



The Council of Parent Attorneys and Advocates, Inc.
Protecting the Civil Rights of Students with Disabilities and their Families

May 14, 2018

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

RE: Docket ID: ED-2017-OSERS-0128

Dear Assistant Secretary Collett:

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.8 million children with disabilities in America. COPAA’s mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community.

COPAA submits comments in response to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on February 27, 2018, proposing to delay the compliance date for the 2016 final regulations implementing the Individuals with Disabilities Education Act (IDEA) requirement addressing significant disproportionality.¹ That provision requires States and school districts to measure, examine, and, when appropriate, reduce significant disproportionality in the identification of students of color as students with disabilities for the purposes of IDEA as well as in the educational placement and disciplining of students of color with disabilities under IDEA. It further mandates the release of certain information by and about school districts so identified.

We oppose a delay in the implementation of the regulations. The proposed delay will harm children and parents by stalling much needed reforms to the ways States determine which of their school districts may be engaging in unlawful practices that result in significant disproportionate numbers of students of color being inappropriately identified as students with disabilities, being placed in inappropriate educational settings and being inappropriately disciplined. It will also deny COPAA and others the opportunity to receive information to which they are entitled under the statute and regulations regarding the identity of school districts found by their States to be significantly disproportionate and how each school district addressed any violations of the IDEA that it detected because of the audit it is required to undergo. The proposal offered by the U.S. Department of Education (ED) knowingly reverts to the status quo, even while the NPRM acknowledges “the status

¹ 20 U.S.C. § 1418(d).

quo for school districts across the country properly identifying children with disabilities is troubling.”²

What ED proposes is both substantively unwise, and procedurally improper. Indeed, there are strong indications that ED has already decided on the question of delay and lacks an open mind to comments during this process. Below, we outline our major concerns with postponement and address ED’s proposed rationale for the delay.

I. ED Has Improperly Limited the Comments it Will Consider

ED made clear in the NPRM that it “will not consider comments on the text or substance of the final regulations.”³ COPAA views that statement as an instruction to commenters not to file comments on the text or substance of the final regulations. But, at the same time, all the purported reasons ED provides for wanting to delay the 2016 final regulations are based on the text and substance of the final regulations. In the NPRM, ED explained that it is “concerned” that the final regulations may not “effectively address” or “appropriately address the problem of significant disproportionality” and “may not meet [their] fundamental purpose, namely to properly identify and address significant disproportionality among children with disabilities.”⁴ Further, ED stated that it elected to propose a two-year delay, as opposed to a one- or three-year delay, because “of how long it takes the agency to develop, propose, and promulgate complex regulations” that it expects will replace the 2016 final regulations.⁵

ED’s statement that it “will not consider comments on the text or substance of the final regulations” makes it virtually impossible for COPAA and other members of the public to provide meaningful comments in this rulemaking. That is because ED will not consider comments that address the exclusive grounds relied on by ED for the delay, *i.e.*, whether the text and substance of the 2016 final regulations give ED any reason to be concerned about their effectiveness and appropriateness. ED’s statement also means that it will not consider comments that challenge the length of any delay based on the argument that there is no need to promulgate new, complex regulations. Indeed, there is a significant circularity to ED’s argument – ED wants to delay (but not currently repeal) the 2016 final regulations because it thinks it will later replace them with “better” regulations, but it won’t consider comments that explain that the 2016 final regulations, in text and substance, are effective and appropriate and therefore should not be delayed *even if* ED subsequently seeks to repeal and replace these regulations.

Although COPAA has elected, contrary to the NPRM’s instructions, to explain below why the final regulations are, in text and substance, effective and appropriate, the plain language of the NPRM both will deter many members of the public from participating in this process and will result in many others submitting truncated comments that do not address the full range of concerns ED purports to be relying upon. For this reason, if ED desires to complete this rulemaking, it should seek a second round of comments after making clear that it will consider comments regarding the text and substance of the final regulations.

² See 83 Fed. Reg. 8396, 8397 (Feb. 27, 2018); Federal Register, Docket ID ED–2017–OSERS–0128.

³ *Id.* at 8396.

⁴ *Id.* at 8396, 8397, 8398.

⁵ *Id.* at 8398.

II. ED’s Proposal is Based on Grounds Previously Addressed: There Is No Claim of Any Change of Circumstances That Would Warrant A Different Outcome

The NPRM justifies the proposed delay claiming, “given the public comments it has received in response to its general solicitation in 2017 on regulatory reform, that the Equity in IDEA regulations may not appropriately address the problem of significant disproportionality.”⁶ The first problem with this assertion is that it is difficult for COPAA and other members of the public to confirm the accuracy of the comment descriptions used by ED. The 2017 general solicitation resulted in over 16,000 comments.⁷ ED’s general descriptions do not permit each comment to be identified and ED did not attach the comments on which it relied to the regulatory docket. A Freedom of Information Act (FOIA) request was submitted to ED seeking the comments that were relied upon in the NPRM. ED responded that it was unable to locate any records responsive to the request; an administrative appeal of that response, filed the same day that no-records response was received, is still pending with ED.⁸ Nor did ED explain why the comments it described warranted credence, but the many comments filed that urged ED to retain the 2016 final regulations – submitted by members of Congress, organizations, educators, and parents – were completely disregarded. For example, COPAA sent a letter urging ED to maintain all the existing IDEA regulations;⁹ and it joined letters sent by The Leadership Conference on Civil and Human Rights¹⁰ as well as the Consortium for Citizens with Disabilities¹¹ that specifically urged that ED not repeal, replace, or modify the 2016 final regulations.

