United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

May 16, 2016

Dr. John B. King Jr.
U.S. Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary King:

We write to express our views and concerns about certain provisions in the U.S. Department of Education's proposed rule (NPRM) to define and clarify significant disproportionality and the use of early intervening services under the *Individuals with Disabilities Education Act* (IDEA) as published in the Federal Register on March 2, 2016.

We share the Department's concern about the problem of over-identification and disproportionate representation of minority children in special education. However, we have particular concerns about the Department's NPRM in establishing a standard methodology that States must use to determine whether significant disproportionality is occurring and expanding the uses of funds reserved for comprehensive early interventions and supports, which we believe conflict with the requirements of the law and the intent of Congress.

Significant Disproportionality Methodology:

The Department's NPRM conflicts with Congressional intent in seeking to establish a standard methodology that each State must use in its annual determination of whether significant disproportionality based on race and ethnicity is occurring in the State and the Local Educational Agencies (LEAs) of the State under section 618(d) of IDEA.

Section 618 of IDEA requires each State that receives assistance to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to the identification and placement of children with disabilities, as well as with regards to disciplinary actions. If a State determines that an LEA has significant disproportionality in the identification or placement, the State Educational Agency (SEA) must provide for the review and, if appropriate, revision of the policies, procedures, and practices used in making identifications and placement decisions, as well as require the LEA to report publicly on any revisions.[1]

When reauthorizing IDEA in 2004, Congress expanded the law's focus on issues related to disproportionality by including consideration of racial disparities and by adding certain

[1] 20 U.S.C. § 1418.

enforcement provisions out of a "desire to see the problems of over-identification of minority children strongly addressed."[2] However, Congress did not define the term significant disproportionality or impose a methodology to determine whether significant disproportionality is occurring. Rather, each state was left to determine its own methodology for determining whether there is a significant disproportionality in LEAs' identification, placement, and disciplining of racial and ethnic minority students.

This intent was reflected in final IDEA Part B regulations promulgated by the Department in August 2006, which stated clearly that "[w]ith respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general."[3] The question of whether to define the term and to impose a methodology for determining significant disproportionality was rejected by the Department as inconsistent with the law. The Department reasoned, correctly, that Section 618 of the law was clear. Specifically, "[w]ith respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general." Furthermore, "[e]stablishing a national standard for significant disproportionality is not appropriate because there are multiple factors at the State level to consider in making such determinations… States are in the best position to evaluate those factors."[4] Rather than overriding Congressional intent and the clear language of the statute through regulation, the Department wisely provided non-regulatory guidance to States on methods for assessing disproportionality.

Congressional intent does not support the NPRM in expanding the Department's authority to determine whether the risk-ratio thresholds established by each State is reasonable. As discussed above, the law and current regulations do not require states to use a specific methodology in identifying significant disproportionality, including by establishing risk ratio thresholds. In 2004, Congress was clear and purposeful that determinations regarding identification, placement, and supports are left to the local individualized education plan (IEP) teams. The identification process requires individualized decisions that are appropriate for the child. A one-size fits all definition of significant disproportionality that allows the Department to determine "reasonable" eliminates state flexibility. This also goes against the child-centric nature of identification and supports that the IEP team is designed to determine appropriate for each individual child.

By expanding the Department's monitoring and enforcement authority, the NPRM effectively requires SEAs to use their authority to force LEAs, schools, and parents to override their best judgement for the subjective judgement of Federal bureaucrats. If a State does not comply with vague Federal standards of reasonableness they could lose Federal IDEA funding. The potential loss of federal funding if not compliant with the new requirements in the NPRM effectively establishes a national standard for determining significant disproportionality, based on what the Department determines is reasonable. The law and Congressional intent do not support such a national standard.

