May 25, 2016

Dr. John B. King, Jr.
Secretary of Education
U.S. Department of Education
400 Maryland Avenue S.W.
Washington, D.C. 20202

Re: Input on Foster Care Provisions of ESSA and Suggestions for Guidance

Dear Secretary King:

The American Bar Association (ABA), through its Center on Children and the Law, has long advocated for improving the educational outcomes of children in foster care, who are some of the country’s most educationally disadvantaged students. We are pleased that the Every Student Succeeds Act (ESSA) for the first time includes provisions in federal education law related to students in foster care. We submit the appended comments to the Department of Education regarding needed guidance to promote effective implementation of the foster care provisions of ESSA in tandem with the 2008 Fostering Connections to Success and Increasing Adoptions Act. Clear and timely information is critical to ensuring effective collaboration among state and local education agencies and state and local child welfare agencies to improve education stability and success for students in foster care.

We would appreciate the opportunity to discuss our comments with you in further detail or provide additional information about the educational needs of children and youth in foster care. Should you wish to meet or have any questions concerning our comments, please 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
Suggestions for Department of Education Guidance on the
Provisions for Students in Foster Care in the Every Student Succeeds Act

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.\(^1\) They are also far less likely to attend and graduate from college. A concerted collaborative effort is needed by leadership within education and child welfare agencies at state and local levels to achieve significant improvement in the educational outcomes of children in foster care. Reforms in many states and districts show that such efforts pay off for students in foster care.

For many years, federal child welfare law has placed obligations on child welfare agencies to collaborate with education agencies to support the educational stability and success of students in foster care. Now, the Every Student Succeeds Act (ESSA) requires state and local education agencies, independently and in concert with their partner child welfare agencies, to ensure school stability and to promote the educational success of youth in care.

Because of this dual-agency responsibility for the educational success of students in foster care, and the tight timelines around certain ESSA provisions relating to youth in foster care, it is critical that state and local education and child welfare agencies receive prompt information and support to help implementation. At a minimum, the issues detailed below should be addressed.

Issues to Address in Guidance

I. TIMELINES:

A. For effective implementation, it is essential that all of the foster care provisions of the law (including school stability assurances, transportation procedures, and points of contact in SEAs and LEAs) are clarified, consistent, and implemented on a similar timeline.

B. Removing “awaiting foster care placement” without ensuring ESSA protections are in place for students in foster care would have devastating consequences on the education and stability of children in care.

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II. DEFINITIONS:

A. “Child in Foster Care”: To ensure consistency between child welfare and education agencies, ensure consistent and meaningful data collection across the country, and clarify which students are entitled to these provisions, it is important to define this term and to align it with Fostering Connections’ school stability requirements. We recommend that the Department of Education use the definition of foster care in federal child welfare regulations at 45 CFR Sec. 1355.20:

Foster care means 24-hour substitute care for children placed away from their parents or guardians 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.

This definition reinforces the importance of collaboration not only at the state and local level but at the federal agency level. This will also help make clear that the obligations in this law apply to all children in foster care, not just those for whom the federal government is providing a financial contribution.

B. “School of origin”: Fostering Connections makes clear that the need to maintain a child in his or her school of origin (when in the child’s best interest) exists when a student enters foster care and at any subsequent change in living placement. See 42 U.S.C. § 675(1)(G)(i). Therefore, to ensure consistency between Fostering Connections and ESSA, guidance 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.”

C. “Immediate enrollment”: Guidance should clarify that “enrollment” means not just technically enrolled or registered, but attending and meaningfully participating in school. Furthermore, a child should be enrolled upon presentation to a school, as occurs in the McKinney-Vento context. Enrollment cannot be denied or delayed because documents normally required for enrollment have not been submitted.
III. BEST INTEREST DECISIONS:

The ABA recommends that the Department of Education:

A. Strongly encourage SEAs to work with state child welfare agencies to issue joint state guidance that details how the best interest decision should be made, including how child welfare will notify school districts about which students are in care and when a placement change is being proposed. The guidance should restate the legal presumption that the child is to remain in the same school unless a determination is made that it is not in the child’s best interest to remain. That decision must be based on all factors relating to the child’s best interest including, as noted in ESSA, but not limited to, consideration of the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement.

