



Comments to Proposed Regulations to 34 CFR Parts 200 and 299 of the Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act—Accountability and State Plans.

Submitted via <https://www.regulations.gov/#!submitComment;D=ED-2016-OESE-0032-0001>

July 15, 2016

U.S. Dept. of Education  
Office of Elementary and Secondary Education  
Docket ID ED–2016–OESE–0032

The Center for Law and Education and The Advocacy Institute appreciate the opportunity to provide comments to the proposed regulations to 34 CFR parts 200 and 299 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act—accountability and state plans published in Vol. 81, No. 104 of the Federal Register published on Tuesday, May 31, 2016. These comments address issues of concern primarily though not exclusively related to students with disabilities. The Center for Law and Education anticipates submitting a fuller set of comments that will also address additional issues affecting all students.

Please find our comments below.

### **Responses to request for additional information on selected issues**

- *Whether the suggested options for States to identify “consistently underperforming” subgroups of students in proposed Sec. 200.19 would result in meaningful identification and be helpful to States; whether any additional options should be considered; and which options, if any, in proposed Sec. 200.19 should not be included or should be modified. (Sec. 200.19)*

**Comment:** We believe that the proposed options set forth at proposed § 200.19(c)(3) would result in meaningful identification, in particular, of underperforming subgroups (e.g., ELs) who are under-represented in the enrollment of certain schools that will not be identified among

the lowest performing in need of comprehensive support and/or who fail to meet the assessment participation rates. We support the proposed options for States to identify a subgroup not on track to meet the State designed long term goals under § 200.13; a subgroup performing at the lowest level on a measure within an indicator (e.g., math proficiency on the State mathematics assessment); a subgroup that is at or below a State threshold compared to average performance among all students or the highest performing subgroup of students in the State; a subgroup that is performing significantly below the average performance among all or the highest performing subgroup such that the gap is among the largest in the State. We agree that innovation should be encouraged by allowing the State to propose another definition consistent with subsection (c)(1) and (2).

*However*, we also believe that the first criterion identified in the proposed regulation [Sec. 200.19(c)(3)(i)] – a subgroup that is not meeting the State’s measurements of interim progress or is not on track to meet the State-designed long-term goals under §200.13 – must be recognized as central and undergirding any State definition of this group. Not being on track to graduate with the skills and knowledge that the State has determined all students should have in order to be college- and career-ready for all students is *by definition* underperforming. [This recognition needs to permeate all aspects of the State’s accountability system, not just this one, in order for the system to be consistent with the core of the Act. It is in this sense that the design of the accountability system should (as is said in other places in the proposed regulations) be “informed by” the State’s long-terms goals and interim measures of progress. Criteria and metrics in the accountability system must be designed consistently with the attainment of those long-term goals and interim measures for all children.]

It also should be noted that the Act, in providing for determination of consistent underperformance of a subgroup “based on all indicators under subparagraph [(c)(4)](B),” is encompassing the additional one or more indicators of school quality or school success adopted by the State under (c)(4)(B)(v).

Finally, the regulations should make it clear that the criterion used for identifying schools that get “*additional* targeted support” under (d)(2)(C) of the Act (beyond the targeted support and improvement plan under (d)(2)(B) ) – namely identifying any subgroup that is, on its own, performing as poorly as all students in the lowest performing 5% of schools in the State – *cannot* be used as the criterion here for identifying the broader category of schools that have a consistently underperforming subgroup, which triggers the targeted support and improvement plan under (d)(2)(C). Schools with subgroups whose performance is as poor as overall performance in the lowest 5% schools of the State are identified under (C) as a particular subset of those schools who, by virtue of having subgroups with consistently low performance, are identified for targeted support and improvement plans under (B). By any meaningful definition of a consistently underperforming group, students who year-after-year are not on track to perform at the level expected for all students -- i.e., to attain standards deemed

necessary to be college- and career-ready – clearly are consistently underperforming, even though students in the very lowest performing schools in the State may be doing even worse. And so using that criterion, set out in the Act for a different purpose, as the basis for also identifying schools with subgroups that are consistently underperforming, would not only make the distinction between two separate provisions of the Act meaningless; it would result in many schools not being identified despite having subgroups whose students clearly are consistently underperforming.

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

**Comment:** In this section we urge ED to underscore first, that States, LEAs and all public schools have a legal obligation under the ESEA to assess every individual public school student in the state in reading or language arts, mathematics, and science (Sec. 1111(b)(2)(B)(i)(II)), so as to ensure that every student is effectively taught a curriculum aligned with the state adopted standards. Each student, regardless of limited English proficiency or disability, has a right to participate in whatever state or local assessments are used to measure student proficiency toward state standards. This is independent of the 95% participation rate provision, which is a criterion for demonstrating that the results of the assessments are adequate for purposes of performance accountability. Whether or not a school meets that rate, it remains a violation of the Act to fail to assess all students. The regulations need to point that out here in this section, because that point is often lost.

With respect to ED’s effort to address the concern about low participation rates in schools, we support the list of proposed actions set forth in the NPRM (§200.15(b)(2)(i)-(iv) requiring the State to “factor the requirement for 95 percent student participation in assessments. . .into its system of annual meaningful differentiation so that missing such requirement, for all students or for any subgroup of students in a school, results in at least one of the following actions:...[including] “another equally rigorous State-determined action...that will result in a similar outcome for the school...and will improve the school’s participation rate” so that the school meets the required 95% rate. We also support the actions required by §200.15(c). We do, however, feel that the regulations should make clear that States may adopt an action that is more rigorous than those proposed.

In addition, to the extent that non-participation is sometimes based on a belief that that the State assessment system does not provide a valid measure of students’ mastery of the knowledge and skills in the State standards or has a negative impact on students’ education toward those standards, and that there are other, better ways of students demonstrating their mastery, the regulations should indicate that that perspective can and should inform the

broader deliberation in developing and improving the State's assessment system itself -- including the potential for incorporating other assessment methods in ways that result in valid and reliable determinations of student proficiency in relation to the standards consistent with the other assessment requirements of the Act. This should highlight the importance of a highly rigorous, open, and participatory process for developing or revising the State's assessment. More attention needs to be paid in this regard to both public and family engagement in the State plan. In addressing these issues, ED should connect them to two other assessment provisions in the Act:

First, the requirement to provide multiple measures of student achievement has been given too little attention (or has been trivialized and drained of meaning, as in the regulations adopted in 2008). Consistent with that requirement, the issues here should provoke consideration and adoption of multiple ways of assessing standards-based skills and knowledge. Multiple measures of the same knowledge and skills is central to ensuring valid and reliable determinations of students' proficiency in a way that applying a cut-score on a single measure typically cannot.<sup>1</sup>

Second, the provisions in the Act for local assessments are relevant to these concerns. The regulations should include language about what is required for LEAs and schools to use locally developed assessments in those instances when they are determined to have met the statutory criteria and are approved by the State to be used in lieu of State assessments.

