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May 16, 2016

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

Re: Comments to Docket ID ED-2015-OSERS-0132

Dear Ms. Harper:

The Council for Exceptional Children (CEC)—an international association of special educators, administrators, related service personnel, higher education faculty, and researchers—is the voice and vision of special education. Our mission is to advance the success of children with exceptionalities. We accomplish our mission through advocacy, standards, and professional development.

CEC appreciates the opportunity to provide feedback on the Notice for Proposed Rulemaking issued on March 2, 2016, on the actions that the Department should take to address significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities. This is a critical issue that has been plaguing the education field and our society as a whole; and it must be confronted and remedied immediately.

Through this NPRM, the Department asks the public to provide comment on multiple proposed changes. In working collaboratively with CEC members and expert content divisions, particularly CEC's Council for Children with Behavioral Disorders and the Division for Early Childhood, we are pleased to provide feedback in the following document.

Please do not hesitate to contact me for any additional information. We look forward to receiving the final regulations to disseminate to CEC members and working with the Department to ensure its successful implementation. Thank you for your leadership on this important issue.

Sincerely,

A handwritten signature in cursive script that reads "Deborah A. Ziegler".

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Council for Exceptional Children
Response to Notice for Proposed Rulemaking
Docket ID ED-2015-OSERS-0132
May 16, 2016

CEC INTRODUCTORY COMMENTS

A systemic approach to change will be necessary to effectively resolve the issues of disproportionality. While many of the proposals in the NPRM will assist in moving toward reducing disproportionality, CEIS alone cannot be the only solution.

CEIS needs to be embraced, implemented, and funded by both general and special education systems. As we approach the reauthorization of IDEA it will be necessary to examine the effectiveness of CEIS, in addition to other methodologies. Would another service delivery system be more effective? As we move to more closely align the provisions in ESSA with IDEA it will be prudent to seek funding from both ESSA and IDEA to deliver CEIS and CEIS-like services and support to all children. General and special educators at the state and local levels will need to work collaboratively to address disproportionality.

Personnel preparation programs need to ensure teacher candidates are prepared to practice effectively and mentoring, induction and professional development programs are of high quality. Emphasis on research and evidence based policies will be important priorities for the upcoming reauthorization of the Education Sciences Reform Act, the Higher Education Act, and the Individuals with Disabilities Act in order to reduce disproportionality and ensure that every child and youth receive an equitable and high quality education.

This opportunity to address the appropriate identification, placement, and disciplining of children and youth with disabilities is of particular interest to CEC given our long history to ensure educational opportunity and appropriate supports and services for children and youth with disabilities.

CEC RESPONSE TO DEPARTMENT OF EDUCATION QUESTIONS

1. and 2. Proposal to require States to calculate the risk ratio, or alternate risk ratio method (if the total number of children in the comparison group within the LEA is fewer than 10 or if the risk for the comparison group is zero, respectively). CEC supports the proposal for a standard methodology, the risk ratio, as a national standard for assessing the presence of significant disproportionality in LEAs. CEC agrees that the proposal addresses the recommendation of the GAO that the USDOE “develop a standard approach for defining significant disproportionality to be used by all States (GAO 13-137).” CEC appreciates that the NPRM included a review of several possible methods for defining disproportionality and have no difficulty with the rationale of choosing the risk ratio as the approach that is most widely used and best understood currently among states. CEC recommended that the U. S. Department of Education set a national criteria involving both a risk ratio and a risk index measure in its July 2014 response to the Request for Information on significant disproportionality. It should be noted, however, that as a ratio, the risk ratio is somewhat dependent on scale, and may unduly penalize LEAs with a low overall prevalence (risk index) in the disability or discipline category. Thus, an LEA with an overall rate of suspension for all students of less than 1% would be regarded by most as exemplary in moving away from exclusionary discipline. Yet, using a risk ratio of 3 times discrepant, that same LEA could be found to be significantly disproportionate if 1.5% of black students were suspended out of school, but only 0.5% of White students were suspended. This finding would have a

very different meaning than results for an LEA in which rates of out of school suspension were 30% and 10% for black and white students, respectively. In the same way that the NPRM allows for an exception for LEAs that are making progress toward lower racial/ethnic disparities, we would recommend considering a similar provision for LEAs with generally lower rates of special education identification or discipline. One possibility might be to encourage a standard that relies upon both the risk ratio and risk index; that is, while any LEA above the specified risk ratio would be considered for a judgement of significant disproportionality, any LEA that was to some degree below the state mean risk index would be able to be released from the finding of disproportionality.

