



National Association of State Directors of Special Education, Inc.

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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 National Association of State Directors of Special Education (NASDSE) thanks the Department of Education (Department) for the opportunity to comment on the proposed accountability regulations for the Every Student Succeeds Act (ESSA) as published in the Federal Register on May 31, 2016.

NASDSE is the national nonprofit organization that represents the state directors of special education, the IDEA Part B data managers and the IDEA 619 coordinators in the states, the District of Columbia, the federal territories, the Freely Associated States and the Department of Defense Education Agency.

As states begin their implementation of the ESSA, it is important that the Department issue regulations and guidance that are consistent with both the letter of the law as well as the intent noted by numerous lawmakers in the recent hearings conducted by the House Education and Workforce Committee and the Senate Health, Education, Labor and Pensions Committee. Lawmakers have been clear that the law provides increased flexibility to states to develop policies and practices that fit their individual needs. Additionally, the law provides an opportunity for the development of state education policies that more fully integrate the needs of students with disabilities, homeless children and youth, those in foster care and English Learner students.

Our comments are divided into two parts: First, we address the specific questions posed in the proposed regulations and second, we raise some specific issues with several sections of the regulations.

Question 1: Whether the suggested options for states to identify “consistently underperforming” subgroups of students in proposed §200.19 would result in meaningful identification and be helpful to states; whether any additional options should be considered; and which options, if any, in proposed §200.19 should not be included or should be modified.

We believe that subgroups should be identified by comparing their performance to the state’s long term goals and measures of interim progress for each subgroup. While the goals must be the same for all subgroups, comparisons among them would not provide meaningful data as the point is to focus on each specific subgroup and the specific needs of the students in each group. In addition, we believe that the timelines set for progress should be identical for all groups.

Question 2: Whether we should include additional or different options, beyond those proposed in this NPRM, to support states in how they can meaningfully address low assessment participation rates in schools that do not assess at least 95 percent of their students, including as part of their state-designed accountability system and as part of plans schools develop and implement to improve, so that parents and teachers have the information they need to ensure that all students are making academic progress (§200.15).

When the No Child Left Behind Act (NCLB) set a target of 95% participation in assessments, NASDSE applauded that step because for the first time, students with disabilities would be fully included in the assessments so that their progress could be tracked. While the importance of setting a goal of 95 percent participation is critical, we believe – and urge the Department to acknowledge – that there are a number of factors at work that must also be taken into account. The regulations must take note of the political realities of the nationwide ‘opt-out’ movement. Local school districts should not be penalized when parents choose to keep their children out of school on test days. In addition, parents may choose to keep their child out of testing because the test environment is particularly frustrating for their child. While it is incumbent on schools to provide universally designed test environments, there may still be some children for whom the standard assessment, even with accommodations, is problematic.

Using Universal Design for Learning (UDL) and other research-based practices, students may validly and reliably be assessed in ways other than the standard testing format. In addition, adding more options for how students are assessed will result in a more well-rounded picture of students’ successes. As an example, the Massachusetts Department of Elementary and Secondary Education allows students with the most significant cognitive disabilities to participate in an alternate assessment that not only reflects a student’s progress toward proficiency, but additionally evaluates students’ independence in completing tasks. Teachers present a portfolio that contains student work samples to show progress towards standards. Some of the methods used in states such as this would benefit students with disabilities, reduce frustration, and allow them to show their mastery in more appropriate ways while still allowing schools to meet the 95 percent rate requirement.

Question 3: Whether, in setting ambitious long-term goals for English learners to achieve English language proficiency, States would be better able to support English learners if the proposed regulations included a maximum State determined timeline (e.g., a timeline consistent with the definition of “long-term” English learners in section 3121(a)(6) of the ESEA, as amended by the ESSA), and if so, what should the maximum timeline be and what research or data supports that maximum timeline. (§200.13)

The proposed regulations call for a maximum determined state timeline for English Learners. While NASDSE supports the recommendation of five years, there should be a recognition that every child is unique in his or her abilities. Students who are dually defined as a student with a disability and an English learner may need more time to acquire the language skills needed to be academically “proficient.” Research indicates that for a student to develop oral fluency, 3-to-5 years are needed. To obtain academic English proficiency, up to seven years is needed.¹ Therefore, the five years should be just that, a recommendation and not a set timeframe.

