

**COMMENTS OF EDUCATION LAW CENTER – PA TO U.S. DEPARTMENT OF
EDUCATION’S PROPOSED RULE: IMPLEMENTING PROGRAMS UNDER TITLE I
OF THE ELEMENTARY AND SECONDARY EDUCATION ACT**

Docket Number: ED-2015-OESE-0130

Docket Name: Programs under Title I of the Elementary and Secondary Education Act of 1965

***RECOMMENDATIONS OF ELC-PA TO EXPAND EDUCATIONAL OPPORTUNITIES
AND IMPROVE OUTCOMES FOR AT-RISK STUDENTS***

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INTRODUCTION

The Education Law Center-PA (“ELC”) submits the following comments in response to the December 22, 2015, request for recommendations prior to publishing proposed regulations to implement programs under Title I of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESSA). We appreciate this opportunity to comment on the Department’s development of regulations and guidance to ensure effective implementation of programs under Title I of the Every Student Succeeds Act (“ESSA”) and to improve educational opportunities and outcomes for our nation’s most vulnerable students.

Education Law Center-PA (“ELC”) 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 Language Learners, 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 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 (ELL); 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. ELC hopes that the regulations promulgated by the Department will clarify critical definitions that impact at-risk student groups, highlight the importance of reducing exclusionary discipline practices, and reinforce the need for intersectional data to be collected and analyzed in order to improve learning environments.

I. RECOMMENDATIONS TO IMPROVE EDUCATIONAL OUTCOMES FOR STUDENTS IN FOSTER CARE UNDER TITLE I, PART D OF ESSA

Children in foster care are some of the country's most educationally disadvantaged students. Studies show students in foster care are more likely to be suspended or expelled, score lower on standardized tests in reading and math, exhibit higher rates of grade retention and drop-out, and are far less likely to attend or graduate from college.¹ A concerted collaborative effort is needed by leadership within both education and child welfare agencies at the state and local level to focus attention on improving educational outcomes of children in foster care. There are promising results in many states and districts that indicate that such efforts pay off for students in care.²

For many years, federal child welfare law has placed independent obligations on child welfare agencies to collaborate with education agencies to support school stability and success for students in foster care.³ For the first time, the Every Student Succeeds Act (ESSA) now contains key protections for students in foster care which can ensure such stability and success, and expressly obligates education agencies to collaborate with child welfare partners.

Because of the dual-agency responsibility for the educational success of students in foster care, and the tight timelines governing the foster care provisions of the new law, it is critical that state and local education and child welfare agencies receive prompt information and support to effectuate implementation of these provisions.

¹Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care, National Working Group on Foster Care and Education (2014). Available at http://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=1279&Comm and=Core_Download&method=inline&PortalId=0&TabId=124

² See e.g., Models and examples highlighted in Blueprint for Change. Available at <http://fostercareandeducation.org/AreasofFocus/BlueprintforChange.aspx>

³ Fostering Connections Act of 2008, P.L. 110-351.

A. Needed Regulations

Some of the new assurances and protections for students in foster care in Title I must be in effect by December 2016, within one year after enactment of ESSA. At that time, a key protection for children in foster care previously available in some states under the definition of “awaiting foster care placement” in McKinney-Vento will disappear in most states. Therefore, it is critically important that guidance for improving educational stability and success for children in foster care be included in the Department of Education’s first set of regulations.

Furthermore, because this is the first time that provisions related to students in foster care are included in federal education law, and because of the need for the State Education Agency (SEA) and Local Education Agency (LEA) to collaborate with state and local child welfare agencies in a timely manner, it will be critically important for the statutory language of the foster care provisions to be emphasized within regulations to provide clear directives to LEAs. At a minimum, the following should be addressed:

A. Definitions: With the passage of ESSA, both education and child welfare agencies at the state and local levels must collaborate with each other to help maintain school stability for students in foster care. Two definitions are needed to ensure consistent implementation between these two agencies. The suggested definitions below are drawn from those used currently applicable to child welfare agencies that must collaborate with education agencies.

1. **“School of origin”:** Child welfare law makes clear that the need to maintain school of origin when in a child’s best interest applies both when a student enters foster care, and also at any subsequent change in living placement.⁴ Therefore, to ensure consistency between child welfare and education law, regulations should define the term ‘school of origin,’ as referenced in 20 U.S.C. 6311(g)(1)(E)(i) and 20 U.S.C. 6312(c)(5)(B)(i), to include: *“(A) The school in which the child was enrolled prior to entry into foster care; and (B) The school in which the child is enrolled when a change in foster care placement occurs or is proposed.”*
2. **“Child in Foster Care”:** To ensure consistency between child welfare and education agencies, and to clarify which students are entitled to these provisions, it is important to define this term. To align it with the corresponding federal child welfare law related to school stability, the term should be defined as: *“Children and youth whose care and placement are the responsibility of the State or Tribal agency that administers a State or Tribal plan under part B or E of title IV of the Social Security Act (42 U.S.C. 621 and 670 et seq.), without regard to whether foster care maintenance payments are made under section 472 of such Act (42 U.S.C. 672) on behalf of such children and youth.”* This will help make clear that the obligations in this law apply to all children in foster care, not just those for which the federal government is providing a financial contribution.

⁴ 42 U.S.C.A. 675(1)(G)(i).

B. State Title I Plan

Because many state and local education agencies may not be familiar with children in foster care or the new state and local plan requirements on their behalf, we propose reemphasizing in regulations the statutory language outlining the various obligations in the Title I State Plan related to foster care, with some clarification as noted below. State agencies will also need to make sure local agencies are familiar with their obligations.

1. **SEA Point of Contact for Students in Foster Care.** State Education Agencies are required to identify someone to serve as the point of contact to oversee and implement the foster care requirements of the state plan. This person must not be the same as the McKinney-Vento State Coordinator to ensure that each individual will have the capacity and resources to support their respective group of vulnerable students.
2. **School Stability Process.** State Education Agencies must work with child welfare agency partners to create a process to ensure that every Local Education Agency (LEA) has policies to support school stability and continuity for students in foster care. This includes adopting a presumption that students remain in the same school, unless not in his or her best interest; ensuring that LEAs are consulted as part of the best interest decision-making process;⁵ ensuring that LEAs together with state or local child welfare agencies will develop by December 10, 2016, local transportation plans that resolve how transportation will be provided, arranged, and funded, when necessary for students to remain in their school of origin to ensure school stability; and outlining the process for ensuring immediate enrollment and transfer of education records when enrollment in a new school is necessary because remaining in the school of origin is not in a child's best interest. In addition, SEAs should clarify for LEAs how they may obtain tuition reimbursement through applicable child accounting guidelines and identify any state funding available to support school stability. SEAs should also clarify obligations regarding the continuing implementation of any pre-existing state laws that effectively ensure school stability in conformity with new federal mandates.

