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U.S. Department of Education
400 Maryland Avenue SW., Room 4032, PCP
Washington, DC 20202-2600

RE: Docket No. ED-2013-OSERS-0058
Comments on Addressing Significant Disproportionality under Section 618(d).

The Public Interest Law Center of Philadelphia ("Law Center") is one of the original affiliates of the Lawyers' Committee for Civil Rights Under Law, and has a long history of representing children with disabilities to ensure their rights to education. The Law Center was counsel in the landmark decision of *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa 1972) which lead to the Congressional passage of the initial version of the current Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq. The Law Center remains a vigorous advocate for children with disabilities in Southeastern Pennsylvania and throughout the Third Circuit. On behalf of the Law Center, and the parents, students, and community members with whom we work, we submit these comments to the U.S. Department of Education, Office of Special Education and Rehabilitation Services ("Department of Education") in response to its Request for Information on Addressing Significant Disproportionality under Section 618(d) of IDEA.

For the past 17 years, the IDEA, at section 601(c)(12)(A) and (B); 618(d)(1); and 34 CFR 300.646(a) has included a statutory admission that African American and other minority children are being misidentified, and required states to collect and examine data in an effort to reduce or eliminate this erroneous use of special education. It is now high time, indeed past time, for the Department of Education to take more vigorous action to eliminate disproportionality: to do more than simply count the numbers and to instead stop the misidentification of minority children. We submit these comments in hope that the Department of Education will take such action and stand ready to assist the Department on this project as it moves forward.

Question 1: Adoption of a Standard Approach for Determining Disproportionality.

The Department should adopt a standard approach for determining significant disproportionality as an initial step to reducing and eliminating misidentification of children. While the numbers are important and a method to track them critical, the human potential lost cannot be overlooked.

The Law Center has recently represented African American clients who have personally experienced the devastating effects of inaccurate identification. *S.H. ex re Durrell v. Lower Merion School District*, 2012 U.S. Dist LEXIS 101048, 729 F.3d 248 (3d Cir. Sept. 5, 2013) (finding that African American student misidentified as having a specific learning disability had no right to a hearing and no cause of action under IDEA and affirming summary judgment on ADA/504 claim); *A.G. v. Lower Merion School District*, 59 IDELR 279, *affirmed* 542 Fed. Appx. 193 (3d Cir. Nov. 14, 2013) (acknowledging that African American student was misidentified as having Other Health Impairment but relying on parent's consent under IDEA to affirm for District on

ADA/504 claim). This situation is about more than numbers; in the words of our clients, misidentification as a student with a disability has an impact[1]:

> *From S.H.*: Well, for starters, I would be in way like – I would probably be taking like all Honors classes if, in my past years, I wasn't taken out of other main classes and just isolated a lot from regular classrooms, because it kind of like -- I feel like it -- being in ISL[2] and stuff kind of just brought me down more than helped me progress. ....Because like, over a time period, like that kind of takes a toll on you, like just knowing that you think you don't have to be somewhere and then someone keeps telling you you have a disability. Like it starts making you feel like you are not smart and like stuff like that. So, I guess, the real intelligent person that I know I could be was hidden. *S.H. Dep.* 15:12-18; 30:14-21, Feb. 14, 2012.
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> *From A.G.*: ...I didn't want to be in ISL because I thought it was pointless to me, and they just said that there's not much they can do... Because I feel like I was ripped off with my education....Because they put me in pointless classes that I did not need, and I could have been with the other students, doing what they were doing, instead of wasting my time...I did reading lab in middle school which was pointless...I know in middle school, I really wanted to take history all three years, but I couldn't. *A.G. Dep.* 21:21-24; 37:25-38:1-6; 38:11-12; 38:24-25.

These individual examples are only a few of the hundreds of thousands that may exist and the impact of disproportionality cannot simply be measured only in numbers. It is well accepted that despite the IDEA statutory language and provisions to prevent significant disproportionality, the same continues to occur.[3] For example, we commend

[1] While the District prevailed in both cases, the District Court each time commented on the misidentification. *S.H.*, at 729 F.3d at 256 (noting that any "misidentification of S.H." was "unfortunate."); *A.G.* 59 IDELR 279 at pg. 23 (concluding that the school psychologist classified A.G.'s observed behavioral and emotional issues as an "other health impairment" in technical noncompliance with the IDEA definition).

