August 1, 2016

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

RE: Elementary and Secondary Education Act of 1965 (Docket Number: ED-2016-OESE-0032-0001)

Dear Ms. Miller:

On behalf of the American Bar Association, with nearly 400,000 members, I write to offer our comments on the proposed regulation referenced above. The ABA has long advocated for the educational needs of children in foster care, some of the country’s most disadvantaged students. We are pleased that the Every Student Succeeds Act, for the first time, includes provisions related to students in foster care. We submit these comments to the Department of Education regarding effective implementation of state plans.

We would appreciate the opportunity to discuss any or all of our comments with you in further detail or provide additional information about the educational needs of children and youth in foster care. Please feel free to contact Kathleen McNaught, Project Director, ABA Center on Children and the Law (202-662-1966; kathleen.mcnaught@americanbar.org).

Sincerely,

Thomas M. Susman
AMERICAN BAR ASSOCIATION COMMENTS ON FOSTER CARE PROVISIONS OF PROPOSED ESSA REGULATIONS

We applaud the U.S. Department of Education (ED) for issuing these regulations, and believe the foster care-related provisions will support effective implementation of the Every Student Succeeds Act. Our comments fall into three categories: I) Transportation, II) Data and Reporting, and III) Supportive Services.

I. Transportation

In §299.13(c)(1)(ii), ED proposes the following regulation to the Title I state plan:

The SEA will ensure that an LEA receiving funds under title I, part A of the Act will provide children in foster care transportation, as necessary, to and from their schools of origin, consistent with the procedures developed by the LEA in collaboration with the State or local child welfare agency under section 1112(c)(5)(B) of the Act, even if the LEA and local child welfare agency do not agree on which agency or agencies will pay any additional costs incurred to provide such transportation.

We strongly support ED for issuing this proposed regulation and for recognizing the critical importance of ensuring that children in foster care receive transportation when needed to support school stability. It is essential that states receive clear direction about this issue. A failure to provide such transportation is a common barrier to stability and it will be a challenge to implement this statutory requirement without clear federal guidance.

However, we propose the following alternative language that we believe may more directly clarify the joint obligations on both local education and child welfare agencies, consistent with the Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care (Guidance) issued on June 23, 2016 at http://www2.ed.gov/policy/elsec/leg/essa/index.html. As stated in this Guidance, “[ESSA and the Fostering Connections Act] make clear that the education stability of children in foster care is a joint responsibility of the educational and child welfare agencies, and to successfully implement these provisions, these entities will need to collaborate continuously” (p. 5). We believe the language below, which accords with the new Guidance, effectively outlines the obligations on both child welfare and education to collaborate to provide school stability transportation. Furthermore, consistent with ESSA, it clarifies obligations of education and child welfare agencies when additional costs are involved and there is a dispute about payment. Most importantly, like the proposed regulation, it will help to ensure that transportation is provided and funded for all children in foster care in accordance with negotiated established procedures and policies and that such transportation is not delayed—and hence the education of these students is not interrupted—during the pendency of any interagency disputes.

(ii) The SEA will ensure that an LEA receiving funds under title I, part A of the Act will ensure children in foster care promptly receive transportation, when necessary, to
Consistent with the statutory language, as well as the joint guidance, this version recognizes that both child welfare and education agencies have an obligation to ensure that transportation is provided, even if there is disagreement. Additionally, it allows for resolution of disputes per the collaboratively developed State plan, and ensures that during any period of dispute resolution, that there is a clearly identified local agency responsible for providing transportation pending the dispute. This language also allows for SEAs to use statewide guidelines or procedures for LEAs to consistently implement transportation throughout the State and ensure resolution of any disputes. We believe this allows for sufficient state and local flexibility, and clearly articulates the dual-agency responsibility while ensuring that all eligible children promptly receive transportation to their school of origin when needed.

