



May 14, 2018

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

**RE: Comments in Opposition to the U.S. Department of Education's
Proposed Two-Year Delay of its Significant Disproportionality
Regulations Addressing Inequity in Special Education; Docket ID ED-
2017-OSERS-0128**

Dear Assistant Secretary Collett:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we write to express our opposition to the U.S. Department of Education's (the Department) notice of proposed rulemaking that proposes postponing by two years states' compliance with the Department's 2016 regulations addressing significant disproportionalities based on race and ethnicity in special education, including the requirement that states include children ages three through five in their analyses of disproportionality.¹ A delay of the rule would be an abdication of the Department's obligation to protect students from widespread and well-documented race-based disparities in the identification, placement, and discipline of students with disabilities.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization. For almost 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other people of color. Since the historic U.S. Supreme Court decision in *Brown v. Board of Education*,² which LDF litigated and won, we have continued to represent students of color to ensure they receive quality and equitable educational opportunities³ and are not subject to racially biased

¹ Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 84 Fed. Reg. 8396 (proposed Feb. 27, 2018) (to be codified at 34 C.F.R. pt. 300).

² 347 U.S. 483 (1954).

³ See, e.g., *Thomas, et al. v. St. Martin Parish Sch. Dist., et al.*, Civil Action No. 6:65-cv-11314, Doc. 178 (W.D. La., Jan. 25, 2016) (approving plan to integrate the district & ensure Black students equal access to educ. opportunities), available at <http://www.naacpldf.org/update/ldf-announces-consent-decree-thomas-v-school-board-st-martin->; Br. for Black Student Alliance at Univ. of Tex. at Austin, Black Ex-Students of Tex., & LDF as Amici Curiae, *Fisher v. Univ. of Tex. at Austin*, 2015 WL 6690039 (Nov. 2, 2015), available at http://www.naacpldf.org/files/case_issue/14-981%20obsac%20The%20Black%20Student%20Alliance%20at%20the%20University%20of%20Texas%20at%20Austin%20et%20al._1_1.pdf.

school practices and policies.⁴

It is well documented that students of color, particularly Black students, are disproportionately represented in special education programs, placed in restrictive learning environments at higher rates than their peers, and disproportionately subjected to punitive discipline practices.⁵ Consequently, since 2004, the Individuals with Disabilities Education Act (IDEA) requires each state to collect and evaluate data to identify and address significant disproportionality based on race and ethnicity in the identification and placement of students in special education programs, and in the imposition of school disciplinary practices.⁶ The Department further clarified this statutory obligation in implementing regulations, finalized on December 19, 2016.⁷

The final regulations were a direct response to the 2013 U.S. Government Accountability Office (GAO) study showing widespread noncompliance by states with significant disproportionality provisions of the IDEA.⁸ Specifically, the GAO study found that states set such high levels for identifying districts with significant disproportionality that no district ever exceeded them. This meant that these districts neither identified existing disparities nor received assistance in determining the root causes of any disparities and implementing needed change.

Yet, instead of enforcing the final regulations, the Department is seeking to delay states obligation to comply with them arguing that “given the public comments it has received in response to its general solicitation in 2017 on regulatory reform, ... the Equity in IDEA regulations may not appropriately address the problem of significant disproportionality.”⁹ In its notice proposing a delay, the Department does not acknowledge the fact that the final regulations were developed after receiving comments from hundreds of individuals and organizations, including LDF.¹⁰ It does not mention the findings of the nonpartisan GAO

⁴ See Complaint from LDF & Nat'l Ctr. for Youth Law to U.S. Dep't of Educ. Office for Civil Rights (hereinafter OCR) against Bryan Indep. Sch. Dist. (Feb. 20, 2013), *available at* http://www.naacpldf.org/files/case_issue/Bryan%20ISD%20OCR%20Complaint.pdf.

⁵ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-258, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (March 2018), *available at* <https://www.gao.gov/assets/700/690828.pdf>.

⁶ 20 U.S.C. 1418(d).

⁷ *Assistance to States for the Educ. of Children with Disabilities; Preschool Grants for Children with Disabilities Final Regulations*, 34 C.F.R. Part 300, *et seq.*, <https://www2.ed.gov/policy/speced/reg/idea/part-b/idea-part-b-significant-disproportionality-final-regs-unofficial-copy.pdf>.

⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION (2013).

⁹ Assistance to States, *supra* note 1, at 8397.

¹⁰ *Fact Sheet: Equity in IDEA*, U.S. DEP'T OF EDUC. (Dec. 12, 2016), <https://www.ed.gov/news/press-releases/fact-sheet-equity-idea>.

report mentioned above, or the fact that states have been aware of their statutory obligation since 2004. The Department will abdicate its duty to protect the civil rights of students with disabilities if it further delays states' compliance with the rule.

