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July 13, 2018

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

The Honorable Johnny W. Collet
Assistant Secretary
Office of Special Education and
Rehabilitation Services
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary DeVos and Assistant Secretary Collett:

We write to express our serious concern over the recent final rule¹ delaying the Equity in IDEA regulation that addresses significant disproportionality as it relates to students with disabilities of color under the Individuals with Disabilities Education Act (IDEA). Although we disagree with the final action taken by the Department of Education ("Department"), we are also deeply troubled by the Department's response to comments and justification of the delay asserting that racial bias does not exist in special education. Further, we are concerned with the Department's oversight process to ensure compliance with IDEA's requirement that states and local educational agencies act to address significant disproportionality in the absence of any regulation.

The final rule released on June 29, 2018, merely two days before the Equity in IDEA rule's effective date of July 1, delays implementation for two years. During the 75 day comment period, 390 comments were submitted. As noted in the final rule, this was approximately 25 percent more comments than the initial comment period in 2016. The high response rate to the notice of proposed rulemaking (NPRM) underscores the importance of this issue. According to our internal review of comments submitted, approximately 83 percent of the comments opposed the proposed delay. Notably, the Department failed to acknowledge that the overwhelming majority of commenters opposed a delay. Especially given the high response rate, it is questionable that the Department made no adjustments to the final rule in an effort to respond to or accommodate the vast majority of commenters who opposed the delay.

We have serious concerns about the Department's minimal response to comments in the final rule. Below are three of the most concerning passages taken from the final rule's preamble:

¹ <https://www.gpo.gov/fdsys/pkg/FR-2018-07-03/pdf/2018-14374.pdf>

“...The Department does not agree with the commenters that the causes of, and remedies for, significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities in LEAs across the country have received sufficient study. [...] The Department also believes that the racial disparities in the identification, placement, or discipline of children with disabilities are not necessarily evidence of, or primarily caused by, discrimination, as some research indicates...” (34 CFR Part 300, 31306)

Significant disproportionality in special education related to identification, placement, and discipline has been studied for decades,² dating back prior to the implementation of IDEA.³ None of this research was cited in the final rule, except one study⁴ that is widely disputed. The study cited by the Department was challenged by experts in the field of special education disproportionality due to “(a) sampling considerations, (b) inadequate support from previous and current analyses, and (c) their failure to consider the complexities of special education disproportionality.”⁵ Additional critiques focused on the flaws in their research design and methodology, limitations of the focus on solely identification, and perspectives on disability and race.⁶ Decades of quantitative, qualitative, and mixed methods studies demonstrate the prevalence of over-identification, inappropriate placement, and over-use of discipline on students of color with disabilities. Suggesting that this issue is under-studied or has not been given adequate attention in research ignores the extensive literature on the topic that happens to be counter to the Department’s current views.

“...The over-representation of one racial or ethnic group that rises to the level of significant disproportionality may occur for a variety of other reasons...” (34 CFR Part 300, 31306)

² See: Skiba, R. J., Poloni-Staudinger, L., Gallini, S., Simmons, A. B., & Feggins-Azziz, R. (2006). Disparate access: The disproportionality of African American students with disabilities across educational environments. *Exceptional Children*, 72(4), 411-424.; Skiba, R. J., Simmons, A. B., Ritter, S., Gibb, A. C., Rausch, M. K., Cuadrado, J., & Chung, C. G. (2008). Achieving equity in special education: History, status, and current challenges. *Exceptional Children*, 74(3), 264-288.; Artiles, A. J., Kozleski, E. B., Trent, S. C., Osher, D., & Ortiz, A. (2010). Justifying and explaining disproportionality, 1968–2008: A critique of underlying views of culture. *Exceptional Children*, 76(3), 279-299.; Albrecht, S. F., Skiba, R. J., Losen, D. J., Chung, C. G., & Middelberg, L. (2012). Federal policy on disproportionality in special education: Is it moving us forward?. *Journal of Disability Policy Studies*, 23(1), 14-25.; Sullivan, A. L., & Bal, A. (2013). Disproportionality in special education: Effects of individual and school variables on disability risk. *Exceptional Children*, 79(4), 475-494.; Graff, C. S., & Kozleski, E. (2014). Calcifying sorting and segregating: Brown at 60. *Multiple Voices for Ethnically Diverse Exceptional Learners*, 14(2), 52-67.

