



**COMMENTS OF EDUCATION LAW CENTER-PA
TO PENNSYLVANIA’S PROPOSED CONSOLIDATED STATE PLAN
SUBMITTED PURSUANT TO THE *EVERY STUDENT SUCCEEDS ACT***

I. INTRODUCTION

The [Education Law Center-PA \(“ELC”\)](#) submits these comments in response to the Pennsylvania Department of Education’s (“Department”) request for input regarding its proposed Consolidated State Plan (“State Plan” or “Plan”) pursuant to the *Every Student Succeeds Act*. With the reauthorization of the *Elementary and Secondary Education Act* (“ESEA”) through the [Every Student Succeeds Act \(“ESSA”\)](#), Pennsylvania has an important and historic opportunity to reflect on its vision and goals for education, determine how to best support that vision, and create a new path to advance the education of all students through a more equitable system of accountability, support, and intervention. From its inception in 1965 until today, ESEA remains a core civil rights law, with a focus on "full educational opportunity" and closing the achievement gap for all students as a national objective. ESEA offers grants to districts serving low-income students, federal grants for textbooks, funding for scholarships, and federal grants to state educational agencies to improve the quality of elementary and secondary education for underserved students.

We have reviewed Pennsylvania’s State Plan through the lens of its impact on the vulnerable children we serve and focused on how the Plan can effectively address entrenched educational inequities often forged by racial injustice and deficiencies in meeting the needs of students with disabilities and English learners.

Through these comments, we acknowledge and applaud the Department’s commitment to increasing student achievement, its decision to broaden the matrix of measures employed to evaluate Pennsylvania schools, its support for community schools initiatives, and its attention to the inequities in opportunities for vulnerable student cohorts across the Commonwealth. Our comments underscore the need for rigorous, uniform goals and standards applicable to all students and the development of more detailed measures and strategies for determining when and how to intervene to close achievement gaps. We highlight the need to address school climate issues and further refine chronic absenteeism as a metric, as well as the need for greater state oversight to implement specific provisions of ESSA. We urge the Department to consider several proposed revisions to the State Plan that we believe will effectively resolve these issues and address the needs of our most educationally at-risk students, including students in foster care, those experiencing homelessness, students with disabilities, English Learners (“ELs”), and youth in and exiting the juvenile justice system.

We appreciate this opportunity to comment on the Department’s proposed State Plan and look forward to working with the Department in the continuing development and implementation of the State Plan in the months and years ahead.

II. OUR PERSPECTIVE

The **Education Law Center-PA** is a non-profit public interest law firm whose mission is to ensure access to quality public schools for educationally at-risk students across Pennsylvania. We pursue this mission by advocating on behalf of the most vulnerable students—children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English learners, LGBTQ students, and those experiencing homelessness.

We work in three strategic areas—enforcing equal access to a quality education, ensuring adequate and fair school funding, and dismantling the school to prison pipeline. Our strategies include advocating for legislative, regulatory, and policy reforms, providing direct legal representation and undertaking impact litigation, and empowering parents and students to understand their legal rights. Over its 40-year-plus history, ELC’s successes have included: ensuring equal access to schools for children in foster care and those experiencing homelessness; expanding access to educational opportunities for English language learners; advocating on behalf of children with disabilities to enforce their right to a free, appropriate public education and inclusive learning environment; challenging unfair and discriminatory school discipline policies; and working with schools to improve school climate.

Our comments grow out of our advocacy experiences in individual and impact cases, our involvement in the development of effective federal, state and local policies, and decades of work with schools across Pennsylvania to expand learning opportunities for vulnerable students.

III. ASSESSMENT & ACCOUNTABILITY

Pennsylvania’s State Plan must meet both the letter and purpose of the law to provide “all children significant opportunity to receive a fair, equitable, and high-quality education, and close educational achievement gaps.” To this end, Pennsylvania’s Plan must establish meaningful, aggressive, consistent, and achievable goals to ensure that children of all races, socio-economic backgrounds, etc. are prepared for future success. The Plan must explain *how* the state will hold schools and districts responsible for educating *all* students. A plan is only as good as the goals it sets for schools and the degree to which those goals drive the accountability system to hold schools and districts accountable for their vital roles in ensuring that all children can succeed. ESSA specifically requires states to identify long-term, statewide goals for: (1) academic achievement in English Language Arts and Mathematics; (2) graduation rates (based on the four-year adjusted cohort and, at a state’s discretion, extended-year rates); and (3) acquisition of proficiency in English language for English learners. ESSA also requires states to *detail* procedures for describing student performance at the all-student and student subgroup levels, the performance measures that will inform how Pennsylvania will measure school success, and the processes for identifying schools that need improvement.

A. *Set Common, Consistent, and High Standards for All Children*

1. Proficiency

The achievement gaps between student subgroups in Pennsylvania are stark and disturbing. For example, while 69.4% of white students scored proficient in Language Arts, only 35.9% of Black students and 40% of Hispanic students scored proficient, and only 25.3% of students with disabilities and 11% of English Learners achieved proficiency. ESSA clearly requires that a State’s long-term goals provide for faster improvement for subgroups that are substantially behind in order to close the achievement and graduation gaps.

Pennsylvania’s State Plan establishes vastly different goals for certain student subgroups and fails to articulate with precision the process, methods, and interventions for addressing and closing our wide achievement gaps forged by gross disparities in school funding and educational opportunities. As outlined on pages 9 and 10, the Plan identifies significantly *lower goals* for students of color, students in poverty, ELs, and students with disabilities, in both proficiency and graduation rates. The Department has proposed to decrease the non-proficient rate by varying percentages (between 30-45%) for four subgroups over the entire 15-year span (2015 baseline-2030). Accordingly, the goal by 2030 is for these subgroups to reach only a fraction of the proficiency rates of *white* students *without* disabilities.

We believe that these significantly lower standards maintain and reinforce gaps between students with disabilities and their non-disabled peers, as well as white and Black students, and thus perpetuate the stereotype of lower expectations for Black and Brown children and students with disabilities—the opposite of what Pennsylvania should embrace as goals and objectives.

We believe that PA should set the same long-term proficiency goals for all subgroups and make a commitment not to reset goals and interim targets downward if actual performance falls short of these targets. Re-setting targets for lack of progress renders the long-term goal meaningless. It is important that Pennsylvania make a commitment that interim targets toward the goals will not be adjusted based on the subgroup’s actual achievement across those years.

2. Graduation Rates

States may establish long-term goals and interim progress for extended-year cohort graduation rates, but only so long as such goals are *more* rigorous than the goals set for the four-year adjusted cohort graduation rate. However, as reflected in Pennsylvania’s proposed State Plan, the 4-year adjusted cohort graduation rate (“ACGR”) for students with disabilities only increases to 85%—the current graduation rate for the all student group. The graduation rate goal for ELs in 2030 is even lower. The 5-year extended graduation rate goals are only slightly more rigorous. It is difficult to understand how the 4-year ACGR of students with disabilities can rise to 85% when only slightly more than half will be proficient or advanced in reading and math. Similarly, it is hard to imagine that 85.9% of Black students will graduate in 2030 when the goal is that only 68% will be proficiency/advanced in English and only 58.6% will be proficient/advanced in Math.

We believe that Pennsylvania should set the same long-term graduation goals for all subgroups and make a commitment not to reset goals and interim targets downward if actual performance falls short of the targets. There is also no mention of measuring graduation indicators by subgroup for determining school ratings. We believe that it is imperative that all indicators be disaggregated by subgroup for assessing schools.

Lastly, it should be noted that Pennsylvania has developed a State Systemic Improvement Plan (“SSIP”) as required by the Individuals with Disabilities Education Act (“IDEA”) and has prioritized increasing the statewide graduation rate for students with disabilities as the State-identified Measurable Result (“SiMR”) of its SSIP. ESSA requires that the state ESSA plan coordinate with other programs, such as those under the IDEA. The SSIP is the major initiative of PDE’s Special Education division. As such, the SSIP and SiMR should be integrated with the state ESSA plan.¹ In fact, there appears to be no alignment of the SiMR goals for 4-year ACGR for students with disabilities and the ESSA goals.

B. Establish Clear Metrics for Identifying Low-Achieving Schools

States must identify low-performing schools and the Plan states that comprehensive support and improvement (“CSI”) identification will be limited to low-growth, low-achieving schools. However, the Plan does not specify how poorly a school must perform with regard to achievement and growth to be identified in the first step in the CSI identification process. Moreover, the use of a “growth data” through the Pennsylvania Value-Added Assessment System (“PVAAS”) to measure school performance is problematic. While such data is extremely helpful to inform instructional decisions, and ensure that students are on the path to proficiency, as a measure of school quality, PVASS raises concerns about reliability and validity due to significant fluctuations in growth from year to year.

It is also unclear how the additional academic and non-academic indicators will be used to identify the bottom 5% in the second step of the CSI identification process. There is a reference to “weighted average” but there is no specificity about how these indicators will be weighed. This is essential to determining which schools will be required to develop and implement CSI plans.

ESSA affords states wide latitude in developing metrics to assess schools. With that latitude, Pennsylvania should consider other evidence-based metrics of school quality that the Department should consider either as part of its accountability system or in the Future Ready PA Index. In particular, ESSA’s new requirements to report per-pupil expenditures at the school level creates an opportunity for the Department to measure and assess adequacy and equity of funding across the Commonwealth’s schools and school districts. Evidence-based research clearly demonstrates the pivotal role of adequate and equitable school funding as a precondition for high quality public schools and student outcomes.² Pennsylvania has the dubious distinction of having the

¹ More information on alignment of ESSA and SSIP is available at https://ncsi.wested.org/wp-content/uploads/2017/02/SSIP-ESSA-Alignment-Tool_NCSI-CCSSO_Winter2017.pdf

² Jackson, Johnson, and Persico. (2015). The Effects of School Spending on Educational and Economic Outcomes. *The Quarterly Journal of Economics*. Oxford University Press, http://socrates.berkeley.edu/~ruckerj/QJE_resubmit_final_version.pdf (last visited Aug. 28, 2017).

most extreme levels of school funding inequity in the country. The Commonwealth has the greatest gap in the nation between poor and wealthy school spending, with poor school districts spending 33 percent less per-pupil than their wealthy school district counterparts.³ This issue cannot be ignored in assessing schools and school districts.

In addition, accountability measures and the Future Ready PA Index should reflect other issues such as school climate (which several other states measure through survey data), including incidents of bullying and harassment; the availability of educational opportunities for vulnerable student subgroups at the school level; student achievement data disaggregated by subgroup; progress in language proficiency for EL students based on WIDA/ACCESS testing; and teacher quality data elements, such as qualifications, average years of experience (which is currently part of the School Performance Profile), hours of professional development in key areas, and vacancy rates. These data elements should be provided at the school level to accurately reflect school quality.

C. Provide More Detailed Descriptions of Evidence-Based Interventions, State Monitoring and Exit Criteria for CSI Schools

ESSA requires a description of the State’s process to ensure effective development and support for LEA improvement plans, including: evidence-based interventions; the process for approving, monitoring, and periodically reviewing LEA CSI plans; the state’s exit criteria for CSI schools and more rigorous interventions required for schools that fail to meet the exit criteria. Pennsylvania’s Plan is vague and imprecise with regard to these descriptions. In particular, the exit criteria for schools that have been identified for CSI is unclear. The Plan states that schools must show measurable progress on *one* of the indicators that resulted in their initial identification, but it does not define “progress” and may allow a school to exit without addressing or remedying a core deficiency that caused the school to be identified as low-performing.