The proposed delay of compliance with the significant disproportionality regulations is even more alarming when one considers that the Department's own Civil Rights Data Collection (CRDC) for the 2013-2014 school year, shows that one in four Black boys with disabilities received at least one out-of-school suspension, compared to only one in ten White boys with disabilities.¹¹ The suspension rates for students of color with disabilities are higher than the rates for each subgroup alone. Eighteen percent of all Black boys received at least one out-of-school suspension during the 2013-2014 school year; 12% of students with disabilities received at least one out-of-school suspension; and 25% of Black boys with disabilities received at least one out-of-school suspension.¹² In Davenport, Iowa, for example, after an audit by the Iowa Department of Education, the school district is now required to work with an adviser to address racial disparities in the discipline of students with disabilities.¹³

After analyzing the 2013-2014 CRDC data, the Government Accountability Office (GAO) found that, with few exceptions, disparities existed for Black students, boys, and students with disabilities regardless of the type of disciplinary action (including in-school and out-of-school suspension, law enforcement referral, expulsion, corporal punishment, and school-related arrest), poverty level of the school, or type of public school attended (including traditional, magnet, charter, alternative, and special education).¹⁴ The disparities start as early as preschool. The 2013-2014 CRDC reported that Black preschool children are 3.6 times as likely as white preschool children to receive at least one out-of-school suspension.¹⁵

Research shows that there is no evidence that students of color misbehave more than their White peers.¹⁶ However, students of color are often disproportionately disciplined for minor, subjective offenses such as disobedience and disruptive behavior, which are left up to

¹¹ *2013-2014 Civil Rights Data Collection: A First Look*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (June 7, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

¹² *Id.*

¹³ *Associated Press*, Audit: Iowa special ed program has multiple violations, SEATTLE TIMES (Apr. 29, 2018), available at <https://www.seattletimes.com/nation-world/audit-iowa-special-ed-program-has-multiple-violations/>.

¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-258, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (March 2018), available at <https://www.gao.gov/assets/700/690828.pdf>.

¹⁵ *A First Look*, supra note 11, p. 3.

¹⁶ See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMIN. OF SCH. DISCIPLINE (2014), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (citing multiple studies and articles supporting the conclusion that "substantial racial disparities . . . are not explained by more frequent or more serious misbehavior by students of color").

the discretion of school staff, administrators, and school police who may be more likely to negatively interpret the behavior of certain racial and ethnic groups based on their own conscious or unconscious bias.¹⁷

Recent incidents show the importance of addressing race- and disability-based discrimination in discipline. A school security officer handcuffed a second-grader with a disability and took him to the principal's office after the student was bullied by other students.¹⁸ School administrators in Michigan expelled a high school student who received special education services for bringing an airsoft gun and kitchen knife to school.¹⁹ Additionally, in New York City last year, police used handcuffs on black students 15% of the time, almost twice the rate of white students, when called in to take students in crisis for mental health evaluations.²⁰

The negative consequences of exclusionary discipline practices impact students both in school and into adulthood. Students who are suspended or expelled are more likely to have decreased academic achievement, drop out of school, and become involved in the juvenile justice system.²¹ A recent national study by the Charles Hamilton Houston Institute for Race & Justice at Harvard Law School and UCLA's Center for Civil Rights Remedies at The Civil Rights Project found that for the 2014-2015 and 2015-2016 school years, Black students with disabilities missed about 77 more days of instruction than their white peers due to suspensions, resulting in dramatic inequities with regard to these students' opportunity to learn.²² The negative impacts of these disparities are not limited to the excluded students –

¹⁷ See, e.g., LDF, *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline*, (2017), available at http://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf; KIRWIN INST., *RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE* (2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf>; Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101 (2016); David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506 (2014); supra note 14, GAO-18-258.

¹⁸ *Kids in Cuffs: Why Handcuff a Student with a Disability*, NBC NEWS (Feb. 20, 2017), <https://www.nbcnews.com/news/us-news/kids-cuffs-why-handcuff-8-year-old-student-disability-n722451>.

¹⁹ Lauren Slagter, *Ypsilanti teen speaking at federal hearing on 'school-to-prison' pipeline*, MLIVE (Dec. 3, 2017), http://www.mlive.com/news/ann-arbor/index.ssf/2017/12/ypsilanti_teen_to_testify_at_f.html.

²⁰ Alex Zimmerman, *Mental health crises are major cause of police interventions in New York City schools, new data show*, CHALKBEAT (Nov. 15, 2017), <https://chalkbeat.org/posts/ny/2017/11/15/mental-health-crises-are-major-cause-of-police-interventions-in-new-york-city-schools-new-data-show/>.

²¹ See U.S. DEP'T OF EDUC., supra note 16 (citing a number of studies).

²² Daniel J. Losen, *Disabling Punishment: The Need for Remedies to Disparate Loss of Instruction Experienced by Black Students with Disabilities*, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE AT HARVARD LAW SCHOOL & THE CENTER FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT (April 2018), available at <https://today.law.harvard.edu/wp-content/uploads/2018/04/disabling-punishment-report-.pdf>.

at schools with higher levels of exclusionary discipline, students who are not suspended have also been shown to have decreased academic achievement.²³

In order to fulfill its duty to ensure access to excellent educational services for all, the Department must require states to comply with the significant disproportionality regulations without further delay.

Thank you for considering this letter. If you have any questions, please contact us at 202-682-1300.

Respectfully submitted,



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Director of Policy

Monique L. Dixon
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Nicole Dooley
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²³ See, e.g., Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOCIOLOGICAL REV. 1067 (2014); *Out-of-School Suspension and Expulsion*, 131 PEDIATRICS e1000 (2013).