



August 1, 2016

Meredith Miller  
U.S. Department of Education  
400 Maryland Ave., SW Room 3C106  
Washington, DC 20202-2800

RE: Docket ID ED-2016-OESE-0032: Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act – Accountability and State Plans

Dear Ms. Miller:

The National Center for Special Education in Charter Schools (NCSECS) is dedicated to ensuring that students with disabilities have equal access to charter schools and that public charter schools are designed and operated to enable all students to succeed. We write to provide input regarding regulations for Title I accountability and State plans of the Elementary and Secondary Education Act as amended by the Every Student Succeeds Act (ESSA), which impacts all public Title I schools, including charter schools.

NCSECS worked intently with the civil rights and disability community throughout the ESEA reauthorization process on ESSA and partners with charter school and special education leaders through our Equity Coalition. We have high expectations that the updated law will successfully foster high achievement and equity, especially for students with disabilities. Our comments are organized as follows:

- I. Questions Posed by ED
- II. Recommendations that Strengthen Charters, Promote Equity and Improve the Status of Students with Disabilities

We provide input to draft regulations developed by The U.S. Department of Education (ED) that we believe are essential to assuring Title I creates and supports access and improved outcomes for underserved students and strengthens the impact of ESEA on both traditional public and charter schools.

## **I. Questions Posed by ED**

**Question regarding § 200.16:** Whether we should retain, modify, or eliminate in the [existing] title I regulations provision allowing a student who was previously identified as a child with a disability under section 602(3) of the Individuals with Disabilities Education Act (IDEA), but who no longer receives special education services, to be included in the students 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.

**NCSECS RECOMMENDATION: Eliminate the existing Title I regulation** as described above. NCSECS urges ED to ***only count students with disabilities who have exited special education in the disability subgroup for the school year in which they exited.*** In each subsequent school year that a student with a disability is not receiving special education, the student should be counted with all students, as well as within any other relevant subgroup.

**RATIONALE:** If a student no longer needs special education services they should no longer be included in the disability subgroup, which is defined as students with disabilities that receive services through the IDEA. However, for reporting ease, NCSECS supports that a student who has exited from special education in the middle of a school year may still be counted in the disability subgroup for the school year in which they exited.

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

**NCSECS RECOMMENDATION: Retain §200.19(c)(1)** which states that a State’s methodology for determining “consistently underperforming subgroups’ must consider the schools performance over no more than two years.

**Rationale:** NCSECS strongly supports a robust methodology for identifying ‘consistently underperforming subgroups’. A State’s methodology should reinforce the notion that there must be a timely recognition of student subgroups that are underachieving. Building an accountability system that promotes this timely recognition – such as over the course of two years, as noted in 200.19(c)(1) – should result in actions, support, and evidence-based practices to increase student achievement.

**NCSECS Recommendation: Revise §200.19(c)(3)** by requiring those States that select (c)(3)(iii) and (c)(3)(iv) from the list of methodologies for defining ‘a consistently underperforming subgroup of students’ to also take into account (i) a subgroup of students 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.’

**Rationale:** This revision would ensure that States do not rely solely on a relative comparison to define ‘underperformance’ for subgroups. It is critical that ED direct states in getting the methodology right for ‘consistently underperforming subgroups’. Not only does this methodology provide public transparency but it is the mechanism within ESSA that prompts targeted resources for schools to develop and implement a plan to improve achievement. Its importance cannot be overstated.

Specifically, NCSECS believes that to determine whether student subgroups are underperforming it is important for States to consider: (1) whether the subgroup is meeting the State defined long-term goals and interim progress measures; and (2) the performance of the subgroup in relation to higher performing groups of students.

