



Tomakie Washington,
Acting Director, Information Collection
Clearance Division, Office of the Chief Privacy
Officer, Office of Management.

RE: Docket ID Number ED–2017–ICCD–0100; OMB Control Number: 1820–0030 **and** Docket ID Number: ED-2017-ICCD-0097-0001; OMB Control Number:1820-0600

Dear Acting Director Washington

The National Disability Rights Network (NDRN) writes in response to the above two referenced Paperwork Reduction Act (PRA) submissions (*Part B Application and State and Local Educational Agency Record and Reporting Requirements Under Part B of the Individuals with Disabilities Education Act*)

NDRN is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. P&As and CAPs are in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the 57 P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

As parents, students, and advocates working to eliminate discriminatory practices that undermine equal educational opportunity, we know all too well that students of color are disproportionately misidentified for certain categories of special education, placed in restrictive learning environments at higher rates than their peers, and subjected to punitive discipline practices. We wholeheartedly support the proposed data collection, as it is an essential state obligation as

required by the Individuals with Disabilities Education Act, signed on December 3, 2004, and clarified by the regulations finalized on December 19, 2016.

When the final rule was issued, the Department stated the need to meet the requirements of the Paperwork Reduction Act. We hope we are correct in assuming that this notice is nothing more than a routine PRA review. We do not understand why the time for comments was extended, nor do we believe that this new regulation should be subjected to the Department's broader regulatory review as it has already completed the regulatory process.

I. The Data Collection Should Be Expedited in the Interest of Justice, not Delayed:

We believe that any failure to require data regarding states' plans for enforcing the new regulations and any failure to ensure that these data are collected and reviewed thoroughly by the department would defeat the important purpose of this statutory requirement. Moreover, as mentioned above, the new reporting requirement is pursuant to rules promulgated on December 19, 2016. This data collection is overdue and expected by stakeholders.

These regulations were a direct response to the U.S. Government Accountability Office (GAO) study showing widespread non-compliance by states with 20 U.S.C. Section 1418(d) of the IDEA requiring states to identify Local Education Agencies (LEAs) with significant disproportionality in areas related to special education: Identification; Restrictive Placement; and Discipline. Most states set thresholds for identifying disproportionate districts so high that no districts ever exceeded them, and, therefore, none were identified. Meanwhile states permitted districts to suspend students of color with disabilities at much higher levels than their White peers. Despite the law, the Department of Education allowed far too many states to ignore the deeply disturbing disparities that inspired Congress to enact the legislation. Nationally, for example, in 2011, districts suspended over one in every four Black students with disabilities, at least once. Rates of disciplinary removal for their disabled White peers were far lower.

One significant concern is that the instruction sheet included with the proposed Part B application permits states to submit their significant disproportionality spreadsheet with their Federal Fiscal Year (FFY) 2019 application, instead of their FFY 2018 application, but provides no justification from states for that delay. Specifically it states:

*“ Each applicant may, but is not required to, complete and submit the Significant Disproportionality Spreadsheet with its FFY 2018 application. **Each applicant that does not submit the Spreadsheet with its FFY 2018 application must submit the Spreadsheet with its FFY 2019 application.** After the initial submission of the Spreadsheet with its FFY 2018 or FFY 2019 application, applicants will only be required to submit the Spreadsheet with any future annual*

IDEA Part B State Applications if the applicant modifies its risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and rationales for each, or the number of years of data used in making annual determinations of significant disproportionality.” (Emphasis supplied)

States have been legally required to address significant disproportionality in areas related to special education since 2004 and have had adequate time to develop appropriate measures for determining these disparities. Many states have already done so and it is unfair to those that have complied with the law to give others extra time. Those who have ignored their responsibility and legal obligations, may have violated student’s civil rights and negatively impacted educational opportunity for many students of color.

On a positive note, we do believe that the choice to use the Part B application is an efficient way for states to submit this critical data, as they have to submit this document anyway.

II. States Should be Encouraged to Report The District Level Data to the Public

The data description as written in the Part B application fails to mention the following state obligation, required per the statute and as described in the regulations:

When a State educational agency (SEA) identifies LEAs with significant disproportionality in one or more of these areas based on the collection and examination of their data, States must: “...*(3) require the LEA to publicly report on the revision of its policies, procedures, and practices.*”

This notice should remind states of their obligation to ensure that LEAs report these revisions to the public.

