



July 28, 2014

Mr. Larry Ringer
Attention: IDEA Determinations RFI
U.S. Department of Education
400 Maryland Avenue SW., Room 4032
Potomac Center Plaza (PCP)
Washington, DC 20202-2600

Re: Docket No. ED-2014-OSERS-0058
CEIS and Significant Disproportionality

CORRECTED COMMENTS

Dear Mr. Ringer:

The Center for Law and Education and The Advocacy Institute appreciate the opportunity to provide information on actions the U.S. Department of Education (ED) should take related to (1) significant disproportionality based on race and ethnicity in the (a) identification of children as children with disabilities, including identification by disability category; (b) placement of children with disabilities in particular educational settings; and (c) the incidence, duration and type of disciplinary action taken with respect to children with disabilities; and (2) ensuring that funds reserved for comprehensive, coordinated early intervening services (CEIS) under Part B of the Individuals with Disabilities Education Act (IDEA) are used to effectively address significant disproportionality.

Question 1. 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?

Comment: We agree with the findings in the GAO report GAO-13-137, *Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, February 2013, that states' definitions for determining which districts have significant disproportionality vary widely and make it unlikely for some states to identify and address, whether through eliminating certain policies and practices and/or through provision of coordinated early

intervening services, the magnitude of racial and ethnic overrepresentation in special education.

The Department's failure to establish a common method for identifying significant disproportionality creates confusion for state, district and school personnel responsible for developing, implementing, and monitoring policies and practices that may have the effect of creating racial/ethnic disparities in providing specialized instruction. To encourage adoption and use of a standard professionally accepted method for determining what constitutes significant disproportionality the method/process proposed by the Department must be fair and include a means for states, LEAs and schools to provide a justification or explanation for the existence of such significant disproportionation.

Establishing a single standard approach to be used by all States in determining which LEAs have significant disproportionality may—on its face—appear to be the most straight-forward way to promote consistency. However, developing a single standard approach to be followed by all States and LEAs in the context of the multiple areas of identification, placement and disciplinary action presents many challenges.

Essential components of a standard approach include:

- Method of calculation (risk, risk ratio, alternate risk ratio, weighted risk ratio, risk difference);
- Threshold value to be exceeded;
- Years threshold value must be exceeded;
- Minimum "n" size for student groups.

We recognize that any method will have drawbacks. Therefore, any standard approach would need to:

- Be replicable by LEAs in order to determine significant disproportionality in a more timely manner than is occurring at the SEA level;
- Allow flexibility to account for state and LEA differences; this is especially important for LEAs with small subgroups of students or unique circumstances.
- Reasonably take into consideration small and large "n" sizes for subgroups of students that are large or small;
- As a matter of fairness, provide LEAs identified as having significant disparities in any one of the three areas being examined (identification, placement, disciplinary action) shall have an opportunity to explain disparate data based on educational necessity.

As is currently the case in some States, the standard approach may be different for each of the three categories: identification, placement and discipline. Examination at the disability category level should be a requirement in all three categories.

Question 2. 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?

Comment: The Department could take several steps that would result in more efficient identification of districts with significant disproportionality so as to ensure timely corrective action, not limited to use of Part B funds for coordinated early intervention services:

Public Reporting. The Department should step up its monitoring of States regarding compliance with state-level and district-level public reporting obligations as well as encourage transparency through district-level public reporting. Enhanced public reporting will raise public awareness and elevate the attention of administrators, school boards, state advisory panels and state boards of education, particularly as it relates to discipline and over/under-representation of children of color in disability categories based on subjective judgments—i.e. intellectual disability, emotional disturbance, specific learning disability. States and districts could be put on notice that failure to comply with the public reporting requirements could result in heightened scrutiny by ED, in particular, referral to OCR.