By considering only how subgroups of students are performing relative to other students without also taking into account whether they are meeting/missing the State defined long term goals and measures of interim progress, numerous unintended consequences can occur. These unintended consequences include providing a perverse incentive for States in establishing truly ambitious long-term goals and interim progress measures. It could also result in creating a scenario where “underperformance” is only shown when achievement levels are extremely low. By using this relative comparison to define

‘underperformance’ there is a real possibility that student subgroups who are truly underperforming will not be identified simply due to poor methodology, not because they are thriving. The “masking” impact of such a methodology that relies solely on a comparison – rather than performance based meeting/missing State-established long-term goals and interim progress measures – has the potential to reverse the decades of progress that have been made to increase transparency of student achievement and spur action when any subgroups of students are not achieving.

Therefore, we urge ED to strengthen its approach to a State’s methodology of identifying consistently underperforming subgroups by requiring any State that proposes to use a comparative methodology (such as those outlined in §200.19(c)(3)(iii) and (iv)) to also take into account standards-based measure (such as those outlined in §200.19(c)(3)(i) and (ii)).

**Question Regarding § 200.34:** *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 (ACGR), and suggestions for ways to standardize these criteria.*

**NCSECS RECOMMENDATION: Standardize the criteria for including children with disabilities within the ACGR.** A two-fold criteria is recommended. Only students meeting both of the following criteria should be reported:

- 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
- 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 their time in the cohort.

**RATIONALE:** Currently, states are defining students who are counted in the “students with disabilities” subgroup of the ACGR in a variety of ways. ESSA regulations should eliminate this inconsistency so that the reported ACGR for students with disabilities is consistent across states. The 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 and is comparable across States. It will also align, to some degree, with the data collection under Section 618 of the IDEA for exiting students, which is being used in ED’s 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.

### **III. Recommendations that Strengthen Charters, Promote Equity and Improve the Status of Students with Disabilities**

#### **Stakeholder Engagement**

**NCSECS RECOMMENDATION: Retain all of the proposed provisions in the final ESSA regulations that require stakeholder engagement** – which assures charter school leaders (§299.15(a)(7), parents (§299.15(a)(8) and others are included in the planning related to: State Report Cards; LEA Report Cards; State Plans; 95% participation rate; and Identification of Schools (including both schools receiving Comprehensive and Targeted Support and Improvement).

**RATIONALE:** NCSECS has communicated previously that broad and inclusive stakeholder engagement will help support the important alignment of Title I with the IDEA as well as other civil rights statutes; reinforcing the State’s commitment to fund every district equitably to support teachers and students. ED

must also provide recommendations to help guide states in conducting a meaningful planning process that ensures all Title I schools encourage and promote meaningful engagement and input of all parents/guardians and that schools communicate and provide information and data in ways that are accessible to all parents (e.g. written, oral, and translated).

#### **Participation of All Students in Assessment and Accountability Systems:**

**NCSECS RECOMMENDATION:** Retain all of the 95% participation rate requirements outlined in the proposed regulations, especially in §200.15.

**RATIONALE:** We support the 95% participation rate requirement in the proposed regulations because this inclusive policy resulted in families, educators, and policymakers receiving comparative information about the academic achievement of students with disabilities for the first time. Before the 95% participate rate policy was implemented, only one state – Kansas – tested 95% or more of their students with disabilities in the 2000-2001 school year, according to the National Center for Educational Outcomes. By 2005, after the 95% participation rate requirement was implemented, 46 states and D.C. reformed their practices and included students with disabilities at this rate.

**§200.14(d)** *“(d) A State must demonstrate in its State plan that indicators of Academic Progress and School Quality or Student Success is supported by research that performance or progress on such measures is likely to increase student achievement or, for measures within indicators at the high school level, graduation rates.”*

**NCSECS RECOMMENDATION:** Retain §200.14(d) to assure indicators are support by research.

**RATIONALE:** We recognize that the ESSA statute allows State accountability systems to include – along with several academic indicators – an indicator of school quality and student success. This “non-academic” indicator, when chosen carefully and implemented well, can provide actionable information to families, educators and policymakers that can help improve educational outcomes for all students, including students with disabilities. In order to help States sharply focus efforts and resources on the purpose of ESSA which as stated in the statute is: *“To provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps”* it is important that this additional indicator be supported by research showing how the indicator is connected to improving academic achievement and graduation rates.