The NPRM points to nothing new to justify the delay. There has been no change in circumstances that would warrant rejecting the compliance date determined in the 2016 final regulations to be appropriate. And, as we show below, the comments described by ED are also not new; each of the comments described by ED in the NPRM was also raised during the 2016 final regulations process:

2018 NPRM	Preamble of 2016 Final Regulations (81 Fed. Reg. 92,376 et al.)
<p>Several commenters suggested, for example, that ED lacks the statutory authority under IDEA to require States to use a standard methodology, pointing out as well that ED’s previous position, adopted in the 2006 regulations implementing the 2004 amendments to IDEA, was that States are in the best position to evaluate factors affecting determinations of significant disproportionality.</p>	<p><i>Comments:</i> One commenter expressed concern that ED’s standard methodology is inconsistent with IDEA. The commenter stated that, when reauthorizing IDEA in 2004, Congress expanded the law’s focus on issues related to disproportionality by including consideration of racial disparities and by adding certain enforcement provisions out of a “desire to see the problems of over-identification of minority children strongly addressed.” The commenter noted that Congress did not define the term “significant disproportionality” or impose a methodology to determine whether significant disproportionality based on race or ethnicity in the State and its LEAs is occurring. According to the commenter, each State was left to choose its own methodology for determining whether there is significant disproportionality in the State and its LEAs with respect to identification, placement, and discipline of racial and ethnic minority children with disabilities. The commenter argued that this intent was reflected in final IDEA Part B regulations, promulgated by ED in August 2006, which stated that “[w]ith respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general.” The commenter stated that, in 2006, the question of whether to impose a</p>

⁶ *Id.* at 8397.

⁷ <https://www.regulations.gov/document?D=ED-2017-OS-0074-0001>.

⁸ Letter from ED FOIA Service Center regarding FOIA No. 18-01375-F (April 23, 2018); Letter from ED Office of the Chief Privacy Officer docketing FOIA Appeal No. 18-00041-A (April 23, 2018).

⁹ <https://www.regulations.gov/document?D=ED-2017-OS-0074-14136> (Aug. 18, 2017).

¹⁰ <https://www.regulations.gov/document?D=ED-2017-OS-0074-13872> (Sept. 20, 2017).

¹¹ <https://www.regulations.gov/document?D=ED-2017-OS-0074-15798> (Sept. 20, 2017).

	<p>methodology for determining significant disproportionality was rejected by ED as inconsistent with the law. The commenter also argued that an expansion of ED's authority to determine whether States' risk ratio thresholds are reasonable conflicts with congressional intent, as the law does not support a national standard for determining significant disproportionality. Other commenters expressed similar concerns, stating that proposed § 300.647(b) was an example of Federal overreach—an improper attempt to control local education.</p>
<p>Similarly, one detailed comment expressed concern that the standard methodology improperly looks at group outcomes through statistical measures rather than focusing on what is at the foundation of IDEA, namely the needs of each individual child and on the appropriateness of individual identifications, placements, or discipline.</p>	<p><i>Comments:</i> Many commenters raised concerns that a standard methodology would be inconsistent with the individualized nature of IDEA. Some were concerned that proposed § 300.647(b) would lead LEAs to establish strict, albeit unofficial, quotas on the numbers of children with disabilities who could be identified, placed in particular settings, or disciplined for the LEA to avoid being identified with significant disproportionality. These commenters stated that this practice, or any uniform mathematical calculation, would fail to consider each child's individual needs. Other commenters had similar concerns, noting that identification and placement decisions are appropriately made by IEP teams on an individual basis—based on a full, fair, and complete evaluation, consistent with IDEA's requirements—and argued that it would be inappropriate for ED to promulgate a regulation that could exert undue pressure on those decisions. These commenters said that discipline decisions alone should be subject to analysis for significant disproportionality, as it was the only category that was an administrative decision and not the purview of IEP teams.</p>
<p>Further, commenters suggested that the standard methodology would provide incentives to LEAs to establish numerical quotas on the number of children who can be identified as children with disabilities, assigned to certain classroom placements, or disciplined in certain ways.</p>	<p><i>Comment:</i> Some were concerned that proposed § 300.647(b) would lead LEAs to establish strict, albeit unofficial, quotas on the numbers of children with disabilities who could be identified, placed in particular settings, or disciplined for the LEA to avoid being identified with significant disproportionality.</p> <p><i>Comment:</i> Some commenters argued that proposed § 300.646(d) would create an incentive to not identify children for special education and related services to reduce disproportionality numbers and show that comprehensive CEIS is working.</p> <p><i>Comments:</i> Many commenters asserted that proposed §§ 300.646(b) and 300.647 would put into place racial quotas that would interfere with the appropriate identification of children with disabilities based purely on the children's needs. Commenters raised concerns that the regulations might generally discourage appropriate identification of children of color, and, in so doing, harm children of color and children from low-income backgrounds. One commenter argued that the regulations will exacerbate inequality for children of color with disabilities and lead to a surge in class action lawsuits by families arbitrarily denied services based on their children's race or ethnicity. Other commenters stated that, if the determination of significant disproportionality is based strictly on numerical data, then the remedy for significant disproportionality, for some LEAs, will be denying access to special education services to children of color. One commenter suggested that to bias LEAs against serving eligible children with special education services is worse than providing these services to children who are only marginally eligible.</p> <p><i>Comments:</i> One commenter stated that it is discriminatory to create a formula for how many children of color can be identified as having disabilities. Another commenter stated that ED's proposal would force LEAs to serve children based on ED's understanding of how many children should be served, rather than on the individual needs of each child. Several commenters argued that individual children need to be assessed without consideration of their race, ethnicity, socioeconomic status, sexual orientation, or gender.</p>

