

July 13, 2016

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

Re: Notice of Proposed Rulemaking 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 Mr. Secretary:

In order for every student in the United States to succeed, they must first count. Therefore, the undersigned organizations urge the U.S. Department of Education (ED) to decrease its proposed n-size threshold from 30 to 10 students in the final Every Student Succeeds Act (ESSA) accountability regulations.

While ED's proposed regulations include a number of important protections for traditionally underserved students, these efforts will be significantly undermined by an n-size of 30 students. 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>1</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>2</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>3</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.

Under the No Child Left Behind Act, many states set n-sizes higher than necessary to avoid the consequences of missing Adequate Yearly Progress. A report referenced by ED in its proposed regulations specifically notes that “while raising the minimum n-size is an effective means of increasing the passing rates of schools, it does so at a considerable cost to special education students in terms of being excluded from the accountability system.”<sup>4</sup> The same can be said of other traditionally underserved student populations, including African American, Latino, American Indian, Alaska Native, and Asian students; English learners; and students from low-income families. Because ESSA allows schools, districts, and states to tailor interventions to address the specific needs of identified students, a high n-size is not necessary and should not be encouraged by federal regulations.

Finally, ED’s Office of Special Education and Rehabilitative Services recently proposed that states set a consistent n-size of 10 students for the purpose of determining whether “significant disproportionality” exists among racial/ethnic groups in the rates at which students with disabilities within each racial/ethnic group are disciplined. If an n-size of 10 is statistically reliable and protects student identity for this purpose, there is no reason to conclude that the same cannot and should not be said about an n-size of 10 for accountability purposes under ESSA.

ED’s proposed regulations appropriately places the onus on states to demonstrate that a high n-size would not exclude subgroups. However, to ensure that all students are provided with equitable access to an excellence education, ED should lower its proposed n-size from 30 to 10 students in the final regulations.

Sincerely,

Alliance for Excellent Education  
The Advocacy Institute  
American-Arab Anti-Discrimination Committee  
American Association of University Women  
America’s Promise Alliance  
Association of University Centers on Disabilities  
The Center for Civil Rights Remedies at UCLA’s Civil Rights Project  
Civic Enterprises  
Council of Parent Attorneys and Advocates  
Disability Rights Education and Defense Fund  
Everyone Graduates Center  
Judge David L. Bazelon Center for Mental Health Law  
The Leadership Conference on Civil and Human Rights  
MALDEF  
NAACP  
National Association of Councils on Developmental Disabilities  
National Center for Learning Disabilities  
National Center for Special Education in Charter Schools  
National Council of La Raza  
National Disability Rights Network

National Down Syndrome Congress  
National Indian Education Association  
National Urban League  
National Women's Law Center  
Organizations Concerned About Rural Education  
PolicyLink  
Rural School and Community Trust  
Southeast Asia Resource Action Center  
Southern Education Foundation  
Southern Poverty Law Center  
Teach Plus

## Notes

---

<sup>1</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>2</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>3</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, 2013).

<sup>4</sup> Simpson et al., *Effect of Minimum Cell Sizes*.