#### **§200.16: Subgroups of Students**

**NCSECS RECOMMENDATION:** Retain the provisions of this section and especially the requirement in §200.16(a)(2) which specifically requires that States measure performance on each indicator, differentiating schools for all students and *for each subgroup, separately*.

**RATIONALE:** NCSECS has consistently advocated that in alignment with the statute, the regulation must prohibit States from measuring the performance of a super-group of students in place of individual student groups. In recent years, as more and more States have been designing their own accountability systems, many have chosen to base their school ratings either solely on schoolwide average performance or on schools’ performance for students overall and for a super-group of students. As a result, in most States, school ratings tell parents and community members little about how schools are performing for individual groups of students. Schools that are doing fairly well on average, but are performing poorly for, for example, their students with disabilities, are allowed to ignore this underperformance.

NCSECS urges ED to reinforce wherever possible, the importance of every student having ready access to schools, including charter schools, prepared to provide them with a high quality education. Data emerging from states with weak accountability systems confirm the need for such systems. In an effort to ensure charter schools meet their potential to provide individual students with a quality education and catalyze broader system improvement, meaningful accountability is essential. When school or district designed interventions aren't working, schools must implement alternative approaches to promote and support academic progress for students. Delaying intervention wastes time and harms students. Therefore, new Title I regulations should reinforce that every school and district must account for and support the academic performance of all students.

#### **§200.17: N Size**

**NCSECS RECOMMENDATION: Modify §200.17(a)(2)(iii) to read: “(iii) Must not exceed ~~30~~ 10 students, unless the State provides a justification for doing so in its State plan under section 1111 of the Act consistent with paragraph (a)(3)(v) of this section;”**

**RATIONALE:** Under §200.17, ED appropriately proposes a threshold n-size above which a state would need to provide a justification in its Title I plan, specifically the data on the number and percentage of schools that are not held accountable for the results of each required subgroup of students in the state's system of annual meaningful differentiation. However, the proposed threshold of 30 students is far too high. One of the most important equity-focused provisions of ESSA is the requirement for schools with consistently underperforming subgroups to be identified for evidence-based, targeted intervention. An unnecessarily high n-size would circumvent the intention of the law under the pretext of protecting student privacy and statistical reliability.<sup>i</sup>

According to the National Center for Education Statistics, a state can set an n-size of 10 students, and even as low as 5 students, and fully meet requirements for statistical reliability and student privacy.<sup>ii</sup> Therefore, an n-size of 30 students is clearly excessive. Moreover, twenty-nine states already have an n-size below 30. ED's current proposal could have the unintended consequence of encouraging those states to increase their n-size. As justification for an n-size of 30, you recently referenced a report from the Institute of Education Sciences during House and Senate ESSA oversight hearings stating that an n-size of 30 captures 79 percent of students with disabilities. It is important to note that this study was limited to only fourteen states.<sup>iii</sup> Moreover, it is concerning that 21 percent of students with disabilities would not be captured by an n-size of 30, and in some states, this percentage could be much higher. 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.

**NCSECS RECOMMENDATION: Retain** the requirement in this provision requiring States to 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.

**NCSECS RECOMMENDATION: Add a new §200.17(a)(3)(vi) to read: “(vi) Information regarding the number and percentage of schools that would not be held accountable for the results of students in one or more subgroups described in §200.16(a)(2) in the accountability system for each indicator described in §200.14.”**

**RATIONALE:** The intent of ESSA was clear in conveying the importance of transparency when student subgroups are excluded from the State's accountability system due to N size. The language above would ensure that the spirit of transparency translated into a critical aspect of the State accountability system: each indicator.

