



May 14, 2018

By Electronic Submission to www.regulations.gov

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
Washington, DC 20202-2500

Re: Comments on Proposed Rulemaking; Docket ID ED-2017-OSERS-0128

Dear Assistant Secretary Collett:

I write in response to the Department's February 27, 2018 request for comments on its proposed delay in requiring compliance with its "significant disproportionality" regulation. The Bazelon Center joins the comments of the Leadership Conference for Civil and Human Rights, the Consortium for Citizens with Disabilities Education Taskforce, and the Civil Rights Roundtable opposing the Department's proposal, and also offers these additional comments.

The Bazelon Center shares with the other organizations in these coalitions their grave concerns regarding the Department's possible rollback of vital civil rights protections for students, with and without disabilities. As national advocates for people with mental disabilities, we are keenly aware of the widespread use of unnecessary segregation and disciplinary removals of students with disabilities, particularly those of color, and the profoundly detrimental effect these practices have on students' educational opportunities and life trajectories.

The Bazelon Center's mission is to protect and advance the rights of adults and children who have mental disabilities. The Bazelon Center pursues a progressive mental health policy agenda, through litigation, legislative and regulatory advocacy, and research and analysis, to reform systems and programs to protect the rights of children and adults with mental disabilities to lead lives with dignity in the community. Among these initiatives, the Bazelon Center has supported proven strategies such as multi-tiered systems of support, including schoolwide positive behavior supports, to reshape how public school systems support children with disabilities so that they avoid isolation, suspension, expulsion, and involuntary placements in inferior residential or day schools, segregated classrooms, juvenile correctional facilities, or other institutions.

The Bazon Center believes that the Department’s proposal does not adequately account for the costs, to students and to society, in delaying compliance with the “significant disproportionality” regulation, or the benefits of timely compliance. We also do not find the Department’s explanation of the need for delay and review of the regulation credible; the regulation was promulgated after a robust public comment period, during which the Department received hundreds of comments from interested parties and addressed them through changes to its proposed rulemaking, and in analyses issued in tandem with the regulation. Stakeholders with concerns have already had the opportunity to seek and obtain changes to the regulation; there is no need to repeat this process now.

Students and Other Stakeholders Will Be Harmed By the Proposed Delay; They Would Benefit from Timely Compliance with the Regulation.

Education, including the education of students with disabilities, is one of the most significant civil rights issues of our time. All too often, however, students with disabilities, including students of color with disabilities, are denied educational opportunities equal to those of their non-disabled peers. As described in the Civil Rights Roundtable’s comments, the overuse of exclusionary discipline contributes to this troubling trend. Youth with disabilities are twice as likely to be suspended as their peers without disabilities, and among Black students with disabilities the rate jumps to one in four. Students with disabilities are disproportionately affected by punitive school policing policies because they are more frequently disciplined for minor public order offenses. They are also disproportionately arrested – often for behaviors that are manifestations of their disability. Low-income children of color are at greatest risk of this treatment. This historic trend continues, as the Department’s recent release of new disaggregated discipline data makes clear.¹ The failure to identify and remedy this issue leads to significant negative outcomes for students of color with disabilities.

Students of color with disabilities are too often inappropriately separated from their non-disabled classmates for other, non-disciplinary reasons. They do not receive the supports they need to succeed in classrooms with students without disabilities, or they are wrongly assumed

¹ See, e.g., U.S. Dep’t of Educ., Office for Civil Rights, 2015-16 Civil Rights Data Collection: School Climate and Safety 3-4, 13-16 (Apr. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>; see also Sarah D. Sparks, *Discipline Gaps – and Ways to Close Them – Get Researchers’ Attention*, Educ. Week (Apr. 24, 2018) (describing research indicating that, in 2014-2015 and 2015-2016 school years, Black students with disabilities lost approximately three times as much instruction from discipline as white students with disabilities), <https://www.edweek.org/ew/articles/2018/04/25/discipline-gaps--and-ways-to-close-them--get-researchers.html?qs=Losen>.

to need a separate setting where their behavior can be addressed. An extensive analysis of student and school district data from Massachusetts shows that low-income students were referred for special education at significantly higher rates than students from middle and upper income households, and that those same students were significantly more likely to be segregated from general education classrooms.² At the same time, data showed substantially high levels of segregation, in separate schools or classrooms, of Black and Latinx students with disabilities, beginning in middle school and continuing through high school, with the sharpest disparities impacting Black students identified as having an “emotional disturbance.”³ We note Massachusetts as only one example, but we know from our own work and from partners in advocacy that similar patterns of significant disproportionality span multiple states and school districts, stemming from bias and discrimination related to differing combinations of race, ethnicity, gender, socioeconomic status, and specific disability. Students with disabilities belonging to multiple minority groups are at highest risk for segregation and school pushout, which deny them the benefits and access afforded by full inclusion.

