



The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

Michael Yudin, Assistant Secretary for Special Education and Rehabilitative Services, and
Larry Ringer, Associate Director, Office of Special Education Programs

Attention: IDEA Determinations RFI

U.S. Department of Education

400 Maryland Avenue, SW

Room 4032

Potomac Center Plaza (PCP)

Washington, DC 20202-2600

July 21, 2014

Re: CEIS and Significant Disproportionality: Docket No. ED-2014-OSERS-0058

Dear Assistant Secretary Yudin,

The Center for Civil Rights Remedies of the Civil Rights Project of UCLA joined by the undersigned appreciate this opportunity to provide research-based information on the need for improved federal enforcement of the Individuals with Disabilities Education Act (IDEA), particularly section 20 U.S.C. 1418 (d) and related provisions. Our comments focus on addressing significant racial and ethnic disproportionality in discipline, but also raise related concerns in the areas of identification and placement.

We sincerely applaud the acknowledgement in the request for information (RFI) that there is reason to be concerned about significant racial and ethnic disparities in district- and state-level disciplinary action, identification by disability category, and placement. We urge the Office of Special Education and Rehabilitative Services (OSERS) to take additional action in both regulation and guidance to ensure that existing mechanisms to address these issues are fully utilized as required by federal law. To this end we believe there are several steps OSERS can take to ensure more appropriate and effective use of coordinated early intervening services (CEIS) funds.

In sum we propose that OSERS:

- 1) Create a model definition of significant disproportionality against which state definitions would be evaluated and approved or rejected;
- 2) Encourage voluntary use of IDEA funds for CEIS to address significant racial disproportionality through: a) providing incentives for district-level public reporting of data describing the degree of disproportionality in all three areas; b) stepping-up federal enforcement of the requirement that states report racially disaggregated data to the public; and c) explicitly encouraging the voluntary use of CEIS funding to address possible root causes of racial disproportionality including to address the possible contribution of implicit racial or ethnic bias;
- 3) Ensure that the students whose experiences of racial or ethnic disparities trigger required expenditures for CEIS actually receive the benefits;
- 4) Create a new two-part indicator for monitoring and enforcement to ensure state compliance with the letter and spirit of 20 U.S.C. sections 1418(a) and (d); and
- 5) Address the related shortcomings of indicators 4b, 9, and 10.

We are concerned about all three areas of significant disproportionality but in the comments that follow we emphasize racial and ethnic disparities in disciplinary removals in light of the research and consensus that demonstrate the harms from suspension and the outrageously high frequency with which students of color with disabilities are suspended from school (Fabelo et al., 2011; Losen & Gillespie, 2012; Skiba, Arredondo, & Rausch, 2014). In our opinion the U.S. Department of Education has been too passive in addressing racial discipline disparities among students with IEPs and overlooked evidence of excessive and disparate suspension from school. We also believe that these disparities indicate that not only are some students with disabilities being denied free and appropriate public education (FAPE), but that this denial has a disparate impact on children of color.

Our more detailed comments and recommendations begin with new research findings to highlight the gravity of the situation with regard to discipline, and are followed by a comprehensive discussion of the issues and some specific suggestions for new regulatory and related administrative actions.

Background

The broader context of disparities in discipline for students with disabilities, and the wide range in the risk for out-of-school suspension by disability category should inform how OSERS can more effectively respond to observed racial and ethnic disproportionality in all three areas: identification; placement and discipline. First it is important to note that, based on the U. S. Department of Education’s Office for Civil Rights data, in 2009-10, 13% percent of K-12 students with disabilities were suspended from school at least once. This is nearly twice the 7% rate the Center for Civil Rights Remedies (CCRR) estimated for students without disabilities¹ (Losen & Gillespie, 2012).

Table 1 shows very high suspension risks for students in some of the high-incidence disability categories. The national rates in Table 1 are drawn from data collected and reported by OSEP for the same year, but based on data reported from 42 states (Losen, Ee, Hodson, & Martinez, in press).

