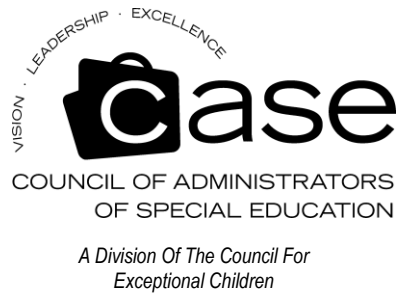


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December 15, 2018

Johnny Collett
Assistant Secretary, United States Department of Education
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202-7100

Dear Assistant Secretary Collett:

The Council of Administrators of Special Education (CASE), the largest group of special education administrators in the country with close to 4000 members, has received the publication from the Office of Information and Regulatory Affairs in the White House's Office of Management and Budget regarding the intent of Secretary DeVos to issue a notice of proposed rulemaking to amend regulations under Part B of the Individuals with Disabilities Education Act (IDEA). Specifically, the notice states that rulemaking will be issued in February to do the following:

"...determine if there is significant disproportionality based on race and ethnicity within the State and local educational agencies in the identification of children as children with disabilities; the placement in particular educational settings of these children; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, taken against these children."

After our summer meeting with you, Deputy Assistant Secretary Richey, and Acting Director of the Office of Special Education Programs Ryder, CASE embarked on a review of research as well as a series of listening sessions with its members across the country to attempt to tackle this issue to ensure that students with disabilities, including those students of color, are being identified and served at appropriate rates. We are pleased to be able to offer several recommendations as you work with Secretary DeVos in the coming weeks to develop the proposed rules to be issued in February. That said, we hope this letter is not the only opportunity to offer your team input into the proposed rule prior to posting in the Federal Register. We are available for further face-to-face dialogue with your team regarding this issue at your convenience.

A Review of Research and Data

(Special Note: In the literature, as well as in some USDOE regulations, the term "in special education" has been noted. However, CASE recognizes this is an inappropriate use of the term. According to IDEA, Special Education is defined as "specially designed instruction." It is clear there is no such thing as being "in special education." The incorrect use of this term implies special education is a place, rather than an instructional service. Therefore, "in special education" should be eliminated from any discussion or



Council of
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communication regarding significant disproportionality. To retain the accuracy of the quotes used in the rest of this letter, the inappropriate use of the term will remain unchanged.)

Over the last several years, much has been discussed and written about the topic of disproportionality (e.g., studies, syntheses of the studies, focus groups, articles in various types of publications). Recently at the suggestion of Deputy Director Ryder, CASE's *ad hoc* committee reviewed a current publication (April 2018) authored by Morgan and his colleagues (2018). The authors conducted a "best-evidence synthesis of 22 studies to examine whether systemic bias explained minority disproportionate overrepresentation in special education" (Morgan et al., 2018, p. 261). The most unique aspect of this synthesis is that the researchers followed "increasing levels of covariate adjustment, thereby allowing for an examination of systemic bias in how children are being identified as having disabilities and so receiving special education services" (p. 264).

Morgan et al. (2018) indicated that "among the best-evidence studies that analyzed individual level data from nationally representative samples, the results yielded no evidence (i.e., zero of 90, or 0%) of overrepresentation attributable to systemic bias based on race or ethnicity" (p. 270). In addition, it was stated (p. 271), "Contrary to characterizations of special education as racially biased and discriminatory (e.g., Skiba et al., 2005), as well as to federal legislative and policy seeking to address minority overrepresentation based on race and ethnicity (e.g., IDEA regulations, 2016), our best-evidence synthesis yielded negligible empirical evidence that minority overrepresentation is occurring because of misidentification based on race, ethnicity, or language use." Instead, "the best-available estimates indicated that minority children were underidentified as having disabilities based on race, ethnicity, or language use" (p. 271). In absorbing the results of this synthesis, it is important to recognize the method used by the researchers "demonstrate[s] that the directionality of disproportionate representation attributable to race, ethnicity, or language use depends on the relative rigor of covariate adjustment being used" (Morgan et al., 2018, p. 272). Further, Morgan and colleagues considered studies analyzing individual-level data and found using stronger covariate adjustment repeatedly "...that minority children are under-identified as having disabilities (e.g., Foran, 2007; Hibel et al., 2010; Morgan et al., 2012, 2015)" (p. 272). Most importantly, Morgan and his co-authors stated, "Federal legislation and policies designed to reduce minority overrepresentation due to concerns of racial or ethnic bias may be unintentionally exacerbating educational inequities by further limiting minority children's access to special education services as well as to IDEA's extensive legal protections" (Morgan et al., 2018, p. 274).