¹ Hakuta, Kenji. (2000). How Long Does It Take English Learners to Attain Proficiency. *University of California Linguistic Minority Research Institute*. UC Berkeley: University of California Linguistic Minority Research Institute. Retrieved from: <https://escholarship.org/uc/item/13w7m06g>

Question 4: Whether we should retain, modify, or eliminate in the title I regulations the provision allowing a student who was previously identified as a child with a disability under section 602(3) of the Individuals with Disabilities Education Act (IDEA), but who no longer receives special education services, to be included in the children with disabilities subgroup for the limited purpose of calculating the Academic Achievement indicator, and, if so, whether such students should be permitted in the subgroup for up to two years consistent with current title I regulations, or for a shorter period of time. (§200.16)

We support the language in the proposed regulation that would allow a student with a disability who exits from special education services to be included in the subgroup for purposes of calculating the Academic Achievement indicator. We believe that two years is the appropriate amount of time for continuing to include these students for this limited purpose.

Question 5: Whether we should standardize the criteria for including children with disabilities, English learners, homeless children, and children who are in foster care in their corresponding subgroups within the adjusted cohort graduation rate, and suggestions for ways to standardize these criteria. (§200.34)

We agree with the Department's decision to keep students in their adjusted cohort graduation rate. For students with disabilities, we feel this rate should be limited to eight years. IDEA is clear that states must provide a free appropriate public education to students with disabilities through age 21, unless state law dictates another age. Therefore, allowing for an adjusted cohort graduation rate up to eight years provides for a melding of IDEA with ESSA without leaving states confused as to which law would take precedence.

While NASDSE agrees with much in the proposed regulations, we do have some areas of concern, which are described below.

- NASDSE opposes the use of a summative rating as described in §200.18(b)(3) and (4) for schools and districts. We believe that boiling down a school's performance, where there may be hundreds of students, to a summative rating will not accurately represent a school's performance. Summative ratings do not suggest nuances as to what might be going on in a school related to teaching and learning. The use of a dashboard with detailed information on all students, including subgroups, will more accurately reflect a school or district's performance. Additionally, a dashboard will highlight areas of improvement and areas where continued improvement is needed.
- In §200.14(d), the proposed regulation states that in differentiating among schools, that greater weight should be placed on the academic indicators. NASDSE believes the proposed regulation goes beyond what is stated in the law. All children must come to school ready to learn. If the socio-emotional needs of each and every student are not addressed, they will not make the academic progress that educators hope to see. For these reasons, we urge the Department to remove this added emphasis on the academic indicators in the final regulation.
- In §200.17(a)(2)(iii), the Department has proposed an 'n-size' of 30 students for subgroups. NASDSE believes this n-size is correct and that it will adequately capture important data for the individual subgroups of students while maintaining their anonymity. Reducing the 'n-size' to 10 as some groups are proposing does not take into account very small schools, where such a small 'n-size' would clearly delineate

which students are part of a subgroup. Thus, the anonymity of the students would be compromised. NASDSE agrees that states should provide a justification for utilizing an 'n-size' that is greater than 30, which is consistent with § (a)(3)(v) of this section.

- As States begin to develop their improvement plans, stakeholder engagement as provided for in §200.21(d), 200.22(c) of the proposed regulations, is essential for successful implementation of the law. NASDSE has been in the forefront of developing stakeholder engagement through its IDEA Partnership, funded by the U.S. Department of Education's Office for Special Education Programs (OSEP) for the past 15 years. NASDSE's Leading by Convening tool, noted recently in a communication regarding stakeholder engagement from Secretary King, describes a process by which stakeholders can be meaningfully engaged in addressing persistent problem areas in a state or local school district. We note that the proposed regulation calls out several groups of stakeholders (e.g., parents, education service agencies, nonprofit entities, etc.). However, we note that the proposed regulation neglects to specifically include specialized instructional support personnel in the list of stakeholder entities. NASDSE urges the Department to correct this omission in the final regulation as these personnel provide valuable support to all students in schools, including students with disabilities.
- §200.19(b)(2) describes the use of evidence-based practices in the lowest performing schools. NASDSE believes that evidence-based practices represent recognized tools and we urge their use throughout all schools.
- §200.34(c)(2) addresses high school graduation rates and the definition of a "regular high school diploma." We believe the regulation should explicitly state that meeting goals on an Individualized Educational Plan (IEP) should **not** be a determining factor for receiving a high school diploma. IEPs are not designed to be qualifying documents for obtaining a regular high school diploma; they are intended to be student-centered documents that are individually developed to provide information on specific goals, special education and related services and accommodations as necessary. We strongly urge the Department to ensure that there is a clear delineation between a diploma and meeting IEP goals. We also urge the Department to clarify what is meant in ESSA by developing an alternate diploma based on alternate academic achievement standards. In our discussions with Hill staff and other stakeholder organizations, there does not seem to be any clear understanding as to what kind of diploma would meet this definition.
- In addition, NASDSE believes the regulations should provide additional clarification around waivers of the one percent cap. ESSA states that local districts should not exceed having more than one percent of students take an alternate assessment based on alternate academic achievement standards, but that they can do so by providing an explanation to the state education agency. NASDSE supports having a one percent cap on the number of students in a local school district who take the alternate assessment. However, we believe that there are circumstances at both the LEA and SEA levels that may require LEAs to exceed the cap and in some instances, where the states will exceed the cap. For example, in some states, an individual school that operates as a local school district may serve a number of students with significant cognitive disabilities. This LEA may well exceed the one percent cap. We recommend that state education agencies work closely with any of their LEAs that exceed the cap and maintain waivers granted on file. In addition, the Department should, at a minimum, provide guidance as

to what steps states need to take to request a waiver from the Department of Education if the state exceeds the cap.

- Data shows that children and youth in the foster care system are disproportionately identified as having a disability. ESSA explicitly includes language that children placed in the foster care system, should remain in the school they attended prior to that placement being made and the proposed regulations reiterate this. (§200.34(f)). However, the proposed regulation does not take into account that if these students are in the process of being identified as having a disability, further evaluation might indicate that the student requires academic supports and services that are not available in the home school. The regulations should clarify that if the home school cannot provide services as required on a student's IEP that the student's school may need to change.
- §299.18(b)(c)(i),(ii) and (iii) addresses the need for all students to be taught by excellent teachers. Currently, all 50 states have teacher shortages in the field of special education. While this complicates the ability of school districts to find well-trained educators for students with disabilities, NASDSE does not believe the standards should be lowered for special educators. We recommend that states require evidence of knowledge, skill, and effectiveness in educators instructing students with disabilities. In addition, teacher certification designations must be transparent and meaningful so parents can have full knowledge of the status of their children's teachers. NASDSE further recommends that if states decide to use their funds to develop 'educator academies' that these programs be required to include training on the needs of students with disabilities and best practices for instructing them.
- Timelines for implementation of the law are an additional area of concern for our members. Currently, the identification for schools in need of assistance would be in the 2017-18 school year. This would require LEAs to use old data collected under NCLB. Further, it would not allow adequate time for thoughtful implementation of ESSA. NASDSE therefore requests that the Department allow flexible timelines regarding the development, adoption, and implementation of accountability plans. We recommend using ESSA 2017-18 data and identify schools during the 2018-19 school year.

Again, NASDSE thanks you for the opportunity to provide feedback to the Department on the proposed regulations. Should you have any questions about our comments, please feel free to contact NASDSE's Director of Government Relations, Nancy Reder, at nancy.reder@nasdse.org.

Sincerely,



Theron (Bill) East, Jr., Ed.D.
Executive Director