B. Emphasize that the cost of transportation cannot be a factor in the best interest decision, in line with what is already required by Administration of Children, Youth and Families’ Guidance ACYF-CB-PI-10-11 (http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf). Furthermore, the best interest decision should be made with input from the youth, child’s education rights’ holders, parents (if appropriate), and schools. If there is disagreement, the ultimate decision maker is the child welfare agency (as outlined in ACYF-CB-PI-10-11) or a court unless state law provides otherwise.

C. Underscore that SEAs shall work with state legislatures and other policy makers to make whatever changes in law and practice are needed to: ensure maintenance in school of origin when in the child’s best interest; remove enrollment barriers and ensure immediate enrollment; and support seamless transfer of records.

D. Encourage LEAs to permit students exiting foster care to remain in the same school until the end of the academic year because this is in the best interest of these children.

E. Highlight that representatives of child welfare agencies are entitled to access student records under the Uninterrupted Scholars Act. Ensuring access to education records is critical to making collaborative best interest determinations, ensuring appropriate school placements, and supporting school success.

IV. TRANSPORTATION FOR CHILDREN TO REMAIN IN THEIR SCHOOL OF ORIGIN:

A. Clarify that Fostering Connections and ESSA each require that when it is in a child’s best interest to remain in the school of origin, and when transportation is necessary to make that happen, transportation must be provided.
Failure to reach an agreement about costs does not relieve either agency of its obligation to ensure prompt transportation and to identify a method of covering additional transportation costs.

B. Clarify that this provision does not override any other school district obligation to transport a student (e.g., this does not affect a school’s obligation to transport a child in foster care in the same way that the school district transports other students at the school district’s cost; when transportation is written into an IEP, the school district responsible for the IEP must fund appropriate transportation).

C. Make clear that the ESSA provisions relating to sharing costs between agencies relate only to additional costs of school transportation needed to maintain the child in the school of origin.

D. Affirmatively state that ESSA requires local educational agencies, in collaboration with local child welfare agencies, to develop and implement clear written procedures for promptly providing, arranging, and funding transportation when needed to support school stability. ESSA does not direct how funding will be provided, but gives examples of ways local education agencies may meet the obligation to provide and fund any additional costs of providing transportation. A state’s duty to ensure school stability for all children in care includes the responsibility for establishing a mechanism or policy for resolving interagency funding disputes. The preferred option would be to establish a uniform statewide policy, with a preference given to an approach whereby both agencies share responsibility. For example, if districts and child welfare agencies cannot agree on how to cover costs, they would collaborate by sharing costs. Also, it is important to explain that not all children in foster care are eligible for child welfare funding reimbursement under Title IV-E of the Social Security Act.

E. Clarify that schools must provide transportation when it can be provided at no additional cost because this is the most “cost-effective” approach, as is required by ESSA. “Additional costs” have to be true costs that result from the fact that the child has moved to a new home (e.g., adding a previously non-existing bus route is an additional cost; granting a student a seat on an existing bus route is not an “additional cost” beyond what a student would be otherwise be provided). When additional costs are involved, the written procedures developed by the local education and child welfare agencies will apply.
F. Encourage SEAs to develop state plans that address how transportation will be coordinated across districts and across state lines.

G. Outline what issues should be addressed in local transportation procedures between child welfare agencies and school districts.

V. MCKINNEY-VENTO RELATED ISSUES:

A. Clarify that states that reference “awaiting foster care placement” in state law will have an additional year before the “awaiting foster care placement” provision is eliminated.

B. Clarify that for those children who are considered “homeless” under McKinney-Vento as of December 9, 2016 under the “awaiting foster care placement” provision, transportation must be provided for remainder of school year as is currently required under McKinney-Vento for all eligible children who subsequently become ineligible during the school year.