C. Local Title I Plan

⁵ 42 U.S.C.A. 675(1)(G)(ii). Child welfare guidance (U.S. Dep't of Health and Human Servs. Admin. for Children and Families, Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008, 19 (July 9, 2010) (hereinafter "ACF Guidance"), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm underscores that it is the duty of the child welfare agency to make this decision, noting that the "agency should determine if remaining in the same school is in the child's best interests." The child welfare agency is well-positioned to make school stability decisions as it can assess non-educational factors such as safety, sibling placements, the child's permanency goal, and the other components of the case plan. The child welfare agency also has the authority, capacity, and responsibility to collaborate with and gain information from multiple parties, including parents, children, schools, and the court in making these decisions.

Given the large number of school districts, and the requirement that LEAs and child welfare agencies must work together to develop transportation plans for students in foster care by December 10, 2016, and the accompanying process that will need to be addressed to ensure transportation plans can be implemented successfully, we encourage the adoption of regulations to clarify the following LEA duties:

1. **LEA Point of Contact for Foster Care:** Regulations should clarify that LEAs can always designate a point of contact for children in foster care, but must do so if the responsible child welfare agency notifies the LEA that it has a designated point of contact for the LEA. To ensure consistent implementation, regulations should clarify that the Local Title I Plan must include timely appointment of LEA points of contact in response to written notification from a child welfare agency, and clarification that the LEA point of contact will often be serving children from multiple child welfare agencies.
2. **Local Transportation Plans:** To ensure the best possible collaboration between child welfare and education in ensuring school stability, regulations should restate the provisions relating to the need for procedures related to proving, arranging, and funding school transportation for students in foster care. Specifically, by December 10, 2016, LEAs must collaborate with state or local child welfare agencies to develop and implement “clear written procedures governing how transportation to maintain children in foster care in their school of origin when in their best interest will be provided, arranged, and funded for the duration of the time in foster care.” The procedures must also “ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner and in accordance with section 475(4)(A) of the Social Security Act (42 U.S.C. 675(4)(A)).”⁶

Regulations must also clarify that once a best interest determination is made by a child welfare agency or court after consultation with LEAs, LEAs are obligated to ensure school stability or immediate enrollment for the student. Further, regulations should clarify that written policies published by LEAs will help ensure timely implementation of transportation, immediate enrollment, and prompt transfer of records, and ensure that schools, parents, students and social service providers are notified of the procedures.

In addition to restating the statutory requirements, regulations should make clear that some school districts may need to engage multiple child welfare partners, because there may be multiple child welfare agencies placing students in a school in the LEA. All children in foster care in the LEA, regardless of what county or state child welfare agency is responsible for the child, need to be accommodated by the plan.

D. Data Reporting

⁶ 20 U.S.C. 6312(c)(5)(B)(i).

- 1. Need to Identify Students in Foster Care:** To disaggregate high school graduation and academic achievement based on a student’s status in foster care, it will be necessary for State Education Agencies (SEAs) to have access to information about which students are in foster care. Regulations must clarify that, as part of this requirement, SEAs must work together with child welfare agencies to identify students in foster care. This requires working with child welfare agencies to develop a process for sharing timely and accurate information.
- 2. Consistent Definitions and Timelines Across States:** To ensure that the data maintained and reported on students in foster care is consistent both within and across states, regulations should be clear about the definition of “child in foster care,” as detailed above. Furthermore, because of the need to work across state and local child welfare and education systems to identify students in foster care for purposes of disaggregation, regulations should be clear about consistency of timelines and methods for identifying students in foster care and the scope of academic achievement reporting required.
- 3. Unique Considerations for Students in Foster Care:** When developing regulations and guidance related to the report cards it is important to remember that the “data definitions” and requirements are critical. For example, requiring the collection of data for children who have spent any time in foster care during a particular timeframe should be considered, given the temporary nature of foster care. Also, because many students in foster care are not graduating on time, it would be useful to specify that high school graduation rates could also reflect those students graduating in 5 years.

E. Removal of “awaiting foster care placement”: The intent of the foster care provisions of the new law is to create a mechanism for education agencies and child welfare agencies to work together to support the school stability and success of all students in foster care. For over a decade, the McKinney-Vento program has been serving many students in foster care, including ensuring that they receive prompt transportation to ensure school stability, and have access to school district liaisons. Therefore, to ensure smooth transition from the McKinney-Vento program to the newly-enacted provisions, prompt guidance to SEAs and LEAs is essential. Regulations need to stress the urgency of the timelines around developing both State and Local Title I Plans related to students in foster care so activities and supports can be put in place, or at least begin to be put in place, with a timetable for completion, before the removal of “awaiting foster care placement” takes effect.

B. Guidance and Activities to Support Full Implementation

In addition to developing regulations to address the issues described above, the Department of Education should take the actions described below to support access to quality education for students in foster care. Specifically:

- Issue joint guidance between the U.S. Department of Education and U.S. Department of Health and Human Services on the new law, the need for inter-agency collaboration to support the educational stability and success of students in foster care, and how Title I funds can be used to promote implementation of these new protections for students in foster care, including its use for transportation to support school stability;
- Hire or designate a dedicated staff person to focus on students in foster care, with a specific goal of mirroring at the federal level the type of cross-agency collaboration that is needed around implementation at the state and local level. This staff person should be the point of contact for overseeing the new foster care provisions of the law, and work collaboratively with the U.S. Department of Health and Human Services to support the educational stability and success of students in foster care;
- Provide technical assistance and training to state and local education agencies around implementation of the foster care provisions of the law, including support around the required data collection and reporting and how to collaborate with child welfare agencies;
- Highlight models from state and local jurisdictions that currently provide, in collaboration with child welfare agencies, school stability and excellent access to quality education for children in foster care;
- Provide grant funding to jurisdictions to help provide the resources needed to successfully implement the foster care provisions of the law, and support evaluation of programs and interventions to support replication.

