

The Advocacy INSTITUTE

A not-for-profit organization dedicated to services and projects that work to improve the lives of children, youth and adults with disabilities.

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January 21, 2016

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

RE: Docket ID ED-2015-OESE-0130: Implementing Programs Under Title I of the Elementary and Secondary Education Act

Submitted via Federal eRulemaking Portal at www.regulations.gov

Dear Acting Secretary King:

The Advocacy Institute is a non-profit, tax-exempt organization dedicated to the development of products, projects and services that work to improve the lives of people with disabilities. We provide information and resources pertaining to the full and equitable inclusion of students with disabilities in all aspects of the Elementary and Secondary Education Act.

While it is broadly recognized that the accountability provisions of the No Child Left Behind Act (NCLB) benefitted students with disabilities, that benefit was diluted by several implementation details. As we begin anew with the Every Student Succeeds Act, it is important that we work to avoid as many of the issues that compromised the attention to and improvement of the achievement for students with disabilities under both NCLB and ESEA Flexibility.

The Advocacy Institute submits the following comments to the U.S. Dept. of Education (ED) in response to the Request for information regarding the implementation of the Every Student Succeeds Act (ESSA).

STATE ACCOUNTABILITY SYSTEMS

ED should define terms such as “consistent underperformance;” “substantial weight” and “much greater” as they relate to the appropriate weight of indicators for annual meaningful differentiation of public schools in a State within the accountability system; and provide additional clarity regarding the

technical requirements the “additional indicator(s) of school quality or student success” must meet to be included in a State’s accountability system.

ANNUAL MEASUREMENT OF ACHIEVEMENT. While States must measure the achievement of not less than 95 percent of all students, and not less than 95 percent of all students in each subgroup of students (including students with disabilities), enrolled in public schools on the State assessments, ESSA makes a **significant change from the assessment participation requirement in No Child Left Behind.** Under NCLB's Adequate Yearly Progress (AYP) provision, schools and districts that failed to assess at least 95 percent of all students and at least 95 percent of students in each subgroup **automatically failed AYP.** Now, under ESSA, states will define the weight given to the achievement measurement, raising significant concern that such weight will not provide the necessary incentive to ensure full participation of student subgroups.

ED should ensure that the Annual Measurement of Achievement metric of a State accountability system carries adequate weight to ensure that schools and districts don’t exclude students who may perform poorly on assessments.

MULTIPLE TEST ADMINISTRATION. ED should clarify if a student takes a State assessment for a particular subject or grade level more than once, the State must use the student’s results from the first administration for purposes of reporting assessment results (as is required in current ESEA regulations.)

GROWTH MODELS. ED must stipulate that growth models must include all students including students with disabilities taking the alternate assessment on alternate academic achievement standards.

STUDENTS WITH DISABILITIES SUBGROUP. ED should reaffirm through federal regulations that the “students with disabilities” subgroup under ESSA is comprised only of students meeting the IDEA definition of a “child with a disability.” This definition was established under NCLB and should be continued. Only students currently eligible for special education are to be counted in this subgroup. Students who have exited special education may not be counted in the subgroup in any subsequent years.

SUBGROUP ACCOUNTABILITY. ED should reaffirm through federal regulations that students must be counted in all applicable subgroups under all indicators and metrics used in a State’s accountability system that require disaggregation. ED should also make clear that combining subgroups of students (or creating additional groups of students) for purposes of meaningful differentiation in a State’s accountability system is prohibited under the Act. The impact of combining subgroups has the effect of masking needs based on specific characteristics, e.g., limited English proficiency, disability, or migrant students who are more likely to have an interrupted formal education.

MINIMUM SUBGROUP SIZE. The minimum subgroup size, or “n” size, established by many States under NCLB resulted in seriously limiting accountability for students with disabilities. A 2013 report of subgroup sizes used in States, *The Inclusion of Students with Disabilities in School Accountability Systems* (<http://ies.ed.gov/ncee/pubs/20134017/>), found that across 40 states with relevant data for the 2008–09 school year, slightly more than a third (35 percent) of public schools were accountable for the performance of the students with disabilities subgroup, representing just over half (58) percent of tested students with disabilities in those states.

