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May 16, 2016

Ms. 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:

As a coalition of over 100 organizations from 26 states dedicated to ending school pushout due to overly punitive discipline practices that fuel the School-to-Prison Pipeline,<sup>1</sup> we submit these comments in response to the Department of Education’s (the “Department”) Notice of Proposed Rulemaking on the issue of significant disproportionality under the Part B of the Individuals with Disabilities Education Act (IDEA) in special education.<sup>2</sup> As parents, students, and advocates working to eliminate discriminatory practices that undermine equal educational opportunity, we know all too well that students of color are disproportionately misidentified for certain categories of special education, placed in restrictive learning environments at higher rates than their peers, and disproportionately subjected to punitive discipline practices. These discipline practices include suspensions, expulsions, and even arrests that disrupt educational placements, result in lost instruction time, and compromise educational outcomes. We believe that all students receiving special education services deserve the opportunity to learn in the general classroom or the least restrictive environment practicable and to receive quality instruction that will prepare them for higher education or careers. In fact, “[o]ne of the most consistent findings in educational research is that students achieve in direct proportion to their opportunity to learn.”<sup>3</sup>

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<sup>1</sup> “School pushout occurs from kindergarten through high school and results from numerous factors that prevent or discourage young people from remaining on track to complete their education . . .” Dignity in Schools Campaign, National Resolution for Ending School Pushout, available at [http://www.dignityinschools.org/files/DSC\\_National\\_Resolution.pdf](http://www.dignityinschools.org/files/DSC_National_Resolution.pdf).

<sup>2</sup> 20 U.S.C. §§ 1413(f)(1) and 1418(d)(2)(B)).

<sup>3</sup> Wang, M. C , Haertel, G. D., & Walberg, H. J. (1997). Learning influences. In H. J. Walberg & G. D. Haertel (Eds.), *Psychology and educational practice* (pp. 199-211). Berkeley, CA: McCutchan.

Therefore, we urge the Department to issue final regulations that will help to ensure that states act to eradicate discriminatory practices that perpetuate significant disproportionality, including by employing a standard formula for determining significant disproportionality, ensuring implementation of evidence-based interventions like positive behavioral interventions and supports, and including parents and community stakeholders in establishing reasonable ratios by which to determine significant disproportionality and developing and implementing interventions to eliminate disproportionality.

We support the Department's proposal for a more standardized approach for determining significant disproportionality. As you know, in 2004, the IDEA was amended to require states to identify and address the overrepresentation of students by race or ethnicity for eligibility for special education services, placement in less inclusive settings, and overuse of punitive disciplinary practices. Further, the law requires those local educational agencies (LEAs) found to have significant disproportionality to dedicate 15 percent of IDEA funds for early intervening programs. However, the law did not define significant disproportionality, leaving it up to states to develop indicators to determine significance. This has resulted in a patchwork of significant disproportionality formulas across states, resulting in virtually no reported incidents of significant disproportionality. In 2010, approximately 2 percent of school districts nationwide were found to have disproportionate representation in special education eligibility, placement, or use of discipline—meaning that 21 states found no instances of significant disproportionality that year. In 2012-2013, 22 states found no instances of significant disproportionality. Therefore, differing state standards have diluted the intent of Congress to address racial and ethnic disproportionality in special education.

In addition, lack of identification of significant disproportionality allows racial and ethnic disparities in the identification, placement, and discipline of students of certain races or ethnicities with disabilities to persist unmitigated. For example, according to national data, more than one in four boys of color with disabilities and nearly one in five girls of color with disabilities receives an out-of-school suspension.<sup>4</sup> Further, although students with disabilities are only 12 percent of the overall student population, they represent a quarter of students arrested and referred to law enforcement.<sup>5</sup> These statistics demonstrate that disparities among students of color receiving special education services in the discipline arena persist. Therefore, we support the Department's proposal to require a more standardized approach for identification of disproportionality, including the Secretary's review and approval of states' definitions of "reasonable" methods for identification of disproportionality within school districts.

However, we oppose the Department's proposal to allow LEAs to exclude reporting of student placements in correctional facilities,<sup>6</sup> as this would obscure a lot of disparities in special education placements resulting from discriminatory discipline practices and referrals to law enforcement. Many students subjected to punitive discipline practices and policies end up in the

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<sup>4</sup> Data Snapshot: School Discipline, U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection (CRDC), March 2014, available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> 34 CFR 300.647(b)(4)(iii).

juvenile justice system, often for minor infractions like dress code violations. The goal of the disproportionality analysis includes determining disparities in placement outside of the general classrooms along racial or ethnic lines. For these reasons, it is critical that correctional settings (which could be categorized as restrictive) not be excluded from the significant disproportionality analysis if they include more than 10 students. As data on the school-to-prison pipeline has demonstrated,<sup>7</sup> some students with disabilities are disproportionately “placed” in the juvenile justice system due to the overuse and/or inappropriate use of school-based arrests and referrals, and students from particular protected classes may be placed into the juvenile justice system at higher rates.<sup>8</sup> While the juvenile court is clearly an additional influencing factor in the placement of students in juvenile facilities, some LEAs have higher placement rates as a result of discriminatory discipline policies and practices. Students within juvenile facilities should be afforded the same IDEA protections as all other covered students under the law. Therefore, we recommend that, if an LEA has more than 10 students placed in a correctional facility’s educational program, that LEA should be included in the significant disproportionality analysis for the same reasons as any other program. As such, students with disabilities in correctional settings should be included in the risk ratio analysis.