II. RECOMMENDATIONS TO IMPROVE EDUCATIONAL OPPORTUNITIES FOR STUDENTS IN THE JUVENILE JUSTICE SYSTEM UNDER TITLE I, PART D OF ESSA

Youth involved in and returning from the juvenile justice system are among the nation’s most educationally vulnerable. They frequently have unmet needs and sometimes are excluded from accessing critical 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. Research has found that these students are chronically behind in school upon juvenile justice entry,⁷ and Department of Education data show that most youth in juvenile justice facilities make

⁷ 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).

no meaningful progress in learning or academic achievement while incarcerated.⁸ Perhaps most distressing, approximately two out of three students drop out after exiting the juvenile justice system.⁹

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, educational assessments when practicable upon entry to a facility, increased emphasis on connecting young people to an appropriate education or career and technical education program 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 have significant support from the field. Improvements made to ESSA in this area reflect recommendations made to the Department of Education and other federal agencies in 2013. Those recommendations resulted from eight regional listening sessions nationwide with over 100 community leaders and experts from the education, justice, and youth advocacy fields. A diverse group of 127 organizations and 84 individuals supported and signed those recommendations.¹⁰

A. Needed Regulations

We request that the Department enact regulations to ensure the provisions described above in Title I, Part D of ESSA are robustly implemented and enforced to help ensure ready access to quality education for young people involved in and returning from the juvenile justice system. Specifically, we urge the Department of Education promulgate regulations to:

1. Broadly interpret and clarify when conducting an education assessment upon entry is “practicable.”

ESSA provides that States accepting funding should 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 of ensuring appropriate education at the correct grade level while youth are in custody. It also represents a key point to intervene and begin to make a positive difference in the youth’s education—for example, by illuminating for the

⁸ *Id.* at 15-17.

⁹ *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.).

¹⁰ Recommendations to Improve Correctional and Reentry Education for Young People. Available at <http://jlc.org/resources/publications/recommendations-improve-correctional-and-reentry-education-young-people>.

first time that a student should be referred for a special education evaluation. We urge the Department to describe what constitutes “to the extent practicable” so that as many States as possible institute this initial assessment. For example, “to the extent practicable” could be defined as “whenever possible unless facilities are prevented from doing so due to circumstances beyond their control.”

2. 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 (ABE) 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 reentering 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 of Education’s regulations should 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 through regulations 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
 - 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 also 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 local educational agency 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 in order to ensure States receiving Title I, Part D funds will indeed be able to carry out the assurances they must now make in their application for funding.

3. Ensure that state educational agencies 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.” The Department should clarify that all three options should 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 the community and in juvenile justice facilities must align with a State’s current academic curriculum standards as set forth in state statute, regulations and/or guidance.

Since ESSA does not specify whether this provision applies to youth in correctional facilities, the community, or both, we urge the Department to interpret this provision to ensure youth have access to these critical opportunities, including earning recognized credits, both while in custody as well as upon reentry into the community.

4. 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 through regulation 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.*¹¹

5. Develop a process for states 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.

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.

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 he/she 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 he/she transfers. 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, the Department must further clarify that when a youth returns to a local educational agency within the one year, he/she must again be included in the graduation cohort.

B. Other Requested Activities to Support Full Implementation of ESSA

¹¹ 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>.

In addition to developing regulations to address the issues described above, the Department of Education should take the actions described below to support access to quality education for students in and returning from the juvenile justice system. Specifically:

- Hire a dedicated staff person or team to focus on issues impacting vulnerable youth, including those involved in the juvenile justice or foster care systems, as well as dual status youth;
- Highlight models from jurisdictions that currently provide excellent access to quality education for young people involved in or returning from the juvenile justice system;
- Provide technical assistance and grant discretionary funding to jurisdictions to help provide the resources needed to successfully implement aspects of Title I, Part D impacting young people involved in or returning from the juvenile justice system, dual status youth, and young people in the foster care system;
- Assess and address barriers to improve youth success in obtaining a traditional high school diploma that leads to post-secondary education or career and technical training; and
- Devote more resources to help jurisdictions implement the December 2014 correctional and reentry education guidance package—juvenile justice and education stakeholders report that additional dissemination, education and enticement/enforcement activities are needed.

III. RECOMMENDATIONS TO IMPROVE EDUCATIONAL OPPORTUNITIES FOR STUDENTS EXPERIENCING HOMELESSNESS UNDER TITLE I, PART A OF ESSA

Approximately 1.3 million students enrolled in U.S. public preschools, elementary schools, middle and high schools experienced homelessness during the 2012-13 school year. This is an 8% increase from the prior year and the highest number on record, according to the National Center for Homeless Education (NCHE) which is operated by the Department.¹² Students experiencing homelessness face unique and often overwhelming barriers to school 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 greater risk of dropping out of school, reinforcing the cycle of poverty and homelessness.¹³ ESSA includes important clarifications and new provisions which significantly strengthen vital protections for

¹² See National Overview: Consolidated State Performance Report (NCHE) available at <http://nchespp.serve.org/profile/National>.

¹³ *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>

children and youth experiencing homelessness. However, we propose specific regulations to ensure effective implementation of these provisions and address the needs of unaccompanied homeless youth. It is estimated that 1.6 to 1.7 million youth experience homelessness on their own each year. These youth live in a variety of unsafe, temporary situations, including cars, parks, the homes of other people, shelters, and motels. Most of these young people have left home due to severe family dysfunction, including abuse and neglect. Studies have found that 20-40% of unaccompanied homeless youth were abused sexually in their homes, while 40-60% were abused physically. Over two-thirds of unaccompanied homeless youth report that at least one of their parents abuses drugs or alcohol. 20-40% of unaccompanied homeless youth have been thrown out of their homes because they are gay, lesbian, bisexual, transgender, or pregnant.¹⁴

A. Needed Regulations

While the McKinney-Vento Act originally referenced conflicting effective dates, this conflict is being rectified through a technical amendment clarifying that the provisions are governed by a July 1 effective date. Accordingly, it is important that regulations addressing educational stability and success for children experiencing homelessness be included in this first set of regulations.

A. Title I Plan Requirements

SEA Plans: Under ESSA, SEAs must describe how they will support local educational agencies to ensure the identification, enrollment, attendance, and school stability of homeless children and youth.¹⁵ We know from our experience in Pennsylvania that SEAs need specific guidance to enable LEAs to: (1) identify unaccompanied homeless youth and ensure they obtain school stability and access to needed supports; (2) establish an effective and fair dispute resolution process at the local level, including ensuring school stability during pendency of any dispute resolution and (3) adopt effective policies for ensuring immediate enrollment. Regulations are needed to proactively address these specific issues.

Local Plans: Title I LEA Plans must describe the services LEAs will provide to support the enrollment, attendance, and success of homeless children and youth, including services provided with the Title I homeless reservation, in coordination with the services the LEA provides under the McKinney-Vento Act.¹⁶ Regulations are needed to inform the content of LEA plans, including ensuring that older youth access needed services to support them to access higher education such as SAT test fees and test prep, assistance with completing financial aid forms. Regulations should also outline procedures and policies required at the local level to identify students experiencing homelessness and ensure collaboration between McKinney-Vento Liaisons and transportation and enrollment staff, special education directors and student services staff.

¹⁴ Profile of Unaccompanied Youth, National Center for Homeless Education
<http://center.serve.org/nche/downloads/briefs/youth.pdf>

¹⁵ See 20 U.S.C. 6311(g)(1)(F).

¹⁶ See 20 U.S.C. 6312(b)(6).

