



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

May 16, 2016

Kristin Harper
Special Assistant to the Assistant Secretary
Office of Special Education and Rehabilitative Services
U.S. Department of Education
550 12th Street SW., Room 5109A, Potomac Center Plaza
Washington, DC 20202-2600

RE: Docket ID ED-2015-OSERS-0132

Dear Ms. Harper:

On behalf of the Education Taskforce of the Consortium of Citizens with Disabilities (CCD) which represents the nearly six million students with disabilities who receive special education services across the country, the undersigned organizations write in response to the notice of proposed rulemaking (NPRM) published in the Federal Register on March 2, 2016 regarding disproportionality in special education. CCD also submitted comments in response to the Department's Request for Information (RFI) on July 28, 2014.

We applaud the Department's efforts and commitment to regulating those provisions in the Individuals with Disabilities Education Act (IDEA) which are meant to address the misidentification and disproportionate over representation of students on the basis of race, ethnicity and gender. CCD believes that through effective regulation on significant disproportionality, IDEA can come closer to providing a "free appropriate public education in the least restrictive environment."

CCD's comments and recommendations will focus on addressing the questions posed by the Department in the NPRM. However, CCD wishes to state that, although we understand that the Department is bound to regulate on the existing statute, proper referrals, evaluations, placements, and provision of services to students eligible for special education are also critical elements which help to ameliorate misidentification and significant disproportionality in special education. We look forward to working with the Department on these regulations as well as the full panoply of factors contributing to significant disproportionality.

Below, please find CCD's responses to the questions posed by the Department.

1. *The Department notes that a number of commenters responding to the RFI expressed concern that the use of a standard methodology to determine significant disproportionality may not be appropriate for certain types of LEAs. How should the proposed standard methodology apply to an LEA that may be affected by disparities in enrollment of children with disabilities, e.g., LEAs that house schools that only serve children with disabilities and school systems that provide specialized programs for children with autism or hearing impairments, etc.?)*

Individual CCD members will submit responses to this question.

2. *Should the Department allow or require States to use another method in combination with the risk ratio method? If so, please state what limitation of the risk ratio method does the method address, and under what circumstances should the method be allowed or required.*

CCD recommends that states be encouraged to consider additional measures to the risk ratio given the concern that in some cases the sole reliance on the relative risk ratio can produce unintended results. For example, if the comparison group has 0% risk, a ratio cannot be calculated. Further, a very high risk ratio can be the result even where rates of identification, restrictive placement or disciplinary exclusion are very low for every racial/ethnic group. In other circumstances sole reliance on the risk-ratio will result in the inappropriate failure to address the problem of racial or ethnic disproportionality. Additionally, CCD agrees with the Department's proposal to have a minimum cell size (further addressed later in question 6) in combination with determining disproportionality across three years. We believe that this will mean that the greatest number of LEAs will be able to examine their practices and to use funds to remediate the concerns they find.

3. *Should the Department exclude any of the six impairments included in the proposed §300.647(b)(3)? If so, which impairments should be removed from consideration? Alternatively, should the Department include additional impairments in §300.647 (b)(3)?*

CDD supports the Department's recommendation that States determine whether there is significant disproportionality with respect to the identification of children as children with disabilities with intellectual disabilities, specific learning disabilities, emotional disturbance, speech or language impairments, other health impairments and autism.

4. *Should the Department also require States to determine whether there is significant disproportionality with respect to placement inside the regular classroom between 40 percent and 79 percent of the day as proposed in the NPRM?*

Individual CCD organizations will submit responses to this question.

