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VIA FEDERAL eRULEMAKING PORTAL

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The Honorable John B. King, Jr.  
Secretary  
U.S. Department of Education  
Potomac Center Plaza  
550 12th Street SW  
Washington, DC 20202

Re: "Assistance to States for the Education of Children with Disabilities:  
Preschool Grants for Children with Disabilities" (ED-2015-OSERS-  
0132-0001)

Secretary King:

On March 2, 2016, the U.S. Department of Education ("DOE") and the Secretary of Education published a proposed rule that seeks to standardize the way that states identify and address significant disproportionality based on race and ethnicity occurring in state and local educational agencies. In response to this proposed rule, we are pleased to provide comments on behalf of our clients, the NAACP Pennsylvania State Conference ("NAACP PA") and Concerned African American Parents ("CAAP"). NAACP PA and CAAP both enthusiastically encourage full adoption of the proposed rule.

**Commenters**

The National Association for the Advancement of Colored People ("NAACP") is the nation's oldest and largest civil rights organization. The NAACP



works to improve the political, educational, social, and economic rights of all persons, to raise awareness of the adverse effects of racial discrimination, and to take lawful actions to eliminate such discrimination. The NAACP Pennsylvania State Conference, with approximately 10,000 members in forty-six Units and Authorized Committees across the state, supports the goals and objectives of the national office.

NAACP PA is dedicated to ensuring that all students in Pennsylvania have an equal opportunity to obtain a high-quality public education. It has worked tirelessly to assure equal access to an appropriate education for minority and special needs students and to ensure that all students receive the services they need to succeed. NAACP PA applauds the DOE's focus on addressing the potential overrepresentation of minority students in special education and the disproportionate use of disciplinary removals with these children.

Concerned African American Parents is a coalition of parents joined together to promote the development and sustenance of excellence among African American students in Upper Dublin School District, a district in the northern suburbs of Philadelphia, Pennsylvania. The organization's mission is to build a bridge between the School District and the African American community to help children achieve academic excellence. CAAP regularly works to eliminate the achievement gap in Upper Dublin by increasing parental and community involvement in the schools, and by advocating on behalf of students. It is a recognized parent group in Upper Dublin, and its members—parents of students from all schools in the Upper Dublin School District—meet with School District officials several times per year.

Since 2008, CAAP has been working to eliminate the racial achievement gap in Upper Dublin, in part by advocating for the elimination of low-track placements and a reduction in

harsh disciplinary procedures, which, it alleges, disproportionately affect African American students. Accordingly, CAAP is appreciative of the DOE's efforts to reduce significant disproportionality based on race in the placement of children in special educational settings and the incidence and type of disciplinary removals.

### **The Problem of Disproportionality**

Disproportionate placement of students into special education on the basis of race and ethnicity is a long-standing and long-recognized problem in American public education. Congress has specifically identified such disproportionality as a motivation for the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400(c)(12). Of particular interest to NAACP PA and CAAP is Congress's recognition that "[s]tudies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education." *Id.* § 1400(c)(12)(E).

Congress last amended the IDEA in 2004, and scholarly work since then has confirmed that these problems remain. *See, e.g.,* Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J. LEGAL EDUC. 129, 133 (2012) ("[A] growing research base shows that color is likely a factor considered at least implicitly when finding and making those first critical referrals and subsequent educational decisions as to minority children."); Rebecca Vallas, *The Disproportionality Problem*, 17 VA. J. SOC. POL'Y & L. 181, 184-185 (2009) ("While African-American students make up just under 15 percent of the K-12 school population, they account for more than 20 percent of the special education population. . . . Similarly, African-American students are underrepresented in gifted programs, making up far less than 14 percent of that population in public schools.") (footnotes omitted).