We also agree with ED's continued focus on the State's responsibility to provide oversight, implementation and enforcement through proposed §200.15(d)(1) by specifically requiring the State to provide a clear explanation of how it has met its responsibility for differentially identifying schools based on student performance, in the aggregate and disaggregated by subgroup. This requirement is especially important in light of the concerns about the more limited accountability provisions under ESSA resulting in reduced student participation in assessment.

We also appreciate ED's clear directive set forth at NPRM § 200.15(d)(2) that prohibits a State, LEA or school from systematically excluding any subgroup of students from participation in the assessments. Related to this particular issue, we urge ED to cross reference §200.15(d)(2), the civil rights statutes (Title VI, Section 504, ADA).

- *Whether we should retain, modify, or eliminate in the title I regulations the provision allowing a student who was previously identified as a child with a disability under section*

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<sup>1</sup> For that very reason, however, the purpose of requiring multiple measures of achievement is not simply to provide different ways for different students to demonstrate their proficiency; it is to provide multiple measures of that achievement so that the determination that a student is or is not proficient in particular skills and knowledge is valid and reliable in a way that really on a cut-score on a single measure generally cannot be. So, ED also needs to emphasize that all students need to be assessed using multiple measures, not some students on one single measure and other students on another.

*602(3) of the Individuals with Disabilities Education Act (IDEA), but who no longer receives special education services, to be included in the children with disabilities subgroup for the limited purpose of calculating the Academic Achievement indicator, and, if so, whether such students should be permitted in the subgroup for up to two years consistent with current title I regulations, or for a shorter period of time. (Sec. 200.16)*

**Comment:** There is no justification for ED’s proposal that would continue to authorize for purposes of reporting and accountability inclusion of the performance of formerly eligible students with disabilities. First, contrary to ELs whose acquisition of language is expected to evolve over a period of 2-7 years and whose success, based on a number of factors, generally results in their removal from the EL cohort, there is no corollary for students with disabilities.

This provision was part of the amendments to Title I regulations in April 9, 2007. It came at a time when states were operating under NCLB regulations, including Adequate Yearly Progress (AYP), which required that the annual measurable objectives (AMO) for each student subgroup be the same. That requirement, in some small way, justified giving States the option to include exited students for a short period of time. It is unclear how many States, if any, have taken advantage of this provision. It is also important to note that, subsequent to this 2007 regulatory provision, States were allowed to reset their AMOs as part of ESEA Flexibility, freeing them from the NCLB-prescribed AMOs.

However, Congress expressly repealed AYP in ESSA, incorporating only those AYP provisions that it wanted maintained, such as the 95 percent participation requirement, now known as annual measurement of achievement, while repealing other elements of AYP such as the AMO requirement. Now, under ESSA, States will set “long-term goals and measurements of interim progress” separately for each student subgroup. Those goals must take into account the improvement necessary for each student subgroup to make significant progress in closing statewide gaps. This requirement makes clear that the long-term goals and measurements of interim progress are to be established based on the most recent performance of each student subgroup on the state’s assessments in reading/language arts and mathematics. For the students with disabilities subgroup, performance on state assessments measures only the achievement of students who meet the definition of a student with a disability under section 602(3) of the Individuals with Disabilities Education Act (IDEA). Thus, including the achievement of “previously identified” students in determining achievement of goals for this subgroup would have the effect of measuring apples and oranges: goals based on actual performance of one group (IDEA students) compared to the achievement of two groups (IDEA students and previously identified IDEA students no longer receiving services), rendering the data on a state’s performance on its goals as completely false.

It is especially noteworthy that Congress recognized the distinction between students with disabilities eligible for special education under IDEA and English learners. This distinction must be recognized and honored: Congress did not choose to codify the 2007 regulation applicable

to students with disabilities in ESSA – unlike the way Congress elected to include (and expand) the provision to include the performance of exited English learners for up to 4 years.

We are particularly distressed that ED raised this issue in the context of proposed rules for accountability under ESSA, as it makes no sense in the new statewide accountability system required by ESSA and also in light of the complete absence of any data on how many states, if any, are currently using the option.

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

**Comment:** ED should, most definitely, standardize the criteria that States must use to identify children with disabilities for inclusion in the subgroup within the adjusted cohort graduation rate. Such standardization would make ACGR rates across States more comparable, which was one of the purposes of establishing the ACGR.

As we have previously commented and advised, the criteria for those students who should be reported in the ACGR students with disabilities subgroup should be two-fold. Only students meeting **both of the following criteria** should be reported:

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

We believe that this two-fold criteria will ensure that the ACGR for the students with disabilities subgroup is representative of the achievement of students receiving services and supports under the IDEA. It will also align, to some degree, with the data collection under 618 of IDEA for exiting students, which is being used in the Office of Special Education Programs “Results Driven Accountability” initiative. Lastly, it will guard against students being identified as a student with a disability for short periods of time (such as just prior to exiting) in order to inflate the ACGR for this subgroup. This more accurate representation of students with disabilities within the cohort can be compared to the number of students identified by each school/district as being graduated –thus providing a basis for federal agency oversight and review.

We recommend that the criteria for the other subgroups of students (English learners, homeless children, and children who are in foster care) also be standardized for reporting in each of these

groups. However, the criteria should be determined based on the particular characteristics of the individual groups of students. We encourage ED to look to input from advocacy organizations representing these groups of students for specific criteria.

## **Comments by section**

### **General comment on web site accessibility.**

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

It is noteworthy that ED's Office for Civil Rights (OCR) has recently reported receiving numerous complaints regarding the inaccessibility of Web sites operated by SEAs and LEAs, indicating that serious problems exist for people with disabilities. In a press release dated June 29, 2016, OCR announced agreements to resolve web site accessibility complaints made against seven states and one territory (see <http://www.ed.gov/news/press-releases/settlements-reached-seven-states-one-territory-ensure-website-accessibility-people-disabilities>).

Given the growing body of evidence that SEA and LEA web sites are, with rare exceptions, not accessible to people with disabilities, ED should include in its final regulations a provision that SEA and LEA Web sites used for dissemination of information required under ESSA must meet minimum accessibility standards, such as the W3C's Web Content Accessibility Guidelines (WCAG) 2.0 Level AA and the Web Accessibility Initiative Accessible Rich Internet Applications Suite (WAI-ARIA) 1.0 for web content. These guidelines have been referenced by OCR in recent resolution agreements.

