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*Submitted electronically*

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

The American Civil Liberties Union of South Dakota 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.”

The ACLU of South Dakota 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 the whether the U.S. Department of Education (“the Department”) should delay regulations on racial disproportionality in the education of students with disabilities.

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>

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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>

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 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 2015, 0% of districts were identified as having disproportionate representation.<sup>5</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. By delaying the rule, the Department of Education 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 proceeds to delay 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.

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<sup>2</sup> Bal, Better-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.

<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> U. S. Department of Education, Office of Special Education Programs. FFY 2015 Part B State Performance Plan (SPP) and Annual Performance Report (APR). <https://osep.grads360.org/#report/apr/publicView>.

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 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, 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>

In 2016, Black and Hispanic students with disabilities age 6 to 21 make up 9.18% and 7.28%, respectively, of students in the regular classroom for less than 40% of the day despite making up only 2.66% and 4.4% of the student body.<sup>8,9</sup> This represents a concerning rate of educational segregation which will be further exacerbated should the Department delay implementation of the rule.

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 IDEA for all students.

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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> U.S. Department of Education. IDEA Part B Data Collection, Child Count and Education Environments, available at <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bccee>.

<sup>9</sup> U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2013-14, available at <http://ocrdata.ed.gov>.

## *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>10</sup> Students with disabilities served by 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 IDEA limiting the extent to which districts may suspend students for disability-related behavior.<sup>11</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 IDEA received one or more out-of-school suspensions, compared to one out of ten white (10%) boys with disabilities served by IDEA. More than one in five multiracial girls with disabilities served by IDEA (21%) received one or more out-of-school suspensions, compared to one in twenty white girls with disabilities served by 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>12</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>13</sup>

In 2015-16, Black students made up 8.3% of all students with disabilities subject to disciplinary removals for greater than 10 days,

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<sup>10</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>11</sup> Ibid

<sup>12</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>13</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.

despite making up only 2.66% of the total student enrollment.<sup>14</sup><sup>15</sup> Black students made up 4.83% of students suspended for 10 days or less.<sup>16</sup> These racial disparities in discipline will be further exacerbated should the Department proceed with the proposed delay in the rule.

Reducing disciplinary disparities based on race and disability makes schools more safe, not less. 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.

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### *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 in South Dakota 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 IDEA, and state failure to adequately implement this requirement prompted this rulemaking. Delay is not warranted, and it is harmful to children.

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 IDEA to address significant disproportionality. The regulation’s purpose is to ensure consistency, so that states

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<sup>14</sup> U.S. Department of Education. IDEA Part B Data Collection, Discipline, 2015-16, available at <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bd>.

<sup>15</sup> U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2013-14, available at <http://ocrdata.ed.gov>.

<sup>16</sup> U.S. Department of Education. IDEA Part B Data Collection, Discipline, 2015-16, available at <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bd>.

are treated fairly and that the statute is implemented effectively, while providing a wide berth for state self-determination.

The ACLU of South Dakota 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. With sufficient backing, we can support staff and educate all students safely and successfully.

We urge the Department to continue to implement 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.

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