UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., Plaintiff, v. **U.S. DEPARTMENT OF EDUCATION, ELIZABETH DEVOS, Secretary of Education, and JOHNNY W. COLLETT, Assistant Secretary for Special Education and Rehabilitative Services,** Defendants.	Case No. 1:18-cv-1636-TSC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Congress has, since 1997, expressed concerns that disproportionate numbers of children from minority racial and ethnic backgrounds have been identified as having a disability and placed in educational settings on that basis. Accordingly, in the Individuals with Disabilities Education Act (the "IDEA"), Congress required the States to collect and examine data to determine whether "significant disproportionality" based on race and ethnicity is occurring with respect to the (1) identification of children as having a disability, (2) placement of children identified as such in particular educational settings, and (3) incidence, duration, and type of disciplinary actions taken. In its initial regulations implementing these statutory requirements, Defendant United States Department of Education ("ED") allowed each individual State to determine the levels at which school districts within their respective States would be identified with significant disproportionality.

Following the issuance of a study by the Government Accountability Office in 2013, which found a wide range of definitions and methodologies being applied by the States in defining significant disproportionality, ED issued regulations in December 2016 (the "2016 Regulations") that attempted to strike a careful balance between standardizing parts of the methodology used by States to identify significant disproportionality, while affording States "substantial flexibility" to tailor implementation of the regulations to the needs of their populations and the unique aspects of their own State. Compl. ¶ 69, ECF No. 1. States participating in the IDEA Part B program were required to comply with the new regulations starting July 1, 2018. On July 3, 2018, ED issued a final rule postponing the compliance date of the regulations for two years, noting concerns about the effects and effectiveness of the regulations, as well as the need to provide the agency and the

States additional time to consider "how best to serve children with disabilities without increasing the risk that children with disabilities are denied [a free appropriate public education]." Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 83 Fed. Reg. 31,306-01, 31,314 (July 3, 2018).

Plaintiff, an advocacy organization comprised of parents of children with disabilities, their attorneys, and their advocates, brings suit under the Administrative Procedure Act to challenge ED's postponement of the regulations' compliance date, which it alleges has harmed it in two ways. First, Plaintiff notes that when a State identifies a school district with significant disproportionality, the district must review its policies, practices, and procedures used in the identification and placement of students with disabilities to ensure that they comply with the requirements of the IDEA. If the district makes any changes based upon that review, the district must publicly report on such revisions. Plaintiff thus postulates that because more school districts would have been identified with significant disproportionality if the 2016 Regulations had gone into effect, ED's postponement will diminish its access to this and other information. Second, Plaintiff asserts that through these reviews, school districts may find students who have been misidentified as having a disability, misplaced in educational settings, or inappropriately disciplined as a result. Thus, again, because more districts allegedly would have been identified with significant disproportionality absent the postponement, thus resulting in more reviews, Plaintiff contends that some mistakes in identification, placement, and discipline will continue unabated.

Such alleged injuries-in-fact do not suffice to demonstrate standing. The premise underlying both of Plaintiff's alleged injuries—that the 2016 Regulations would have resulted in more school districts being identified with significant disproportionality than will occur following ED's postponement—is entirely speculative, as it depends on how the States, which are nonparties to this litigation and not before the Court, will decide in their independent capacities to implement the regulations. Aside from this uncertain foundation, Plaintiff's alleged injuries also fail on their own merits. Plaintiff's alleged information-based injuries do not demonstrate organizational standing because Plaintiff cannot show that it is being required to spend any resources beyond that which it normally expends, and its theory of diminished access to information provided in school districts' reports is speculative and dependent on a chain of hypothetical, third-party conduct. As for Plaintiff's alleged injuries arising from mistakes in student identification, placement, and discipline that would have been caught but for ED's postponement, Plaintiff fails to identify any of its members who actually have suffered or will imminently suffer such harm, which is fatal to its attempt to demonstrate standing.

For similar reasons, Plaintiff can demonstrate neither causation nor redressability. Plaintiff proffers no plausible claim that the injuries of which it complains are traceable to ED, as any occurrence of the injuries alleged would depend on the conduct of nonparties to this litigation. And there is no substantial likelihood that Plaintiff's alleged injuries would be redressed by the relief Plaintiff seeks—essentially, vacatur of ED's postponement—because amelioration of those injuries would require further actions by nonparties. Specifically, the States would have to implement the regulations in such a way as to increase the number of districts identified with significant disproportionality.

Additionally, school districts would need to change their policies, practices, or procedures in order to trigger the obligation for public reporting of such revisions. They would also need to conduct their reviews in a way that identifies the mistakes in identification, placement, and discipline of which Plaintiff complains. In short, given the flexibility afforded to the States in implementing the regulations and to the districts in operating under the regulations, it does not necessarily follow that vacatur of ED's postponement will redress the injuries on which Plaintiff relies.

Accordingly, in challenging the agency's *lack* of regulation of nonparties to this litigation, Plaintiff cannot carry its substantially more difficult burden of demonstrating standing. The Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) due to the absence of jurisdiction.

BACKGROUND

I. Statutory and Regulatory Background

A. The IDEA

The IDEA was enacted to help ensure that children with disabilities receive needed special education services. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). Under Part B of the IDEA, ED provides grants to States, outlying areas, and freely associated States to assist in providing special education and related services to children with disabilities. Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities, 81 Fed. Reg. 10,968-01, 10,970 (Mar. 2, 2016).

Congress has amended the IDEA on multiple occasions to address the overrepresentation of children from racial, cultural, ethnic, and linguistic minority backgrounds in special education programs. The first of these amendments occurred in

1997. *Id*. At that time, Congress noted that "more minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population." Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 601(8)(B) 111 Stat. 37 (1997) (codified at 20 U.S.C. § 1400(c)(12)(B)). Accordingly, the 1997 Amendments added a requirement that States collect and examine data to determine if "significant disproportionality" based on race is occurring in the identification and placement of children with disabilities. *Id*. § 618(c) (codified as amended at 20 U.S.C. § 1418(d)(1)). If a State finds significant disproportionality, the amendments require the State to provide for the review and, if appropriate, revision of the policies, practices, and procedures used in identifying and placing children with disabilities in educational environments to ensure that they comply with the requirements of the IDEA. *Id*. § 618(c)(2) (codified as amended at 20 U.S.C. § 1418(d)(2)(A)).

Finding that additional efforts were needed to tackle the problem of misidentifying minority children as having a disability, Congress passed the Individuals with Disabilities Education Improvement Act of 2004. 81 Fed. Reg. at 10,970-71. Those amendments require the States to collect data on the incidence, duration, and type of disciplinary actions taken with respect to children with disabilities, including suspensions and expulsions; to publicly report on any revisions made to their policies, practices, and procedures based on the review described above; and to reserve a portion of their IDEA funds for the provision of comprehensive coordinated early intervening services. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446,

§ 618(d)(2)(B), (C), 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. § 1418(d)(2)(B), (C)).

In sum, States are required under the IDEA to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in their school districts across three metrics:

- the identification of children as having a disability, including by disability category;
- the placement of children identified as having a disability in particular educational settings; and
- the incidence, duration, and type of disciplinary actions taken.

20 U.S.C. § 1418(d)(1). If a State identifies a school district as having significant disproportionality, the district must (1) review and, if appropriate, revise the policies, practices, and procedures it uses in identifying or placing children with disabilities to ensure they comply with the requirements of the IDEA; (2) publicly report on any revisions of its policies, practices, and procedures that it makes on the basis of its review; and (3) reserve a portion of its IDEA funds for providing comprehensive coordinated early intervening services to its students, particularly (but not exclusively) those in groups that are significantly over-identified as having a disability. *Id*. § 1418(d)(2).

