



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

July 28, 2014

Larry Ringer
IDEA Determinations RFI
US Department of Education
400 Maryland Avenue SW, room 4032
Potomac Center Plaza
Washington, DC 20202-2600

Dear Mr. Ringer:

Thank you for the opportunity to respond to Docket No. ED-2014-OSERS-0058 regarding actions the Department can take related to the disproportionality of racial and ethnic minority students among students with disabilities. The undersigned members of the Consortium for Citizens with Disabilities Education Task Force offer the following recommendations.

Place a higher priority on early education. States are serving fewer children in the early intervention program authorized under Part C of the Individuals with Disabilities Education Act. There are several factors that contribute to this decrease in children and families served. Limitations in federal and state funding have forced states to narrow the eligibility criteria resulting in fewer children being able to participate in this important program. Thus, children with mild to moderate disabilities who are not eligible, but who could benefit from intervention services are going without supports. More states have implemented sliding fee scales that result in barriers to services. Families need greater access to basic information about child development milestones so they can trigger interventions if their child has a delay. As a result of the combination of these factors, too many children entering kindergarten with delays that put them behind their non-disabled peers. We also know that with some disabilities, children of color wait much longer than their white counterparts for a diagnosis. The Centers for Disease Control and Prevention reports that white children are 30 percent more likely to be diagnosed with autism than their black or Hispanic peers.

Go beyond discipline: We are pleased with the Department's focus on the significant racial and ethnic disparities in the use of discipline by public schools, and urge it to take additional action to ensure that these requirements are fully enforced. In addition, we urge the Department to broaden its view beyond discipline, to the larger issue of school removal in general, including the informal methods by which students with disabilities are removed from school and from academic instruction.

There is reason to be deeply concerned about significant racial and ethnic disparities in district- and state-level disciplinary action. We believe that these disparities indicate that not only are some students with disabilities being denied free and appropriate public education (FAPE), but that this denial has a disparate impact on children of color. Neither scenario is acceptable in our Nation's public schools.

In addition to formal school removals (suspension and expulsion), we believe that children with disabilities are removed from classrooms and instruction by informal means far more than is commonly understood and far, far more than is acceptable. The protection and advocacy (P&A) network handles cases in which children with disabilities are deprived of FAPE, as they are removed from class and instruction repeatedly and/or for significant periods of time as a result of behavior related to their disabilities. This occurs through the use of shortened school days (e.g. repeated midday "sent homes"), forced withdrawals from school, compulsory transfers to inadequate alternative programs and homebound instruction, lengthy stays in seclusion rooms, and other methods.

Given the severity of racial and ethnic disparities in formal disciplinary action, data should be collected and analyzed on these informal methods of removal as well, to insure they too do not occur disproportionately with regard to race and ethnicity, as well as disability. Any solutions proposed to the larger issues of racial disproportionality in identification, discipline and/or placement need to be thoughtfully considered so they do not create the unintended consequence of increasing informal removals from school or, as mentioned by the Disability Rights Education and Defense Fund (DREDF) in their comments, from special education identification.

I. Response to the Department's Questions

With respect to the specific questions raised in this RFI, we propose that OSERS:

- 1) Create a rigorous model definition of *significant disproportionality* against which state definitions would be evaluated and approved or rejected;
- 2) Create a new two-part indicator for monitoring and enforcement to ensure state compliance with the letter and spirit of 20 U.S.C. sections 1418(a) and (d)

In **Question 1** of the RFI, the Department asked:

Should the Department issue proposed regulations requiring States to use a standard approach to determine which LEAs have significant disproportionality? If so, how might a standard approach properly account for State differences (e.g., population size)? If so, what should be included in such a standard approach?

Based on the U. S. Department of Education's own Office for Civil Rights data, in 2009-10, 13% percent of K-12 students with disabilities were suspended from school at least once. This is nearly twice the 7% rate estimated for students without disabilities¹ (Losen & Gillespie, 2012).