It is clear from the language in proposed regulations to 34 CFR Parts 200 and 299 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act—Accountability and State Plans that ED is failing to recognize the nature, scope and critical importance of Web site accessibility issues being reported to its Office for Civil Rights. ED must assume its oversight and enforcement responsibility. It is not sufficient to suggest by merely cross referencing the proposed notice requirements of §§200.21(b)(1) through (3) that States, LEAs, and schools, as recipients of federal funds, are meeting the legal requirements for ensuring any information disseminated via their Websites is accessible to all individuals, including those with disabilities and who have limited English literacy consistent with their obligations under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, the Americans with Disabilities Act, and Title VI of the Civil Rights Act of 1964.

**Specific references to use of SEA and LEA Web sites:**

**§ 200.30 Annual State report card.**

(c) *Accessibility.* Each State report card must be in a format and language to the extent practicable, that parents can understand in compliance with the requirements under § 200.21 (b)(1) through (3).

(d) *Dissemination and availability.*

(1) A State must—

(i) Disseminate widely to the public the State report card by, at a minimum, making it available on a single page of the SEA's Web site; and

(ii) Include on the SEA's Web site—

(A) The report card required under § 200.31 for each LEA in the State; and

(B) The annual report to the Secretary required under section 1111(h)(5) of the Act.

**§ 200.31 Annual LEA report card.**

(c) *Accessibility.* Each LEA report card must be in a format and language, to the extent practicable, that parents can understand in compliance with the requirements under § 200.21(b)(1) through (3).

(d) *Dissemination and availability.*

(1) An LEA report card must be accessible to the public.

(2) At a minimum the LEA report card must be made available on the LEA's Web site, except that an LEA that does not operate a Web site may provide the information to the public in another manner determined by the LEA.

**§ 200.32 Description and results of a State's accountability system.**

(b) *Reference to State plan.* To the extent that a State plan or another location on the SEA's Web site provides a description of the accountability system elements required in paragraph (a)(1) through (5) of this section that complies with the requirements under § 200.21(b)(1) through (3), a State or LEA may provide the Web address or URL of, or a direct link to, such State plan or location on the SEA's Web site to meet the reporting requirement for such accountability system elements.

**§ 299.13 Publication of State plan.**

(f) After the Secretary approves a consolidated State plan or an individual program State plan, an SEA must publish its approved consolidated State plan or individual program State plan on the SEA's Web site in a format and language, to the extent practicable, that the public can access and understand in compliance with the requirements under § 200.21 (b)(1) through (3).

**§ 299.18 Supporting excellent educators.**



(v) The information required under paragraphs (c)(4)(i) through (iv) of this section in a manner that is easily accessible and comprehensible to the general public, available at least on a public Web site, and, to the extent practicable, provided in a language that parents of students enrolled in all schools in the State can understand, in compliance with the requirements under § 200.21(b)(1) through (3). If the information required under paragraphs (c)(4)(i) through (iv) is made available in ways other than on a public Web site, it must be provided in compliance with the requirements under § 200.21(b)(1) through (3).

**§ 200.21 (b)(1) through (3)** – referenced in all of the above sections, reads as follows:

- (1) Be in an understandable and uniform format;
- (2) Be, to the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and
- (3) Be, upon request by a parent or guardian who is an individual with a disability as defined by the Americans with Disabilities Act, 42 U.S.C. 12102, provided in an alternative format accessible to that parent.

**§ 200.12 Single Statewide Accountability System.**

**Subsection (b) says that “The State’s accountability system must--**

(b)(2) “Be informed by the State’s long-term goals and measurements of interim progress under § 200.13;”

**Comment:** While the statute similarly uses the phrase “be informed by”, ED should use this opportunity to make perfectly clear that the State established long-term goals are not abstractions but concrete, meaningful targets intended and expected to be addressed if student achievement is to improve. (See also our comments about how to understand the term “informed by the State’s long-term goals and measurements of interim progress” in response to the first general issue raised by ED, at the beginning of this document.

**Action requested:** After “Be informed by” ADD: “, and address,”; After “State’s” ADD: “ambitious”.

**§ 200.13 Long-term goals and measurements of interim progress.**

**Comment:** We support ED’s proposed regulation at § 200.13(a)(1) and (2) that makes clear that student proficiency goals and measures shall be based on the same definition of grade-level proficiency for all students. However, at § 200.13(a)(2)(iv) the language that says “*take into account* the improvement necessary for each subgroup of students...to make significant progress in closing statewide proficiency gaps...such that the State’s measurements of interim

progress require greater rates of improvement for subgroups of students that are lower achieving” is not sufficiently directive and clear.

**Action requested:** In §200.13(a)(2)(iv), after the reference to “§ 200.13(a)(2)(iv), ADD “to achieve the long-term goals and”. Make the same change to § 200.13(c)(3)(ii).

In addition, in addressing concerns about what is achievable in this context, the narrative for the regulations should point out that meeting the interim measures and attaining the long-term goals are not legal requirements and that failing to meet and attain them is not a violation of the Act. (And under ESSA, States are positioned to make sure that the primary responses to not meeting goals are largely non-punitive.) What *is* required is to set them properly, develop and carry out the school-, LEA-, and State-level provisions found elsewhere in the Act for providing the quality education that will enable students to achieve them, implement an assessment and accountability system that accurately draws attention to whenever students are not on track, and take action where gaps are found.

From this perspective, the *goals* must be consistent with the purposes and premises at the core of the Act – i.e., that the State has identified the knowledge and skills it expects *every* student to master in order to be college- and career-ready, so the long-term goals must be for that to happen, and the interim measures of progress must in turn be logically linked to the achievement of those long-term goals. The title of the Act – *Every Student Succeeds* – must not be viewed as a rhetorical flourish. It’s the basic premise around which everything -- the long-term goals, the interim progress measures toward them, the State, LEA, and school plans for achieving those long-term goals, and the systems for identifying gaps and improving programs – must be based.

ED should thus make this clear and indicate that it is not acceptable to have goals and progress measures which result in failing to identify and address when some students are not on a path to the goals for every student because it would be seen as overly punitive to do so. The point is to have responses to the identification that are educationally sound and not unnecessarily punitive, rather than to fail to identify and let students slip through the cracks for fear of punitive response. And States must be required to think through the implications of their goals, interim progress measures, and systems for identifying them in terms of the impact on students. For example, while it may not be reasonable to assume that all students who are very far behind grade-level expectations, a system premised on closing the gap between where students are and where they are expected to be by the time they graduate by closing the gap in equal increments across the remaining years of the students K-12 education would be problematic as applied, for instance to 2<sup>nd</sup> graders, because it means that interim progress measures would contemplate a child continuing, year after year, to be in classrooms where they are behind.

