

July 9, 2019

Director of the Information
Collection Clearance Division
U.S. Department of Education
550 12th Street SW, PCP, Room 9086
Washington, DC 20202-0023

RE: ED-2019-ICCD-0065

Dear Director:

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.7 million children with disabilities in America. COPAA's mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community.

We are writing to provide comments on the U.S. Department of Education (ED) proposed Significant Disproportionality State Survey (Survey). As indicated by the notice, ED intends to "collect information on the State's use of the standard methodology, or another methodology based upon risk ratios and risk ratio thresholds, to identify significant disproportionality in the local education agencies (LEAs) of the State... and will use this information to support States and LEAs in their efforts to comply with the statutory requirement at section 618(d) of the Individuals with Disabilities Education Act (IDEA)." COPAA has long supported the implementation of the *Equity in IDEA* regulations¹ to assure appropriate identification and support for eligible children and to help correct the inappropriate identification of children of color for special education services because we know this leads to segregation and/or more frequent use of harsh disciplinary actions that affect the child. The Equity in IDEA regulations were promulgated in 2016 with a compliance date of July 1, 2018. In March 2019, the District Court for the District of Columbia vacated ED's effort to delay the regulations.

COPAA's commitment to and work in support of equity for all children guides our efforts to assure that the required regulatory changes for State Education Agencies (States) will in fact help assure students are treated with fairness under the law and capture how States and local education agencies (LEA) intend to determine progress and by what specific student equity measures. As ED has conceded (albeit after it issued the proposed Survey for comment),² States must move forward to

¹ 34 CFR 300.646 & 647

² U.S. Department of Education, *Calculating Significant Disproportionality* (May 21, 2019), <https://sites.ed.gov/idea/calculating-significant-disproportionality/>.

implement the regulations in the 2018-19 school year in order to identify and address significant disproportionality. ED must support this effort and the Survey as currently proposed does not do so.

COPAA opposes the Survey for the reasons outlined below and has also provided an Appendix detailing specific edits to the Survey as discussed therein:

I. There Are Other Pressing Data Collection Matters That ED Must Address Around the Equity in IDEA Regulations.

No one doubts the importance of collecting relevant data. But before releasing a new data collection of questionable value, ED must start collecting all the data identified in the Equity in IDEA regulations and must, in the interim, assist States to comply with existing data collections.

Rationale: *First*, ED is *not* currently collecting the detailed data the Equity in IDEA regulations said it would collect. With regard to data reporting, the Equity in IDEA regulations provide:

The State must report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for measuring reasonable progress ... and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes not presumptively reasonable ... must include a detailed explanation of why the numbers chosen are reasonable and how they ensure that the State is appropriately analyzing and identifying LEAs with significant disparities.³

Although ED sought clearance from the Office of Management and Budget (OMB) in July 2017 to collect all of that data from States,⁴ ED abandoned its proposal in November 2017, apparently after it had decided to delay the Equity in IDEA regulations.⁵

Recommendation: ED should abandon this proposed Survey. ED should make it a priority to obtain clearance to collect all the data described in the Equity in IDEA regulations in a mandatory annual IDEA collection as soon as possible.

Rationale: *Second*, in the meantime, it is critical that ED assist States to provide complete and accurate data for the 2018-19 school year through the presently cleared EMAPS data collection, even though that form will not collect as much information as the Equity in IDEA regulations identify. ED currently asks States in EMAPS what their “definition of significant disproportionality” is.⁶ The instructions say SEAs ... “should” (but don’t have to) “include the following elements” in their description “if appropriate:

1. The calculation method(s) being used (i.e., risk ratio, weighted risk ratio, e-formula, etc.);
2. Any minimum cell- or n-sizes (i.e., risk numerator and/or risk denominator);
3. The number of years of data used in the calculation; and

³ 34 C.F.R. § 300.647(b)(7).

⁴ ED initially sought approval to collect these data as part of the clearance of its Annual State Application under Part B of the IDEA, OMB Control No. 1820-0030, 82 Fed. Reg. 31,954-55 (July 11, 2017); and its State and Local Education Agency Record and Reporting Requirements under Part B of the IDEA, OMB Control No. 1820-0600, 82 Fed. Reg. 31,955 (July 11, 2017).

