



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

Melody Musgrove  
Director, Office of Special Education Programs  
And Tomakie Washington, Acting Director  
Information Collection Clearance Division  
Office of Management  
U.S. Department of Education  
400 Maryland Avenue, SW  
LBJ Building, Room 2E105  
Washington, DC 20202-4537

April 24, 2014

Re: Docket No: ED-2013-ICCD-0047

Dear Ms. Musgrove and Ms. Washington:

The Center for Civil Rights Remedies of the Civil Rights Project of UCLA and 14 co-signatories appreciate this opportunity to comment on proposed revisions to the State Performance Plan (SPP) and the Annual Performance Report (APR) regarding the Part B programs. Our comments are informed by the recent data snapshot released by the U.S. Department of Education's Office for Civil Rights finding that in 2011-12, thirteen percent of all students with disabilities were suspended at least once, which is more than twice the rate of students without disabilities (6%).<sup>1</sup> Further, students with disabilities make up 12% of the enrollment yet 25% of the school-based arrests and 25% of those referred to law enforcement.<sup>2</sup>

As disturbing as the findings regarding students with disabilities are, the racial disparities among students with disabilities subjected to discipline are equally problematic. Our analysis of the OCR data for 2009 show that one in four (24%) of Black students with disabilities in grades K-12 were suspended out of school at least once in 2009-10. That is over 2.5 times the rate for White students with disabilities (9%). Unfortunately, these data are very difficult for the public to obtain, despite the fact that Congress requires each state to report this information to the public each and every year. In fact, non-

<sup>1</sup> **These statements are also informed by the 2014 published work of the Disparities in Discipline Research Collaborative. A full set of briefing papers is available at:**  
U. S. Department of Education Office for Civil Rights, Civil Rights Data Collection Data Snapshot: School Discipline at p. 7 (March 21, 2014).



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

compliance with the discipline data reporting requirements is the norm, not the exception.

We believe that the elimination of indicator 20, which governs compliance and accuracy of data reporting, is inappropriate given widespread state non-compliance with requirements to report discipline disparities to the public. The stakes are grave.

Further, OSEP's elimination of the indicator for monitoring of accurate data reporting would undermine the U.S. Department of Education's efforts and priorities as reflected in the My Brother's Keeper Initiative, the DOJ/OCR guidance on school discipline and the Supportive School Discipline Initiative (SSDI). Consider, for example, that at the secondary level, across the nation, 36% of Black males with disabilities were suspended at least once. In launching the initiative called My Brother's Keeper, President Obama spoke of the "school-to-prison" pipeline and the data regarding Black males in particular. The President pledged to review all the areas in which the federal government could improve its efforts to address the unacceptable statistics. One place to begin is to step-up federal law enforcement when states provide no discipline data on students with disabilities by race despite an explicit statutory requirement to do so under the IDEA. The fact that the public gets partial information about these disparities from OCR *every other year* is no excuse for the widespread non-compliance with the IDEA. Congress obligated states to report this information to the public every year when it amended the IDEA in 2004, and further required reporting of racial disparities in discipline, including suspensions of one day or more. We believe the Department of Education's Office of Special Education Programs (OSEP) sends the wrong message when, despite these initiatives and discourse about the importance of data, and in the face of widespread non-compliance with the discipline reporting, OSEP eliminates data reporting and accuracy as an indicator.

We understand that the way that indicator 20 has been worded and implemented, including the permissive nature of monitoring in the past, may have created the perception that reviewing compliance with data accuracy and reporting is now redundant or unnecessary. However, we argue that the context calls for a revision of the indicator, and that the Department of Education must do more, not less, to ensure state compliance with both the letter and spirit of



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

IDEA's public data reporting requirements, especially with regard to discipline disparities.

Our core recommendation to revise rather than eliminate indicator 20 is connected to our concerns about lax enforcement of the IDEA with regard racial disproportionality in special education. Here is a summary of our related recommendations:

- Expand the scope of indicators 4a and 4b to address the stark disparities in suspensions including suspensions of one day or more by race and disability.
- Revise indicators 4b, 9, and 10, to remedy the well-documented problems in monitoring and enforcing IDEA's provisions intended to reduce racial disproportionality.

The following comments provide our reasoning in detail for each concern and suggestion made above:

**1. Revise Indicator 20:** Recently we joined with the Council for State Governments and each organization surveyed the reporting of discipline data on each state's website. We compared and confirmed our findings and have jointly published a guide to state reporting. We have concluded that most states failed to publicly report *any* discipline data on students with disabilities (see attached excel summary). Further, most of those that reported some data did not meet the more extensive annual discipline data reporting requirements required by Section 618. We applaud the fact that the Department of Education intends to commit funding for a data technical assistance center to improve the quality of states' data collection and reporting. Technical assistance toward meeting the data requirements of 616 and 618 has been provided in the past. Here is an excerpt from a 2011 survey by a federally funded technical assistance provider (with emphasis added).

