

Congress of the United States
Washington, DC 20515

May 14, 2018

The Honorable Johnny W. Collett
Assistant Secretary
Office of Special Education and Rehabilitation Services
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Docket ID ED-2017-OSERS-0128

Dear Assistant Secretary Collett:

As the ranking members of the U.S. Senate Health, Education, Labor, and Pensions Committee and the House Education and the Workforce Committee, we write to express our strong objection to any delay of the “Equity in IDEA” rule. We urge the U.S. Department of Education (the Department) to maintain the current timeline of compliance, and firmly oppose any proposal to delay efforts to correct the disparate treatment of students of color with disabilities and direct federal resources to address gross inequities. Delaying the regulation undermines the fundamental goals of the Individuals with Disabilities Education Act (IDEA), disregards Congress’s intent to meaningfully address significant disproportionality in our nation’s schools, and jeopardizes educational opportunity for millions of children of color.

When Congress last reauthorized the IDEA in 2004, it sought to correct disparate treatment of students of color with disabilities by requiring states, for the first time, to identify school districts with significant disproportionality and by directing federal resources to address inequities. Congress knew then, just as it knows now, that students of color are over-identified for special education services, placed in more restrictive settings, and disciplined at higher rates than their peers, and that significant disproportionality exists between disability categories.¹ Despite having had more than a decade to comply with this important IDEA requirement, too many states and districts continually fail to uphold their legal responsibility to address significant disproportionality in the identification, placement, and discipline of students of color with disabilities. A delay of this regulation is misguided, harmful to students, and disregards the clear intent of Congress.

The Notice of Proposed Rulemaking published on February 27, 2018 (the NPRM), outlined several concerns with the Equity in IDEA rule. We have addressed them below.

¹ U.S. Department of Education, Office for Civil Rights. (2014). *Civil Rights Data Collection: Data snapshot: School discipline (Issue Brief #1)*. Washington, DC: U.S. Department of Education, Office for Civil Rights.
U.S. Department of Education, Office of Special Education and Rehabilitative Services. (2016) *Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity*. Washington, DC: U.S. Department of Education, Office of Special Education and Rehabilitative Services.

The Law Requires States to Address Significant Disproportionality

Identifying and addressing significant disproportionality is not a question of regulation; this is a requirement of the law itself. Congress found “[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities,” and that “[m]ore minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.”² To address these findings, Congress required in section 618(d) of IDEA that each state collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the state and school districts related to “the identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment,”³ “the placement in particular educational settings of such children,”⁴ and “the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.”⁵

When significant disproportionality is found, Congress requires the State to review and revise policies, procedures, and practices.⁶ To effectuate the changes made to these policies, procedures, and practices to reduce and eliminate significant disproportionality, Congress mandated that these school districts reserve the maximum amount of funds under section 613(f) to provide comprehensive early intervening services. Using these funds, the school district must also focus on serving the groups of children who were significantly overidentified.⁷ Finally, Congress required school districts to publicly report on what changes were made to policies, practices, and procedures to reduce and eliminate significant disproportionality.⁸ The Equity in IDEA rule fulfills the statutory mandate to reduce and eliminate significant disproportionality using a standardized approach.

The Standard Methodology in the Equity in IDEA Rule Corrects Years of Inconsistent Implementation

Under final IDEA Part B regulations published in the Federal Register in 2006, the Department afforded states broad discretion in defining significant disproportionality and in developing procedures for identifying school districts with significant disproportionality. While allowing states such discretion may have been well intentioned, it resulted in many states creating definitions and policies that resulted in the identification of few school districts, even when disparate treatment of children based on race or ethnicity was well known.⁹

² IDEA, section 601(c)(12)

³ IDEA, section 618(a)(1)(A)

⁴ IDEA, section 618(a)(1)(B)

⁵ IDEA, section 618(a)(1)(C)

⁶ IDEA, section 618(d)(2)(A)

⁷ IDEA, section 618(d)(2)(B)

⁸ IDEA, section 618(d)(2)(C)

⁹ U.S. Department of Education, Office of Special Education and Rehabilitative Services. (2016) *Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity*. Washington, DC: U.S. Department of Education, Office of Special Education and Rehabilitative Services.

In 2013, this led the U.S. Government Accountability Office (GAO) to recommend the Department “develop a standard approach for defining significant disproportionality to be used by all states. This approach should allow flexibility to account for state differences and specify when exceptions can be made.”¹⁰ In developing the report and recommendation, GAO examined data on comprehensive early intervening services under section 613(f) of IDEA for two school years, carefully reviewed how 16 states identified school districts for significant disproportionality, and conducted on-site visits to several states and school districts. GAO noted in the report the remarkably low number of schools districts using IDEA funding for comprehensive early intervening services, pointing out that “[a]mong the almost 15,000 school districts nationwide that received IDEA funding in school year 2010-11, states required 356 (2.4 percent) districts to use these funds [...] due to significant disproportionality.”¹¹

GAO concluded that Congress required states and school districts to address significant disproportionality, “[h]owever, the discretion that states have in defining significant disproportionality has resulted in a wide range of definitions that provides no assurance that the problem is being appropriately identified across the nation.”¹² This failure is denying children access to additional supports provided as comprehensive early intervening services, which the GAO notes, “without these services, struggling students may not receive the services they need to help them improve academically and thus may ultimately need special education services.”¹³

In the NPRM, the Department notes some commenters believe the Department may not have statutory authority under IDEA to require states to use a standard methodology. Both the GAO recommendations and the 2016 approval from the Office of Management and Budget recognize that Congress clearly granted the Department that authority in 2004 when it enacted section 618(d) of the IDEA. Nothing in the text of the statute prohibits the Department from promulgating a standard methodology.