However, CCD does believe that this NPRM neglects to capture valuable data on students who are placed in homebound or hospital settings as well as in correctional settings if they number more than ten students. Advocates and attorneys working in the

field are noticing an increasing number of students with disabilities being placed on homebound/tutoring programs (and other forms of informal removal) due to unaddressed or insufficiently addressed disability related behaviors in school. Included within this are students who are moved to homebound without an effort to provide supplementary aides and services in less restrictive settings. These placements often consist of a child placed out of school at the district's request, who meets with a school provided tutor (who may or may not be a certified teacher) in the home or a neutral setting in the community outside of school for one or two hours per day. The child typically does not receive the related services in his or her IEP and other critical IEP services and remains at home the majority of the school day. As homebound placement marks the extreme end of the LRE continuum, a homebound placement based on unaddressed behavior raises a realistic concern about a potential LRE violation. Additionally, there are FAPE and equity concerns related to these placements.

The increase in these placements may be due to the fact that LEAs are now under greater scrutiny for their rates of disciplinary removals. Due in large part to the Department's leadership in this area, high levels of suspension and expulsion are noticed now, rightfully, in a manner they had not been previously. As a result, some LEAs may remove students they might once have suspended or expelled to other settings, including homebound. Similarly, these students may be sent home from school repeatedly, or placed on shortened school days. We believe based on our case work experience that this may have a greater impact on low income families and students of color. As such, we firmly support including students on homebound in the risk ratio calculation if their numbers exceed 10. Within the homebound data collection, there will be students who are on homebound or hospital services for other reasons, such as medical fragility. However, the purpose of this analysis is only to identify potential areas of concern for further investigation, and not to rule out every possible false positive. Given the seriousness of the possibility that students are being deprived of appropriate placements and due process protections, the minimal risk of a false positive is worthwhile.

As data on the school to prison pipeline has demonstrated,ⁱ some students with disabilities are disproportionately "placed" into the juvenile justice system by the overuse and/or inappropriate use of school based arrest and juvenile justice referrals, and that students from particular protected classes may be placed into the juvenile justice system at higher rates.ⁱⁱ Due to this risk, it is not correct to say that an LEA has little control over this type of placement. While the juvenile court is an intervening factor, some LEAs "place" more students into this system than others. If an LEA has more than 10 students placed in a correctional facility's educational program, it should be included in the risk ratio analysis for the same reasons as any other program. As mentioned above, a finding of significant disproportionality is not determinative of a violation rather it is intended to invite future investigation. As such, students with disabilities in correctional settings should be included in the risk ratio analysis.

5. *Should the Department, at a future date, mandate that States use the same risk ratio? What safe harbor should the Department create for risk ratio thresholds that States could*

voluntarily adopt with the knowledge that it is reasonable pursuant to this proposed regulation?

CCD remains silent on this question. However, CCD recommends the Department issue guidelines to help ensure that states meet the threshold for “reasonability,” in its final rule. We suggest that the Department recommend a range in which states may choose their risk-ratio threshold. We strongly recommend this range be 1.5-3.0 with the ability for a state to use a higher threshold, as long as the state has identified some districts in the prior two years and is able to provide evidence that it will identify some districts using a threshold that is higher than the recommended range. Further, the guidance should make it clear that States that seek a higher threshold, or are using a risk ratio threshold that previously did not yield a single district in any area, will unlikely have their threshold deemed reasonable if it is higher than the recommended range or remains unchanged but is at the high end of the range.

6. *Does the Department’s proposed minimum cell size of 10 align with existing State privacy laws, or would the proposal require States to change such laws?*

CCD supports the Department’s proposal to require States to make a determination of whether significant disproportionality exists in each LEA for racial and ethnic group with 10 children (for purposes of identification) and 10 children with disabilities (for purposes of placement and discipline). Indeed, as the Department notes in the NPRM, “as the minimum cell size increases, the number of LEAs eliminated from analysis increases. Additionally, the U.S. Department of Education’s Institute for Education Science has recommended a subgroup size of 10 for confidentiality purposes.ⁱⁱⁱ We therefore support the Department’s proposal and do not feel that this proposal would require States to change existing privacy laws.