To ensure that ESSA accountability systems include the maximum number and percentage of students in each student subgroup, we strongly urge ED to issue the required study on “best practices for determining valid, reliable, and statistically significant minimum numbers of students for each of the subgroups of students for the purposes of inclusion as subgroups of students in an accountability system within the specified timeline (90 days of ESSA enactment). While the required study must not recommend a specific subgroup number, it should include recommendations regarding the percent of public schools within a State that should be held accountable for subgroup performance.

ED should make clear in regulation that – while subgroup size must be the same for all subgroups that require disaggregation of information by each subgroup of students – subgroup size may vary depending on the metric, i.e., proficiency, participation and graduation rate.

While subgroup size for **proficiency** involves statistical reliability (the degree of confidence associated with the decision of whether or not enough students in a subgroup performed above the cut point for proficiency to meet the annual objective), **test participation** and **graduation rate** calculations are only tempered by the requirement to not reveal personally identifiable information (the inability to determine from the subgroup values reported how an individual student performed on an indicator) consistent with the Family Education Rights and Privacy Act (FERPA) and IDEA.

GAP CLOSING. ESSA requires that when setting long-term goals, including regular measurements of interim progress toward meeting such goals, States must take into account the improvement necessary on such measures to make **significant progress** in closing statewide proficiency and graduation rate gaps for subgroups of students who are behind. ED should make clear that goals for subgroups of student who are behind must be ambitious. Furthermore, goals must be set for all achievement levels (not less than 3 levels) within subgroups to ensure that the focus is not merely getting students to the lowest level of proficiency but is designed to ensure that students are on a sufficiently accelerated path to achieving the desired goals toward proficiency. States should not be allowed to **reset** long-term goals based on failure to achieve such goals in order to reduce gap closing expectations.

ALTERNATE ACADEMIC ACHIEVEMENT STANDARDS (AAAS): At a minimum ED should, through regulation, further clarify in the following areas regarding the AAAS:

- Establish and implement a ‘documented and validated standards-setting process’;
- Reinforce that the AAAS are designed only for students with the most significant cognitive disabilities;
- Ensure the AAAS are aligned to the challenging state academic content standards;
- Ensure the AAAS promote access to the general education curriculum, consistent with the Individuals with Disabilities Education Act;
- Clarify that the term “challenging state academic standards,” which is defined in ESSA to refer to both content and achievement standards, must be interpreted as referring only to achievement standards in the provision about using accommodations to increase the number of students with significant cognitive disabilities who are taking the general assessments based on “challenging state academic standards” for the grade level in which the student is enrolled (this is necessary to avoid

the common misconception that alternate assessments are not based on grade-level content standards);

Ensure that any student who meets the AAAS is on track to pursue postsecondary education and employment, consistent with the purposes of Rehabilitation Act (Public Law 93–112) as amended by the Workforce Innovation and Opportunity Act of 2014.

ADJUSTED COHORT GRADUATION RATE (ACGR). The Adjusted Cohort Graduation Rate (ACGR) – which is the mechanism prescribed in ESSA for calculating the high school graduation rate, needs to be clarified with regard to which students are counted in the “students with disabilities subgroup.” Currently this subgroup is being defined in a variety of ways. According to the U.S. Dept. of Education, States may define the subgroup as (a) only students who both entered and exited high school as a IEP student, (b) only students who had an IEP at graduation, (c) any student who had an IEP at any time between entering high school and graduation, (d) some other definition.

ED should issue regulations that define the “students with disabilities” to be included in the “students with disabilities” subgroup as any student who has an IEP for the majority of time (more than 50 percent) in the cohort (both 4-year and extended).

STATE-DEFINED ALTERNATE DIPLOMA. ED must clarify through regulations that states may develop a State-defined *alternate* diploma provided this new diploma option meets all statutory requirements and promotes postsecondary success of students with the most significant cognitive disabilities without lowering expectations or reducing access to the general curriculum or a state’s regular high school diploma. Furthermore, ED should clarify that such alternate diplomas only applies to the ACGR and do not meet the definition for a high school diploma in ESSA or IDEA. Additionally, students receiving such diploma must not be counted in the IDEA 618 data collection as “graduated with a regular high school diploma.”

Additionally, ED should require that any State electing to exercise the option provided in the ACGR definition under ESSA [to count all students with the most significant cognitive disabilities assessed using the alternate assessment aligned to alternate academic achievement standards and awarded a State-defined alternate diploma that is standards-based; aligned with the State requirements for the regular high school diploma; and obtained 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\(a\)\(1\)](#)) to be counted as having graduated] to report disaggregated data on the percentage of the students with disabilities subgroup that are such students.

