



August 1, 2016

The Honorable John King
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202-280

RE: Comments on Every Student Succeeds Act – Accountability and State Plans Proposed Regulations, Docket ID: ED-2016-OESE-0032

Dear Secretary King:

The Dignity in Schools Campaign (DSC) submits this letter in response to the U.S. Department of Education’s (the Department) request for comments on the proposed regulations for the accountability and state plans provisions of Title I of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015 (ESSA).¹ DSC is a coalition of over 100 grassroots and education advocacy organizations in 27 states. Since its inception in 2006, DSC members have worked to dismantle the school-to-prison pipeline by advocating for educational environments that keep students in school and learning. We have challenged the systemic use of exclusionary discipline practices that disproportionately impact students of color, students with disabilities, and students who identify as Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ), a problem that the Department’s most recent civil rights data verifies.²

DSC opposed the passage of ESSA because we were deeply concerned about provisions in it that restricted the Department’s oversight authority and its ability to assist states and local school districts with improving educational outcomes for students in failing schools. But, through the issuance of regulations and guidance, the Department continues to have the authority to help states and school districts ensure that all students have a “significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps,” as required

¹ Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act-Accountability and State Plans, 81 Fed. Reg. 34539, 34544 (May 31, 2016), (hereinafter, Accountability and State Plans Proposed Regulations).

² U.S. Dep’t of Education, 2013-2014 Civil Rights Data Collection: A First Look (June 7, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

by ESSA.³ Consistent with our January 2016 letter to the Department, which commented on priorities for Title I regulation,⁴ we respectfully urge the Department to strengthen the proposed regulations relating to: school climate and safety; stakeholder engagement in the development and monitoring of state plans and accountability measures; and the re-integration of students returning to public schools after a placement in the juvenile justice system. Specifically, the Department’s proposed regulations should:

I. Assist states with selecting and defining school climate and safety as a measure of school quality and student success by providing multiple means of measuring and improving school environments
(Proposed regulation §200.14)

In response to persistent advocacy by DSC and other organizations, Members of Congress recognized the critical role that positive school climate plays in student achievement by including a provision in ESSA requiring state accountability systems to comprise one or more school quality and student success indicators.⁵ These indicators may include annual measures of school climate and safety for all students and separately for subgroups of students.⁶

Proposed regulation §200.14 reiterates this provision of ESSA, and adds that school quality and student success indicators must be supported by research showing that progress on these measures will result in student achievement.⁷ The executive summary of the proposed regulations, however, provide only one example of how school climate and safety may be measured – “through a robust, valid student survey that measures multiple domains (e.g., student engagement, safety, and school environment.”⁸ We urge the Department to provide more guidance by requiring states to define school climate and safety and use multiple means of measuring outcomes.

³ Accountability and State Plans Proposed Regulations, *supra* note 1, at 34549 (discussing § 1001 of ESSA).

⁴ Letter from Dignity in Schools Campaign to Deborah Spitz, U.S. Department of Education (Jan. 21, 2016) <http://www.dignityinschools.org/sites/default/files/1-21%20DSC%20ESSA-Title%20I%20RFI.pdf>.

⁵ Accountability and State Plans Proposed Regulations, *supra* note 1, at 34545 (discussing §1111(c)(4)(B)(v) of ESSA).

⁶ *Id.* at 34549 (discussing § 1111(c)(2) of ESSA, which defines “subgroups of students” as “economically disadvantaged students, students from major racial and ethnic groups, children with disabilities, and English learners”).

⁷ *Id.* at 34598-99.

⁸ *Id.* at 34547.

It goes without saying that students simply cannot learn if they are not in school; and, recent civil rights data released from the Department indicate that during the 2013-14 school year, 2.8 million public school students received at least one out-of-school suspension.⁹ These data and other national research have shown that exclusionary and punitive disciplinary practices disproportionately impact students of color, students with disabilities, and those who identify as LGBTQ.¹⁰ Consequently, these students are more likely to drop out of school, be retained a grade, or become involved in the juvenile or criminal justice systems.¹¹

The Department's regulations should help states define school climate and safety. For example, DSC's *Model Code on Education and Dignity* urges states and local school districts to create positive school climates where "students feel socially, emotionally and physically safe, ... there is mutual respect between teachers, students, parents or guardians, and ... students' self-expression and self-esteem are supported."¹² Research has shown that schools are safe when personnel utilize preventive and positive approaches to discipline, such as responding to student misbehavior in constructive ways, which could improve students' academic performance and teacher satisfaction, and reduce violence and disciplinary incidents.¹³ The regulations should require states to include these or similar definitions of these terms in their state plans, in consultation with parents and other stakeholders.