**NCSECS RECOMMENDATION: Modify § 200.17 (a)(2)(iv) to read:** *“(iv) Information regarding the number and percentage of all students and student in each subgroup described in 200.16 (a)(2) for whose results school would not be held accountable in each indicator of the State accountability system for annual meaningful differentiation under 200.18”*

**RATIONALE:** The information required in § 200.17 (a)(2)(iv) must be provided for each indicator of the State accountability system regardless of whether the minimum group size being proposed is the same for all indicators or differs across indicators in order to provide stakeholders with complete information on the impact of the proposed group size(s).

**NCSECS RECOMMENDATION: Modify § 200.17 (a)(3)(v) to read:** *“(v) Information regarding the number and percentage of schools that would not be held accountable for the results of one or more student subgroups in each indicator of the State accountability system for annual meaningful differentiation under 200.18.”*

**RATIONALE:** States should be required to submit these data in support of the proposed minimum group size for each indicator in order for stakeholders to be fully informed.

#### **§200.18(b)(3) and (4): Meaningful Differentiation**

**NCSECS RECOMMENDATION: Retain §200.18(b)(3) and (4)** which describe the process for meaningful differentiation between schools that provide the public with both an overall summative school rating and information about how a school performed on each indicator within its accountability system, as measured for all students and each subgroup. We strongly support the requirement that systems for annual meaningful differentiation for all public schools result in a single rating for each school (§200.18(4)).

**RATIONALE:** NCSECS has advocated that school accountability [summative] ratings, or combination of ratings (be they letter grades, other labels, index values or rankings etc.) must reflect how each school is performing for each group of students that it serves, as well as whether the school is consistently underperforming for any student group. Ratings must be based on disaggregated results for each group of students, and differentiate schools that consistently underperform for any group. The ESSA statute is clear that some indicators must be a more significant factor in a State’s accountability framework than others. In fact, the statute goes into great detail to describe the relationship between the indicators and how they should be ‘weighted’ in a State’s accountability system. The proposed regulations operationalize the framework outlined in the statute by including summative ratings for schools and reinforcing the need to disaggregate subgroup performance on each of the indicators.

Most importantly, if evidence indicates student subgroups within any school are not meeting State-defined outcomes, then districts and their respective schools should work together to provide targeted support and intervention within a reasonable timeframe that benefits the student group not meeting state-set standards. Furthermore, an accountability system should reinforce the importance of improving academic outcomes for all students and student subgroups.

#### **§200.24(d)(2): Resources to support continued improvement**

**NCSECS RECOMMENDATION: REVISE proposed section 200.24(d)(2) and ADD a new clause (iii) which reads:** *“(iii) Using funds that it reserves under section 1003(a), directly provide for the creation of new, replicated, or expanded charter schools to serve students enrolled in schools identified for comprehensive support and improvement, and other students in the local community, provided that:*



*“(A) The SEA has the authority to take such an action under State law or, if the SEA does not have that authority, the SEA has the LEA’s approval to use the funds in this manner; and*

*“(B) Such charter schools will be established and operated by non-profit entities with a demonstrated record of success (particularly in serving students from communities similar to those that would be served by the new charter schools), which the State shall determine through a rigorous review process.”*

**RATIONALE:** This language would be consistent with other provisions of the proposed regulations that support the concept of making charter school options available to students who would otherwise be enrolled in low-performing schools. The language makes it possible for students enrolled in comprehensive support and improvement schools (as well as other students in the neighborhood or local community) to have the opportunity to transfer to a charter school run by a highly successful operator. We emphasize that the language would allow an SEA to use section 1003 funds for this purpose with the approval of the affected LEA, unless state law gives the SEA the authority to take such an action without LEA approval.

#### **§ 200.30(a)(2)(A) and § 200.30(a)(2)(B): Annual State report card**

**NCSECS RECOMMENDATION:** Retain the provisions in § 200.30(a)(2)(A) and § 200.30(a)(2)(B) requiring State report cards to include how the percentage of students in each subgroup and the academic achievement for each charter school authorized compares to the district or districts from which the charter school draws a significant portion of its students or geographic community within the LEA [as determined by the State].