³ See: Mercer, J. R., & Richardson. (1975). Mental retardation as a social problem. In N. Hobbs (Ed.), *Issues in the classification of children volume II* (pp. 463-496). San Francisco: Jossey-Bass.; Dunn, L. M. (1968). Special education for the mildly retarded - is much of it justifiable? *Exceptional Children*, 35(1), 5-22.; Chinn, P. C., & Hughes, S. (1987). Representation of minority students in special education classes. *Remedial and Special Education*, 8(4), 41-46.

⁴ Morgan, P. L., Farkas, G., Hillemeier, M. M., Mattison, R., Maczuga, S., Li, H., & Cook, M. (2015). Minorities are disproportionately underrepresented in special education: Longitudinal evidence across five disability conditions. *Educational Researcher*, 44, 278–292.

⁵ Skiba, R. J., Artiles, A. J., Kozleski, E. B., Losen, D. J., & Harry, E. G. (2016). Risks and consequences of oversimplifying educational inequities: A response to Morgan et al. (2015). *Educational Researcher*, 45(3), 221-225.

⁶ Collins, K. M., Connor, D., Ferri, B., Gallagher, D., & Samson, J. F. (2016). Dangerous assumptions and unspoken limitations: A disability studies in education response to Morgan, Farkas, Hillemeier, Mattison, Maczuga, Li, and Cook (2015). *Multiple Voices for Ethnically Diverse Exceptional Learners*, 16(1), 4-16.; Black, D. (2015). New York Times story on special education got it all wrong says Dan Losen. Retrieved from http://lawprofessors.typepad.com/education_law/2015/08/new-york-times-story-on-special-education-got-it-all-wrong-says-dan-losen.html.; Weston Phippen, J. & National Journal (2015). The racial imbalances of special education. Retrieved from <https://www.theatlantic.com/education/archive/2015/07/the-racial-imbalances-of-special-education/397775/>.

The assertion from the Department that significant disproportionality occurs for reasons other than race ignores both the overwhelming evidence base and the statutory intent and purpose of §618(d). Numerous studies have found race as the primary predictor of overrepresentation after controlling and accounting for socioeconomic status.⁷ Further, a recent study⁸ conducted by the Government Accountability Office (GAO) found that disparities in discipline by race occurred regardless of poverty level of the school. While poverty and race are intricately entangled due to our Nation's history of oppression of people of color, decades of research concludes that race is a key factor in educational equity,⁹ including significant disproportionality¹⁰ in special education identification¹¹ and school discipline.¹²

Comment: Still other commenters supported a delay and suggested repeal of the 2016 significant disproportionality regulations for financial reasons: LEAs identified with significant disproportionality must reserve 15 percent of their IDEA Part B funds to implement comprehensive CEIS, which could shift funding from children with disabilities and increase State maintenance of fiscal support requirements. One commenter noted that significant disproportionality should be addressed using a different source of funding than IDEA. Another noted that the reservation of funds could negatively affect LEAs that themselves do not have significant disproportionality but are located within, or are members of, Educational Service Agencies that are identified with significant disproportionality. Discussion: [...] [T]he Department has an obligation to implement and enforce the requirements of IDEA as they exist today, and we will work with Congress on any potential changes to IDEA, including to section 618(d) (81 FR 92380, the Department should await congressional action) (34 CFR Part 300, 31310)