Subsection (2)(ii) of §200.13(b) provides that “If a State chooses to use an extended-year adjusted cohort graduation rate as part of its Graduation Rate indicator..., the extended-year adjusted cohort graduation rate [must be] consistent with § 200.34(d) [defining extended-year

ACGR], except that a State must set *more rigorous* long-term goals for such graduation rate, as compared to the long-term goals for the four year adjusted cohort graduation rate.” (emphasis added)

**Comment:** ED should clarify that the term “more rigorous” which is also used in the statute, refers to the percentage rate being set at a higher rate for those expected to attain this extended-year graduation goal as compared to the four-year ACGR; it does not mean that States must hold students within this cohort to more difficult academic standards or higher levels of proficiency.

An important reason for the extended graduation cohort is to help ensure that all students, including struggling learners, those with substantially interrupted education, ELs, and students with disabilities who have not received a regular high school diploma, remain in school during the period of their age eligibility under state law or IDEA for students with disabilities, in order to meet the standards necessary to graduate, and thus be counted for purposes of accountability and reporting. The extended cohort provides schools and LEAs with an additional opportunity to demonstrate success based on the increased number of successful graduates who for a variety of reasons, e.g., economic disadvantage, SIFE, limited English proficiency, homelessness, disability, may need additional time to be successful; it is not to impose additional barrier to their meeting that goal.

**Action requested:** ED should provide clarifying comment.

### **§ 200.13 (c) English language proficiency**

**Comment:** Add “Disability” to the list of student characteristics for consideration as a factor. A student’s disability (as identified under the Individuals with Disabilities Education Act or Section 504) can have a significant impact on the student’s ability to achieve proficiency in English and should therefore be one of the listed characteristics for consideration.

**Action requested:** Under § 200.13(c)(2)(ii) which describes student characteristics from (A) through (E), after “(E) limited or interrupted formal education, if any.” DELETE “.” ADD: “and (F) “disability.”

### **§200.14 Accountability indicators**

We support ED’s clarification that States may identify new and/or modify/replace existing indicators over time, because, e.g., the data upon which the indicators are based are not ready for use in 2017-18.

### **§ 200.15 Participation in assessments and annual measurement of achievement.**

**Comment:** This section should make clear that the two methods of calculation found in (b)(1)(i) and (ii) results in all non-participants being counted as non-proficient below 95 percent in total

or subgroup. The only students who may be excluded from the calculation are those students who were enrolled in the school for less than half of the academic year, as stated at § 200.20(b). The regulations should make expressly clear that students who opt out of state assessments must be included in the denominator for participation calculation.

**Action requested:** ED should provide additional clarification.

**Comment:** As discussed above in response to the specific questions raised by ED, we support, with changes we have proposed there, subsection (b)(1) of § 200.15 that underscores the importance of ensuring that each State annually measures the achievement of at least 95% of all students, and 95% of students in each subgroup consistent with ESSA.

And, we support the flexibility given to States by (b)(2) to choose at least one of a variety of actions to maintain this level of participation to help ensure that assessment results are valid and will be considered as of one of multiple measures for determining evidence of student growth, interim progress and proficiency. Requiring states to take some form of action but allowing them to decide which course of action to take based on facts and context, may help minimize the risk of limited resources being directed at schools that do not meet the minimal 95% participation requirement, and serve predominantly students who do not fall within the subgroups and are successful learners in those states which permit parents to opt out their children from participation in the state assessments [*or in LEAs/schools where parents refuse to allow their children to participate in the state assessments*].

We similarly support ED's efforts through subsections (c) and (d) to ensure that schools and school districts are publicly accountable for improving student achievement, including but not limited to their performance on a State assessment. Because we support the use of multiple measures in addition to standardized assessments, for assessing student achievement, we support ED's continued efforts to create new options for States to address low assessment participation rates, in particular when they are the result of parents exercising opt outs created by State law.

[See our response to the specific question raised by ED on the 95% for additional comment and request for change.]

#### **§ 200.16 Subgroups of students.**

**Comment:** We support subsection (ii)(A) and (B) of § 200.16(b) that limits the State from including a former EL student for any purposes in the accountability system, except as provided for purposes of calculating the Academic Achievement Indicator consistent with (b)(1)(i) or for “[p]urposes of reporting information on State and LEA report cards under section 1111(h) of the Act, except for providing information on each school’s level of performance on the Academic Achievement indicator...”

We also support subsection (b)(2) which requires a State with respect to an EL with a disability “for whom there are no appropriate accommodations for one or more domains of the English language proficiency assessment . . . in measuring performance against the Progress in Achieving English Proficiency indicator, [to] include such a student’s performance on the English language proficiency assessment based on the remaining domains in which it is possible to assess the student.”

**§ 200.17 Disaggregation of data.**

The proposed regulations state, at §200.17(a)(1)(i) that each State shall determine the minimum number of students (the “n” size) sufficient to yield statistically reliable information for each purpose for which disaggregated data are used, including for reporting purposes or for purposes of the statewide accountability system.

We support ED’s expressed recognition at § 200.17(a)(1)(ii) of the relationship between the “n” size and inclusion of students, by subgroups at the school level as reflected by the proposed regulatory language requiring that the “n” size shall be determined to [e]nsure that, to the maximum extent practicable, each student subgroup...is included at the school level for annual meaningful differentiation and identification of schools...”

However, we oppose **§ 200.17(a)(2)(iii)** of the proposed regulations which states that the ‘n-size’ –the minimum group size of students needed to include a subgroup of students in the accountability system - must not exceed 30 students unless the State provides a justification for doing so.

**Comment:** This provision **§ 200.17(a)(2)(iii)** will strongly suggest to States that 30 is an acceptable minimum group size when, in fact, there is little evidence to support this. Using 30 students for graduation rate could result in significant numbers of schools not being held accountable for one or more subgroups of students, essentially rendering the indicator meaningless. Under the No Child Left Behind Act, many states set n-sizes higher than necessary to avoid the consequences of missing Adequate Yearly Progress. A report referenced by ED in its proposed regulations specifically noted that “while raising the minimum n-size is an effective means of increasing the passing rates of schools, it does so at a considerable cost to special education students in terms of being excluded from the accountability system.” [Page 34553]

In order to ensure that, to the maximum extent practicable, each student subgroup is included in the accountability system, ED should lower its proposed n-size from 30 to 10 students in the final regulations. Even at a level of 10, many subgroups of students in many schools will not be addressed, no matter how poorly they may be faring. Thus, we would strongly oppose any number above 10, even if it is lower than 30.

