



THE SCHOOL SUPERINTENDENTS ASSOCIATION DRAFT 1

May 16, 2016

Kristen Harper  
U.S. Department of Education  
550 12th Street SW Room 5109A  
Potomac Center Plaza  
Washington, DC 20202-2600

RE: ED-2015-OSERS-0132; RIN 1820-AB73

Dear Ms. Harper,

AASA, The School Superintendents Association, which represents over 10,000 local school leaders, appreciates the opportunity to comment on the proposed regulations to address significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities. We respectfully submit our comments below.

IDEA reauthorization is seven years overdue. The issue of significant disproportionality is an important one and deserves to be addressed in the context of a completely revised law. The changes proposed by the Department in how significant disproportionality is calculated and how States and districts must respond to these findings vary considerably from prior regulation and the statute. After careful review we believe that the Department is once again exceeding its authority to regulate on this IDEA issue.

We greatly appreciate some of the new flexibilities proposed by the Department in these proposed regulations such as the ability to calculate significant disproportionality using data over a three-year period, the ability to apply CEIS funds and programs towards students with disabilities, and the option to exempt districts from setting aside resources if they are making reasonable progress in addressing significant disproportionality. However, given that it is anticipated that at least 400 new LEAs will be identified if the new regulations are promulgated thereby requiring \$550 million to be set-aside from the current IDEA appropriation of \$11.7 billion to address significant disproportionality, the financial impact of these regulations at the local level cannot be understated. Without considerable new financial and technical support from the States<sup>1</sup>, a district requirement to address significant disproportionality will either not be fulfilled or will be met with lackluster results.

---

<sup>1</sup> Center on Budget and Policy Priorities, Most States Have Cut School Funding and Some Continue Cutting, Jan 25, 2016, <http://www.cbpp.org/research/state-budgetand-tax/most-states-have-cut-school-funding-and-some-continue-cutting>)

As we indicated in our RFI two years ago, we concur with the assessment of the Government Accountability Office (GAO) report examining how States measure significant disproportionality, which outlined legitimate flaws with the current system. We understand, therefore, why this Department would want to address significant disproportionality and not wait for a new policy to be delivered from Capitol Hill, particularly in this political climate. However, when we review the GAO report and look at the remedies proposed by GAO for addressing the problem in calculating and addressing significant disproportionality, we see the Department's proposal as having moved beyond the reasonable, objectively recommended fixes in the report. Specifically, GAO simply 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."

We do not take issue with your attempt to require States to adopt a methodology that ensures they are appropriately addressing instances of significant disproportionality. However, we question whether the approach you developed truly recognizes the differences in State population and enrollment policies. This is most apparent in your requirement that every State and district use a cell size of 10 for calculations of disproportionality. We are highly concerned that a cell size of 10 will unfairly burden small and rural districts. After examining the data provided by the Department, we note how a risk ratio of 3.0 coupled with a cell size of 10 will require a State like Wyoming to identify 20 districts out of 61 as having significant disproportionality in at least one category when compared to its prior finding of 2. This is a 900 percent increase in the number of districts required to take action related to significant disproportionality in one State alone. The continued underfunding of IDEA at the federal level coupled with the limited capacity of SEA personnel to provide the necessary monitoring and technical assistance to districts will lead to substantial implementation problems at the local level if a 10 cell size is required.

If a more rigorous standard for determining significant disproportionality is mandated without new funding for States and local districts, more consideration of LEA population differences and the circumstances that may reflect these demographic differences is critically important. When considering a standard methodology for States, the regulations should clarify that States have the authority to exempt any district from setting aside Part B funds for early intervening services or performing any other corrective actions related to significant disproportionality if one or more of the following is present: 1) an exceptionally low student population where the addition or subtraction of a few students results in meeting/not meeting the State's risk ratio, 2) a school serving a specific subgroup of students with disabilities, 3) a highly regarded program for students with disabilities that attracts students from across the State or region, 4) residential facilities or group homes within the district, 5) a recent environmental catastrophe specific to the region that has substantially impacted the health of children throughout the district, or 6) very low rates of special education identification, restrictive placements or exclusionary discipline for all students. Below we will describe the rationale for each of these exceptions and why they

must be explicitly allowed if a more rigorous, standard methodology is applied across a State.

