January 21, 2016

Deborah Spitz
U.S. Department of Education
400 Maryland Avenue SW.
Room 3E306
Washington, DC 20202

RE: Programs under Title I of the Elementary and Secondary Education Act of 1965 (Docket Number: ED-2015-OESE-0130)

Dear Ms. Spitz:

The American Bar Association has long advocated for the educational needs of children in foster care, some of the country’s most educationally 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 the foster care provisions of the Every Student Succeeds Act. We urge you to include guidance and support for state and local education agencies to ensure effective collaboration with state and local child welfare agencies for timely implementation of these important provisions.

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 me or Kathleen McNaught, Project Director, ABA Center on Children and the Law (202-662-1966; kathleen.mcnaught@americanbar.org).

Sincerely,

Thomas M. Susman
Response to Request for Public Comment by the Department of Education on the Proposed Rule Implementing Programs Under Title I, Part D of the Every Student Succeeds Act, to Improve Access to Education for Children in Foster Care

Submitted by
The American Bar Association
January 21, 2016

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

Pursuant to the notice published in the Federal Register on December 22, 2015, the American Bar Association submits these comments on the proposed rule implementing programs under Title I, Part D of the Every Student Succeeds Act, Docket Number: ED-2015-OESE-0130.

I. Introduction

Children in foster care are some of the country’s most educationally disadvantaged students. Studies show students in foster care are more likely to be suspended or expelled, score lower on standardized tests in reading and math, and have higher rates of grade retention and drop-out, and are far less likely to attend and graduate from college.\(^1\) A concerted collaborative effort is needed by leadership within child welfare agencies and education agencies at state and local levels to work together to focus on significant improvement in the educational outcomes of children in foster care. The promising results in many states and districts show that these efforts pay off for students in foster care.

For many years, federal child welfare law has placed obligations on the child welfare agencies to collaborate with education agencies to support the educational stability and success of students in foster care.\(^2\) For the first time, the Every Student Succeeds Act (ESSA) now contains key protections for students in foster care to promote school stability and success, and requires education agencies to collaborate with child welfare partners.

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

II. Needed Regulations

Some of the new assurances and protections for students in foster care in Title I must be in effect by December 2016, within one year after enactment of ESSA. At that time, a key protection for children in foster care previously available in some states under the definition of “awaiting foster

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care placement” in McKinney-Vento will disappear for most states. Therefore, it is critically important that guidance for improving educational stability and success for children in foster care be included in the Department of Education’s first set of regulations.

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

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

1. **“School of origin”**: Child welfare law makes clear that the need to maintain a school of origin, when in a child’s best interest, exists both when a student enters foster care and also when there is any subsequent change in living placement. Therefore, to ensure consistency between child welfare and education law, regulations should define the term “school of origin,” as referenced in 20 U.S.C. 6311(g)(1)(E)(i) and 20 U.S.C. 6312(c)(5)(B)(i), to include: “(A) The school in which the child was enrolled prior to entry into foster care; and (B) The school in which the child is enrolled when a change in foster care placement occurs or is proposed.”

2. **“Child in Foster Care”**: To ensure consistency between child welfare and education agencies, and to clarify which students are covered by these provisions, it is important to define this term. To align it with the corresponding federal child welfare law related to school stability, the term should be defined as: “Children and youth whose care and placement are the responsibility of the State or Tribal agency that administers a State or Tribal plan under part B or E of title IV of the Social Security Act (42 U.S.C. 621 and 670 et seq.), without regard to whether foster care maintenance payments are made under section 472 of such Act (42 U.S.C. 672) on behalf of such children and youth.” This will help make clear that the obligations in this law apply to all children in foster care, not just those for which the federal government is providing a financial contribution.

B. **State Title I Plan**

Because many state and local education agencies may not be familiar with children in foster care or the new state and local plan requirements on their behalf, we propose reemphasizing in regulations the statutory language outlining the various obligations in the Title I State Plan

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related to foster care, with some clarification as noted below. State agencies will also need to make sure local agencies are familiar with their obligations.

1. **SEA Point of Contact for Students in Foster Care:** State Education Agencies must identify someone to serve as the point of contact to oversee and implement the foster care requirements of the state plan. This person must not be the same as the McKinney-Vento State Coordinator to ensure that each individual will have the capacity and resources to support his or her respective group of vulnerable students.

2. **School Stability Process:** SEAs will have to work with child welfare agency partners to create a process to ensure that every LEA has policies to support school stability and continuity for students in foster care. This includes ensuring a presumption that students will be maintained in the same school, unless not in his or her best interest; ensuring that LEAs are consulted as part of the best interest decisionmaking process;\(^4\) ensuring that LEAs together with state or local child welfare agencies will develop by December 10, 2016, local transportation plans that resolve how transportation will be provided, arranged, and funded when necessary for students to remain in their schools of origin to ensure school stability; and outlining the process for ensuring immediate enrollment and transfer of records when a new school is necessary because remaining in their school of origin is not in a child's best interest. In addition, SEAs should clarify for LEAs how they can obtain any state funding to support school stability. SEAs should also clarify obligations regarding the continuing implementation of any pre-existing state laws that effectively ensure school stability and how they conform with new federal mandates.

