to disseminate information to the public. For example, SEAs may provide their proposed state plan (for public comment), approved state plan and annual state report cards on their Web sites. LEAs may post annual report cards on their Web sites.

However, it is noteworthy that ED’s Office for Civil Rights (OCR) has recently reported receiving numerous complaints regarding the inaccessibility of Web sites operated by SEAs and LEAs, indicating that serious problems exist for people with disabilities. In a press release dated June 29, 2016, OCR announced agreements to resolve web site accessibility complaints made against SEAs and LEAs located in seven states and one territory.

It is clear from the language in proposed regulations to 34 CFR Parts 200 and 299 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, that ED is failing to recognize the nature, scope and critical importance of Web site accessibility issues being reported to its Office for Civil Rights. It is not sufficient to suggest by merely cross referencing the proposed notice requirements of §§200.21(b)(1) through (3) that States, LEAs, and schools, as recipients of federal funds, are meeting the legal requirements for ensuring any information disseminated via their Web sites is accessible to all individuals, including those with disabilities consistent with their obligations under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104.

Given the growing body of evidence that SEA and LEA Web sites are, with rare exceptions, not accessible to people with disabilities, ED should include in its final regulations a provision that SEA and LEA Web sites used for dissemination of information required under ESSA must meet minimum accessibility standards, such as the W3C’s Web Content Accessibility Guidelines (WCAG) 2.0 Level AA

and the Web Accessibility Initiative Accessible Rich Internet Applications Suite (WAI-ARIA) 1.0 for web content. These guidelines have been referenced by OCR in recent resolution agreements.

CCD RESPONSES TO QUESTIONS POSED BY U.S. DEPARTMENT OF EDUCATION IN PROPOSED REGULATIONS

Please see CCD's responses above to address questions related to "consistently underperforming subgroups" (Question 1) and 95% participation rate (Question 2).

QUESTION 4: COUNTING STUDENTS WITH DISABILITIES WHO HAVE EXITED FROM SPECIAL EDUCATION IN THE DISABILITY SUBGROUP

CCD Recommendation: CCD encourages the Department to only count students with disabilities who have exited special education in the disability subgroup for the school year in which they exit. For 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 (e.g., economically disadvantaged).

Rationale: CCD believes that students no longer needing special education services should no longer be included in the disability subgroup, defined as students with disabilities receiving services under the Individuals with Disabilities Education Act. However, for reporting ease, CCD supports the notion that students exiting 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.

QUESTION 5: STANDARDIZED CRITERIA FOR STUDENTS WITH DISABILITIES WITHIN THE ACGR

CCD Recommendation: The criteria for students who should be reported in the ACGR "students with disabilities" subgroup should be standardized. A two-fold criteria is recommended. Only students meeting both of the following criteria should be reported:

- The student was a student with a disability as defined in 602(3) of the Individuals with Disabilities Education Act at the time of being awarded a regular high school diploma and
- The student was a student with a disability as defined in 602(3) of the Individuals with Disabilities Education Act for the majority (i.e., more than 50 percent) of their time in the cohort.

Rationale: This two-fold criteria will ensure that the ACGR for the "students with disabilities" subgroup is representative of the achievement of students receiving services and supports under the IDEA and is comparable across States. It will also align, to some degree, with the data collection under Section 618 of the IDEA for exiting students, which is being used in the Department's Results Driven Accountability initiative. Lastly, it will guard against students being identified as a student with a disability for short periods of time (such as just prior to exiting) in order to inflate the ACGR for this subgroup.

In closing, CCD appreciates the opportunity to provide feedback on critical areas of the ESSA proposed regulations that will impact our nation's 6 million students with disabilities. CCD pledges to continue to provide the Department with the views of people with disabilities, families, educators, employers, experts and advocates working to ensure that high expectations are upheld for all students with disabilities. CCD looks forward to continuing to be a vocal advocate for students with disabilities as the regulatory process unfolds. Our organizations stand ready to work with the Department and States across the nation to ensure they are implementing measures that will help all students with disabilities achieve their full potential.

Sincerely,

ACCSES
The Advocacy Institute
American Dance Therapy Association
American Music Therapy Association
American Speech-Language-Hearing Association
Association of Assistive Technology Act Programs
Association of University Centers on Disabilities
Autism Society
Autism Speaks
Brain Injury Association of America
Council for Exceptional Children
Council for Learning Disabilities
Council of Parent Attorneys and Advocates
Disability Rights Education & Defense Fund
Easter Seals
Higher Education Consortium for Special Education
Judge David L. Bazelon Center for Mental Health Law
Learning Disabilities Association of America
Mental Health America
National Association of Councils on Developmental Disabilities
National Association of School Psychologists
National Center for Learning Disabilities
National Center for Special Education in Charter Schools
National Council on Independent Living
National Disability Rights Network
National Down Syndrome Congress
National Down Syndrome Society
Perkins School for the Blind
School Social Work Association of America
Teacher Education Division/CEC
The Arc
Tourette Association of America
United Cerebral Palsy

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The Consortium for Citizens with Disabilities is a coalition of national consumer, advocacy, provider and professional organizations headquartered in Washington, D.C. Since 1973, the CCD has advocated on behalf of people of all ages with physical and mental disabilities and their families. CCD has worked to achieve federal legislation and regulations that assure that the 54 million children and adults with disabilities are fully integrated into the mainstream of society.

ⁱ Every Student Succeeds Act Conference Report to Accompany S. 1177. (114-354, pg. 451). Retrieved at: <https://www.congress.gov/114/crpt/hrpt354/CRPT-114hrpt354.pdf>

ⁱⁱ *Report and Recommendations on the Use of Restrictive Housing*, U.S. Department of Justice, 2016, retrieved at: <https://www.justice.gov/restrictivehousing>

ⁱⁱⁱ Civil Rights Data Collection 2013-2014, U.S. Department of Education, retrieved at: <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>

^{iv} Ibid.

^v *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, (2012) UCLA Civil Rights Project, Retrieved at: <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crr-research>