7. *Are there other situations, currently not accounted for in the proposed regulations where it would be appropriate to use the alternate risk ratio? Should the Department require or allow States the option to use the alternate risk ratio method for?*

CCD supports the Department’s proposal to allow States to use the alternate risk ratio in instances where the total number of children in a comparison group is less than 10 or when the risk to children in a comparison group is zero. CCD remains silent regarding other situations where the use of the alternate risk ratio may be appropriate.

8. *The Department is interested in seeking comments on how to require entities, whose population is sufficiently homogenous to prevent the calculation of a risk ratio or alternate risk ratio, to identify significant disproportionality.*

We recommend the Department encourage the use of a second calculation, comparing to national averages for all students, when states are determining if disproportionality exists in an LEA. This calculation would be a comparison of the eligibility, placement, or discipline usage rate for a subgroup to the overall national average for all students. If the risk levels are extraordinarily high, but the ratios are not, intervention should still be

required. Conversely, if the ratios are above the selected threshold, but the risk level of the highest group is not significantly above the national average, the district's identification for CEIS should be reconsidered.

If the state average is within the normal range of the national average, comparing the district rate for a particular group to the state average for all students should also be permissible. We recommend that a state set a maximum rate at which a racial or ethnic group risk rate could be above the national/state rate in any of the three areas of concern when compared to the overall student rate for the state. We suggest the Department provide states with the flexibility to set this maximum rate between 1 and 2 percentage points. This additional criteria for determining disproportionality will protect children in situations where there are overall higher rates of occurrence of eligibility, placement or discipline use. The additional metric will diminish the number of districts where the issue is more likely the under-representation of students of color (i.e. autism), or where risk levels are very low for all groups, but where the relative ratios are high due to the mathematical properties of ratios.

9. *The Department is interested in seeking comments on where the proposed regulations should include additional restrictions on developing and applying risk ratio thresholds.*

CCD has concerns with permitting States to set different risk ratio thresholds for different categories of analysis. We are concerned that this practice would impede transparency for parents and educators at the LEA level. Additionally, we have overall long-term concerns around the implications for equity.

10. *The Department is interested in seeking comments on whether to place additional flexibility to define "reasonable progress."*

The Department should note that the terms "reasonable progress" and "discernable progress" are very ambiguous. Although CCD agrees that states need the flexibility to determine the amount of reduction in risk ratios that would be considered reasonable based on a variety of factors, without quantifying these terms, or providing greater clarity the CCD fears the data generated will not be accurate or meaningful.

Additionally, quantifying these terms would be nearly impossible based on the number of states and school districts with varying circumstances such as:

- LEAs with group homes, facilities, special programs, etc. where students with disabilities are publicly placed,
- LEAs with significant numbers of charter schools who attract specific subgroups. Most students with disabilities enroll in charters, having been identified elsewhere, and often take advantage of the charters' focus on special education services. It is unclear how these charters could prevent unnecessary identification.

11. *What technical assistance or guidance might the Department put in place to ensure that LEAs identified with significant disproportionality do not inappropriately reduce the identification of children as children with disabilities or under-identify children of color in order to avoid a designation of significant disproportionality? How could States and LEAs use data to ensure that children with disabilities are properly identified?*

While CCD has deep concerns about over- or under-representation of particular groups of students in special education, we also believe the focus should be on proper referral, evaluation, placement, and provision of services to eligible students. Critically important, is that a full array of services be provided to all eligible students to ensure students have the supports they need to succeed.

Having a workable formula may assist in ensuring the right students are served. However, we believe a purely mathematical approach to determining disproportionality will not necessarily address the issue.

