



July 28, 2014

Mr. Michael Yudin
Acting Assistant Secretary
Office of Special Education and Rehabilitative Services
Attention: IDEA Determinations RFI
U.S. Department of Education
400 Maryland Avenue, S.W., Room 4032
Potomac Center Plaza
Washington, DC 20202-2600

Re: Docket No. ED-2014-OSERS-0058

Dear Mr. Yudin:

For decades, the NAACP Legal Defense and Educational Fund, Inc. (LDF)¹ has advocated for equal educational opportunities for all of America's children. In response to the U.S. Department of Education's (the "Department") acknowledgement of the alarming disparities negatively impacting children of color with disabilities, and its Request for Information on actions the Department should take to address them, LDF herein highlights the need for increased federal enforcement of the Individuals with Disabilities Education Act (IDEA). In particular, we discuss racial and ethnic disparities in special education and significant disproportionality under Section 618(d) of the IDEA.²

It is well documented that African American children, and many other children of color, are disproportionately impacted by practices that result in their misidentification for special education services,³ high rate of placement in restrictive learning environments,⁴ and exclusion

¹ Founded in 1940 under the leadership of Thurgood Marshall, LDF is the nation's first and foremost civil rights legal organization.

²Codified as 20 U.S.C. § 1418(d).

³ Skiba, Russell, et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, *Exceptional Children*, Vol. 74, No. 3, 264, 270 (2008).

from school due to harsh discipline practices.⁵ The 2004 IDEA took steps to address racial disparities in special education by requiring states to identify significant disproportionality related to racial and ethnic disparities in the identification, placement, and discipline of children with disabilities.⁶ States identified for significant disproportionality are required to provide Coordinated Early Intervening Services (CEIS).⁷

However, in practice, most states have failed to identify significant disproportionality or provide effective CEIS; therefore disparities persist. Even where districts have been identified as having significant disproportionality, there is scant public information about the steps states have taken to address significant disproportionality or the outcomes of those actions. Therefore, we urge the Office of Special Education and Rehabilitative Services (OSERS) to create a uniform national standard against which to measure states' definitions of significant disproportionality to ensure that district level disparities are accurately identified and states are held accountable for remedying them.

Since "significant disproportionality" is not defined in statute, discretion is left to states to develop formulas to measure what constitutes significant disproportionality.⁸ This has resulted in a patchwork of significant disproportionality formulas across states, resulting in virtually no reported incidents of significant disproportionality. For instance, a national investigation by the Government Accountability Office (GAO) found that only 2.4 percent of the nation's districts receiving IDEA funding used IDEA funds for CEIS due to significant disproportionality, with 21 states not requiring any of their districts to provide CEIS.⁹ OSERS' allowance for differing state definitions may serve to dilute congressional intent to address racial and ethnic disproportionality, thereby allowing racial and ethnic disparities to persist unmitigated.

Therefore, we believe that, in order to effectively address these disparities and hold states accountable, implementation of a reasonable national standard of significant disproportionality, allowing for some flexibility to account for state population differences, is needed. This standard

⁴ "[A]vailable data demonstrates that students of color, especially African Americans, are overrepresented in more restrictive educational environments and under-represented in less restrictive settings," even more than their white peers with the same disabilities. Fierros, E.G., & Conroy, J.W. *Racial Inequity in Special Education, Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, D. Losen & G. Orfield (eds.) (Harvard Education Press), 2002.

⁵ More than one out of four boys of color served by IDEA, and nearly one in five girls of color served by IDEA received an out-of-school suspension during the 2011-2012 school year. Civil Rights Data Collection, *Data Snapshot: School Discipline*, U.S. Department of Education, Office for Civil Rights, available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> (Issue Brief No. 1, March 2014).

⁶ 20 U.S.C. § 1418(d).

⁷ *Id.*

⁸ 20 U.S.C. § 1413(f)(4).

⁹ *Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, Government Accountability Office (GAO), Report to the Chairman, Committee on Health, Education, Labor, and Pensions U.S. Senate, (GAO-13-137)(February 2013), at 7.

should be clearly defined and accompanied by detailed guidance and technical support offered to districts to ensure proper implementation and compliance.

Further, if districts provide CEIS (either voluntarily or if required by a showing of significant disproportionality), these interventions should be targeted to help those students with Individualized Education Programs (IEPs) who are most impacted by significant disproportionality. While the law allows 15 percent of CEIS funding to go towards all students,¹⁰ interventions, such as training for educators, should be designed to benefit the special education students most affected by the disparities. We recommend that the Department provide districts with examples of promising CEIS programs in detailed guidance.

Once districts with significant disproportionality are accurately identified through a national standard, we urge the Department to work with those districts to address factors contributing to significant disproportionality. For instance, research shows that many factors contribute to special education disparities for African American children, including: systemic racism, biased testing, racial bias of educators and administrators (explicit and implicit), lack of cultural competency of educators, parental exclusion from the placement process, and resource inequities (including lack of qualified and experienced educators).¹¹ Research also shows that individual educator discretion and opinion contributes to these disparities, and data show that African American children are disproportionately misidentified for subjective disability categories.¹² Without addressing these contributing factors, disproportionality will likely continue.

We applaud the Department's issuance of this Request for Information and its acknowledgement that unnecessary disparities impacting children of color with disabilities cannot continue. We hope the Department will act swiftly to establish and implement a national standard for significant disproportionality and to provide guidance to states to remedy significant disproportionality in their districts.

Sincerely,

Leticia Smith-Evans, Interim Director, Education Practice
Janel George, Education Policy Counsel
NAACP Legal Defense and Educational Fund, Inc.

¹⁰ 20 U.S.C. § 1418(d).

¹¹ *Supra* note 3, at 274.

¹² “Disproportionate representation is greater [for African American students] in the judgmental or ‘soft’ disability categories of [Mental Retardation] MR, [Emotional Disturbance] ED, or [a Learning Disability] LD than in the non-judgmental or ‘hard’ categories, such as hearing impairment or visual impairment . . .” *Supra* note 3, at 269.