All disabilities are not created equal. Suspension risk varies greatly by eligibility category and the issue of identification for IDEA eligibility as it relates to race and ethnicity is far more complex

than simple over or under-identification. Research suggests that there is likely a connection between over-identification by category and over-identification for disciplinary actions. (Losen, Ee, Hodson & Martinez, in press 2014-15). Specifically, the category of emotional disturbance not only has the highest risk for suspension, but it is also one of the “high-incidence” categories in which children of color, and especially Black students, are most likely to be disproportionately identified. The other categories in which children of color are most prone for over-identification are intellectual disability and specific learning disabilities which are also among the disability categories with the highest suspension risk. Conversely, it is also notable that Black and Latino children are under-identified (compared to White children) as having autism—this category is now regarded as high- and not low-incidence. Students with autism have a much lower risk for out-of-school suspension.

Unfortunately, there is very little data that shows suspension rates by race and disability that is further disaggregated by disability category. However, research has found, for example, that nationally, 36% of all Black male secondary students with disabilities were suspended at least once in 2009-10 compared to 17% of White male secondary students with disabilities (Losen and Martinez, 2013). Moreover, across the nation, in 2009-10, there were 211 districts in which 50% or more Black secondary students with disabilities were suspended at least once. As President Obama stated recently in launching the My Brother’s Keeper Initiative, these data should provoke a sense of outrage. We share President Obama’s concern and add that these data are not new. Therefore action in response to these outrageous disparities by the Department of Education is essential.

The data do not allow for further breakdown by number of suspensions by offense category because the federal government does not collect this data. California data, where such breakdowns are made public, shows that the largest share of out-of-school suspensions are for minor non-violent school code violations. Moreover, the largest racial and ethnic disparities among students with disabilities are found in these minor and highly subjective offenses categories. To begin with, the catch-all “disruption/willful defiance” category, one of 24 offense codes in California, yields a large disparity in suspensions between students with disabilities and their non-disabled peers: Center for Civil Rights Remedies’ (CCRR’s) analysis found that students with disabilities receive 3.3 additional out-of-school suspensions per 100 students in the “disruption/willful defiance” category, compared to a much smaller gap of an additional 1.8 per 100 students for the most serious offenses. Ending the use of subjective disciplinary code categories such as “disruption/willful defiance” will go far toward reducing their inappropriate use.

The largest racial gaps in California are noted between Black and White students with disabilities. Compared to their White counterparts, Black students with disabilities received 10.1 additional out-of-school suspensions per 100 students enrolled. The Black/White gap in this frequent and more subjective category is two-and-a-half times larger than the racial gap (4.2 suspensions per 100) in the serious offense category.¹

Yet almost no states or districts identified significant disproportionality. Something here is just not right. The Government Accountability Office (GAO) report pointed out that only about 2% of all districts nationally were identified as having significant disproportionality in identification. Even

¹ Source: Analysis of CALPADS data from the California Department of Education, 11-12

though the GAO report did not look at how many districts were identified for significant disproportionality in discipline, the numbers were unlikely any better because the same flaw—hyper-stringent definitional criteria that evades districts’ meeting them despite extant disproportionalities—were permitted for use for placement and discipline as well as for identification. To confirm this, in preparing these comments, CCRR visited the website of the 16 states that the GAO report examined for “identification” and found only 26 out of 4,626 possible districts identified as having an issue with regard to discipline. That is less than *half of 1 percent* of all districts reviewed. Further 10 of the 16 states found zero districts.

OSEP has allowed far too much leeway in states’ definitions of “significant disproportionality.” As a result of lax monitoring and inadequate enforcement of both the definitions of significant disproportionality and of state’s obligation to publicly report, profoundly disturbing disparities at the district-level in thousands of districts exist and have failed to prompt needed state and district interventions.

But the bones are there. Enforcement of the current requirements would be a positive step toward meaningful change. Section 1418 (d), as clarified in guidance to the states issued by OSEP,² requires states to analyze discipline data (incidence, duration and type), including in and out of school suspensions of one day or more. Section 1418 (d) also makes it clear that the districts must describe the actions it takes as a result of this analysis. Clear, consistent and meaningful enforcement of these current requirements is a good first step.

Recommendations

- 1) Create a model federal definition of “significant disproportionality” to serve as a standard against which state definitions would be evaluated and approved:
 - a. The methods that states use to define significant disproportionality are critically important if states are to identify or prioritize districts with the most problematic disparities. Although we welcome a uniform definition and argue that OSERS should encourage states to adopt definitions that are substantively identical (allowing for reasonable variability based on state demographics), much can be accomplished by simply ensuring that each state’s definition is sufficiently rigorous. We recommend that a research-based model standard be fully developed based on sound principles. Once developed, this definition could be offered to states. States could use the federal model or develop their own, knowing the model would be used to evaluate the appropriateness of any alternative definition the state developed and implemented.
 - b. Ensure that definitions do not allow extraordinarily high rates and large racial gaps to be ignored. A model definition should not focus primarily on relative disparities and ignore the size of racial gaps in terms of absolute differences, or rates that seem excessive.
 - c. Mitigate against the chance that states would identify districts with high ratios but low suspension by requiring that definitions of significant disproportionality include a floor for the risk level. Since excessive suspension rates are a national concern in their own right,

² CEIS Guidance, OSEP 08-09 (#15)

the floor should be below the national average for ALL students, which should be lowered over time.

- d. Significant disproportionality determinations for disciplinary actions must include data on suspensions of less than 10 days. The fact that many state definitions of significant disproportionality only account for suspensions greater than 10 days may artificially depress the rate at which districts are identified. The Department should prohibit States from only looking at suspensions greater than 10 days, as this approach is inconsistent with the framework of IDEA Sec. 618(d) and fails to address racial and ethnic disparities in total suspensions identified by sources such as the CRDC. Consistent with OSEP’s guidance, some States, such as New Mexico³ and Michigan,⁴ analyze disciplinary actions of various length and type. Others, like California⁵ and Arkansas,⁶ rely solely on SPP/APR Indicator 4B data, which measures the percent of districts that have a significant discrepancy, by race or ethnicity, in the rate of suspensions and expulsions of greater than 10 days for children with IEPs, and policies, procedures or practices that contribute to the significant discrepancy. However, suspensions shorter than ten days, especially repeated suspensions, have a significant impact on student performance and engagement.⁷ The Department should require States to analyze multiple data sources when determining significant disproportionality, in a manner consistent with Sec. 618(d) and OSEP Memorandum 08-09. This data should be readily available, as IDEA Section 618(a)(1)(D) requires SEAs to compile data on “incidence and duration of disciplinary actions by race, ethnicity, limited English proficiency status, gender, and disability category, of children with disabilities, *including suspensions of 1 day or more*” (emphasis added).⁸

In **Question 2** of the RFI, the Department asked:

What actions, apart from requiring a standard approach, should the Department take to address the very small number of LEAs identified with significant disproportionality, despite data (including the data the Department collects under section 618 of the IDEA, data collected by the Department’s Office for Civil Rights, and the information in the GAO report) showing significant disparities, based on race and ethnicity, in the identification of children for special education including by disability category, educational placements, and disciplinary actions?

³ New Mexico Public Education Department (PED), *Annual Performance Report FFY 2012* at 140 (Feb.3, 2014). Available at: http://www.ped.state.nm.us/SEB/2014/NM_APR_FFY%202012_FEB_03_2014.pdf (last visited July 9, 2014).

⁴ Michigan Department of Education, Office of Special Education, *Procedures for Calculating Significant Disproportionality—Discipline* (Oct. 2013). Available at: http://www.michigan.gov/documents/mde/Discipline_Sig_Dispro_Procedures_428458_7.pdf (last visited July 10, 2014).

⁵ CalStat, *supra* note 1.

⁶ Arkansas Department of Education—Special Education Unit, *Significant Disproportionality and Coordinated Early Intervening Services, 2013-2014 CEIS Report* (Apr. 2014). Available at: https://arksped.k12.ar.us/documents/data_n_research/201314CEISSummaryReport.pdf (last visited July 10, 2014).

⁷ **Insert study cite here.**

⁸ New Mexico, for example, already uses Section 618(a)(1)(D) data in its significant disproportionality analysis. See New Mexico PED, *supra* note 2, at 140.

Data collection and reporting is key. OSERS leadership is essential in order to ensure that the data required by 20 USC 1418(d)(2)(C) is accurate and publicly reported, so there is accountability and transparency about the use of school removal. Community stakeholders care about these issues and will help ensure programs move toward removing inequities. OSERS should encourage District-level public reporting as well, as this will help raise awareness at the community level of problems in identification, placement and discipline.

OSERS should enforce state-level public reporting. At minimum, OSERS should require that states comply with their state-level public reporting obligations. Enforcing requirements regarding reporting numbers of eligible students and incidence and duration of discipline will help bring large disparities to light at least at the state-level. With greater public awareness will come greater pressure to address obvious problems that have not received adequate attention. Further, the issues will also be elevated in the minds of district superintendents, board members and special education directors making more likely that where the issue arises at the district-level, district administrators will voluntarily take action to seek remedies where appropriate.

Externally, states and districts could be put on notice that compliance with the public reporting requirements could affect their eligibility status or at very least either help or hinder their status when they compete for federal education grants. Internally, OSEP, OCR and others within the department with enforcement and monitoring authority could supply information about data compliance to competitive grant awarding divisions so that the noncompliant state and local educational agencies would have a disadvantage compared with fully compliant LEAs and SEAs.

If possible, OSERS should consider the use of discretionary funding to encourage states with districts that have disparities in the use all forms of school removal that do not rise to the level of “significant disproportionality” to complete a root cause analysis, including a review of their policies, procedures and methods of service provision of the cause of the overuse of removal.

In **Question 3** of the RFI, the Department asked:

What actions, including research- or evidence-based actions, should the Department take to: (a) Encourage greater voluntary use of funds for CEIS in LEAs showing significant disparities (but no determination of significant disproportionality, pursuant to 34 C.F.R. § 300.646), by race and ethnicity, in the rates of identification of children for special education, including identification by disability category, educational placements, and disciplinary actions; and (b) assist LEAs in more effectively targeting their use of funds for CEIS to address significant disproportionality in both districts required to use funds for CEIS (as a result of determination of significant disproportionality) and districts choosing to use funds for CEIS, in a manner that is both consistent with the requirements of the IDEA and which help to address the causes and effects of significant disproportionality?

The CEIS guidance⁹ does not appear to require that states approve or even review LEA level CEIS plans or provide any particular requirements for these plans in cases in which CEIS spending is required as a result of significant disproportionality. Reviewing these plans should be a required part of effective state oversight. Given the scarcity of Part B funds and the seriousness of the

⁹ CEIS Guidance, OSEP 08-09 (#11)

problem intended to be solved, we encourage OSERS to provide specific guidance to states regarding the development and state review processes for these spending plans.

Plans for use of these scarce Part B funds should be:

- Based on a root cause analysis, understanding that there may be more than one cause.
- Focused in a manner that will resolve the identified problem
- Supported by accurate data
- Implement evidence based practices
- Evaluated at regular intervals to ensure they are achieving their goals.

It does not make sense to require an LEA to spend a large sum of public Part B funds to solve a significant problem without any oversight of that spending.

In addition, OSERS should create a new two-part indicator for monitoring and enforcement exclusively for states: 20 USC 1416 explicitly authorizes the Secretary of Education to create indicators for monitoring and enforcement that the Secretary decides are needed after considering all relevant information, “including the data from 618” (20 U.S.C. Sec. 1416(a)(4)). Moreover, the IDEA at 20 U.S.C. Section 1412 (a)(24) already requires states to provide assurances to the Secretary that they are taking preventive actions with regard to over- identification and disproportionality and specifically references section 1418(d). Given that the data show significant disparities and that the GAO report details a history of inadequate monitoring, we believe new regulations and/or guidance with a new two part indicator is warranted.

State-Level Indicator About Compliance With 20 U.S.C. Sec. 1418(A) And (D)

Part I: The state-level indicator would review whether or not the state has ensured annual and public reporting of *discipline* data, including disparities for suspensions of one day or more, disaggregated as required in 20 USC 1418(a), at the state-level *and* on all districts.

Part II: a. District-level outcome indicator providing the number and names of school districts where the state has found “significant disproportionality” in identification, placement or discipline.

b. For each district in which significant disproportionality is reported to the public, the state and district would further be required to publicly report the action plan to address the issue, including how it was redirecting 15% of Part B funds and including assurances that the students in the racial and ethnic groups who triggered the funding shift would benefit.

III. Recommendations Regarding Informal School Removal

It is the experience of the P&As, based on their extensive representation of children with disabilities, that IDEA and Section 504 eligible children spend significant amounts of time out of school as a result of their disabilities, even when they have not been formally suspended or expelled. We strongly encourage OSERS and state departments of education to look closely at these informal forms of removal. As mentioned above, it is impossible to believe that children of color are not impacted disproportionately in these informal methods of removal, given the

evidence that they are when formal methods of removal such as suspension and expulsion are used. It is likely, in fact that the problem of informal removals for this population may be worse than it is for formal removals.