<p>Finally, still other commenters suggested that ED could not accurately assess the impact of the regulations given that it did not provide any standards by which it would assess the required “reasonableness” of State risk ratio thresholds ...</p>	<p><i>Comment:</i> One commenter requested that ED withdraw the proposed regulations due to concerns that they do not include sufficient detail to allow the public to provide informed comments. In particular, the commenter expressed concern that the proposed regulations do not include any national standard, criteria, benchmarks, or goals upon which to gauge State compliance with them. ED interprets these comments to refer to the impact of the proposed standard methodology.</p> <p><i>Comment:</i> A few commenters challenged ED's estimate in the Regulatory Impact Analysis of the NPRM of how many LEAs would be identified with significant disproportionality, stating that the regulation would significantly increase the number of LEAs identified with significant disproportionality. One commenter noted that ED provided little explanation for its estimates that 400 to 1,200 LEAs could be affected by the regulations.</p>
<p>and [commenters suggested] that calculations of significant disproportionality should be better aligned with State Performance Plan indicators, including the percent of districts that have a significant discrepancy, by race or ethnicity, in the rate of suspensions and expulsion for children with disabilities (Indicator 4B), and the percent of districts with disproportionate representation of racial and ethnic groups in special education and related services (Indicator 9) and in specific disability categories (Indicator 10) that is the result of inappropriate identification.</p>	<p><i>Comment:</i> One commenter requested that ED eliminate SPP/APR Indicators 4 (rates of suspension and expulsion), 9 (disproportionate representation in special education resulting from inappropriate identification), and 10 (disproportionate representation in specific disability categories resulting from inappropriate identification). The commenter asserted that the standard methodology will require States to duplicate analyses of the same data, albeit with varying definitions, and to report it twice.</p> <p><i>Comments: ***</i> A second commenter requested that ED clarify whether a State might use the same calculation to determine significant disproportionality with respect to disciplinary removal that it currently uses to identify significant discrepancy for purposes of APR/SPP Indicator 4. The commenter added that the State currently compares children with disabilities to children without disabilities within an LEA and does not make comparisons between children with disabilities across LEAs.</p> <p><i>Comments:</i> Several other commenters requested that the analysis for significant disproportionality include not only a risk ratio or other mathematical calculation but also a review of factors such as inappropriate identification, discriminatory practices, State performance indicators, graduation rates, and academic performance. One commenter suggested that ED use a two-step approach to ensure that States are focusing on LEAs where compliance indicators may have impacted the performance of children with disabilities. ED would first examine performance indicators and identify agencies significantly discrepant from the median. This information would then be combined with data from compliance indicators, including information on disproportionality, to determine how to provide States and LEAs with technical assistance and support. A few commenters suggested that LEAs first undergo a review for discriminatory practices, and, if none exist, no further action should be taken.</p>

III. ED Has Authority to Regulate on Significant Disproportionality

As noted above, ED states that commenters, in response to its general solicitation in 2017 on regulatory reform, questioned whether the ED has the statutory authority under the IDEA to require States to use a standard methodology. In responding to the same question in 2016, ED determined that it did possess that statutory authority. ED was correct in 2016: it does have that authority.

An integral part of the separation-of-powers is the Constitutional requirement that the Executive Branch take care that federal laws be faithfully executed. In passing IDEA, Congress envisioned a vital and active role for ED: to make and allocate grants; to monitor States' implementation of IDEA through quantitative and qualitative indicators that, among other things, ensure that States meet the program requirements; to provide technical assistance; and to enforce IDEA through measures that include withholding or recovering federal funds.¹² As part of its active role, IDEA also affirmatively grants ED the authority to "issue regulations" to "ensure that there is compliance with the specific requirements...."¹³ In addition to that IDEA-specific authority, Congress also authorized ED "to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department" in order to "carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law."¹⁴

IDEA also identifies two express limits on ED's regulatory authority. First, ED cannot adopt regulations that violate IDEA.¹⁵ Second, it cannot adopt regulations that procedurally or substantively lessen the protections provided to children with disabilities, as embodied in regulations in effect on July 20, 1983.¹⁶ In addition, IDEA provides that it may not be construed to authorize ED (through its employees) to "mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction."¹⁷ IDEA identifies no other limitations to ED's regulatory authority.

Regulations to ensure there is compliance with the significant disproportionality provision fall squarely *within* the Congressional grants of ED's regulatory authority. And, they fall squarely *outside* the Congressional limits of ED's regulatory authority. As a matter of statutory interpretation, the answer is simple: the text of Sections 1406 and 1221e-3 permit ED to issue regulations regarding significant disproportionality.

Once it is established that ED has authority to issue regulations, the next question is whether the regulation adopted is valid. *Chevron v. Natural Resources Defense Council* articulates the relevant inquiry:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. Rather, if the statute is silent

¹² 20 U.S.C. §§ 1411(a)(1), 1416(a), (e), 1417(a).

¹³ *Id.* § 1406(a).

¹⁴ *Id.* § 1221e-3.

¹⁵ *Id.* § 1406(b)(1).

¹⁶ *Id.* § 1406(b)(2).

¹⁷ *Id.* § 1417(b).

or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁸

Under step one of *Chevron*, a court first looks to whether Congress has “directly spoken to the precise question at issue.”¹⁹ If it is silent or ambiguous, then under step two of *Chevron*, “the question for the court is whether the agency's answer is based on a permissible construction of the statute.”²⁰ There is no realistic argument that Congress has directly spoken to the precise question at issue. And it seems beyond cavil that this significant disproportionality regulation is within the agency’s reasonable implementation of the IDEA.