If a ten cell-size is included in the final regulation there is deep concern that small, rural districts that have not had to take corrective action in the past regarding significant disproportionality would be required to do so with little consideration of the overall student population. AASA believes the proposed number of 10 enrolled students in a racial or ethnic group as the minimum required to apply a calculated risk ratio for IDEA eligibility determinations will result in far too many districts inaccurately identified as significantly disproportionate just because of small numbers. Setting a cell size was not recommended by the GAO and a federally-imposed cell size does not exist in ESEA or any other law touching elementary and secondary schools. It is unclear how many States would be impacted if a cell size of 10 were required, but regardless of impact there will be confusion if districts are required to using one cell size for assessment purposes and disaggregation and a different cell size for calculations of significant disproportionality. This confusion could lead to less accurate data collection. In situations where the placement, discipline, or identification of a few students causes a district to be found to have significant disproportionality, we recommend that the State review whether the district is compliant with other requirements in IDEA before requiring the district to set aside Part B funds for early intervening services.

Furthermore, having the “n” size of 10 apply in the denominator for purposes of calculating significant disproportionality could prove to be very problematic for districts with fairly homogenous districts with small subgroup populations. If there must be a mandatory cell size of ten, it would be far more appropriate to set the cell size of ten in the numerator than the denominator. If, for example, a district only has one Latino student with OHI out of a total school population of 14 Latino students then the likelihood for OHI eligibility would be .071. However, if there was a large non-Latino student population and only .008 of all these non-Latino students were identified as having an OHI disability then it would appear that Latino students are being disproportionality found to have OHI at almost 9 times the rate of non-Latino students. Applying a standard cell size of ten given the overall size of the entire student population in the district would be wholly unfair for purposes of significant disproportionality. States need to set the cell size as well as have more discretion in exempting districts with small populations of student subgroups from being erroneously found to have significant disproportionality.

We appreciate the Department’s consideration, in question 1 of the Directed Questions, for how the States should view LEAs that may have disparities in the enrollment of children with disabilities due to the presence of a specialized school or program. As administrators of districts that can exclusively serve students with disabilities as well as districts with specialized programs for certain categories of students with disabilities, AASA has given considerable thought to how to fairly ensure significant disproportionality is not occurring in identification, placement or discipline contexts. We think the fairest and least

burdensome approach for these districts is to allow them to provide an explanation to the State as to why they have uniquely large groups of students in their district and how this is not indicative of any inappropriate identification, placement or discipline of students. The State must consider this explanation as well as any other compliance data measured by IDEA (or any other material they request from the district) to ensure that the LEA's disproportionality makes sense in context.

We are also concerned with how districts in States with sweeping open enrollment policies may be unfairly impacted by a finding of significant disproportionality, particularly in cases where a district has a well-regarded program for serving students with specific disabilities. It is well accepted that in States with mandatory inter-district open-enrollment policies, parents may opt to send their child to a school district different than the one located where they reside. Parents of students with disabilities are particularly interested in ensuring the highest quality of service for their child, and may opt to send their child to another district if they believe they would benefit more from the special education program in that LEA. If a district has no or little choice but to accept that student into their system they may discover that their risk ratios are impacted over time, particularly in the realm of identification.

While the Department views disproportionality as a negative, regardless of the context, in this situation a district with a great reputation for serving students with disabilities will be required to set aside funding to address significant disproportionality. This would occur even though neighboring districts actually have lower-quality programming for students, but meet the State risk ratios due to the lower enrollment of students with disabilities generally (or students with specific disabilities). AASA believes that districts with high-performing or specialized programs for students with disabilities should not be punished under the significant disproportionality regulations. We urge there to be greater discretion at the State level to ensure that a district can appeal their status of significant disproportionality. If this does not happen, we are concerned that districts now required to address significant disproportionality under the new regulation will use whatever means available to them to turn students with disabilities away from their programs and districts, so that they meet the State risk ratio. This will unintentionally hinder parental choice and could lead to the receipt of lower-quality special education programming for some students.

The fourth exception AASA would like to see granted to States around exempting districts from findings of significant disproportionality pertains to the presence of residential facilities or group homes for foster youth. There is considerable evidence pointing to severe disproportionality of youth with disabilities in the foster care system. One study has determined that between 20 and 60 percent of children entering foster care have developmental disabilities or delays such as cerebral palsy, developmental delays, learning disabilities, mental and emotional health issues, and speech, hearing, and vision impairments.<sup>2</sup> The Northwest Foster Care Alumni Study found that more than half of

---

<sup>2</sup> National Collaborative on Workforce and Disability for Youth, *Negotiating the Curves Toward Employment: A Guide About Youth Involved in the Foster Care System*, at 3 (2007).

alumni studied had mental health problems.<sup>3</sup> Regarding physical disabilities, one California study found that 8 percent of foster youth studied had some type of physical impairment.<sup>4</sup> LEAs that have residential facilities or group homes for foster youth should receive special consideration by States when determining significant disproportionality, particularly in the realms of identification and placements. To require an LEA to set aside resources because it has an above-average enrollment of students with disabilities that is due to the presence of large population of children in foster care is unfair. Districts must be able to appeal their status as significantly disproportionate to the State and be exempt from taking corrective actions related to significant disproportionality when these rare circumstances exist.