Need based assessment. Regulation must clarify what factors shall be considered in the need based assessment to determine the amount of Title I funds reserved for homeless children and youth. This needs to be uniform to ensure consistent implementation. In addition, Title I funds reserved for homeless children and youth may be used for services not ordinarily provided by Title I, including local liaisons and transportation to the school of origin and other services needed to support the unique needs of students, including counseling.

B. Data Reporting

Graduation Rates: Regulations are needed to clarify “data definitions” including how graduation is defined. For example, because many students experiencing homelessness are not graduating on time, it would be useful to specify that high school graduation rates could also reflect those students graduating in 5 years.

B. Other Guidance and Activities Needed to Support Full Implementation For Students Experiencing Homelessness

In addition to developing regulations to address the issues described above, the Department of Education should take the actions described below to support access to quality education for students experiencing homelessness. Specifically:

- * Provide technical assistance and training to state and local education agencies around implementation of the homelessness provisions of the law, including support around the required data collection and reporting and how to collaborate with human service agencies;
- * Provide models for SEAs and LEAs to follow for their Title I plans with the new additions of description of support for the enrollment, attendance, and success of homeless children and youth;
- * Highlight models from state and local jurisdictions that currently provide school stability and excellent access to quality education for children in experiencing homelessness;
- * Provide grant funding to jurisdictions to help provide the resources needed to successfully implement the homelessness provisions of the law, and support evaluation of programs and interventions to support replication.

IV. RECOMMENDATIONS TO IMPROVE EDUCATIONAL OUTCOMES FOR ENGLISH LANGUAGE LEARNERS UNDER TITE I, PART A OF ESSA

There are approximately 5,000,000 English Language Learners (ELL) enrolled in US schools, comprising nearly 10% of total student enrollment.¹⁷ Not only do these students speak a wide range of languages, they also differ in terms of English proficiency, academic backgrounds,

¹⁷ 2011-2012 Estimations for Enrollment, Civil Rights Data Collection (2012)
http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12

socioeconomic standing, and immigration status. Many English Language Learners struggle academically and never reach the levels of English proficiency needed to fully participate and succeed in school. ELLs have unique educational needs, yet schools are often unable or unequipped to address these needs. As a result, ELLs exhibit consistently poor educational outcomes in comparison to non-ELL peers. In 2013, 70% of ELLs were below basic in reading, compared to 20% of non-ELL students, and 69% were below basic in math, compared to 24% of non-ELL students.¹⁸ Evidence also suggests that these gaps in achievement continue to expand as students age.

By moving accountability for growth in English language proficiency among ELLs from Title III to Title I, the ESSA draws greater attention to the academic needs of English Language Learners. This change offers an opportunity to put the academic performance of ELLs front and center, and to bring more attention, scrutiny, and resources to schools and districts that serve ELLs. In order to meet the needs of English Language Learners, the Education Law Center suggests that the federal government consider the following recommendations in drafting regulations and guidance for the Every Student Succeeds Act.

a. Needed Regulations

A. Definitions

Define “to the extent practicable”: The ESSA requires states to administer assessments to English Learners “to the extent practicable...in the language and form most likely to yield accurate data.” The federal regulations should define “to the extent practicable” in a way that requires states and districts to use multiple means when providing information, assessments, or accommodations to English learners and their families. The definition should make clear that “to the extent practicable” is a high bar, which requires states and districts to make substantial efforts in order to provide all English Learners with full and appropriate access to educational materials.

Define “improving” English language proficiency: ESSA requires all schools have to demonstrate that they are improving the English language proficiency of their English-language learners. Improving English language proficiency is a required indicator in every state's school accountability system, which will help ensure that schools prioritize the needs of ELL students and provide needed supports. However, the standard for “improving” proficiency must be defined with clarity using standardized methods and uniform assessments that incentivize progress to make this indicator meaningful.

¹⁸ English Learners and NAEP, Office of English Language Acquisition (2015)
http://www.ncele.us/files/fast_facts/OELA_FastFacts_ELSandNAEP.pdf

Define “*meaningful differentiation*”: ESSA’s accountability measures permit elementary, middle and high schools to rely on an indicator of school success or quality that allows for meaningful differentiation among student groups. This term must be defined with precision to make this a robust and meaningful measure.

B. Title I Plan Requirements

- 1. The regulations should direct states, especially those with large populations of English Learners, to allocate significant weight to English Language proficiency in their accountability plans.** Regulations should clarify how much weight states must give to each factor in their state accountability plan, and should require that such plans give meaningful weight to English language proficiency. Doing so will ensure that states and districts are held accountable for addressing and improving the language proficiency of ELLs.
- 2. The regulations should require that federal peer review teams include researchers who are familiar with the needs of English learners.** Each state’s accountability plan will be reviewed and approved by a peer review team that includes education experts. In order to ensure that state accountability plans meet the wide and varied needs of ELL students, the regulations should require or advise that these teams include researchers who focus on the academic needs of English Language Learners, including ELLs who are experiencing homelessness, are in foster care, are living in poverty, and who have disabilities.
- 3. Provide additional guidance about appropriate English language proficiency standards.** Title I requires states to use English language proficiency standards in their accountability plans. The regulations should clarify how states are to measure English language proficiency, and should provide states with examples of English language proficiency standards that are evidence based, address the varying needs of English learners of different cultural and linguistic backgrounds, and are aligned with State academic standards.

b. Guidance and Activities Needed to Support English Language Learners

In addition to developing regulations to address the issues described above, the Department of Education should take the actions described below to support access to quality education for ELLs. Specifically:

- Hire a dedicated staff person to focus on English Language Learners. This staff person should be the point of contact for overseeing the new ELL provisions of the law;
- Highlight models from jurisdictions that currently provide excellent English language services to ELLs, including ELLs with disabilities;
- Provide states with additional guidance about appropriate procedures for identifying English Language Learners in need of English language educational programs and determining when students are ready to exit such programs, so that states can develop effective identification and exit systems. Such guidance should also address the professional development needed to permit regular education teachers to modify instruction for ELL students and guidelines for determining the hours of ESOL instruction required for varying levels of proficiency. This information should be drawn from evidence-based practices and should account for the needs of English Learners of different cultural and linguistic backgrounds, as well as English Language Learners with disabilities;
- Provide technical assistance and grant discretionary funding to jurisdictions to help provide the resources needed to successfully implement aspects of Title I that impact English Language Learners; and
- Provide technical assistance and training to state and local education agencies around implementation of the ELL provisions of the law, including support around the required data collection and reporting.