To be sure, ED’s view about the need for these regulations changed between 2006 and 2016. ED initially took a hands-off approach to the significant disproportionality requirement included in the 2004 amendments to IDEA. That did not turn out very well. According to the non-partisan U.S. Government Accountability Office (GAO), following the 2004 amendments to IDEA, most States set thresholds for identifying disproportionate districts so high that no districts ever exceeded them.²¹ Therefore, in many States no disproportionate districts were ever identified, and the issues of disproportionality never addressed or resolved. ED’s own data, relied on by ED during the 2016 rulemaking and repeated in the NPRM,²² simply confirmed the situation that COPAA and its members have experienced. Under the 2006 regulations, many States were not using effective methodologies to evaluate significant disproportionality and help districts identify and address it. As documented extensively below in Part IV, significant disproportionality is a clear problem in the identification, placement, and discipline of students of color with disabilities. The GAO thus appropriately recommended that the “Secretary of Education develop a standard approach for defining significant disproportionality to be used by all States. This approach should allow flexibility to account for state differences and specify when exceptions can be made.”²³

In response, ED acted responsibly by conducting a thoughtful process – including a Request for Information preceding the NPRM and 2016 final rule – to determine whether, based on a decade of intervening experience, revising and adapting the 2006 regulations was appropriate. “An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.”²⁴

The regulations are both proactive and preventative. The 2016 regulation ensures States will more fully comply with the law by developing a standard methodology but provides ample flexibility to States by permitting them to determine for their schools and districts the:

- a. Reasonable risk ratio threshold;
- b. Reasonable minimum cell size;
- c. Reasonable minimum n-size; and

¹⁸ *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–843 (1984).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See Government Accountability Office, *Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, GAO-13-137, 10-15 (February 2013) [hereinafter GAO-13-137], at <http://www.gao.gov/products/GAO-13-137>.

²² See 81 Fed. Reg. 92,376, 92,380 (Dec. 19, 2016); 83 Fed. Reg. at 8397.

²³ See GAO-13-137, *supra* at 22.

²⁴ *Rust v Sullivan*, 500 U.S. 173, 186-187 (1991) (citations and internal quotation marks omitted).

d. Standard for measuring reasonable progress.²⁵

The regulations also provided sufficient time for States to work with districts to assure that relevant data is made available to the public and to provide support and funding through the Coordinated Early Intervention Services (CEIS). They seek to assure school teams comprised of leaders and teachers receive training and funds so that children are supported in the classroom.

In the 2016 final regulations, ED addressed a problem identified through IDEA's 618 data and other credible sources by updating the regulation and, in the process, provided reasonable deference to State authority and respected state autonomy to do what is best for districts, schools and most importantly, the children. ED's actions to ensure compliance with IDEA were reasonable and sorely needed so that we do not lose another generation of students.

IV. ED's Postponement Harms Children and Parents

As COPAA has commented to ED in 2014 and 2016 respectively, prior to the 2016 final regulations there was a great need for updated regulations to ensure States focus on racial and ethnic disparity in the identification of children for special education, including identification by disability category, educational placement, and disciplinary action. The problem is documented and has been a concern for decades. The data we previously provided ED documenting this need²⁶ then have been further substantiated through data collection at the U.S. Department of Education,²⁷ the Government Accountability Office,²⁸ testimony received by the U.S. Commission on Civil Rights,²⁹ as well as research conducted by both civil rights³⁰ and disability experts.^{31,32}

Identification: It is undisputed that the overrepresentation of minorities in certain categories of disability is a decades old problem. For over thirty-five years, schools have struggled with the accurate identification of disabilities, especially for students of color.³³ Without a doubt, identifying the optimal level of special education is complex and research and practice both show that regional differences in the ways in which students of color are identified for special education services vary across region by disability category and the restrictiveness of placements.³⁴

²⁵ See 34 C.F.R. § 300.647.

²⁶ See <https://www.regulations.gov/document?D=ED-2014-OSERS-0058-0067> (July 28, 2014) and <https://www.regulations.gov/document?D=ED-2015-OSERS-0132-0243> (May 16, 2016).

²⁷ See OSEP Memo, 48 IDELR 193 (April 24, 2007), <https://www2.ed.gov/policy/speced/guid/idea/letters/2007-2/osep0709disproportionality2q2007.pdf>; Office for Civil Rights, U.S. Department of Education, *2015-16 Civil Rights Data Collection: Data Highlights on School Climate and Safety in Our Nation's Public Schools* (April 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

²⁸ Government Accountability Office, *Discipline Disparities for Black Students, Boys and Students with Disabilities*, GAO-18-258 (March 22, 2018), <https://www.gao.gov/products/GAO-18-258>, and GAO-13-137, *supra*.

²⁹ The School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities, U.S. Commission on Civil Rights, 2017, <http://www.usccr.gov/press/2017/12-13-PR.pdf>.

³⁰ Losen et.al. *Are We Closing the School Discipline Gap?*, (2015), UCLA Civil Rights Project, <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap>

³¹ *Sharing the Short Bus: Eligibility and Identity Under IDEA*, Hensel, Number 2008-04, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004731.

³² *The Segregation of Students with Disabilities*, National Council on Disability (February 7, 2018) [hereinafter *Segregation of Students with Disabilities*], https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf.

³³ See generally *Larry P. v. Riles*, 793 F.2d 969, 973-74 (9th Cir. 1984).

³⁴ Elizabeth B. Kozleski, Remarks at TASH Congressional Briefing, (2009), <https://tash.org/wp-content/uploads/2015/07/Inclusive-Education-and-Implications-for-Policy-1.pdf>.