Table 1. Suspension Risk by Disability Category^a

Disability Category	Suspension Rate (in percentages)
Emotional disturbance	32.88
Other health impairment	14.68
Specific learning disability	13.06
Intellectual disability (mental retardation)	10.17
Traumatic brain injury	8.00
Deafness/Blindness	7.06
Hearing impairment	5.94
Orthopedic impairment	5.74
Multiple disabilities	4.65
Developmental delay	4.52
Autism	4.32
Visual impairment	4.32
Speech or language impairment	3.68

a. Forty-two states had complete data.

Sources: Civil Rights Data Collection National Estimations (2009-2010); IDEA Data Center: Part B-Child Count (2009-2010)

Without disaggregating by race, the CRR found that about one in 8 students with disabilities were suspended out of school at least once, and that they are about twice as likely as their non-disabled peers to be suspended out-of-school. The risk for suspension, however, is much higher for students with “emotional disturbance” (ED) who have a nearly one in three chance of being suspended (Losen et al., in press). This is particularly alarming because, as a feature of their disability, students with emotional disturbance often exhibit problematic behavior in the absence of proper supports and services. The data above suggests that this subgroup may in fact be getting suspended *because of their disability*, a blatant violation of federal law commonly referred to as denial of students’ right to a free and appropriate public education (FAPE). This concern is not limited to students with ED as several “high-incidence” disability categories are associated with comparatively higher risk for suspension than other disability categories.

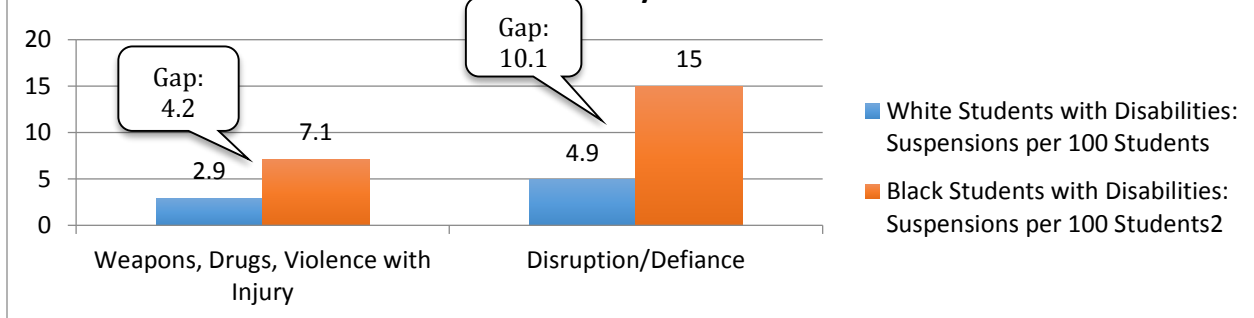
While we purposefully draw your attention to discipline disparities, research suggests that there is likely a connection between over-identification by category and over-identification for disciplinary actions (Losen et al., in press). Specifically, the category of emotional disturbance not only has the highest risk for suspension, but it is also one of the “high-incidence” categories in which children of color, and especially Black students, are most likely to be disproportionately identified. The other categories in which children of color are most prone for over-identification are intellectual disturbance and specific learning disabilities which are also among the disability categories with the highest suspension risk. Conversely, it is also notable that Black and Latino children are under-identified (compared to White children) as having autism—this category is now regarded as high- and not low-incidence. Students with autism have a much lower risk for out-of-school suspension.

Unfortunately, we have very little data that shows suspension rates by race and disability that is further disaggregated by disability category. However, the CRR has found, for example, that nationally, 36% of all Black male secondary students with disabilities were suspended at least once in 2009-10 compared to 17% of White male secondary students with disabilities (Losen and Martinez, 2013). Moreover, across the nation, in 2009-10 over 211 districts were found where 50% or more Black secondary students with disabilities were suspended at least once. As President Obama stated recently in launching the My Brother’s Keeper Initiative, these data should provoke a sense of outrage. We share President Obama’s concern and add that these data are not new. Therefore action in response to these outrageous disparities by the Department of Education is long overdue.

