



For people with intellectual  
and developmental disabilities

The Arc

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Johnny W. Collett  
Assistant Secretary  
Office of Special Education and Rehabilitation Services  
Department of Education  
400 Maryland Avenue SW, Room 5107  
Potomac Center Plaza  
Washington, DC 20202-2500

Submitted Electronically via Regulations.gov

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

Dear Assistant Secretary Collett:

On behalf of The Arc, I am pleased to submit comments to the Office of Special Education and Rehabilitation Services (OSERS) on the U.S. Department of Education's proposed rulemaking, Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities (Equity in IDEA), [Docket ID ED-2017-OSERS-0128](#).

The Arc is the largest community-based organization for people with intellectual and developmental disabilities (I/DD). The Arc has a network of over 650 chapters across the country promoting and protecting the human rights of people with I/DD and actively supporting their full inclusion and participation in the community throughout their lifetime.

Before delving into specific comments about the regulation, we believe it is important to articulate why significant racial and ethnic disproportionately in identification, placement, and discipline are harmful to both the children who experience it, as well as to those who do not.

#### **Harm resulting from significant racial/ethnic disproportionality in identification and placement**

While The Arc does not believe that appropriate special education identification and placement should be avoided or stigmatized, we are very concerned about the human and financial costs of inappropriate

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identification and placement. The Individuals with Disabilities Education Act (IDEA) is effective only when students are appropriately assessed, evaluated, and correctly determined to need special education and related services. Inappropriate identification and placement should be avoided for a number of reasons including:

**Exclusion.** Despite requirements in the IDEA for students with disabilities to be educated in the general education classroom to the “maximum extent appropriate,” we know that this is not always the case. Such inclusion is most limited for students identified with intellectual disability. According to the most recent [Report to Congress on IDEA implementation](#), nearly half (49.7 percent) of students reported under the category of intellectual disability were educated inside the regular class less than 40% of the day.<sup>1</sup>

**Reduced likelihood of receiving a regular high school diploma.** Exclusion from the general education classroom limits access to the general education curriculum, which in turn reduces the likelihood of graduating with a regular high school diploma. In the 2014-15 school year, students served by IDEA graduated from school at a rate of 69%<sup>2</sup>, while the national graduation average was about 83%<sup>3</sup>.

**Loss of resources.** It costs more to educate students with disabilities than it does to educate those without disabilities, with estimates indicating the cost is more than double.<sup>4</sup> The current system of over identification and placement is resulting in fewer dollars to support the students who most need special education and related services. Coupled with the continued underfunding of IDEA by the federal government, most school districts are struggling to fulfill their obligations.

### **Harm resulting from significant racial/ethnic disproportionality in discipline**

There is ample evidence of not only the harm of punitive disciplinary practices, but of effective alternatives to these practices. Unfortunately, students of color, particularly African Americans, have long borne the brunt of disproportionate rates of suspension, expulsion, and other harmful forms of discipline such as restraint, aversive interventions, and seclusion. For instance, African American students represent 27% and 23% of students restrained or secluded, respectively, yet make up only 15% of the student population.<sup>5</sup> Such disproportionate rates of disciplinary action must be reduced to avoid, among other things:

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<sup>1</sup> 39th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2017

<sup>2</sup> Children and Youth with Disabilities, April 2018. Available at [https://nces.ed.gov/programs/coe/indicator\\_cgg.asp](https://nces.ed.gov/programs/coe/indicator_cgg.asp)

<sup>3</sup> Public High School Graduation Rates, May 2018. Available at [https://nces.ed.gov/programs/coe/indicator\\_coi.asp](https://nces.ed.gov/programs/coe/indicator_coi.asp)

<sup>4</sup> Background of Special Education and the Individuals with Disabilities Education Act, 2004. Available at <http://www.nea.org/home/19029.htm>

<sup>5</sup> 2015-16 Civil Rights Data Collection: School Climate and Safety, April 2018. Available at <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>

**Lost instructional time.** Exclusionary discipline practices, which result in lost instructional time, have been found to have a detrimental impact on a student’s academic and professional success. Exclusionary discipline practices also have an indirect adverse effect on students who were not suspended, by negatively affecting their academic achievement, including math and science scores<sup>6</sup>, and contributing to a negative school climate both in and outside the classroom.<sup>7</sup> In school districts across California, African American students lost 43 days of instruction per 100 enrolled, compared to 11 days lost per 100 white students.