B. The 2016 Regulations

Congress did not set forth a definition in the IDEA for "significant disproportionality." Through 2016, ED provided each State with "the discretion to define the term for [its own school districts] and for the State in general," and to "determine statistically significant levels" at which significant disproportionality would be found.

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540-01, 46,738 (Aug. 14, 2006). In February 2013, the Government Accountability Office ("GAO") issued a study finding that "the discretion that States have in defining significant disproportionality has resulted in a wide range of definitions that provides no assurance that the problem is being appropriately identified across the nation." GAO, *Individuals with Disabilities Education Act— Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education (GAO-13-137)* 22 (2013), https://www.gao.gov/assets/660/652437.pdf (last visited Sept. 9, 2018). The GAO recommended that ED "develop a standard approach for defining significant disproportionality to be used by all states," and that the "approach should allow flexibility to account for state differences and specify when exceptions can be made." *Id*.

ED took a number of steps following the GAO's study, including publication of a request-for-information inviting public comment on the GAO's recommendations and undertaking its own review of State procedures for identifying districts with significant disproportionality. 81 Fed. Reg. at 10,972. Based on those and other efforts, ED published a notice of proposed rulemaking on March 2, 2016, setting forth proposed regulations that would "require States to use a standard methodology that consists of specific methods for calculating racial or ethnic disparities, specific metrics that the States must analyze for racial and ethnic disparities, . . . and specific flexibilities States may consider when making determinations of significant disproportionality." *Id*. at 10,978.

On December 19, 2016, ED issued its final rule, which adopted the proposed regulations with changes made based on comments received by the agency. As recommended by the GAO, ED sought in the new regulations to achieve some "standardization of [the] analysis" used by States when identifying significant disproportionality, "while providing a great deal of flexibility to States" to decide how that analysis would apply in each of their respective States. Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 92,376, 92,396 (Dec. 19, 2016). Specifically, the regulations set forth a standard methodology that would be applied by all States. *See id*. at 92,391 (noting that 34 C.F.R. § 300.647 contains "common parameters for analysis, which each State must use to determine whether significant disproportionality is occurring at the State and local level"). First, States would be required to employ risk ratios in analyzing disparities across seven racial or ethnic groups listed at § 300.647(b)(2), using fourteen categories of analysis listed at 34 C.F.R. § 300.647(b)(3) and (4).[1] A risk ratio is "a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group . . . by the risk for children in all other racial and ethnic groups." 34 C.F.R. § 300.647(a)(6). "[A] risk ratio of 1.0 indicates that children from a given racial or ethnic group are no more or less likely than children from all other racial or ethnic groups to experience a particular outcome," while "[a] risk ratio of 2.0 indicates that one group is twice as likely as all other children to experience that outcome." Compl. ¶ 67. Second, States were to compare the risk ratios for the seven racial or ethnic groups to those of all

[1] When ED reviewed the States' procedures for identifying significant disproportionality, it found that "45 States used one or more forms of the risk ratio method to determine significant disproportionality." 81 Fed. Reg. at 10,972.

other children within the school district. 34 C.F.R. § 300.647(b)(6). If the risk ratio for a racial or ethnic group within any of the fourteen categories of analysis exceeds the applicable "risk ratio threshold"—the point at which disproportionality based on race or ethnicity can be deemed significant, *see id*. § 300.647(a)(7)—a school district may be identified, but is not required to be identified, with significant disproportionality. *Id*. § 300.647(b)(6).

Balancing this standard methodology, ED provided "substantial flexibility to the States" in terms of how they choose to implement the regulations for their school districts. Compl. ¶ 69; *see also* 81 Fed. Reg. at 92,388 (noting "wide flexibilities provided to States in the final regulations"). For example, ED "did not propose to decide for States the point at which specific racial or ethnic overrepresentation becomes significant disproportionality"—the risk ratio threshold. 81 Fed. Reg. at 92,388. Rather, the agency afforded States "a key area of flexibility" in allowing them to set the risk ratio thresholds applicable to their own school districts, subject to a requirement of reasonableness.[2] *See id*.; *see also* 34 C.F.R. §§ 300.647(b)(1)(i), (b)(1)(iii)(B). This included the flexibility to select "up to 15 different risk ratio thresholds" for each impairment and for various placements and disciplinary removals identified in the regulations. 81 Fed. Reg. at 92,421; *see also* 34 C.F.R. § 300.647(b)(1)(ii).

States also have the flexibility to determine when there exists a sufficient number of children in a particular racial or ethnic group to permit application of the regulations'

[2] The 2016 Regulations thus do not constitute a drastic departure from the prior regulatory scheme insofar as States had and continue to have under the regulations "the discretion to define the term ['significant disproportionality'] for [their own school districts] and for the State in general," and to "determine statistically significant levels" at which significant disproportionality may be found. 71 Fed. Reg. at 46,738.

methodology in the first instance. States set for themselves what are described in the regulations as "minimum cell sizes" and "minimum n-sizes." Cell size refers to the number of children in a particular racial or ethnic group experiencing an outcome (such as being identified as having a disability, or being placed or disciplined as such), or the number of children in all other racial and ethnic groups experiencing an outcome. *Id*. § 300.647(a)(3). This figure is used as the numerator when calculating a risk ratio. *Id*. For identification, n-size refers to the total number of children in a particular racial or ethnic group, or the total number of children in all other racial and ethnic groups, enrolled at a school district. *Id*. § 300.647(a)(4). For placement and discipline, n-size refers to the total number of children in a particular racial or ethnic group identified as having a disability, or the total number of children in all other racial and ethnic groups identified as having a disability, enrolled at a school district. *Id*. This figure is used as the denominator for calculating the risk ratio. *Id*.

Recognizing that "[r]isk ratios may produce unreliable results when the calculation is done with small numbers of children in a particular category of analysis," which could lead to school districts "being inappropriately identified with significant disproportionality," 81 Fed. Reg. at 92,425, the regulations do not require a State to calculate a risk ratio if "[t]he particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size." 34 C.F.R. § 300.647(c)(1). Under the 2016 Regulations, States have the authority to set for themselves the minimum cell sizes

and n-sizes that will apply to their school districts, subject to a requirement of reasonableness.[3] *See id*. § 300.647(b)(1)(i)(B), (C), (b)(1)(iii)(B).

Finally, ED provided States with the discretion *not* to identify a school district as significantly disproportionate in certain circumstances, even if the minimum cell sizes and n-sizes are met, and even if a group's risk ratio exceeds the applicable risk ratio threshold. Under 34 C.F.R. § 300.647(d)(1), a State, if it chooses, has the authority not to identify a school district with significant disproportionality until the risk ratio threshold for a racial or ethnic group in the relevant category of analysis exceeds the risk ratio threshold for up to three prior consecutive years. Similarly, under § 300.647(d)(2), a State can decide to forgo identifying a school district with significant disproportionality if a group's risk ratio exceeds the applicable threshold, but the district has nonetheless demonstrated reasonable progress in lowering its risk ratio for the group in the relevant category of analysis in each of the two prior years.

Upon a finding of significant disproportionality, a school district is to review its policies, practices, and procedures for identifying students with disabilities or placing such students in a particular educational settings, including disciplinary removals, for compliance with the IDEA. 34 C.F.R. § 300.646(c)(1). If the school district revises any of its policies, practices, or procedures based on that review, the district must publicly report on the revision. *Id*. § 300.646(c)(2). Additionally, school districts identified with

[3] Allowing States to set their own minimums, ED noted, would "allow States to account for the volatility of risk ratio calculations[] [and] deem as significant only the most systemic cases of significant disproportionality." 81 Fed. Reg. at 92,406; *see also id*. at 92,398 (allowing States to "determine reasonable minimum cell sizes and n-sizes" so as "to exclude from their review for significant disproportionality those racial and ethnic groups within [school districts] with too few children to calculate stable risk ratios").

significant disproportionality must "identify and address the factors contributing to the significant disproportionality" and reserve a portion of their IDEA funds to provide coordinated early intervening services that address those factors. *Id*. § 300.646(d)(1)(ii).