The data described thus far did not allow for further breakdown by number of suspensions by reason for offense because the federal government does not collect data on the reasons. California data, where such breakdowns are made public, shows that the largest share of out-of-school suspensions are for minor non-violent school code violations (Losen, Martinez, & Okelola, 2014). Moreover, the largest racial and ethnic disparities among students with disabilities are found in these minor and highly subjective offenses categories (National Civil Rights Leaders, 2013). To begin with, the catch-all “disruption/willful defiance” category, one of 24 offense codes in California, yields a large disparity in suspensions between students with disabilities and their non-disabled peers: It was found that students with disabilities receive 3.3 additional out-of-school suspensions per 100 students in the disruption/willful defiance category, compared to a much smaller gap of an additional 1.8 per 100 students for the most serious offenses (Losen, Martinez, & Okelola, 2014) .

Black students with disabilities are harmed most: The largest racial gaps in California are noted between Black and White students with disabilities. As depicted in Figure 1 below, compared to their White counterparts, Black students with disabilities received 10.1 additional out-of-school suspensions per 100 students enrolled. The Black/White gap in this frequent and more subjective category is two-and-a-half times larger than the racial gap (4.2 suspensions per 100) in the serious offense category.

Figure 1: Frequent and Disparate Use of Suspension* for Minor Offenses under Disruption/Defiance Compared with Serious Offense by Race and Disability Status



*Includes only out-of-school suspensions

Source: Analysis of CALPADS data from the California Department of Education, 11-12

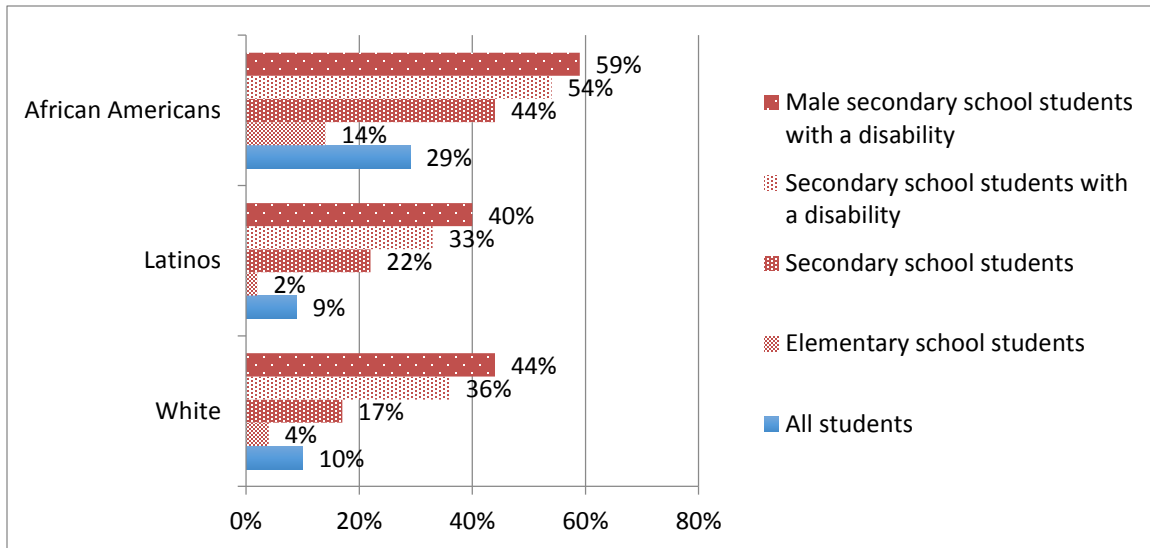
Problematic definitions identified by the GAO apply to discipline disparities: The Government Accountability Office (GAO) report pointed out that only a few states reported districts with significant disproportionality in identification, and only about 2% of all districts nationally were thus identified. Even though the GAO report did not look at how many districts were identified for significant disproportionality in discipline, the numbers were unlikely any better because the same flaw—hyper-stringent definitional criteria that evades districts’ meeting them despite extant disproportionalities—were permitted for use for placement and discipline as well as for identification. To confirm this, in preparing these comments, the CCRR visited the website of the 16 states that the GAO report examined for “identification” and found only 26 out of 4,626 possible districts identified as having an issue with regard to discipline. That is less than half of 1 percent of all districts reviewed. Further 10 of the 16 states found zero districts.

