 Ensuring a Place at the Table for Every Family

Thank you for the opportunity to comment on the proposed delayed compliance dates for the Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities regulations (the “Equity in IDEA” or “significant disproportionality” regulations). The National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE) is a national organization focused on strengthening the voice of families and family-led organizations at decision-making tables that affect our nation’s children, youth, and families, especially those who face the greatest challenges and disproportionately negative outcomes. Our 55+ local, state and national members represent Parent Training and Information Centers, Community Parent Resource Centers, Family to Family Health Information Centers (F2Fs), Parent to Parent USA affiliates, National Federation of Families for Children’s Mental Health chapters, Family Empowerment Centers, Early Start Family Resource Centers, and other family-led, family-run organizations committed to ensuring the highest quality and most effective services and supports for children and families including those related to education. Our comments are based on our knowledge and expertise regarding the current impact of disproportionate treatment of students with disabilities and their families based on race/ethnicity and the impact of the proposed delay in correcting these existing and long-standing injustices.

The current practices of schools and districts across the country that result in significant disproportionality are contrary to the Equal Protection provisions of the United States Constitution, various Federal civil rights statutes, such as the Civil Rights Act of 1964, and the Americans with Disabilities Act (ADA), as well as IDEA. Families routinely report to Parent Centers and other family-led organizations that their children with disabilities or perceived disabilities are routinely identified, placed, and disciplined differently by schools because of their race or ethnicity. This is not just their perception; it is supported by the data. Every State in the Union has tracked these practices for many years. The risk level of students being identified, placed, and/or disciplined because of their race/ethnicity/language has been reported by the States to the U.S. Department of Education for many years. Yet improvement in the data is not occurring, in large part because states have utilized definitions of disproportionality that result in few or no districts in their states being identified as having disproportionality that is the result of inappropriate practices, policies, etc., contrary to the data and to the experiences of minority, LEP, etc. students and their families.

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It should go without saying that the risk of a student experiencing any of these actions should be the same as his or her peers across the board, regardless of race or ethnicity or language. Yet, these disparities have persisted. The regulations that the Department proposes to delay are the first attempt in many years to reduce and eventually eliminate these disparities using an evidence-based approach supported by the research. It is impossible to argue that a student with disabilities is receiving a free and appropriate public education as guaranteed by IDEA if they are being treated differently than their peers because of their race/ethnicity.

We are somewhat puzzled by the stated justification for seeking to postpone implementation of these regulations. The notice announcing the intended delay refers to Executive Order 13777, which, on its face, seeks to “alleviate unnecessary regulatory burdens” on the people of the United States. The review of the significant disproportionality regulations is stated as being part of that process. However, the stated reason for the proposed delay does not reference the regulatory burden, if any, of these regulations, but states that the proposed two year delay in compliance is to allow the Department to “review the regulation to ensure it effectively addresses significant disproportionality.” There is no suggestion anywhere in the notice proposing the delay that the regulations are a burden. However, to the extent that this may be a part of the reason for the proposed delay, National PLACE does not believe that Federal law permits the delay of measures to enforce Equal Protection under the Constitution and basic civil rights statutes on the basis of possible regulatory burden on the states, districts, or schools.

As we noted in our previous response to the proposed delay of these regulations submitted in response to the OMB Regulatory and Deregulatory agenda, the significant disproportionality regulations have gone through an intensive and lengthy regulatory process in which comments from stakeholders, including parents and family-led organizations, were solicited, reviewed, and used to develop the final regulations. The original timeline provided states, districts, and schools with over 18 months following adoption of the regulations to prepare for their implementation. Children with disabilities and their families representing diverse races/ethnicities and other groups that have faced significant disproportionality have already waited decades for the disproportionality language in the Individuals with Disabilities Education Act to have any real meaning.  These regulations are essential to give parents the tools they need to ensure that their children do not face significant disproportionality in the special education process and system.  It is important to remember that the types of significant disproportionality addressed by the regulations have significant negative impacts on children with disabilities and their families – overrepresented in special education, especially the disabilities that result in the most segregated placements, overrepresentation in those segregated placements, overrepresentation in poor academic results, overrepresentation in the most punitive discipline, overrepresentation in drop-out rates, etc. Children of color, LEP children, etc. are not over-represented in high academic achievement, high graduation rates, or positive post-high school outcomes.

Without these regulations, parents will be forced to continue to operate under state-by-state rules that set such a high threshold for identifying significant disproportionality that there have been virtually no findings of significant disproportionality, even in states and districts where it is clear that disproportionality exists.  These regulations meet our test – they will make the lives of individuals, children, and families, especially those facing the greatest challenges, better.  (The regulations would also set a standard way to identify disproportionality so children in different states will not have their Federal right to be free of inappropriate actions that lead to disproportionality dependent on the state in which they live.)

The Department states several reasons for delaying implementation of the regulations and, thus, preserving the status quo. National PLACE strongly believes that none of the stated reasons, discussed below, are sufficient for a two year delay, which will result in the continued unequal treatment of students, including students with disabilities, based on their race/ethnicity and will continue to deny them a free and appropriate public education. Rather, National PLACE strongly urges the Department to continue with the planned implementation of the regulations, which it acknowledges in the notice of the proposed delay is already well advanced in many states. National PLACE further notes that most, if not all, of the stated reasons for the proposed delay would have already been considered by the Department in the extensive preparation, review, and comment period for the significant disproportionality regulations.