[2] ISL is an acronym for Instructional Support Lab, a special education class.

[3] Notably, in 2007, the NEA and National Association of Psychologists jointly issued "Truth in Labeling: Disproportionality in Special Education." www.nccret.org/Exemplars/Disproportionality_Truth_In_Labeling.pdf. in which it concluded that at least part of the probable explanation is in the lack of a common standard and the assessment process. Recent settlements in both Sun Prairie (OCR Case #05-11-5003,

to you Jamila Codrington & Halford H. Fairchild, *Special Education and the Mis-Education of African American Children: A Call to Action*, Association of Black Psychologists, (Feb. 13, 2012)[4] , the recent white paper which has vigorously advocated for a national systemic change to stop the travesty of placing African American children in special education who do not belong there and which emphatically calls for an end to this new form of discrimination. Another important scholarly resource is Karolyn Tyson, *Integration Interruption*, (Oxford Press 2011). And, of course, it is also without dispute that non-Caucasian children are more frequently disciplined than their peers.[5]

States have varying approaches to disproportionality, both in terms of what is deemed an "acceptable level" and in ways of calculating significant disproportionality. Most recently, the General Accounting Office has recommended a federal threshold.[6] The lack of a common consensus makes it difficult for the Department to monitor and to ensure that states are correctly addressing disproportionality.[7]

Because of the incalculable loss of human potential caused by disproportionality, especially that due to mis-identification, the Law Center strongly supports adoption of a nationally determined standard approach that states would use to determine disproportionality. We urge the Department to convene a national taskforce of

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<www2.ed.gov/documents/press-releases/sun-prairie-wisconsin-agreement.doc>) and Schenectady (OCR Case #02-10-5001, <www2.ed.gov/documents/press-releases/schenectady-new-york-agreement.doc>) are examples of systemic change needed and may be useful for guidance to reduce disproportionality.

[4] *Available at* www.abpsi.org/pdf/specialedpositionpaper02132.pdf.

[5] Both nationally, and locally, disproportionate discipline remains a significant problem. See, *Beyond Zero Tolerance: Discipline and Policing in PA Public Schools*, ACLU (November 2013), www.ackupa.org/bzt, and *U.S. Department of Education Office for Civil Rights 1 Civil Rights Data Collection: Data Snapshot (School Discipline)* March 21, 2014.

[6] U.S. Gov't Accountability Office, GAO-13-137, 2013, Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education (2013).

[7] State Definitions of Significant Disproportionality, inForum, July 2007, available at http://www.ed.gov/about/offices/list/osers/index.html.

multidisciplinary experts who are culturally sensitive and skilled in identification, evaluation, and statistics to address this question and to mandate a federal risk ratio. If the intent of the IDEA is to be met – providing special education services to children who need special education services- then, the ratio simply should not be more than 1.5.[8] Local population issues are important and must be fairly considered, and there should be statistical corrections for districts and states with very small or large "n's" of a particular subgroup. But districts simply cannot continue to allow overidentification of minority (or in some cases even majority students non-Caucasian). For example, Pennsylvania's risk ratio is 4.0.[9] This means that the state officials have deemed it officially acceptable that students who are non-Caucasian risk mis-identification as a student with a disability at a rate of 4:1 compared to a Caucasian student. This should not be tolerated 17 years after Congress identified the problem and after 17 years of collecting data about the problem.

Question 2: What Actions Should the DOE Take to Address Disparity in Data?

The Department inquires how it should address the differences between the overall data and the suggestions of state after state that significant disproportionality does not exist within any LEA or state. Our suggestion is that the Department should recall that the root of the IDEA is an individualized approach to education.[10] Without an approach to address significant disproportionality by which parents and their children are individually given information so that they are fully informed and have recourse to address the misidentification, such misidentification and hence "hidden" significant

[8] A risk ratio of 1.0 is considered to be perfectly proportionate and a risk ratio between .50 and 1.5 is considered to be proportionate. Sue Gamm, *Disproportionality in Special Education: Where, Why and How It Occurs*, 5 (2010).