A Standardized Approach to Significant Disproportionality is Well Understood and Will Improve Enforcement of the Law’s Requirements

In February 2016, the Department released extensive analysis using example risk-ratio thresholds that would comply with the requirements of the Equity in IDEA proposed rule.¹⁴ While the GAO found that states required approximately two percent of all districts to use comprehensive early intervening services to address disproportionality, the Department’s analysis showed that 46.9% of districts met the example threshold for significant disproportionality for three consecutive years.

¹⁰ U.S. Government Accountability Office. (2013) *Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*. Washington, DC: U.S. Government Accountability Office, p22 [hereinafter 2013 GAO Report].

¹¹ 2013 GAO Report, p. 7.

¹² 2013 GAO Report p. 22.

¹³ *Id.*

¹⁴ U.S. Department of Education, Office of Special Education and Rehabilitative Services. (2016) *Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity*. Washington, DC: U.S. Department of Education, Office of Special Education and Rehabilitative Services.

In the intervening months between February 2016 and when the Department published the final rule on December 13, 2016, the Department continued to conduct extensive analysis to understand how the standardized approach included in the final rule would allow for comparisons within and between states and school districts to provide a more accurate picture of how students of color with disabilities are disproportionately identified, placed, or disciplined. As the UCLA Center for Civil Rights Remedies noted, the Equity in IDEA rule relied on risk ratios “in part because most states were already using it.”¹⁵

The Equity in IDEA Rule was Subject to Extensive Public Comment and Review

There is no need for the Department to delay the Equity in IDEA regulation to collect more information from the public as the regulation already went through extensive public comment, review, and scrutiny before final release. The public first had an opportunity to provide information to the Department under docket ED-2014-OSERS-0058, which was published on June 19, 2014. The public was given until July 21, 2014 to comment and provide information. The Department even extended the deadline by a week to ensure the public had robust opportunity to review the request for information and to submit their comments. Taking into account the public comments, the Department published in the federal register a notice of proposed rulemaking on March 2, 2016, under docket ED-2015-OSERS-0132, providing the public 75 days to comment on a draft rule to promote equity in IDEA under section 618(d). More than 300 comments were submitted by researchers, school leaders, families, and advocates, who shared their views on how the regulation would positively impact their lives, suggested changes to the proposed rule, and offered information for the Department to consider. The Department took seven months to carefully review and respond to the public comments and modify the rule to address concerns of the public while also carrying out the requirements of the law in section 618(d). In response to public comments, the Department made at least a dozen changes from the NPRM to the final rule.¹⁶ In short, the public had ample opportunity to provide information and to respond to the proposed rulemaking.

Conclusion: Delaying the Equity in IDEA Compliance Deadline Would Harm Children of Color

The Department must fulfill Congress’s intent to identify and promptly address inequities that lead to significant disproportionality in identification, placement, and discipline. In 2004, Congress found that students of color with disabilities were being mislabeled, overidentified, and overdisciplined compared to their peers, resulting in long-term negative outcomes.¹⁷ Congress provided the Department clear authority to address these problems.¹⁸ Congress directed the Department to prioritize in-state monitoring of disproportionality.¹⁹ In response to the GAO’s recommendation the Department engaged in a three-year-long rulemaking process, which provided ample opportunity for the public to participate. After finalizing the rule, the Department

¹⁵ Losen, D. J. (2018). *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities*. Los Angeles, CA: The Center for Civil Rights Remedies. p. 5.

¹⁶ U.S. Department of Education. (N.D.). *Significant Disproportionality—Changes From Proposed Rule to Final Rule*.

¹⁷ IDEA, section 601(c)(12)

¹⁸ IDEA, section 618(d)

¹⁹ IDEA, section 616(a)(3)(C)

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allowed states more than a year to come into compliance for school-aged children and more than three years for children aged three to five. However, in 2018, by proposing to delay the compliance date of the Equity in IDEA rule, the Department is failing to address the pervasive and ongoing problem of disparate treatment of children of color.

This failure will continue to have serious impacts on our nation's children. A recent report released by the UCLA Center for Civil Rights Remedies found that of the states analyzed, on average, black students with disabilities lost 77.9 more days of instruction than their white peers due to discipline disparities.²⁰ In some states, this gap grew to as high as 153 school days. These disparities in discipline, placement, and identification are pervasive and persistent. While IDEA may be focused on the individual child, it is states, school districts, and schools that must create equitable educational systems and are subject to the requirements of the law.

The law is clear that schools must address these disparities, yet the Department has failed to adequately enforce the law and schools have failed to make meaningful changes as a result. More than a decade later, an entire generation of children have grown up in and graduated from a system that tolerates pervasive inequity for students of color—it is time to take action and support equity for such students by not postponing the Equity in IDEA rule.

The Department must maintain the current timeline for compliance with the Equity in IDEA regulation. Anything less would clearly be inconsistent with the intent of Congress to end significant disproportionality in our nation's schools.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives



PATTY MURRAY
Ranking Member
Committee on Health, Education, Labor
and Pensions
U.S. Senate

CC: The Honorable Betsy DeVos

²⁰ Losen, D. J. (2018). *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities*. Los Angeles, CA: The Center for Civil Rights Remedies.