Additionally, the Department's regulations should mandate states to measure school climate by analyzing the school discipline data they are required to collect, publish and distribute to the public annually. Specifically, ESSA provides that states and school districts must publish annual report cards that detail rates of in and out-of-school suspensions, expulsions, school-based arrests, referrals to law enforcement, chronic absenteeism, and incidences of violence, including bullying and harassment.¹⁴ Therefore, instructing state and local educational agencies to

⁹ U.S. Dep't of Education, *supra* note 2, at 3.

¹⁰ *See id.* *See also*, Hilary Burdge, Adela C. Licon & Zemi T. Hyemingway, *LGBTQ Youth of Color: Discipline Disparities, School Push-out, and the School-to-Prison Pipeline 2*, https://gsanetwork.org/files/aboutus/LGBTQ_brief_FINAL-web.pdf ("Research shows that LGBTQ youth of color in particular face persistent and frequent harassment and bias-based bullying from peers and school staff as well as increased surveillance and policing, relatively greater incidents of harsh school discipline, and consistent blame for their own victimization.").

¹¹ Russell J. Skiba, Mariella I. Arredondo & M. Karega Rausch, *New and Developing Research on Disparities in Discipline*, *Discipline Disparities: A Research-to-Practice Collaborative*, 2 (Mar. 2014).

¹² The Dignity in Schools Campaign, *A Model Code on Education and Dignity*, Revised October 2013, at 18, http://www.dignityinschools.org/files/Model_Code_2013.pdf.

¹³ *Id.*

¹⁴ *Accountability and State Plans Proposed Regulations*, *supra* note 1, at 34572 (discussing §1111(h)(1)(C)(viii) and §1111(h)(2)(C) of ESSA).

use these data to measure school climate would not be an added burden. We encourage the Department to offer any technical assistance or guidance to states on how to comprehensively and accurately collect these data for all students and by student subgroups as required by ESSA.

In addition to instructing states and school districts to use school discipline data to measure school climate and safety, the Department's regulations should provide multiple examples of evidence-based best practices for improving educational environments. The Department has highlighted some of these best practices, such as peer mediation, school-based counselors and mental health professionals, and restorative practices, in its *Dear Colleague Letter on the Non-Discriminatory Administration of School Discipline*.¹⁵ Also, researchers have documented school-based interventions for addressing disparities in school discipline.¹⁶ Providing examples of these resources in this regulation will equip states and school districts with the necessary tools to foster positive and inclusive school climates.

Also, in an effort to ensure that school climate measures are inclusive of all students, we urge the Department to add LGBTQ students as a subgroup of students whose performance is considered in states' accountability systems. Research shows that LGBTQ students of color in particular face persistent harassment, bullying and harsh disciplinary practices.¹⁷ Yet, little has been done to address this problem, in part because there is limited information collected from this student population. The Department's regulations should offer ways in which states and school districts could gather school climate information from LGBTQ students, such as through surveys that allow students to anonymously self-identify their sexual orientation and/or gender identity as well as their school experiences.¹⁸

¹⁵ U.S. Dep't of Justice & U.S. Dep't of Education, *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* app. at 2 (2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

¹⁶ Anne Gregory, James Bell & Mica Pollock, *How Educators Can Eradicate Disparities in School Discipline: A Briefing Paper on School-Based Interventions*, Discipline Disparities Series: Interventions, Mar. 2014, at 1.

¹⁷ Mariella Arredondo et al., *Documenting Disparities for LGBT Students: Expanding the Collection and Reporting of Data on Sexual Orientation and Gender Identity*, Discipline Disparities: A Research-to-Practice Collaborative, Mar. 2016, at 1.

¹⁸ *See id.* at 5.

II. Prohibit the Use of School Discipline Practices to Exclude Students from Participating in Annual Testing (*Proposed Regulation § 200.15*)

ESSA relies heavily on annual tests to measure students' academic achievement. High-stakes testing has led some schools to use various tactics, including disciplinary action, to ensure that low-achieving students are excluded from testing. "Schools have incentive to keep high performing students in school and low-performing students out of school during the testing window in order to maximize aggregate test scores."¹⁹ The Department should explicitly draw attention to this exclusionary tactic and deter schools from employing it.

Proposed regulation § 200.15(d)(2) provides that a state, school district, or school may not systematically exclude students in any subgroup from participating in annual testing. We recommend that the Department explicitly state in this regulation that educational agencies cannot systematically exclude subgroups of students from annual testing through the use of disciplinary actions, such as out-of-school suspensions, expulsions and school-based arrests.