These benefits are well established. Longitudinal research sponsored by the Department of Education, along with independent studies, confirms that students with disabilities who are included in regular classrooms do better in school and as adults than students with disabilities in separate, “segregated” schools or classrooms. The Department has found that, even controlling for students’ cognitive abilities, students with disabilities who spend most of their time in regular classes have higher test scores in reading and mathematics than students who spend most of their time in segregated schools and classes.⁴ Greater participation in regular classrooms also leads to positive social outcomes for students with disabilities, including belonging to school or community groups and missing fewer days of school.⁵ Inclusion also

² See Thomas Hehir et al., Review of Special Education in the Commonwealth of Massachusetts 5-6 (Apr. 2012), <http://www.doe.mass.edu/sped/hehir/2012-04sped.pdf>.

³ *Id* at 11-12.

⁴ See Mary Wagner & Jose Blackorby, Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal Study (SEELS) 24 (June 2004) [hereinafter Overview of Findings from Wave 1], http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf; Jose Blackorby et al., What Makes a Difference? Influences on Outcomes for Students with Disabilities 7-7 (Feb. 2007) [hereinafter What Makes a Difference?], http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf.

⁵ What Makes A Difference?, *supra* note 1, at 7-17; Overview of Findings from Wave 1, *supra* note 1, at 24.

leads to better postsecondary outcomes, including in employment, postsecondary education, and income.⁶

The Massachusetts data analysis showed that including students with disabilities in regular classrooms led to better performance on state academic proficiency tests.⁷ The higher scores were not explained by income, race, English language proficiency, or type of disability. Further, across all disability groups, students with disabilities included in regular classrooms were more likely to graduate than students who spent all or most of the day in segregated settings.⁸

Inappropriately segregating students with disabilities, including students of color with disabilities, harms these students in significant ways. Segregated students perform worse in reading and math than do included students, controlling for other differences between students, including functional cognitive skills.⁹ Segregated students miss more days of school.¹⁰ Among all students with disabilities, there are huge differences in the graduation rates of students who are segregated, versus those who are included. These differences are even greater for students with certain types of disabilities; the Massachusetts study showed that, among students with emotional disturbance still enrolled four years after entering high school, 60 percent of included students graduated on time, but only 35 percent of segregated students graduated on time.¹¹ Further, segregated students with emotional disturbance are more likely to be involved in disciplinary removals from school¹² – and, as the Department has acknowledged, exclusionary discipline is correlated with an array of negative outcomes,

⁶ See Mary Wagner et al., *What Makes a Difference? Influences on Postschool Outcomes of Youth with Disabilities: The Third Comprehensive Report from the National Longitudinal Transition Study of Special Education Students 4-8 to 4-9 & Table 4-5* (Dec. 1993), <http://files.eric.ed.gov/fulltext/ED365085.pdf>.

⁷ Hehir (2012), *supra* note 2

⁸ Thomas Hehir et al., *Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report 9-10 & n.14* (Aug. 2014), <http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf>.

⁹ Overview of Findings from Wave 1, *supra* note 4, at 24; *What Makes a Difference?*, *supra* note 4, at 7-7.

¹⁰ *What Makes a Difference?* at 7-17; Overview of Findings from Wave 1 at 24.

¹¹ Hehir (Aug. 2014), *supra* note 8, at 9-10 & n.14.

¹² *What Makes a Difference?* at 7-17; Overview of Findings from Wave 1 at 24.

including school avoidance, increased behavior problems, substance abuse, and involvement with delinquency and adult criminal systems.¹³

The Department's proposal to delay compliance with its significant disproportionality regulation does not adequately account for the harms to students, and stresses to families, schools, and other youth and family-serving systems, from the delay – or, conversely, for the benefits inhering in timely compliance. The Department estimates that over the next two years some 620 fewer school districts will be identified by states as having significant disproportionality on the basis of race or ethnicity in special education identification, placement, or exclusionary discipline.¹⁴ Students of color, both with and without disabilities, will not have the benefit of the regulation's requirement that these districts review and, if necessary, revise their special education policies, practices, and procedures to end any discriminatory disproportionality. They will not benefit from the regulation's required reservation of comprehensive coordinated early intervention services (CEIS) to address the factors contributing to discriminatory disproportionality. And their families will not have the benefit of publicly-available information about the districts that have been identified as having significant disproportionality, information parents and guardians may use to make decisions about where to send their children to school, or to help families advocate for change at their school.