*"Indicator B20 measures the timeliness and accuracy of state-reported data (Section 618 and Section 616). The data sources for this indicator are state selected and include data from the state data and assessment systems, as well as technical assistance and monitoring systems.*

*Measurement of this indicator is defined in the SPP/APR requirements as:*

*State-reported data, including Section 618 data and annual performance reports, are: (a) Submitted on or before due dates (February 1 for child count, including race and ethnicity, placement, and assessment, and November 1 for*



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

exiting, *discipline*, personnel, and dispute resolution, and February 1 for the APR); and (b) Accurate (describe mechanisms for ensuring error free, consistent, valid and reliable data and evidence that these standards are met).

The Data Accountability Center (DAC) reviewed a total of 60 FFY 2009 APRs. These included the 50 states, the District of Columbia, the territories, and the Bureau of Indian Education (BIE). For this discussion, all of these will be referred to as states, unless otherwise noted. Analysis of the actual target data as reported by states indicates:

- Thirty-one (52%) states reported that their data were 100% accurate.
- Twenty-nine (48%) states reported accuracy other than 100%.
- Of these 29 states, 27 reported a percentage between 90 and 99%.”

As mentioned, our own survey of state websites in 2013 found that only 17 of 50 states had publicly reported *any* of the discipline data required by the IDEA.<sup>3</sup> Consistent with our findings, the Department of Education, in the NPRM regarding a technical assistance center for IDEA data described the results of a recent survey they conducted as follows:

“... various programs, districts, and other facilities are using different collection processes to gather data for required data submissions. Federal data reports that include the same data elements on the same subgroups of students include data that often do not match. These situations hinder the States’ capacity to report valid and reliable data to the Secretary and to the public as required by IDEA section 616(b)(2)(B) and to meet IDEA data collection and reporting requirements in IDEA sections 616 and 618.

*States with fragmented data systems are also more likely to have missing data. For example, if a State collects and maintains data on disciplinary removals of students with disabilities in a special education data system and maintains data on the demographics of students in another data system, the State may not be able to accurately match all data on disciplinary removals with the demographics data needed to meet the IDEA reporting requirements.”*

**Recommendations:** We believe that indicator 20’s simple self-report of accuracy and compliance with data reporting has proven to be insufficient. Previously, we urged OSEP to compare the content of state’s public reporting on state websites to their self-reports of compliance. Further, the indicator allows for “state selection” of criteria and seems to permit states to use their own standards to evaluate compliance. For this reason we believe that the needed technical assistance to improve data collection reporting (and use) should be coupled with a more substantial, rigorous and annual federal review of what states actually report to the public to ensure that states meet their public reporting obligations.

A revised indicator 20 should also add a state review of compliance by districts. Only with strong district compliance can states meet their public reporting obligation.

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<sup>3</sup> The 50 State Survey is available here: <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/online-data-resources/nation-wide-survey-of-state-education-agencies2019-online-school-disciplinary-data>



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

In its response to several objections to the proposed elimination of indicator 20 OSEP stated:

*Current Indicator 20: Timely and Accurate Data*

*Comment: A few commenters are concerned that data quality will suffer because States would no longer be required to report on timely and accurate data.*

*Discussion: We do not agree that data quality will be compromised because States are no longer required to report on Indicator 20. We will continue to consider data accuracy and the timeliness of a State's submission when making annual determinations under section 616(d).<sup>4</sup>*

The stated plan is inconsistent with the several federal initiatives on school discipline. The Department of Education has argued that OSEP could simply review what states currently provide through EDFacts and other submissions and determine whether states complied, and eliminate the obligation for states to explicitly describe how they were complying in their response to indicator 20. We believe that merely tracking a state's submission to EDfacts, further weakens what is already a clear example of inadequate monitoring and enforcement. Years of a permissive approach to poor quality reporting by states may have contributed to the problematic data collection and reporting at the school and district level. The current indicator 20 may be poorly worded, but the need to monitor and enforce the collection and public reporting of special education data, especially with regard to the disparate discipline of students with disabilities, remains extremely high.

