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*Submitted electronically*

**Re: Proposed Delay of Equity in IDEA regulations**

The American Civil Liberties Union (“ACLU”) submits these comments to express our strong opposition to the proposed delay for compliance with the Equity in IDEA regulations, as detailed in the Notice of Proposed Rulemaking published at 83 FR 8396 (February 27, 2018), RIN 1820-AB77, with the title “Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities.”

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. With more than 2 million members, activists, and supporters, the ACLU is a nationwide organization that fights in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The ACLU has a strong interest in advancing educational equity and upholding the rights of students with disabilities and students of color. We are therefore well-positioned to comment on whether the U.S. Department of Education (“the Department”) should delay regulations on racial disproportionality in the education of students with disabilities.

The American Civil Liberties Union strongly opposes the proposed delay to the Equity in IDEA rule because it will:

1. harm students with disabilities,
2. harm students of color,
3. harm students of color with disabilities most significantly,

4. leave schools without the guidance necessary to appropriately identify special education needs and resources,
5. leave schools without clarity as to when they need to reserve funds for early intervening services,
6. slow equitable access to general education – which harms students and is a violation of their constitutional rights,
7. slow interventions and to a timely referral for an evaluation for disability under the IDEA or Section 504,
8. perpetuate unequal treatment of students of different races, which harms the individual students, creates a bad environment for all students, and violates the constitution,
9. deny students with disabilities access to the quality special education services and supports they need,
10. and force many students – especially students of color – to receive their education in a more restrictive environment than necessary, violating their rights under the IDEA, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

## **BACKGROUND**

### ***Understanding the Disproportionality Problem***

In order to address racial disproportionality, Section 618(d) of the Individual with Disabilities Education Act (IDEA) requires that states must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the identification of children with disabilities. The inquiry includes the identification of children with disabilities with a specific impairment, the placement in particular educational settings of such children, and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions. When a state identifies a district as significantly disproportionate, it must require the district to reserve funds for early intervening services to address the overrepresentation.

Nationally, Black students are 40% more likely, and American Indian or Alaska Native students are 70% more likely, to be identified as having disabilities than are their peers.<sup>1</sup> This disparity is especially intense in specific disability categories. At the level of special education eligibility categories, disproportionality is most pronounced in the more subjectively-defined and high-incidence categories of Emotional Disturbance (ED) and Intellectual Disability (ID). Black students (and American Indian or Alaska Native students, when included in studies) are consistently overrepresented in ED and ID categories and often also in Specific Learning Disability (SLD), though to a lesser extent.<sup>2</sup> Averaged across all states, overrepresentation is

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<sup>1</sup> “Thirty-Eighth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Parts B and C. 2016.” Annual Reports, November 9, 2016.

<https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html>

<sup>2</sup> Bal, Betters-Bubon, and Fish, 2017; Deninger, 2008; Losen et al. “Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline.” (2014).; U.S. Dept. of Education 2016 IDEA Report; Zhang et al. 2014.

strongest for Black students, who are more than twice as likely to receive an ED or ID classification as students in any other group.<sup>3</sup>

Despite this, in 2010, only 2% of all districts were identified as having significant disproportionality.<sup>4</sup> In 2013, GAO studied this issue and found variation in how states identified significant disproportionality. Of the 356 districts required to provide services to address overrepresentation, half were clustered in five states – and 73 were in Louisiana alone. GAO found that the way many states defined overrepresentation made it very unlikely that any districts would be identified and required to provide services to remedy the problem. In the 2010-2011 school year, twenty-one states did not require any school districts to address significant disproportionality.<sup>5</sup>

To address this, the Department issued regulations in 2016 requiring a common standard (with some flexibility left to states) for identifying significant disproportionality in representation of students within special education, segregated school settings, and in receipt of disciplinary actions. In addition to setting a common standard for identifying disproportionality in classification and placement, the rule clarified that states must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities.

The rule also provided school districts with additional flexibility to use funds mandated to address significant disproportionality to serve students with disabilities and pre-school children. By delaying the rule, the Department would maintain this unfortunate status quo whereby districts lack any meaningful accountability for addressing significant disproportionality – and should thus plan to continue implementation as currently scheduled. If the Department delays implementation of the Equity in IDEA rule, many children simply won't receive the attention they deserve, missing a critical opportunity for early intervention services.

### ***Why Over-Identification is a Problem***

The IDEA guarantees every student a right to a “free and appropriate public education in the least restrictive environment.” The goal is to have every student educated in the general education classroom, including students with disabilities. Unfortunately, many school districts have used the over-classification of students of color into special education as a means of placing these students into more restrictive environments, out of the general education classroom, and not being taught to challenging academic standards.