II. Data Collection and Reporting

a. Definition

In §200.30(f)(1)(iii), ED proposes the following regulation related to the Annual State report card:

(iii) With respect to the term “status as a child in foster care,” the term “foster care” has the same meaning as defined in 45 CFR 1355(a), which means 24-hour substitute care for children placed away from their parents and for whom the title IV–E agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, tribal, or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

We strongly support the inclusion of this definition within education regulations, especially because it cross-references federal child welfare regulations 45 CFR 1355(a). It is important to define this term and align it with Fostering Connections’ school stability requirements. However, we note that this definition is included only in the definitions relating to the Annual State Report
Card. We believe that it is important that a definition of a child in foster care that aligns with the federal child welfare definition is needed and should apply throughout the ESSA.

In addition, we note that some states currently define “child in foster care” more broadly than the federal definition. For example, California education law defines foster youth to include children who have not been removed from their home but are the subject of a petition filed in dependency court. As such, we recommend that the following sentence be added to the text of the proposed regulation: To the extent that state education law defines “child in foster care” more broadly to include children who are not living in 24-hour substitute care but for whom the Title IV-E agency has placement responsibility, states are permitted to apply that broader definition for purposes of data reporting.

We acknowledge that this change may result in slightly different reporting populations for purposes of the State Report Card. However, we do not believe this will cause significant discrepancies in comparing data among and between states, and will allow for states to have some flexibility to expand both protections and reporting for a slightly broader group of students (those under the placement and care responsibility of the state child welfare agency but who are living at home).

b. Student Achievement

In § 200.33(a)(3)(ii)(E)i, ED proposes that, for purposes of reporting student achievement results, information must be disaggregated by status as a child in foster care.

Because students in foster care have unique educational needs, and because we need to identify the educational barriers they face, we strongly support the designation of students in foster care as a subgroup for purposes of reporting student achievement data. Additionally, unlike in the situation of reporting high school graduation rates (see below), we do not believe that this clarification in regulation and annual reporting requirement will result in underreporting or inconsistent data.

c. High School Graduation Rates

In §200.34(e)(1)(i)ii, ED proposes regulations relating to the high school graduation rates and specifically asks whether criteria for the foster care subgroup should be standardized for adjusted cohort graduation rates and for suggestions for standardization. Simply stated, if the high school graduation rate is reported only for students in foster care at the time of reporting, the data will significantly underreport.

Status in foster care is, by nature, short-term. Students may move in and out of the foster care system for short- or long-term stays. It is common for children to be involved with the foster care system more than once. Finally, many students in foster care may drop out of school before reaching 12th grade.
In order to accurately reflect the academic achievement of students impacted by the foster care system, it is important to collect and report on both cohorts – those in foster care at the time of reporting (as a point-in-time cohort), as well as those who have ever experienced foster care while in high school. Doing so ensures that states have an accurate picture of the graduation success of students who have experienced foster care. To narrow the cohort only to those in foster care at the time they exit high school will fail to capture the significant number of students impacted by foster care who may have dropped out or fallen behind rather than timely exited high school.

Accordingly, we recommend the following:

(c) Definition of terms.

For the purposes of calculating an adjusted cohort graduation rate under this section—
(4) “Child in foster care” as defined by §200.30(f)(1)(iii) shall include two disaggregated subgroups as separate reporting categories:
(1) Students in foster care at the time of graduation and
(2) Students who ever qualified as children in foster care in grades 9-12.

We understand that collecting both cohorts (those in foster care at the time of graduation, and those who have ever experienced foster care while in high school) will create additional data collection requirements. However, we are confident this is the most accurate way to have a full understanding of the educational experiences of students in foster care. If only one cohort is possible, we suggest collecting only those who were in foster care at any time during high school. This prevents underreporting and better reflects this vulnerable population of students.

d. State Accountability Indicators

In §200.14(b)(2), ED proposes regulations that require an Academic Progress Indicator for all elementary and middle schools to measure either student group based on reading and math assessments or another academic measure that meets requirements of the proposed regulation §200.14(c). The other academic measures of §200.14(c) would require use of a measure that: “(1) is valid, reliable, and comparable across all LEAs in the state; (2) is calculated in the same way for all schools across the State, except that measures within the indicator of Academic Progress and within any indicator of School Quality or Student Success may vary by each grade span; (3) is able to be disaggregated for each subgroup of students described in §200.16(a)(2); and (4) is used no more than once in its system of annual meaningful differentiation under §200.18.”