Health or environmental catastrophes impacting a specific community or region can be a root cause of racial disproportionality in special education identification. The lead poisoning that will impact thousands of students in Flint, Michigan is just one example of how these tragic and unique circumstances must be accounted for in findings of significant disproportionality. While a district can and should try to dedicate resources to ensuring that they are addressing health issues of students who come through their doors, it would be unrealistic not to anticipate disproportionality in rates of identification and placement for students in these harmed communities. Administrators may choose to use federal funding for de-leading, for example, but given the dismal financial picture within these districts it may not be a wise use of federal special education resources. We urge the State to have discretion in determining what the appropriate set-aside should be if the district is suffering both a fiscal and environmental crisis, or if there should be a set-aside for districts that are recovering from a substantial health or environmental crisis, as the need to provide basic special education programs and services for eligible students may be extremely high.

Finally, we believe the district's overall rates of identification, placement and discipline must be considered before requiring a district to take action to address significant disproportionality. For example, if a district has an effective RTI program that results in especially low rates (when compared to the State average) of overall students being identified for special education, given restrictive placements, or disciplined, then the district should not be automatically required to address any significant disproportionality. To put this in context, imagine if one district has a Black/White racial gap of 1% between 1.5% and 0.5% in restrictive placements. With restrictive placements far lower than the State average of close to 8%, this district should not have to set aside Part B funds to

---

<sup>3</sup> Peter J. Pecora et al., *Assessing the Effects of Foster Care: Early Results from the Casey National Alumni Study*, Casey Family Programs, at 32-34 (2003), available at <http://www.casey.org/NR/rdonlyres/4E1E7C77-7624-4260-A253-892C5A6CB9E1/923/CaseyAlumniStudyupdated082006.pdf> (viewed on February 22, 2007).

<sup>4</sup> United States Census Bureau, *Sex by Age by Physical Disability for the Civilian Noninstitutionalized Population 5 Years and Over*, 2005 American Community Survey, Table C18004, available at <http://factfinder.census.gov> (viewed on May 22, 2007); Voices of Individuals and Communities Empowering Society (VOICES), *Understanding Disability*, available at [http://www.voices4all.org/Understanding\\_Disability.htm](http://www.voices4all.org/Understanding_Disability.htm) (viewed on May 22, 2007).

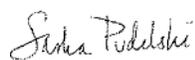
conduct early intervention since it clearly is conducting admirable practices to ensure that all students, regardless of race, are placed in the least restrictive of settings.

Finally, we would like to make a general comment regarding the unintended consequences of requiring States to adopt a calculation for significant disproportionality that could lead to a large percentage increase in the number of districts that must set-aside Part B funds for CEIS. It is well understood that the reason for adopting of a low standard for identifying significant disproportionality in the past was based on concerns for how the set-aside for CEIS would impact districts financially. An inappropriate or excessive system for determining disproportionality that the Department mandates a State to adopt to adopt could lead to unintended consequences at the local level. Specifically, determining disproportionality based on how many students are identified in certain disability categories could lead to a quota system for special education and deny services to students who truly need those supports. As the Department acknowledges in the NPRM, under-identification in special education is a real and substantial issue. If the State cannot thoroughly support districts in addressing significant disproportionality and districts continue to lack the know-how and resources to address this complex issue locally then one must assume districts will take whatever action is necessary to preclude the set-aside of precious Part B funds. We hope the Department considers the potential ramifications of these regulations seriously.

Our responses to the directed questions are below.

Thank you for soliciting feedback and for giving thoughtful consideration to stakeholder input on how to monitor and improve rates of significant disproportionality in special education. Superintendents take their responsibility to appropriately serve students with disabilities seriously, and hope the Department contemplates the issues we have raised as the agency promulgates final regulations.

Sincerely,



Sasha Pudelski  
Assistant Director, Policy & Advocacy

## Responses to Select Directed Questions

Question 1: See above.

Question 2: For districts found to have significant disproportionality, States should consider the overall rate before requiring action to be taken. Using a minimum of 10 for the denominator of the risk calculation for the reference group can enable very small groups of students, with potentially only one identified student, to result in the LEA appearing to have significant disproportionality. This will lead to fiscal and compliance issues in many small, rural school districts.