STUDENT ACADEMIC ASSESSMENTS

PARTICIPATION IN ASSESSMENTS. ED must reaffirm that all students with disabilities (except for those students with the most significant cognitive disabilities who participate via alternate assessments on alternate academic achievement standards) will participate in the general assessment at their enrolled grade level, as stated in ESEA regulations:

“One of the bedrock principles of the NCLB Act is that all students can learn to high standards. As a result, section 1111(b)(1) requires challenging academic content and student achievement standards that a State applies to all schools and students in the State. Similarly, section

1111(b)(3) requires a State to develop aligned assessments that the State uses to measure the achievement of all students. These requirements are accurately implemented in Secs. 200.2(b)(1) and 200.6(a) of the final regulations. Specifically, as Sec. 200.6(a)(1) indicates, a State's assessment system must provide accommodations so that a student with disabilities or a student covered under Section 504 of the Rehabilitation Act of 1973 can be held to the content and achievement standards for the grade in which the student is enrolled. **Although "out-of-level" tests, for example, may provide instructional information about a student's progress, they are not an acceptable means to meet the State's assessment requirements under Secs. 200.2 and 200.6 or the accountability requirements of the NCLB Act.**" (34 CFR Part 200, Final Regulations for Standards and Assessments, Federal Register: July 5, 2002 (Volume 67, Number 129))

ALTERNATE ASSESSMENTS ALIGNED TO ALTERNATE ACHIEVEMENT STANDARDS (AA-AAS): ED must clarify and reinforce, through regulation, the following requirements related to the AA-AAS:

- Reinforce the statutory requirement of a state level cap not to exceed 1% of the total number of students in grades assessed;
- Establish precise consequences for exceeding the 1% cap, for example, students tested on the AA-AAS in excess of 1% must be counted as non-proficient;
- Establish criteria for requesting a Secretarial waiver to exceed the 1% cap that match the prior requirements in the Department's 2003 regulation on this issue which states:
 - "An SEA may request from the Secretary an exception permitting it to exceed the 1.0 percent cap. The Secretary will consider granting, for a specified period of time, an exception to a State if the following conditions are met:*
 - (i) The SEA documents that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the grades assessed.*
 - (ii) The SEA explains why the incidence of such students exceeds 1.0 percent of all students in the combined grades assessed, such as school, community, or health programs in the State that have drawn large numbers of families of students with the most significant cognitive disabilities, or such a small overall student population that it would take only a very few students with such disabilities to exceed the 1.0 percent cap.*
 - (iii) The SEA documents that it is fully and effectively addressing the requirements of § 200.6(a)(2)(iii)."*

PROHIBITION ON ANY OTHER ALTERNATE ASSESSMENT. ED should further clarify that the ESSA prohibition on States' development and implementation of any other alternate or modified academic achievement standards includes "out-of-level," below-level," or "instructional level" testing of students with disabilities. Furthermore, the Department should make clear that assessing students with disabilities in any of these ways will result in those students being counted as non-participants.

MEANINGFUL OPPORTUNITY TO PARTICIPATE. ED is urged to issue regulations and guidance ensuring effective and meaningful opportunity for students with disabilities to participate in assessments. Ensuring students with disabilities are allowed to use other alternative formats and the assistive technology they regularly rely on when accessing the general education curriculum, is a large part of

effective and meaningful accessibility to assessments. 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. 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 needing to test while using unfamiliar technology. This potential became a reality during the administration of California's assessments as reported in the Hechinger Report article, *Special Ed Testing Accommodations Backfire* at <https://www.disabilitycoop.com/2016/01/12/special-ed-testing-backfire/21760/>. ED must recognize the barriers created for students with disabilities when instruction is provided in the classroom without giving students the accommodations they need to learn, and assessments are designed without consideration for alternative formats and interoperability, as well as to take this opportunity to update regulations in order to have assessments comport with the Individuals with Disabilities Education Act, Section 504, the ADA, and Department of Justice guidance on this issue.

COMPUTER-ADAPTIVE ASSESSMENTS (CAT). ED should further clarify ESSA provisions about measuring the student's level of academic proficiency and growth using items above or below the student's grade level, and the limitation on the use of out-of-grade-level scores within a State's accountability system, as indicated by the statute.