C. Remind SEAs and LEAs that some children in foster care may still be covered under McKinney-Vento by virtue of qualifying under another definition of homeless (e.g., living in a shelter, doubled up, runaway from foster care).

D. Encourage states to focus on seamless transitions for children in care who are currently served through McKinney-Vento but will after mid-December be served through these new ESSA protections.

VI. POINTS OF CONTACT:

A. Encourage the expedited appointment of LEA and SEA points of contact (POCs) given the one-year timeline for completing and implementing the local transportation plans.

B. Encourage SEAs to issue guidance to specify roles and responsibilities for the SEA and LEA POCs.

C. Clarify that LEAs can appoint POCs at any time and are encouraged to do so. LEAs are required to appoint when child welfare notifies them in writing of their point of contact.

VII. DATA SHARING:

A. Clarify that for purposes of the state report cards, foster youth should be identified pursuant to a data match between the SEA and the State agency responsible for administering the State child welfare plans under parts B and E of Title IV of the Social Security Act.
B. Address how the foster care flag on SEA longitudinal data systems can be used to help with this identification and data collections process.

C. Clarify that the state report card, for the purpose of reporting on academic achievement, should include all children in foster care during the relevant school year, regardless of the length of time in care. For purposes of reporting on high school graduation, the data should reflect a clear definition of “child in foster care” for the four-year adjusted cohort rate, and encourage states to report on extended-year adjusted cohort rates.

D. Clarify when state report cards are due that data should be publicly reported and address how to use the information to improve educational outcomes for the children in foster care.

E. Recommend that the data match should enable child welfare agencies to further disaggregate student outcomes to inform and improve practice. For example, data may be disaggregated by placement setting, permanency plan, and length of stay.

F. In order to improve educational outcomes for children in foster care, strongly encourage SEAs to report on additional outcomes for foster youth the same way they report on additional disaggregated student outcomes for other student subgroups.

G. Clarify that for LEAs to comply with a number of the provisions of the Act they will need to be informed, on a regular basis, which of their students are in foster care. This is consistent with the USDA Memo SP 17-2011, dated 3/16/2011, strongly encouraging school food authorities to establish formal mechanisms with State and local foster agencies to receive information directly from these agencies to facilitate certification for free meals for foster children.

H. Clarify that the school food authorities and other child nutrition institutions within LEAs can share the identity of those students in foster care with other school district staff for the purposes of allowing LEAs to implement the plans developed pursuant to ESSA.

I. Encourage SEAs to regularly engage in data sharing and data matching with the State agency responsible for administering the State plans under Parts B and E of Title IV of the Social Security Act so that the SEA can regularly inform LEAs which students are in foster care.

J. Provide guidance and model MOUs for SEAs and child welfare agencies to ensure confidentiality protections and limited access to personally identifiable information to protect disclosures at the local level.
K. Encourage SEAs and LEAs to **regularly share education records and data with local child welfare agencies**, as permitted under the Uninterrupted Scholars Act, so that these agencies can better monitor and support the educational success of foster youth.

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

In addition to developing guidance 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:

A. In addition to U.S. Department of Education guidance, issue with the U.S. Department of Health and Human Services a joint letter or informational memorandum to state and local child welfare and education agencies 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;

B. Hire or designate a dedicated staff person in the Department of Education 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 of ESSA at the state and local levels. This staff person should be the point of contact for overseeing implementation of the new foster care provisions of the law and work collaboratively with a similar staff person in the Administration on Children, Youth and Families in the U.S. Department of Health and Human Services to support the educational stability and success of students in foster care;

C. Provide technical assistance and training to state and local education agencies regarding implementation of the foster care provisions of the law, including support relating to required data collection and reporting and how to collaborate with child welfare agencies;

D. 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;

E. Offer 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; and

F. Evaluate implementation of the new ESSA foster care provisions after three years and address whether targeted federal funding is needed to support school stability and/or improve academic outcomes for children in foster care.