Overrepresentation in special education is particularly troubling given that misplacement into special education has significant emotional and educational effects on affected students, including social isolation and diminished self-esteem. *E.g.*, Tara C. Raines et al., *Universal Screening for Behavioral and Emotional Risk: A Promising Method for Reducing Disproportionate Placement in Special Education*, 81 J. NEGRO EDUC. 283, 284 (2012). Students erroneously placed into special education receive a substandard education: they are “exposed to a less rigorous curriculum, instructed at a slower pace, and held to lower academic expectations than their peers” in the regular classroom. *Id.* These “curriculum inadequacies” lead such students to poorer academic performance, and it is likely that many of these students will drop out of high school, as research has demonstrated that dropout rates of students in special education are double those of other students. *Id.* As Raines et al. suggest, “the practice of placing a disproportionate number of minority students in special education classes places them on a trajectory for diminished life opportunities.” *Id.*

Recent federal court decisions have only intensified the urgency of preventing the misidentification of minority students. In 2013, the United States Court of Appeals for the Third Circuit held that only a child with a disability can bring a claim under the IDEA, meaning that children erroneously identified as disabled have no remedy under that statute for their misplacement. *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 260 (3d Cir. 2013). Alternatively, to bring a claim for compensatory relief under the Rehabilitation Act or Americans with Disabilities Act, such a student must prove that her misidentification was “intentional,” *id.* at 261, a nearly insurmountable barrier for most plaintiffs. With the courthouse doors effectively closed to such students, it is even more important that misidentifications not happen in the first place.

### **The Proposed Rule Should Be Adopted In Full**

Although the IDEA authorizes the Secretary of Education to issue regulations under the IDEA, 20 U.S.C. § 1406, to date the only such regulation concerning disproportionality merely reproduces the wording of the statute, *compare* 34 C.F.R. § 300.646, *with* 20 U.S.C. § 1418(d)(1). The proposed regulations would represent a significant improvement, by adding needed specificity within the statutory framework for making determinations of significant disproportionality, *see* Proposed 34 C.F.R. §§ 300.646(b), .647, and for remedying the problem once it is identified, *see* Proposed 34 C.F.R. § 300.646(c)-(d).

In particular, the proposed regulations strike a needed balance between (1) allowing states and Local Educational Agencies (LEAs) some discretion in how they calculate disproportionality and (2) requiring states and LEAs to exercise that discretion within reasonable, well-delineated bounds. Too rigid of a formula could incorrectly identify disproportionality where none exists, or fail to identify it where it does; too flexible of a formula could allow States and LEAs to massage their numbers until real problems disappear from view, and could render it difficult to make meaningful LEA-to-LEA or state-to-state comparisons. The Proposed § 300.647 successfully navigates these shoals by allowing states a limited menu of specific options for determining significant disproportionality.

The proposed regulations also represent an important improvement by requiring analysis of both overall disproportionalities and disproportionalities by certain individual disability categories. *See* Proposed 34 C.F.R. § 300.647(b)(3). Of similar importance, the proposed regulations require detailed analysis related to compliance with the IDEA's "least-restrictive environment" mandate and to the problem of overly harsh discipline of students

with disabilities. See Proposed 34 C.F.R. § 300.647(b)(4). NAACP PA and CAAP have heard much anecdotal evidence suggesting that these are problematic areas for many school districts in Pennsylvania; and the proposed regulations will shine a spotlight on these problems. NAACP PA and CAAP are hopeful that once LEAs have run the numbers as required by the proposed regulations, they will better recognize these problems and will want to resolve them quickly.

Finally, NAACP PA and CAAP are supportive of the proposed regulations' approach to resolving problems identified by the newly required analyses. In particular, the organizations are pleased that the regulations' remedial provisions are designed to assist not only children with disabilities but also children "who need additional academic and behavioral support to succeed in a general education environment" and other children who may not have disabilities, Proposed 34 C.F.R. § 300.646(d)(2)(i), (d)(3). This aspect of the proposed regulations will, among other positive effects, help prevent students without disabilities from being misplaced into special education programs—an especially important safeguard in light of the lack of legal remedies for such misplacements under *S.H. v. Lower Merion School District*.

### **Conclusion**

NAACP PA and CAAP strongly support the proposed rule and urge its adoption in full.

Sincerely,

/s/Benjamin D. Geffen

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