C. Postponement of the 2016 Regulations

Under the agency's 2016 final rule, States participating in the IDEA Part B program were required to comply with these regulations starting July 1, 2018. 81 Fed. Reg. at 92,378. On July 3, 2018, ED issued a final rule postponing the compliance date of the regulations by two years, citing concerns that the "regulations may not meet their fundamental purpose, namely to ensure the proper identification of [school districts] with significant disproportionality among children with disabilities," and the need to give ED, the States, and the public "additional time to evaluate the questions involved and determine how best to serve children with disabilities without increasing the risk that children with disabilities are denied [a free appropriate public education]." 83 Fed. Reg. at 31,314.

ED clarified, however, that postponement of the regulations' compliance date does not "affect a State's annual obligation under IDEA section 618(d)(1) to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in the State and [school districts] of the State with respect to the identification, placement and discipline of children with disabilities." *Id*. at 31,309. To that end, States are free to "implement the standard methodology [set forth in the 2016 Regulations] . . . to identify significant disproportionality in their [school districts]," despite the postponement. *Id*. at 31,309.

II. Party Background and Procedural History

Plaintiff is a national not-for-profit organization comprised of "parents of children with disabilities, their attorneys, and their advocates." Compl. ¶ 12. It has over 2,100 members across the United States, with membership open to those "who are interested in furthering COPAA's purposes, and each member pays annual dues." *Id.* ¶ 13.

Plaintiff's mission is to "protect and enforce the legal and civil rights of students with disabilities and their families." *Id.* ¶ 12. It accomplishes this mission by

- "providing resources, training, and information to parents, advocates, and attorneys to assist them in obtaining the equal educational opportunity to which children with disabilities are entitled under the federal civil rights laws, including the IDEA";
- "educating members of the public and policy makers, including federal agencies, about the educational experiences of children with disabilities and their families"; and
- "educating COPAA members about developments in the federal civil rights laws and policies affecting education of children with disabilities."

Id. ¶ 14. In performing these activities, Plaintiff "relies on information and research it collects about what school districts are doing with regard to disability and race, including how States identify school districts as significantly disproportionate and how school districts respond . . . to determinations of significant disproportionality." *Id.* ¶ 17.

Plaintiff filed its Complaint on July 12, 2018, setting forth one claim under the Administrative Procedure Act. ECF No. 1.

STANDARD OF REVIEW

When adjudicating a motion to dismiss pursuant to Rule 12(b)(1), "the Court must accept as true all of the factual allegations contained in the complaint." *Gordon v. Office of the Architect of the Capitol*, 750 F. Supp. 2d 82, 86-87 (D.D.C. 2010). In doing so, the Court need not accept inferences that are unsupported by facts alleged in the Complaint or that amount to mere legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Moreover, a "court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion because subject-matter jurisdiction focuses on the court's power to hear the claim." *Adams v. U.S. Capitol Police Bd.*, 564 F. Supp. 2d 37, 40 (D.D.C. 2008); *see also Morrow v. United States*, 723 F. Supp. 2d 71, 75 (D.D.C. 2010) (noting that a Rule 12(b)(1) motion "presents a threshold challenge to the court's jurisdiction" (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987))); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (noting a court's "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"). "[T]he plaintiff bears the burden of establishing that the court has subject-matter jurisdiction." *Adams*, 564 F. Supp. 2d at 40.

ARGUMENT

I. Plaintiff Cannot Establish Standing Because the Injuries-in-Fact on Which It Relies are Speculative and Dependent on the Intervening Actions of Nonparties to This Litigation

A. Standing Principles for Organizational Plaintiffs

Article III of the Constitution limits the jurisdiction of the federal courts to adjudicating "Cases" and "Controversies." A key component of this constitutional limitation is that a plaintiff must have standing to bring suit—a requirement "built on

separation-of-powers principles" and which "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Second, there must exist "a causal connection between the injury and the conduct complained of," meaning that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id*. at 560-61 (alterations in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). And third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id*. at 561 (quoting *Simon*, 426 U.S. at 38, 43). The plaintiff "bears the burden of establishing these elements," which "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Id*.

Organizational plaintiffs are no different. "When an association seeks to invoke the jurisdiction of a federal court, it can establish standing in one of two ways." *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 17 (D.D.C. 2018). "[I]t can assert 'organizational standing' to sue on its own behalf," or "[i]t can assert 'associational standing' to sue on behalf of its members." *Id*. For organizational standing, the organization must, "like an individual plaintiff, . . . show 'actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a

favorable court decision.'" *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)). For associational standing, the organization must "plausibly allege or otherwise offer facts sufficient to permit the reasonable inference (1) that the plaintiff has at least one member who 'would otherwise have standing to sue in [her] own right;' (2) that 'the interests' the association 'seeks to protect are germane to [its] purpose;' and (3) that 'neither the claim asserted nor the relief requested requires the participation of [the] individual members in the lawsuit.'" *Pub. Citizen*, 297 F. Supp. 3d at 17-18 (alterations in original) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

For organizational standing, not just any injury will suffice. Courts do not entertain claims of "organizations 'who seek to do no more than vindicate their own value preferences,'" and "an organization's abstract interest in a problem is insufficient to establish standing, 'no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem.'" *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 24-25 (D.C. Cir. 2011) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). Indeed, as the D.C. Circuit observed in *Center for Law & Education v. Department of Education*, 396 F.3d 1152 (D.C. Cir. 2005),

> [t]his Court has not found standing when the only "injury" arises from the effect of the regulations on the organizations' lobbying activities (as opposed to the effect on non-lobbying activities): "[C]onflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing. Frustration of an organization's objectives is the type of abstract concern that does not impart standing."

Id. at 1161-62 (quoting *Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996)); *see also Turlock Irrigation Dist. v. Fed. Energy Regulatory Comm'n*,

786 F.3d 18, 24 (D.C. Cir. 2015) (noting that "impairment" of an organization's "advocacy . . . will not suffice," and that "the expenditure of resources on advocacy is not a cognizable Article III injury").

Rather, to demonstrate a constitutionally cognizable injury-in-fact, the organization "must demonstrate that 'the organization has suffered injury in fact,' including '[s]uch concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests.'" *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)) (alterations in original). The organization must "allege that the defendant's conduct 'perceptibly impaired' the organization's ability to provide services." *Turlock Irrigation Dist.*, 786 F.3d at 24 (quoting *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138-39 (D.C. Cir. 2011)). Perceptible impairment occurs where there exists a "direct conflict between the defendant's conduct and the organization's mission." *Am. Soc. for Prevention of Cruelty to Animals*, 659 F.3d at 25 (quoting *Nat'l Treas. Emps. Union*, 101 F.3d at 1430). This requires more than an allegation that the defendant's activities "injured the plaintiff's interest in promoting its mission," but also that the plaintiff actually "used its resources to counteract that injury." *Id*. Perceptible impairment also occurs where "the defendant's conduct causes an 'inhibition of [the organization's] daily operations.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (alteration in original) (quoting *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric*. ("*PETA*"), 797 F.3d 1087, 1094 (D.C. Cir. 2015)).

In short, the defendant's allegedly "illegal action must be 'at loggerheads with and squarely counter[] [to] the plaintiff['s] organizational objective.'" *U.S. Women's Chamber of Commerce v. U.S. Small Bus. Admin.*, No. 1:04-CV-01889, 2005 WL 3244182, at *6 (D.D.C. Nov. 30, 2005) (alterations in original) (quoting *Nat'l Treas. Employees Union*, 101 F.3d at 1426). As the D.C. Circuit has noted, the "'at loggerheads' requirement exists because, '[i]f the challenged conduct affects an organization's activities, but is neutral with respect to its substantive mission,' then it is 'entirely speculative whether the challenged practice will actually impair the organization's activities.'" *PETA*, 797 F.3d at 1095 (quoting *Am. Soc. for Prevention of Cruelty to Animals*, 659 F.3d at 25, 27).