D. Make Additional Refinements Needed to Ensure the Accuracy and Reliability of Accountability Measures to Assess Schools and Student Performance

1. Minimum Subgroup (N) Size

The State Plan includes a chart showing how the N-size of 20 impacts the percentage of students in each subgroup who would be excluded from accountability for assessments. The chart shows that only 4% of students with disabilities would be excluded. However, there is no such data for graduation rates. There is also no data on the *percentage of schools* that would not be held accountable for the disability subgroup using an N-size of 20 for either assessments or graduation rates. Generally, this data is more disturbing than the percentage of students who will be excluded. In addition, no comparison data is provided using the different N-sizes that were

³ National Center for Education Statistics. 2012. Current expenditures minus federal revenue other than Impact Aid per pupil in membership, by poverty quartile and state, with no adjustment for students in poverty. http://nces.ed.gov/edfin/Fy11_12_tables.asp. (last visited Aug. 28, 2017).

considered. Without this data, it is difficult for stakeholders, including parents, to assess the reasonableness and validity of the N-size and provide meaningful feedback.

As an alternative, an N-size of 10 is justified because it is high enough to ensure student anonymity and the protection of personally identifiable information pursuant to the Family Educational Rights and Privacy Act (“FE RPA”), and low enough to include a much larger swath of students with disabilities across Pennsylvania, and, likely, schools.

2. Weighting of Indicators

ESSA requires *substantial* weight be given to each academic indicator defined in the statute (Academic Achievement, Other Academic Indicator, Graduation Rate, and English Language Proficiency) and that, in the aggregate, these indicators should have much greater weight than the SQSS indicator(s) selected by the state. Pennsylvania’s Plan ignores the ESSA requirement that indicators must be weighted. The requirement to weight each indicator is primarily to ensure that the academic indicators are given much greater weight than the SQSS indicators selected by the state. However, as discussed above, it is also important to know the relative weight of each academic indicator to ensure that each is given substantial weight as required by ESSA. For example, it does not appear that graduation rate is given any weight, unless a school is doing so poorly that the graduation rate is 67% or lower. Also, it is unclear how much English language proficiency will count, even though it should have more weight than the SQSS indicators.

3. Participation in Annual Assessments

ESSA requires that at least 95% of all students in the assessed grades (and at least 95% of each subgroup) be included in the state’s annual assessments. It is important to keep in mind the impact of the participation rate requirement on educationally vulnerable students like students with disabilities, ELs, and students of color. A “non-punitive” approach would likely lead to widespread exclusion of historically underperforming subgroups-similar to the situation that existed prior to the *No Child Left Behind Act*. The failure to meet the 95% assessment participation rate rule for all students, **and** for each subgroup, is required to impact the calculation of academic achievement. It is not clear whether Pennsylvania intends to follow this requirement.

In addition, ESSA states that the failure to meet this rule must be factored into the system of annual meaningful differentiation of schools. The Plan appears to be in clear violation of this ESSA requirement. The only statement the Plan makes about this issue is that it does not impact differentiation of schools: “School-level participation rates will be published within the state’s annual public-facing school report cards. Schools with rates below 95 percent will be required to develop and implement state-approved improvement plans, and may be required to complete a school- or LEA-level assessment audit.” This statement does not make clear that the participation requirement applies to both the all student group **and** to every student subgroup.

IV. FAILURE OF THE PLAN TO ADDRESS SCHOOL CLIMATE AND BULLYING AS REQUIRED BY ESSA

School climate has been characterized as a leading predictor of school dropout and many states have chosen it as an accountability measure. Moreover, ESSA requires that “[e]ach state plan shall describe—how the State educational agency will support local educational agencies receiving assistance under this part to improve school conditions for student learning, including through reducing—(i) the incidences of bullying and harassment; (ii) the overuse of discipline practices that remove students from the classroom; and (iii) the use of aversive behavioral interventions that compromise student health and safety.” 20 U.S.C § 6311(g)(C)(i)-(iii). Pennsylvania’s State Plan falls far short in articulating how PDE will accomplish these critical goals of ESSA. Other states have included much more specific and robust descriptions of the efforts to be undertaken to reduce incidences of bullying and the overuse of harmful and discriminatory exclusionary discipline.⁴ Any such plan must address the fact that students of color, students with disabilities, LGBTQ students, and other educationally at-risk groups are disproportionately affected by bullying and harassment and punitive exclusionary discipline policies, which negatively impact academic progress. Pennsylvania’s State Plan must go further to identify meaningful steps the Department and LEAs will take so that these important goals of ESSA are realized in schools across Pennsylvania.

A. Reducing the Incidences of Bullying and Harassment

Bullying is ubiquitous in Pennsylvania’s schools. According to the 2015-16 Safe Schools Report issued by PDE, there were 2,293 incidents of bullying in Pennsylvania’s schools, which accounts for 5.33% of total incidents in schools. Bullying is the seventh most frequently occurring incident in schools, behind fighting (20.53%), disorderly conduct (13.49%), minor altercations (10.67%), simple assault (10.52%), threatening school official/student (7.32%), and all other forms of harassment/intimidation (5.94%).⁵ Harassment is the fifth most frequently occurring incident in schools. Together, bullying and harassment accounted for 11.94% of total incidents in Pennsylvania’s schools,⁶ making bullying and harassment the third most frequently occurring category of offenses in Pennsylvania’s schools, behind only fighting and disorderly conduct. Moreover, research on bullying explains that incidents of bullying are greatly underreported,⁷

⁴ For example, states like Illinois, New Mexico, Nevada, Tennessee, and North Dakota school climate as one of ESSA’s school quality indicators, while states like Massachusetts and New Jersey have established initiatives to collect data on school climate and exclusionary discipline, and Oregon has committed to not only data collection on discipline, but also a plan for corrective action where LEAs are disproportionately displacing student cohorts.

⁴ ELC retrieved this data from the 2015-16 Safe Schools – Statewide Report, available here: [https://www.safeschools.state.pa.us/\(S\(elcexqfveilywuffxkr4qw0\)\)/Main.aspx?App=6a935f44-7cbf-45e1-850b-e29b2f1ff17f&Menu=dbd39a1f-3319-4a75-8f69-d1166dba5d70&res=](https://www.safeschools.state.pa.us/(S(elcexqfveilywuffxkr4qw0))/Main.aspx?App=6a935f44-7cbf-45e1-850b-e29b2f1ff17f&Menu=dbd39a1f-3319-4a75-8f69-d1166dba5d70&res=).

⁵ ELC retrieved this data from the 2015-16 Safe Schools – Statewide Report, available here: [https://www.safeschools.state.pa.us/\(S\(elcexqfveilywuffxkr4qw0\)\)/Main.aspx?App=6a935f44-7cbf-45e1-850b-e29b2f1ff17f&Menu=dbd39a1f-3319-4a75-8f69-d1166dba5d70&res=](https://www.safeschools.state.pa.us/(S(elcexqfveilywuffxkr4qw0))/Main.aspx?App=6a935f44-7cbf-45e1-850b-e29b2f1ff17f&Menu=dbd39a1f-3319-4a75-8f69-d1166dba5d70&res=).

⁶ This figure includes bullying, racial/ethnic intimidation, and all other forms of harassment/intimidation.

⁷ According to data available on www.stopbullying.gov, only about 20-30% of students who are bullied notify adults about the bullying; and approximately 28% of students in the United States in grades 6-12 report having been bullied. Facts About Bullying, <https://www.stopbullying.gov/media/facts/index.html#stats> (last visited Aug. 28, 2017).

which means that the incidents of bullying that are occurring in Pennsylvania’s schools are likely even higher.

Bullying not only can have devastating impacts on a child’s educational experience and success, but certain student populations—students of color, students with disabilities, students who identify as LGBTQ/GNC, and religious and ethnic minorities⁸—are far more likely to be bullied than their peers. The United States Department of Education’s Offices of Civil Rights and Special Education and Rehabilitative Services have explained that where schools fail to address bullying of students with disabilities, they risk depriving those children of the free appropriate public education to which they are entitled under federal law.⁹ It is our experience, in operating a statewide helpline that receives over one thousand calls from parents and students each year, that bullying and harassment are widespread in Pennsylvania’s schools, and that schools are not equipped with the tools to effectively prevent and address bullying and to mitigate its harmful effects on students. When this shortfall impacts students with disabilities, we and other advocates are called to respond with expensive and time-consuming [litigation](#) to remedy widespread deprivations of FAPE. Consequently, it is imperative under ESSA that Pennsylvania articulate a clear plan which includes evidence-based techniques to reduce incidents of bullying and harassment in order to support *all* students.

Unfortunately, the Department’s plans for ensuring that incidents of bullying and harassment are reduced, as required by ESSA, are not articulated. Indeed, Pennsylvania’s State Plan references “bully[ing]” only five times throughout the entire 135-page document. While the State Plan champions the Bullying Prevention Toolkit developed by the Center for Safe Schools, as well as PDE’s Bullying Hotline, it does not explain in detail whether and to what extent those resources have been successful in reducing the incidence of bullying in Pennsylvania’s schools, especially for the most educationally vulnerable student populations.¹⁰ The Department’s vague and conclusory statement that it will “reduce[] incidents of violence and harassment, especially incidents tied to bias and discrimination on the basis of race, ethnicity, sexual orientation, gender, gender identity or expression, religion, ancestry, national origin, or disability” fails to satisfy either the Department’s requirements or the needs of Pennsylvania students. In our

⁸ See, e.g., CENTER FOR SAFE SCHOOLS, PENNSYLVANIA BULLYING PREVENTION TOOLKIT, at 10, <http://www.safeschools.info/content/BPToolkit2014.pdf> (“Certain groups of students are more likely to be targets of bullying or prejudicial comments. These include students with disabilities, students who are obese and students who defy gender norms. Students who are not in the racial, ethnic or religious majority are also at greater risk of being targeted.”).

⁹ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (OCR), *Dear Colleague Letter on Bullying of Students with Disabilities under Section 504 and Title II*, at 1 n.1 (Oct. 21, 2014), available at, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf> (“[Students with disabilities] are bullied or harassed more than their nondisabled peers.”); U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, *Dear Colleague Letter on Bullying of Students with Disabilities under IDEA* (Oct. 21, 2014), available at, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf> (failure of a local education agency to address bullying of students with disabilities on any basis may result in the deprivation of educational benefit under IDEA).

¹⁰ The Toolkit is impressive and resourceful, but it is unclear how often schools are using it with results, and whether PDE or the Center for Safe Schools tracks that information.

experience, this is a critical deficiency as Pennsylvania’s schools are not equipped with the tools they need to effectively prevent bullying and to mitigate its harmful effects on students. Based on our review of other State plans, as well as best-practices in bullying prevention and reduction, here is a list of recommendations that we urge you to incorporate in your response to section 6.1(C) of the State Plan:

- Articulate a detailed plan for the collection of data regarding incidence of bullying and harassment in all Pennsylvania schools, disaggregated by the race, gender, disability status, and age of the bullying victim.
- Publish this data in the Department’s Safe Schools report on an annual basis.
- Charge the Office of Safe Schools to receive and investigate complaints related to bullying and harassment in Pennsylvania’s schools and collect and maintain data regarding outcomes.
- Publish an annual report detailing the number of complaints filed, the outcomes of complaints and investigations, and trends in the nature of complaints, including data regarding the race, gender, and disability status of the bullying victim and whether the bullying was based in whole or in part on racial, gender, religious and/or disability bias.
- Provide technical assistance, including crisis response and training, to schools and/or school districts where (1) the Department has received a critical number of complaints regarding bullying and harassment and (2) the Department has determined a need for intervention based on information received through an investigation or other source.