⁵ ED abandoned its requests for these data in both collections. *See* Information Collection Request Reference No. 2017-07-1820-002, *Supporting Statement for 1820-0030* (Nov. 29, 2017), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=78801301>; Information Collection Request Reference No. 2017-07-1820-001, *Supporting Statement for 1820-0600* (Nov. 29, 2017), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=78800901>

⁶ EMAPS User Guide: State Supplemental Survey – IDEA SY 2018-19, at 32 (Release 10.0, Jan. 2019), <https://www2.ed.gov/about/initiatives/ed/facts/emaps-idea-sss-user-guide.pdf>.

4. The threshold at which significant disproportionality is identified.”⁷

Unlike the collection anticipated by the Equity in IDEA regulations, the *EMAPS* form does not solicit data on standards for measuring reasonable progress, or the rationales for the State choices, including detailed explanations for minimum cell sizes and minimum n-sizes that are not presumptively reasonable.

For 2018-19 school year, that portion of the *EMAPS* data collection opened and closed in February 2019 (prior to the District Court’s invalidation of ED’s delay regulation) and will be open for changes for only 9 days in January 2020.⁸

Recommendation: ED should abandon this proposed Survey. ED should be working with States now to make sure they provide full and accurate information when the *EMAPS* data collection re-opens in light of their obligation to comply with the Equity in IDEA regulations for this school year, as recently acknowledged by ED.⁹

II. ED Must Initiate A Study of School Administrators, Teachers and Parents as Promised in The Preamble to the Final Equity in IDEA Regulations.

Rationale: ED must follow through on its commitment, made in the preamble to the final Equity in IDEA regulations, to conduct “an examination of the extent to which school and LEA personnel incorrectly interpret the risk ratio thresholds and implement racial quotas in an attempt to avoid findings of significant disproportionality by States, contrary to IDEA.”¹⁰

It is important to understand how teachers and school-level administrators are, in practice, responding to the regulations and how parents are perceiving those responses. Without such examination, it is impossible to know what additional guidance or technical assistance is necessary to further reduce the risk of students of color being over-, under- or mis-identified as students with disabilities, improperly placed, and improperly disciplined because of their race or national origin.

Recommendation: ED should abandon this proposed Survey. ED must promptly initiate a separate survey, as promised in the preamble to the Equity in IDEA regulations, that inquires of teachers and parents about the effects, if any, of the new policies and actual practices in schools and districts.

III. The Survey Is Duplicative, Premature, And A Waste of Resources.

Rationale: Many of the questions in the proposed Survey will be answered by States once ED clears the collection, discussed in Part I above, regarding all the data required to be reported by the Equity in IDEA regulations. For example, that collection will gather data the proposed Survey wishes to solicit about the rationale for risk-ratio thresholds adopted (Part I.1.a); the definition of “reasonable progress” and selection of multiple years of data (Part V.1 & 2); and the rationale for risk-ratios, minimum cell and n-sizes and reasonable progress (Part V.3).

We agree that this information about the decisions States make about implementation of the Equity in IDEA regulations is appropriate, but it should be collected as part of a mandatory annual IDEA collection, not as a voluntary stand-alone survey. Further, if this Survey is intended as a substitute to that regular collection, then the Survey is under-inclusive, because it does not ask for all the decisions

⁷ *Id.*

⁸ *Id.* at 6.

⁹ U.S. Department of Education, *Calculating Significant Disproportionality* (May 21, 2019), <https://sites.ed.gov/idea/calculating-significant-disproportionality/>.

¹⁰ 81 Fed. Reg. 92,376, 92,385 (Dec. 19, 2016); *see also id.* at 92,395 (“we plan to evaluate the impact of these regulations, including the implications of using risk ratios to compare racial and ethnic groups”).

made by the States, just the rationales for certain decisions, and because it is voluntary and does not extend to all the government entities (such as the District of Columbia) that are subject to the Equity in IDEA regulation.

Recommendation: ED should abandon this proposed Survey. ED should make it a priority to obtain clearance to collect all the data described in the Equity in IDEA regulations in a mandatory annual IDEA collection as soon as possible.