B. The Fundamental Premise Underlying Plaintiff's Injuries-in-Fact Is Conjectural

Plaintiff sets forth theories for both organizational and associational standing in its Complaint, neither of which suffices to establish standing. Plaintiff relies on different alleged injuries-in-fact for organizational- and associational-standing. For organizational standing, Plaintiff notes that school districts identified with significant disproportionality "must engage in a review of their policies, practices, and procedures." Compl. ¶ 118. School districts that make changes to their policies, practices, and procedures on the basis of such a review must publicly report on those revisions. *Id.* ¶ 119; *see also* 34 C.F.R. § 300.646(c)(2) (noting the obligation of school districts to "publicly report on the revision of policies, practices, and procedures"). Alleging that ED's postponement of the compliance date of the regulations will "reduce the number of school districts determined to be significantly disproportionate," Plaintiff contends that postponement will decrease the number of districts obligated to issue such a report and thus "reduce the amount of

information available to COPAA and its members." Compl. ¶ 119. Plaintiff further asserts that it will suffer diminished access to information pertaining to districts' "root-cause analysis" of the factors contributing to significant disproportionality under § 300.646(d)(1)(ii). *Id.*

For associational standing, Plaintiff alleges that when school districts identified with significant disproportionality actually review their policies, practices, and procedures, those "reviews can find students that are mis-identified, misplaced, or improperly disciplined" and "districts can correct such mistakes." *Id.* ¶ 118. Thus, Plaintiff suggests that because "[t]he delay in the compliance date [of the 2016 Regulations] will reduce the number of school districts that must engage in [such] a review . . . some such mistakes will continue unabated, to the detriment of COPAA and its members." *Id.*

Both of Plaintiff's proffered injuries-in-fact thus rely on the same underlying premise—namely, that ED's postponement of the compliance date for the 2016 regulations will result in fewer school districts being identified with significant disproportionality than would have occurred absent the postponement. *See id.* ¶ 116. Whether and to what extent this premise becomes reality, however, depends on the independent actions of entities not before the Court and not parties to this litigation—namely, States, which wield significant flexibility and discretion as to how the regulations are implemented and applied to school districts within their respective States. In setting forth its two alleged injuries-in-fact, Plaintiff simply assumes without any factual basis that States would have chosen to implement the 2016 Regulations in such a way as to result in more school districts being identified with significant

disproportionality. This assumption renders Plaintiff's alleged injuries both conjectural and hypothetical, as opposed to actual or imminent.

i. States Play a Key Role in Determining When, Which, and How Many School Districts Are Identified with Significant Disproportionality Under the 2016 Regulations

As discussed above, the 2016 Regulations afford significant flexibility and discretion to the States in determining how the regulations would operate and what effect they would have on school districts. 81 Fed. Reg. at 92,397 (noting the need to provide States with "flexibility to tailor [the regulations] to the needs of their populations"). While the regulations set forth "common parameters for analysis, which each State must use," *id*. at 92,391, States have substantial sway over how the regulations would be implemented in practice. *See also id*. at 92,396 (noting the regulations impose some "standardization of [the] analysis" used to identify significant disproportionality, "while providing a great deal of flexibility to States" in how the analysis applies within each State).

The regulations require use of a standard methodology in identifying significant disproportionality. In the first step of this methodology, States calculate risk ratios for seven racial or ethnic groups listed at 34 C.F.R. § 300.647(b)(2) for fourteen categories of analysis. *See* 34 C.F.R. § 300.647(b)(3)-(4). In the second step, States compare the risk ratios for those racial and ethnic groups to all other racial and ethnic groups in the school district. A school district may be, but is not required to be, identified with significant disproportionality when the risk ratio for a racial or ethnic group in any of the fourteen categories of analysis exceeds the applicable risk ratio threshold. *Id*. § 300.647(b)(6). The 2016 Regulations thus require significant disproportionality to be determined by reference to a substantially higher likelihood that a particular racial or ethnic group will

experience a particular outcome, as compared to all other racial and ethnic groups within the school district.

While the regulations require these common parameters for analysis, they nonetheless provide (as Plaintiff acknowledges) "substantial flexibility to the States" in terms of how the regulations actually operate in practice and when findings of significant disproportionality are to be made. Compl. ¶ 69; *see also* 81 Fed. Reg. at 92,388 (noting "wide flexibilities provided to States in the final regulations"). To cite the most obvious example, ED "did not propose to decide for States the point at which specific racial or ethnic overrepresentation becomes significant disproportionality." 81 Fed. Reg. at 92,388. Rather, ED reserved "a key area of flexibility" for the States to set for themselves the risk ratio thresholds that would apply to their school districts, subject to a requirement of reasonableness. *See* 81 Fed. Reg. at 92,388; 34 C.F.R. §§ 300.647(b)(1)(i), (b)(1)(iii)(B). Indeed, ED gave States the discretion to select, if they so wished, "up to 15 different risk ratio thresholds" applicable to the different impairments, placements, and disciplinary removals. 81 Fed. Reg. at 92,421; *see also* 34 C.F.R. § 300.647(b)(1)(ii). Thus, under the 2016 Regulations, States exert significant control over when and at what levels significant disproportionality will be found.

States also determine in the first instance when a sufficient number of children exists in a particular racial or ethnic group to permit application of the regulations' methodology. This happens through the setting of minimum cell sizes (*e.g.*, the number of children in a district from a particular racial or ethnic group identified as having a disability) and n-sizes (*e.g.*, the total number of children in that racial or ethnic group in the school district). Because "[r]isk ratios may produce unreliable results when the

calculation is done with small numbers of children in a particular category of analysis," 81 Fed. Reg. at 92,425, the regulations do not require the States to apply the standard methodology if "[t]he particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size" set by the State. 34 C.F.R. § 300.647(c)(1). ED vested responsibility for setting minimum cell sizes and n-sizes with the States, finding that they are best situated to "balance the risks of inappropriately identifying districts because of small minimum cell sizes or n-sizes against the risk of inappropriately excluding large numbers of districts from analysis because of particularly large minimum cell sizes or n-sizes."[4] 81 Fed. Reg. at 92,425. States thus have under the regulations "a great deal of flexibility to set reasonable minimum n-sizes and cell sizes," which set the points at which the standard methodology would apply in the first place. *Id.* at 92,427.

Finally, even if all of these prerequisites are satisfied—where minimum cell sizes and n-sizes are met and a particular group's risk ratio exceeds the applicable threshold—the regulations nonetheless provide States with the authority, in certain circumstances, *not* to identify a school district with significant disproportionality. In a subsection appropriately titled "Flexibility," the regulations allow States to refrain from making a determination of significant disproportionality where a school district has not exceeded a risk ratio threshold for three prior consecutive years. 34 C.F.R. § 300.647(d)(1). Similarly, a State can decline to identify a district with significant disproportionality if a group's risk ratio exceeds the applicable threshold, but the district has nonetheless demonstrated reasonable progress in lowering that risk ratio in each of the two prior

[4] This approach, ED noted, would enable States to use "minimum cell and n-sizes comparable to what they use for other Federal programs." 81 Fed. Reg. at 92,428.

years. *Id*. § 300.647(d)(2). The regulations do not mandate any specific outcome or action by a State in such scenarios. Rather, the choice of what to do is left to the State. *See* 81 Fed. Reg. at 10,969 (noting that the regulations "provide States with flexibility in determining whether significant disproportionality exists, even if a risk ratio exceeds the risk ratio threshold established by the State").

ii. The Impact that the 2016 Regulations Would Have Had on the Number of School Districts Identified with Significant Disproportionality Is Speculative Given the Considerable Flexibility Afforded to the States

As this makes clear, States have substantial discretion in determining how the regulations would have operated—and thus, what effect the regulations would have had—with regard to their own school districts. Accordingly, the premise on which Plaintiff's alleged injuries-in-fact rest—that more school districts would have been identified with significant disproportionality had ED not postponed the compliance date of the regulations, *see* Compl. ¶ 116—is speculative because it relies on unfounded assumptions about how the States would have implemented the regulations and the effect those decisions would have had on identifications of significant disproportionality writ large.