For students with the most significant cognitive disabilities, the CAT provisions state that the requirement to measure proficiency on the challenging state academic standards for the student's grade-level does not apply; however the term "challenging state academic standards," which is defined in ESSA to refer to both the content and achievement standards, must be clarified as only referring to achievement standards for the student's grade level in this section (an alternate CAT must not be exempt from alignment with the state content standards for the student's grade level).

INNOVATIVE ASSESSMENT AND ACCOUNTABILITY DEMONSTRATION AUTHORITY. ED must stipulate that innovative assessment systems designed under this authority must include students with disabilities, including students with the most significant cognitive disabilities.

STATE PLANS

STAKEHOLDER INVOLVEMENT. ED should provide further clarification on acceptable methods of stakeholder involvement. Specifically, the State Special Education Advisory Panels (as required by IDEA) should not serve as the sole avenue for involvement regarding students with disabilities. Rather, States must engage with disability organizations, Parent Training and Information Centers and Protection and Advocacy agencies at a minimum.

EDUCATOR EQUITY. ED should issue regulations and guidance that reinforce the importance of ensuring students from disadvantaged backgrounds are not disproportionately taught by ineffective, inexperienced, out-of-field educators. "Inexperienced" should be defined as three years of experience or less. ED should promote state consideration of the distribution of beginning teachers who have not completed their preparation before becoming the teacher of record and the distribution of teachers who are fully state certified. While the Title I LEA Plans outline this student population as students from low-income and minority backgrounds, ED must also recognize that students with disabilities also come from low income and minority backgrounds and analyze their access to well-prepared educators.

Expanding teacher shortages in special education must not result in lower entry standards for special education teachers.

SCHOOL CONDITIONS FOR STUDENT LEARNING. ED should provide additional regulations and/or guidance on how the State educational agency will support local educational agencies in reducing:

- incidences of bullying and harassment;
- the overuse of discipline practices, including in-school suspension, that remove students from the classroom; and
- the use of aversive behavioral interventions that compromise student health and safety.

Specifically, States must be required to include data analysis of each of these elements, disaggregated by student subgroups, in order to identify high incidences and disproportion impact on student subgroups. Data should be cross-tabulated in order to further identify disparities within subgroups, such as Black students with disabilities.

We further encourage ED to issue Federal guidance on the use of restraint and seclusion with no exception for students with disabilities who have IEPs.

COMPREHENSIVE SUPPORT AND IMPROVEMENT PLANS

SCHOOL CHOICE. Under ESSA a local educational agency (school district) may allow students enrolled in a school identified by the State for comprehensive support and improvement to transfer to another public school served by the local educational agency, unless such an option is prohibited by State law. The district must give priority to transfer to the lowest-achieving children from low-income families.

ED should ensure that LEAs allowing school transfers must provide students with disabilities the same options as those without disabilities. Transfer options must not be restricted to certain schools within the LEA due to school capacity to serve students with disabilities.

SMALL HIGH SCHOOLS. ESSA allows high schools with a total enrollment of less than 100 students to forego implementation of improvement activities if identified due to grad 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 and in particular, students of color with disabilities. ED should further define “high schools with a total enrollment of less than 100 students” 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.

TARGETED SUPPORT AND IMPROVEMENT PLANS

Evidence-based interventions. ESSA requires that schools in which any subgroup of students is “consistently underperforming” develop a Targeted Support and Improvement Plan for each underperforming subgroup. ESSA further states that such plan must include “evidence-based interventions.” ED should clarify in regulation that such interventions must have proven evidence of effectiveness for the **subgroup of students that lead to the identification**. Too often schools and districts select “off the shelf” interventions with no particular focus on the particular group of students needing significant improvement, such as English learners and students with disabilities.

STATE AND LOCAL EDUCATIONAL AGENCY REPORT CARDS.

ED should issue regulations clarifying State and LEA report card requirements in areas such as:

- Reinforcing 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.
- Align the LEA report card to reflect new LEA responsibilities in implementing the State’s accountability system, specifically in the areas of how LEAs will monitor a school that receives Targeted Support and Improvement and the number of years to determine if the school’s plan has been unsuccessful and additional action that will need to occur and the LEA’s role in determining this additional action.
- 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 groups reported separately by NAEP. The students with disabilities subgroup should reflect the achievement of only students with IEPs. The participation rate for students with disabilities and ELs should also be reported.

Thank you for the opportunity to submit comments regarding implementation of the Every Student Succeeds Act.

Sincerely,



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