We assert that OSEP has allowed far too much leeway in states’ definitions of “significant disproportionality” such that states that defined the problem out of existence did so with impunity. One major concern we have expressed in prior comments about OSEP’s enforcement is that the monitoring indicator calls for analysis of racial disparities in discipline of more than ten days, and only requires states to report about district-level discipline disparities *after* the state has determined that the disparity was *caused* by the district’s failure to comply with the law. In 2008, for example, we raised a concern that states would be lead to think that they need not publicly report on the racial disparities in the incidence and duration of suspensions and expulsions, including suspensions of one day or more. In fact, in 2014 all 50 states were reviewed for their public report of racial disparities among students with disabilities and found that only one state is currently complying with this explicit statutory requirement (Center for Civil Rights Remedies, 2014). This means that OSEP’s oversight has failed to detect the fact that 49 states are blatantly out of compliance with an explicit and very straightforward requirement that they annually report these state-level data to the public.

As a result of lax monitoring and inadequate enforcement of both the definitions of significant disproportionality and of state’s obligation to publicly report, profoundly disturbing disparities at the district-level in thousands of districts exist and have failed to prompt needed state and district interventions.

To highlight the problem of poor oversight, consider the discipline disparities in Memphis and that the State of Tennessee has failed to identify any districts in the state with racial discipline disparities that would warrant action. The graph that follows shows suspension rates by school level, race and disability status reveals profound disparities in the risk for out-of-school suspensions. The graph (Losen & Martinez, 2013) is just one example of how deep disparities along the lines of race, gender, disability status, and English learner status can go at the district-level, as well as the typical pattern where disparities are greater at the secondary school level than at the elementary school level.²

Figure 2: Risk for Suspension at the Elementary and Secondary Levels by Selected Subgroups



To the best of our knowledge, based on our review of the state website, Tennessee only looks at long-term suspension rates by school districts. Section 1418 (d), however, as clarified in guidance to the states issued by OSEP (2008) requires states to analyze discipline data, including disparities in out of school suspensions of one day or more. 1418 (d) also makes it clear that the districts must describe the actions it takes pursuant thereto. For Tennessee, our review found no reporting of such actions and none of the required data from 1418(a). The state did, however, find several districts with racial disparities in long-term suspension in 2012 and one in 2013; in both years none of these districts disparities was caused by non-compliance with the IDEA, and no action was taken.³ The main point we express here is that OSERS should absolutely take action through both regulations and guidance to ensure that states follow the letter and the spirit of the IDEA provisions at 1418 (d) intended to ensure that states prompt districts, like Memphis, to reduce disparities in discipline among students with disabilities, including suspensions of one day or more.

To answer the RFI more completely we recommend the following actions:

Recommendations

1) Create a Model Federal Definition of Significant Disproportionality to Serve as a Standard against which State Definitions Would Be Evaluated and Approved: Although we welcome a uniform definition and argue that OSERS should encourage states to adopt identical definitions, much can be accomplished by simply ensuring that each state’s definition is sufficiently rigorous such that districts like Memphis, Tennessee would not be overlooked by the state obligated with monitoring. We recommend that a research-based model standard be fully developed based on sound principles. Once developed this definition could be offered to states. States could use the federal model or develop their own, knowing the model would be used to evaluate the appropriateness of any alternative definition the state developed and implemented. For example, if Tennessee developed its own definition and Memphis and districts like it were flagged as a result, OSEP should allow Tennessee to use its own definition.

