



Nothing about us without us!

Kristen Harper
U.S. Department of Education
550 12th Street SW, Room 5109A
Potomac Center Plaza
Washington, DC 20202-2600

Dear Ms. Harper:

The Autistic Self Advocacy Network (ASAN) submits the following comments on the Department of Education’s Notice of Proposed Rulemaking (NPRM), “Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities.”¹ ASAN, a 501(c)(3), non-profit organization, is the nation’s leading self-advocacy organization by and for Autistic people ourselves. Its mission is to advance the social and civil rights of Autistic people and other individuals with disabilities.²

ASAN praises the additions to the regulations proposed by the Department of Education, which would ensure that state Departments of Education and Local Educational Agencies (LEAs) appropriately identify racial and ethnic disparities in the identification, placement, and discipline of students with disabilities. The regulations propose to do this by creating a standard methodology that all states and LEAs will use to identify disproportionality.³ This methodology would include a standard risk ratio and a sample size of not more than 10 students for determining whether disproportionality is significant.⁴ The Department of Education explains that previously, because the IDEA was ambiguous on the issue of how to calculate disproportionality, the states developed their own methodologies.⁵ The Department has found that these methodologies have been ineffective and tend to under-report disparity. Both the listed standard and alternative risk ratio are necessary to ensure that the states are accurately calculating disproportionality in relation to each setting.

ASAN’s comments on the NPRM are as follows:

¹ Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 10967, 10967-998 (proposed Mar. 2, 2016) (to be codified at 34 C.F.R. pt. 300).

² For more information on ASAN, view its website at: <http://autisticadvocacy.org/>

³ 81 Fed. Reg. at 10968.

⁴ *Id.* at 20969.

⁵ *Id.* at 29968.

ASAN commends the Department of Education’s minimum cell size of 10, as it is likely to maximize the ability to detect disproportionality in most LEAs.

When an LEA has very few members of a particular racial minority or ethnic group who have a particular disability (For example, there may be only two American Indian/Alaskan Native students with autism in an LEA), the disproportionality data may become skewed due to the method the Department proposes for calculating disproportionality risk. In order to prevent the disproportionality calculation from becoming inaccurate, LEAs generally wait until the population of students with disabilities in that race or ethnicity reaches a minimum number before calculating disproportionality for that population. This minimum number, or sample, is known as a “cell size.” However, minimum cell size has previously varied between LEAs, with some having a minimum of just 9 students while other LEAs have set the minimum as large as 30 students.⁶ Larger minimum cell sizes may result in disproportionality being missed entirely in some LEAs.

ASAN agrees that the minimum cell size chosen (10) by the Department is a good median number given the wide variety in the number of minority students attending schools in each LEA. ASAN recommends that the Department of Education state in its regulations that LEAs may make their cell size smaller if they so choose. In small school districts or in school districts where the vast majority of students are of one particular race or ethnicity, such a change may make it more likely that disproportionality will be detected if it exists.

In response to the Department’s Question 3, ASAN recommends that blindness, orthopedic impairment, and hearing impairments be added to the list of categories in § 300.647(b)(3).

ASAN recommends that the Department require LEAs to analyze potential disproportional identification and segregation of students in these categories. Although discussions of disproportionality often focus on students with developmental disabilities, intellectual disabilities, and specific learning disabilities, we also see disproportionalities in the segregation and discipline of students with sensory and orthopedic disabilities. For example, state IDEA regulations sometimes classify cerebral palsy as an orthopedic impairment rather than a developmental disability.⁷

Students with sensory disabilities also may experience disproportionate discipline and segregation. ASAN is aware of situations in which, due to a child’s difficulty in coordinating movement or speech, school staff may presume that the child is uncooperative or lacks the capacity to learn. We believe, based on the experiences of our advocacy partners working in the Deaf and racial justice communities, that this presumption is particularly likely if the

⁶ *Id.* at 10976.