This NPRM further limits state and local flexibility by setting an arbitrary "n" size that conflicts with recent updates to federal law governing elementary and secondary education. The NPRM would require all states to use an "alternative risk ratio" in cases where the number of children

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[2] H.R. REP. NO. 108-077, at 122 (2003).
[3] 71 Fed. Reg. 46,738 (Aug. 14, 2006)
[4] Id.

in all other racial groups is fewer than 10 or the risk for children in all other racial groups is zero. In December 2015, President Obama signed the Every Student Succeeds Act (ESSA) into law, which reauthorized the Elementary and Secondary Education Act of 1965.[5] During the reauthorization process, Congress considered and rejected the notion of requiring States to disaggregate specified student subgroups that exceed a federally imposed minimum number of students for purposes of reporting and accountability. While ESSA asks states to describe the minimum number of students that each State determines are necessary to be included in each subgroup of students, how the state came up with the determination, and how the State will protect personally identifiable information, it does not impose a federal minimum.[6] In fact, ESSA explicitly prohibits the Department from prescribing a specific number of students.[7]

Congress was clear that such decisions are best left to the states, whose differences in population size and composition did not support a one-size-fits-all approach. Similarly, imposing such an arbitrary threshold (or n size) under IDEA disregards the clear will of Congress in recent updates to federal education laws that increase deference to state and local judgments.

Expansion of Comprehensive Early Interventions and Supports:

The NPRM changes the clear meaning of statute regarding the parameters of comprehensive early intervening services (CEIS) in a manner that conflicts with Section 613(f) of IDEA. The NPRM would allow funds reserved for CEIS to be used to serve children starting at age 3, including both children with disabilities and children not currently identified as needing special identification.

Expanding CEIS under Part B to students starting at age 3 and those who have been identified as needing special education conflict with the clear language and intent of IDEA. Under section 613(f), CEIS services may be provided "for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who are not currently identified as needing special education or related services." In most states kindergarten commences at age 5 and the law clearly limits the use of Part B funding for CEIS to support students beginning in kindergarten. This limitation in the law is supported by guidance issued by the Department in 2008, which states that "Children who are not yet in kindergarten may not receive CEIS."[8] Furthermore, the preamble to the IDEA Part B regulations reinforces the focus of CEIS on students who are not currently identified as needing special education by clarifying that students who received special education in the past, but are not currently receiving special education, are eligible to receive CEIS.[9] The clear language and intent of the law do not support the NPRM in expanding the focus of CEIS under Part B to serve children starting at age 3 and those who have been identified as needing special education.

We share the Department's concern with regards to evidence of the over-identification of certain students for special education services. However, the law is clear in deferring to States in determining whether significant disproportionality is occurring. Any changes to the clear intent

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[5] Pub.L. 114-95 (2015).
[6] Id. at §1111(c)(3).
[7] Id. at §1111(e)(1)(B)(iii)(VIII).
[8] U.S. Department of Education, "Memorandum: Coordinated Early Intervening Services (CEIS) Under Part B of the Individuals with Disabilities Education Act (IDEA)," July 28, 2008
[9] 71 Fed. Reg. 46,626 (Aug. 14, 2006) and 34 C.F.R. §300.226 (2010)

of Congress, as expressed in the plain language of the law, must be made through the legislative process, rather than through administrative regulatory action. Furthermore, the changes spelled out in the NPRM create unprecedented Federal interference regarding the identification, supports, and placement of special education students at the local level. This action is clearly influence and coercion, if not direct control. It is extremely concerning that the Department is proposing unilateral changes to the *Individuals with Disabilities Education Act* without seeking legislative approval, disregarding Congressional intent, and changing the clear meaning of statute.

We share your belief that every child, regardless of income, race, background, or disability can succeed if provided the opportunity to learn and the importance of this issue. These are topics that should be debated and resolved within the context of the reauthorization of the *Individuals with Disabilities Education Act* and not administrative fiat almost twelve years after the last reauthorization. Stripping state individualized education program teams of their local ability to make individualized child-centric decisions is not the solution and not what Congress intended in 2004.

Thank you for your careful consideration of this important matter and we look forward to your detailed response.

Sincerely,

Lamar Alexander
Chairman

Michael B. Enzi
United States Senator

Susan M. Collins
United States Senator

Lisa Murkowski
United States Senator

Mark Kirk
United States Senator

Orrin Hatch
United States Senator