Additionally, in §200.14(b)(3), ED proposes regulations that require a Graduation Rate Indicator, which measures the adjusted cohort rate consistent with §200.34(a), and, at the state’s discretion, measures the extended adjusted cohort graduation rate consistent with §200.34(d).
ESEA in § 111(h)(1)(C)(ii-iii) requires these to be included in the state report card disaggregated for status as a child in foster care.

Because of the unique educational needs of students in foster care, as described above, we support the inclusion of youth in foster care as a subpopulation for purposes of the state accountability indicators.

III. Supportive Services

In § 299.18(b)(2)(i)(E) relating to supporting excellent educators and § 299.19(a)(2)(i)(E) relating to supporting all students, children and youth in foster care are identified as a specific identified group for support. As referenced above, because of the unique educational needs of students in foster care, and because of the critical need for additional supports and services, we strongly support the inclusion of children and youth in foster care in these two proposed regulations.

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\[\text{i} \text{§200.34(e)(1)(i) provides as follows:}\]

(a) Calculations for reporting student achievement results.

(1) . . . each State and LEA report card must include the percentage of students performing at each level of achievement . . . on the academic assessments . . . by grade.

(2) . . . each LEA report card must also . . .

(3) Each State and LEA must include . . .

(i) Information for all students;

(ii) Information disaggregated by—

(A) Each subgroup of students in § 200.16(a)(2);

(B) Migrant status;

(C) Gender;

(D) Homeless status;

(E) Status as a child in foster care; and

(F) Status as a student with a parent who is a member of the Armed Forces . . . .

(iii) Results based on . . .

(b) Calculation for reporting on the progress of all students and each subgroup of students toward meeting the State-designed long-term academic achievement goals.

(c) Calculation for reporting the percentage of students assessed and not assessed.

\[\text{ii} \text{§ 200.34 provides as follows:}\]

(a) **Four-year adjusted cohort graduation rate.** A State must calculate a *four-year adjusted cohort graduation rate* for each *public high school* in the State in the following manner:

(1) The **numerator** must consist of the sum of—

(i) *All* students who graduate in four years with a *regular high school diploma*; and

(ii) *All* students with the *most significant cognitive disabilities* in the cohort . . .

(2) The **denominator** must consist of the number of students who form the adjusted cohort of
entering first-time students in grade 9 enrolled in the high school . . .
(3) For those high schools that start after grade 9 . . .

(b) Adjusting the cohort.

(1) ‘‘Adjusted cohort’’ means the students who enter grade 9 (or the earliest high school grade) plus any students who transfer into the cohort in grades 9 through 12, and minus any students removed from the cohort.
(2) ‘‘Students who transfer into the cohort’’ means . . .
(3) To remove a student from the cohort, a school or LEA must confirm in writing that the student—
   (i) Transferred out, such that the school or LEA has official written documentation that the student enrolled in another school or educational 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;
   (ii) Emigrated to another country;
   (iii) Transferred to a prison or juvenile facility and participates in an educational program that culminates in the award of a regular high school diploma, or State-defined alternate diploma for students with the most significant cognitive disabilities; or
   (iv) Is deceased.

(4) A student who is retained in grade, enrolls in a general equivalency diploma [GED] program or other alternative education program that does not issue or provide credit toward the issuance of a regular high school diploma or a State-defined alternate diploma, or leaves school for any reason other than those described in paragraph (b)(3) of this section may not be counted as having transferred out for the purpose of calculating the graduation rate and must remain in the adjusted cohort.

(c) Definition of terms. For the purposes of calculating an adjusted cohort graduation rate under this section—

(1) ‘‘Students who graduate in four years’’ means . . .
(2) ‘‘Regular high school diploma’’ means . . .
(3) ‘‘Alternate diploma’’ means . . .

(d) Extended-year adjusted cohort graduation rate. In addition to calculating a four-year adjusted cohort graduation rate, a State may calculate and report an extended-year adjusted cohort graduation rate.

(1) ‘‘Extended-year adjusted cohort graduation rate’’ means . . .
(2) A State may calculate one or more extended-year adjusted cohort graduation rates, except that no extended-year adjusted cohort graduation rate may be for a cohort period longer than seven years.