COPAA has long-advocated that disproportionality should be measured as both over-identification and under-identification in each category of identification for special education services. As we stated in our 2016 letter to ED, quoting a research article:

Disproportionate representation in special education by race and ethnicity is deeply complex, varying substantially across several dimensions. At the *national* level, African American students have been found to be consistently over-represented and Asian American students consistently under-represented; Hispanic/Latino students or English language learner students have been found to be inconsistently represented, with some early studies in the Southwest and California describing over-representation, but more recent investigations finding under-representation, in special education. Disproportionality has also been found to vary by state, district size, and disability category. These complex variations have led previous researchers to dub disproportionality “multiply determined” and suggest that remediation will need to be responsive to local variations that may determine over- or under-representation.³⁵

Placement: Placement decisions (where students spend the school day) significantly impact whether children are denied an education in the least restrictive environment alongside their peers without disabilities and/or denied grade-level access to the general curriculum.

The national trend data regarding placement decisions are mixed. Although many States show that the proportion of students attending general education classes for 80 percent or more of the day has increased across all categories of race and ethnicity over time, major discrepancies between racial and ethnic groups persist.³⁶ Additionally, in a 2016 report prepared for ED’s Office of Special Education detailing the progress States were making toward Indicator 5 (Least Restrictive Environment (LRE) and Indicator 6 (Preschool LRE), the authors concluded that there is very little change or progress and little movement toward realizing IDEA’s mandate of LRE and inclusion over time.³⁷

This year, the National Council on Disability (NCD) reported:

White students and Native American students continue to be included in general education classrooms more often than African American students, Asian students, and those from the Pacific Islands, including Hawaii. Most troubling, because variables other than child-related factors (such as IQ or communication skills) appear to be at play in placement decisions.³⁸

The NCD Report credited a 2016 analysis of placements for students with autism. In that analysis, researchers “found that highly inclusive States tended to have more rural, White, and educated adults. They suggested that African American students with autism are disproportionately placed in more restrictive educational settings.”³⁹ The NCD also reported:

ED is not holding states accountable for their failures to uphold the IDEA’s LRE requirements. ... For example, despite New Jersey’s low levels of educating students with

³⁵ <https://www.regulations.gov/document?D=ED-2015-OSERS-0132-0243> (quoting Russell J. Skiba, Alfredo J. Artiles, Elizabeth B. Kozleski, Daniel J. Losen, Elizabeth G. Harry), (May 16, 2016); Risks and Consequences of Oversimplifying Educational Inequities: A Response to Morgan et al. *Educational Researcher*, Vol. 45 No.3, pp.221-225, <http://journals.sagepub.com/doi/full/10.3102/0013189X16644606> (citations omitted).

³⁶ *Segregation of Students with Disabilities*, *supra*, at 25.

³⁷ Early Childhood Technical Assistance Center, “Indicator 6: Preschool LRE,” in *Part B State Performance Plan/ Annual Performance Report 2016 Indicator Analyses* (2016), <https://osep.grads360.org/#communities/pdc/documents/12827>.

³⁸ *Segregation of Students with Disabilities*, *supra*, at 25.

³⁹ *Segregation of Students with Disabilities*, *supra*, at 25-26 (citing Jennifer A. Kurth, Anne M. Mastergeorge, and Katherine Paschall.) “Economic and Demographic Factors Impacting Placement of Students with Autism,” *Education and Training in Autism and Developmental Disabilities* 51, no. 1 (2016): 3–12).

disabilities with their peers without disabilities in general education settings [only 46 percent of New Jersey’s students with disabilities were included 80 percent or more of the time in the general classroom, and 15 percent spent more than 60 percent of their day in special education settings], they were determined by ED to “meet requirements,” even when their annual LRE targets were not achieved and, in fact, the percent of students who were educated in general education classes was lower in 2013 than in the preceding three years.⁴⁰

Discipline: As reported by ED this month with the release of the 2015-2016 Civil Rights Data Collection, students with disabilities are consistently disciplined at disproportionate rates. Students with disabilities represented *12 percent of the overall student enrollment* yet school-level reported data show they are:

- 28 percent of students referred to law enforcement or arrested;
- 51 percent of the students harassed or bullied based on disability;
- 71 percent of all students restrained;
- 66 percent of all students secluded;
- 26 percent of students who received an out-of-school suspension; and
- 24 percent of those students who were expelled.⁴¹

These data are overwhelming and sobering because we know that in the 96,360 schools⁴² reporting these data, there is a child reflected in every number – who has been on the receiving end of a harsh bullying or disciplinary action – that is most likely the result of discrimination and bias. Students of color with disabilities experience the highest rates of exclusion. Notably, the vast majority of suspensions are for minor infractions of school rules, such as disrupting class, tardiness, and dress code violations, rather than for serious violent or criminal behavior.⁴³

Lost instruction time for Black students with disabilities is particularly egregious. The Center for Civil Rights Remedies at UCLA recently found that nationally Black students lost 121 days of instruction per 100 students. Moreover, Black students with disabilities experienced much higher rates in many States. In seven of the eight States where the racial gap is over 100 days of lost instruction for Black students, no districts were identified for disproportionality.⁴⁴ The following graph highlights the five States with the largest racial gap.

⁴⁰ *Segregation of Students with Disabilities*, *supra*, at 32.