3. Proposal to exclude any of the six impairments or include additional impairments. CEC supports the Department's recommendations that states determine whether there is significant disproportionality with respect to the identification of children as children with disabilities with intellectual disabilities, specific learning disabilities, emotional disturbances, speech or language impairments, other health impairments and autism.

4. Proposal to determine significant disproportionality with respect to placement inside the regular classroom between 40 percent and 79 percent of the day. CEC does not support this proposal as the metrics to measure this aspect of disproportionality would be difficult at best due to the range of times a student would be in a regular classroom. It may be useful to pilot this aspect of disproportionality for future implementation.

5. Proposal that States may select risk ratio thresholds appropriate to their individual needs, provided that: (a) The thresholds are reasonable, and (b) the thresholds are developed based on advice from stakeholders, including State Advisory Panels. CEC supports the proposal to allow states to select state-specific risk ratios, provided they are reasonable and based on advice from stakeholders, with some caveats. Theoretically this provision could allow states to continue to set unreasonably high standards that will continue to result in the identification of few or no LEAs. On the other hand, a single national standard may not be feasible across the wide variety of regional, state, and local differences. CEC is comfortable with the provisions that such standards be "reasonable" and developed based on stakeholder advice. CEC would strongly recommend, however, that the Department provide proactive guidance on the parameters that would be included in its consideration of whether a threshold was "reasonable." At the very least, CEC believes that no state that has a risk ratio exceeding a level of 2 times discrepant or above the national average be allowed to identify zero LEAs as being significantly disproportionate.

6. Proposal to require states to calculate the risk ratio/alternate risk ratio based on a minimum cell size no greater than 10 children for analysis of either identification or disciplinary removal or placement. CEC strongly supports the specification of a relatively low minimum cell size for analysis of both identification data and disciplinary removal and placement data. Specification of high cell sizes for each racial/ethnic group of 25 or more has likely been one method for reducing the number of LEAs identified as disproportionate. In general, use of a high cell size also tends to weight monitoring for significant disproportionality towards identification of only the largest urban districts; CEC agrees that smaller districts should not be automatically removed from state disproportionality assessment. The choice of this particular minimum cell size has been empirically validated in the literature by Bollmer et al. (2004), who found that 10 was the minimum cell size that could guarantee reliability of the risk ratio. It is also of note, however that a minimum cell size of 15 led to a slight increase in reliability; although that increase was not substantial enough to lead Bollmer and colleagues to recommend a minimum N of 15 per cell, political considerations might. CEC expects that the issue of cell size will be an area in which there may be considerable pushback. Given that it may not make a large difference in identification (and will slightly increase reliability) to move from a cell size of 10 to an cell size of 15, allowing states to set a minimum cell size *between* 10 and 15, may be a place in which DOE can allow some of the flexibility recommended by GAO.

There are some concerns raised about the proposal that states could set a minimum cell size below 10 (p. 10979), both for purposes of confidentiality, but also that risk ratios can become dramatically inflated below an N of 10. It might be possible to allow a risk ratio to be replaced with a risk index or proportion for cell

sizes smaller than 10. If, for example, there were 7 African American students in an LEA and 6 were identified as ID, there would clearly be a case to be made that there was significant disproportionality.

Consideration should be given to permit states to use the cell size in both the numerator and the denominator. States should be allowed to use the denominators that most closely align with the numerators of the risk calculations.

7. Proposal for other situations currently not accounted for in the proposed regulations where it would be appropriate to use the alternate risk ratio. CEC supports the Department's proposal to allow states to use the alternate risk ratio for instances where the total number of children in a comparison group is less than 10 or when the risk to the children in a comparison group is zero.

8. Proposal to require entities, whose population is sufficiently homogenous to prevent the calculation of a risk ratio or alternate risk ratio, to identify significant disproportionality. CEC recommends the Department encourage the use of a second calculation, comparing to national averages for all students, when states are determining if disproportionality exists in an LEA. This calculation would be a comparison of the eligibility, placement, or discipline usage rate for a subgroup to the overall national average for all students. If the risk levels are extraordinarily high, but the ratios are not, intervention should still be required. Conversely, if the ratios are above the selected threshold, but the risk level of the highest is significantly above the national average, the district's identification for CEIS should be reconsidered.