Although the statute does not explicitly require it, pursuant to section 1416 of the IDEA, Congress gave the Secretary the authority to collect information it deems necessary, and explicitly references the data in section 1418. The Secretary can and should require that states report the number, and identify by name, those districts that the state deemed to have significant disproportionality, to both the Secretary and to the public.¹ Given the well-documented lax enforcement of these provisions by states, the Office of Special Education Programs (OSEP) should review compliance as part of their compliance monitoring. Additional monitoring is supported by both the letter and spirit of the law, as Congress made racial disproportionality a priority area for enforcement in the actual statute. 20 U.S.C. Section 1416.

¹ Please see Section V below for additional information about reporting of LEA determinations.

In the course of issuing this data request we also urge the Department of Education to remind states of the substantive clarifications provided by the regulations.

The two most significant points of clarification are summarized by the Department of Education as follows:

“ [The]final regulations clarify ambiguities in the existing regulations concerning significant disproportionality in the disciplining of children with disabilities. Specifically, these regulations adopt the Department’s long-standing interpretation that the required remedies in IDEA section 618(d)(2) apply when there is significant disproportionality in identification, placement, or any type of disciplinary removal from placement. In addition, funds reserved for comprehensive CEIS now must be used to identify and address the factors contributing to significant disproportionality and may be used to serve children from age 3 through grade 12, with and without disabilities.”

III. The Data Collection Should be Made Public to Bolster Monitoring and Enforcement

Finally, this document should honor the promise contained in the comment section of the final rule where the Department stated:

“We agree with the commenters’ suggestion that all of the risk ratios and alternate risk ratios the States calculate for their LEAs should be made public. This increased transparency allows States, LEAs, and stakeholders alike to monitor significant disproportionality and reinforces the review and revision of risk ratio thresholds, cell sizes, and n-sizes as an iterative public process within each State. The Department therefore anticipates that all risk ratios and alternative risk ratios will be made public but has not yet determined the precise time and manner for this to occur. We anticipate doing so through an information collection request, through the Department’s own publication of these data, or some combination of the two.”²

We are alarmed that the Department suggests in the supplemental materials, such as in response to item #16, that it will not require any information regarding how these data will be made public. We reiterate the Department’s statement to the public that it published in the federal register alongside the final regulations emphasizing that making these data public helps involve more stakeholders in the decision process and ultimately makes for smoother implementation. This in turn reduces the burden on states and adds a level of regulatory understanding that can also help ensure that the state’s monitoring of LEAs is efficient and effective.

In addition, states should be required to describe their data sources, including

² Page 83 of the unofficial final rule.

and especially those used to populate their numerators and denominators, and describe them further by each category (identification, placement and discipline). This information is necessary in order for the stakeholders to understand the situation fully so they may make accurate policy decisions. States may differ in terms of the data sources they use and may have vastly different numerical outcomes based on their choices. As the recent revisions to the disproportionality formula are intended to increase standardization, this step is critical in order to ensure that the data are meaningful.

IV. The Department Should Establish Clear Standards of “Reasonableness” for Thresholds

Finally, we applaud the fact that the instruction sheet clarifies that justifications are required for the thresholds, as well as cell-sizes and n-sizes, and standards for reasonable progress. For the sake of clarity, the data collection instructions should provide more guidance on exactly what is considered “reasonable.” As discussed above, the goal is to produce data that are readily understood by stakeholders for their use in making policy decisions. That cannot occur without sufficient leadership by the Department on this crucial federal monitoring and enforcement obligation.

V. Docket Number ED-2017-ICCD-0097-0001: *State and Local Educational Agency Record and Reporting Requirements Under Part B of the Individuals with Disabilities Education Act*

A second notice issued by the Department on 07/11/2017 (ID: ED-2017-ICCD-0097-0001; *State and Local Educational Agency Record and Reporting Requirements Under Part B of the Individuals with Disabilities Education Act*) suggests that certain information should be recorded by the state, although it would not be required to be reported to the Department. This information includes both states’ significant disproportionality determinations (LEAs found to have met the threshold), and how stakeholder input was included in the process of setting these standards. We strongly support this inclusion, as it provides the remaining information that stakeholders require to make thoughtful decisions, however, we believe it is imperative that the public has access to this information. States should also report this information to the Department, especially if they opt not to report it directly to the public themselves, as it would ensure that the Department and the public assess the degree to which the new regulations are being appropriately implemented nationally, with minimal additional reporting burden for SEAs or LEAs.

Thank you for your consideration of these comments. If you have any questions or concerns, please do not hesitate to contact Diane Smith Howard at diane.smithhoward@ndrn.org

Sincerely,

A handwritten signature in cursive script, appearing to read "Curtis Decker".

Curtis Decker , J.D.
Executive Director