Thus, National PLACE feels that the best approach – and the most family-friendly approach – to halt the existing disproportionate treatment of students based on their race/ethnicity is to continue to implement the existing regulations and modify them, if necessary, as experience dictates down the road. The harm being suffered by students, including students with disabilities, as well as their families who bear the brunt of the negative outcomes of their children, is too great to wait an additional two years to begin to address these issues.

In the reasons stated for the proposed delay, the Department states that a number of commenters, in response to its general solicitation of comments on regulatory reform in 2017, suggested that the Department does not have the statutory authority under IDEA to require States to use a standard methodology. National PLACE firmly believes that this issue must have been addressed by the Department prior to the implementation of the regulations. However, even if this were not the case, the Department clearly has authority under the Equal Protection clauses of the United States Constitution and other existing Federal civil rights statutes to fashion a remedy such as these regulations that is designed to halt, as soon as possible, such egregious harm to students and their families.

The Department further states that the above commenters pointed out that the Department’s previous position was that States are in the best position to evaluate factors affecting determinations of significant disproportionality. National PLACE notes that the current regulations are not in conflict with this position, as they preserve and require significant State involvement in determining what constitutes “significant” disproportionality for an individual state. Members of National PLACE have participated in this process as part of the implementation of the regulations and can state unequivocally that the State role in making such decisions is undiminished.

A concern raised by a commenter is noted by the Department to the effect that the standard methodology in the regulations looks at group outcomes through statistical measures, rather than focusing on the needs of each individual child and the appropriate individual identifications, placements, or discipline. National PLACE wholeheartedly supports the focus of IDEA on the individual student. However, measures such as the standard methodology are effective in ferreting out systemic racial and ethnic discrimination. Even if one were able to determine that each of the actions addressed in the regulations were taken improperly based on a student’s race or ethnicity (which would require, in essence, a confession of racial/ethnic motivation by the LEA), it would be a logistical nightmare for districts and schools to attempt to address each such instance on an individual, case by case, basis. The standard methodology reveals systemic patterns in a district, in a State, and allows comparisons across States. It also provides an effective mechanism to inform the enactment of systemic reforms to eradicate widespread unequal treatment. It is, in the opinion of National PLACE, the most effective and efficient method to root out the grave injustices that are being perpetrated daily against students and their families because of their race/ethnicity across the country. It is also the method that provides the greatest opportunity for families and family-led organizations to impact this process.

The Department also notes that some commenters suggest that the standard methodology would provide incentives to LEA’s to establish quotas for numbers of children who can be identified as children with disabilities, or placed or disciplined in certain ways. National PLACE does not agree that the standard methodology does this. However, we also note that other factors in the way in which special education services are provided to students – apart from the regulations proposed to be delayed here – provide these incentives. Delaying the rooting out of unequal race/ethnicity-based treatment of students for two years (or more) will do nothing to reduce or eliminate these incentives.

Another factor noted by the Department in proposing to delay the regulations is that some commenters suggest that the Department could not accurately assess the impact of the regulations given that it did not provide any standards by which it would assess the required reasonableness of State risk ratio thresholds and that calculations of significant disproportionality should be better aligned with State Performance Plan indicators. National PLACE feels strongly that the regulations, as they stand, are sufficient to allow the Department to judge whether risk ration thresholds are reasonable. Indeed, determining “reasonableness” is a function performed by the Department and by agencies and departments across the Federal government on a daily basis. However, even if this were not the case, neither this, nor the urged closer alignment with the State Performance Plan indicators, is sufficient justification to continue to allow the great harm being suffered across the country by the students and their families. It is that harm – the unequal and unjustified treatment of students based on their race and ethnicity, already prohibited by the United States Constitution and Federal law – that must be the overriding factor in the Department’s implementation of these regulations. The significant disproportionality regulations have begun the process of eradicating this evil – the Department should not delay this process for a single day. National PLACE is of the strong opinion that none of the reasons stated by the Department as justification for the delay of the regulations justifies the continued harm that students and their families will suffer.

Finally, none of the justifications for delay cited by the Department in any way address delaying the inclusion of children ages three through five in the analysis of significant disproportionality from July 1, 2020, to July 1, 2022. National PLACE cannot discern any reason for this delay. Again, given the ongoing nature of significant harm being suffered by families daily, we urge the Department to not implement this additional delay in including such children. However, if the implementation of the regulations is delayed until 2020, National PLACE urges the Department to require that children ages three to five be included in the analysis as of July 1, 2020.

As first stated by William E. Gladstone, British statesman and Prime Minister in the 1800’s, “Justice delayed is justice denied.”  As paraphrased by Dr. Martin Luther King, Jr. writing from a Birmingham jail, “Justice too long delayed is justice denied.”  Extending the date of implementation of these regulations would certainly represent the denial of justice due to unnecessary delay for millions of children with disabilities and their families. National PLACE strongly opposes any proposal to delay implementation of these critical regulations.

Thank you for the opportunity to provide our perspective as family-led, family-run, family-supporting organizations on the reasons why implementation of the significant disproportionality rules should not be delayed.

Very truly yours,

Diana MTK Autin, Director

National PLACE