If the state average is within the normal range of the national average, comparing the district rate for a particular group to the state average for all students should also be permissible. CEC recommends that a state set a maximum rate at which a racial or ethnic group risk rate could be above the national/state rate in any of the three areas of concern when compared to the overall student rate for the state. CEC suggests the Department provide states with the flexibility to set this maximum rate between 1 and 2 percentage points. This additional criteria for determining disproportionality will protect children in situations where there are overall higher rates of occurrence of eligibility, placement, or discipline use. The additional metric will diminish the number of districts where the issues is more likely the under-representation of students of color (i.e. autism), or where risk levels are very low for all groups, but where the relative ratios are high due to the mathematical properties of the ratios.

9. Proposal to include additional restrictions on developing and applying risk ratio thresholds. CEC has concerns with permitting states to set different risk ratio thresholds for different categories of analyses. CEC is concerned that this practice would impede transparency for parents and educators at the LEA level. Additionally, CEC has overall long-term concerns around the implications for equity.

10. Proposal on whether to place additional flexibility in defining "reasonable progress". CEC supports the proposed rule, in which the Department clearly indicates that it will not designate a specific risk-ratio threshold, thus allowing states flexibility to address their individual circumstances, yet will insist that the chosen threshold is reasonable. We support this approach and recommend the Department issue guidelines to help ensure that states meet the threshold for "reasonability" in its final rule. We suggest that the Department recommend a range in which states may choose their risk-ratio threshold. We strongly recommend this range be 1.5-3.0 with the ability for a state to use a higher threshold, so long as the state has identified some districts in the prior two years and is able to provide evidence that it will identify some districts using a threshold that is higher than the recommended range. Further, the guidance should make clear that states seeking a higher threshold, or using a risk ratio threshold that previously did not identify a single district in any area, will be unlikely to have their threshold deemed "reasonable" if it is higher than the recommended range or remains unchanged, but is at the high end of the range. If states are given too much flexibility, the data analysis required by the provision becomes less meaningful. A requirement that provides little meaningful information is a waste of public resources.

11. Proposal for technical assistance or guidance that the Department should put in place to ensure that LEAs identified with significant disproportionality do not inappropriately reduce the identification of

children as children with disabilities or under-identify children of color. While CEC has deep concerns about over- or under-representation of particular groups of students in special education, we also believe the focus should be on proper referral, evaluation, placement, and provision of services to students eligible for special education. More important, for students for whom special education placement is not appropriate, a full array of services must be provided in general education to ensure students have the supports they need to succeed.

Having a workable formula may assist in ensuring the right students are served. However, we believe a purely mathematical approach to determining disproportionality will not necessarily address the issue. In fact depending on the demographics and a number of variables of a school district, some societal rather than educational, there may be times when disproportionality is justifiable.

The Department should provide guidance and technical assistance focused on the following:

- Staff training regarding when it is appropriate to refer a student for special education evaluation.
- Professional development for IEP team members in best practices in performing evaluations and analyzing results to determine eligibility for services and what services are necessary.
- Understanding the importance of having a full complement of specialized instructional support personnel to ensure services are available to students in general and special education.
- Utilizing schoolwide approaches such as positive behavioral interventions and supports to ensure respect for all students and attention to their individual needs.
- Developing multi-tiered systems of support to address academic concerns at the earliest stages and provide more intensive services before referral to special education.
- States must conduct Child Find activities, and screening for “invisible” disabilities as one way of identifying children in need of special education and related services. Such screening and identification, coupled with appropriate services, can prevent problems in school. For example, unidentified minimal hearing loss can greatly impact school-aged children.

CEC supports these changes to the regulations regarding CEIS and significant disproportionality provisions. They provide a balance between needed clarification that has been recommended by many organizations, and the need to provide some degree of flexibility in their implementation. Ultimately, however, the success of any approach to addressing disproportionality in special education will depend upon the degree to which states, and especially LEAs feel supported in their efforts to address disparities. If LEAs perceive these regulations as primarily burdensome, exceeding their resource capabilities, they will likely resist implementation, or choose shortcuts, such as under-reporting of discipline incidents, or “identifying fewer children of color.” Thus, in addition to these changes, we would recommend that, in the long term, states also be required to submit a long-term plan for addressing special education disproportionality that addresses not only how they intend to implement these new regulations, but also how they intend to provide professional development and technical support to LEAs around issues of disproportionality. We believe that the success of these proposed rules depends, not only upon their clarity and logic, but also upon the extent to which local educators feel supported in addressing the very critical issue of disproportionality.