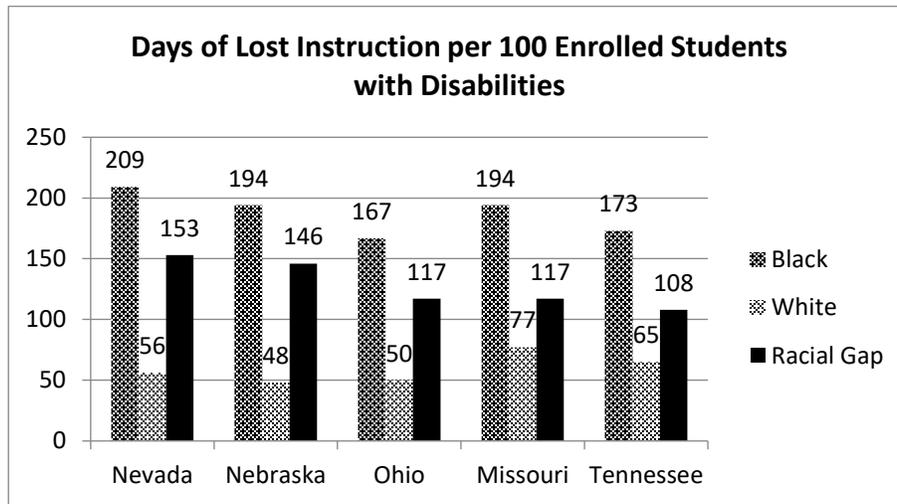
⁴¹ Office for Civil Rights, U.S. Department of Education, *2015-16 Civil Rights Data Collection: Data Highlights on School Climate and Safety in Our Nation’s Public Schools* (April 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

⁴² *Ibid.*

⁴³ Daniel J. Losen, Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools* (April 8, 2013), <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools>.

⁴⁴ *Ibid.*

Figure 1: The Five States with the Largest Racial Disparity in Loss of Instruction for Students with Disabilities in 2015-16



Source: U.S. Department of Education

It is clear to COPAA that States are falling short in their obligation to monitor districts in meeting all obligations under the IDEA including the law’s requirements for Manifest Determination Evaluations, Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs) and more. Our continued concern is that, in the case of disciplinary removals, schools are not adequately providing FBAs and BIPs and that far too often BIPs are sloppily written and poorly implemented. Moreover, districts rarely perform FBAs before drafting BIPs despite that special education experts regard an FBA as inseparable from an effective BIP.⁴⁵ We know these lax practices significantly impact and lead to the inappropriate removal of children with disabilities from school, creating barriers to the provision of appropriate interventions, mental health services, and other behavior supports students may need.

Furthermore, COPAA urges ED to consider how the delay in implementing the regulations will impact district and school access to Coordinated Early Intervening Services (CEIS) funds. We supported the new expansion to the definition of who is eligible to receive CEIS. Use of CEIS is integral to providing professional development to staff in effective practices regarding the identification and provision of interventions, supports and services to children of any age. There is absolutely nothing in the NPRM that suggests that the expanded definition of who is eligible to receive CEIS *after* a school district is identified as significantly disproportionate is related to any of ED’s concerns about *how* a state should be identifying such school districts. The information released, and state oversight generated by the 2016 final regulations, along with the mandatory spending on CEIS for students with and without disabilities, may begin to ameliorate many of these practices.

⁴⁵ National Council on Disability, *Breaking the School to Prison Pipeline for Students with Disabilities* (June 2015).

V. ED's Cost-Benefit Analysis Disregards Benefits to Children and Ignores Investments Already Made

The NPRM asserts that, consistent with Executive Order 12866 and Executive Order 13563, it is “issuing this proposed regulatory action only upon a reasoned determination that its benefits justify its costs.”⁴⁶ But ED made that determination only by: (1) completely ignoring the costs associated with delaying the final regulations; (2) reversing the 2016 final regulations’ contrary findings with no justification; and (3) not accounting for the spending that States have already done to prepare for compliance.

In 2016, ED determined that the final regulations would provide substantial benefits to students, parents, and members of the public, although it acknowledged that it could not “meaningfully quantify the economic impacts of the benefits.”⁴⁷ Once the regulation was effective, those benefits became part of the baseline in assessing proposed changes.⁴⁸ ED’s proposed delay in regulation would impose a cost on children and parents – one that may not be quantifiable, but which is real. ED’s regulatory impact analysis inexcusably ignored these burdens on families when it reached its conclusion. COPAA argues that the analysis in the NPRM is inherently flawed because it does not consider the true costs of delay; which are the costs to children. As the Office of Information and Regulatory Affairs makes clear in its *Primer on Regulatory Impact Analysis*: “When the unquantified benefits or costs affect a policy choice, the agency should provide a clear explanation of the rationale behind the choice.”⁴⁹ ED has provided no clear explanation for its choice.

Further, in the 2016 final regulations, ED determined that the benefits of the regulations “outweigh the estimated costs of these final regulations.”⁵⁰ Yet, now ED now asserts that the saving resulting from the delay of the regulations for two years – at most, \$11.5 million – outweighs the costs of delaying the final regulations. ED offers no rationale how this is consistent with its 2016 finding that, over a 10-year period, the benefits of the final regulation will outweigh its costs.⁵¹ Nor does it suggest that it has in its possession new facts that would devalue the benefits children and families will experience. By ignoring the needs and costs to children, ED is turning away from its obligation to fully implement the IDEA so that the law can achieve its statutory purpose which is: “to ensure that all students with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁵²

Additionally, the NPRM clearly overestimates the savings that state and local agencies would experience if the final regulations were delayed for two years.⁵³ It does so by pretending that State and local agencies have invested no time or money to prepare for this regulation in the 16 months

⁴⁶ See 83 Fed. Reg. at 8398.

⁴⁷ See 81 Fed. Reg. at 92,458.

⁴⁸ https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf at 5.

⁴⁹ https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf at 13.

⁵⁰ See 81 Fed. Reg. 92,376, 92,458.

⁵¹ *Ibid.*

⁵² 20 U.S.C. § 1400(d)(1)(A).