As a result, Plaintiff cannot demonstrate standing. "When '[t]he existence of one or more of the essential elements of standing . . . depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' it becomes 'substantially more difficult to establish' standing." *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 50 (D.C. Cir. 2016) (first alteration in original) (quoting *Lujan*, 504 U.S. 562); *see also Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684,

689-90 (D.C. Cir. 2015) (where the plaintiff is not "the object of the government action or inaction [s]he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish" (quoting *Lujan*, 504 U.S. at 562)). Indeed, when, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed." *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (quoting *Lujan*, 504 U.S. at 562).

Plaintiff has not accomplished its "substantially more difficult" task of demonstrating a viable injury-in-fact given that Plaintiff's two proffered injuries rest on such a conjectural premise. Even at the time ED issued its final rule in 2016, the agency disclaimed the ability to predict with reasonable certainty whether the new regulations would result in more school districts being identified with significant disproportionality. The regulations, ED pointed out, "largely focus on methodological issues related to the consistency of State policies and do not require States to identify [school districts] at a higher rate than they currently do." 81 Fed. Reg. at 92,458. And the key role played by the States in determining how the regulations would operate in practice made prognostication regarding the likely effect of the regulations difficult, if not impossible. Indeed, as ED specifically noted, its decision "to allow States to select reasonable risk ratio thresholds means that, to a great extent, the final impact of these regulations will be determined by the States themselves." 81 Fed. Reg. at 92,388.

As a result, ED could not estimate "with a high degree of certainty how many [school districts] would be newly identified in future years, particularly given the wide flexibilities provided to States in the final regulations." *Id*. This was a repeated point in ED's final rule. *See, e.g.*, *id*. at 92,458 ("We do not specifically know what risk ratio

thresholds, minimum n-sizes, and minimum cell sizes States will set in consultation with their State Advisory Panels and therefore do not know the number of [school districts] that would be identified under those new thresholds."). Indeed, given the wide flexibilities afforded to the States, ED noted it was "possible that the[] regulations may not result in any additional [school districts] being identified as having significant disproportionality," though it deemed such an outcome "unlikely." *Id.*

These observations of uncertainty are as apt and accurate now as they were when made in 2016. ED's regulations impose a standard methodology for calculating significant disproportionality. But in terms of whether those calculations would have resulted in more identifications of significant disproportionality, such an outcome hinges on "how independent decisionmakers"—here, the States—"[would have] exercise[d] their judgment." *Clapper*, 568 U.S. at 413. This includes the minimum cell sizes and n-sizes selected, the risk ratio thresholds imposed, and the exercise of States' discretion not to identify a school district with significant disproportionality until the district exceeds a risk ratio threshold for up to three prior consecutive years, or where a district has demonstrated reasonable progress in lowering a risk ratio in each of the two prior years. Moreover, when postponing the regulations' compliance date, ED made clear that States were free to "implement the standard methodology [set forth in the 2016 Regulations] . . . to identify significant disproportionality in their [school districts]," even despite the postponement. 83 Fed. Reg. at 31,309; *see also* Compl. ¶ 115 ("[T]he Department has given States a choice whether to delay or not."). Thus, depending on how many States choose of their own accord to adopt the standard methodology, there may be little to no

difference between what will in fact occur and what would have occurred absent postponement.

Courts "must take care not to place [themselves] in the role of policymaker or to second-guess the 'broad and legitimate discretion' of the other branches of government." *Pub. Citizen*, 297 F. Supp. 3d at 22 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (opinion of Kennedy, J.)). "Accordingly, in the absence of clear markers—such as proposed rules or agency pronouncements—[courts] should avoid speculating about how governmental entities 'will exercise their discretion.'" *Id.* (quoting *Clapper*, 568 U.S. at 412). Plaintiff's Complaint offers no such markers or allegations to suggest how the States intended to implement the 2016 Regulations, or how they intend to act following postponement of the compliance date. In such a context, the States constitute paradigmatic "independent actors not before the courts . . . whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Scenic Am.*, 836 F.3d at 50 (quoting *Lujan*, 504 U.S. 562). Due to this uncertainty and indeterminacy, Plaintiff cannot demonstrate standing. *See Gettman v. Drug Enf't Admin*., 290 F.3d 430, 435 (D.C. Cir. 2002) (noting that "courts have reiterated that such speculative claims dependent upon the actions of third parties do not create standing for the purposes of establishing a case or controversy under Article III"); *United Transp. Union v. ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989) (holding that "indeterminacy" of competitive impact was "enough to defeat petitioner's standing"); *Am. Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150 (D.C. Cir. 1977) (affirming dismissal for lack of standing where appellees "rel[ied] solely on speculation

in their attempt to assert that their business or profits would improve in the event that appellees [took the desired regulatory action]").

C. Plaintiff's Alleged Information-Based Injury Fails to Demonstrate Organizational Standing

Beyond the conjecture inherent in the premise underlying Plaintiff's two alleged injuries-in-fact, both are without merit. Plaintiff's first alleged injury-in-fact pertains to the reviews in which school districts must engage after being identified with significant disproportionality. In that review, a district must examine the policies, practices, and procedures it uses in identifying children with disabilities, placing such children in particular educational settings, and effecting disciplinary removals in order to ensure that those policies, practices, and procedures comply with the IDEA. 34 C.F.R. § 300.646(c)(1). If a district revises its polices, practices, and procedures following that review, it must "publicly report on th[ose] revisions." *Id.* § 300.646(c)(2).

Plaintiff postulates that because postponement of the 2016 Regulations will reduce the number of school districts identified with significant disproportionality, fewer school districts will engage in a review under § 300.646(c)(1), and thus fewer districts will issue reports regarding revisions to their policies, practices, and procedures. Compl. ¶ 119. Thus, in support of its organizational standing, Plaintiff alleges that this will "deprive [it] of key information on which it relies to educate its members and the public and will prevent [it] from receiving information it wishes to use in its routine information-dispensing activities," thus obligating it "to expend resources to obtain information about significant disproportionality, and effective remedies, through investigations, research, and state and local public records requests." *Id.* ¶¶ 120, 122.

i. Plaintiff Is Not Subjected to Any Operational Costs Beyond Those Already and Currently Being Expended

This information-based injury fails for three reasons. First, Plaintiff cannot demonstrate any "concrete and demonstrable injury to [its] activities." *Pub. Citizen, Inc*., 297 F. Supp. 3d 36 (quoting *PETA*, 797 F.3d at 1093) (alteration in original); *see also Food & Water Watch*, 808 F.3d at 919 (requiring an "inhibition of [the organization's] daily operations'" (quoting *PETA*, 797 F.3d at 1094) (alteration in original)). As pertaining to public reporting by districts identified with significant disproportionality, the 2016 Regulations are virtually identical to the preceding version. *Compare* 34 C.F.R. § 300.646(c)(2) (requiring districts identified with significant disproportionality "to publicly report on the revision of policies, practices, and procedures described under paragraph (c)(1) of this section") *with* 34 C.F.R. § 300.646(b)(2) (2016) (requiring districts identified with significant disproportionality "to publicly report on the revision of policies, practices, and procedures described under paragraph (b)(1) of this section"). Thus, under the currently applicable regulations, school districts are still required to publicly report on revisions made to their policies, practices, and procedures, and that obligation would not change under the 2016 Regulations.