V. RECOMMENDATIONS TO IMPROVE EDUCATIONAL OUTCOMES FOR STUDENTS WITH DISABILITIES UNDER TITLE I PART D OF ESSA

Children with disabilities are some of the most vulnerable and educationally disadvantaged students. Federal law, including the Individuals with Disabilities Education Act (“IDEA”), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, protects students with disabilities and ensure that students with disabilities receive individualized services and instruction to help them overcome their disabilities and achieve educational success. The Every Student Succeeds Act contains key provisions impacting students with disabilities and offers important opportunities to vastly improve their educational success.

A. Needed Regulations

Improving Basic Programs Operated by State and Local Educational Agencies

1. Parent and Family Engagement

ESSA requires SEAs and LEAs to promote parent and family engagement in the development of LEA plans under ESSA. SEAs and LEAs must integrate and coordinate parent and family engagement strategies under ESSA with parent and family engagement strategies under relevant federal and state laws. ESSA also mandates that SEAs and LEAs conduct annual reviews of parent and family integration strategies to ensure that such strategies contribute to the

improvement of the academic quality of schools. This review must include the identification of barriers to parent and family participation, “with particular attention to parents who are economically disadvantaged, are disabled, have limited English proficiency, have limited literacy, or are of any racial or ethnic minority background.” The review must also include an assessment of the “needs of parents and family members to assist with the learning of their children,” as well as “strategies to support successful school and family interactions.” ESSA requires SEAs and LEAs to use the information gathered through evaluations of parent and family engagement strategies to “design evidence-based strategies for more effective parental involvement” and to revise parent and family engagement strategies according to findings from annual assessments.

In order to effectuate these important provisions and ensure engagement of vulnerable families, the Department should:

- Clearly define the terms “economically disadvantaged,” “disabled,” “limited English proficiency,” “limited literacy,” and “racial or ethnic minority background” in this context to ensure that SEAs and LEAs promote meaningful parental and family engagement of the most disadvantaged students and families.
- Promulgate regulations to ensure that SEA and LEA parent and family engagement policies include provisions to promote the engagement of parents and families of the most vulnerable student subgroups, including parents with disabilities and Limited English Proficient (LEP) parents.
- Define standards for annual reviews of parent and family engagement strategies that ensure detailed and honest assessments of SEA and LEA performance in the area of parent and family engagement. Standards must include the SEA’s and LEA’s success in engaging parents of the most vulnerable student subgroups, including students with disabilities.

State Title I Plan Requirements

2. Intersectional Data Across Student Subgroups: Disaggregation

ESSA mandates that states disaggregate academic assessment data by each major racial and ethnic group; economically disadvantaged students as compared to students who are not economically disadvantaged; *children with disabilities as compared to children without disabilities*; English proficiency status; gender; and migrant status.

However, it is critical to further disaggregate these categories in order to identify and develop targeted interventions for overlapping and more vulnerable subpopulations such as minority girls with disabilities. Research indicates that such disaggregation to identify intersectional students is essential to identify trends and provide targeted interventions and supports that can improve

educational outcomes. For example, we must acknowledge, examine and understand the critical role of gender in order to effectively reform school discipline policies and practices that negatively and differently impact girls of color. In the absence of such an intersectional lens and intertwined relationships of race, gender and disability, schools fail to undertake the proper analysis or make important structural changes that would address the unique barriers facing vulnerable and invisible student cohorts.¹⁹

Moreover, reporting of disaggregation by subgroup is not required at all—and is, in fact, disallowed—where the size of a subgroup is so small within a particular state, local educational agency, or school that the results would reveal personally identifiable information (“PII”) or present statistically unreliable information. However, in the absence of a definition for what constitutes a smaller subgroup, many LEAs and schools may claim an exemption from reporting critical data disaggregated by subgroup.

To address these concerns, we urge the Department to:

- Ensure, through regulation, that state plans include rigorous data collection mechanisms that disaggregate data by overlapping student subgroups and include methods to uncover intersectional trends between and among student subgroups.
- Issue regulations clarifying what constitutes a smaller subgroup in a manner which ensures disclosure of critical information, while also protecting student confidentiality under the Family Educational Rights and Privacy Act (“FERPA”). We specifically recommend that the Department consider aligning this definition with FERPA guidance that defines personally identifiable information with reference to “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable *person in the school community*, who does not have personal knowledge of the relevant circumstances, *to identify the student with reasonable certainty.*”²⁰ Regulations could also reference coding options that would permit smaller schools to report data disaggregated by subgroup under miscellaneous coding and geographic locations in order to ensure anonymity and the protection of personally identifiable information.

¹⁹ See Morris, Monique. *Race, Gender, and the School-to-Prison Pipeline: Expanding Our Discussion to Include Black Girls*. African American Policy Forum. 2012. Available at <http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5422efe3e4b040cd1f255c1a/1411575779338/Morris-Race-Gender-and-the-School-to-Prison-Pipeline+FINAL.pdf>

²⁰ See FERPA Compliance Office analysis of 34 CFR § 99.31(b), available at <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ht12-17-08-att.pdf>. See also OMB M-07-16, “Safeguarding Against and Responding to the Breach of Personally Identifiable Information” at footnote 1: <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf>

3. Exclusionary Discipline for Students with Disabilities

ESSA mandates that each state plan describe “how the [s]tate educational agency will support local educational agencies . . . to improve school conditions for student learning, including through reducing . . . *incidences of bullying and harassment, the overuse of discipline practices that remove students from the classroom, and the use of aversive behavioral interventions* that compromise student health and safety.”

In our experience and according to a plethora of research studies, students with disabilities are often targets for bullying and harassment in school. Moreover, students with disabilities may engage in negative behaviors that are related to, or the result of their disabilities, or a failure to follow their IEP. Despite the protections of the IDEA,²¹ student with disabilities are too often disciplined through exclusionary practices and aversive techniques.²²

To address these critical concerns, the Department should:

- Define with clarity what constitutes incidences of “bullying,” “harassment,” “removing students from the classroom” and “aversive behavioral interventions.” It is crucial that the Department clarify all forms of exclusionary discipline, including expulsion, out-of-school suspension, in-school suspension, and any other disciplinary method that denies a student instructional time.
- Require states to report the number of bullying and harassment incidents that involve students with disabilities, in an effort to reduce incidences of bullying and harassment, the overuse of exclusionary discipline, and aversive behavioral interventions.
- Obligate states to provide detailed descriptions of plans to deal with disruptive student behavior without resort to exclusionary discipline and aversive techniques.

4. Peer Review Teams

ESSA requires the Secretary of Education to convene peer review teams that include, parents, teachers, principals, school leaders, specialized instructional support personnel, community leaders, and researchers who are familiar with “how to meet the needs of students with disabilities” when reviewing state plans.

To make this requirement meaningful, we urge the Department to:

- Define key terms, including “specialized instructional support personnel,” “community leaders,” and “researchers.” Specifically, the Department should issue standards for who composes the peer team and that such review must rely on research-informed evidenced-

²¹ See 20 U.S.C. § 1415(k) and 34 CFR §§ 300.530-300.536

²² See Civil Rights Data Collection Snapshot: School Discipline (March 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>

based measures and practices governing how to meet the needs of students with disabilities.