Although several commenters suggested that the 15 percent reservation for comprehensive coordinated early intervening services (CEIS) would be burdensome or challenging, it is important to point out that this is a requirement in statute,¹³ not a change with the rule. In fact, the Equity in IDEA provided additional flexibility on how the reserved funds can be utilized. Therefore, even delay of this rule does not abdicate local educational agencies from their statutory obligation to reserve the full 15 percent of

⁷ See Coutinho, M. J., Oswald, D. P., & Best, A. M. (2002). The influence of sociodemographics on the disproportionate identification of minority students as having learning disabilities. *Remedial and Special Education*, 23, 49–59; Oswald, D. P., Coutinho, M. J., Best, A. M., & Singh, N. N. (1999). Ethnic representation in special education: The influence of school-related economic and demographic variables. *The Journal of Special Education*, 32, 194–206.; Skiba, R. J., Poloni-Staudinger, L., Simmons, A. B., Feggins, L. R., & Chung, C. G. (2005). Unproven links: Can poverty explain ethnic disproportionality in special education? *The Journal of Special Education*, 39, 130–144; Sullivan, A. L., & Bal, A. (2013). Disproportionality in special education: Effects of individual and school variables on disability risk. *Exceptional Children*, 79, 475–494.; Wiley, A. L., Brigham, F. J., Kauffman, J. M., & Bogan, J. E. (2013). Disproportionate poverty, conservatism, and the disproportionate identification of minority students with emotional and behavioral disorders. *Education and Treatment of Children*, 36, 29–50.

⁸ Government Accountability Office (2018). Discipline disparities for black students, boys, and students with disabilities. Retrieved at <https://www.gao.gov/assets/700/690828.pdf>.

⁹ Gershenson, S., Holt, S. B., & Papageorge, N. W. (2016). Who believes in me? The effect of student–teacher demographic match on teacher expectations. *Economics of Education Review*, 52, 209–224.

¹⁰ Artiles, A. J., Kozleski, E., Trent, S., Osher, D., & Ortiz, A. (2010). Justifying and explaining disproportionality, 1968–2008: A critique of underlying views of culture. *Exceptional Children*, 76, 279–299.

¹¹ Skiba, R. J., Poloni-Staudinger, L., Simmons, A. B., Feggins, L. R., & Chung, C. G. (2005). Unproven links: Can poverty explain ethnic disproportionality in special education? *The Journal of Special Education*, 39, 130–144.

¹² Skiba, R. J., Michael, R. S., Nardo, A. C., & Peterson, R. L. (2002). The color of discipline: Sources of racial and gender disproportionality in school punishment. *The Urban Review*, 34(4), 317–342.

¹³ § 618(d)(2)(B)

funds for CEIS. Additionally, the response provided by the Department suggests that it will implement the law as is written today, but also suggests working with Congress on potential changes, specifically those related to disproportionality. Not only is this suggestion troubling, but it appears to disregard Congressional input provided during the NPRM. More than thirty Members of Congress provided comments on NPRM, all expressing serious concern with the Department's proposed delay.

Given these passages and our concerns over the Department's response to comments from the NPRM, we request immediate responses to the following questions:

1. Is it your position that racial bias does not exist in special education? Provide evidence as to how the position was determined.
2. What process did the Department undertake to review current research on significant disproportionality? Please provide a citation list of articles reviewed and a list of researchers consulted.
3. Describe how the Department will oversee §618(d) during the delay of the Equity in IDEA rule, including:
 - a. What is the monitoring process of States as they determine school districts that have demonstrated significant disproportionality? How will the Department determine compliance with the statute as passed by Congress?
 - b. What is the monitoring process of States as they require school districts to reserve 15% of their funds for comprehensive CEIS? How will the Department determine compliance?
4. Describe the changes the Department seeks regarding IDEA and specifically §618(d). Please detail any conversations with Members of Congress or Congressional Staff discussing these changes.

Thank you for your prompt response to this letter.

Sincerely,



Cedric L. Richmond
Chair, Congressional Black Caucus



Danny K. Davis
Co-Chair, CBC Education and Labor Task Force



Frederica Wilson
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Yvette D. Clarke
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