B. Reducing the Overuse of Discipline Practices that Remove Students from Classrooms

Similarly, Pennsylvania’s State Plan fails to adequately articulate a plan for reducing the overuse of discipline practices that remove students from the classroom. Across Pennsylvania, schools impose exclusionary discipline—including: out-of-school suspension, expulsion, in-school suspension, transfers to Alternative Education for Disruptive Youth (“AEDY”), referrals to law enforcement, office referrals, and other means of excluding children from instruction—especially Black students at alarming rates. Black students are roughly three times more likely to receive an out-of-school suspension than white students,¹¹ even though Black students are not more prone to misbehavior.¹² Likewise, students with disabilities in Pennsylvania’s fifty largest school districts are 2.43 times more likely in Pennsylvania to be suspended at least once than their non-disabled peers. And Black students with disabilities in these schools are 2.86 times more likely to be suspended at least once than white students with disabilities.

¹¹ To be precise, according to the most recent Civil Rights Data Collection (2013-14), in Pennsylvania’s 50 largest school districts, Black students are **3.2** times more likely to receive at least one out-of-school suspension than white students and Hispanic students are **1.83** times more likely to receive at least one out-of-school suspension than white students.

¹² See, e.g., Russel J. Skiba & Natasha T. Williams, *Are Black Kids Worse? Myths and Facts about Racial Differences in Behavior*, The Equity Project at Indiana University, at 5, http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf.

In addition, suspensions are much more likely to be employed by schools that serve predominantly Black student populations than white ones. In this way, suspensions and other exclusionary disciplinary practices are tools school use to maintain segregated learning environments and reinforce achievement gaps between racial subgroups. For instance, when students apply to magnet schools in Philadelphia, schools consider their disciplinary records. Because Black students are not only more likely to be suspended for the same behavior than their white peers, but are also more likely to attend schools that employ suspensions and school police as a means of control, Black students are much more likely to find themselves on a path to pushout than academic excellence touted by these programs.¹³

Reducing the overuse of exclusionary discipline is not only mandated by ESSA, but is also an important strategy in shrinking the historical achievement gaps that perpetuate an unequal system. Research has demonstrated that closing the “discipline gap” also shrinks the “achievement gap”; thus, the failure of school systems to reduce the overreliance of exclusionary discipline is enforcing equity gaps in education.¹⁴ Accordingly, the Plan’s failure to meaningfully address exclusionary discipline undermines the very proficiency and graduation goals it seeks to achieve, even at the current 50% reduction rate. While we applaud the Department for affirmatively stating that it will “[i]nvest[] in technical assistance and supports for LEAs to identify disproportionate exclusionary discipline practices and create conditions for students to remain in school,” we believe the Plan falls short in explaining how and when the Department will intervene and hence fails to comply with ESSA’s specific mandates regarding this issue.

To ensure that Pennsylvania is prepared to meet this critical goal of ESSA, the Department should undertake the following revisions to the section of its State Plan addressing the overuse of exclusionary discipline practices. Specifically, the Plan should:

- Develop and publish to annually review Safe Schools data, as well as recent CRDC data, to identify schools with either (1) significant disproportionalities (racial, disability, etc.) in the use of suspensions (both in-school and out-of-school), expulsions, referrals to AEDY, and referrals to law enforcement and (2) high numbers of suspensions, expulsions, referrals to AEDY, and referrals to law enforcement, and target those schools for technical assistance and corrective action.

¹³ According to both the 2015-16 Safe Schools Report, as well as the School District of Philadelphia’s Open Data Initiative, five of Philadelphia’s top magnet schools recorded only 14 total suspensions: Julia R. Masterman School (1); Girard Academy Music Program (0); Science Leadership Academy (10); Girls High (1); Central High School (1). *Note: The Open Data Initiative indicates that Science Leadership Academy suspended just 3 students.* With the exception of Science Leadership Academy and Girls High, these schools enroll disproportionately more white students, and less Black students, than are enrolled across the District (14% white, 50% Black): Masterman (24% white, 26% Black); Girard Academy Music Program (41% white, 28% Black); Science Leadership Academy (34% white, 36% Black); Girls High (4% white, 66% Black); and Central High School (24% white, 26% Black). The District’s Open Data Initiative data sets are available here: <https://www.philasd.org/performance/school-information/>.

¹⁴ See, e.g., Skiba & Williams, *supra* n. 12 (citing “consistent findings of a negative relationship between school achievement and rates of exclusionary discipline [citation omitted] mean that effort put into improving the discipline gap will also have a positive effect on achievement, especially for students of color.”).

- Articulate exactly what “technical assistance” will be provided to LEAs with respect to both (1) strategies to reduce disproportionalities (racial, disability, ELL, etc.) in school discipline and (2) alternatives to suspensions.
 - To this end, the Department should issue guidance documents—perhaps in parallel with guidance it may issue regarding reducing the rates of chronic absenteeism—to assist schools in eliminating disproportionalities (racial, disability, ELL, etc.) in school discipline and developing alternative approaches to discipline that include school-wide positive behavior interventions and supports, restorative practices, and other evidence-based strategies.
- Earmark funding specifically for schools to use to reduce racial and other disproportionalities in school discipline and the overuse of exclusionary practices. In addition, the Department should permit schools to use funds earmarked for reducing the chronic absence rate toward reducing exclusionary discipline practices, which will, in turn, reduce the chronic absence rate.

Finally, the Department should define key terms with clarity and precision in the Plan, as follows:

- ***Discipline practices that remove students from the classroom:*** At minimum, these must include: in-school suspension; out-of-school suspension; expulsion; referral to law enforcement; and school-based arrests, which are the disciplinary removal categories that states are required to report on pursuant to 1111(h) of the statute. We also suggest that the Department encourage LEAs to reduce *all* exclusion from instructional time for disciplinary purposes, including office referral, ticketing, mandated cyber school or referral to alternative education, and any other disciplinary method that denies a student instructional time in the classroom. This is consistent with the Department’s definition of chronic absenteeism.
- ***Aversive behavioral interventions:*** Any activities, practices, forms or techniques, including the use of seclusion or restraints that restrict a student’s participation in school or access to resources or are undertaken because a child has an aversion to the action, even if most children would not be upset by it. Aversive interventions include a broad spectrum of activities that range from clear physical and emotional abuse to subtler forms of restriction. Chapter 14 of Pennsylvania’s Administrative Code defines “aversive techniques” as “[d]eliberate activities designed to establish a negative association with a specific behavior.”¹⁵ The state regulations further state that the “following aversive techniques of handling behavior are considered inappropriate and may not be used by agencies in educational programs: (1) Corporal punishment; (2) Punishment for a manifestation of a student’s disability; (3) Locked rooms, locked boxes or other structures or spaces from which the student cannot readily exit; (4) Noxious substances; (5) Deprivation of basic human rights, such as withholding meals, water or fresh air; (6) Suspensions constituting a pattern under § 14.143(a) (relating to disciplinary placement);

¹⁵ 22 Pa. Code § 14.133(b).

(7) Treatment of a demeaning nature; (8) Electric shock.¹⁶ We urge the Department to adopt this definition of aversive behavioral interventions in full.

- ***Overuse of discipline practices:*** The “overuse” should include assurances that LEAs address this problem even when only one subgroup is subjected to overuse. The Department should adopt a definition clarifying that “reducing overuse” includes identification and reduction of the disproportionate use of any disciplinary practice that disrupts student learning, removes a student from instructional time, places unnecessary financial hardships on students or their families, or leads to the student's contact with or placement in the criminal or juvenile justice system.

V. **CHRONIC ABSENTEEISM AS AN ACCOUNTABILITY INDICATOR**

We had recommended and continue to urge the Department to adopt accountability indicators that focus on school climate more broadly, particularly as it relates to the overreliance on exclusionary discipline practices that are disproportionately used to punish and exclude African-American students, Hispanic students, and students with disabilities. We note that throughout its Plan, the Department touts Positive Behavior Interventions and Supports (“PBIS”) as an important framework for creating positive school climates. We believe that the Department should go one step further, as recommended by the Center for Positive Behavioral Interventions and Supports, and adopt school climate as one of the additional school quality indicators.¹⁷ Other states have already adopted such additional indicators, or have stated in their plans that they intend to consider such indicators for accountability purposes in future plans.¹⁸ However, the Department’s adoption of chronic absenteeism as an indicator of school quality is certainly promising and has the potential to make a profound difference in the lives of Pennsylvania’s schoolchildren and in our schools. To ensure that this metric is meaningful and can be effectively implemented as a core component of the Department’s accountability planning, we recommend several key revisions to the Department’s definition of chronic absenteeism and its plan for implementing this accountability measure.

¹⁶ 22 Pa. Code § 14.133(e)(i)-(viii).

¹⁷ CENTER FOR POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, *Every Student Succeeds Act: Why School Climate Should Be One of Your Indicators*, https://webcache.googleusercontent.com/search?q=cache:kGuwY5_PReYJ:https://www.pbis.org/common/cms/files/pbisresources/ESSA%2520and%2520School%2520Climate%2520Brief%252029%2520nov%25202016.docx+&cd=10&hl=en&ct=clnk&gl=us (Nov. 29, 2016).

¹⁸ See, e.g., Samantha Batel, *Measuring Success: An Overview of New School Classification Indicators under ESSA*, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/education/reports/2017/08/04/436965/measuring-success-overview-new-school-classification-indicators-essa/> (last visited, Aug. 29, 2017) (explaining that Illinois, New Mexico, Nevada and North Dakota submitted state plans that chose school climate surveys as a school quality indicator; Tennessee chose out-of-school suspensions as a quality indicator; North Dakota chose out-of-school suspension as a quality indicator); Kate Stringer, *3 States Cite School Climate Surveys in Their ESSA Plans. Why Don't Others Use Culture for Accountability?*, THE 74, <https://www.the74million.org/article/3-states-cite-school-climate-surveys-in-their-essa-plans-why-dont-others-use-culture-for-accountability/> (last visited April 30, 2017) (explaining the benefits of using climate surveys for accountability, and noting that even states like New Jersey that did not choose school climate as the fifth ESSA indicator made a commitment to collecting survey data and considering its use for accountability in future plans).

A. *The Department’s Definition of “Chronic Absenteeism” Must Be Clear to Ensure Fidelity in Data Reporting and Accountability*

1. The Department Should Remove the Clause that Excludes Students with Less Than 60 Days’ Enrollment from the Definition

The Department’s exclusion of students who are enrolled in an educational entity for less than 60 school days will exclude numerous students who might nevertheless miss 10% or 18 days of school instruction and should be included in this accountability benchmark. The exclusion of students who are enrolled for less than 60 days is likely to eliminate the very students who are most likely to need attention, including students experiencing homelessness, students involved in the child welfare or juvenile justice systems, and students with disabilities. Other states who have selected chronic absenteeism as the school quality metric have not included this limitation in their definitions.¹⁹ This more reliably approaches a true chronic absenteeism rate. Under The Department’s definition, a student who misses 18 school days is chronically absent; that should not turn on whether the student was enrolled for 60 days or not. The needs of these highly mobile chronically absent students should be acknowledged and addressed through this metric.