a. Ensure extraordinarily high rates and large racial gaps cannot be ignored. One principle is that a model definition should not focus primarily on relative disparities and ignore the size of racial gaps in terms of absolute differences, or rates that seem excessive. This concern applies to identification, placement in overly restrictive settings and discipline. Therefore, the methods states use to define significant disproportionality are critically important if states are to identify or prioritize districts with the most problematic disparities. For example, among Memphis secondary students with disabilities there is an 18 percentage-point Black/White gap in the risk for at least one out-of-school suspension. However, if the absolute size of this gap was not accounted for, and Tennessee decided to use only a relative risk ratio to identify the districts, they might

miss Memphis. Blacks with disabilities in secondary schools in Memphis are 1.5 times as likely their White peers to be suspended. Many districts across the nation with much lower suspension rates and much smaller racial gaps than those in Memphis have much higher risk ratios. To make this point clear, imagine District A where there is a Black/White racial gap of 1 percentage point between 1.5% and 0.5% in suspensions.

With suspension rates close to zero, District A is low suspending and the absolute size of the racial gap is just 1 percentage point. Yet District A has a risk ratio of 3.0. That risk *ratio* is twice as high as the 1.5 risk ratio in Memphis. The racial gap (in absolute terms) is 18 percentage points in Memphis and just 1 point in District A. A comparison of the actual size of the gap shows that the Memphis gap is 18 times larger than the racial gap found in District A. A much higher percentage of the enrolled children are harmed in Memphis.

The following example shows how districts with identical risk ratios in the identification rate for Mental Retardation, (now known as having Intellectual Disability), can obscure significant instances of racial disproportionality that would be revealed by a more straightforward analysis of the difference in risk levels.

Table 2. Identical Risk Ratios May Represent Racial Gaps of All Sizes

	Risk Level For Blacks Identified as Mentally Retarded	Risk Level For Whites Identified as Mentally Retarded	Black/White percentage point gap in risk level	Black/White Risk Ratio
District A	40%	20%	20 points	2.0
District B	10%	5%	5 points	2.0
District C	0.5%	0.25%	¼ of 1 point	2.0

b. Create a model with safeguards to ensure that states identify the districts with the most serious discipline disparities: No known research has shown that suspensions from school benefit the excluded students. As a result it is difficult to say exactly when suspension rates are too high or if they can possibly be too low. Another way to mitigate against the chance that states would identify districts with high ratios but low suspension is to have a definition of significant disproportionality that includes a floor for the risk level. So for example, districts in which no subgroup had a risk that exceeded a certain percentage of their total enrollment would not be regarded as having a problem for the purposes of triggering Part B funds.⁴ Since excessive suspension rates are a national concern in their own right, the floor should be below the national average for ALL students, which should be lowered over time.

2) Encourage voluntary use of IDEA funds for CEIS to address significant racial or ethnic disproportionality.

a. Encourage District-level Public Reporting: District-level reporting will help raise awareness at the community level of problems in identification, placement, and discipline. If the suggested indicator was created this new level of public reporting would encourage voluntary use of funds for CEIS in districts that were close to having significant disproportionality. With more districts using these funds more information will become available to help distinguish what sorts of CEIS investments work best and under what context. Further, with regard to discipline disparities, OSERS should provide incentives for district-level reporting of discipline disparities further broken down by type of offense. This breakdown would help schools and districts see the areas in which discipline disparities are the greatest and better target the voluntary use of CEIS funds dedicated to improving behavioral outcomes. In addition, states and districts should be encouraged to look at disparities at the secondary level where out of school suspensions and expulsions are more common as well as at the intersection of race, disability, and gender.

b. Enforce State-level Public Reporting. At minimum, OSERS needs to do a better job of monitoring states for compliance with their state-level public reporting obligations. With regard to the explicit requirements on reporting numbers of eligible

students and incidence and duration of discipline, enforcing these requirements will help bring large disparities to light, at least at the state-level. With greater public awareness will come greater pressure to address obvious problems that have not received adequate attention. Further, the issues will also be elevated in the minds of district superintendents, board members and special education directors making more likely that where the issue arises at the district-level, district administrators will voluntarily take action to seek remedies, including using CEIS funds where appropriate.