**Involvement with the Criminal Justice System.** A new report from the Department of Education’s Office of Civil Rights for the 2015-16 school year found that African American students accounted for 31% of referrals to law enforcement or school-related arrests, but make up just 15% of school enrollment.<sup>8</sup> Such experiences are shown to worsen the odds of these students succeeding in school and increase their likelihood of entering the juvenile justice and adult prison systems. Even one or two out-of-school suspensions are linked by multiple studies to a greater risk of a student dropping out, suffering “failure” and being incarcerated.<sup>9</sup> According to [data](#) collected by the Council of State Governments Justice Center, students who are suspended or expelled for a discretionary violation were nearly three times as likely to be in contact with the juvenile justice system the following year.<sup>10</sup>

## Background on the Equity Regulation

The requirement for data on significant disproportionality was made in response to substantiated concerns that students from certain groups are treated unfairly in terms of over identification with certain types of disabilities, placement in segregated classes, and suspension and expulsion from school. As stated by former Assistant Secretary for OSERS Michael Yudin:

*“As research shows and data shows and as Congress has found, more children of color continue to be served in special ed than would be expected from the percentage of children of color in the general school population. We know from research that kids of color are significantly more likely to be identified as having a disability particularly in the category of emotional disturbance or intellectual disability. Kids of color are significantly more likely to be educated in segregated or*

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<sup>6</sup> Suspending Progress: *Collateral Consequences of Exclusionary Punishment in Public Schools* Brea L. Perry, Edward W. Morris (2014) available at <http://journals.sagepub.com/doi/abs/10.1177/0003122414556308>

<sup>7</sup> *Influence of Classroom and School Climate on Teacher Perceptions of Student Problem Behavior*, Lindsey M. O’Brennan, Catherine P. Bradshaw, and Michael J. Furlong, (2014) available at

<sup>8</sup> 2015-16 Civil Rights Data Collection: School Climate and Safety, April 2018. Available at <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>

<sup>9</sup> *Breaking Schools’ Rules: A Statewide Study on How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, available at [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf)

<sup>10</sup> *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, July 2011. Available at [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf)

*self-contained settings. And kids of color are significantly more likely to be submitted to disparate practices that move them from the classroom.”<sup>11</sup>*

In 2004, the requirement to collect and report data on significant disproportionality ([20 USC 1418\(d\)](#)), and take certain action if it is found, was added to IDEA. However, in the 14 years since the law was changed, few states and school districts have reported any such significant disproportionality. This fact was documented in a [2013 U.S. Government Accountability Office \(GAO\) study](#) showing widespread noncompliance by states with these provisions. Most states had set thresholds for identifying disproportionate districts so high that no districts ever exceeded them, and, therefore, none were ever identified or the issues resolved. Only 2-3% of all school districts nationwide were identified and required to take action. The GAO recommended that, “To promote consistency in determining which districts need to provide early intervening services, Education should develop a standard approach for defining significant disproportionality to be used by all states.”

Following the GAO’s recommendation, the Department of Education issued a [notice of proposed rulemaking \(NPRM\)](#) in March of 2016 and final regulations in December of 2016 ([34 CFR 330.646](#) and [34 CFR § 300.647](#)) that are set to take effect in July of 2018. These regulations provide a standard methodology (a standard or alternate risk ratio) for determining significant disproportionality, but permit each state to set its own thresholds so long as they are “reasonable.”

The regulation requires districts to continue collecting data on the elements shown in the chart below:

School District Action	BY Race/Ethnicity
<p><b>I Identification</b> (ages 3-21):</p> <ol style="list-style-type: none"> <li>1) All disabilities</li> <li>2) Intellectual disabilities</li> <li>3) Specific learning disabilities</li> <li>4) Emotional disturbance</li> <li>5) Speech or language impairments</li> <li>6) Other health impairments</li> <li>7) Autism</li> </ol> <p><b>II Placement</b> (ages 6-21)</p> <ol style="list-style-type: none"> <li>8) In regular class &lt; 40% of day</li> <li>9) Separate schools and residential facilities</li> </ol> <p><b>III Discipline</b> (ages 3-21)</p> <ol style="list-style-type: none"> <li>10) Out-of-school suspensions or expulsions ≤ 10 days</li> <li>11) Out-of-school suspensions or expulsions &gt; 10 days</li> <li>12) In-school suspensions ≤ 10 days</li> </ol>	<ol style="list-style-type: none"> <li>1) Hispanic/Latino of any race, and for individuals who are non-Hispanic/Latino only;</li> <li>2) American Indian or Alaska Native;</li> <li>3) Asian;</li> <li>4) Black or African American;</li> <li>5) Native Hawaiian or other Pacific Islander;</li> <li>6) White; and</li> <li>7) Two or more races.</li> </ol>

<sup>11</sup> Equity in IDEA: Notice of Proposed Rulemaking. Transcript of Presentation Dialog. March, 2016.