⁵³ The NPRM states that the “calculation of cost savings [to States and school districts] does not change any of the assumptions regarding wage rates, hours of burden, or number of personnel that were discussed in the final rule.” 83 Fed. Reg. at 8398 n.1. To confirm that ED had not considered the items discussed in this Part, a Freedom of Information Act (FOIA) request was submitted to ED seeking “[a]ny cost analysis spreadsheet used to estimate the costs and benefits of delaying” the 2016 final regulations. ED responded that it was unable to locate any records responsive to the request; an administrative appeal of that response, filed the same day that no-records response was received, is still pending with ED. Letter from ED FOIA Service Center regarding FOIA No. 18-01375-F (April 23, 2018); Letter from ED Office of the Chief Privacy Officer docketing FOIA Appeal No. 18-00041-A (April 23, 2018).

between January 2017, when the 2016 final regulations became effective, and now. To the contrary, ED’s model timeline suggests that to “prepare States for full compliance in [school year] 2018-19,” States by this point will have engaged in numerous activities. They will have reviewed the final regulations and guidance and submitted questions; informed districts of relevant changes related to the new regulations; reviewed and analyzed data to inform stakeholder discussions; met with stakeholders to develop risk ratio thresholds, minimum cell and n-sizes, standards for reasonable progress, if applicable and the rationales for each; reviewed and drafted revisions to State policies and procedures necessary to comply with the final regulations and, if amendments are needed, conducted public hearings on the amendments. They also will have modified the data systems to track IDEA funds and children for purposes of the new comprehensive CEIS.⁵⁴

While the timeline was just a suggestion, it was a sensible one. And, therefore, States have begun the work to prepare to implement. As the Michigan Department of Education reports, since the regulation became final “states have been working diligently to analyze data and thoughtfully prepare for implementation of the new regulations. States have been cross-collaborating through the IDC Peer-to-Peer groups, seeking input from stakeholder groups and conducting public hearings.”⁵⁵ The Wisconsin Department of Public Instruction states that it has already “held numerous meetings with stakeholders over the last year to address implementation and [is] ready to move forward with the rules currently in effect.”⁵⁶ Likewise, the Alaska Governor’s Council on Disabilities and Special Education reports that the proposed delay “would not greatly reduce the state’s additional administrative burden” because Alaska’s Department of Education and Early Development “has already held several meeting with the [Special Education Advisory Panel] and other stakeholders to determine our state’s significant disproportionality methodology.”⁵⁷

The National Association of State Directors of Special Education (NASDSE) sent a letter to the Secretary on February 9, 2018, explaining that “*all* states have been moving forward to implement the regulation. Postponing implementation not only stops work already in motion, but it suggests that the identification and redress of significant disproportionality can be put on hold.”⁵⁸ In its more recent filing in this rulemaking docket, NASDSE has not only re-affirmed that assertion, but also made clear that, based on a survey of its members, the “overwhelming majority” of States “have devoted resources to implementation” and “have spent time and money on an issue clearly worthy of their attention.”⁵⁹ NASDSE further makes clear that, regardless of whether the delay regulation is promulgated, States will not see any savings. This is because, first, “the states must continue to plan as if the regulation will ultimately go into effect;” and, second, because the “overwhelming majority of states ... plan to move forward regardless of postponement of the regulation.”⁶⁰

Finally, ED did not include in its analysis the likelihood that the delay regulation will cause confusion, and that the States will need to expend resources to help school districts and parents understand the delay, what is going to happen during the pause, and what may happen over the next two years. COPAA agrees with Wisconsin Department of Public Instruction that merely by

⁵⁴ <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/model-state-timeline-for-significant-disproportionality-implementation.pdf> (March 8, 2017; last updated May 25, 2017).

⁵⁵ <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0003>.

⁵⁶ <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0200>.

⁵⁷ <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0204>.

⁵⁸ <http://www.nasdse.org/LinkClick.aspx?fileticket=G8dNhd4UhPw%3d&tabid=36>.

⁵⁹ <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0171>.

⁶⁰ *Ibid.*

“proposing this delay the USDE is causing confusion in the field.”⁶¹ COPAA also agrees with the Council of Administrators of Special Education that “delay may cause greater confusion in the field and continued wide variability in practice” than moving forward with the 2016 final regulations as planned.⁶²

VI. ED Is Not Seeking Comments with an Open Mind

COPAA has significant concerns that ED has already decided to delay the 2016 final regulations and that the notice-and-comment process for this delay is a mere charade that will not provide aggrieved persons an opportunity to seek and obtain judicial relief before July 1, 2018. In addition to excluding relevant comments about the text and substance of the 2016 final regulations (see Part I), attempting to justify a change of the compliance date based on comments that were already made and considered in the 2016 final regulations (see Part II), and relying on a cost-benefit analysis that ignored all the benefits of the 2016 final regulations and many costs of the delay itself (see Part V), there are three other factors that also point towards lack of an open mind bordering on pre-determination.