The Department's proposal would also delay by two years compliance with the regulation's requirement, now to take effect in July 2020, that states include children ages three through five in their significant disproportionality analysis.¹⁵ If this aspect of the regulation is delayed, these young children in school districts with discriminatory disproportionality, both with and without disabilities, would also be denied the benefit of evidence-based comprehensive CEIS,

¹³ U.S. Dep'ts of Educ. & Justice, Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014) (citing authorities), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

¹⁴ Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 83 Fed. Reg. 8,398 (Feb. 27, 2018) [hereinafter NPRM]. Although in its proposal the Department says that it is unlikely that more schools would be identified, it has also estimated that the number of identified LEAs might triple or quadruple over its 2012-2013 school year baseline, in which states identified 449 school districts as having significant disproportionality. Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 92,388 (Dec. 19, 2016) [hereinafter Final Regulation].

¹⁵ NPRM, *supra* note 14, at 83 Fed. Reg. 8,396.

which has been shown to help children in inclusive settings make more progress in learning, and demonstrate stronger social-emotional skills, than children in segregated settings.¹⁶

In its promulgation of the significant disproportionality regulation, the Department stated its belief that compliance with the regulation would result in school districts “increas[ing] the number of children participating in the general education curriculum on a regular and sustained basis,” which in turn would lead to greater educational gains for students with disabilities.¹⁷ The costs of delaying these gains, to students with and without disabilities, their families, and the rest of society, are nowhere to be found in the Department’s analysis of costs and benefits supporting its proposal to delay the regulation. The failure to take these costs into account seriously undermine the Department’s purported rationale for delay.

The Department Has Already Considered Hundreds of Comments on the Regulation; Further Review is Unnecessary.

The significant disproportionality regulation was issued after the Department’s review of 316 sets of comments on its proposed regulation.¹⁸ This was not a *pro forma* review: the Department made several significant changes to its original proposal, including changes that give states more discretion in how they identify significant disproportionality in schools.¹⁹ As published in the Federal Register, the regulation is accompanied by lengthy analyses of the comments the Department received, the Department’s response to each substantive comment, and identification of any changes made in response to each comment.²⁰

¹⁶ See U.S. Dep’t of Health & Human Servs. & Educ., Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs 3-4 (Sep. 14, 2015) (citing studies), <https://www2.ed.gov/policy/speced/guid/earlylearning/joint-statement-full-text.pdf>.

¹⁷ Final Regulation, *supra* note 14, 81 Fed. Reg. 92,458.

¹⁸ *Id.* at 92,379. The proposed regulation followed the Department’s review of 95 sets of comments on an earlier Request for Information on the General Accounting Office’s 2013 study recommending that the Department adopt a standard methodology for determining significant disproportionality. Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 10,968, 10,972 (March 2, 2016) (citing Request for Information on Addressing Significant Disproportionality Under Section 618(d) of the Individuals with Disabilities Education Act (IDEA), 79 Fed. Reg. 35,154 (Jun. 19, 2014)).

¹⁹ Final Regulation, *supra* note 14, at 92,378.

²⁰ *Id.* at 92,379-92,455.

The Department’s proposal now to delay compliance with the regulation identifies a few comments it received in response to its 2017 general solicitation on regulatory reform that it says raise concern that the regulation “may not appropriately address the problem of significant disproportionality.”²¹ Each of these comments, however, was raised and addressed during the public comment period on the significant disproportionality regulation itself, before its promulgation in December 2016:

- The proposal summarizes comments arguing that the Department lacks statutory authority under the IDEA to require states to use a standard methodology to determine whether significant racial or ethnic disproportionality exists within a school district’s special education system.²² As the analyses of similar comments from 2016 make clear, however, the Department considered this argument before promulgating the regulation, and responded by defending its statutory authority to issue regulation, to the extent such regulation is necessary to ensure compliance with the IDEA.²³
- The proposal also repeats a comment from the 2017 solicitation that the standard methodology the regulation requires states to use to determine whether significant disproportionality exists “improperly looks at group outcomes through statistical measures” rather than focusing on each individual child’s needs and the appropriateness of individual identifications, placements, or discipline.²⁴ In 2016, however, the Department responded to a similar comment, clarifying – repeatedly –

²¹ NPRM, *supra* note 14, 83 Fed. Reg. 8,397.