Cruz and Rodi (2018) acknowledged findings that were not in agreement due to the preliminary stage of research on this topic. Cruz and Rodi (2018) "...examined the ways in which current studies analyze disproportionality through statistical methods, and to compare those analyses based on the conceptualization of covariates" (p. 50). "Though the overrepresentation of students from racially and ethnically diverse backgrounds in special education has been identified as a significant problem, research is in nascent stages regarding understanding the interplay of factors that may cause and maintain disparities" (Cruz & Rodi, 2018, p. 50-51). In addition, the authors noted, "Federal and state agencies mandate reductions in overrepresentation of racially and ethnically diverse groups in special education,

but research studies have produced inconsistent findings...” (p. 51). The authors related that “...understanding that bivariate risk-ratio results show high levels of disproportionality should be alarming regardless of covariates, as it may lead to de facto segregation and further widening of opportunities to learn in a typical classroom” (p. 61). In addition, Cruz and Rodi (2018) stated, “It is clear that the massive current body of research on disproportionality in special education remains insufficient for our understanding of the ways in which special education laws and policies might be tailored to either perpetuate or truncate racial and socioeconomic inequities in education” (p. 61).

Data from the Digest of Education Statistics (NCES 2017-094) from 2016 revealed African-American students make up 15.5% of the overall public school enrollment and yet they account for approximately 18.1% of the students served in special education. Similarly, students of Asian descent account for approximately 2.5% of the overall student population and 5.1% of the special education population. While the disparity in numbers is not uniform, the report from the Government Accountability Office in 2013 and the information collected in 2014 by the U.S. Department of Education ahead of the 2017 rule indicates there are issues across the country with how students are identified for special education and, in particular, how racial and ethnic bias is identified. Indeed, in the 39th Annual Report to Congress on the Implementation of the Individuals with Disabilities in Education Act (2017), staff from OSERS acknowledged that “...with a risk ratio of 4.1, American Indian or Alaska Native students ages 6 through 21 were much more likely to be served under IDEA, Part B, for developmental delay than were students ages 6 through 21 in all other racial/ethnic groups combined” (p. 28). Further, while the overall number of African American students receiving special education services might not be disproportionate, the same report identified risk ratios of higher than one for this group in several eligibility categories. Specifically, it was noted that “the risk ratios for Black or African American students ages 6 through 21 served under IDEA, Part B, were larger than 1 for the following disability categories: developmental delay (1.7), emotional disturbance (2.0), intellectual disability (2.2), multiple disabilities (1.3), other health impairment (1.4), specific learning disability (1.5)” (p. 29). Finally, the 2004 amendments to the Individuals with Disabilities Education Act call out the problem of disproportionate identification, noting, “studies have found that schools with predominantly white students and teachers have placed disproportionately high numbers of their minority students into special education (Public Law No. 108-446, § 601(c)(12), 118 Stat. 2651 (2004).”

In addition to the data and compiled research above, Sullivan and Bal (2013) described the results of a comprehensive review of disproportionality in a study which controlled for several demographic factors. This study examined “patterns and predictors of disproportionality within a diverse urban school system, using both descriptive analyses typical within the disproportionality literature and multivariate multilevel modeling” (p. 478). Appropriate statistical methodology was used to look across different identities/demographics. It controlled for those identities/demographics and described their effect on eligibility in progressive modeling. The authors consider gender in model 1 and not surprisingly that shows that boys are more likely to be eligible. In model 2 they add race to the model and that also results in a high level of disproportionality. “Model 3 added free/reduced-price-lunch status to the prediction

of identification. Students who received free/reduced-price lunch were significantly more likely to be identified for special education (OR = 2.04, $p < .001$), SLD (OR = 2.77, $p < .001$), CI (OR = 3.07, $p < .001$), ED (OR = 3.69, $p < .001$), and OHI (OR = 1.66, $p < .001$). Statistically controlling for this variable attenuated the race effects for SLD (e.g., odds ratio for Black of 3.09 in Model 2 and 1.69 in Model 3), but race remained significant ($p < .001$)" (p.481). Of significant importance are the results of this study which "highlight the importance of moving beyond studies of race alone and confirm that overrepresentation is unique to the subjective disability categories whereas underrepresentation was observed in the low-incidence disabilities" (p. 483).