C. **Local Title I Plan**

Given the large number of school districts, and the requirement that LEAs and child welfare agencies must work together to develop transportation plans for students in foster care by December 10, 2016, and the accompanying process that will need to be addressed to ensure transportation plans can be implemented successfully, we encourage regulations to restate the foster care provisions of the ESSA, with some clarification, noted below:

1. **LEA Point of Contact for Foster Care:** LEAs can always designate a point of contact for children in foster care, but must do so if the responsible child welfare

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\(^4\) 42 U.S.C.A. § 675(1)(G)(ii). Child welfare guidance from the U.S. Department of Health and Human Services underscores that it is the duty of the child welfare agency to make this decision, noting that the “agency should determine if remaining in the same school is in the child’s best interests.” U.S. Dep’t of Health and Human Servs. Admin. for Children and Families, *Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008* 19 (July 9, 2010) [hereinafter “ACF Guidance”], available at [http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm). The child welfare agency is well-positioned to make school stability decisions as it can assess non-educational factors such as safety, sibling placements, the child’s permanency goal, and the other components of the case plan. The child welfare agency also has the authority, capacity, and responsibility to collaborate with and gain information from multiple parties, including parents, children, schools, and the court in making these decisions.
agency notifies the LEA that it has a designated point of contact for the LEA. To ensure consistent implementation, regulations should clarify that the Local Title I Plan must include timely appointment of LEA points of contact in response to written notification from a child welfare agency and clarification that the LEA point of contact will often be serving children from multiple child welfare agencies.

2. **Local Transportation Plans**: To ensure the best possible collaboration between child welfare and education agencies in ensuring school stability, regulations should restate the provisions relating to the need for procedures involved in the process of proving, arranging, and funding school transportation for students in foster care. Specifically, by December 10, 2016, LEAs must collaborate with state or local child welfare agencies to develop and implement “clear written procedures governing how transportation to maintain children in foster care in their school of origin when in their best interest will be provided, arranged, and funded for the duration of the time in foster care.” The procedures must also “ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner and in accordance with section 475(4)(A) of the Social Security Act (42 U.S.C. 675(4)(A)).”

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

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

D. **Data Reporting**

1. **Need to Identify Students in Foster Care**: To disaggregate high school graduation and academic achievement based on a student’s status in foster care, it will be necessary for SEAs to have access to information about which students are in foster care. Regulations must clarify that, as part of this requirement, SEAs must work together with child welfare agencies to identify students in foster care. This requires working with child welfare agencies to develop a process for sharing timely and accurate information.

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2. **Consistent Definitions and Timelines Across States**: To ensure that the data maintained and reported on students in foster care are consistent both within and across states, regulations should be clear about the definition of a “child in foster care,” as detailed above. Furthermore, because of the need to work across state and local child welfare and education systems to identify students in foster care for purposes of disaggregation, regulations should be clear about consistency of timelines and methods for identifying students in foster care and the scope of academic achievement reporting required.

3. **Unique Considerations for Students in Foster Care**: When developing regulations and guidance related to report cards, it is important to remember that the “data definitions” and requirements are critical. For example, requiring the collection of data for children who have spent any time in foster care during a particular timeframe should be considered, given the temporary nature of foster care. Also, because many students in foster care are not graduating on time, it would be useful to specify that high school graduation rates could also reflect those students graduating in 5 years.

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

III. **Other Guidance and Activities to Support Full Implementation of ESSA**

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

- Issue joint guidance between the U.S. Department of Education and U.S. Department of Health and Human Services on the new law, the need for inter-agency collaboration to support the educational stability and success of students in foster care, and how Title I funds can be used to promote implementation of these new protections for students in foster care;
- Hire or designate a dedicated staff person to focus on students in foster care, with a specific goal of mirroring at the federal level the type of cross-agency collaboration that is needed around implementation at the state and local level. This staff person should be the point of contact for overseeing the new foster care provisions of the law and should
work collaboratively with the U.S. Department of Health and Human Services to support the educational stability and success of students in foster care;

- Provide technical assistance and training to state and local education agencies relating to implementation of the foster care provisions of the law, including support around the required data collection and reporting and how to collaborate with child welfare agencies;
- Highlight models from state and local jurisdictions that currently provide, in collaboration with child welfare agencies, school stability and excellent access to quality education for children in foster care; and
- Provide grant funding to jurisdictions to help provide the resources needed to successfully implement the foster care provisions of the law, and support evaluation of programs and interventions to support replication.