13) In-school suspensions > 10 days 14) Total disciplinary removals	
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What is new in the regulation, however, are “presumptively reasonable” cut off points for numbers that should be examined in each of the cells in a spreadsheet. There are up to 98 such cells (14 district actions x 7 racial ethnic groups) if there are sufficient numbers for all of the categories. Many states and school districts have not been examining these numbers because they say there are too small (not enough of them in each cell). To avoid this, the regulation established the following presumptively reasonable minimum numbers:

- Minimum cell size of 10. This means that if there are at least 10 students with a particular outcome, they must be counted. For example, 10 students identified with intellectual disability.
- Minimum “N size” of 30. This means that as long as there are at least 30 students in the population being looking at, they must be counted. For example, 30 African American students in a school district.

The regulation also now requires states to analyze racial and ethnic disparities using a standard or alternate risk ratio (which most already do)<sup>12</sup>. A risk ratio is the chance that something happens to one group of students compared to the chance that it happens in another group of students. For example, in a hypothetical school district in South Carolina, African American students have a 1 in 20 chance of being identified with intellectual disability, while all other students have a 0.5 in 20 such chance. This example yields a risk ratio of 2:1 (1/0.5), meaning that African Americans students in this particular school district are twice as likely as other students to be identified with intellectual disability. It is also worth noting that this difference would not presently be considered significantly disproportionate since South Carolina has set a weighted risk ratio of 4:1 (or 4) as the threshold for identification.<sup>13</sup>

Under the regulations, states can continue to set their own thresholds for risk ratios so long as they are “reasonable.” While the regulation does not define a reasonable risk ratio, the Department had previously published in its [NPRM](#), a set of *example* risk ratio thresholds that are two median absolute deviations (MADs) above the national median of school district risk ratios.<sup>14</sup> In plain English, the threshold of 2 MADs was selected to identify school districts whose numbers are far off from the national picture. Instead of picking an arbitrary threshold, this approach helps to ensure equity by highlighting districts that are outliers when compared to other school districts across the country.

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<sup>12</sup> 45 States used the risk ratio method or one of its variations to define a risk ratio threshold, over which disproportionality is considered significant. Available at <https://www2.ed.gov/policy/gen/guid/school-discipline/files/nprm-significant-disproportionality--unofficial-copy.pdf>

<sup>13</sup> The Department found that the most common risk ratio threshold used by States was 4.0 (16 States), with 7 States each using 3.0 or 5.0. Available at <https://www2.ed.gov/policy/gen/guid/school-discipline/files/nprm-significant-disproportionality--unofficial-copy.pdf>

<sup>14</sup> Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children With Disabilities, March, 2016. Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-03-02/pdf/2016-03938.pdf>

The Department published a [report](#) in February of 2016 with a set of tables showing the number and percentage of school districts that would be identified with significant disproportionality if the Department’s example risk ratio thresholds were adopted by all 50 states and the District of Columbia.<sup>15</sup> The figures in the report were based on the averages of 17,371 school districts over three academic years (2011–12, 2012–13, and 2013–14). By using these risk ratio thresholds (shown below), the Department found that many more school districts and states would have to report significant disproportionality, consistent with what the research studies have shown.

**Exhibit 1: U.S. Department of Education’s example risk ratio thresholds, equaling two MADs above the median<sup>a</sup> of all districts<sup>b,c</sup> in 2011–12, 2012–13, and 2013–14**

Analysis Category	Risk Ratio
<b>Identification</b>	
All disabilities	1.672
Autism	2.411
Emotional disturbance	2.959
Intellectual disabilities	2.475
Other health impairments	2.376
Specific learning disabilities	1.971
Speech or language impairments	2.034
<b>Educational Environments</b>	<i>Risk Ratio</i>
Inside regular class 40% through 79% of the day	1.578
Inside regular class < 40% of the day	1.653
Separate settings	2.126
<b>Discipline</b>	<i>Risk Ratio</i>
In-school suspensions <= 10 days	1.967
In-school suspensions > 10 days	2.937
Out-of-school suspensions/ expulsions <= 10 days	2.008
Out-of-school suspensions/ expulsions > 10 days	3.000
Total removals	1.873

Based on these example risk ratio thresholds, for instance, 21% of school districts in South Carolina would have significant disproportionality in the identification of intellectual disability in African American students. Stated differently, about 1 in 5 school districts in that state are identifying African

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<sup>15</sup> Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity. Office of Special Education and Rehabilitative Services, U. S. Department of Education. February, 2016

American students with intellectual disability nearly two and a half times as often as students who are not African American. Fortunately, however, this case is not typical as the percentages range from zero (CO, DC, DE, FL, HI, SD, & WY) to 25 (VA) with an average of 6.6%.