- Develop standards and promulgate regulations to ensure that states submit plans that promote parent and community participation to the greatest extent possible on peer review teams.
- Define “parents” to include the parents of vulnerable student subgroups, including students with disabilities.

5. Challenging Academic Standards and Academic Assessments

ESSA mandates that states implement a set of high-quality student academic assessments in mathematics, reading or language arts, and science. Assessments must be aligned to challenging academic achievement standards. ESSA requires that states ensure that *students with disabilities receive accommodations, including “interoperability with, and ability to use, assistive technology,” in order to participate in academic assessments.* This includes accommodations for students with the most significant cognitive disabilities to ensure participation in assessments. Accommodations for students with disabilities are crucial in order to effectively “measure the academic achievement of such children relative to the challenging State academic achievement standards or alternate achievement standards”

ESSA also requires that states ensure that regular and special education teachers are trained in the appropriate use of accommodations for students with disabilities on all assessments, including traditional assessments.

To effectuate these goals, we urge the Department to:

- Clearly define “accommodations,” “interoperability,” and “assistive technology,” so that states adopt measures and tools that best promote the successful participation of students with disabilities in state testing on equal footing with children without disabilities.
- Set standards regarding the level and types of training and professional development necessary to ensure that all teachers are prepared to include students with disabilities in challenging state assessments.

6. Alternate Achievement Standards and Alternate Assessments

ESSA mandates that states adopt challenging academic standards and hold all students, regardless of disability, to these standards. However, the state may create alternate academic achievement standards for children with the “most significant cognitive disabilities.” Alternate achievement standards must be aligned to the challenging academic achievement standards. Alternate achievement standards must ensure access to the general curriculum to the greatest

extent possible; comport with the IDEA; and promote progress towards post-secondary success, including education and employment.

ESSA instructs that the decision whether a student with the most significant cognitive disability will be held to alternate achievement standards and participate in alternate assessments must be made by the IEP Team in accordance with IDEA.

ESSA also requires that states ensure that regular and special education teachers are trained in the administration of alternative assessments.

To ensure these protections, we ask the Department to:

- Define “most significant cognitive disabilities” to ensure consistent state compliance with ESSA. This definition should provide clear guidance to IEP Teams charged with making these difficult determinations, including indicators for early detection of students with the most significant cognitive disabilities.
- Promulgate regulations that reiterate that students who participate in alternate assessments are entitled to a regular high school diploma.
- Ensure that parents are engaged in the assessment process and are properly informed of their child’s participation in alternate assessments.

7. Parent Notification – Participation in Alternate Assessments

ESSA requires that, when using alternative assessments, states must ensure that parents of such students are clearly informed, through IDEA’s individualized education process: 1) that their child’s academic achievement will be measured through alternative assessments and 2) how participation in such assessments will delay or affect the requirements for the student to complete the requirements for a regular high school diploma.

These notification protections are essential to ensure meaningful participation in the special education process and that students with disabilities obtain the skills they need to succeed in life.

To safeguard these protections we urge the Department to:

- Reiterate, through regulation, the importance of parental notification, including standards for acceptable notification methods that are sensitive to the practical challenges faced by the families of vulnerable student subgroups, including students with disabilities. In particular, such regulations should clarify the obligations of LEAs to parents with Limited English proficiency to provide interpretation and translation services to ensure meaningful parent participation, as required by federal law.²³ The Department should

²³ See IDEA, 20 U.S.C. §§ 1400 et seq., 34 C.F.R. Chapter 300; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; the Equal Education Opportunities Act, 20 U.S.C. § 1703(f); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

specify the essential components of parental notification and require states to implement a process for ensuring that parents of students with disabilities are clearly notified and informed about their child's participation in alternate assessments and its import, including highlighting a student's right to remain in school to age 21 in order to develop needed skills.

8. The 1% Rule

ESSA requires that schools limit the use of alternative assessments to no greater than 1% of the total state population of students assessed in a particular subject. That means that states must limit the number of students identified as having *the most significant cognitive disabilities* who are assessed using alternative achievement assessments to 1%.

To address this issue, we ask the Department to:

- Clearly define “most significant cognitive disability,” “accommodations,” and “assistive technology.” This is necessary to ensure that that students with disabilities, even significant disabilities, receive accommodations that will prepare and equip them to succeed on challenging state assessments. Strong definitions will ensure that students are prepared to succeed and are not misidentified as having the most significant cognitive disabilities.

B. Statewide Accountability Systems

ESSA mandates that states create comprehensive accountability systems. State accountability systems must account for subgroups of students, including children with disabilities. The accountability system must include ambitious long-term goals for all students and for each subgroup. These goals must include improved: 1) academic achievement, as measured by proficiency on state assessments and 2) high school graduation rates, including the extended year cohort graduation rate. The plan must also provide for improvement measures when subgroups of students fall behind the long-term goals.

In addition to academic achievement and graduation rates, important indicators that the state must include in its accountability plan are: 1) student growth; 2) progress in achieving English proficiency for language learners; and 3) one of the following: i) student engagement; ii) educator engagement; iii) student access to and completion of advanced coursework; iv) postsecondary readiness; and v) school climate and safety.

States must ensure that data with regard to these performance indicators are differentiated by subgroup.

To develop a robust accountability plan with regard to students with disabilities, we urge the Department to:

- Define “student engagement,” “educator engagement,” “student access to and completion of advanced coursework,” “postsecondary readiness,” and “school climate and safety.”
- Promulgate regulations to ensure that when states adopt accountability measures based on these indicators reported data is disaggregated by student subgroup, including intersectional trends between and among student subgroups.
- Mandate that states report data on all school-based incidents (discipline, violence, bullying, harassment) involving students with disabilities if states adopt the “school climate and safety” indicator as an accountability metric.

C. State Report Cards

ESSA requires states to publish annual report cards. These reports must be concise, presented in a form understandable to parents, and widely accessible to the public. ESSA establishes a list of information that states must include in their annual report cards. All of this information must be disaggregated by student subgroup, *including students with disabilities*.

One of the key pieces of information states must include in annual report cards is information on the progress of all student subgroups, *including students with disabilities*. Additionally, the state report card must include: “measures of school quality, climate, and safety, including rates of in-school suspensions, out-of-school suspensions, expulsions, school-related arrests, referrals to law enforcement, chronic absenteeism (including both excused and unexcused absences), incidences of violence, including bullying and harassment.”