[9] The state increased its WRR to 4.0 on August 26, 2013.

[10] See, for example, Justice Rehnquist's explanation that the "modus operandi of the Act is the already mentioned individualized education program." *Burlington Sch. Committee v. Dept. of Education*, 471 U.S. 359, 367 (1985).

disproportionality will continue unabated. The national data will continue to differ from the state data. Hence, the Law Center proposes five solutions to the dilemma, addressing the three most common ways that disproportionality occurs – mis-identification, placement and discipline.

The Department should require that states provide all IEP team members, including parents, with written explanation of each of the 13 disability categories of the IDEA at the time of any evaluation or re-evaluation. If this information is provided to parents, they will be better able to assess whether, in fact, the child in question "has" a disability. Likewise, teachers should have the explanations and should receive training in each of the disability categories.

Second, the Department should request Congress to amend the IDEA such that identification/misidentification of a child is a matter for a due process hearing or at least a state complaint. In the E.D. of PA and the Third Circuit, children have no remedies under the IDEA and cannot even bring a due process hearing on that issue. So long as there is no remedy for misidentified children through due process or the complaint system, misidentification "without a face" will continue.

Third, The Department should create a taskforce to collect and analyze carefully the data in the "soft" disability categories – i.e. specific learning disabilities, emotional disturbance, and other health impairment - and determine if revisions to the statutory definitions are necessary. For example, our knowledge about dyslexia and other learning disabilities is greater now than when the definition was originally included in the IDEA.[11] Additionally, the Department should consider revising 34 C.F.R. 300.307 to completely ban the identification of a child on the sole basis of the discrepancy model.

[11] Sally Shaywitz, *Overcoming Dyslexia: A New and Complete Science-Based Program for Reading Problems at Any Level* (Knopf 2003).

As noted at 71 Fed. Reg. 46650 (Aug. 14, 2006), the research does not support the use of a discrepancy model approach.

Because of the nature of these disabilities, errors in identification are more common. But experts in all of the areas can assist in further clarifying these disabilities in more concrete terms, or requiring more stringent evaluations, including diagnostic teaching evaluations. A diagnostic teaching evaluation may be as effective in determining if a child has a disability, especially since it is well accepted that standardized testing measures will not always capture a child's true ability and learning style.

Fourth, experts agree that teacher referral is often the reason a child is evaluated for special education, and the research also shows that teachers commonly refer when children do not meet the social norms in a classroom. Thus, when school districts and states collect and analyze disciplinary data, the Department should assist the states by providing technical assistance to address the relationship between disproportionate discipline and significant disproportionately of students in special education. Teachers need training on when to refer and school districts should be encouraged to utilize objective information, not anecdotal and subjective information, as a basis for referrals. Districts must be taught how to take the information they have and use it in a way to reduce disproportionality when the primary motivator for referral is that the child is a "behavior problem."

A final suggestion is that the Department develops a national monitoring system with highly trained and culturally sensitive experts to conduct yearly audits of each state based on random reviews of selected files. This auditing could be done whenever a

district appears near or at a disproportionate level, rather than waiting for states to take action on their own.

Thus, the Department should establish an explicit sound approach to measuring disproportionality and then intensive technical assistance for school districts on what to do with the information they gather so that the net result is proportionality.

Question 3: What actions should the DOE take with regard to CEIS to reduce disproportionality?

Currently, districts are not required to use IDEA funds for Coordinated Early Intervening Services until they experience (or admit experiencing) significant disproportionality. Consequently, the funds do not flow very often because school districts do not want to measure in such a way as to admit significant disproportionality. A solution is to require a school district to use IDEA funds where there are significant disparities, even if the state's threshold of significant disproportionality is not yet met. There is simply no justifiable reason to wait until more children are harmed to use what funds we have to help the children currently at risk of harm. The Law Center appreciates an opportunity to engage in this important discussion and looks forward to working with the Department to move forward with a proactive approach so that the next revision of the IDEA does not recount continued significant disproportionality but instead addresses how children are properly identified, taught, and fairly disciplined in their educational settings.

Very truly yours,
/s/ Sonja D. Kerr_____
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