1. In the portion of the NPRM identifying what “[a]lternatives” ED “[c]onsidered,” ED identifies only alternatives relating to the length of the delay, rather than whether there are alternatives other than delay. But that is not sufficient under the regulatory impact analysis (RIA) mandated by Executive Order 12866 and Executive Order 13563. The Office of Information and Regulatory Affairs’ *Primer on Regulatory Impact Analysis* makes this clear: “If an agency has decided that Federal regulation is appropriate, it should identify and include in its RIA a range of alternative regulatory approaches, *including the option of not regulating.*”⁶³ This is true even when examining “modifications to an existing regulation;” that is, “a baseline assuming no change in the regulatory program generally provides an appropriate basis for evaluating regulatory alternatives.”⁶⁴

One obvious alternative that ED did not identify was to not regulate at all. Or, if it thought the text and substance of the 2016 final regulations flawed (a position we reject), another obvious alternative to consider was to require compliance with the 2016 final regulations until ED develops, proposes, and promulgates a new regulation that would supersede it. Other obvious alternatives to delaying the 2016 final regulations that were not identified as considered by ED include:

- ED could provide more technical assistance and guidance to ensure that States and districts avoid the outcomes about which ED has concerns;
- ED could accelerate the evaluation, to which it committed in the 2016 final regulation preamble, of the extent to which school and district personnel incorrectly interpret the risk ratio thresholds and implement racial quotas to avoid findings of significant disproportionality, looking at States that already use risk ratios; and
- ED could initiate and publicize compliance reviews under Title VI of the Civil Rights Act to ensure that States and districts do not adopt “numerical quotas” based on race.

Instead, ED’s focus started and ended with delay, despite clear guidance to consider alternatives beyond rulemaking.

⁶¹ <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0200>.

⁶² <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0035>.

⁶³ https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf at 2 (emphasis added).

⁶⁴ *Id.* at 5.

2. Another factor that also points towards lack of an open mind is the statement issued to the media by ED on December 15, 2017 – 10 weeks before the NPRM was published. ED spokesperson Elizabeth Hill was quoted in both the *New York Times* and *Washington Post* as saying: “ED is looking closely at this rule and *has determined that*, while this review takes place, *it is prudent to delay implementation for two years.*”⁶⁵ That statement of pre-determination makes this whole comment process of questionable validity.

3. Finally, the timing of the NPRM’s publication, in context, raises concerns that ED is at least recklessly – if not intentionally – planning to issue the final delay regulation so late in the process that aggrieved individuals and organization will not have time to seek and obtain judicial review prior to the final delay rule’s effective date.

ED was aware that any proposal to delay the July 1, 2018 compliance date of the 2016 final regulations would need to comply with IDEA requirement that ED have a comment period of 75 days for any proposed regulations.⁶⁶ But, as the table below shows, ED has not moved with any alacrity. By October 2017, ED had drafted and significantly revised a NPRM to delay the final regulations. By December 15, 2017, ED was publicly stating it had determined to delay the final regulations. And yet, ED did not send the NPRM to the Office of Management and Budget (OMB) for review until January 23, 2018.⁶⁷ It was only on February 27, 2018, that it was finally published for comment.

12/09/16	Final regulations published in Federal Register. They set compliance date as July 1, 2018, 18 months after the effective date of the regulation.
01/18/17	Final regulations effective.
02/07/17	Betsy DeVos sworn-in as Secretary of Education
03/08/17	ED issued a Question and Answer document about regulations; ⁶⁸ also issued Model Timeline, which suggested many activities needed to be done in 2017 to meet July 1, 2018 compliance date.
10/26/17	Leaked draft NPRM shows ED intends to issue NPRM extending compliance date for two years. <i>Politico</i> reports: “An Education Department official said the draft is an early version of the notice and has been significantly revised but did not challenge its veracity.” ⁶⁹
12/15/17	NYT and Washington Post report ED spokesperson says ED has “determined that ... it is prudent to delay implementation for two years.”
01/23/18	NPRM sent to OMB for review.
02/27/18	NPRM published – provides 75 days to comment (minimum required by IDEA)
05/14/18	NPRM comment period closes
??	Final rule
07/01/18	Current compliance date

⁶⁵ <https://www.nytimes.com/2017/12/15/us/politics/devos-obama-special-education-racial-disparities.html> and https://www.washingtonpost.com/local/education/devos-wants-to-delay-special-education-rule-intended-to-protect-minority-students/2017/12/15/62fd7970-e1d1-11e7-89e8-edec16379010_story.html?utm_term=.c7a1f89f3317 (emphasis added).

⁶⁶ 20 U.S.C. § 1406(c).

⁶⁷ <https://www.reginfo.gov/public/do/eoDetails?rrid=127857>.

⁶⁸ <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/significant-disproportionality-qa-03-08-17.pdf>.

⁶⁹ <https://www.politico.com/tipsheets/morning-education/2017/10/26/devos-mulled-delay-of-obama-special-ed-rule-223012>.

These repeated lacunae in activity have left ED's decisionmakers with no real time (less than 7 weeks) to meaningfully consider numerous comments and reach a conclusion about whether to proceed to a final rule; and, if so, to draft appropriate responses and get the proposed final delay rule reviewed by OMB. Even if ED could do all of that before July 1, 2018, the brief time between the finality of the delay regulation and its effective date will give aggrieved individuals and organization almost no time to seek and obtain a judicial remedy before the regulation goes into effect. And, undoubtedly, ED would argue to a court at that point, that it is too late to undo what the final delay regulation would do.

These factors – the failure to address obvious alternatives, public statements indicating ED had already reached its determination, and timing that will make it difficult to seek and obtain effective judicial remedies – combined with the palpable errors described in Parts I, II, and V would cause a reasonable observer to infer that ED has pre-determined the outcome of the regulation and is not open to comments. These factors result in the appearance ED is attempting to concoct a justification for delay, while at the same time, shield that decision from legal challenge. ED should stop this rulemaking because it is tainted by a closed mind and pre-determination.

For all of the reasons COPAA articulated in our comments, we urge ED to stop wasting precious time and retain the July 1, 2018 compliance date for the 2016 final regulations implementing the IDEA requirement addressing significant disproportionality. It is your responsibility to take action to protect the civil rights of students with swiftness and certainty. Our children's lives depend on it.

Sincerely,



Denise Marshall
Executive Director

COPAA is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.5 million children with disabilities in America. COPAA's mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community.

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