²² *Id.*

²³ Final Regulation, *supra* note 14, at 81 Fed. Reg. 92395-96 (explaining that the Department chose not to define “significant disproportionality” in its 2006 IDEA regulation, but that this did not preclude it from doing so in 2016; adding, with respect to whether it had exceeded its authority, that “[n]othing in these regulations requires the adoption of particular educational practices at the local level or seeks to exert control of local education decision-making”); *see also id.* at 92,443 (defending Department’s authority under IDEA to clarify through regulation that IDEA requires states to remedy discriminatory disproportionality when it occurs in disciplinary removals from placement).

²⁴ NPRM, *supra* note 14, at 83 Fed. Reg. 8,397.

that nothing in the regulation “restrict[s] the ability of Individualized Education Program (IEP) Teams or others to appropriately identify and place children with disabilities.”²⁵

- The proposal also summarizes comments raising concerns that the standard methodology would incent school districts to establish numerical quotas on the number of children who can be identified as eligible for special education, or quotas for types of placements or incidents of the use of certain disciplinary methods.²⁶ But this argument was made and addressed during the 2016 comment period; the Department stated then that a school district’s use of a quota would “almost certainly” conflict with its obligations to comply with other federal laws, and added to the regulation a prohibition on the implementation of policies or practices to address significant racial or ethnic proportionality that would violate other IDEA requirements.²⁷
- Finally, the proposal summarizes comments from 2017 criticizing the Department for not providing standards by which it would assess the “reasonableness” of a state’s significant disproportionality analyses.²⁸ But in its analyses of comments accompanying the regulation’s promulgation, the Department clarified what conditions it might consider in making a reasonableness determination, while indicating that it would provide additional guidance in the future.²⁹ Such guidance has not been issued; instead, the Department has reversed course and now seeks to delay compliance with the regulation, rather than enforce it.

Critics of the Department’s efforts, pursuant to its statutory obligation, to reduce discriminatory racial or ethnic disproportionality in special education may not appreciate aspects of the regulation, but their criticisms appear to have all been addressed by the

²⁵ Final Regulation, *supra* note 14, at 81 Fed. Reg. 92,381, 92,393-94, 92,397.

²⁶ NPRM, *supra* note 14, at 83 Fed. Reg. 8,397.

²⁷ Final Regulation, *supra* note 14, at 81 Fed. Reg. 92,381-82, 92,385. *Cf.* Letter to the Honorable Mike Morath, Commissioner, Texas Education Agency, from Ruth Ryder, Acting Director, U.S. Dep’t of Educ., Office of Special Educ. Programs (Jan. 11, 2018) (where state had “standard” for school districts of identifying 8.5% of students as IDEA-eligible, finding that state was noncompliant with IDEA “child find” and FAPE obligations).

²⁸ NPRM, *supra* note 14, at 83 Fed. Reg. 8,397.

²⁹ Final Regulation, *supra* note 14, at 81 Fed. Reg. 92,422-23.

Department in its review of comments before promulgating the regulation in 2016. To the extent that the proposal's examples of concerns raised in response to its 2017 solicitation are intended to represent contemporaneous but unidentified concerns, it is hard to imagine an issue that the Department did not consider and address as part of its 2016 promulgation. And it is difficult to see how any newly-identified critique, on any grounds, of the regulation could provide a credible rationale for delay, before compliance with the regulation has been required. Stakeholders who wish to maintain a status quo in which students of color, with and without disabilities, continue to be inappropriately identified for special education, unnecessarily and harmfully segregated, and disciplined at far greater numbers than their peers should not get a second bite at the apple. The Department should not delay compliance with the regulation based on these warmed-over complaints.

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The Bazelon Center appreciates the opportunity to comment upon the Department's proposal to delay the significant disproportionality regulation. We oppose any delay or review that would jeopardize the implementation of these long overdue rules for identifying and, as needed, taking steps to eliminate discriminatory racial or ethnic disproportionality in special education policies, procedures, and practices. Please feel free to contact Lewis Bossing, Senior Staff Attorney, at (202) 467-5730 x1307 or at lewisb@bazelon.org with any questions about these comments, or for additional information.

Sincerely,

/s/

Jennifer Mathis

Director of Policy and Legal Advocacy

Judge David L. Bazelon Center for Mental Health Law