Beyond categorical data, there is concern about whether placements create disparities. In a 2012 Massachusetts study by Hehir and associates, low-income students were found to be "...far more likely to be eligible for special education services than other students and once they receive services, are more apt to be educated in separate settings. This is particularly alarming given evidence that separation from the mainstream is associated with poorer standardized test performance for students with disabilities" (p. 2). Deninger (2009), also using Massachusetts data, found that moving from substantially separate settings to fully separate or out-of-district settings, the trend lines reversed direction for each of the racial and ethnic groups and the resulting risk ratios for all four groups were relatively similar. Deninger felt this was surprising given that it is more likely for African American and Hispanic students to be placed in more restrictive settings within the district. Speculation is that social class plays a role in out-of-district placements with upper-class parents perceiving private schools having more to offer than public schools and they are more likely able to retain the services of advocates or lawyers to argue for out-of-district placements (Deninger, 2009).

It is clear in our review of these research studies that the evidence is inconclusive regarding disproportionality, its root causes, and the best way to address the challenge. It is important all concerns be considered. Based on these important syntheses of the literature and other studies on disproportionality of students with disabilities receiving specially designed instruction, CASE has identified the following common themes:

- The current body of research on disproportionality in special education remains insufficient for understanding the ways in which special education laws and policies might be tailored to either perpetuate or truncate racial and socioeconomic inequities in education.
- There are issues across the country with how students are identified for special education services and, in particular, how some in the field identify racial and ethnic bias.
- Results of some studies have yielded no evidence (i.e., zero of 90, or 0%) of overrepresentation attributable to systemic bias based on race or ethnicity while others have found schools with predominantly white students and teachers have disproportionately high numbers of their minority students receiving special education services.
- It is important to move beyond studies of race alone and confirm overrepresentation is unique to the subjective disability categories (e.g., high-incidence v. low-incidence disabilities).

- Socio-economic status may play a larger role than originally thought in special education placements with low-income students from underrepresented groups being placed in more restrictive placements within the district and high-income white students benefiting more from private placements.
- None of the studies considered how demographic variables affect school district profiles.

The CASE History on Disproportionality

CASE has had a longstanding interest in this issue, highlighting it in our legislative platforms, policy and legislative committee, and conference activities. Specifically, in January 2018, CASE endorsed a legislative platform which stated, in part:

“...CASE supports efforts to reduce disproportionate representation of minority students with disabilities in areas of overall eligibility, eligibility in specific disability categories, placement, and exclusionary disciplinary outcomes.”

In our conversation with your team this past summer following the delay of the rule, we identified several issues and agreed as a board that disproportionality needs to be formally addressed, despite concerns with the process of identifying disproportionality. All team members were in agreement that disproportionate representation of students of color in special education is an important civil rights concern to our organization. We identified two major areas to address with the OSERS during the coming years: (1) how to address the issues surrounding the requirement to utilize 15% of funds to address disproportionality; and (2) how to examine the issue of disproportionality more closely from a systems perspective (e.g., district, state, and federal). CASE recognizes that the issue of disproportionality is challenging given the unique makeup of school districts across the country and the unavailability of technical assistance around systems change once issues are identified. Nonetheless, despite these limitations, all team members were in agreement that the issue of disproportionality must be addressed since it may leverage change in outcomes for students with disabilities.

What We Have Learned

In July, CASE formed an *ad-hoc* committee on disproportionality. Under the leadership of Dr. Pam Howard, the committee conducted an open forum with the Board of Directors (representatives from 43 states) and several listening sessions at the CASE Fall Conference in Biloxi. After reviewing the relevant research, participating in the listening sessions, and discussing the topic on several occasions, we are pleased to offer a possible method and a series of recommendations for moving forward with the disproportionality regulations.

In setting forth this proposed path, it is our belief disproportionality represents an issue that is far beyond the scope of special education; it is a whole school and whole district challenge that should be addressed within those contexts. Disproportionality, where it exists, must be addressed at a systems level rather than in a siloed approach by special educators alone.

Educators from Georgia noted almost every district in the state has been identified as having disproportionate representation of students of color in special education. In each of our conversations, educators spoke passionately about the idea that disproportionality in special education was being addressed by special education administrators, even though the root cause of the disproportionality is rarely, if ever, related to inappropriate special education services or identification. Instead we found educators believe this issue is one that stems from systemic bias and underlying cultural inequities.

During our most recent 2018 fall Board of Directors meeting, one of our members from Indiana recalled his experiences as one of 85 Black students who began attending a desegregated school in Gary, Indiana. He passionately described his experience in the 1980s, citing that 75 of the 85 students were eventually identified as having disabilities. In fact, he was one of those students of color in an almost all white school and was identified as a student with a disability even though he clearly was not. This incident certainly has helped to shape his beliefs and understandings surrounding the issue. It is, indeed, difficult to discount personal stories like his since they seem to point to the fact our own biases could play a role in any overidentification of students with disabilities.