Externally, states and districts could be put on notice that compliance with the public reporting requirements could affect their eligibility status or at very least either help or hinder their status when they compete for federal education grants. Extra credit could be given to those states that establish and consistent track record of fully and accurately and publicly reporting their data. Internally, OSEP, OCR and others within the department with enforcement and monitoring authority could supply information about data compliance to competitive grant awarding divisions so that the noncompliant state and local educational agencies would have a disadvantage compared with fully compliant LEAs and SEAs.

c. Explicitly encouraging the voluntary use of CEIS funding to address possible root causes of racial disproportionality including to address the possible contribution of implicit racial or ethnic bias. We hope to engage the department in further discussion about how to implement this recommendation.

3) Ensure CEIS Funds are comprehensive when triggered by disproportionality and particularly benefit those students whose experience triggers their use.

a. Identification: CEIS funds, when triggered by significant racial or ethnic disproportionality in identification, should be used to better understand the root causes of over-identification and to provide a remedy. One of these causes, for example, may be unconscious or implicit racial or ethnic bias; another may be multicultural insensitivity. Interventions resulting from root cause analysis should not exclude educators currently working with students in the over-identified group, including those with IEPs. While the primary emphasis of CEIS funds is prevention, OSERS should widen the scope of possible prevention activities to include prevention of continued effects of implicit racial or ethnic bias. Further over-identification in certain disability categories can be caused by problems in identifying the appropriate category and does not necessarily mean that there is over-identification in special education generally.

Where the issue for a district is over-identification in a particular disability category, some portion of the mandated CEIS funds should be allowed to benefit students who have IEPs, and need an IEP or a 504 plan, but who may have been inappropriately identified for a particular category of disability. Although very few states require districts to take action, those districts that states do identify should ensure that any students subsequently found ineligible are carefully monitored and provided with support services as they transition out of special education. Decisions to change a student's eligibility status that result from a finding that the initial designation was due to an inappropriate policy or practice by the district should have already publicly reported the cause and the revisions pursuant to 20 U.S.C. 1418(d)(2)(C) and therefore should also provide this information to the student and parents if the student's eligibility status changes as a result.

b. Placement and Discipline: Significant racial or ethnic disproportionality in identification of students for overly restrictive educational placements or for disciplinary exclusion can trigger CEIS funds, even where disproportionate identification for eligibility is not at issue. For this reason, when significant disproportionality in placement or discipline triggers mandatory use of CEIS funds, students from the affected racial or ethnic subgroup, including those with IEPs MUST be the primary intended beneficiaries. Again, OSERS should make clear that CEIS funds can be used to address implicit bias and any other root causes of these forms of disproportionality. Districts should submit action plans to the state describing how their CEIS funds will benefit the children from the subgroup that triggered the shift in use of Part B funds.

4) Create a new two-part indicator for monitoring and enforcement exclusively for states: The IDEA at section 1416 explicitly authorizes the Secretary of Education to create indicators for monitoring and enforcement that the Secretary decides are needed after considering all relevant information, "including the data from 618" (20 U.S.C. Sec. 1416(a)(4)). Moreover, the IDEA at 20 U.S.C. Section 1412 (a)(24) already requires states to provide assurances to the Secretary that they are taking preventive actions with regard to overidentification and disproportionality and specifically references section 1418(d). Given that the data show outrageous disparities and that the GAO report details a history of inadequate monitoring,

and considering our own findings of blatant and widespread non-compliance with the IDEA's public reporting requirements, we believe new regulations and/or guidance with a new two part indicator is warranted.

State-level indicator about compliance with 20 U.S.C. Sec. 1418(a) and (d).

Part I: The state-level indicator would begin with whether the state has ensured annual and public reporting of *discipline* data, including disparities for suspensions of one day or more, disaggregated as required in 1418(a), at the state-level *and* on all districts.