To ensure the accuracy of this information the Department should:

- Issue standards to ensure that all data collected and disseminated through the state report card is cross-tabulated and disaggregated by student subgroup, including students with disabilities. For instance, “chronic absenteeism” and “in-school suspension” rates should be disaggregated by student subgroup. The Department should ensure that states can identify intersectional trends between and among student subgroups. Regulations are necessary to accomplish this goal.

D. Local Title I Plan Requirements

ESSA permits states to make subgrants to local educational agencies (“LEAs”). LEA plans must meet many of the same requirements as state plans.

For instance, LEA plans must be coordinated with IDEA. Additionally, LEA plans must include a description of “how the [LEA] will support efforts to reduce the overuse of discipline practices that remove students from the classroom, which may include identifying and supporting schools with high rates of discipline, disaggregated by each of the subgroups of students,” including students with disabilities.

To support LEAs to develop effective plans, we ask the Department to:

- Develop standards and promulgate regulations governing state subgrants to LEAs that promote the achievement of students with disabilities and reduce the use of exclusionary discipline practices against students with disabilities. This must include standards for plans to reduce all forms of exclusionary discipline, including expulsion, suspension, in-school suspension, referrals or transfers to inferior alternative education or cyber-based programs and other forms of removal from the classroom or instructional opportunities.

E. Pay for Success

ESSA defines “pay for success initiatives” as “performance-based grant[s], contract[s], or cooperative agreement[s] awarded by a public entity in which a commitment is made to pay for improved outcomes that result in social benefit and direct cost savings or cost avoidance to the public sector.” Such initiatives must include a “feasibility study . . . describing how the proposed intervention is based on evidence of effectiveness” and “a rigorous, third-party evaluation that use experimental or quasi-experimental design . . . to determine whether the initiative has met its proposed outcomes.”

Title I, Section D of ESSA promotes the improvement of educational services for the prevention and intervention programs for children who are neglected, delinquent, or at-risk, so that these students have every opportunity to meet challenging state academic standards. Under ESSA, states receiving funds for these purposes can now use funds towards “pay for success initiatives.”

In addition, Section 4108 of Title IV of ESSA requires LEAs who receive funding from states to develop and implement programs that promote the safety and health of students. Programs developed under this part can be coordinated with partnering organizations, like community-based agencies, universities, local businesses, etc., with track records of success in implementing activities designed to promote safe and healthy students.

The section provides examples of activities that LEAs may adopt, including: substance abuse prevention programs; school-based mental health services, etc. in coordination with IDEA. It further provides: *In addition to these programs, LEAs may use the funds through “pay for success” initiatives aligned with the purposes of promoting safe and healthy students.*

ESSA’s strong support for “pay for success” initiatives raises concerns that students with disabilities placed in such programs will not be promptly identified and receive the essential services to which they are legally entitled. To address this concern, we urge the Department to:

- Promulgate regulations to ensure that pay for success initiatives are rigorously evaluated to ensure compliance with federal law, specifically the IDEA, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act. States must not withhold special education funds from students with disabilities entitled to critical legal protections

under IDEA and other laws. The Department’s regulations must ensure that pay for success initiatives promote the prompt identification of students with disabilities and support student achievement without denying civil rights.

c. Guidance and Activities Needed to Support Full Implementation For Students with Disabilities

a. State Title I Plan Requirements

i. Intersectional Data Across Student Subgroups: Disaggregation

We urge the Department to provide technical assistance to states to adopt metrics to uncover intersectional trends between and among student subgroups when creating state plans.

ii. Exclusionary Discipline for Students with Disabilities

We request that the Department issue joint guidance with the Department of Justice on the reduction in use of exclusionary discipline practices. Federal guidance should address all forms of exclusionary discipline, not just those forms of discipline triggering protections under IDEA.

iii. Parent Notification – Participation in Alternate Assessments

The Department should provide guidance and technical assistance to states on accomplishing consistent parental notification, including the adoption of procedural safeguards to ensure schools clearly explain testing options and rights to parents of students with disabilities.

b. Statewide Accountability Systems

We ask the Department to provide comprehensive guidance and technical assistance to states when developing state accountability plans, including assistance to ensure that state plans account for the needs of vulnerable student populations, including students with disabilities. State plans must account for the needs of students with disabilities in areas of academic achievement, postsecondary readiness, school climate and safety, and more.

c. Targeted Support and Improvement Plan

ESSA requires states to hold underperforming schools accountable. Underperforming schools must receive targeted support through a detailed plan implemented at the school-level. Targeted support and improvement plans must include methods for improving student outcomes based on the indicators in the statewide accountability system for each student subgroup, *including students with disabilities*. Targeted support and improvement plans must address underperformance and statewide indicators for students with disabilities through evidence-based interventions. The state must monitor the implementation of the targeted improvement plan.

To fully implement these requirements, we urge the Department to:

- Issue guidance and provide technical assistance to help states develop and monitor targeted support and improvement plans that are sensitive to the needs of vulnerable student groups, including students with disabilities.
- Identify and list evidence-based interventions for states to adopt when constructing targeted improvement plans, including evidence-based interventions for students with disabilities.

VI. RECOMMENDATIONS TO IMPROVE SCHOOL CLIMATE

Much of the work that Department is already doing to promote positive school climate remains intact. The responsibilities to enforce and monitor civil rights laws, including issuing guidance, regulations, and technical assistance, remains in place under ESSA and should continue and be strengthened. The biannual reporting under the Civil Rights Data Collection is a critical component of this effort and compliance must be highlighted for SEAs and LEAs. In addition, the Department should encourage state agencies to implement the school discipline guidance from 2014 and the Department should not shy away from enforcement.

A. Needed Regulations

Needs Assessments: Regulations should define “consultation” to ensure that LEAs are encouraged to meaningfully include parents and stakeholders in the development of the comprehensive needs assessment, including being receptive to their input and ideas about fostering safe and healthy school environments.

Reporting on State Plan under Title I: Regulations are needed to define the term “aversive behavioral interventions” to clarify that the use of restraint, seclusion, and handcuffing of students are actions that compromise student health and safety.

Removal from Graduation Cohort: Regulations are needed to clarify the definition of “transfer to” as consistent with other provisions of the act where a student can only be transferred out of a graduation cohort if the student is transferring to a diploma granting institution. Furthermore, a student can only be removed from the cohort if that transfer is for an entire school year. If the student is only out of school for part of the year, the student must remain in the cohort and the state can then decide if they remain members of the last school attended cohort or the cohort where they spend most of their time. Congressional intent was not to remove these students from accountability if only temporarily away from school.

B. Other Guidance and Activities Needed to Support Full Implementation

School Climate as a Factor: We urge the Department to build upon the Joint Discipline Guidance from 2014 and provide technical assistance to schools to help clarify how to make school climate a factor as an indicator of School Quality or Student Success. The Department

should urge schools to keep students in school to enhance learning for all students, and avoid the punitive provisions of NCLB that motivated many schools to push students out of school in a failed attempt to inflate test scores. The Department should use its experience in data collection to help states understand these issues, monitor effectiveness, and challenge disproportionality.