Two conclusions follow from these points. First, any difference between the *amount* of information publicly available to Plaintiff through school districts' reports is a product of what effect, if any, the 2016 Regulations will have on the number of school districts identified with significant disproportionality. For the reasons discussed above, Plaintiff's suggestion that more information would have been available had ED not postponed the compliance date of the regulations is entirely speculative and does not support standing.

Second, because the compliance date for the regulations was postponed and thus school districts were never required to adopt the standard methodology set forth therein, Plaintiff is currently in the same situation it has always been in and cannot demonstrate any injury to its daily operations and activities. Plaintiff suggests that the postponement "deprive[s] COPAA of key information on which it relies to educate its members and the public and will prevent COPAA from receiving information it wishes to use in its routine information-dispensing activities." Compl. ¶ 120; *see also id.* ¶ 121 (noting Plaintiff's efforts "to educate the public about racial disproportionality and possible remedies"); *id.* ¶ 122 ("COPAA is required to expend resources to obtain information . . . ."); *id.* ¶ 123 ("But for the Department's Delay Regulation, COPAA would not need to undertake such extensive efforts."). But insofar as Plaintiff refers to reports that would have issued under the 2016 Regulations, Plaintiff never had access to that "key information" in the first place and thus is not "deprive[d]" of anything. *Id.* ¶ 120. And if it wishes to obtain such information, Plaintiff must simply continue engaging in the same information-gathering activities that it does now and did prior to the issuance of the 2016 Regulations. *See Food & Water Watch, Inc.*, 808 F.3d at 920 (noting that "an organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended'" (alteration in original) (quoting *Nat'l Taxpayers Union*, 68 F.3d at 1434)); *see also Nat'l Taxpayers Union*, 68 F.3d at 1434 ("[The plaintiff organization] cannot convert its ordinary program costs into an injury in fact.").

Such activities do not suffice to demonstrate standing. *See, e.g.*, *Nat'l Fair Hous. All. v. Carson*, No. CV (BAH) 18-1076, 2018 WL 3962930, at *22 (D.D.C. Aug. 17,

2018) (finding no injury-in-fact where the organizational plaintiffs were "largely engaged in the same kinds of activities now that they were undertaking before the [challenged agency action] . . . namely, education, research, advocacy, and counseling"). Indeed, any decision to continue engaging in such enterprises merely constitutes the type of "'self-inflicted' budgetary choice" that falls short for Article III purposes. *Am. Soc. for Prevention of Cruelty to Animals*, 659 F.3d at 25; *see also Elec. Privacy Info. Ctr. v. U.S. Dep't of Educ.*, 48 F. Supp. 3d 1, 23-24 (D.D.C. 2014) (reasoning that when an organization's mission includes "advocacy and lobbying," the expenditure of funds to "promote its legislative agenda through research, education, [and] outreach to the public and the media . . ." are "normal and critical" parts of its mission and operations).

Also unavailing is Plaintiff's allegation that ED's postponement "has already impaired and will continue to impair COPAA's ability to bring potential IDEA violations to the attention of the Department." Compl. ¶ 121. Regarding past impairment, Plaintiff is no more impaired now than it was prior to ED's postponement and prior to ED's issuance of the 2016 Regulations. As for Plaintiff's reliance on its allegedly current impaired ability to bring IDEA violations to the attention of ED, "that 'injury' is no more than a generalized 'interest in enforcement of the law,' and does not support standing." *Judicial Watch, Inc. v. Fed. Election Comm'n*, 180 F.3d 277, 278 (D.C. Cir. 1999) (quoting *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)). Indeed, courts have made clear that organizational standing "requires 'more than allegations of damage to an interest in seeing the law obeyed or a social goal furthered.'" *Nat'l Taxpayers Union*, 68 F.3d at 1433 (quoting *Am. Legal Found. v. Fed. Commc'ns Comm'n*, 808 F.2d 84, 92 (D.C. Cir. 1987)). This case should be no different.

Finally, Plaintiff relies on a purported conflict with ED's postponement and its "mission to prevent violations of the IDEA," as well as its desire "to learn what school districts that would otherwise be determined to be significantly disproportionate under the 2016 Final Regulations are doing." Compl. ¶¶ 120, 122. Neither basis suffices. "It is not enough for the organization to show that its 'mission has been compromised,'" *Pub. Citizen*, 297 F. Supp. 3d at 36 (quoting *Food & Water Watc*h, 808 F.3d at 919), or "that it has experienced a 'setback to its abstract social interests,'" *id*. (quoting *Equal Rights Ctr*., 633 F.3d at 1138). These allegations set forth only "the type of abstract concern that does not impart standing." *Food & Water Watch*, 808 F.3d at 919 (quoting *Nat'l Taxpayers Union*, 68 F.3d at 1433).

ii. Plaintiff's Alleged Informational Injury Depends on a Chain of Hypothetical Third-Party Conduct

Plaintiff's alleged informational injury also fails for the independent reason that it is pure conjecture. *See, e.g.*, *DaimlerChrysler Corp.*, 547 U.S. at 350 (noting that courts "may not entertain [conjecture] in assessing standing"). As explained above, the premise underlying this injury is speculative and contingent on the way in which States choose to implement the regulations, including setting risk ratio thresholds, setting minimum cell sizes and n-sizes, and exercising discretion in certain circumstances not to identify districts with significant disproportionality. Plaintiff's informational injury takes this chain of speculation one step further. Assuming that, following a State's implementation of the regulations, a school district is identified with significant disproportionality, it is not automatically required to issue a report under 34 C.F.R. § 300.646(c)(2). Rather, the district must first review the policies, practices, and procedures it uses in identifying children with disabilities, placing such children in particular educational settings, and

effecting disciplinary removals for compliance with the IDEA. *Id*. § 300.646(c)(1). Only if the district determines that a change to its policies, practices, or procedures is necessary for compliance and then actually makes a change is the district required to publicly report on the change. *See id*. § 300.646(c)(2).

Thus, in order for Plaintiff to demonstrate standing on the basis of its informational injury, the Court must find that Plaintiff will actually or imminently suffer a "reduc[tion] [in] the amount of information available to COPAA and its members," Compl. ¶ 119, on the basis that (1) States would have implemented the regulations, with all of the attendant flexibilities, in a way that increases the number of school districts identified with significant disproportionality and therefore subject to § 300.646(c), *id*. ¶¶ 116, 119; and (2) the school districts would have conducted reviews that identified necessary changes to their policies, practices, and procedures and then made those changes, thus triggering the obligation for public reporting. *See Lujan*, 504 U.S. at 560 (requiring injuries-in-fact to be actual or imminent, and not conjectural or hypothetical).

Plaintiff's informational injury thus depends on the hypothetical actions of *two* sets of independent actors not before the Court—the States, in deciding how to implement the 2016 Regulations, and the school districts, in conducting their reviews and then identifying and making necessary revisions to their policies, practices, and procedures. As the D.C. Circuit has noted, "[t]he greater number of uncertain links in a causal chain, the less likely it is that the entire chain will hold true." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (en banc). Such uncertain links are fatal to a plaintiff's efforts to demonstrate standing, as it must "allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine

circumstances in which he could be affected by the agency's action." *Save Jobs USA v. DHS*, 210 F. Supp. 3d 1, 7 (D.D.C. 2016), *appeal filed* Sept. 27, 2016 (D.C. Cir.); *see also Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) (noting that standing requirements are not "satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury"). Accordingly, the Court should reject Plaintiff's information-based "theory of standing, which relies on a highly attenuated chain of possibilities" and thus "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410; *see also Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (noting that courts "may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)" (quoting *United Transp. Union*, 891 F.2d at 913)).[5]

iii. There Is No Statutory or Regulatory Requirement that Districts Publicly Disclose Their "Root-Cause" Analysis

In a final attempt to demonstrate organizational standing via an information-based injury, Plaintiff references a "root-cause analysis" that school districts identified with significant disproportionality are required to conduct in order to "identif[y] the factors contributing to the significant disproportionality." Compl. ¶ 119. As above, Plaintiff alleges that because ED's postponement of the regulations' compliance date will "reduce the number of school districts determined to be significantly disproportionate," fewer

[5] The Court should alternatively find this injury-in-fact lacking in causation and redressability, as it is "based on speculation upon speculation about how third parties might act." *Abulhawa v. U.S. Dep't of Treasury*, 239 F. Supp. 3d 24, 35 (D.D.C. 2017); *see also id*. at 35, 37 (finding no causation or redressability).

districts will engage in this root-cause analysis, which "will necessarily reduce the amount of information available to COPAA and its members." *Id*.