12. Proposal on whether additional restrictions on the use of funds for comprehensive CEIS are appropriate for children who are already receiving services under Part B of the IDEA. CEC supports the proposed expansion to the definition of who is eligible to receive CEIS to students age 3 through 12 and to children with and without disabilities. However, with regard to the Department’s “additional restrictions on the use of funds for comprehensive CEIS are appropriate for children who are already receiving services under Part B of the IDEA.” We are troubled by the statement that these funds should not be used “to provide special education and related services already identified in a child’s IEP” (pg. 10980)...

CEC believes that the Department should not place restrictions on the use of funds for comprehensive CEIS for students who are already receiving services under Part B of IDEA. We believe that by expanding CEIS to include students with disabilities, funds can be used to ensure that they are receiving appropriate services and supports. This may include professional development, the expanded use of technology, ensuring that behavior plans are in place and appropriately implemented, implementing or expanding the use of positive behavior

supports and/or a multi-tiered system of supports. CEC believes that it is important that strategies are targeted and aligned to specific needs and we remain concerned that additional restrictions may hinder the implementation of appropriate strategies.

13. Proposal to monitor and assess these regulations once they are final to ensure they have the intended goal of improving outcomes for all children. What metrics should the Department establish.

CEC believes the key measures of success of the proposed regulations should be: better academic performance of students with disabilities; appropriate identification of, and not inappropriate segregation or disciplining of students of color with disabilities; and increased time in general education classrooms for students with disabilities who are of color, with appropriate supports, where they have more access to engaging curriculum based on state grade level academic standards. Secondly, we would like to see, as evidenced by the data and the outcomes, that more students with disabilities historically placed in more restrictive settings due to significant disproportionality are educated in the general classroom 80 percent or more of the school day.

CEC ADDITIONAL COMMENTS

1. Proposal that requires calculation of disproportionality from age 3-21 for identification and discipline. CEC supports this provision given the data that indicate significant disproportionality in discipline of all preschoolers in public preschools across the country. Data from the Office for Civil Rights CRDC indicate that, although African American children represent 17% of students in pre-school, they represent 42% of those suspended (USDOE, 2014). These data report on all children receiving services in a public preschool, not just children with a disability. This reality is simply unacceptable and generally agreed to be an underrepresentation of the problem, as many children receive early learning services in private settings that are not required to participate in this data collection.

We understand that the data used to calculate disproportionality with regard to discipline in this NPRM are the 618 data collected and reported annually and not the CRDC data on all preschoolers in public early learning programs. Regardless, the data are clear and the issue must be addressed. DEC is concerned that the 618 preschool data may underrepresent the use of these disciplinary procedures. The field of early childhood generally does not use the terms suspension and expulsion. We hear from our members that such removal of preschoolers is more often described in other ways that leave families left alone to find other arrangements with no notice or settings more willing to individualize for their child. CEC recommends that additional focus be applied to these 618 preschool discipline data at the federal, state and local level to ensure equity of educational opportunity for preschoolers with disabilities.

CEC agrees that the calculation for disproportionality with regard to placement should be for children ages 6-21 years and not include preschoolers, since the required 619 environment data collection uses a different measurement than the school age data collection.

CEC would, however, recommend a minor wording change in the description of these changes (p. 10978). In the NPRM, both placement in educational settings, and removal from these settings through suspension or expulsion, are referred to under the category "Placement." CEC would suggest, in order to reduce confusion, that items regarding placement in educational settings (Items 1 through 3) be separated from the remainder of the categories (Items 4-8) and that those latter items be placed under a heading of "Discipline." Including both of these sets of items under a single category called "Placement" introduces an ambiguity: Are removals due to suspension and expulsion for students with disabilities to be monitored in all educational settings (including inclusion settings with less than 40% removal from the regular class) or only in the settings listed in Items 1-3 (that is, settings in which a student receives service outside the mainstream more than 40% of the time)? CEC would argue that, given that many students with disabilities that are removed from regular class settings, it is important to make clear through this change that data must be collected on exclusionary removals of all students with disabilities and must be monitored, regardless of the restrictiveness of the setting in which they are served.

2. Proposal allowing comprehensive CEIS funds to be used to serve children from age 3 to grade 12, with and without disabilities. CEC supports this proposal. CEIS funds should support all preschool children, with and without IEPs, to ensure that children in community based settings are able to receive the necessary instruction and supports within their community based settings. This is consistent with the federal Early Childhood Inclusion Policy. Community-based early learning programs such as Head Start, child care and preschool programs often do not have sufficient resources to support the individualized needs of the children enrolled in their programs. Availability of tiered instruction can support the developmental needs of all children and can provide important instructional data on children to ensure their equitable opportunity to full participation in their program.