We also heard from several administrators who were opposed to the idea of a one-size- fits- all solution and who identified concerns with this approach given the myriad of school district configurations across the country. In Illinois, for example, many elementary school districts are separate from their high school districts and disproportionality might be the result of identification at an entirely different school district. We have heard from educators in Utah and Kansas concerned with the idea that one or two students from underrepresented groups might cause their school districts to suddenly be identified as having issues with disproportionality. Any rule implemented must address these concerns and allow for flexibility while still identifying those schools and districts that might have disproportionate rates of special education identification.

CEIS Challenges

We heard from administrators who spoke out against the required use of the coordinated early intervening services (CEIS) dollars to address disproportionality. Educational administrators from Pennsylvania discussed their concerns regarding the use of 15% of IDEA funds for this purpose, given the fact special education identification at higher than typical rates might be a symptom of a problem beginning in general education. Put simply, depleting special education funding rather than allocating new funds for this purpose seems counterproductive. Though some LEAs have voluntarily used IDEA funds to implement CEIS successfully to impact change, the overarching concern is the lack of IDEA funds allocated to school districts to meet the requirements of the law. Most special education administrators have concluded that, when using IDEA funds for CEIS, it is simply just shifting money from local and state funding sources to a federal funding source to fill the gap. They have also indicated that the reporting requirements under CEIS add additional burdensome paperwork when not required by law. It is less complicated and seems logical to use state, local and other funding sources for CEIS given the lack of IDEA funding for local school districts.

Looking closer at the statutory language and requirements when LEAs have been identified as significantly disproportionate, we question the previous guidance requiring the use of 15% of IDEA funds as stated in IDEA, Part B, Sec. 613(f). This section of the law does not speak to a *maximum* amount but, instead, states a district may not use *more than* 15%, in combination with other amounts. Though the interpretation may imply the maximum amount is 15%, we struggle with the confusing language used in this section and in the follow-up guidance.

Further, CASE questions the one-size-fits-all approach in requiring an LEA to use the 15% CEIS funds regardless of whether they have been identified in all areas (identification, placement, discipline) or just one. It is our understanding (as stated in guidance from SEAs) there are a total of 98 instances where an LEA may be found disproportionate. If identified as significantly disproportionate in only one of the 98 areas, why would LEAs be required to expend a full 15% of their total IDEA allocation?

In addition, CASE is also concerned that districts in some states are impacted by these rules simply based on the how their organizations are structured. In Michigan, Intermediate School Districts (ISD) are formed to more effectively provide special education services across specific regions. For example, Kent ISD, Michigan, serves 20 public school districts. In Missouri Special School Districts (SSD) are formed. As an example, the Special School District of St. Louis County, Missouri, serves 22 public school districts. In each of these examples the federal allocation of IDEA funds flows through the ISD or the SSD. If one of the component districts is found to be significantly disproportionate, 15% of the total IDEA allocation provided to the ISD or SSD is allocated to that single district for corrective action. This potentially could create an incentive to be disproportionate in order to benefit from a financial windfall to aid the implementation of CEIS. Given these examples, it is clear that there are very significant challenges in the implementation of the present rules specific to the financial investment expected for disproportionality. In addition, the impact of these rules on Maintenance of Effort should be reviewed as another financial implication for school districts.

Our Proposed Solutions

The subject of disproportionality based on race is a critical topic to address directly and is the primary topic of these proposed solutions. CASE does not support any policy changes that will position poverty or gender in ways that overshadow the role of racial bias in the identification, discipline, or placement of students with disabilities in special education programs. Doing so would deny the research that shows that racial bias plays a role in the determination of eligibility for special education. However, CASE supports considering the role of bias specific to socioeconomic status and gender in the future that is beyond the scope of these comments. CASE also supports the consideration of demographic variables that could negatively impact district profiles.

As an organization, we offer the following recommendations for calculation of risk-ratios, technical assistance/guidance, and coordinated early intervention service fund disbursements when creating the new regulations to be proposed in February 2019:

Calculation Methodology for Identification of Disproportionality: Risk-Ratio

- CASE supports a consistent methodology within a rule that is implemented with fidelity across the nation regarding findings of disproportionality and application of financial impact based on those findings.
- Based on the variability in the studies, using one risk ratio across the country does not appear to be an appropriate solution. Specifically, using a single risk ratio may not control for all of the demographic variables at play in a single school district.
- Given this, the federally funded IDEA Data Center (IDC) or other federally funded centers should work collaboratively with OSERS to identify several different risk ratios ranging from low to high for each state and eligibility category. Using these risk ratios, the states would then require a certain subset of school districts to complete an in-depth analysis of their special education data. For example, the IDC or some other similar entity would identify three different risk ratios for the State of Louisiana. The State education agency in Louisiana would then choose 25% of its school districts to review their own data based on the identified risk ratios. The school districts would be asked to identify the risk ratio that best suits the unique data circumstances in their district and complete a root cause analysis to determine why students in the district are being identified at a lower

rate than appropriate, higher than appropriate, or on target with identification rates. Based on this analysis, the district would then complete a plan of improvement specific to the root cause analysis findings. Providing districts the opportunity to review their data specific to risk ratios, requiring a root cause analysis and expecting a plan to address disproportionality based on that analysis is appropriate and should be required within the rule on disproportionality.