⁷ 25 Va. Regs. Reg. 2872, 2880 (2009).

child is a member of a racial or ethnic minority. Administrators may disproportionately discipline minority blind or hearing-impaired children for behavior related to their disabilities (such as an inability to see the board or hear the teacher's verbal instructions). Collecting data on these groups would ensure that individual LEAs are aware of this disparity and would allow them to better address the lack of staff training in disability.

Research also indicates that African-American children identified as having a disability are twice as likely as white children with disabilities to be sent to a non-mainstreamed, segregated educational setting.⁸ The same data holds true for other minority students with disabilities.⁹ As a result, an African-American child with cerebral palsy would be more likely to be sent to a segregated school than a white child with the same disability. It is critical that this disparity be measured across all categories of disability.

States should also measure disparities in placement within separate schools for deaf and blind students. Both the Texas School for the Deaf¹⁰ and the Maryland School for the Deaf,¹¹ for instance, have separate sub-campus or separate residential placements and academic tracks for children with multiple disabilities. It may be more likely, given the documented overrepresentation of people of color in special education, that students at these sub-campus are also disproportionately members of racial or ethnic minorities as compared to the total population at these schools. A number of these schools either receive public educational funding from the state or are directly operated by state or local governments, and would therefore be among the categories of placement for which the state is to calculate disproportionality.

ASAN commends the Department of Education for its consideration of disproportionality as it relates to identification of disability. ASAN notes that minority children with disabilities are also likely to be misidentified.

The proposed revisions to 34 C.F.R. §§ 300.647(b)(3)(i)-(ii) and 300.647(b)(4)(i)-(viii) list six broad categories of disability for which LEAs must calculate disproportionality: intellectual disabilities, specific learning disabilities, emotional disturbance, speech or

⁸ James W. Conroy and Edward Garcia Fierros, "Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education," *Racial Inequality in Special Education*, Losen and Orfield, Eds. (Cambridge: Harvard Education Press, 2002).

⁹ de Valenzuela, J.S., S.R. Copeland, C. Huaqing Qi, & M. Park, *Examining Educational Equity: Revisiting the Disproportionate Representation of Minority Students in Special Education*, 72 *Exceptional Children* 425-441 (2006), Keller-Allen, C., *English Language Learners with Disabilities: Identification and Other State Policies and Issues*, (Alexandria, Va.: Project Forum, National Association of State Directors of Special Education) (2006).

¹⁰ Map of TSD campus: http://www.tsd.state.tx.us/docs/pdfs/TSD_Map.pdf

¹¹ Description of separate special needs curriculum and Shockley House in the Maryland School for the Deaf: <http://www.msd.edu/academics/specialneeds.html>

language impairments, other health impairments, and autism. The language of the proposed rule indicates that the Department is concerned with the over-identification of minority children as children with disabilities.¹² ASAN agrees that over-identification of minority children as children with disabilities, particularly, is an important concern, particularly when the result of identification is segregation and/or lowering of academic expectations.

Nevertheless, *under-identification* of students with disabilities, especially in specific categories of disability, also can have troubling consequences. For example, African-American children with disabilities are twice as likely to be identified as having an emotional disturbance (ED) and more likely to be identified as having an intellectual disability.¹³ However, African-Americans are less likely to be identified as being on the autism spectrum.¹⁴ There may also be a significant rate of misidentification among minorities with disabilities. Students who are misidentified may lack access to appropriate supports. In one case ASAN encountered, a school identified an African-American as having ADHD and offered services only for ADHD, despite the fact that the student had also been diagnosed with autism spectrum disorder. According to special education attorneys with whom we have spoken, this practice is widespread.¹⁵

When an LEA finds that there is significant disproportionality, they are required to perform a review of their policies and practices, and if necessary revisions to their policies to reduce disproportionality.¹⁶ We recommend that the Department clarify that this review is necessary not only when certain classes of students have a high overall rate of identification for special education, but also when certain classes of students have an elevated or lowered rate of being identified in certain specific disability categories. This will enable LEAs to modify policies that result in misidentification and under-identification of certain kinds of disabilities.