Question 3: AASA does not support requiring that significant disproportionality be examined and addressed for students with autism or other health impairments given that it districts are rarely in a position of identifying the presence of autism in a student district diagnoses a student as having one of these disabilities. In addition, some States have eligibility criteria that require that a medical evaluation be conducted or a medical diagnosis be considered before a child is labeled as having autism or other health impairment. If a doctor's diagnosis must be considered when evaluating a child for special education and the doctor's evaluation indicates a child has autism or OHI the district's failure to provide special education to that student could result in noncompliance with IDEA. Furthermore, the Department's data shows that the most egregious disproportionality with respect to autism or OHI applies to white students throughout the State. Requiring a district to address significant disproportionality with respect to white students was not the intention of this provision. We would oppose the expansion to other disability categories for the calculation of significant disproportionality.

Question 4: The Department should not expand the data collection around disproportionality in placements. If the goal of this data is to ensure students of a specific race or ethnicity or with specific disabilities are not being placed in inappropriate classroom settings, then reporting on whether a child spends 65 percent versus 80 percent of his time in a general education classroom says nothing about the severity of his disability, the classroom supports he receives, or the quality of services he may obtain. While we agree it is worth noting how much time a child spends in a self-contained classroom as this is a more unique and isolated placement, it is a meaningless to try to draw conclusions about the precise percentage of time a child is in a general education classroom above 40% in a general education classroom and to draw conclusions about whether the district is abiding by LRE provisions in IDEA. Decisions about student placements are often the toughest decisions to come to agreement on in an IEP meeting and can vary significantly from year to year. For example, a child who moves from elementary school to middle school may have a dramatic shift in placement in sixth grade until he becomes acclimated to changing classes frequently. Unlike discipline, for example, where the discretion is much more in the hands of the district, placement decisions are almost always made with parent input. Reporting this data will be a burden for districts and will not provide the Department with useful information. Based on the Department's data, 300 districts would be found to have

significant disproportionality for black students if they place them in an education setting that allows access to the general education classroom 40-79% of the time; 270 districts would be found to have significant disproportionality for Latino students under the same measurement. We question what this information is really telling us about these 570 districts and whether that information should require districts to do anything differently.

Question 5: The Department should never mandate that States use the same risk ratio thresholds. The Department lacks the statutory authority to mandate the adoption of a reasonable risk ratio.

Question 6: We lack the capacity to review fifty State privacy laws, but have noted our objection to the ten cell size above.

Question 7: No comment.

Question 8: This is exactly why the Department should not mandate a cell size of 10.

Question 9: Given the variation in demographics across States, AASA encourages the Department to allow States to set different risk ratios for different categories of analysis. It would be welcome flexibility.

Question 10: Since there is nothing in the statute or regulations of IDEA to indicate that a State may not identify a district that is making “reasonable progress” for significant disproportionality, AASA appreciates that the Department is providing states with this unprecedented flexibility. However, we would caution away from dictating how reasonable progress is defined and leave it to the SEA to determine on a case-by-case basis whether the progress a district is making compared to its peers across the state warrants an exemption from allocating funding for CEIS. For example, a state may grant an exemption if the district is showing some progress in addressing disproportionality despite facing enormous financial strains. Another district may receive an exemption if they have experienced a tragic environmental crisis that has spiked the population of students eligible for special education, but are trying to address this spike through a holistic approach to general and special education such as MTSS. While not showing gains right away, their attempts may be noted by the State and the State may want to waive the requirement for CEIS. The variation in these examples demonstrates why the federal government should not create any sort of definition or checklist for a State to use when determining what is and is not reasonable.

Question 11: Technical assistance regarding under-representation could be helpful to States and districts. Given the correlation between poverty and special education eligibility, it would be useful to share national data about the likely rate of special education identification cross-tabulated by the poverty level in a community. We commend NASDSE for their recommendation that states be able to utilize appropriate cell sizes, risk ratio thresholds and significance testing to ensure districts do not inappropriately reduce identification in order to avoid a designation of significant disproportionality.

Question 12: We do not believe additional restrictions on the use of CEIS funds are helpful or warranted. Instead, we support greater technical assistance to States and districts on the most effective, research-driven practices for reducing significant disproportionality in identification, placement and discipline. Of particular importance would be highlighting how urban, suburban and rural districts have successfully addressed each of these challenges as well as high, medium and low-resource rich districts.

Question 13: The impact of the new regulations should be measured by whether or not they accomplish what they intend to accomplish. In this case, if the goal is to reduce or eliminate the number of SEAs and LEAs with significant disproportionality in the areas of discipline and identification, then the new rules should reduce or eliminate the number of SEAs and LEAs where this is an issue. We do not support the use of any metrics that would compare LEAs to each other or states to each other or to a national average as both LEAs and SEAs can have radically different demographic compositions and needs.