**RATIONALE:** NCSECS strongly supports these provisions as they help provide the transparency of data that parents, communities and school leaders need to make the critically important decisions regarding the use of resources, providing interventions and supports and ensuring equity so that all students can achieve. As one example, authorizers such as the DC Public Charter School Board have introduced Equity Reports, loosely analogous to report cards, to introduce a heightened level of transparency.

#### **§200.34(c)(2): Definition of “regular high school diploma”**

**NCSECS RECOMMENDATION:** Delete the text as indicated: *“(2) “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.~~”*

**RATIONALE:** This language is not in the statute and NCSECS strongly urges ED to delete the language indicated above because it allows for the unintended consequence of allowing a ‘regular high school diploma’ to be defined to include a diploma that is based on meeting IEP goals that are fully aligned with the State’s grade-level academic content standards.

Awarding a regular high school diploma based on whether a student has met his/her IEP goals – whether they are aligned to grade-level standards or not – is wholly inappropriate for the following reasons:

- IEPs are not designed to be qualifying documents for obtaining a regular high school diploma; they are intended to be child-centered documents that are individually developed to provide information on specific goals, special education and related services, and accommodations necessary.
- IEPs often do not include goals aligned to every standard that might be appropriate for graduation. Additionally, it is very likely that a goal could be based on a standard, but be nowhere close to reflecting what the student would need to do to meet the graduation requirement.
- Allowing this practice would revert back to a time when the performance of students with disabilities was based solely on whether or not they met their IEP goals, which has resulted in a lowering of expectations and goals for students with disabilities.

**NCSECS RECOMMENDATION:** Delete § 200.34(e)(4)(ii): *“(iii) 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.”*

**RATIONALE:** See the rationale following the next recommendation.

**NCSECS RECOMMENDATION:** Add subsection (f) to § 200.34 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)).

**RATIONALE:** 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 ACGR. Together, the changes we propose will have the effect of allowing students with the most significant cognitive disabilities – who are awarded a state’s alternate diploma (that in fact 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).

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.

We believe the legislative intent of the new provision allowing students awarded an alternate diploma to be counted as four-year graduates in the ACGR was clearly intended 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 was awarded his or her alternate diploma, the student would be counted in the four year ACGR data for that year, and not for the actual cohort year in which he or 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 would also discourage schools from inappropriately ending IDEA services to students earlier than their rights under IDEA allow.

In conclusion, NCSECS reminds ED that together, we support the innovation and autonomy the law intends for charter schools, however, through the creation of new and high quality educational opportunities for students we must also require and support robust accountability systems. Absent rigorous accountability structures that include clear consequence for failure to meet performance metrics, the charter concept is unlikely to reach its potential. NCSECS appreciates the opportunity to comment and make recommendations to implement ESSA.

Sincerely,



Lauren Morando Rhim, Ph.D.

**NCSECS.ORG**  
National Center for Special Education in Charter Schools

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<sup>i</sup> M.A. Simpson, B. Gong, and S. Marion, *Effect of Minimum Cell Sizes and Confidence Interval Sizes for Special Education Subgroups on School-level AYP Determinations: Synthesis Report 61* (Washington, DC: Council of Chief State School Officers and Minneapolis, MN: National Center on Educational Outcomes, University of Minnesota, 2006).

<sup>ii</sup> U.S. Department of Education, National Center for Education Statistics, *Statistical Methods for Protecting Personally Identifiable Information in Aggregate Reporting* (NCES 2011–603) (Washington, DC: Author, 2011).

<sup>iii</sup> J. Harr-Robins et al., *The Inclusion of Students with Disabilities in School Accountability Systems: An Update* (NCEE 2013–4017) (Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education).