This approach ill-serves students of color, with and without disabilities, and corrupts the special education system for all students with disabilities. By turning special education into a tool of educational segregation, districts are failing to meet their obligations under the IDEA. A system

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<sup>3</sup> “Thirty-Eighth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Parts B and C. 2016.” Annual Reports, November 9, 2016.

<https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html>

<sup>4</sup> U. S. Government Accountability Office. “Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education,” no. GAO-13-137 (March 29, 2013). <https://www.gao.gov/products/GAO-13-137>

<sup>5</sup> Ibid

designed to promote inclusion and equality of opportunity for students with disabilities is being used to warehouse students of color. This is unacceptable – and degrades the quality of the special education system for students with disabilities by turning it into a dumping ground where the presumption is that students will be educated outside the general education classroom. As such, this delay will harm students with disabilities by further delaying their ability to access appropriate services. Delay will also harm students of color, who are negatively impacted by being removed more frequently from the general education classroom and being tracked into more restrictive settings. Finally, students of color with disabilities will be subject to particular harm, as they are most likely to be subject to disproportionate discipline and segregation.

When disability status intersects with race, educational segregation is dramatically more frequent. In 2014, 17% of Black students, and 21% of Asian students were placed in the general education classroom less than 40% of the school day.<sup>6</sup> By comparison, 11% of white and American Indian or Alaskan Native children with disabilities were similarly placed.

Relative to white students, Black students ages 6 to 21 are less likely to be in the regular classroom at least 80% in the day (57.4% vs. 65.3%) and more likely to be inside the regular classroom less than 40% of the day (17.1% vs. 10.8%).<sup>7</sup> A similar, but less extreme, pattern can be seen for Hispanic students. Native Hawaiian/Pacific Islander students are least likely to be included at least 80% of the day (54.9%), though it is possible this effect is driven by the State of Hawaii's unusually restrictive placement patterns. Asian students were most likely to be in the most restrictive placement (20.1%).

Differences may be more pronounced at state and local levels. One study of a large Southwestern school district found that approximately half (49.8-54.9%) of Black, Hispanic, and American Indian or Alaska Native special education students were served in the most restrictive setting, defined as placement in a separate class at least 60% of the time.<sup>8</sup> Only 32.9% of white and 21.6% of Asian students were served in the same setting. In Indiana, another study found that Hispanic students were more likely than white students to be served in a separate class and less likely to be served in the regular education classroom.<sup>9</sup>

Previously, research found that Black students in Indiana were nearly three times as likely as all other students combined to be served in the most restrictive placement.<sup>10</sup> Black students receiving services in the speech and language category were 7.7 times as likely to be served in a separate setting than were other students.<sup>11</sup> In Massachusetts, Black and Hispanic students were

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<sup>6</sup> "Thirty-Eighth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Parts B and C. 2016." Annual Reports, November 9, 2016.

<https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html>

<sup>7</sup> Ibid

<sup>8</sup> De Valenzuela, Copeland, Qi, and Park. "Examining Educational Equity: Revisiting the Disproportionate Representation of Minority Students in Special Education." (2006).

<sup>9</sup> Pérez, Becky, Russell J. Skiba, and Choong-Geun Chung. 2008. "Latino Students and Disproportionality in Special Education." Education Policy Brief, Center for Evaluation and Education Policy, University of Indiana.

<sup>10</sup> Skiba et al. "Disparate Access: The Disproportionality of African American Students With Disabilities Across Educational Environments." (2006).

<sup>11</sup> Ibid.

almost twice as likely as white students to be in the regular education classroom less than 40% of the day.<sup>12</sup>

Students with and without disabilities deserve the opportunity to access a high-quality education within the general education environment. The use of special education as a tool of educational segregation for students of color corrupts the intent and promise of the IDEA for all students.

### ***Disproportionality in School Discipline***

The over-identification of disabilities among students of color takes place against a backdrop of concerning racial and disability disproportionality in school discipline. For example, Black students account for 15.5% of all public-school students, but about 39% of students suspended from school.<sup>13</sup> Students with disabilities served by the IDEA (12%) are more than twice as likely to receive one or more out-of-school suspensions as students without disabilities (5%), despite legal protections within the IDEA limiting the extent to which districts may suspend students for disability-related behavior.<sup>14</sup> Delay in the regulation will limit the effectiveness of IDEA provisions on discipline in protecting students of color.