III. Ensure that states are held accountable for the success of each subgroup of students by prohibiting "super groups" and decreasing the number (n-size) of students included in accountability systems (*Proposed regulation §§ 200.16 and 200.17*)

DSC supports the provisions in ESSA and the Department's proposed regulations requiring state accountability systems to capture and report the performance of all students and each of the following subgroups of students: economically disadvantaged; major racial and ethnic groups; children with disabilities; and English language learners.²⁰ The proposed regulations clarify that states cannot combine students from racial and ethnic groups into one "super group," for example. The prohibition on super groups will ensure that states, school districts and schools are held accountable for the academic success of all students, particularly subgroups of students that have been underserved historically.

¹⁹ David N. Figlio, *Testing, Crime and Punishment*, 90 J. Pub. Econ. 837 (2003). See also, Advancement Project, *Test, Punish, and Push Out: How "Zero Tolerance" and High-Stakes Testing Funnel Youth into the School-To-Prison Pipeline* 6 (2010), https://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf ("The practice of pushing struggling students out of school to boost test scores has become quite common. There are a number of widely used strategies for manipulating test scores, such as withdrawing students from attendance rolls, assigning students to alternative schools, coercing or encouraging students to drop out or enroll in General Educational Development (GED) programs, along with using suspensions, expulsions, and referrals to alternative schools.")

²⁰ Accountability and State Plans Proposed Regulations, *supra* note 1, at 34549-52 (discussing §1111(c)(2) and (4) of ESSA).

While we are encouraged that ESSA and the proposed regulations require states to determine, in consultation with stakeholders, the number of students (n-size) that states will use for accountability and reporting purposes,²¹ the proposed n-size of 30 is too large and may result in the exclusion of far too many students from state accountability systems. We recommend requiring states to set an n-size as small as possible, without revealing personally identifiable information about individual students. There is research supporting a statistically sound n-size of 10.²²

IV. Define Clearly What Constitutes a Partnership and Meaningful Consultation with Parents and Stakeholders in the Development of Needs Assessments, Improvement Plans, and State Plans
(Proposed regulations §§ 200.21, 200.22, and 299.13)

Proposed regulations 200.21 and 200.22 reiterate provisions in ESSA that require states to notify school districts if one or more schools are in need of improvement or one or more subgroups within a school are consistently underperforming. The DSC is pleased to see that the proposed rules require the local school district or school to “promptly” notify parents of the reasons for the identification and how they may partner with school officials, and other stakeholders, to conduct comprehensive needs assessments and create improvement plans. These regulations emphasize the importance of transparency and parental engagement in their children’s education.

To bolster this section, we recommend that the Department define “promptly” as no more than 60 days after the school district receives notice from the state. Additionally, this notification should go not only to parents, but to students as well, as it is their education and future at stake. We suggest that the proposed rule also detail what a “partnership” could entail, such as regular listening sessions with stakeholders, and the incorporation of stakeholder input.

Additionally, proposed regulation §299.13 details how states must engage in timely and meaningful consultation with parents and other stakeholders as they develop and change state plans by: providing public notice in a format and language that the public can access and understand; conduct outreach to solicit input; make the plan available for public comment for 30 days prior to the submission of it to the Secretary of the Department; and taking into account the feedback received from the consultation and public comments. DSC applauds this description of meaningful consultation, and urge the Department to strengthen this regulation by requiring states to make state plans available for public comment for

²¹ *Id.* at 34552-53 (discussing 1111(c)(3) of ESSA).

²² See, e.g., Jessica Cardichon, *Ensuring Equity in ESSA: The Role of N-Size in Subgroup Accountability*, Alliance for Excellent Education, 7 (June 2016). <http://all4ed.org/wp-content/uploads/2016/06/NSize.pdf>.

60 days, which would give stakeholders time to ask questions about the plan so as to inform their comments.

We recommend further that the Department include examples of how states may collect feedback received from stakeholders, such as exit surveys following meetings or written comments, including by electronic mail.

The regulations should also require that any comprehensive needs assessment consider school climate and safety measures, such as school discipline data and any disparities based on race, gender and disability. In order to fully address any resource inequities, as required by ESSA,²³ schools should be encouraged to include in their improvement plans requests for funding to improve school climate, such as for school counselors and evidence-based programs.