In reducing the “n-size” ED should retain the requirement [proposed §200.17((iv))] that States must submit information regarding the number and percentage of all students and all student subgroups for whose results schools would not be held accountable in the accountability system.

**Requested Action:** At § 200.17(a)(2)(iii), after “Must not exceed” STRIKE: “30” REPLACE: “10”  
At § 200.17(a)(3)(v), after “number of students exceeding” STRIKE: “30” REPLACE: “10”

**Comment:** States should not be permitted to use assessments for purposes of individual student determinations (an n-size of one), fail to fully implement the provisions for multiple measures of achievement in order to improve the validity and reliability of the determinations of proficiency, and then select an n-size based on a claim that it’s single measure is not reliable for that purpose with an n-size considerably larger than one. There is a basic responsibility under the Act for ensuring that the methods used to measure the indicators provide the basis for valid and reliable information about the performance of the group being assessed, even if it is a relatively small number of students.

**Requested Action:** The regulations should include clear statements of the following:

- 1) Under the Act, there is no basis for setting n-size based on a conclusion that, below a certain level, a group is too small to make a valid and reliable determination of the actual achievement levels of the students within the group who were in fact assessed.**

Why? Title I requires that the State to have assessments of sufficient quality to provide valid and reliable information about the level of proficiency of *each* single child and therefore about the level of proficiency of even relatively small groups of students. And indeed, many States are using the results to make individual students decisions of considerable import. A determination that the State’s assessments cannot provide valid and reliable information about actual achievement of a group of students who are assessed is statement that the assessment system is inadequate to meet the law’s requirements, not a basis for allowing groups of students not to count.

- 2) In ensuring that its assessment system is capable of providing valid and reliable information about the achievement of each student, and thereby minimize the use of n-sizes to exclude groups from the accountability system, the State must fully implement the Act’s requirement that assessments involve multiple measures of achievement.**

Why? It is indeed difficult to meet the Act’s requirement for a valid and reliable system for determining the level of a student’s achievement if it is based on the results of a single test or measure, particularly when a determination a bright-line division in which, for example, a cut-off score separates by one point,

students who are or are not deemed proficient. A central purpose of the requirement of the multiple measures of achievement is to help assure the validity and reliability of the determination – by drawing from different sources of information about/multiple ways of assessing the same skills and knowledge. Thus, the lack of valid and reliable information about students’ actual levels of achievement because of failure to fully meet this requirement must be remedied, not used as the basis for excluding groups of students.

**3) To further minimize the need to exclude groups of students from the accountability system based on n-size, States should provide for analysis of student groups across more than one year or more than one grade where necessary to avoid exclusion.**

Why? While, as explained above, under the Act no group should be too small to draw valid and reliable conclusions about *their* level of achievement, a group may be too small by itself to draw valid conclusions about other students – e.g., making conclusions about the school’s overall capacity to meet the educational needs of one of the Act’s subgroups over time, based solely on the achievement levels of the 5 students in this year’s third grade. States should use their authority to average three years of data in order to address this situation without excluding a subgroup wherever possible, rather than allow an ongoing pattern of lack of success for a group go unidentified and unaddressed because no one year by itself crosses the threshold. Similarly, there should be use of aggregation across grades where necessary to provide a group large enough to draw such conclusions.

**4) The State’s accountability system should provide for effective attention to the actual members of a low-performing subgroup, even if the group is too small by itself to draw conclusions about the school’s overall success with *other* members of that subgroup over time. This should happen regardless of whether the subgroup is too small to publish the assessment results without revealing personally identifiable information.**

Why? As noted above, while a subgroup in one particular year may be too small to draw such broader conclusions and base broader interventions upon them, the assessments must be capable of providing valid and reliable information about the students who were assessed, from which (along with other indicators that are part of the State’s accountability system), can be drawn a valid and reliable conclusion that *this* group of actual students is low-performing, is not on track, and needs attention and support.

The proposed regulations at **§200.17(a)(3)(iv)** include a provision that each State must submit in its State plan information regarding “the number and percentage of all students and students

in each subgroup . . .for whose results schools would not be held accountable in the State accountability system for annual meaningful differentiation...”

**Comment:** This provision is appropriate and will bring needed transparency. Studies of subgroup sizes used under NCLB exposed significant numbers of schools and students left out of the accountability system. For example, a 2013 report of subgroup sizes used in States, *The Inclusion of Students with Disabilities in School Accountability Systems* (<http://ies.ed.gov/ncee/pubs/20134017/>), found that across 40 states with relevant data for the 2008–09 school year, slightly more than a third (35 percent) of public schools were accountable for the performance of the students with disabilities subgroup, representing just over half (58) percent of tested students with disabilities in those States.

This provision should be expanded to include information on the **number and percentage of schools that would not be held accountable for one or more student subgroups** in addition to the number and percentage of students. Such as addition would ensure full information on the impact of the proposed subgroup sizes will be available to ED for consideration in its state plan review and also for public information. This provision should also require the information be submitted for EACH indicator in the state accountability system (regardless of whether the proposed group size is the same or different across indicators). We also propose adding this information to the requirements for state and local report cards.

**Action requested:** At the end of § 200.17(a)(3)(iv), after “meaningful differentiation under § 200.18; and” ADD: “information regarding the number and percentage of all schools that would not be held accountable for the results of one or more student subgroups for all indicators in the State accountability system; and”

**Comment:** The proposed regulations should expressly state that students must be counted in all subgroups to which they belong under all indicators in the State’s accountability system that require disaggregation. During implementation of NCLB, States made frequent requests to limit the counting of students in multiple subgroups in order to minimize these students’ impact, such as establishing a “default” subgroup (for example, a student in the economically disadvantaged subgroup need not be counted in other subgroups to which they belong). Under ED’s ESEA Flexibility States were allowed to minimize the impact of students belonging to multiple subgroups by establishing super subgroups. Congress explicitly prohibited such action, so ED should further clarify this in regulation.

**Action requested:** Add a new provision under this proposed regulation at § 200.17(e) to the effect that students must be included in **all** student subgroups to which they belong for all calculations.