Without these additional CEIS funds, young children, who have not been identified as a child with a disability, often do not have access to individualized instruction that provides them with full developmental opportunity. Budget limitations of early learning programs limit what these settings can do. Too often, without these tools, children are suspended, expelled or simply asked to leave an early childhood classroom or early childhood environment. When this occurs, and a child goes back home, there is a danger that some children will be less likely to access an appropriate referral for an IDEA evaluation. Children, without necessary instructional supports who have a difficult time finding and staying in a high quality early education programs can also lose ready opportunities to be identified under child find for appropriate evaluation under Part B.

Given the allowance of CEIS funds for technical assistance in community-based early learning settings, expansion of the use of these funds should provide access to high quality cross-sector professional development for all providers and staff. This professional training can address the process of data collection and progress monitoring for children's instruction, skills development on early social emotional competence, cultural competence, and implicit bias. With the possibility of these expanded funds, such PD Systems can be maintained, evaluated, and updated to adequately and effectively meet their purpose. Given the ever-changing landscape of early childhood education and the necessary adaptation of systems put in place to effectively monitor and report on disproportionality, suspension, and expulsion.

These CEIS funds can provide significant value in assisting all staff who work with preschoolers to develop the necessary skills to manage challenging behavior. Availability of individualized tiered support for children including mental health consultation can promote better retention and engagement of children and facilitate appropriate identification of any social emotional challenges. Mental health consultation can also be effective in reducing the suspension and expulsion of children from preschool programs. Such mental health consultation is sometimes a service under an identified child's IEP but could also be provided through the expanded use of CEIS funds.

3. Proposal regarding multiple years of exceeding risk ratio criteria and LEAs making reasonable progress. Although CEC can support the proposal that states be allowed to set a criteria that LEAs can exceed the risk ratio criteria for up to three years, CEC finds the wording somewhat ambiguous: "States would have the flexibility to identify as having significant disproportionality only those LEAs that exceed their risk ratio threshold(s) for up to three *prior* consecutive years" (italics added). Does this mean that an LEA could be identified as being significant disproportionate in the third year in which their data exceeded the state defined threshold? Or that an LEA could exceed the state threshold for three years and then be ruled to have significant disproportionality in the fourth year? CEC would hope the former—a two to three year period to work on reducing disproportionality—is reasonable, but a four year period seems to be an unnecessarily long period of delay.

CEC also supports the notion that a district making "reasonable progress" could avoid a judgment of significant disproportionality. Again however, more specific definition would be in order. For a state using a three year criteria, how consistent does progress need to be? Would a year of progress followed by a slight upward trend count as reasonable progress? CEC would argue that progress should be defined in some socially meaningful way, (e.g., risk ratios consistently moving in a downward direction across all three years).

4. Requiring LEAs to carry out activities to identify and address factors contributing to the significant disproportionality. CEC strongly supports this provision. The development of the Safe and Supportive Schools Root Cause analysis document has provided a significant resource for LEAs in identifying and addressing disproportionality. CEC would hope that additional practical tools could be made available to help LEAs carry out RCAs to identify and address factors that contribute to disproportionality in their district.

5. Supplemental statistical analyses. Although CEC appreciates the examples and comprehensive nature of the supplemental analysis that accompanied the NPRM, CEC has noted that it has generated some confusion in the field. There are some who believe that the analyses contained in the supplemental materials are a requirement; that is, that states or even LEAs would be required to complete this exact analysis in setting their state risk ratio criteria. Further clarification that these analyses are simply illustrative would be helpful in avoiding such confusion.

6. IES/NCSEER Research. CEC would recommend that the U. S. Department of Education, Institute for Education Sciences, National Center on Special Education Research identify research on issues of disproportionality as a priority for funding.

7. Child Find. CEC recommends that the Department convene an expert group to identify evidence based practices in the implementation of Child Find provisions in IDEA, disseminate them widely to the field and provide intensive technical assistance to SEAs, and LEAs.

8. Under-identification. While under-identification is not the primary emphasis of this NPRM, it is an issue for the field. CEC recommends that the Department convene an expert group to identify the issues and possible solutions to under-identification including children and youth who are twice exceptional.