### **The Arc's Comments**

The Arc opposes the proposed delay for school districts' compliance with the Equity in IDEA regulations for the reasons outlined below.

### **Delayed Compliance Will Harm Students**

As discussed earlier, inappropriate identification, placement, and discipline take a human and financial toll. Delaying compliance will simply increase the likelihood that students of color will be subject to inappropriate educational segregation and harmful disciplinary practices, with potentially lifelong negative consequences.

### **The Financial Cost of Delayed Compliance is Too High**

The Department estimates that delaying the regulations will generate cost savings between \$10.9 and \$11.5 million, with a reduction in transfers of between \$59.6 and \$63 million. However, these savings pale in comparison to the exorbitant financial costs of increased school failure, dropout rates, and criminal justice system involvement associated with significant racial/ethnic disproportionality in identification, placement, and discipline. A California study estimates that the cost of students who drop out of high school due to suspensions would result in about \$2.7 billion in costs stemming from lost wages and tax revenue, increased crime, and higher welfare and health costs in that state alone.<sup>16</sup>

### **Current Regulations Grant Sufficient Flexibility to States**

The regulations require states to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for measuring reasonable progress for each indicator and provide rationales for each. If states chose to use minimum cell sizes or minimum n-sizes that are higher than the ones the Department proposes are presumptively reasonable, then the state must include a *detailed explanation* of why the numbers chosen are reasonable and how they ensure that the State is appropriately analyzing and identifying school districts with significant disparities, based on race and ethnicity, in the identification, placement, or discipline of children with disabilities. In other words, states have flexibility in setting their standards, but they must now provide justifications for their choices.

Further, the Department explained that "reasonable" means "*a sound judgment in light of all of the facts and circumstances that bear upon the choice. When choosing a risk ratio threshold, a State may consider its unique characteristics, such as the racial and ethnic composition of the State and LEAs, enrollment demographics, and factors correlated with various disabilities or disability categories.*" In

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<sup>16</sup> School Suspensions Cost California Billions, March 2017. Available at <https://www.civilrightsproject.ucla.edu/news/press-releases/2017-press-releases/school-suspensions-cost-california-billions-1>

addition, states must also base their selection of risk ratio thresholds upon the advice of stakeholders, including the State Advisory Panels.<sup>17</sup>

### **The Remedy in Cases of Significant Disproportionality is Reasonable**

State education agencies and school districts must take action when significant disproportionality is found and use certain amounts of reserved funds to address the disproportionality. Fifteen percent of IDEA Part B funds must be used for Coordinated Early Intervention Services (CEIS) - which can include professional development, educational and behavioral evaluations, services, and supports – and must include addressing any policy, practice, or procedure identified as contributing to the significant disproportionality.

The 2016 regulations added an important change regarding who can receive these CEIS. Instead of being used just for students who were not being served under IDEA (but who were at risk for being placed into special education in the future), the regulations expanded the use of CEIS to include students already served under IDEA. In other words, funding is not taken from services and supports for special education students. Further, states have flexibility to not identify significant disproportionality in school districts that make reasonable progress in lowering risk ratios for two prior consecutive years.

### **Many States are Already Moving Forward with Implementing the Regulations**

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.

### **Conclusion**

The Arc opposes any postponement of implementation of the Equity in IDEA regulations. Further delay will result in further disproportionate representation of children from racial and ethnic minority backgrounds in special education programs and disciplinary actions. We believe the Equity in IDEA regulations are a positive step for the nation's students, and we urge OSERS to move forward with implementation and that the delay proposed by the Department will result in harm to students.

Sincerely,



Annie Acosta  
Director of Fiscal and Family Support Policy

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<sup>17</sup> Idea Part B Regulations: Significant Disproportionality (Equity in Idea). Essential Questions and Answers March 2017. Available at <https://sites.ed.gov/idea/files/significant-disproportionality-qa-03-08-17.pdf>