The Department should provide guidance and technical assistance focused on the following:

- Staff training regarding when it is appropriate to refer a student for special education evaluation.
- Professional development for IEP team members in best practices in performing evaluations and reading results to determine eligibility for services and what services are necessary.
- Understanding the importance of having a full complement of specialized instructional support personnel to ensure services are available to students in general and special education.
- Utilizing schoolwide approaches such as positive behavioral interventions and supports to ensure respect for all students and attention to their individual needs.
- Developing multi-tiered systems of support to address academic concerns at the earliest stages and provide more intensive services before referral to special education.
- States must conduct Child Find activities, and screening for “invisible” disabilities is one way of identifying children in need of special education and related services. Such screening and identification, coupled with appropriate services, can prevent problems in school. For example, unidentified minimal hearing loss can greatly impact school-aged children. One study showed that thirty-seven percent of the children with minimal hearing loss failed at least one grade. And children with minimal hearing loss exhibited significantly greater dysfunction than their fully hearing peers on measures of behavior, energy, stress, social support, and self-esteem (Bess, F. H., Dodd-Murphy, J., Parker, R. A. (1998). Children with minimal sensorineural hearing loss: prevalence, educational performance, and functional status. *Ear & Hearing*, 19(5) http://journals.lww.com/ear-hearing/Abstract/1998/10000/Children_with_Minimal_Sensorineural_Hearing_Loss_1.a.spx).

Minimal hearing loss is almost impossible to detect through observation alone. Yet school-based hearing screening is possible and helps identify children with hearing loss. One study “suggests that [hearing] screening in early childhood settings helps identify approximately 1 of every 43 children as needing audiological treatment or monitoring and

1 of every 600 as having a permanent hearing loss that was not previously identified (Eisenman, W. D. et al. (2008). Updating hearing screening practices in early childhood settings. *Infants and Young Children*, 21(3), 186-193) https://depts.washington.edu/isei/iyc/21.3_eiserman.pdf.) Identifying children with such “invisible” disabilities through screening can help direct appropriate services to all students who need them.

12. The Department is interested in seeking comments on whether additional restrictions on the use of funds for comprehensive CEIS are appropriate for children who are already receiving services under Part B of the IDEA.

CCD supports the proposed expansion to the definition of who is eligible to receive CEIS to students age 3 through grade 12 and to children with and without disabilities. However, with regard to the Department’s “additional restrictions on the use of funds for comprehensive CEIS are appropriate for children who are already receiving services under Part B of the IDEA”, we are troubled by the statement that these funds should *not be used* “to provide special education and related services already identified in a child’s IEP” (pg 10980)... Because, in the case of disciplinary removals, it is widely held that schools are not adequately providing FBAs and BIPs and that far too often BIPs are sloppily written and poorly implemented. Moreover, LEAs rarely perform FBAs before drafting BIPs despite the fact special education experts regard an FBA as inseparable from an effective BIP.^{iv} We know these lax practices significantly impact and lead to the inappropriate removal of children with disabilities from school, lack of access to appropriate interventions, mental health services and other behavior services students may need. Therefore, we ask the Department to allow LEAs [found having significant disproportionality and required to use 15% of CEIS] to: train staff in effective practices regarding FBAs and BIPs, re-assess students to provide more effective FBAs and BIPs including a review and examination of the services provided under the BIP and as part of the IEP as appropriate. The Department should also issue guidance that seeks to follow the [2015] recommendations of the National Council on Disability with regard to ensuring students with disabilities can access appropriate FBAs and BIPs (See: *Breaking the School to Prison Pipeline for Students with Disabilities*, pgs. 31-33).

We also urge the Department to clarify that expanded uses of CEIS, when used specifically to address significant disproportionality, and as allowable under IDEA in combination and as allowable with other federal funds would include:

- Maximizing use and braiding CEIS with [other] intervention funds;
- Providing professional development to staff to address the learning needs of students including a wide range of topics related to student learning and behavior (e.g. trauma informed care, multi-tier system of supports, re-entry IEPs; implicit bias, data-driven, evidence-based prevention and responsive strategies (including such approaches as restorative justice and Positive Behavioral Interventions and Supports));
- Implementing social and emotional learning programs for targeted schools/districts (e.g. Responsive Classroom, Second Step, Restorative Justice etc...; and,

Supporting specific [necessary and eligible] personnel, instructional technology tools including software, and school/district instructional programming primarily used for the delivery of academic or behavioral intervention, consistent with the principles of Universal Design for Learning.