## **2. Expand the scope of indicators 4a and 4b to include suspensions of one day or more:**

Our recent report analyzing the data collected and reported by OCR for the 2009-10 academic year reveals disability and combined race and disability disparities that shock the conscience. Section 616 of the IDEA, the statutory provision on monitoring enforcement, at subsection (a)(4) explicitly encourages the Secretary to consider other relevant information and data. We believe that the well documented frequency with which students with disabilities are suspended for a day or more, warrant an expansion of indicators 4a and 4b to cover all out of school suspensions. As mentioned, our most recent study reported in "Out of School and Off Track" revealed that 36% of all Black male secondary students with disabilities were suspended, out of school, at least once in 2009-10. These data are shocking because they implicate a widespread pattern of unjust and extremely harmful exclusion from school of students with

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<sup>4</sup> <http://www.regulations.gov/#!documentDetail;D=ED-2013-ICCD-0047-0082>



# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

disabilities, and especially children of color with disabilities. Research further indicates that suspensions are strongly associated with higher risk for dropping out and future involvement in the juvenile justice system. On top of the detriments to the life outcomes of children with disabilities, there are also staggering costs to the taxpayer resulting from all the associated risk increases such as decreased productivity and unemployment, greater health problems, delinquency, needs for social services and adult incarceration.

Given that behavioral issues have historically been used to justify the unlawful wholesale exclusion from school, and given clear and conclusive evidence that high percentages of students with disabilities are still frequently excluded from school on behavioral grounds, and at dramatically higher rates than their non-disabled peers, we urge OSEP to expand indicators 4a and 4b to address disparities in suspensions of one day or more as well as for long-term suspensions.

**3. Revise indicators 4b, 9, and 10, to ensure that racial disproportionality is identified and addressed.** Based on the GAO's February, 2013 report, "Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education" it is well documented that OSEP has taken a permissive stance on defining significant disproportionality and this has undermined the efficacy of OSEP to address racial disproportionality. Specifically, the GAO points out that there is an underlying problem in that OSEP has allowed states far too much flexibility in defining "significant disproportionality" and "Education's ability to oversee states' identification of districts with significant disproportionality is hampered" as a result. The GAO states that "[Education] has not...required states to change their definitions when they make it unlikely that disproportionality will be identified." A more uniform standard to review and possibly reject state's definitions is necessary.

Specifically OSEP's comments acknowledged the problem stating:

*Discussion: We maintain that it would not be appropriate to specifically define the term "disproportionate representation" as used in Indicators 9 and 10 given that there are multiple factors at the State level to consider when establishing this definition. However, we recognize that some State-established definitions may be written in such a way that makes it likely that no LEAs will be identified with disproportionate representation. We encourage every State, particularly those in which the State, using its current State-established definition, has not identified any districts with disproportionate representation, to review its definition and, with*





# The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

*stakeholder involvement, make any necessary revisions. OSEP will continue to review State definitions to ensure the definitions will yield valid results.*<sup>5</sup>

OSEP's comment in response to this concern, acknowledging the problem and stating they will *encourage* such states to revise their definitions is too weak a response. This approach has been tried and has not prevented states from making a mockery of these indicators. We believe that, even without setting forth a uniform definition, OSEP can do far more than merely "encourage" states to review their current definition. Clearly OSEP can provide additional guidance and the Secretary can reject any definition that violates the letter *or spirit* of the law. OSEP can set forth some "model" definitions, provide incentives to states that implement them with integrity, and reject definitions that violate the spirit of the law.

OSEP's continued inaction in the face of these glaring deficiencies will not only undermine the initiatives around school discipline but will amount to a disregard of congressional intent as racial disproportionality was an explicit priority area for monitoring and enforcement.

## **Conclusion:**

The Center for Civil Rights Remedies of the Civil Rights Project at UCLA along with the co-signatories to this letter, believe that the proposed changes are far more detailed and have much greater implications than simply a change to a data collection to reduce burdens. We applaud OSEP's intentions to reduce burdens and to strengthen monitoring and enforcement in a manner that yields improved outcomes for students with disabilities. However, the reduced public reporting and proposed diminished attention to compliance with regard to data accuracy only elevates our prior concerns that OSEP has failed to adequately monitor and enforce the statutory provisions regarding racial disproportionality with regard to discipline, placement and identification.

We believe that as OSEP has entered into a process of revisiting the indicators and how it uses data to monitor and enforce the IDEA, there is an opportunity for OSEP to align its monitoring and enforcement with the goals of My Brother's Keeper Initiative and make significant improvements in how the priority area of

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<sup>5</sup> <http://www.regulations.gov/#!documentDetail;D=ED-2013-ICCD-0047-0082>



# The Center for Civil Rights Remedies

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racial disproportionality is monitored and enforced. As a research based center dedicated to remedying racial inequity in education, we would welcome any opportunity to work with the Department of Education toward addressing the concerns raised above.

Thank you for considering these comments,

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel J. Losen".

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# The Center for Civil Rights Remedies

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<sup>i</sup> CRP at UCLA, formerly at Harvard University, is a research center that produces and commissions studies on civil