V. *Provide More Direction on How States Should Assist Local Educational Agencies with Improving School Environments for Student Learning (Proposed Regulation § 299.19)*

ESSA requires each state plan to include a description of how a state will support local educational agencies to improve school conditions for student learning, including through the reduction of: bullying and harassment incidents; the overuse of discipline practices that remove students from the classroom; and the use of aversive behavioral interventions that are unhealthy or unsafe for students.²⁴ Section 299.19 of the proposed regulations repeats this statutory language.

We urge the Department to define or list the types of disciplinary actions that would remove students from the classroom, such as in- and out-of-school suspensions, expulsions, referrals to law enforcement, and school-based arrests. Overuse of discipline practices should be defined as the disproportionate application of disciplinary actions to subgroups of students, and the imposition of discipline for subjective, nonviolent conduct, such as disrespect of authority and disorderly conduct. Also, the regulations should offer a definition for aversive behavioral interventions, such as involuntary confinement or the use of restraints, including handcuffs, that would prevent students from moving freely.

National data show that a significant number of schools have police stationed in them, and Black students are twice as likely to receive a referral to law enforcement or be subjected to a school-based arrest.²⁵ Therefore, this regulation should also encourage states to limit the presence of police in schools or at the least,

²³ Accountability and State Plans Proposed Regulations, *supra* note 1, at 34560-34564 (discussing § 1111(d)(1) and § 1111(d)(2) of ESSA).

²⁴ *Id.* at 34586 (discussing § 1111(g)(1)(C)).

²⁵ U.S. Dep't of Education, *supra* note 2, at 4-5.

provide guidance on proper training in order to ensure that their presence fosters a positive school environment.²⁶

VI. Ensure that Justice-Involved Students Receive Quality Instruction and Seamlessly Re-enroll into the Public Educational Systems (*Proposed regulation §200.34 and Title I Part D of ESSA*)

Section 200.34 of the proposed regulation provides that in calculating the four-year graduation rate for each high school, states must include students who transferred to a prison or juvenile facility, unless that facility offers a regular high school diploma or alternate diploma. We appreciate that this rule “helps ensure that this high-risk population of students does not disappear from graduation cohort so that either the school or facility remains accountable for students’ graduation outcome.”²⁷ But, the Department should go further by providing additional guidance to help states provide quality educational opportunities to students held in prison or juvenile facilities and efficiently re-enroll students returning from correctional facilities.

We generally support comments on the proposed regulations provided by a coalition of juvenile justice advocates.²⁸ More specifically, we urge the Department to issue regulations for the implementation of Title I, Part D of ESSA, which provides federal funding to states that seek to improve educational services for children and youth who are neglected or delinquent, provide these young people with services to ensure a successful transition from incarceration to public schools, and prevent youth from dropping out of school.²⁹ ESSA provides that state plans requesting Title I, Part D funds must describe how states will ensure that these children and youth: achieve a regular high school diploma; re-enroll in secondary schools or reentry programs in a timely fashion after a period of incarceration; transfer credits earned during incarceration; and participate in credit-bearing coursework.³⁰ But, the law does not require states to follow through with assurances they include in their state plans.

It is important to have regulations and guidance from the Department to help states realize the law’s intent to re-enroll and reintegrate students who return to

²⁶ See generally Justice Policy Institute, *Education Under Arrest: The Case Against Police in Schools* (Nov. 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

²⁷ Accountability and State Plans Proposed Regulations, *supra* note 1, at 34577.

²⁸ Letter from Robert F. Kennedy Juvenile Justice Collaborative, *et al.*, to the U.S. Department of Education, Aug. 1, 2016, (commenting on the proposed rules for the Every Student Succeeds Act to improve access to education for young people involved in and reentering from the juvenile justice system).

²⁹ Every Student Succeeds Act, Public Law, 114.95, S. 1177, 114th Cong. §1401 (2015).

³⁰ *Id.* at § 1414.

public schools after placement in the juvenile or criminal justice system. For example, regulations could require states to collect data on the number of formerly justice-involved students who re-enroll in public school systems receiving Title I, Part D funds.

Additionally, the Department should include rules that ensure that coursework in facilities are aligned with challenging academic standards. We believe that, if properly implemented, these suggestions could help states establish procedures and supports to ensure that system-involved students can access the quality instruction needed to continue to learn, re-enroll in school, gain a regular high school diploma, and go on to attain postsecondary credentials.

Thank you for your consideration of these comments. We look forward to continuing to work with the Department and state and local educational agencies to ensure that ESSA is implemented in a manner that allows all students to succeed. If you have any questions or concerns, please do not hesitate to contact Natalie Chap at natalie@dignityinschools.org.

Sincerely,

The Dignity in Schools Campaign
(www.dignityinschools.org)