Rationale: Many of the questions contained in the proposed Survey are premature. Clearance of this proposed Survey by OMB will not be complete until the Fall of 2019. Because ED disrupted the orderly roll-out of compliance with the Equity in IDEA regulations, many States did not begin implementing the regulations until March 2019 (when the court vacated ED's delay regulation) or even May 21, 2019 (when ED first acknowledged that States would have to comply with the regulations for the 2018-19 school year).

Therefore, asking States questions in Fall 2019 is premature when asking about, for example, what steps States have taken with regard to monitoring (Part I.2); challenges that have been faced in implementation (Part I.3 & 4, Part V.4); any unintended consequences observed (Part I.5); any problems encountered with the root-cause analyses (Part IV); and meeting LEA capacity and training needs (Part VI.1). Asking States to respond prematurely is a waste of their time and resources. ED (and States) would be better served if resources were directed toward collecting the basic data discussed in Part I about implementation.

Furthermore, it is unclear if this is intended as an annual Survey. ED said, in Supporting Statement A, Section 6, that this is "planned as a reoccurring Survey." But in later years, a Survey of this type should be designed with the capacity to compare trends from year to year and to be adapted to try and answer important questions such as: how districts have reacted to being on the list of significant disproportionality districts; and how have districts that are close to being identified reacted?

Recommendation: ED should abandon this proposed Survey. If ED intends to go forward with this Survey, ED must reconsider the timing of the Survey, allowing States to have at least one full school year to implement a methodology based upon risk ratios and risk ratio thresholds to identify significant disproportionality in LEAs. Additionally, the Survey must be re-designed to consider trend line questions important in the long run regarding implementation at the LEA and State levels.

IV. Making the Survey Voluntary, As Proposed, Is Likely to Skew the Results and Hide the Responses from The Public.

Rationale: IDEA authorizes ED to require States to report any data ED wishes. 20 U.S.C. § 1418(a)(3) says: "Each State that receives assistance under this subchapter... shall provide data each year to the Secretary of Education and the public on the following: ... [a]ny other information that may be required by the Secretary.)" But ED appears to be electing not to rely on this authority, and instead leaving States with a choice whether or not to reply. That decision is objectionable for two reasons.

First, making the Survey voluntary will result in response bias because ED will only receive responses of those who choose to volunteer. Voluntary response samples tend to oversample those who have strong opinions and under sample those who do not care much about the topic. Inferences

drawn from a voluntary responses sample would be misleading because these methods of choosing a sample are biased.¹¹

Second, by not relying on IDEA's data-collection authority, the responses to the Survey will not be made available to the public, as otherwise would be required by the IDEA. (See: 20 U.S.C. § 1418(a) "any data required by the Secretary shall be provided to the Secretary of Education and the public." Responses to the Survey should be made available to the public so that parents, teachers and other stakeholders have the opportunity to learn more about the implementation process the State has designed to improve discriminatory practices in districts.

Recommendation: ED should abandon this proposed Survey. If ED intends to go forward, ED must issue the Survey under 20 U.S.C. § 1418(a), and therefore State participation will be mandatory (not voluntary) and States will be required to make the responses available to the public.

In conclusion, the whole purpose of the Equity in IDEA regulations is to stop the decades-long practices in certain districts and States that have allowed significant racial and ethnic disparity and discrimination in the identification of children for special education, including identification by disability category, educational placement, and disciplinary action. If ED is to proceed with the proposed Survey of States with regard to significant disproportionality, the survey tool must be redesigned and the process to collect the data must be reconsidered.

Without changes, the current proposed Survey will do little to advance the best practices intended by the 2016 Equity in IDEA regulations which are meant to help prevent and reduce the discriminatory practices that affect our nation's children and children of color in particular. Therefore, COPAA encourages ED to rethink both the Survey's purpose and its design. In doing so, ED will begin to fulfill its obligation to States as they strive to meet their statutory responsibilities in ensuring that the promise of IDEA is fulfilled without regard to race or ethnicity.