### **§ 200.21 Comprehensive support and improvement**



**Comprehensive support and improvement plan.** Proposed regulation §200.21(d) provides that each LEA identified for comprehensive support and improvement “must...develop and implement a comprehensive support and improvement plan for the school to improve student outcomes” that 1) Is developed in partnership with stakeholders (including principals and other school leaders, teachers, and parents)....”

**Comment:** Clarify that “to be developed in partnership with stakeholders” means that the process must be proactive and inclusive to develop a true partnership –i.e., a collaborative and joint endeavor with equitable participation and full voice from the stakeholders at all stages of the process. ED should not set such a minimum bar for the LEA -- merely providing evidence of having solicited early stakeholder input that was taken into account in the development of the plan. This is not enough to constitute evidence of a partnership.

The terms of the partnership should be decided at the front-end with full participation of representative stakeholders, so that the process begins with them all feeling that this is a partnership, rather than some stakeholders coming into a process that has already been designed and described as a partnership, but they think otherwise.

Partners must have the same full information, and the assistance needed to fully understand it, the time to develop responses, and the vehicles for responding. However, a partnership means more than “being heard” -- i.e., coming to a meeting, presenting your views, and leaving, while the real decision-makers then deliberate and decide. Partnership means shared decision-making and working together towards a common resolution.

It also means that full participation takes place from the beginning and at each stage of the process -- for example, designing a needs assessment, analyzing the results and their implications, etc. conducting a needs assessment, analyzing the needs assessment, developing a plan, there should be thorough, informed discussion before developing a draft. So that the initial drafting of a plan for that stage reflects widespread input on the front end (rather than leaving some stakeholders trying to shoe horn in major things at a later stage), thorough discussion of the initial draft and how to change it, and then thorough discussion of whether the revised document now reflects people’s expectations. This is not simply a matter of fairness and being heard. It is critical to the quality and effectiveness of what gets developed.

Specify for purposes of clarity and instruction that stakeholders are members of the school community who include, in addition to those identified, “parents and family members representative of all the subgroups, in particular, the low performing subgroup(s), secondary school students, their advocates, and other interested persons representative of the broader community.”

The explicit inclusion of students reflects that they are, of course, the biggest “stakeholders” in their own education; that student engagement is increasingly recognized as central in providing high-quality, effective education; and that, along with their teachers, they have the most intensive and direct knowledge and experience of what is happening in classrooms (and in their minds), as well as the capacity to be thoughtful and innovative in response.

**Action requested:** Define a “partnership” to require a planned sustained collaboration with equitable participation of diverse stakeholders working together to develop and implement the plan. After “(including principals and other school leaders, teachers, and parents,” ADD: “and family members representative of all subgroups, in particular, low performing subgroup(s), secondary school students, their advocates, and other members of the community.” Include the following:

The way the partnership will operate should itself be discussed and developed with full participation of representatives of the stakeholders. The partnership should:

(1) Be developed in full partnership with principals and other school leaders, teachers, a broad range of parents, secondary school students, and organizations representing parents and students, including students with disabilities and English language learners;

(2) Provide for:

(A) access to these opportunities for involvement to all parents and family members of students eligible for or participating in programs under this part and all secondary students eligible for or participating in such programs;

(B) representation in numbers sufficient to play a meaningful role in decisions;

(C) parent and student selection of their own representatives;

(D) opportunities for ongoing communication by those representatives with the parents and students they represent;

(E) full inclusion of students and parents, who have disabilities or are English learners;

(F) at each stage **of the process, full opportunity for discussion and deliberation (i) before a draft is developed**, (ii) in response to an initial draft, and (iii) in reviewing changes made as a result of the responses to the draft,

(G) decision-making methods that ensure that the programs have the active and informed support of, and reflect the needs articulated by, such parents and students, as well as the other stakeholder groups; and

(H) provision of all information, including background information, and assistance needed to be full, equal, and effective participant;

(I) sufficient time for absorbing information, communicating with others, and development of input.

**Comment:** There are specific requirements in Section 1116 of the Act that apply to the engagement of parents and family members<sup>2</sup> in comprehensive support and improvement under this section, as well as in targeted support and improvement in § 200.22. The regulations here must make that connection, and clarify how they apply here. In regard to developing the plan in partnership with parents, the regulations should incorporate and describe specific requirements under Section 1116(a) of the Act:

At the LEA level, Sec. 1116(a)(2)(A) provides that the LEA shall “(A) involve parents and family members in . . . the development of support and improvement plans under paragraphs (1) and (2) of section 1111(d)” [i.e., comprehensive support and improvement plans and targeted support and improvement plans]. What distinguishes this from the involvement of other stakeholders however, is that **how** the parents and family members will be involved must (along with all the other LEA-level parent and family engagement provisions of Title I) must be described in the LEA’s parent and family engagement policy, which the LEA must **“jointly develop with, agree on with,** and distribute to, parents and family members of participating children this policy. Sec. 1116(a)(2) (emphasis added).

At the school level, there are parallel requirements. Under Sec. 1116 (c)(3), the school must “involve parents and family members, in an organized, ongoing, and timely way, in the planning, review, and improvement of programs under this part. Under Sec. 1116(b)(1), the school “shall jointly develop with, and distribute to, parents and family members of participating children a written parent and family engagement policy, agreed on by such parents, that shall describe the means for carrying out the requirements of subsections (c) through (f) [ which includes the requirement for involvement in program review and improvement]. Parents shall be notified of the policy in an understandable and uniform format and, to the extent practicable, provided in a language the parents can understand. Such policy shall be made available to the local community and updated periodically to meet the changing needs of parents and the school.

In other words, not only must parents and family members be, as indicated in the proposed regulation, partners in developing the comprehensive support and improvement plan, but it is not for the LEA and the school to determine unilaterally how that partnership will be formed and used to develop the plan. Instead, the Title I parents and family members of students in the LEA and in the school must **jointly develop with and agree upon,** as part of the parent and family engagement policy, the way that the LEA and the school will together develop the support and improvement plan.

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<sup>2</sup> Under Title I, “parent” has been defined to include a legal guardian or other person standing in the place of the parents -- such as a grandparent or stepparent with whom the child lives, even if that person does not have legal custody of the child (as well as persons who do have legal responsibility for the child’s welfare). Under ESSA, the law now goes further by using the term “parents and family members.”