Data Analysis. The Department should engage in deep data analysis annually for a selected group of states on a rotating basis in addition to targeting any states that have been identified by OCR complaints/reviews to manifest significant disparities during the prior year. Such investigation should examine the state's IDEA-eligible population by grade, gender, disability category, race, ELL status, and poverty for identification, placement and discipline. The data collected through this process manifesting significant racial/ethnic disparities in any one of the three areas being examined (identification, placement, disciplinary action) should be a starting point for the OSEP in collaboration with OCR to examine possible discriminatory effects of inappropriate policies/procedures by conducting more extensive investigations, as needed. Evidence of disparate impact, by itself, does not constitute discrimination, but such a finding should trigger the burden being shifted to the LEA to justify or change its policies/practices. Issues identified through this examination should result in corrective action consideration and planning regardless of whether the state is identified as having a satisfactory rating on SPP indicators defined by the state and designed to measure significant disproportionality.

Consequently we urge the Department to be more proactive in utilizing the data analysis as a trigger to move forward to redress potential signs of discrimination on the part of individual schools and school districts under the oversight and responsibility of their respective states. States should be required to include activities regarding significant disproportionality in the State Systemic Improvement Plan (SSIP). This new indicator, designed to improve results for students with disabilities, must be used as a vehicle to address problems of racial/ethnic disproportionality.

Question 3: 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?

Comment: We feel that the very low voluntary use of IDEA Part B funds for CEIS among LEAs is due in large part to the gross inadequacy of Federal funding. The IDEA 2004 reauthorization included not only the new provisions regarding use of Part B funds for CEIS but also an annual authorization for funding that, if appropriated, would have placed Part B funding at \$26.1 billion in 2011 vs. an actual appropriation of \$11.5 billion – a shortfall of \$14.6 billion. Thus, it is reasonable to conclude that Congress intended use of Part B funds for CEIS in the context of appropriations more than double those actually being distributed to LEAs. This gross inadequacy of federal funding, coupled with the inequities created by an outdated funding formula (as recently reported in the New America Foundation White Paper, *Federal Funding for Students with Disabilities: The Evolution of Federal Special Education Finance in the U.S.*) we believe seriously limit LEAs' ability to voluntarily use Part B funds to serve non-IDEA eligible students, no matter how important the effort. Even in the years when LEAs received substantial increases due to the Recovery Act few LEAs elected to use any of these additional funds for CEIS, likely because they were under and continue to be under significant pressure to improve the educational results for all students with disabilities consistent with their entitlement under IDEA to FAPE consistent with state educational standards established for all other students under Title I of the ESEA and as required by Section 504.

Imposing further conditions on LEAs regarding the use of Part B funds for CEIS will only act as a further deterrent while adding to the monitoring burden of OSEP. Ensuring the proper identification of students as having a disability and in need of special education is a shared responsibility of general education and special education. Efforts to promote more spending of IDEA funds for CEIS will only serve to erode the responsibility of general education in the referral/identification process.

Furthermore, instead of encouraging voluntary use of limited Part B funds by schools and districts for improving behavior through CEIS so as to prevent disciplinary action against students who are *not identified* as having a disability, the Department ought to “encourage” the use of these “non-mandatory” Part B funds to target corrective actions designed to benefit those racial/ethnic students *with disabilities* whom the evidence shows are being and have been disparately subjected to disciplinary action with respect to the incidence, duration, and type of disciplinary actions, including suspensions and expulsions. OSEP and OCR should

collaborate in mining the data and reviewing policies and practices and other methods or criteria of administration that may be contributing to the disparities in disciplinary actions; the agencies should randomly review significant samples of IEPs of affected students (i.e., students who have been subjected to disciplinary actions, including suspensions and expulsions) to determine whether their respective IEPs include behavioral goals, and if evidence of challenging behaviors is gleaned from their evaluations and education records, OSEP should examine whether such behaviors are, in fact, being addressed as education-related issues in their IEPs as required by IDEA.

Thank you for your consideration of our comments.

Yours truly,



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