Part II: a. District-level outcome indicator providing the number and names of school districts where the state has found "significant disproportionality" in identification, placement, or discipline.

b. For each district where significant disproportionality reported to the public, the state and district would further be required to publicly report the action plan to address the issue including how it was redirecting 15% of Part B funds and including assurances that the students in the racial and ethnic groups who triggered the funding shift would benefit.

5) Address the related shortcomings of indicators 4b, 9, and 10: The request for information only asked about a standard definition and how to address issues with the use of CEIS funds. However, concerns about the U.S. Department of Education's monitoring and enforcement of racial disproportionality go deeper than these important areas. In 2004 when Congress made this a priority area for monitoring and enforcement in section 1416, the amendments to the relevant provisions replaced "non-compliance" with "inappropriate identification." This change reflected the research pointing to issues of discrimination and inadequate general education instruction as possible contributing factors to disproportionality. However, the construction of the indicators 4b; 9 and 10 only appear to require a review for "non-compliance with the IDEA" that caused the disproportionality in question. OSEP, in revising the intent in guidance to focus on IDEA non-compliance has undermined the congressional purpose, which was to root out all inappropriate contributions to racial disproportionality in identification and in long-term discipline. We believe that in addition to ensuring proper implementation of 1418 (d) the indicators pursuant to 1416 also need to be reviewed and revised to more effectively address the overarching concerns raised in these comments, and especially the outrageous discipline disparities.

Thank you for considering these comments,

Sincerely,



Daniel J. Losen
Director, The Center for Civil Rights Remedies
The Civil Rights Project at UCLA⁵
20 Hillcrest Avenue, Lexington MA 02420

The following organizations support the positions in this letter.

Christopher Edley, Jr.
The Honorable William H Orrick Distinguished Professor
on behalf of Chief Justice Earl Warren Institute on Law and Social Policy
UC Berkeley School of Law

Alfredo J. Artiles, Ph.D.
Associate Dean of Academic Affairs
Ryan C. Harris Professor of Special Education
Mary Lou Fulton Teachers College
Arizona State University

Elizabeth B. Kozleski, Professor and Chair
Department of Special Education
University of Kansas

On Behalf of Equity Alliance at ASU

Russell Skiba
The Equity Project at Indiana University
Center for Evaluation & Education

National Association of School Psychologists

Angela Ciolfi
Legal Aid Justice Center's Just Children Program

Lisa J Krisher
Georgia Legal Services Program

Laura W. Murphy
Director, Washington Legislative Office, American Civil Liberties Union

Bob Fleischner
Center for Public Representation

Elizabeth King
Senior Policy Associate, Education
Children's Defense Fund

Shannan Wilber
Youth Policy Director
National Center for Lesbian Rights

Bonnie Jean Smith Author
Excellence in Action Ministries, Inc.
Minneapolis, Minnesota

Arnold F. Fege, President
Public Advocacy for Kids
Washington, DC

Brad Strong, Senior Director
Children Now

Robert Mahaffey
The Rural School and Community Trust

Stella Connell Levy, JD
President
Restorative Schools Vision Project

David Sciarra, Esq.
Education Law Center

Took Crowell Institute for Youth
Juvenile and Special Education Law Clinic
University of the District of Columbia
David A Clarke School of Law
Joseph B. Tulman, Professor of Law and Institute Director
Tomar N. Brown, Instructor and Supervising Attorney

Sarah Biehl
Policy Director
Children's Defense Fund-Ohio

Alliance for Excellent Education

Charles Hamilton Houston Institute for Race and Justice

Phillip Kassel
Executive Director
Mental Health Legal Advisors Committee

The Kirwan Institute for the Study of Race & Ethnicity

W. Haywood Burns Institute

Laura Faer
Statewide Education Rights Director
Public Counsel

Lawyers' Committee for Civil Rights and Economic Justice (Boston, MA)

The California Conference for Equality & Justice

Rev. Janet Wolf
Children's Defense Fund's Nashville Organizing Team

Opportunity Action

Ann O'Halloran, President
Lisa Guisbond, Executive Director
Citizens for Public Schools

Center for Collaborative Education

Equal Justice Society

Disability Rights Ohio

The following join as individuals and their title and organization reference is strictly for affiliation purposes.