(e) Reporting on State and LEA report cards.

(1) A State and LEA report card must include, at the school, LEA, and State levels—
   (i) Four-year adjusted cohort graduation rates and, if adopted by the State, extended-year adjusted cohort graduation rates for all students and disaggregated by each subgroup of students in § 200.16(a)(2), homeless status, and status as a child in foster care.
Whether all students and each subgroup of students described in § 200.16(a)(2) met or did not meet the State measurements of interim progress for graduation rates under § 200.13(b).

(2) A State and its LEAs must report . . . graduation rate . . . that reflects results of the immediately preceding school year.

(3) If a State adopts an extended-year adjusted cohort graduation rate, the State and its LEAs must report the extended-year adjusted cohort graduation rate separately from the four-year adjusted cohort graduation rate.

(4) A State that offers an alternate diploma . . . must—
   (i) Not delay the timely reporting . . .
   (ii) Annually update the . . . graduation rates reported for a given year to include in the numerator any students with the most significant cognitive disabilities . . . .

(f) Partial school enrollment. Each State must apply the same approach in all LEAs to determine whether students who are enrolled in the same school for less than half of the academic year as described in § 200.20(b) who exit high school without a regular high school diploma and do not transfer into another high school that grants a regular high school diploma are counted in the denominator for reporting the adjusted cohort graduation rate—

(1) At the school in which such student was enrolled for the greatest proportion of school days while enrolled in grades 9 through 12; or
(2) At the school in which the student was most recently enrolled.

iii § 299.18 provides:

(a) Systems of educator development, retention, and advancement.

(b) Support for educators.

(1) In its consolidated State plan, each SEA must describe how it will use title II, part A funds . . .
(2) In its consolidated State plan, each SEA must describe—
   (i) How the SEA will improve the skills of teachers, principals, or other school leaders in identifying students with specific learning needs and providing instruction based on the needs of such students consistent with section 2101(d)(2)(J) of the Act, including strategies for teachers of, and principals or other school leaders in schools with:
      (A) Low-income students;
      (B) Lowest-achieving students;
      (C) English learners;
      (D) Children with disabilities;
      (E) Children and youth in foster care;
      (F) Migratory children . . . .
      (G) Homeless children and youths;
      (H) Neglected, delinquent, and at-risk children identified under title I, part D of the Act;
      (I) Immigrant children and youth;
      (J) Students in LEAs eligible for grants under the Rural and Low-Income School Program under section 5221 of the Act;
      (K) American Indian and Alaska Native students;
      (L) Students with low literacy levels; and
      (M) Students who are gifted and talented;
(ii) . . . how the SEA will work with LEAs in the State to develop or implement State or local teacher, principal or other school leader evaluation and support systems . . . ;

and

(iii) . . . how the State will improve educator preparation programs . . .

(3) In its consolidated State plan, each SEA must describe its rationale for, and its timeline for the design and implementation of, the strategies identified under paragraph (b)(1) and (2) of this section.

§ 299.19 provides as follows:

(a) Well-rounded and supportive education for students.

(1) In its consolidated State plan, each SEA must describe its strategies, its rationale for the selected strategies, timelines, and how it will use funds under the programs included in its consolidated State plan and support LEA use of funds to ensure that all children have a significant opportunity to meet challenging State academic standards and career and technical standards, as applicable, and attain, at a minimum, a regular high school diploma . . . .

(2) In describing the strategies, rationale, timelines, and funding sources . . . each SEA must consider—

(i) The academic and non-academic needs of subgroups of students including—

(A) Low-income students.

(B) Lowest-achieving students.

(C) English learners.

(D) Children with disabilities.

(E) Children and youth in foster care.

(F) Migratory children . . . .

(G) Homeless children and youths.

(H) Neglected, delinquent, and at-risk students . . . .

(I) Immigrant children and youth.

(J) Students in LEAs eligible for grants under the Rural and Low-Income School program . . .

(K) American Indian and Alaska Native students.

(ii) Data and information on resource equity . . . .

(3) In its consolidated State plan, the SEA must use information and data on resource equity collected . . . .

(4) In its consolidated State plan, each SEA must describe how it will use . . . Federal funds—