While the LEA-level and school-level provisions of Sec. 1116 run in parallel – each with its own set of requirements for family and parent engagement at either the LEA level or the school level and then requiring an LEA or school parent and family engagement policy, respectively, to be jointly developed with and approved by the participating parents at the LEA or school level that describes how those LEA or school level engagement requirements will be carried out – school program review and improvement is one area where the two levels overlap. That is not surprising, given that both the LEA and the school are involved in support and improvement plans. We believe that the most sensible interpretation, consistent with the Act is that:

Consistent with Sec. 1116(a)(2), parents and family members district-wide are engaged with the LEA in jointly developing and approving district-wide parameters for development of support and improvement plans, as part of the LEA engagement policy, and that they would also, under terms agreed to in the LEA policy, be engaged with the LEA in LEA’s role in developing particular school plans. (In the latter role, they, with a district-wide perspective with knowledge of other schools and often as leaders, could complement the role of the school’s families, in a way that is not unlike the relationship of district staff resources and school staff.)

Consistent with Sec. 1116(b)(1) and (c)(3), the parents and family members of the school address the methods for engagement in program review and improvement plans in their particular school (consistent with district-wide parameters), as part of school engagement policy that they jointly develop and approve, and that they also, under terms agreed to in that school policy, be engaged in the program review and improvement process. They, on behalf of their children, are of course the biggest “stakeholder” in this process.

Reference should also be made here to other relevant, supporting provisions of Sec. 1116. At both the LEA level and the school level, there are provisions to ensure that parents and family members have the full capacity to participate effectively as full partners across their various roles (including in this one regarding program support and improvement), and that schools and staff have the capacity to work effectively with families – including providing information, training, and other assistance, professional development, effective vehicles for communication with staff and with other parents and family members, ensuring access to full participation for family members with disabilities or limited English proficiency, and for annually reviewing and revising as necessary the effectiveness of the parent and family engagement policy etc. As with other requirements, how these provisions will be carried out must be spelled out in the parent and family engagement policy that is jointly developed with and approved by the parents. Similarly, parents and family members must be meaningfully involved in “annual evaluation of the content and effectiveness of the parent and family engagement policy *in improving the academic quality* of all [Title I] schools,” including, inter alia, barriers to participation in Sec. 1116 activities, and use the evaluation findings to design evidence-based strategies for more

effective involvement and to revise if necessary the engagement policies. Sec. 1116(a)(2)(D) and (E) (emphasis added). As with the other provisions, how the evaluation will be done must be spelled out in the jointly developed and approved parent and family engagement policy. Evaluating and improving the parent and family engagement in the comprehensive and targeted assistance support plans should be part of this annual evaluation.

We are spelling this out at some length here because years of experience suggests that ED needs to do so in the regulations, rather than rely on a terse cross-reference, with the expectation that it would result in implementation. These provisions have been in the law, with modest changes, since 1994, but they and their meaning have gotten relatively little attention. The result, with limited understanding by schools or families, is that it is very common to find that schools have had parent involvement policies that neither were jointly developed with and approved by the Title I parents of the school nor spell out how each of the requirements will be carried out in the school, let alone developed and spelled out in a way likely to result in the effective, informed engagement called for by those provisions.

**Action requested:** Spell out the applicability of both the LEA-level and school-level requirements of Sec. 1116 of the Act to this school support and improvement provisions in this section and § 200.22, with full explanation of their content, significance, and relevance to the concept of “partnership” that is central to this section, as discussed above, at least as it relates to the parent and family member stakeholders. This should include emphasis on the requirements for ensuring that the terms of the engagement are spelled out in the LEA and school parent and family engagement policies that are truly jointly developed with, and approved by, the Title I parents and family members of the LEA and of the school, and that, consistent with those requirements, the parents and family members have the vehicles, information, training, and assistance to be fully and effectively participate in those processes as equal partners.

## § 200.21

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

**Comment:** This provision needs clarification in order to prevent unintended consequences. First, clarify that under § 200.21(g)(2), the reference to “such a school...” does not refer to

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

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

**Action requested:** Provide clarification and an admonition to LEAs concerning unintended consequences of denying protected subclasses of students their rights under the ADA, Section 504, and Title VI. Also clarify that if a school with a low graduation that is identified under § 200.19(b)(2), also meets the criteria for identification under § 200.19(a)(1) or (a)(2) or (b), the LEA must implement the comprehensive or targeted support and improvement activities under this section or § 200.22.

### **§ 200.22 Targeted support and improvement**

At § 200.22(b)(2) The LEA, after being notified by the State of those schools requiring targeted support and improvement, must promptly and effectively notify the parents of each student enrollee of the school’s identification, and such notice must include the reason(s), (i.e., which subgroup or subgroups are consistently underperforming), including any subgroup(s) identified if the State chooses to require such schools to implement targeted support and improvement plans, or which subgroup(s) are low-performing, and an explanation of how parents might be involved in developing such targeted support and improvement plan.

**Comment:** Because some schools have limited enrollment by grade assessed and subgroup, ED might add yet another caveat about the need to protect personally identifiable information in this instance when the required notice contains sensitive subgroup information.

**Action requested:** Cross reference to provision establishing “n” size for protection of personally identifiable information.

Proposed regulation §200.22(c)(1) provides that each school having been notified by the LEA of its identification, “must develop and implement a school-level targeted support and improvement plan to address the reason or reasons for the identification and improve student outcomes. The plan is to be developed in partnership with stakeholders (including principals and other school leaders, teachers, and parents)....”

**Comment:** Clarify that “to be developed in partnership with stakeholders” means that the process is inclusive and to be undertaken collaboratively and jointly with equitable participation and full voice from the stakeholders. Specify for purposes of clarity and instruction that stakeholders are members of the school community who include, in addition to those identified, “parents and family members representative of all the subgroups, in particular, the low performing subgroup(s), students (if appropriate), their advocates, and other interested persons representative of the broader community.”

**Action requested:** ADD: “developed in partnership with stakeholders shall mean....” After “(including principals and other school leaders, teachers, and parents,” ADD: “and family members representative of all subgroups, in particular, low performing subgroup(s), students, as appropriate, their advocates, and other members of the community.” *Include the same additional language we are requesting for §200.21 to ensure full partner, addressing representation, decision-making, information and assistance, back-and-forth processes, etc.*

**Comment:** The terms for parent and family member engagement in developing the targeted support and improvement are governed by the same requirements in Section 1116 as apply to the comprehensive plans under §200.21.

**Action Requested:** Provide the same changes addressing parent and family member engagement as requested in under §200.21.

### **§ 200.30 Annual State report card.**

**Minimum number of students.** The proposed regulations require annual state report cards to include the minimum number of students that the state determines are necessary to be included in each of the subgroups of students for use in the accountability system (1111 (h)(1)(C)(i)(1)).