As an initial matter, the regulation on which Plaintiff relies, 34 C.F.R. § 300.646(d)(1)(ii), merely sets restrictions on a school district's use of IDEA funds reserved for comprehensive coordinated early intervening services after it has been identified with significant disproportionality. It does not mandate public disclosure of any information. Rather, § 300.646(d)(1)(ii) simply requires that after a finding of significant disproportionality is made, a district must "reserve the maximum amount of funds under section 613(f) of the [IDEA]" to address factors that the district identifies as contributing to the significant disproportionality. 34 C.F.R. § 300.646(d). Nothing in that regulatory provision or the IDEA requires the issuance of a report or public disclosure regarding the nature or outcome of a school district's "root-cause analysis."

For this reason, Plaintiff's reliance on 34 C.F.R. § 300.646(d)(1)(ii) fails to demonstrate a viable information-based injury-in-fact. Informational injuries arise only in "exceedingly limited" circumstances, *see Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 197 (D.D.C. 2015), and only when Congress explicitly defines "the existence and scope" of such an injury in a statute. *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). A plaintiff sets forth a "sufficiently concrete and particularized informational injury" when two prerequisites are met. *Id*. First, the plaintiff must allege that it has "been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it." *Id*. Second, the plaintiff must allege that, by being denied access to that information, it suffers "the type of harm Congress sought to prevent by requiring disclosure." *Id*. That a statute requires

disclosure of information is "the sine qua non of informational injury." *Id.* The D.C. Circuit has emphasized the "narrow scope of informational injuries," *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018), and requires a statute to mandate disclosure "by its terms." *Friends of Animals*, 828 F.3d at 992.

While the IDEA requires public disclosure of revisions, if any, made by school districts identified with significant disproportionality to their policies, procedures, and practices, *see* 20 U.S.C. § 1418(d)(2)(C), there is no such statutory requirement for public disclosure of districts' root-cause analysis. Indeed, the obligation of those districts to undertake a root-cause analysis when implementing comprehensive coordinated early intervening services was first added in the 2016 Regulations and did not exist prior to that. *See* 34 C.F.R. § 300.646(b) (2016). The absence of a statutory mandate for public disclosure distinguishes this case from others in which the Supreme Court found standing where a "plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). *See also, e.g.*, *id.* at 26 (finding standing in suit seeking disclosures regarding the membership, contributions, and expenditures of the American Israel Public Affairs Committee under the Federal Election Campaign Act of 1971, which requires such records to be filed); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 451 (1989) (finding standing in suit seeking minutes, records, and reports of the American Bar Association's Standing Committee on Federal Judiciary under the Federal Advisory Committee Act, which mandates public disclosure of such records).

Plaintiff cannot therefore rely on a purported lack of public disclosure of school districts' root-cause analyses, as it has not "been deprived of information that . . . a statute requires the government or a third party to disclose to it." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) (quoting *Friends of Animals*, 828 F.3d at 992); *see also Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of the Treas., Internal Revenue Serv.*, 21 F. Supp. 3d 25, 33 (D.D.C. 2014) (finding no standing where the plaintiff "cite[d] no law or interpretation of law that automatically and directly applies . . . disclosure requirements to the . . . organizations at issue"). Because the IDEA "does not confer any such informational interest on [Plaintiff]," this postulated injury does not suffice to establish standing, as Plaintiff "cannot ground organizational injury on a non-existent interest." *Elec. Privacy Info. Ctr.*, 878 F.3d at 379. And absent a cognizable informational interest, any actions taken by Plaintiff to obtain such information, or any actions it might take in the future, constitute nothing more than "a self-inflicted budgetary choice that cannot qualify as an injury in fact." *Id*. (quoting *Am. Soc'y for Prevention of Cruelty to Animals*, 659 F.3d at 25).[6]

D. Plaintiff's Alleged Injury Based on the Failure of States to Identify Mistakes in Student Identification, Placement, and Discipline Fails to Demonstrate Associational Standing

Plaintiff's attempt to establish associational standing similarly fails. As noted *supra*, Plaintiff suggests in its Complaint that the reviews of policies, practices, and

[6] This alleged injury-in-fact also fails for the alternative reason that Plaintiff cannot demonstrate it was caused by ED. *See Elec. Privacy Info. Ctr.*, 878 F.3d at 379 ("[N]ot only does EPIC have no cognizable interest in a privacy impact assessment but the resources it spent were not even demonstrably attributable to the lack of an assessment. It has suffered no organizational injury, much less an injury caused by the defendants.").

procedures undertaken by school districts identified with significant disproportionality "can find students that are mis-identified, misplaced, or improperly disciplined, and districts can correct such mistakes." Compl. ¶ 118. Plaintiff contends that ED's postponement of the regulations' compliance date will result in fewer school districts identified with significant disproportionality, thus "reduc[ing] the number of school districts that must engage in a review of their policies, practices, and procedures." *Id.* The result, Plaintiff alleges, is that "[a]bsent these mandated reviews, some such mistakes will continue unabated, to the detriment of COPAA and its members." *Id.*

As an initial point, those reviews are in no way "[a]bsent," but rather, continue to be mandatory for school districts identified with significant disproportionality, even following ED's postponement of the regulations' compliance date. *See* 34 C.F.R. § 300.646(b)(1) (2016). But even construing Plaintiff's allegation to refer to an unidentified number of reviews that only would have occurred if the 2016 Regulations had been implemented, Plaintiff cannot demonstrate standing on the basis of alleged "mistakes" that will "continue unabated." Compl. ¶ 118. To begin, though Plaintiff suggests in a conclusory fashion that the absence of these reviews operates to "the detriment of COPAA," Plaintiff fails to explain how such mistakes would result in any injury to the organization itself. Indeed, it is hard to see how school districts' uncaught mistakes in student identification, placement, or discipline harms Plaintiff in an organizational capacity. *Cf. Ctr. for Law & Educ.*, 396 F.3d at 1161-62 ("[C]onflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing." (quoting *Nat'l Treas. Emps. Union*, 101 F.3d at 1429)).

To the extent Plaintiff seeks to maintain this action on the basis of associational standing and bring suit on behalf of its members, which include "parents of children with disabilities, their attorneys, and their advocates," Compl. ¶ 12, such efforts also fail. Plaintiff does not identify any member of its organization—much less any member who would have been injured by such undiscovered mistakes—which is fatal to its claim of associational standing. Associational standing requires a plaintiff to show that "(1) at least one of its members has standing in its own right, (2) the interests [it] seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual . . . member[s] in the suit." *Interstate Nat. Gas Ass'n of Am. v. FERC*, 494 F.3d 1092, 1095 (D.C. Cir. 2007).