Comprehensive Needs Assessment: As part of regulation, guidance, or technical assistance, the Department should ensure that the LEA's comprehensive needs assessment fully examines areas for improvement to create a healthy and safe school environment, including by reducing the presence of police in schools, reducing suspension and expulsion rates, and addressing disproportionality in discipline along racial, gender, and disability lines.

Use of Title I – Funds: We urge the Department to issue guidance and technical assistance that emphasizes accountability of Title I funds through clear reporting on how funds are being used. The Department should share with states best practices about how to monitor, track, and report on use of funds to ensure that they are being used as intended and directed at schools identified as in need of improvement. Guidance should also define how LEAs should conduct outreach to parents about services available under Title I funds.

State Plans under Title I: State plans should encourage schools with significant discipline disparities to address them. Guidance and technical assistance is needed to help states identify and address resource inequities, as well as provide information on monitoring data, intervention design, and reviewing school level budgeting and remedies. Guidance is needed on outreach and involvement of parents and other community stakeholders to be meaningfully involved in the peer review process and demonstrate that parents are involved.

Enforcement of Accurate Data: We also urge the Department to issue guidance and technical assistance to ensure that reporting in state plans is comprehensive, accurate, and complete. We urge enforcement action if reporting is not accurate and complete.

VII. RECOMMENDATIONS TO ENSURE EDUCATIONAL ACCESS & OPPORTUNITIES RELATING TO CHARTER SCHOOL EXPANSION

ESSA includes a number of provisions that encourage SEAs to expand charter school growth. In Pennsylvania, we have witnessed tremendous growth of charter schools in the past decade. While there are good examples of charter operators that provide strong options for students with diverse needs, charter growth has also led to numerous perverse unintended consequences.

First, charter school growth has exacerbated pre-existing crisis level of underfunding of many of our most needy community schools. School districts are the entities charged with *systemically* providing a quality education option to *every* eligible student. Many school districts who are unable to strategically control the costs associated with charter growth, are unable to ensure this mandate. In this way, charter growth has too often created an adversarial relationship between school districts and charters and stretched already thin resources to the point of preventing either sector from providing quality public school options.

Second, charter schools, taken as a whole, often underserve the students in their communities who have the greatest educational needs. As we have [documented](#), the charter sector in Philadelphia, which comprises over a 70,000 students and more than one-third of all the public school students in the city, dramatically underserves vulnerable student populations in comparison with the local school district. Students with severe disabilities, English language learners, students living poverty, and students involved in the child welfare and juvenile justice system are all disproportionately underserved by charter schools in the city. The same phenomenon, as well as higher racial stratification in charter schools, has been repeatedly documented in other heavily-charterized communities.²⁴

Finally, and related to above, the test-based accountability metrics developed by most SEAs in the wake of No Child Left Behind, perversely reward all public schools, both traditional and charter schools, for underserving vulnerable students. In Pennsylvania, schools with high concentrations of vulnerable students are generally ranked as “failing” while schools with low concentrations of vulnerable students are considered “successful.”²⁵ Charter schools, as LEAs of choice which can be “full” and are, thus, not mandated to serve every eligible student as traditional public school district LEAs are, have greater leverage, both legal and illegal, to keep out and push out, the students they view as least desirable. This often happens early in the process and therefore is never captured in reporting. For example, often prior to any lottery process, parents of students with disabilities or ELL students are “counseled away” from applying to charter schools by the charter schools.

Regulatory and non-regulatory guidance could help ensure that ESSA protects, rather than exacerbates, all of these problems.²⁶ In particular, when ESSA grant funding is distributed to SEAs for charter expansion, regulations or guidance should incentivize a fair process and ensure that recipients are favored when their state plans incorporate the following protections:

- School districts, and other authorizers, are empowered to consider the financial capacity of the larger system of public education as a factor in evaluating new charter applications. Charter expansion is limited to when state and local revenues are adequate to support the addition of the charter school into the local public school system.
- Charter authorizers are given greater oversight authority. States should be encouraged to ensure appeal boards and the courts provide a greater level of deference to the decisions of locally elected school boards.

²⁴ See Eg. “New Jersey Charter Schools: A Data-Driven View, Part I Enrollments and Student Demographics” (available at http://www.saveourschoolsnj.org/save/corefiles/wp-content/uploads/2014/10/NJ-Charter-School-Report_10.29.2014.pdf); “Delaware charters fuel segregation, ACLU says” (available at <http://www.newsworks.org/index.php/local/delaware/75875-aclu>);

²⁵ See “Pennsylvania’s School Performance Profile: Not the Sum of its Parts,” March 15, 2015 Research for Action (available at http://8rri53pm0cs22jk3vvqna1ub.wpengine.netdna-cdn.com/wp-content/uploads/2015/10/RFA_PACER_SPP_Brief_March_2015.pdf); “Research suggests school accountability measure is inaccurate,” Ed Fuller, Center for Evaluation and Educational Policy Analysis, Penn State University (available at <http://ed.psu.edu/news/2015-jan-march-news/accountability-measure>).

²⁶ Many of these suggestions are consistent with recent guidance from the federal government regarding best practices in [school climate and discipline](#).

- School performance metrics are developed that do not reward schools for underserving vulnerable student populations.
- Locally elected school board authorizers have the authority to implement enrollment caps on charter schools that are not equitably serving at-risk students and achieving superior results.
- Charter schools are required to reserve space for the enrollment of highly mobile vulnerable students in their communities who are experiencing homelessness, living in foster care, and returning from juvenile justice placement. Authorizers are required to hold charter schools accountable for failing to equitably and effectively serve at-risk student populations.
- Authorizers have the authority to grant charters that specify a particularly underserved enrollment catchment area.
- States must eliminate [perverse financial incentives](#) that encourage charter schools to underserve vulnerable students.
- States must place strict limits on the expansion of [underperforming cyber charter schools](#) and eliminate the current waste associated with the excessive tuition paid by school districts to cyber charter schools.
- Charter schools must be required to enforce truancy laws, rather than merely drop truant students from their enrollment.
- Charter schools must be required to “[backfill](#)” their enrollment and eliminate other [barriers to enrollment](#).
- Charter schools must be encouraged to abandon zero tolerance disciplinary practices that rely on exclusion rather than teaching children appropriate conduct.

CONCLUSION

We appreciate this opportunity to comment on the Department’s development of regulations and guidance to ensure effective implementation of programs under Title I of the Every Student Succeeds Act. We believe this new law offers multiple opportunities to significantly improve educational and life outcomes for our nation’s most vulnerable students. We would welcome any opportunity to work with the Department towards achieving this critical goal.