**Action requested:** Regulations should expand this requirement to include the following information related to the minimum subgroup size:

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

**Charter schools.** We strongly support the proposed subsection (a)(2)(ii) regarding requirements for reporting charter school enrollment and academic achievement. Such data is critical to ensuring that students seeking to enroll in publicly funded charter schools are not subject to discrimination, in particular, on the basis of their type and level of disability, and their level of limited English proficiency. Data concerning their academic achievement consistent with other public schools in the State is also critical for purposes of accountability.

### **§ 200.31 Annual LEA report card.**

**Minimum number of students.** The proposed regulations require annual LEA report cards to include the minimum number of students that the state determines are necessary to be included in each of the subgroups of students for use in the accountability system (1111 (h)(1)(C)(i)(1)).

Regulations should also state that the report cards must include the following information related to the minimum subgroup size:

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

The proposed regulations require the LEA report card to include:

- o For the LEA, how academic achievement under § 200.30 (b)(2)(i)(A) compares to that for students in the State as a whole; and
- o For each school, how academic achievement under § 200.30 (b)(2)(i)(A) compares to that for students in the LEA and the State as a whole.

**Action requested:** Final regulations should make clear that this information must be provided for all students and for each subgroup of students required under § 200.16 (a)(2)

### **§ 200.34 High school graduation rate.**

#### **-Definition of terms.**

The definition of “Regular high school diploma” in the proposed regulations at §200.34(c)(2) is highly problematic. ED should not embellish or otherwise modify the plain language of the statutory definition, yet it has chosen to do so several times within this section, which we find most alarming.



Specially, the reference to diplomas based on meeting IEP goals found in proposed § 200.34(c)(2), and underlined below reads as follows:

“Regular high school diploma” means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E) of the ESEA, as amended by the ESSA; and does not include a general equivalency diploma, certificate of completion, certificate of attendance, or any similar or lesser credential, such as a diploma based on meeting individualized education program (IEP) goals that are not fully aligned with the State’s grade-level academic content standards.

ESSA definition: The term ‘regular high school diploma’—  
Sec. 8101(43) (A) means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E); and (B) does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential.

**Comment:** A State’s “Regular high school diploma” should only be those that are fully aligned with state standards and a State’s “Alternate diploma” should only be those that are standards-based and meet all other criteria as required by the statute. Basing any diploma wholly or in part on meeting IEP goals, regardless of whether a student’s IEP goals are purportedly “standards-based”, undermines the definition of both a “regular high school diploma” and the “Alternate diploma.”

**Action requested:** At proposed § 200.34(c)(2), after “lesser credential” ADD: “.” STRIKE: “such as a diploma based on meeting individualized education program (IEP) goals that are not fully aligned with the State’s grade-level academic content standards.”

- **Calculation/reporting of students receiving an alternate diploma.**

The proposed regulations spell out a rather complex manner in which students with the most significant cognitive disabilities who are awarded the state’s alternate diploma are to be reported in the state’s four-year adjusted cohort graduation rate (ACGR).

At §200.34(e)(4) States are directed to annually update the ACGR reported for a given year to include any students from the same cohort (i.e., started 9<sup>th</sup> grade together) who obtain the alternate diploma. Given that most students taking the alternate assessment on alternate achievement standards and eligible for a state’s alternate diploma will in all likelihood “age out” of services under the IDEA, generally at age 21, this provision would typically mean that States

would go back 3-4 years to make the appropriate data entry and thus, “adjust” their four-year ACGR.

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

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

**Action requested:** At § 200.34(e)(4), **DELETE** subsection “(ii) Annually update the four-year adjusted cohort graduation rates, and, if adopted by the State, extended-year adjusted cohort graduation rates reported for a given year to include in the numerator any students with the most significant cognitive disabilities who obtain a State defined alternate diploma within the time period for which the State ensures the availability of a free appropriate public education.”

[This will have the effect of allowing students with the most significant cognitive disabilities who are awarded a state’s alternate diploma that meets the criteria in the statute to be counted as a four-year graduate at the conclusion of the year in which the diploma is awarded (or during the summer session immediately following)].

**-Removal from a cohort.** To remove a student from a cohort, the statute requires “a school or local educational agency shall require documentation, or obtain documentation from the State educational agency, to confirm that the student has transferred out, emigrated to another country, or transferred to a prison or juvenile facility, or is deceased.” ESSA, § 8002, (25)(C)

**Comment:** The language in the proposed regulation at § 200.34(b)(3) needs to be clarified to be consistent with the precise language of the statute so as not to be abused. The language in the proposed regulation that requires documentation that a student enrolled in another school or education program that *culminates in* the award of a regular high school diploma or a State defined alternate diploma for students with the most significant cognitive disabilities does not provide the level of protection to which students are entitled based on the more limiting and precise language of the statute, e.g., a school or educational program in which the student “is expected to receive”.

The proposed language must state explicitly that for a student to be identified as having ‘transferred out’ means that there must be written documentation provided by the receiving school or LEA in which the student has enrolled, that the student has transferred to a school from which he/she “*is expected to receive a regular high school diploma*” or to another education program from which the student “*is expected to receive a regular high school diploma or an alternate high school diploma*” consistent with the Act. [ESSA, § 8002 (25)(C)] It is not the same for a student to enroll in a “school or program that culminates in” – i.e., provides for the award of a diploma upon successful completion of particular requirements or conditions. Rather, what is required is written evidence that this student has transferred to a school or program in which this particular student “is expected to receive” a regular high school diploma or alternate high school diploma consistent with the Act.

Moreover, any lack of written documentation from the receiving school or program in which the student is enrolled shall mean that the student shall remain in the cohort.

**Action requested:** At §200.34(b)(3)(i), after “Transferred out” STRIKE and replace the language consistent with the following statutory language:

After “transferred out such that the school or LEA has official written documentation that the student is enrolled in another school or educational program” DELETE: “that culminates in the award of” REPLACE with: “in which the student is expected to receive”

**- Disaggregation of number and percentage of students with disabilities reported in the four year ACGR.**

**Action requested:** At proposed § 200.34, **ADD:** subsection (f) to require States and LEAs to disaggregate the number and percentage of students with disabilities reported in the four-year ACGR into two categories:

- Those students with disabilities earning a regular high school diploma at the conclusion of their fourth year, or during a summer session immediately following their fourth year and

- Those students with the most significant cognitive disabilities earning a state-defined alternate diploma within the time period for which the State ensures the availability of a free appropriate public education under section 612(a)(1) of the Individuals with Disabilities Education Act (20 U.S.C. 1412(a)(1)).

Thank you for your consideration of our comments.

Yours truly,



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