¹² 81 Fed Reg. at 10970.

¹³ James M. Patton, *The Disproportionate Representation of African-Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions*, *Journal of Special Education*, Spring 1998, 25-31.

¹⁴ Mandell et. al., *Racial/Ethnic Disparities in the Identification of Children with Autism Spectrum Disorders*, *Am. J. Public Health*, Mar. 2009, 493-98.

¹⁵ As a result, the statistics that schools collect on disability categories may not accurately reflect the number of children actually diagnosed with a disability: many autistic children may instead be reported as having an “other health impairment,” severe emotional disturbance, or intellectual disability.

¹⁶ 81 Fed. Reg. at 10996.

In response to the Department’s Question 4, we encourage the Department to require the states to determine whether there is significant disproportionality with respect to placement in a regular classroom between 40 and 79 percent of the time. ASAN also recommends that the Department consider examining possible disproportionately in correctional and hospital settings.

We encourage collection of the data proposed in Question 4, as there may be significant racial and ethnic disparities in “partially” mainstreamed placements.

We also recommend that the Department consider examining disparity in the number of referrals to correctional or hospital settings. With respect to correctional settings, given the available data on school-to-prison pipeline,¹⁷ it is likely that many if not most LEAs refer some of their students into the criminal justice system. According to the data, the children referred are disproportionately likely to be children with disabilities¹⁸, and disproportionately likely to be members of racial and ethnic minorities.¹⁹ Referrals to the juvenile justice system not only cause social and emotional harm but also should be viewed as a form of segregation. Moreover, children with disabilities who are referred into the juvenile justice system, although they are still entitled to special education services under the Individuals with Disabilities Education Act (IDEA), very rarely receive education services in correctional settings of the same quality as what they would receive in the public school system. It is therefore crucial for each LEA to gather disproportionality data on the number of children of each race or ethnicity, in each category of disability, referred into the juvenile justice system.

The same problem may exist with regards to referrals from the public school system to inpatient hospital settings and Residential Treatment Centers (RTCs) for children with psychiatric and substance abuse disabilities. ASAN recommends that the Department require LEAs to calculate disproportionality for these settings as well. Finally, ASAN recommends that the Department require calculation of disproportionality in homebound placements.

¹⁷ National Council on Disability, Breaking the School-To-Prison Pipeline for Students with Disabilities, (2015), retrieved from: https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf

¹⁸ *Id.*

¹⁹ Daniel J. Losen and Russell J. Skiba, Southern Poverty Law Center, Suspended Education: Urban Middle Schools in Crisis, retrieved from: https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Suspended_Education.pdf

We recommend that the Department calculate disproportionality in parental placement of students into private residential schools or other private schools, as well as homeschooled settings.

ASAN is aware of situations in which parents remove their children from public education and send them to private placements or choose to homeschool because they are unable to come to an agreement with the school district regarding accommodations for their child, or they feel that their child's current education is not sufficient or appropriate to the child's needs.

High rates of private school or homeschooling placements may reflect practices by LEAs that "push out" students with disabilities from public schools. They also may occur when LEAs fail to classify students as having disabilities or to provide them with adequate supports. They may occur when expectations for the child's progress in school are too low, or when the child is not receiving an education in the most integrated setting appropriate. As noted earlier in these comments, all of the above circumstances are more likely if the child is a member of a racial or ethnic minority. For that reason, we recommend that the Department calculate disproportionality in placements that result from parental removal of the child from public education.

We thank the Department of Education for its thoughtful consideration of the issues relating to disproportionality in special education. We reiterate that this rulemaking is crucial for understanding the relationship between race, ethnicity, and disability in schools and for ensuring that all children have access to an appropriate education. For more information on ASAN and our policy positions with regards to special education, please contact Samantha Crane, our Director of Legal and Public Policy, at scrane@autisticadvocacy.org.