Plaintiff falls short at the first step. "[I]t is not enough [for Plaintiff] to aver that unidentified members have been injured." *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011). Nor is it sufficient "to show . . . that there is a substantial likelihood that at least one member [of the association] has standing." *Pub. Citizen*, 297 F. Supp. 3d at 18 (alterations in original) (quoting *Am. Chemistry Council v. Dep't of Transp*., 468 F.3d 810, 820 (D.C. Cir. 2006)). Rather, Plaintiff "must specifically 'identify members who have suffered the requisite harm.'" *Chamber of Commerce*, 642 F.3d at 199 (quoting *Summers v. Earth Island Inst*., 555 U.S. 488, 499 (2009)); *see also Am. Chemistry Council.*, 468 F.3d at 820 ("At the very least, the identity of the party suffering an injury in fact must be firmly established."); *Pub. Citizen*, 297 F. Supp. 3d at 18 ("At the threshold, . . . the plaintiff-association [must] identify at least one specific member who has suffered, or is likely to suffer, an injury in fact."); *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 400

(D.D.C. 2014) ("Plaintiffs bear the burden of specifically identifying at least one 'member [who] had or would suffer harm' from each challenged agency action."). Plaintiff makes no effort to do so. As a consequence, it cannot demonstrate standing on this basis.

II. Plaintiff Cannot Demonstrate that Either of Its Alleged Injuries-in-Fact Are Fairly Traceable to ED or Would Be Redressed By a Favorable Judicial Order

A. Causation and Traceability

As with the requirement of injury-in-fact, Plaintiff cannot carry its substantial burden of demonstrating that its alleged injuries are traceable to ED and would be redressed by a favorable judicial opinion. When a plaintiff's "asserted injury stems from 'the government's allegedly unlawful regulation (or lack of regulation) of someone else,' the 'fairly traceable' and redressability prongs of standing analysis require more exacting scrutiny." *Freedom Republicans, Inc. v. Fed. Election Comm'n*, 13 F.3d 412, 416 (D.C. Cir. 1994) (quoting *Lujan*, 504 U.S. at 562). There must be "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Arpaio*, 797 F.3d at 20 (citation omitted); *see also U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000) ("[I]t becomes the burden of the [plaintiff] to adduce facts showing that [third-party] choices have been or will be made in such manner as to produce causation and permit redressability." (quoting *Lujan*, 504 U.S. at 562)). "[R]eliance on the anticipated action of unrelated third parties makes it considerably harder to show the causation required to support standing." *Arpaio*, 797 F.3d at 20.

Regarding causation, as explained by the D.C. Circuit in *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004) *abrogation on other grounds recognized by Perry Capital, LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), where courts "find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct," the "cases fall into two . . . categories." *Id*. at 940. "First, a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Id*. This means that "when the challenged rule carves out an exception to otherwise outlawed behavior (*i.e.*, when the rule that the plaintiff seeks to attack authorizes the third party to do something that would have been impermissible otherwise) and the plaintiff is allegedly harmed as a result, courts have concluded that the necessary causal link between repealing the challenged rule and redressing the injury is established." *Am. Fed'n of Gov't Emps., AFL-CIO v. Vilsack*, 118 F. Supp. 3d 292, 300 (D.D.C. 2015).

A necessary predicate of this principle, therefore, is that the plaintiff's alleged injury must "result directly from what the challenged regulation permits." *Id*.; *see also Urban Health Care Coal. v. Sebelius*, 853 F. Supp. 2d 101, 108 (D.D.C. 2012) (noting that cases within this category "each . . . involve[] a challenge to agency rule-making or agency adjudication that affected, and effectively bound, the third-parties"). Thus, "where a plaintiff's alleged injury is not caused directly by the purportedly otherwise illegal act that the rule has authorized," but rather, is an "attenuated" or "indirect consequence of the government's authorization, further evidence is needed to establish the causation element of standing." *Am. Fed'n of Gov't Emps.*, 118 F. Supp. 3d at 300.

This action thus does not fall within this first category of cases. Although ED's postponement of the regulations' compliance date permits States to continue identifying instances of significant disproportionality using their existing methodology, which some States might not otherwise be allowed to use, the regulations do not bind the States to any threshold at which, or circumstances in which, significant disproportionality must be found. Rather, they give States considerable discretion over how, when, and under what conditions a district will be identified with significant disproportionality. As such, Plaintiff's two proffered injuries-in-fact—reduced access to information and undiscovered mistakes in student identification, placement, and discipline—would only result, to the extent they result at all, as an attenuated and indirect consequence of ED's actions, with the States' implementation of the regulations and the districts' reviews of their own policies, practices, and procedures operating as intervening factors. Causation cannot, therefore, be found on this basis. *See State Nat'l Bank*, 795 F.3d at 55 (finding that the plaintiff, a bank, lacked standing to challenge the Financial Stability Oversight Council's "too big to fail" designation authority because the plaintiff's theory of causality was "simply too attenuated and speculative to show the causation necessary to support standing").

In the second category of cases identified by the D.C. Circuit in *National Wrestling Coaches Ass'n*, courts "have held that plaintiffs have standing to challenge government action on the basis of injuries caused by regulated third parties where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." 366 F.3d at 941. It is "the burden of the plaintiff to adduce facts showing

that those choices have been or will be made [by the regulated third-party] in such manner as to produce causation and permit redressability of injury." *Am. Freedom Law Ctr. v. Obama*, 106 F. Supp. 3d 104, 109 (D.D.C. 2015) (quoting *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 938).

There is no "substantial evidence" of such a causal relationship here, and certainly none that leaves "little doubt" as to the existence of causation and redressability. To the contrary, the plain text of the 2016 Regulations and the agency's final rule announcing the regulations make clear that States play a significant role in determining how the regulations operate as to their own school districts. Though the regulations require the use of certain "common parameters for analysis," 81 Fed. Reg. at 92,391, the decisions on issues that actually determine when significant disproportionality will be found all lie in the hands of the States. "The 'causal connection between the injury and the conduct complained of' must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Arpaio*, 797 F.3d at 19 (quoting *Lujan*, 504 U.S. 561). And "speculation about the complex decisions made by" third-parties will not suffice. *Id*. at 21. For these reasons, Plaintiff's theories of causation cannot survive the "more exacting scrutiny" applied in the context of claims challenging the Government's nonregulation of third-parties. *Freedom Republicans*, 13 F.3d at 416 (quoting *Lujan*, 504 U.S. at 562).

B. Redressability

For similar reasons, Plaintiff cannot show a "substantial likelihood" that the relief it seeks—effectively, vacatur of the agency's rule postponing the regulations' compliance date, *see* Compl. at 37—would redress the two injuries of which it complains. *Renal*

Physicians Ass'n v. U.S. Dep't of Health & Human Servs., 489 F.3d 1267, 1275 (D.C. Cir. 2007). Even if implemented, the 2016 Regulations would simply require the States to apply certain standardized calculations using certain specified metrics. They do not mandate any particular circumstance in which findings of significant disproportionality or revisions to a district's policies, practices, or procedures must be made. It is therefore far from clear that vacatur of the agency's regulation postponing the July 1, 2018 compliance date would increase the amount of information available to Plaintiff through the issuance of school district reports, which would be dependent, *inter alia*, on the risk ratio thresholds set by States and the revision, if any, of school districts' policies, practices, or procedures.[7] *See* 34 C.F.R. § 300.646(c)(2). It is similarly speculative whether vacatur would reduce the number of previously undiscovered mistakes in student identification, placement, or discipline, which would depend on the number, nature, and quality of the reviews performed by school districts.

"When conjecture is necessary, redressability is lacking." *West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017). Courts "require[] that the facts alleged be sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Renal Physicians Ass'n*, 489 F.3d at 1275. Plaintiff cannot make such a showing.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of

[7] It also goes without saying that vacatur is far from likely to provide Plaintiff with additional information regarding school districts' root-cause analyses, as the regulations do not require disclosure of that information in the first place. *See supra* Part I.C.iii.

jurisdiction.

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