13. *What metrics should the Department establish to assess the impact of the regulations once they are final?*

CCD believes that accurate metrics will be critical to assessing the impact of the regulations once they are final. Although CCD does not, at this time, have a comprehensive recommendation, we put forth for the Department's consideration the following two recommendations. Additionally, CCD looks forward to working with the Department as they consider additional components:

Maintenance of Effort (MOE): CCD recommends that the Department should maintain its current position regarding MOE in cases where an LEA must use 15% of its Part B funds for CEIS due to a finding of significant disproportionality. Such LEAs may not reduce their local expenditures by any amount. CCD recommends that in cases of a reduction in an LEA's sub grant of IDEA Part B funds (section 611 and 619) in any year the maximum amount of funds available for CEIS is reduced by the total sub grant reduction.

DATA COLLECTION: CCD feels that the Department will need to expand the current MOE/CEIS data collection in order to capture information on the number of IDEA-eligible students (ages 3-21) who have received CEIS as well as the amount and percentage of Part B funds used for those services. This will be necessary in order to ensure that LEAs do not limit provision of CEIS to children with disabilities. Data on CEIS expenditures should also include a breakdown of expenditures by the three categories of disproportionality (identification, placement, and disciplinary removals) to ensure that LEAs are using CEIS to serve students in the groups that were significantly over identified.

In conclusion, CCD thanks the Department for the opportunity to comment on this critical NPRM. CCD firmly believes that this NPRM represents an important step forward to addressing the issue of significant disproportionality and lifting up the Civil Rights principles upon which the IDEA based and we look forward to working with the Department as it moves forward with this NPRM.

Sincerely,

Association of University Centers on Disabilities
Autism Speaks
Conference of Educational Administrators of the Schools and Programs for the Deaf
Council of Parent Attorneys and Advocates
Disability Rights and Education Defense Fund
Easter Seals
Higher Education Consortium for Special Education

Institute for Educational Leadership
National Association of Councils on Developmental Disabilities
National Association of School Psychologists
National Centers for Independent Living
National Center for Learning Disabilities
National Disability Rights Network
National Down Syndrome Congress
Teacher Education Division of the Council for Exceptional Children
The Advocacy Institute
The Arc

ⁱSee for example: “The school to prison pipeline, explained” Justice Policy Institute, January 24, 2015, retrieved at <http://www.justicepolicy.org/news/8775>

ⁱⁱDisproportionate Minority Contact. 6 Nat'l Council of St. Legis. 1, 2 (2011). Retrieved at <http://www.ncsl.org/documents/cj/iiguidebook-DMC.pdf>
Skowrya & Cocozza, Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System, National Center for Mental Health and Juvenile Justice, (May, 2015); http://www.ncmhji.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf. Teplin, Linda A., et al., The Northwestern Juvenile Project: Overview 1-13 (2013). Available at <http://www.ojjdp.gov/pubs/234522.pdf> Better solutions for Youth with Mental Health Needs in the Juvenile Justice System, The Mental Health and Juvenile Just. Collaborative for Change, 1 7 (2014). Retrieved at: <http://cfc.ncmhji.com/wp-content/uploads/2014/01/Whitepaper-Mental-Health-FINAL.pdf>

ⁱⁱⁱInstitute for Education Sciences, (2010), U.S. Department of Education, Statistical Methods for Protecting Personally Identifiable Information in Aggregate Reporting retrieved at: <https://nces.ed.gov/pubs2011/2011603.pdf>

^{iv} See for example, Breaking the School to Prison Pipeline for Students with Disabilities, (2015), National Council on Disability, retrieved at: https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf