



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

Johnny W. Collett,
Assistant Secretary,
Office of Special Education and Rehabilitation Services
U.S. Department of Education
400 Maryland Avenue SW
Room 5107
Potomac Center Plaza
May 14, 2018

Washington, DC 20202-2500

Re: Opposition to the Proposed Delay of Significant Disproportionality Regulations ([34 CFR §300.646](#) and [34 CFR § 300.647](#))

Dear Assistant Secretary Collett,

The undersigned members of the Consortium for Citizens with Disabilities (CCD) Education Taskforce write to express our strong opposition to the proposed delay of the compliance date for the Individuals with Disabilities Education Act (IDEA)'s disproportionality regulations (codified at 34 CFR 300.646- 300.647) from July 1, 2018 to July 1, 2020 and for children ages three to five from July 1, 2020 to July 1, 2022, which is included in the Notice of Proposed Rulemaking posted in the federal register on February 27, 2018.

CCD is the largest coalition of national disability organizations and the CCD Education Task Force advocates for Federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of children and adults with disabilities in all aspects of society. The CCD Education Task Force sees these principles as critical elements in a society that recognizes and respects the dignity and worth of all its members.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1418 (d)¹ requires that states

¹ 20 U.S.C. §1418 (d); “**(d)** ...Each State that receives assistance under this subchapter, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the local educational agencies of the State with respect to--
(A) the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in [section 1401\(3\)](#) of this title;
(B) the placement in particular educational settings of such children; and
(C) the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.
(2) Review and revision of policies, practices, and procedures
In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of such children, in accordance with paragraph (1), the State or the Secretary of the Interior, as the case may be, shall--
(A) provide for the review and, if appropriate, revision of the policies, procedures, and practices used in such identification or placement to ensure that such policies, procedures, and practices comply with the requirements of this chapter;

determine whether or not significant disproportionality based on race and ethnicity is occurring in the state, and in the Local Educational Agencies (LEAs) of the state, with respect to the identification, placement, discipline, suspension, and expulsion of children with disabilities. If significant disproportionality is identified, the IDEA requires that the state and any LEAs review its policies, procedures, and practices to ensure that they comply with the IDEA's requirements. They must also utilize the maximum amount of funding required by law to provide "comprehensive coordinated early intervening services," in order to address disproportionality. The requirements are clearly set forth in the statute.

The 2016 final regulations 34 C.F.R. §§ 300.647 explain *how* SEAs and LEAs are required to calculate whether there is significant disproportionality as required by the IDEA. First, they create a standard methodology that all states and LEAs must use in order to calculate whether significant disproportionality exists. That methodology consists of a standard risk ratio for all school districts and guidance on reasonable sample sizes for the purposes of calculating disproportionality. The CCD Education Task Force strongly supports states adopting a standard methodology to determine significant disproportionality, which is necessary for effective and consistent compliance with the IDEA's statutory requirements.

The 2016 final regulations also require states to calculate whether there is significant disproportionality in the identification of children as having intellectual disabilities, specific learning disabilities, emotional disturbance, speech or language impairments, other health impairments, and autism. This level of specificity is particularly important given that differences in identification can manifest as either over, under or mis-identification of children of a specific race or ethnicity. For example, Black children with disabilities are twice as likely to be identified as having an emotional disturbance (ED) and more likely to be identified as having an intellectual disability.² However, Black students are less likely to be identified as autistic.³ The NRPM specifically cited its concerns that children of color were being misidentified as children with disabilities.⁴ Students who are misidentified may lack access to appropriate supports.

In addition, the regulations require that each state must now address significant disproportionality by incidence, duration, and type of disciplinary action (including suspensions and expulsions) and that the state clarify their existing requirements for the review and revision of relevant policies, practices, and procedures when significant disproportionality is found. However, the state sets its own thresholds and other key determinants. The regulation's purpose is to ensure consistency, so that states are treated fairly and that the statute is implemented effectively, while providing a wide berth for state self-determination.⁵ To be clear, the regulations **are not** the source of the requirement to address significant disproportionality. As stated above, that requirement is present in the IDEA itself.

(B) require any local educational agency identified under paragraph (1) to reserve the maximum amount of funds under section 1413(f) of this title to provide comprehensive coordinated early intervening services to serve children in the local educational agency, particularly children in those groups that were significantly overidentified under paragraph (1); and
(C) require the local educational agency to publicly report on the revision of policies, practices, and procedures described under subparagraph (A)."

² James M. Patton, *The Disproportionate Representation of African-Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions*, Journal of Special Education, Spring 1998, 25-31.

³ Mandell et. al., *Racial/Ethnic Disparities in the Identification of Children with Autism Spectrum Disorders*, Am. J. Public Health, Mar. 2009, 493-98.

⁴ 81 Fed Reg. at 10970.

⁵ Several commentators apparently questioned the Department's authority to develop a standard methodology for the determination of significant disproportionality. It seems that they are really quarreling with the statute, not the regulations. It is not unreasonable or uncommon for a federal agency to set out a process for the implementation of statutory requirements through regulations. In addition, this particular regulation creates a process by which states may set their own thresholds.

It is important to note that the Equity in IDEA regulation was a direct response to a February 2013 U.S. Government Accountability Office (GAO) study, which indicated that there was widespread noncompliance by states with 20 U.S.C. Section 1418(d) of the IDEA. Most states set thresholds for identifying disproportionate districts so high that no districts ever exceeded them, and, therefore, none were identified. Meanwhile, states permitted districts to suspend students of color with disabilities at much higher levels than their White peers. Nationally, for example, in 2011, districts suspended over one in every four Black students with disabilities, at least once. According to the 2013-2014 Civil Rights Data Collection issued by the U.S. Department of Education's Office for Civil Rights (OCR), Black students are more than three times more likely than White students to be suspended or expelled from school.⁶ Rates of disciplinary removal for their disabled White peers were far lower. The vast majority of suspensions are for minor infractions of school rules, such as disrupting class, tardiness, and dress code violations, rather than for serious violent or criminal behavior.⁷ The GAO recommended that the Department of Education “develop a standard approach for defining significant disproportionality to be used by all states.”

CCD's Education Task Force has actively supported the regulation. Indeed, in 2014 the CCD Education Taskforce submitted comments on the significant disproportionality regulations in [response](#) to a Request for Information from the Department of Education, the Taskforce then submitted [comments](#) on the Notice of Proposed Rulemaking from the Department in 2016, and the finally Taskforce submitted a [letter](#) to the Secretary in 2017 urging that the regulations not be delayed.⁸

Delaying the regulations will increase the likelihood that students with disabilities and students of color will be subject to inappropriate educational segregation. When IDEA's vital system of services and legal protections are instead used to over identify students of color as a means of diverting them from the general education classroom, the broader project of ensuring a Free and Appropriate Public Education in the Least Restrictive Environment is threatened. Funneling students of color into special education rather than using it as a tool to advance educational opportunity for students with disabilities of all races harms the integrity of special education services and IDEA as a whole.

Of additional concern is the fact that many states have already moved forward with implementation of the regulation in anticipation of the July 1, 2018 start date finalized in the 2016 regulations. To now delay implementation of these regulations will result in additional burden to states as well as unnecessary confusion at the state and local level. Indeed, as stated in comments submitted to the Department in response to the NPRM, the Council of Administrators of Special Education (CASE) stated, “we believe delay may cause greater confusion in the field and continued wide variability in practice, exactly what these regulations are designed to avoid.” Additionally, in a letter to Secretary DeVos sent on February 6, 2018 by the National Association of State Directors of Special Education (NASDSE) stated, “Postponing implementation not only stops work already in motion, but it suggests that the identification and redress of significant disproportionality can be put on hold.”

⁶CIVIL RIGHTS DATA COLLECTION Data Snapshot: School Discipline available at <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

⁷ Daniel J. Losen, Tina Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools* (April 08, 2013).

⁸ The Department's statement in the NPRM that it “will not consider comments on the text or substance of the final regulations” makes it impossible for our organizations and other members of the public to provide full comments in this rulemaking. That is because all the purported reasons provided in the NPRM for wanting to delay the 2016 final regulations are based on concerns allegedly rooted in the text and substance of the final regulations. Although we have elected to explain why the regulations are effective and appropriate, the plain language of the NPRM has created serious doubt about whether our comments will be considered at all and has likely had a deterrent effect on many commenters and potential commenters. For this reason, if the Department desires to complete this rulemaking, it should seek a second round of comments after making clear that it will consider comments regarding the text and substance of the final regulations.

Furthermore, if the regulations are eventually rescinded, the impact will be even more severe. The Individuals with Disabilities Education Act (IDEA) requirement⁹ will remain but the useful guidance that assists state and school districts in effectively implementing the law will be unavailable. More children will be hurt when services they need are not provided. In addition, the substantial government resources that went into the regulations' approval process and the changes made by state and local governments to meet the requirements will be wasted.

The undersigned firmly believe that the proposed delay in these regulations must not be mistaken for a harmless administrative change. There are actual children who will be harmed by a two year delay in the implementation -- those children currently in school or about to enter school in districts which are failing to provide services to them, and/or who are unfairly suspended and expelled. They will not receive services that would be provided to them as a result of changes to school policies and procedures, or due to the expenditure of funds caused by a finding of significant disproportionality per Section 1418(d)(2), for two additional years. As such, the undersigned firmly oppose the proposed delay of the significant disproportionality regulation. We believe that a delay of the regulations would be in direct opposition to the purpose of the IDEA. We call on the Department to begin implementation and the 2016 final regulations as originally planned.

Sincerely,

ACCSES

American Association of People with Disabilities

American Civil Liberties Union

American Dance Therapy Association

American Foundation for the Blind

American Physical Therapy Association

American Psychological Association

American Speech-Language-Hearing Association

Association of Assistive Technology Act Programs

Autism Society of America

Autistic Self Advocacy Network

Center for Public Representation

Council for Exceptional Children

Council for Learning Disabilities

Council of Administrators of Special Education

Council of Parent Attorneys and Advocates

Disability Rights Education & Defense Fund

Division for Early Childhood of the Council for Exceptional Children (DEC)

Easterseals

Epilepsy Foundation
Higher Education Consortium for Special Education
Institute for Educational Leadership
Judge David L. Bazelon Center for Mental Health Law
Learning Disabilities Association of America
National Association of Councils on Developmental Disabilities
National Association of School Psychologists
National Association of State Head Injury Administrators
National Center for Learning Disabilities
National Center for Parent Leadership, Advocacy and Community Empowerment (National PLACE)
National Center for Special Education in Charter Schools
National Council on Independent Living
National Disability Rights Network
National Down Syndrome Congress
National PTA
RespectAbility
School Social Work Association of America
SPAN Parent Advocacy Network
TASH
Teacher Education Division of the Council for Exceptional Children
The Advocacy Institute
The Arc of the United States