Disparities in discipline are higher for students of color with disabilities. More than one out of five American Indian or Alaska Native (23%), Native Hawaiian or other Pacific Islander (23%), Black (25%), and multiracial (27%) boys with disabilities served by the IDEA received one or more out-of-school suspensions, compared to one out of ten white (10%) boys with disabilities served by the IDEA. More than one in five multiracial girls with disabilities served by the IDEA (21%) received one or more out-of-school suspensions, compared to one in twenty white girls with disabilities served by the IDEA (5%). These suspensions increase the likelihood that a student will find themselves intertwined with law enforcement, and ultimately support and reinforce the school to prison pipeline. Notably, most 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.<sup>15</sup>

Lost instruction time for Black students with disabilities is particularly egregious, and will be exacerbated by the delay of the regulation. The Center for Civil Rights Remedies at UCLA recently found that, nationally, Black students lost 121 days of instruction per 100 students as compared to only 43 for white students.<sup>16</sup> Moreover, Black students with disabilities experienced much higher rates in many states – for example, in Nevada, Black students with disabilities lost 209 days of instruction per 100 enrolled, 153 more days than those lost by white students with disabilities. In 7 of the 8 states where the racial gap is over 100 days of lost instruction for Black students, no districts were identified for disproportionality. Only one of these, Nebraska, identified any districts for racial disproportionality in discipline according to the Department’s report for 2015-16.

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<sup>12</sup> Deninger, 2008.

<sup>13</sup> U. S. Government Accountability Office. “K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities,” no. GAO-18-258 (April 4, 2018). <https://www.gao.gov/products/GAO-18-258>

<sup>14</sup> Ibid

<sup>15</sup> *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools* Authors: Daniel J. Losen, Tia Elena Martinez (April 08, 2013)

<sup>16</sup> Losen, Daniel J., Wei-Ling Sun, and Michael A. Keith. 2018. *Suspended Education in Massachusetts: Using Days of Lost Instruction Due to Suspension to Evaluate Our Schools*. The Center for Civil Rights Remedies.

Reducing disciplinary disparities based on race and disability makes schools safer. When students are aware that their placement, discipline and education are heavily influenced by their race, they understandably distrust the credibility of their schools and educational authorities. By helping ensure that students can receive an equitable education, the Department will be promoting safety in schools, not detracting from it.

### ***Conclusion***

The proposed delay in these regulations is not a harmless administrative change – it has concrete and real consequences for students with and without disabilities. There are actual children who will be harmed by a two-year delay in the implementation – those children currently in school or about to enter school in districts which are failing to provide services to them, and/or who are unfairly suspended and expelled. They will not receive appropriate early intervening services that would be provided to them as a result of a finding of significant disproportionality for two additional years.

The “significant disproportionality” regulations were promulgated in response to long-standing problems. In 2013, the GAO recommended “a standard approach for defining significant disproportionality to be used by all states.” The Equity in IDEA regulation was the fulfillment of that regulation, responding to a grave problem well documented by independent researchers and oversight entities. Young people and their families have waited long enough for the federal government to take action to ensure the proper implementation of IDEA Section 618(d). Measuring “significant disproportionality” is a long-standing requirement of the IDEA, and state failure to adequately implement this requirement prompted this rulemaking. Delay is not warranted, and it is harmful to children.

School based leaders support the Equity in IDEA regulation and have urged the Department to implement it without delay. To quote the National Association of State Directors of Special Education, “NASDSE does not believe that addressing equity should ever be put on hold. Postponing implementation leaves the states in limbo - should they move forward or stop what they are doing?”

Additionally, delay sends the wrong message, implying that the Department is no longer committed to addressing issues of educational equity for students of color and students with disabilities. It is important to recall that these regulations emerge from the statutory responsibility within the IDEA to address significant disproportionality. The regulation’s purpose is to ensure consistency, so that states are treated fairly and that the statute is implemented effectively, while providing a wide berth for state self-determination.

The ACLU urges swift implementation of the Equity in IDEA regulation and opposes the proposed delay. There is no legal, factual, or moral basis to turn away from our commitment to ensure educational opportunities and academic success for children of color and children with disabilities and to create a positive school climate for all children.

We urge the Department to continue implementing this regulation and to maintain a strong commitment to addressing disproportionality in classification, placement and discipline as part of a broader effort towards educational equity for all students.

If you have any questions, please contact Vania Leveille at [vleveille@aclu.org](mailto:vleveille@aclu.org) or Mike Garvey at [mgarvey@aclu.org](mailto:mgarvey@aclu.org).

Sincerely,



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