Further, we urge the Department to clarify that comprehensive Coordinated Early Intervening Services (CEIS) can include evidence-based interventions proven to curb the use of exclusionary and overly punitive discipline practices, like schoolwide positive behavioral interventions and supports. We agree with the Department’s assertion that “suspensions and expulsions can often be avoided,”<sup>9</sup> and we agree that implementation of evidence-based discipline alternatives will help to ensure that “LEAs will increase the number of children participating in the general education curriculum on a regular and sustained basis . . . .”<sup>10</sup> Implementation of alternatives like training on implicit bias can help to address the root causes of discipline disparities along racial lines, consistent with the Department’s proposed language requiring LEAs identified as having significant disproportionality to act to address the contributing factors and root causes of the disproportionality. Since data show that children of color with disabilities are disproportionately targeted for exclusionary discipline and disruption of special education placements, it is important that interventions include programs, such as: training on implicit bias and cultural competency; training on restorative practices; training on peer mediation; and schoolwide positive behavioral interventions and supports.

In addition, it is important that states examine any disciplinary practices that disrupt special education placements, even those disruptions that are less than 10 days, which would not be

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<sup>7</sup> “While black students represent 12 percent of the student population, they represent 27 percent of students referred to law enforcement and 31 percent of students subjected to a school-related arrest.” Data Snapshot: School Discipline, U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection (CRDC), March 2014, available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

<sup>8</sup> See *The school to prison pipeline, Explained*, the Justice Policy Institute, January 24, 2015, available at <http://www.justicepolicy.org/news/8775>.

<sup>9</sup> U.S. Department of Education 81 Fed. Reg. 41 (proposed March 2, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-03-02/pdf/2016-03938.pdf>.

<sup>10</sup> *Id.*

considered a removal from placement under IDEA section 615(k)(1)<sup>11</sup> or a change in placement under IDEA section 615(k)(1)(C).<sup>12</sup> We also support the Department’s proposal that comprehensive CEIS serve both students with and without disabilities to ensure that all students reap the benefit of programs and interventions to address the overuse of exclusionary and punitive discipline.

Finally, we support the Department’s proposed expansion and strengthening of the role of stakeholders, including statutorily required representatives of State Advisory Panels,<sup>13</sup> to ensure meaningful stakeholder input in determining a state’s “reasonable” risk ratio threshold for identifying significant disproportionality and for advising on implementation and oversight of state efforts to address and remedy significant disproportionality. The proposed regulations, consistent with prior law, require states to incorporate the input of members of the State Advisory Panel who are representative of statutorily required groups.<sup>14</sup> In particular, we support the Department’s proposal that stakeholder input be incorporated in defining a “reasonable” threshold for risk ratios in three categories of analysis: identification of children with disabilities, including for particular disability categories described in section 602(3) of IDEA; placement of children with disabilities in particular educational settings; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions. For too long, exploitation of state flexibility to set risk ratios to determine significant disproportionality has served only to mask disparities and leave issues of significant disproportionality invisible and unaddressed—to the detriment of affected students.

As parents of students with disabilities and as advocates, we have experienced exclusion from state and LEA decision-making and recommend that the Department ensure that regulations outline ways that states and LEAs can meaningfully include all stakeholders in addressing significant disproportionality. For instance, in order to ensure that states meaningfully incorporate stakeholder input and advice in developing “reasonable” risk ratio thresholds, we recommend that states be required to demonstrate outreach and incorporation of diverse stakeholder input and advice in setting thresholds and addressing significant disproportionality. This can be achieved through: documentation of outreach to stakeholders (including efforts to recruit a diverse State Advisory Panel); posting of detailed minutes of State Advisory Panel meetings; transparent publication and communication about state efforts to set “reasonable” risk ratios; demonstration of how stakeholder feedback was incorporated in defining final thresholds above which

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<sup>11</sup> 20 U.S.C. 1415(k)(1).

<sup>12</sup> *Id.*

<sup>13</sup> Established under Section 612(a)(21)(D)(iii) of the Individuals with Disabilities Education Act, P.L. 118-446, requires that the State has “established and maintained a an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.”

<sup>14</sup> *Id.* Such representatives are to include: a parent of a child with disabilities; an individual with disabilities; teachers; a representative from an institution of higher education that prepares special education and related services personnel; one State and one local education official, including an official who carries out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act; one Administrator of programs for children with disabilities; one representative of private schools and public charter schools’ one representative of a vocational community, or business organization concerned with the provision of transition services to children with disabilities; one representative from the State child welfare agency responsible for foster care; and one representative from the State juvenile and adult correctional agencies.

disproportionality is significant; demonstration of stakeholder input in reviewing and revising state policies, practices, and procedures related to identification or placement of children with disabilities in LEAs identified as having significant disproportionality; and transparency in noting state efforts and progress in remedying significant disproportionality.

In addition to the statutorily required representative groups in the State Advisory Panel, we also urge the Department to ensure that states select stakeholders from geographically, racially, and ethnically diverse groups, particularly those populations impacted by and familiar with the issue of significant disproportionality. As a national coalition, we represent a wide range of stakeholders, including groups representing parents of students with disabilities, who have advocated for decades for meaningful inclusion in state development and implementation of policies and practices impacting students with disabilities.

We thank you for the opportunity to comment on the Department's proposed regulations. We look forward to working with you to finalize strong regulations that will help states address significant disproportionality, particularly in the discipline of students with disabilities, and to advance equal educational opportunity for all students. If you have any questions about the concerns raised in this comment letter, please contact Natalie Chap at [natalie@dignityinschools.org](mailto:natalie@dignityinschools.org). Thank you for your thoughtful consideration of the comments outlined herein.

Sincerely,

The Dignity in Schools Campaign