Technical Assistance/Guidance

An IDEA reauthorization statute [IDEA 2004 618(d)] to have become effective July 1, 2005 regarding disproportionality and overidentification, [663(c)(9)-(10)] stated IDEA 2004 “4. Authorizes technical assistance, demonstration projects, dissemination of information, and implementation of scientifically based research”...“Activities that may be carried out under Section 663 include activities to improve services provided under IDEA, including the practices of professionals and others involved in providing such services to children with disabilities, that promote academic achievement and improve results for children with disabilities through... demonstrating models of personnel preparation to ensure appropriate placements and services for all students, and to reduce disproportionality in eligibility, placement, and disciplinary actions for minority and limited English proficient children and disseminating information on how to reduce inappropriate racial and ethnic disproportionalities identified under Section 618.”

With this piece of the statute regarding technical assistance in mind, CASE recommends a detailed focus on providing technical assistance and comprehensive guidance for both SEAs and LEAs in the form of:

- adding USDOE personnel whose sole role would be to create specific technical assistance/guidance to SEAs and LEAs;
- providing technical assistance and guidance rather than monitoring, that may include OSERS approved calculation methodology software created by the IDEA Data Center (IDC) or other such federally funded center, professional development/training for implementation based on the work of the National Implementation Research Network (NIRN), online modules, exemplary examples, and assistive feedback for SEAs and LEAs;
- providing comprehensive guidance to support, not monitor, the accurate implementation of the data collection process and reporting;
- providing comprehensive guidance, not monitoring, to determine whether these regulations will, in fact, address racial and ethnic disparities where noted;
- providing financial support for continuation of high-quality scientifically-based research to improve the identification, placement, and discipline of children with disabilities;
- providing high-quality professional development and resources devoted to support school districts specific to racial disproportionality and implicit bias training as a component of improvement activities; and,
- providing high-quality professional development/training specific to root cause analysis of findings of disproportionality.

Coordinated Early Intervening Services (CEIS) Funds

The required use of IDEA funds for Coordinated Early Intervening Services (CEIS) to address the issue of disproportionality in special education is of great concern to our members. It has tremendous impact on the availability of funds for special education services. This is evidence that the present rule does not recognize the challenges of disproportionality as a larger systemic problem as opposed to an issue specific to special education. It is for this reason we strongly

support the following recommendations to increase the flexibility of funds available to be used under this rule. CASE recommendations are to:

- Provide specific clarification of the language in section 613(f) that states:
EARLY INTERVENING SERVICES.— “(1) IN GENERAL.—A local educational agency may not use more than 15 percent of the amount such agency receives under this part for any fiscal year, less any amount reduced by the agency pursuant to subsection (a)(2)(C), if any, in combination with other amounts (which may include amounts other than education funds),

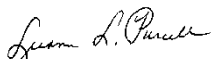
Please clarify the words “may” and “in combination with other amounts (which may include amounts other than education funds.”. Clarification of these words/phrases could provide greater flexibility than the current regulations and guidance states.

- Consider regulatory language stating LEAs may use up to an amount equal to 15% of their IDEA allocation.
- Review the manner in which funding requirements are imposed based on the number of specific areas in which an LEA has been identified as significantly disproportionate.
- Review the organizational structure of school districts across each state and revise the funding requirements for CEIS to insure the specific needs of school districts are met.

Conclusions

CASE is pleased to be able to offer these recommendations as we work toward improving outcomes for students with disabilities across the country. CASE recognizes the need for all parties to stop, look (at the most current literature and data), and listen (to the educators whose boots are on the ground) before rules and regulation are finalized. While we believe these are carefully thought out recommendations, given the shortened timeline for feedback prior to the February deadline, we would be available for further discussion on any of these or other issues. We look forward to our continued conversation with you in the near future.

Sincerely,



Dr. Luann Purcell
Executive Director

cc: Laurie Vanderploeg, Director, United States Department of Education, Office of Special Education Programs
Ruth Ryder, Deputy Director, United States Department of Education, Office of Special Education Programs

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