Fortunately, there are concrete steps that may be taken to test this hypothesis and to remedy problems if they exist. By informal methods of removal, we mean removal from school and from instruction repeatedly and/or for significant periods of time sufficient to create a denial of Free Appropriate Public Education (FAPE) as a result of behavior related to a student's disability,¹⁰ through the use of shortened school days (e.g repeated "sent homes"), forced withdrawals from school, compulsory transfers to inadequate alternative programs, and homebound instruction, lengthy stays in seclusion rooms, and other methods.

We Urge the Department To Use Currently Available Compliance Tools To Address Informal Removal

1. To issue guidance on the following topics:¹¹

- "Shortened school day" as proposed in a memo by NDRN to Catherine Lhamon, Assistant Secretary, OCR on May 29, 2014
- That excessive removal from Instruction may implicate FAPE (e.g. shortened day, seclusion), and specifically to clarify that the use of removal from school/instruction as a form of discipline in residential and institutional settings may implicate FAPE.
- Use of restraint and seclusion as described in NDRN's recommendations memo to Michael Yudin, dated March 26, 2014
- It would be of great help to have a guidance document on disability similar to that issued by the Department, jointly with the Department of Justice on January 8, 2014, to assist public elementary and secondary schools in meeting their obligations under Federal law to administer student discipline without discriminating on the basis of disability.¹²

2. To Collect and Analyze Data

¹⁰ As these forms of removal do not trigger due process protections, manifestation determination reviews are not required.

¹¹ NDRN is happy to meet with the Department to provide additional detail on these recommendations.

¹² <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>

- a. In the Civil Rights Data collection (CRDC), to collect data regarding the length of out of school suspensions disaggregated by race, ethnicity, and disability category. Currently all suspensions are collected together, regardless of length.
- b. To consider how to accurately collect data on the removal of students from school/instruction for a partial day, or to a homebound setting, for more than ten days in a school year, as a result of their behavior; disaggregated by race, ethnicity, and disability category.

3. Include the following in the RDA “Results Matrix

- i. Least Restrictive Environment (Indicator 5)
- ii. Rates of students graduating with a regular diploma (Indicator 1) as measured by the Adjusted Cohort Graduation Rate required by ESEA.
- iii. Include suspension for a period of less than 10 days

For Indicators 1, 2 and 4A and 4B, it is critical that states include comparison data regarding students without disabilities. Otherwise, it is impossible to gauge whether or not the gap between students with and without disabilities is closing. It is our understanding that some or all of that data is collected by ED currently, so it is available for use in the status determination process.

We encourage state departments of education to consider the following and for the Department to provide technical assistance to them regarding:

- Review of district and building level policies to ensure they do not encourage unnecessary suspension, expulsion, or informal removal:
 - To review all zero tolerance policies, but especially those resulting in suspension/expulsion for truancy.
 - District that use school resource officers have Memoranda of Understanding regarding their duties and responsibilities that remove officers from enforcing school code violations and that focus on school safety.
 - School codes limit the use of subjective categories such as “willful defiance”
 - Currently Pittsburgh and Chicago, among others, have undertaken this analysis.¹³
 - Review use of seclusion, especially when it is allowed to continue beyond the time at which any danger has passed.
 - Review how school days are counted for the purposes of funding? Does the funding formula encourage the use of shortened school days?

Thank you for your consideration of the CCD’s Education Task Force’s views.

¹³ See: <http://legalclips.nsba.org/2014/07/03/chicago-school-boards-new-student-discipline-code-reduces-use-of-suspensions-and-expulsions> ;<http://www.post-gazette.com/local/2014/07/21/Proposed-changes-in-the-Student-Conduct-Code-emphasize-progressive-and-positive-discipline/stories/201407190129>

Sincerely,

Easter Seals

ⁱ Our analysis of the data from 2009-10 revealed that OCR had erred in calculating the data for students without disabilities that year by dividing the number of students without disabilities suspended at least once by *all* students enrolled (including students with disabilities). Our calculations that year yielded a suspension rate for students without disabilities that was 7%. We note that OCR may have made the same mistake this year with regard to the 2011-12 data report.