2. The Department Should Revise Its Definition of “Absence” to More Accurately Reflect the True Number of Instructional Hours Lost Due to Absenteeism

The Department should revise its definition of “absence” to more accurately reflect the fact that lost instructional hours, even where a student is physically present in a building for a portion of the day, can quickly add up to lost instructional hours that meet The Department’s definition of chronic absenteeism (*i.e.* missing 10% or more of school days). A student who is not physically present for even a portion of the day may quickly accrue lost instructional hours. The Department’s current definition of “absence” permits students to miss up to 49% of the school day without being included in the chronically absent population. Under this definition, a student who attends school but leaves just before the midway point in the day for just 37 days will have missed the equivalent of over 18 school days— The Department’s definition of chronically absent—yet will be excluded from the count. In fact, the Hamilton Project, in advocating for states to adopt chronic absenteeism as the school quality indicator, notes that it has the potential to be “gamed” where states “adopt a low threshold . . . for how much of a day must be attended to count towards a fully day of attendance.”²⁰ To avoid this result, The Department should define “absence” to mean missing more than 10% of the school day, for if a student missed 10% of every school day in the year, then that student will have missed the equivalent of 18 school days and thus be chronically absent.

3. The Department Should Affirmatively Include “Suspensions” in Its Definition of “Chronic Absenteeism”

¹⁹ Only one state, Massachusetts, has adopted a similar limitation. PDE should align with the majority of states.

²⁰ Diane Whitmore Schanzenbach, et al., THE HAMILTON PROJECT, *Lessons for Broadening School Accountability under the Every Student Succeeds Act*, at 11 (Dec. 2016), http://www.hamiltonproject.org/assets/files/lessons_school_accountability_essa.pdf.

All of the leading definitions of chronic absenteeism include suspensions in the metric.²¹ This inclusive definition is essential to ensuring that The Department’s chronic absenteeism indicator actually measures *lost instructional hours*, regardless of the reason. As The Department has already recognized by selecting this indicator, lost instructional opportunities are associated with negative outcomes in academic performance and high school graduation, which is why so many states have chosen chronic absenteeism as the school quality indicator under ESSA. Several states, including Colorado, New Jersey, and Tennessee have explicitly explained in their ESSA state plans that suspensions are included in the definition of chronic absenteeism. For instance, Colorado defines “chronic absenteeism” to “include students who are absent for any reason (*e.g.* illness, *suspension*, the need to care for a family member), regardless of whether absences are excused or unexcused.”²²

The Department’s definition of “chronic absenteeism” implicitly includes out-of-school suspensions and in-school suspensions. By PDE’s definition, a student is not “physically participating in instruction . . . on school grounds” if they are not in their assigned classroom. Schools in Pennsylvania prevent students from “participating in instruction . . . on school grounds” through a variety of punitive disciplinary practices, including both in-school and out-of-school suspensions. Out-of-school suspensions quite clearly exclude students from the classroom and thus appear to be included in The Department’s definition of chronic absenteeism. Similarly, where a student is removed from his or her regular classroom and placed in an AEDY program, in-school suspension, a segregated or other restricted setting, an administrative office, etc., the student is not “participating in instruction” in their assigned classroom and is thus likewise included in The Department’s definition of chronic absenteeism.²³

The Department should make this explicit in its definition in order to ensure that all schools know that they will be held accountable for days students miss instruction hours in the classroom due to suspension and other forms of discipline that remove students from the classroom. The explicit inclusion of exclusionary discipline in this definition will ensure that LEAs are prepared to accurately collect and report this data to The Department. From a civil rights and policy perspective, it is imperative that The Department include exclusionary discipline in the definition of chronic absenteeism because reducing instructional hours lost due to suspension are critical to

²¹ See, *e.g.*, Robert Balfanz & Vaughn Byrnes, *The Importance of Being in School: A Report on Absenteeism in the Nation’s Public Schools*, at 7 (May 2012), http://new.every1graduates.org/wp-content/uploads/2012/05/FINALChronicAbsenteeismReport_May16.pdf (“Although there is no standard definition, chronic absenteeism is typically based on total days of school missed This is critical because the evidence indicates that it is how many days a student misses that matters, not why they miss them. In other words, the detrimental impacts of missing school occur if a student misses because of illness, *suspension*, the need to care for a family member, or any other reason.”) (emphasis added); ATTENDANCE WORKS, *What Is Chronic Absence?*, at 2, <http://www.attendanceworks.org/wordpress/wp-content/uploads/2011/06/What-is-Chronic-Absence.pdf> (last visited Aug. 21, 2017) (“Suspensions are considered excused absences.”); HAMILTON PROJECT at 6 (chronic absenteeism “includes all days a student spends out-of-school for unexcused absence (truancy), exclusionary disciplinary action (out-of-school suspension)”; EDUCATION TRUST at (“Since a student’s absence from school matters regardless of the reason, all lost instructional days should be counted, including those resulting from disciplinary action.”).

²² COLORADO DEP’T OF EDUC., *Consolidated State Plan under the Every Student Succeeds Act (ESSA)*, at 52, <https://www.cde.state.co.us/fedprograms/essa> (last visited Aug. 21, 2017) (emphasis added).

²³ See THE EDUCATION TRUST, *Chronic Absenteeism: An Overview*, at 2, http://www.hamiltonproject.org/assets/files/lessons_school_accountability_essa.pdf (last visited Aug. 21, 2017) (“Students suspended in-school should also be considered absent since they are losing instructional time.”).

student success, particularly for Black students, Hispanic students, and students with disabilities who are *disproportionately suspended* across Pennsylvania.²⁴

Inclusion of suspension and other forms of discipline in the definition of chronic absenteeism is also consistent with Pennsylvania law and The Department guidance regarding truancy. In November, Pennsylvania passed legislation, Act 138,²⁵ that states that “[s]chools shall not expel or impose out-of-school suspension, disciplinary reassignment or transfer for truant behavior.” In a PENN*LINK issued on February 15, 2017, The Department’s Office of Safe Schools informed LEAs that Act 138 “[p]rohibit[s] . . . schools from utilizing exclusionary tactics in response to truant behavior.” Exclusionary discipline tactics include, but are not limited to, out-of-school suspension, disciplinary reassignment to an alternative education program, transfer, and in-school suspension. Pennsylvania’s prohibition on the use of exclusionary discipline tactics as a response to truancy provides further support inclusion of exclusionary discipline in PDE’s definition of chronic absenteeism in its ESSA State Plan.

Lastly, The Department is poised to implement this indicator beginning in 2017-18 because schools already report data on suspensions to The Department’s Office of Safe Schools (every year), as well as to the U.S. Department of Education’s Office for Civil Rights (every two years). For the foregoing reasons, we strongly urge The Department to revise its definition of chronic absenteeism to explicitly include out-of-school and in-school suspensions, as well as placement in alternative education and other restrictive settings, in its definition. In addition, we urge PDE to expressly reference a loss of instruction time due to “administrative leveling” where students are waiting to be assigned to classrooms. This occurs in some larger school districts in the beginning of the school year (September – October). In those situations, children are outside of assigned classrooms and waiting in gymnasiums to be placed in classrooms.

B. PDE Should Develop Strategies to Reduce Manipulation and Gaming of Chronic Absenteeism Data

The Department should, either in its State Plan or in separate guidance cross-referenced in the State Plan, develop protocols for data collection that reduce the risk that schools will manipulate or game chronic absenteeism data. While schools are already required to report attendance data to The Department, there have been questions raised in the past as to reliability of this data. For instance, in a 2016 audit, Pennsylvania’s Auditor General found that the student data that the School District of Philadelphia submitted to The Department was not sufficiently reliable, even though it is used to calculate state subsidies, enforce the compulsory school attendance laws, and make educational decisions about school improvement. The Auditor General declared that this “impedes transparency and accountability and interferes with predictive analyses and continuous improvement efforts.”²⁶ Therefore, The Department should be proactive in developing strategies

²⁴ According to the most recent Civil Rights Data Collection (2013-14), in Pennsylvania’s 50 largest school districts, Black students are **3.2** times more likely to receive at least one out-of-school suspension than White students; Hispanic students are **1.83** times more likely to receive at least one out-of-school suspension than White students; and students with disabilities are **2.43** times more likely to receive at least one out-of-school suspension than their non-disabled peers.

²⁵ Section 10 of Act 2016, Nov. 2, P.L. 1061, No. 138.

²⁶ See Eugene A. DePasquale, Auditor General, *Performance Audit, The School District of Philadelphia*, at 56-61 (May 2016) <http://www.paauditor.gov/Media/Default/Reports/sch77432PhiladelphiaCitySchoolDistrict051016.pdf>.

to eliminate manipulation and gaming to ensure accurate and reliable data on chronic absenteeism.

In recommending chronic absenteeism as the school quality indicator that states should select, the Hamilton Project notes that while it is less likely to be gamed than other metrics, there are still associated risks.²⁷ Specifically, the Hamilton Project predicts that schools might falsify their attendance logs to reduce chronic absenteeism rates.²⁸ The Hamilton Report cites an example of this in Chicago, but we know, both from our own representation of students and the Auditor General’s sobering 2016 report, that the problem exists in Pennsylvania, as well.

The Hamilton Project outlines several steps states can take to reduce the risk of manipulation and gaming. States could require daily attendance to be centrally managed, or adopt monitoring algorithms to spot “anomalies such as late data entry, the volume of edited entries, or excess deviation from base chronic absenteeism data.”²⁹ Additionally, “[s]tates . . . could support random, in-person spot-checking of logs if data were not centrally managed.”³⁰ Finally, the Hamilton Project advises that another way to reduce the incentive on schools to manipulate or game is to establish alternative goals, other than “zero chronic absenteeism,” so that schools are supported and rewarded for their efforts to *improve*.³¹ Given Pennsylvania’s past history with erroneous data entry in this context, we strongly urge The Department to revise its State Plan to include these critical accountability checks on school-level data collection to ensure accurate and reliable data that will inform continuous school improvement.

C. PDE Should Create a Guide to Assist Schools in Addressing Chronic Absenteeism

To assist schools not only in collecting and reporting reliable data, but also implementing strategies to reduce chronic absenteeism and foster school improvement, The Department should issue guidance on best practices in reducing chronic absenteeism and promoting school attendance. In its approved State Plan,³² Connecticut explained that it “developed a guide to reduce chronic absenteeism in schools, which provides significant information on best practices for keeping all students, especially students at-risk, in school,” and is entitled “*Reducing Chronic Absence in Connecticut: A Prevention and Intervention Guide for Schools and Districts*.”³³ The Department should follow Connecticut’s lead in developing guidance for districts and schools for reducing chronic absenteeism. The Department’s guidance should also include strategies for reducing exclusionary discipline practices that fuel the chronic absenteeism rate, which is an

²⁷ HAMILTON PROJECT at 11.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² CONN. DEP’T OF EDUC., *Consolidated State Plan under the Every Student Succeeds Act*, http://www.sde.ct.gov/sde/lib/sde/pdf/essa/august_4_ct_consolidated_state_essa_plan.pdf (last visited Aug. 21., 2017).

³³ CONN. DEP’T OF EDUC., *Reducing Chronic Absence in Connecticut’s Schools: A Prevention and Intervention Guide for Schools and Districts* (April 2017), <http://www.sde.ct.gov/sde/lib/sde/pdf/publications/chronicabsence/chronicabsence.pdf>.

ESSA mandate.³⁴ Furthermore, pursuant to ESSA, strategies aimed at reducing chronic absenteeism should focus on the most vulnerable student cohorts, including students with disabilities,³⁵ students experiencing homelessness,³⁶ and Black students,³⁷ all of whom are more likely to be chronically absent (and disproportionately targeted for exclusionary discipline) than peer populations.

VI. CAREER READINESS AS AN ACCOUNTABILITY MEASURE

Pennsylvania's Plan identifies career readiness as an additional measure. However, as currently formulated, the benchmarks to be employed are highly subjective and address student career exploration rather than career readiness. For example, the requirements in the Plan accountability section, such as documenting the "percentage of students who, by the end of grade 8, create an individualized career plan and participate in career preparation activities" provide little evidence of actual career readiness. In contrast, other states that have included college and career readiness indicators such as participation and performance on accelerated coursework and tests (e.g., AP tests), the percentage of students in dual enrollment programs, participation and performance on the SAT/ACT, postsecondary outcomes and career certification.³⁸ Many of these benchmarks appear to be included in the Future Ready PA Index.

However, as discussed above, we recommend that Pennsylvania's Plan utilize a broader School Climate indicator as an evidence-based measure of school quality. This is recognized as a critical predictor of school and student success and an accurate and reliable indicator of school quality that is applicable to all grade levels and schools.

VII. EARLY EDUCATION MEASURES AND SCHOOL READINESS

A child's early years lay the foundation for school success. In recent years, researchers have learned that the human brain develops the vast majority of its neurons and is at its most receptive to learning, between birth and three years of age.³⁹ Such development is essential to the formation of active neural pathways. Thereafter, early education plays a critical role continuing

³⁴ 20 U.S.C. § 6311(g)(C) ("Each State plan shall describe—how the State educational agency will support local educational agencies receiving assistance under this part to improve school conditions for learning, including through reducing—(i) incidences of bullying and harassment . . . [and] (ii) *the overuse of discipline practices that remove students from the classroom* . . .") (emphasis added).

³⁵ U.S. DEP'T OF EDUC., *Chronic Absenteeism in the Nation's Schools: An Unprecedented Look at a Hidden Educational Crisis*, <https://www2.ed.gov/datastory/chronicabsenteeism.html#intro> (last visited, Aug. 21, 2017) (stating that "[s]tudents with disabilities are nearly 50% more likely to be chronically absent than students without disabilities.").

³⁶ INSTITUTE FOR CHILDREN, POVERTY & HOMELESSNESS, *Empty Seats: The Epidemic of Absenteeism Among Homeless Elementary Students*, at 2 (Nov. 2015), <http://www.icphusa.org/wp-content/uploads/2016/09/ICPH-Policy-Report-Empty-Seats-Chronic-Absenteeism.pdf> (finding that "homeless children [in New York City] were chronically absent at almost twice the overall citywide rate—36% compared to 19% in SY 2013-14.").

³⁷ U.S. DEP'T OF EDUC., *supra* n. 34 (providing data indicating that Black students are 1.36 times more likely to be chronically absent than white students).

³⁸ <http://www.air.org/sites/default/files/downloads/report/AIR%20Reflections%20on%20State%20ESSA%20Plans.pdf>

³⁹ Shonkoff, JP and Phillips, DA (eds). 2000 *From Neurons to Neighbourhoods: The science of early child development*, National Academy Press, Washington, DC.

and expanding cognitive development. Research studies linking early intervention and early learning to cognitive and socio-emotional gains and school success abound.⁴⁰

A. School Improvement Funds

As a component of Section 4.3 (State Support and Improvement for Low Performing Schools) ESSA requires Pennsylvania to describe how it will meet its obligations to award, monitor, and evaluate the use of school improvement funds. On page 48 of the Plan, the Department states that it will use “four tools” as the foundation for support for early learning and references different existing toolkits and standards. However, the Department has failed to identify how it will measure whether these tools actually *result* in the improvements ESSA mandates—academic and non-academic student outcomes, engagement in school, family engagement, and the readiness of the school itself to receive young children.

The Plan should require the Office of Child Development and Early Learning (“OCDEL”) to collect data and measure impact. OCDEL should disaggregate data based on race, ethnicity, and disability to monitor and ensure equitable access to quality programs that improve school-readiness. While the Plan discusses the use of a data “bridge” (p. 81) it should further lay-out what specific data will be collected and how it will be used to evaluate school readiness. The data elements should include the rates of suspensions and expulsions in preschools as a critical measure of positive school climate.

B. Promoting Successful Transitions in Early Childhood through Postsecondary Education

In Section 6.3 (Promoting Successful Transitions in Early Childhood through Postsecondary Education) the Plan states that “[c]oordination and collaboration between the state’s early learning service and program providers and LEAs is vital to ensure a focus on “readiness” to learn for all students.” The plan points to the Keystone STARS program as providing that collaboration by requiring programs with the highest rating to collaborate with LEAs when children are transitioning from preschool to kindergarten.

While the Keystone STARS program is an excellent example of such coordination, the use of the Keystone STARS rating system is insufficient to support successful transitions. The Keystone STARS system provides indicators of levels of quality for publicly-supported early childhood education programs. However, many of our most at-risk students have difficulty accessing such high-quality preschools due to high rates of mobility, the absence of quality programs in poor neighborhoods, etc. Pennsylvania must ensure equitable access to both school readiness and smooth transitions and measure outcomes towards that goal through data collection. Specifically, the Department should track and publicly report whether children (disaggregated by subgroup) participated in a quality pre-school program and what supports they received to transition to school. Additionally, the Plan should address vulnerable children during transition periods, particularly those with disabilities. For children transitioning from early intervention to kindergarten or first grade, data should be collected regarding: (1) whether they participated in a

⁴⁰ See e.g., Research studies on early childhood education collected by National Education Association available at <http://www.nea.org/home/18226.htm>.

transition meeting; (2) whether a reevaluation report was completed and given to the parent within 60 days; (3) whether a child had an IEP meeting within the next 30 days; (4) whether the child had an IEP in place on the first day of their school-age program. This information should be disaggregated by race.

VIII. RECOMMENDATIONS TO IMPROVE EDUCATIONAL OPPORTUNITIES AND OUTCOMES FOR AT-RISK STUDENTS

For too long, students of color, low-income students, English learners, students with disabilities, as well as children and youth in foster care and the juvenile justice system and other marginalized students have been denied the equal educational opportunity that is their right and our collective responsibility. Given the civil rights legacy and purpose of ESEA, and the centrality of accountability and reporting requirements to ensure that all students are well served by the law, we must consider whether the proposed Plan both implements the new protections of ESSA and facilitates equal access to quality schools for our most at-risk children and youth. We offer the following comments to ensure that the needs of at-risk students are identified and addressed, and to highlight areas where the Plan needs to be strengthened.

A. Students with Disabilities

1. Pennsylvania’s State Plan Should Better Articulate How the State Will Ensure Meaningful Consultation with the Disability Community

In the chart on pages 21-22 detailing the stakeholders with whom PDE consulted, the only reference to PDE’s consultation with the disability community is to the Governor’s Special Education Advisory Panel. In light of the significant impact of ESSA on students with disabilities and the strength of Pennsylvania’s disability community, including its strong commitment to students’ rights, such consultations should be far more frequent, expansive, and robust. In Philadelphia alone, there are well over a half-dozen groups who have been advocating on behalf of students with disabilities for years. As outlined below, the proposed State Plan must be strengthened to be responsive to the needs of students with disabilities. In order to ensure effective implementation of ESSA and address identified issues going forward, we propose that the State Plan more clearly describe the Department’s efforts to consult the disability community going forward.

2. Pennsylvania’s State Plan Should Provide Guidance to LEAs Regarding the Definition of “Most Significant Cognitive Disabilities” So That IEP Teams Are Prepared to Employ This Definition in Meetings When Making Determinations about a Student’s Participation in Alternate Assessments

Pennsylvania’s State Plan provides little guidance to schools, and thus IEP Teams, on how to determine which students have the “most significant cognitive disabilities.” Because the U.S. Department of Education has failed to provide a clear definition, it is incumbent on PDE to do so. This is especially true because the Department of Education has stated that there is “no specific cap on the number or percentage of students with the most significant cognitive

disabilities to whom a State may award a State-defined alternate diploma.”⁴¹ Thus, without a clear definition, the risk that schools will mis-identify or over-identify students as having the most significant cognitive disabilities is very high.

A clear definition is absolutely essential to prevent the gaming of graduation rates at the expense of the most vulnerable students with disabilities. Under the U.S. Department of Education’s non-regulatory guidance, schools may remove students with the most significant cognitive disabilities from the 4- and 5-year graduation rates if they have not graduated with their cohort but are still working towards their alternate diplomas. If these students ultimately do not graduate pursuant to the alternate diploma, they are added to the 4-year graduation rate of the ninth-grade cohort associated with the year of the student’s *exit*, not entrance. Thus, schools have the opportunity to improve their 4-year graduation rates in the *short term* by placing students with the most significant cognitive disabilities on a path toward an alternate diploma. To avoid this gaming of the 4-year graduation rate at the expense of the most vulnerable students with disabilities, it is imperative that PDE define “most significant cognitive disabilities” in its State Plan. This will promote appropriate and uniform identification of these students across the Commonwealth, and limit this designation to those few students who will most benefit from alternate assessments.

3. Pennsylvania’s State Plan Should Include Former Students with Disabilities Who Lost Their Disability Designation in the Current School Year in the Subgroup

Pennsylvania should make clear in its State Plan that LEAs must include *former students* with disabilities who lost their disability status in the current school year in the “students with disabilities” subgroup. This is critical to ensuring that Pennsylvania’s State Plan does not provide a perverse incentive to remove a student’s disability status—and, with it, essential and legally-mandated services, supports, and accommodations—in the middle of a school year. Pennsylvania’s State Plan is confusing on this point and must be clarified.

4. Pennsylvania Should Adopt an N-Size of 10 So as Not to Exclude 6,056 of Pennsylvania’s Students with Disabilities

For the reasons previously discussed in Section III(D)(1), we propose using an N-size of 10 rather than 20, which would exclude 6,056 students. An N-size of 10 is justified because it is high enough to ensure student anonymity and the protection of personally identifiable information while ensuring that students with disabilities across Pennsylvania are validly counted.

5. Pennsylvania Should Revise Its Definition of Chronic Absenteeism to Ensure that Students with Disabilities Have Equal Access to Inclusive Instructional Opportunities

According to the most recent CRDC data published by the U.S. Department of Education, which, for the first time included data on chronic absenteeism, students with disabilities are *50% more*

⁴¹ U.S. DEP’T OF EDUC., *Every Student Succeeds Act High School Graduation Rate Non-Regulatory Guidance*, at 15 (Jan. 2017), <https://www2.ed.gov/policy/elsec/leg/essa/essagradrateguidance.pdf>.

*likely to be chronically absent that students without disabilities.*⁴² Furthermore, it is our experience, in representing students and families in local truancy court proceedings in Southeastern Pennsylvania, that students with disabilities are far more likely to be cited in court or placed into foster care than students without disabilities. Therefore, any discussion of chronic absence rates, and strategies schools may use to improve these rates, must center on the student populations, like students with disabilities, who are overrepresented in this rate. For a full discussion, see our analysis of the chronic absenteeism indicator above in Section V.

6. Pennsylvania’s State Plan Should Better Describe How the State Will Empower Excellent Special Educators to Employ Best Practices to Promote Inclusion (Page 62)

Pennsylvania’s State Plan provides little explanation on how it will ensure that educators are meeting the individualized needs of specific learners, including students with disabilities. The State Plan refers to Multi-Tiered Systems of Support (“MTSS”) and culturally-responsive and trauma-informed concepts, but not to evidence-based programs and teaching frameworks that have been proven to promote the inclusion of students with disabilities. We join those who have called upon Pennsylvania to include strategies in its State Plan to improve the capacity of educators to implement inclusive best practices.

7. Pennsylvania Should Revise Its State Plan to Reduce and Eliminate the Overreliance on Exclusionary Discipline Tactics and Aversive Techniques, Which Disproportionately Impact Students with Disabilities (Page 92)

As previously discussed in Section IV, ESSA requires that “[e]ach state plan shall describe—how the State educational agency will support local educational agencies receiving assistance under this part to improve school conditions for student learning, including through reducing—(i) the incidences of bullying and harassment; (ii) the overuse of discipline practices that remove students from the classroom; and (iii) the use of aversive behavioral interventions that compromise student health and safety.” 20 U.S.C § 6311(g)(C)(i)-(iii). We have serious concerns about Pennsylvania’s State Plan with respect to these critical goals of ESSA, and how it will impact students with disabilities. Students with disabilities are more likely to be bullied and harassed, are disproportionately suspended from school, and are more likely to be the subject of illegal aversive techniques than their peers without disabilities. Furthermore, the State Plan is practically devoid of any strategies aimed at improving outcomes for students who are at the intersections of multiple subgroups, and who are often the most vulnerable students in our schools. For a full discussion, see section IV of these comments.

B. Students in Foster Care

It is well-documented that youth in foster care are among the most educationally at-risk of all student populations. They experience lower academic achievement, lower standardized test

⁴² U.S. DEP’T OF EDUC., *supra* n. 36 (stating that “[s]tudents with disabilities are nearly 50% more likely to be chronically absent than students without disabilities.”).

scores, higher rates of grade retention, and higher dropout rates than their peers who are not in foster care.⁴³ Based on a review of studies conducted between 1995 and 2005, one report estimates that about half of foster youth complete high school by age 18 compared to 70% of youth in the general population.⁴⁴ Other studies show that as few as 11% attend college.⁴⁵ In the School District of Philadelphia, one in five high school students (and 17% district-wide) are involved with the child welfare or juvenile justice system and these children fall far below their peers academically, are more likely to be eligible for special education services, experience higher rates of absenteeism, and lower rates of grade promotion and credit accumulation—all of which place these youth at greater risk of dropping out.⁴⁶

ESSA includes important new school stability and data collection provisions designed to improve educational outcomes and opportunities for children in foster care. Specifically, ESSA requires every state to describe in its State Plan, the steps the State educational agency will take—in collaboration with the State’s child welfare agency—to ensure school stability for all children in foster care. Accordingly, the Department must assure that a child in foster care enrolls or remains in the child’s school of origin, unless a determination is made that this is not in the child’s best interest based on child-centered factors. If a determination is made that it is not in a child’s best interest to remain in the school of origin, the child must be “immediately enrolled” in a new school, even without required documents. The enrolling school must immediately contact the child’s last school to obtain relevant academic and other records. In addition, transportation to support school stability may be determined by state law or by agreement between local education agencies and county children and youth agencies. Finally, each State education agency must designate a Point of Contact to oversee implementation of these provisions and local education agencies must designate “LEA Foster Care Points of Contact” if there are analogous points of contact within child welfare agencies.

1. School Stability Provisions of ESSA

In its current form, Pennsylvania’s State Plan does not include or reference ESSA’s provisions relating to students in foster care nor include mandated assurances, and fails to articulate Pennsylvania’s strategies to support the education of students in foster care in alignment with ESSA’s school stability requirements. This is a critical deficiency of the Plan as the Department and LEAs play a pivotal role in closing the achievement gap for system-involved youth. ESSA outlines key requirements regarding what the Department and LEAs must do to both support system-involved youth as a whole *and* to target specific areas

⁴³ National Working Group on Foster Care and Education, *Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care* (January 2014), <http://fostercareandeducation.org/> (under “Research and Statistics”).

⁴⁴ Wolanin, T. R. (2005). *Higher education opportunities for foster youth: A primer for policymakers*. Washington, DC: The Institute for Higher Education Policy.

⁴⁵ Burley, M. (2009). *Foster Care to College Partnership: Evaluation of education outcomes for foster youth*. Washington State Institute for Public Policy, available at <http://www.wsipp.wa.gov/rptfiles/09-12-3901.pdf>.

⁴⁶ *Supporting the Needs of Students Involved with the Child Welfare and Juvenile Justice System in the School District of Philadelphia* is available at http://policylab.chop.edu/sites/default/files/pdf/publications/PolicyLab_Report_Supporting_Students_Involved_with_Child_Welfare_June_2014.pdf (study examined the educational outcomes of students in the 3rd, 7th, 9th, and 12th grades attending public schools in Philadelphia during the 2011-12 school year, with a cohort of over 68,000 students).

of need for youth in foster care. In addition to adhering to the requirements of *ESSA*, Pennsylvania has the opportunity to set more rigorous guidelines for LEAs to better serve and support system-involved youth.

To achieve the goals of assuring school stability and improving educational outcomes for youth in foster care, we recommend that the State Plan be revised to describe how PDE will collaborate with DHS and provide guidance and direction to LEAs to comply with the school stability requirements of *ESSA*. Specifically, the Plan should include the following elements:

- ***Scope of School Stability***. The Plan should articulate an explanation of how PDE will ensure that all students in foster care entitled to enroll in or remain in their school of origin will be supported to do so. This should include a clear definition of “school of origin” as (a) the school the child is enrolled in or was enrolled in prior to entry in foster care; and (b) the school the child is enrolled in when a change in foster placement occurs or is proposed. In addition, the right to school stability applies to children and youth placed in congregate care settings.
- ***Best Interest Determinations***. The Plan should describe how Best Interest Determinations shall be made based on child-centered best interest factors, who will have input into these determinations and how the ultimate decision shall be made. The Plan should make it clear that the best interest determination cannot be based on the cost of transportation.
- ***Transportation***. The Plan should address how transportation will be arranged, provided, and funded to support school stability. The Plan should reflect steps taken by PDE to ensure that LEAs receiving funds under Title I, Part A will provide students in foster care transportation, as necessary, to and from their schools of origin consistent with the procedures developed by LEAs in collaboration with state or local child welfare agencies. The Plan should reflect that:
 - LEAs and child welfare agencies must maintain clear written plans for the providing, arrangement, and funding of transportation to ensure school stability.
 - *ESSA*’s provisions do not affect a school’s obligation to transport a child in foster care in the same way they do other students at the school district’s cost. The new school stability provision does not override any other school district obligation to transport a student (*e.g.*, when transportation is written into an IEP as a related service).
 - Transportation shall be provided in the most cost-effective manner. Failure to reach an agreement about costs does not relieve either agency of its obligation to transport and cover costs.

- The Department will establish a default cost-sharing arrangement which LEAs and local child welfare agencies must follow if they are not able to come to an agreement in a timely fashion.
- ***Dispute Resolution Process.*** The Plan should include an explanation of how disputes regarding best interest determinations, transportation costs, and other issues shall be addressed and resolved.
- ***Immediate Enrollment.*** The Plan should describe how the Department will ensure that if a determination is made that it is not in the student’s best interest to remain in the school of origin, the student will be immediately enrolled upon presentation to a new school, even if the student cannot produce records normally required for enrollment. The plan should clarify that “immediate enrollment” means not just technically enrolled or registered, but attending and meaningfully participating in school. The Plan should also explain how the Department will ensure that the enrolling school will immediately contact the student’s prior school to obtain academic and other records promptly.
- ***Points of Contact.*** The Plan should reflect that the Department has designated an employee to serve as Pennsylvania’s State Point of Contact for child welfare agencies, to oversee implementation of the Department’s responsibilities. In addition, the Plan should reflect the appointment and duties of Regional Coordinators and LEA Foster Care Points of Contact across the Commonwealth who have been appointed in light of Education Liaison counterparts appointed by County Children & Youth agencies. These POCs are a central component of information and leadership that is vital to the implementation of ESSA provisions related to foster care.

2. Pennsylvania’s State Plan Must Ensure that Students with Disabilities Will Be Provided with Critical and Related Educational Services

In addition, we note that according to data from the National Technical Assistance Center for the Education of Neglected or Delinquent Children and Youth, 27% of students served under Subpart 1 in PA in 2014-15 had IEPs and 26% of students served under Subpart 2 had IEPs.⁴⁷ Despite this prevalence, there is no mention of students with disabilities in the Commonwealth’s Consolidated State Plan.⁴⁸ The Plan should state specifically how it will ensure that students with disabilities will be provided with critical special education and related services they need and are legally entitled to, and how the state and local education agencies will fulfill their duties to such students.

3. Data Collection and Reporting

⁴⁷ NDTAC at <https://www.neglected-delinquent.org/>

⁴⁸ See Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At-Risk under Title I, Part D at page 109.

ESSA also includes new provisions which require, for the first time, that states collect disaggregated data regarding the academic achievement and graduation rates of children in foster care. In order to implement these provisions, we recommend the following additional amendments to the Plan:

- ***The Plan should clearly define the term “child in foster care” for data collection purposes.*** It is important to define this term and align it with Fostering Connections’ school stability requirements. The term “foster care” has the same meaning as defined in 45 C.F.R. 1355(a), which means 24-hour substitute care for children placed away from their parents and for whom the title IV–E agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, including youth dually adjudicated, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and pre-adoptive home. The designation applies regardless of whether a foster care facility is licensed and payments are made by the State, tribal, or local agency, is subject to federal matching, or whether adoption subsidy payments are made prior to the finalization of an adoption.
- ***Data collected should include all children in foster care at any time during an academic school year regardless of the child’s length of stay in foster care.*** In order to accurately reflect academic achievement of students impacted by the foster care system, it is important to collect and report on *both* cohorts—those in foster care at the time of reporting (as a point-in-time cohort), as well as those who have *ever* experienced foster care. Status in foster care is, by nature, short-term. Students often move in and out of the foster care system for short- or long-term stays and it is common for children to be involved with the foster care system more than once. Because students in foster care have unique educational needs, and because we need to identify the educational barriers they face collectively, we strongly support the designation of all students in foster care as a subgroup for purposes of reporting student achievement data.
- ***Graduation rates for this student cohort*** should include four-year adjusted cohort graduation rates, extended-year adjusted cohort graduation rates, and two disaggregated subgroups: (1) students in foster care at the time of graduation and (2) students who ever qualified as children in foster care in grades 9-12. Narrowing the cohort only to those in foster care at the time they exit high school will fail to capture the significant number of students impacted by foster care who may have dropped out or fallen behind rather than timely exited high school. Simply stated, if the high school graduation rate is reported only for students in foster care at the time of reporting, the data will significantly underreport reality. It is well-documented that many students in foster care drop out of school before reaching twelfth grade. Collecting *both* cohorts (those in foster care at the time of graduation, and those who have ever experienced foster care while in high school) provides the most accurate way to have a full understanding of the educational experiences of students in foster care.
- ***PDE should commit to issuing an Annual State Report Card*** regarding the graduation rates and academic achievement data of children in foster care. Because of the unique educational needs of students in foster care, as described above, we also support the

inclusion of youth in foster care as a subpopulation for purposes of all state accountability indicators.

In addition, we urge the Department to undertake the following actions to support full implementation of ESSA for students in foster care:

- Ensure that students in foster care are enrolled in or remain in their school of origin, unless a determination is made that it is not in their best interest;
- Ensure that students in foster care are provided with transportation, as necessary, to and from their schools of origin;
- Ensure that students with disabilities who are dependent are provided with critical and related educational services, particularly when attending on-grounds schools.
- Hire a dedicated staff person at PDE to oversee and monitor educational programs at residential facilities serving children in dependent care;
- Monitor and assess the educational programs in residential placements through annual public reviews that include assessing progress made while in a particular placement.
- Offer youth a state-issued diploma if they meet state standards but are unable to receive a school-issued high school diploma due to high rates of mobility.

C. Students in the Juvenile Justice System

Youth placed in and returning from the juvenile justice system are among the Commonwealth's most vulnerable student cohorts. They frequently have unmet needs and are often excluded from critical services and resources that could markedly improve life outcomes. Unfair or ineffective school discipline policies, lack of access to appropriate educational services and supports, and inappropriate referrals to law enforcement for school disciplinary violations all too often push youth into the juvenile justice system—and lead them on a trajectory towards adult incarceration. Importantly, subgroups of students—racial minorities, those with disabilities, English learners, and the economically disadvantaged—are disproportionately pushed into the juvenile justice system. Nationally, 65% of youth in custody are students of color;⁴⁹ the number of students receiving special education services in juvenile correction facilities is almost four times higher than in public school programs;⁵⁰ and 16% of youth in residential placement come from families speaking a language other than English.⁵¹

⁴⁹ Office of Juvenile Justice and Delinquency Prevention, *Youth's Characteristics and Backgrounds*, Juvenile Justice Bulletin, 2 (December 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/227730.pdf>.

⁵⁰ Mary Magee Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher, and Jeffrey M. Poirer, *Youth with Disabilities in Juvenile Corrections: A National Survey*, Exceptional Children, 342 (Spring 2005), http://helpingganyouth.homestead.com/disability-best_corrections_survey.pdf.

⁵¹ A. Sidana, S. Lampron, and M. O'Cummings, *Fact Sheet: ELL Students and the N or D Context*, National Evaluation and Technical Assistance Center for the Education of Children and Youth who are Neglected, Delinquent, or At Risk, 4 (August 2011), <http://www.neglected-delinquent.org/sites/default/files/docs/ELLFactSheet.pdf>.

Our recommendations for Pennsylvania’s State Plan focus on accountability issues concerning the equitable education of justice-involved youth. Without expanding and strengthening both efforts and reporting requirements for juvenile justice facilities, our youth in Pennsylvania will continue to drop out upon returning to their home schools because they have fallen so far behind their peers. National research reflects that students are often chronically behind in school upon juvenile justice entry,⁵² and data shows that many youth in juvenile justice facilities make no meaningful progress in learning or academic achievement while in placement.⁵³ *Perhaps most distressing, approximately two out of three students drop out after exiting the juvenile justice system.*⁵⁴

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

The strengthened education protections for justice-involved youth codified in ESSA require strong and thoughtful state commitment to effective implementation. While the Pennsylvania Department’s draft State Plan provides some promising general objectives, there is insufficient detail to guide the local education agencies to meet ESSA’s requirements. We urge the Department to address the following issues in much greater detail in its State Plan in order to provide rigorous guidelines for LEAs and best serve justice-involved youth. To fulfill the requirement of ESSA, the Plan and guidance issued to LEAs pursuant to the Plan should include the following elements:

1. Require Facilities to Conduct Meaningful Education Assessments upon Entry and Define “Whenever Practicable”

⁵² Southern Education Foundation, *Just Learning: The Imperative to Transform Juvenile Justice Systems into Effective Educational Systems—A Study of Juvenile Justice Schools in the South and the Nation* 14 (2014), <http://www.southerneducation.org/getattachment/cf39e156-5992-4050-bd03-fb34cc5bf7e3/Just-Learning.aspx> (2/3 of juveniles entering state institutions were below grade level in math and reading and 44% entering local juvenile justice facilities were below grade level in math and reading).

⁵³ *Id.* at 15-17.

⁵⁴ *Id.* at 18 (citing Joseph C. Gagnon, Brian R. Barber, Christopher L Van Loan, and Peter E. Leone, “Juvenile Correctional Schools: Characteristics and Approaches to Curriculum,” *Education and Treatment of Children*, Vol. 32, no. 4, 673-696, 2009; Joseph C. Gagnon, “State-Level Curricular, Assessment, and Accountability Policies, Practices, and Philosophies for Exclusionary School Settings,” *The Journal of Special Education*, vol. 43, No. 4, 206-219, February 2010; Joseph C. Gagnon, Christopher L Van Loan, and Brian R. Barber, “Secondary Psychiatric Schools: Characteristics and Approaches to Curriculum,” *Preventing School Failure*, Vol. 55, No.1, 42-52, 2010; Joseph C. Gagnon and Brian Barber, “Characteristics of and Services Provided to Youth in Secure Care Facilities,” *Behavioral Disorders*, vol. 36, no. 1, 7-19, November 2010.).

ESSA provides that States accepting funding describe the procedures they will use to assess students' educational needs. They must do so upon entry to a correctional facility "to the extent practicable." This is a critical step towards ensuring youth receive an appropriate education at the correct grade level while they are in custody. It also represents a key point of intervention and beginning to make a positive difference in a youth's education—for example, by illuminating for the first time that a student should be referred for a special education evaluation. We urge the State Education Agency to define what constitutes "to the extent practicable" as "whenever possible unless a facility is prevented from doing so due to circumstances beyond its control."

Moreover, education assessments must be standardized across the Commonwealth. Many facilities use "assessments" that are not evidenced-based and therefore fail to provide needed information. Commonly, students are placed in the wrong grade or receive an inappropriate or below-grade curriculum while in placement.

A standard education assessment should include the following:

- Obtaining an accurate Reading and Math Level;
- Reviewing standardized test scores;
- Considering whether a youth should be evaluated to determine eligibility for special education services;
- Determining whether a youth qualifies for language services as an English language learner and if so, what level of instruction and services are needed;
- Determining the youth's appropriate grade level
- Assessing credits needed towards graduation at the school to which the student shall return.

2. Emphasize Credit-Bearing Secondary and Postsecondary Coursework and Career and Technical Education

ESSA requires States receiving Title I, Part D funding to establish "opportunities for students to participate in credit-bearing coursework while in secondary school, postsecondary education, or career and technical education." PDE should require that all three options must be available to students involved in the juvenile justice system. Specifically, although career and technical education is extremely important to engage students and build skills towards family-sustaining careers, youth in the juvenile justice system should have *equal access* to traditional coursework that leads to recognized academic credit. In order to effectuate access to credit-bearing coursework, secondary schools and programs in juvenile justice facilities *must align* with the requirements set forth in Chapter 4 of the Pennsylvania School Code and with the local education agency where the juvenile justice facility is located including earning recognized credits for coursework that aligns with these standards.

3. Define When a Youth Has "Come into Contact with Both the Child Welfare and Juvenile Justice Systems"

ESSA requires States receiving Title I, Part D funding to note when a youth has had "contact" with both systems. It also allows funds to be used to support services for these youth. The Department should clarify what constitutes "contact" to avoid confusion and promote consistent

data collection across jurisdictions. We recommend the following definition, which includes youth who are dually-adjudicated and have other contact with the systems but is not so broad as to overburden jurisdictions in obtaining the information: *Youth who have concurrent involvement (diversionary, formal, or a combination of the two) with both the child welfare and juvenile justice systems.*⁵⁵

4. Ensure That Upon Reentry, Students Are Immediately Re-Enrolled in Appropriate Quality Education Programs and Not Automatically Sent to Alternative Schools or Placed in GED or Adult Basic Education Programs That Do Not Meet their Needs

a. *Expressly Prohibit Blanket Policies That Force Returning Students to Enroll in Alternative Schools*

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

b. *Define the Process for Determining which School or Education Program Best Meets a Youth's Needs upon Reentry into the Community, Including which Curricula, Credits, and Supports Are Needed for Educational Success*

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

- Who makes the decision and within what time frame;
- That the decision is based on individual student-centered considerations, driven by the expressed wishes of the student and family after meaningful discussion, consistent with Title I, Part D's new emphasis on family engagement;
- What specific factors the decision-maker should consider, including:
 - the student's education record prior to and during placement;
 - educational assessments; and

⁵⁵ See definition of "Dually-involved Youth" in Tuell, John et al., Robert F. Kennedy Children's Action Corps, Dual-Status Youth - Technical Assistance Workbook 4 (Models for Change 2013), <http://www.modelsforchange.net/publications/515>.

- other types of records, including consultations with experts.
- What type of dispute or appeals process should be available to youth and their families or advocates.

c. Define “Timely” Re-Enrollment

The Department should clarify that “timely” re-enrollment means immediate re-enrollment. Re-enrollment should occur immediately and in no case later than 3 business days after the local educational agency receives notice of the student’s discharge from a correctional facility. The Department should clarify that re-enrollment includes enrollment of young people into new schools or educational programs which they have not yet attended which best meet their needs. Finally, the LEA should be prohibited from preventing enrollment or re-enrollment of students because of administrative issues beyond a youth’s control, such as lack of a proper mailing address.

Early, thoughtful, youth- and family-driven re-entry planning across state and local educational agencies, the juvenile justice system, and correctional facilities, is fundamental to ensuring that youth are immediately re-enrolled in an appropriate educational program. School choice decisions and transfer of records and credits must occur before the youth is discharged from custody and local education agencies should be notified of a student’s re-enrollment no later than two weeks prior to discharge whenever possible. The Department should emphasize and require this robust re-entry planning through regulation or guidance.

5. Develop a Process for the Department to Track the Number of Students Involved In and Returning From the Juvenile Justice System, Including Dual Status Youth, Who Achieve a Traditional High School diploma, and Ensure Appropriate Tracking of Justice-Involved Students with Disabilities

Tracking this data is essential to monitoring educational achievement of youth in the juvenile justice system, and enforcing the Title I, Part D provisions to ensure appropriate use of the funds. The Department’s draft State Plan is vague in its promise to “creat[e] a statewide committee to develop and oversee systemic procedures” and “develop a process for the continuous evaluation and identification of best practice programs.” The State Plan should include detailed description of the systemic procedures and evaluation tools proposed.

In particular, the Department should clarify the language in Title VIII that creates a loophole through which States may remove from the graduation cohort students who have “transferred to a prison or juvenile facility.” Complete removal of these students from the cohort renders them invisible—and Congress did not intend to eliminate accountability for states and local educational agencies with respect to these students. Indeed, 1111(c)(4) subsection (F) dictates that a student who attends a school for at least half the year is counted in the cohort of the local educational education which they attended for the greater part of the year; not counting students who transfer to prisons or juvenile facilities for even a short time creates an unintended perverse incentive for districts to push struggling students into the juvenile or adult justice system and undermines the strengthened emphasis on reentry supports in Title I, Part D.

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

6. Ensure that Students with Disabilities Will be Provided with Critical and Related Educational Services

In addition, we note that according to data from the National Technical Assistance Center for the Education of Neglected or Delinquent Children and Youth, 27% of students served under Subpart 1 in PA in 2014-15 had IEPs and 26% of students served under Subpart 2 had IEPs.⁵⁶ Despite this prevalence, there is no mention of students with disabilities in PA's draft State Plan. *See* Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At-Risk under Title I, Part D at page 109. Pennsylvania's State Plan should state specifically how it will ensure that students in juvenile justice facilities will be provided with critical special education and related services they need and are legally entitled to, and how the state and local education agencies will fulfill their child find duties to students in these settings.

In addition, we urge the Department to undertake the following actions to support full implementation of ESSA for students in the juvenile justice system:

- Hire a dedicated staff person at PDE to oversee and monitor educational programs at juvenile justice facilities;
- Collect data related to the achievement of students in the JJ system, including high school graduation rates;
- Ensure that students with disabilities who are delinquent are provided with critical and related educational services.
- Monitor and assess the educational programs in juvenile justice facilities through annual public reviews that include assessing progress made while in a particular placement.
- Offer youth a state-issued diploma for youth in the juvenile justice system if they meet state standards but are unable to receive a school-issued high school diploma due to high rates of mobility;
- Devote more resources to a reentry education guidance package for both juvenile justice

⁵⁶ NDTAC at <https://www.neglected-delinquent.org/>

and education stakeholders based on stakeholder input.

D. Students Experiencing Homelessness

Students experiencing homelessness face unique, often overwhelming, barriers to educational success including hunger, high rates of mobility, and lack of basic resources needed for learning. They score lower on standardized tests, have higher rates of grade retention, and are at a greater risk of dropping out of school, perpetuating the cycle of poverty and homelessness.⁵⁷ Given the heightened vulnerability of students experiencing homelessness and the need to identify all the educational barriers they face, we recommend that the Department provide greater guidance and oversight to local education agencies to ensure that students receive the support and services they need and are legally entitled to under ESSA, which encompasses the McKinney-Vento Homeless Assistance Act. A plan that lacks specificity and objective guidelines will fail to meet the educational needs of students experiencing homelessness.

ESSA includes important clarifications and new provisions which significantly strengthen vital school stability protections for children and youth experiencing homelessness and, for the first time, require states to collect academic achievement data and graduation rates.

The proposed Plan fails to address these new provisions or the role of the Department and LEAs in implementing ESSA's new protections. We recommend that as part of the State Plan, the Department describe how it will implement the new data collection requirements and commit to issuing an Annual State Report Card. We also strongly encourage the designation of students who are homeless as a subgroup for all reporting purposes. This would enable the Department to evaluate whether districts are effectively serving this subgroup and enable LEAs to intervene if data reveals that students experiencing homelessness are not succeeding academically. With regard to calculating graduation rates, the Department should calculate rates both for students who are currently homeless at the time of reporting in twelfth grade (point-in-time cohort) and calculate rates for students who *ever* experienced homelessness while in high school. Doing so ensures that states have an accurate picture of the graduation success of students who have experienced homelessness. To narrow the cohort only to those in experiencing homelessness at the time they exit high school will fail to capture the significant number of students impacted by homelessness who may have dropped out or fallen behind rather than timely exited high school.

In addition, we recommend that PDE commit to issuing guidance and providing technical assistance to school districts regarding new obligations of LEAs under ESSA, which include but are not limited to the following:

- **Best Interest Analysis:** Priority must be given to the parent's, guardian's, or unaccompanied youth's request. LEAs must consider student-centered factors, such as attachment to teachers, availability and quality of service, and travel time. LEAs must presume that attending the school of origin is in the best interest of the child, unless this is contrary to the request of the parent, guardian, or unaccompanied youth.

⁵⁷ *Residential Instability and the McKinney-Vento Homeless Children and Education Program What We Know, Plus Gaps in Research*, Mary Cunningham, Robin Harwood, Sam Hall available at <http://files.eric.ed.gov/fulltext/ED510555.pdf>

- ***Access to Extracurriculars & Other Services:*** PDE is required to have procedures to eliminate barriers to academics and extracurriculars. LEA liaisons must ensure children have access to and receive services such as Head Start, early intervention services, and other preschool programs. LEA liaisons must affirm students' eligibility for HUD assistance. Schools are encouraged to provide trauma-informed training, revise policies that may act as barriers to enrollment and success for homeless students, and consider homelessness prior to taking disciplinary action.
- ***Support for Older Youth & Access to Higher Education:*** All youth who are homeless must be able to receive individualized college counseling. Liaisons must also ensure that unaccompanied youth are informed of their status as independent students and must help them to obtain verification of that status.
- ***Pre-school:*** The school of origin now includes pre-school and thus young children have a right school stability beginning in pre-school.
- ***Immediate Enrollment:*** Enrollment includes extracurricular activities.
- ***Right to Privacy:*** Information about a homeless child's or youth's living situation shall be treated as a student education record, and shall not be deemed to be directory information.
- ***Duration of school stability:*** An LEA must continue the student's education in the school of origin for the duration of the student's homelessness AND until the end of the academic year in which the student becomes permanently housed, with transportation provided.
- ***Feeder Schools:*** The right to school stability applies to the designated "receiving" school at the next grade level, even if the school is in a different location. This means that if a child is going from elementary school to middle school or middle school to high school, the next grade is still considered the school of origin.
- ***Transportation:*** Schools (including preschools) must provide or arrange transportation for students to and from their school of origin and it must be comparable to what is offered to non-homeless students. Transportation requirements apply until the end of the school year when a student finds permanent housing.

E. English Language Learners

There are more than 61,000 English Learners who speak more than 200 different languages in Pennsylvania. Nationally, ELs are projected to comprise 25% of the total K-12 student population by 2025.

ELs often face significant challenges entering school and receiving the services they need and are entitled to in order to learn. Common education barriers include: refusing to enroll or delaying the enrollment of immigrant students, failing to provide adequate language instruction services to advance language proficiency and ensure access to the curriculum, failing to properly and timely evaluate ELs to determine eligibility for special education services, and failing to provide translation and interpretation services to allow students and parents to participate in school decision-making.

The education of students whose dominant language is not English and who are ELs is the responsibility of the State Education Agency and every LEA. Title 22, Chapter 4, Section 4.26 of the Curriculum Regulations requires the LEA to provide a program for every student who is an English learner. The needs of EL students are a main focus of ESSA. Specifically, under ESSA, all states must now include progress in proficiency for English Learners as one of the academic factors in their Title I state accountability plan. This should bring more attention, scrutiny, and needed resources to schools and districts serving EL students throughout Pennsylvania.

1. Inclusion of Former English Learners in the EL Subgroup Accountability

Pennsylvania proposes to include former English-learners in the EL subgroup accountability for four years.⁵⁸ Including the number of reclassified English learners could allow districts to "mask the performance" of current ELs. In order to balance the demonstration of progress made by former English learners and clearly report the needs of current ELs, we urge the Department to include reclassified, former ELs for only three years. Additionally, the Department should report data for former and current English learners separately.

2. The Timeline for English Learners to Achieve English language Proficiency Must Not Exceed Five Years

The Department's Plan provides that "English Learners are expected to attain proficiency in English in up to six years depending on their initial proficiency level."⁵⁹ We urge the Department to revise this standard to a maximum timeline of five years. The average time to reclassification is under four years for children under grade five. Research on long-term ELs shows that the longer students are identified as ELs, the less likely they are to get access to the full set of courses they need to finish high school and to graduate. A revision is necessary to be consistent with best practices signaling that more than five years is excessive and students should be "making progress" with the supports they need to become proficient in the English language within a reasonable timeline, particularly while in a lower grade.

3. Recently-Arrived English Learners

ESSA allows states to exclude math and English/language arts test results for newly arrived English-learner students as part of their performance ratings and proposes options for reporting scores of newly arrived ELs until the third year. But Pennsylvania "proposes a fourth option"

⁵⁸ Pennsylvania State Plan, at 36.

⁵⁹ Pennsylvania State Plan, at 33, 12.

that delays reporting for some newly arrived ELs until the fourth year.⁶⁰ We urge the Department to revise the proposal to require test results be reported in no later than the third year so ELs' need for improvement is clear and LEAs can be held accountable to provide sufficient and effective services that EL students require to make progress.

4. Accountability for LEAs That Have Fewer English Learners than Proposed N-size

ESSA requires states to address the progress of ELs as a mandatory measure and holds all schools – not just those with significant number of ELL students—accountable for progress. The Department has chosen an N-size of 20 students.⁶¹ An N-size of 20 students would exclude from reporting accountability many of the rural and small school districts that have a smaller number of ELs with significant language needs. The Department appears to recognize this problem and is reportedly “considering additional reporting requirements” but offers no detail or proposed solution.⁶² We have proposed an N-size of 10. Such a change would make a profound difference for EL students and would hold more schools accountable for meeting the significant needs of this vulnerable population. If that change is not made, it is still imperative that the Department provide a thoughtful, detailed plan to assure that the needs of all ELs are addressed, regardless of the geographic region where they live. ESSA seeks to protect all English Learner students, including those who are not part of a larger population. In the absence of further detail, the current proposal fails to assure appropriate accountability for all ELs across the Commonwealth.

5. Reporting Data on Long-Term ELs and ELs with Disabilities

ESSA requires LEAs and states to report additional data on ELs with disabilities and long-term English-learners who don't reach a sufficient level of English proficiency to be reclassified as fluent within a set period of time. However, it is not clear from the Department's draft State Plan how long-term ELs will be reported. ESSA requires LEAs to report the number and percentage of ELs who have not yet attained English Language Proficiency (“ELP”) within five years of initial classification as an EL and first enrollment in the LEA.⁶³ It is critical to clearly report this data because ELs who remain in EL status for prolonged periods of time may face significant barriers to attaining English language proficiency and graduating college and career ready.⁶⁴ LEAs need the data accounting for the number of ELs who have not attained ELP within five years because they will need unique supports to address academic as well as social skills development. Reporting data on long-term ELs will inform LEAs and the state whether modifications to the language program or other targeted services are necessary.

The Department should require LEAs to report not only on aggregate ELs but separately on English learners with disabilities, and other disaggregated subgroups of ELs such as long-term

⁶⁰ Pennsylvania State Plan, at 36-37.

⁶¹ Pennsylvania State Plan, at 37-38

⁶² Pennsylvania State Plan, at 38.

⁶³ ESEA Section 3121(a)(6).

⁶⁴ See U.S. DEPT. OF EDUC., *Non-Regulatory Guidance: English Learners and Title III of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA)*, Sept. 23, 2016, at 38.

ELs, recently arrived Els, and EL students with limited or interrupted formal education (“SLIFE”). More data provided in this detail will enable LEAs and the Department to better tailor services to meet the unique needs of ELs across the state and appropriately respond to gaps in achievement between different groups of ELs.⁶⁵

6. Establish Clear and Consistent Exit Criteria Applicable to All EL Students

ESSA requires states to establish *consistent* standards for determining when students require English-learner services and when students are ready to exit special programs. Researchers and advocates have expressed concern about the patchwork of entry/exit criteria and exiting from ESL has been a significant issue for many students in Pennsylvania. On page 12, the Department reports that ELs have attained proficiency when they achieve an overall composite proficiency level score of 5.0 on the ACCESS test. Pennsylvania requires use of WIDA assessments including ACCESS for all ELs. We agree with this criteria and urge the Department not to impose additional exit requirements.

IX. CONCLUSION

We appreciate this opportunity to comment on the Department’s development its State Plan under ESSA. We believe this new law offers multiple opportunities to significantly improve educational and life outcomes for our most vulnerable students. We would welcome the opportunity to work with the Department towards achieving these critical goals.

Maura McInerney, Esq.
Senior Attorney
Alex Dutton
Staff Attorney

Education Law Center
1315 Walnut Street Suite 400
Philadelphia, PA 19107
215-238-6970 (Ext. 316)
215-346-6906 (direct dial & fax number)
mmcinerney@elc-pa.org

⁶⁵ *Id.* at 38.