George Sugai
Professor and Carole J. Neag Endowed Chair
University of Connecticut

Kevin G Welner
University of Colorado Boulder, and
National Education Policy Center

Jay P. Heubert
Professor of Law and Education
Department of Education Policy and Social Analysis
Teachers College, Columbia University
Adjunct Professor of Law
Columbia Law School

Rudolfo Chávez Chávez
Regents Professor, NMSU

David Isaac Hernandez-Saca
Arizona State University (ASU)
Mary Lou Teachers College

Marc Brenman
Morgan State University

Thalia González, JD
Assistant Professor
Politics Department
Anderson Center for the Study of Public Policy
Occidental College

Dewey Cornell, Ph.D.
Clinical Psychologist and Professor of Education
Curry School of Education, University of Virginia

Anne Gregory
Associate Professor
Rutgers University

Pamela Fenning, Professor
Loyola University Chicago

Sarah E. Redfield
Professor of Law Emerita
University of NH School of Law

Jay D. Blitzman, First Justice
Massachusetts Juvenile Court- Middlesex Division

Jeff Spitzer-Resnick
Systems Change Consulting

Ruth Zweifler
Founder, Board Member
Student Advocacy Center of MI

Kent McIntosh
University of Oregon

Peter Leone, Ph.D.
Professor
Department of Counseling, Higher Education, and Special Education
University of Maryland, College Park

Ruth Colker
Distinguished University Professor and
Heck-Faust Memorial Chair in Constitutional Law
Moritz College of Law

Tanya E. Coke, J.D.
Distinguished Lecturer, John Jay College
City University of New York
Department of Public Management

Maya Rockeymoore, Ph.D.
President
Center for Global Policy Solutions.

References

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¹ The Center for Civil Rights Remedies' analysis of the data from 2009-10 revealed that OCR had erred in calculating the data for students without disabilities that year by dividing the number of students without disabilities suspended at least once by *all* students enrolled (including students with disabilities). Our calculations that year yielded a suspension rate for students without disabilities that was 7%. They note that OCR may have made the same mistake this year with regard to the 2011-12 data report.

² For a breakdown of Memphis discipline rates for students with and without disabilities for K-12 for this same year they are 46.9% of all enrolled Black students with disabilities and 29.1% of Whites with disabilities; and 27.1% of Blacks without disabilities and 9.9% of Whites without disabilities. These data and data on every district OCR collected data from are available at www.schooldisciplinedata.org.

³ At pages 21-14 Tennessee's APR report does describe some voluntary awareness raising activities that occurred in 11 districts in 2010 and in 8 districts in 2011, but no districts are named and it remains unclear whether any districts were identified under section 1418(d) because the APR report concerns indicator 4(b) which is focused solely on racial disparities in long-term suspensions. But the APR report does state that none of districts were out of compliance and therefore none were required to take action pursuant to the indicator. States are not currently required to report the number or names of districts identified under Section 1418 (d). http://www.state.tn.us/education/student_support/special_ed/1112apr.pdf; see also http://www.tn.gov/education/student_support/special_ed/tnaprffy2012.pdf

⁴ The concern about significant disproportionality in identification and in placement might also benefit from a floor. It should be noted that this same concern about over-reliance on relativity exists when analyzing data for disproportionality in identification or placement. The difference is that identification and placement are intended to benefit children. In these two areas a floor might take into consideration the risk for identification or placement and might be specific to each disability category. Therefore, the floor for identification and placement might reflect the national average for ALL students (see, e.g., Rhode Island).

⁵ CRP at UCLA, formerly at Harvard University, is a research center that produces and commissions studies on civil rights that has been utilized in improving the design and implementation of education policy at many levels of government. In 2001, CRP published a book entitled "Racial Inequity in Public Education," including studies by leading national researchers. The independent studies presented at that conference revealed serious concerns about racial disproportionality, both under and over-representation, in special education.