Sincerely,



Denise Marshall
Executive Director

¹¹ The statements in this paragraph are drawn or paraphrased from Daren S. Starnes et al., *The Practice of Statistics* 220 (2010), and <https://web.ma.utexas.edu/users/mks/statmistakes/biasedsampling.html>.

APPENDIX A

Rationale: ED must make the following changes to the Survey in order accommodate the above recommendations as well as to assure data collected from States will allow ED to set trend lines for comparability and provide useful data to both ED and the public.

Recommendations:

A. Delete the following questions:

- **Delete:** Introductory Questions 1 and 2 and all of parts II and III.

Rationale: ED has now made clear that all states must use the standard methodology for 2018-19 school year, therefore the questions are unnecessary.

- **Delete:** Question I.1.a

Rationale: It is repetitive of Question V.3.

- **Delete:** Question I.2.a.

Rationale: It is unclear what the question means when it asks whether the standard methodology “actually addresses” significant disproportionality. COPAA suggests that ED may instead want to elicit from States specific examples where the application of the standard methodology results in identification of LEAs that seem either over- or under-inclusive based on other quantitative or qualitative data the State collects about those LEAs.

- **Delete:** Question I.2.g

Rationale: This question suggests that a State needs to ensure that LEAs complying with the requirements of IDEA are not subject to “IDEA statutory remedies for exceeding the risk ratio.” COPAA is skeptical that, in fact, any LEA is currently completely in compliance with the requirements of IDEA around identification, placement, and discipline. In any event, as ED knows, a determination of significant disproportionality is not a determination that an LEA violated the IDEA; likewise, compliance with the IDEA is not a defense to a determination of significant disproportionality. This question does not provide any clarity with regard to the purpose of the Survey.

- **Delete:** Question V.1.

Rationale: It is repetitive of Question V.2, which asks about the two flexibilities of 34 C.F.R. § 300.647(d), i.e. reasonable progress and range of years. We make a recommendation to edit V.2 below.

B. Amend or Consolidate the following questions.

- **Consolidate:** Questions I.1.b, I.2.b, c, d, e, and f, to read:

What steps has your State already taken (and what plans has it made) to prevent and/or detect race-based caps/quotas or any violations of the IDEA by LEAs caused by incentives to avoid being identified as an LEA with significant disproportionality in the identification, placement or disciplining of children.

- *Please attach copies of trainings, monitoring plans, investigative findings, etc., if available.*

- *Provide a link to website policy and best practice resources for districts*

Rationale: We support asking questions about policies and practices that can reduce the risk of race-based quotas, especially since 34 C.F.R. § 300.646(f) prohibits it. However, the Survey appears to ask the same question several times with only minor variations.

- **Amend:** Question I.5 to ask about both negative and positive effects observed as a result of implementing the December 2016 regulations.

Describe any positive or negative effects that are the result of implementing the December 2016 regulations in your State.

Rationale: We support having States provide data on both the negative and the positive effects of regulations.

- **Amend:** Questions V.1 through V.4. by deleting the introductory phrase “If your State used the standard methodology set out in the 2016 regulations when it made its annual determination for SY 2018-2019”.

Rationale: States are required to use the standard methodology for SY2018-2019 and this recommendation is consistent with the recommendation above to delete Introductory Questions 1 and 2 and all of parts II and III.

- **Amend:** Question V.2 to address the recommendation to delete V.1:

Did your State apply either of the flexibilities available under 34 CFR 300.647(d), i.e., multiple years or reasonable progress? If yes, please describe.

Rationale: This allows States to answer with regard to both flexibilities allowed under the law.

- **Amend:** Question VI.5 by using the phrase “*caps/quotas*”.

Rationale: Matches the language of Questions I.2.b and II.2.b (and our proposed I.1 above).

C. Add the following question(s):

- **Add:** a new Question I.6, based on proposed Question II.5 and III.5, asking:

Describe challenges and/or benefits your State and LEAs would anticipate if the Department amended the December 2016 regulations in SY 2019 or 2020.

Rationale: Because the Uniform Regulatory Agenda suggests ED is still considering further rulemaking on this topic, we suggest adding this for clarity.

- **Add:** a new Question to Part V that, in addition to asking *how* the State made its determination, also asks *what* determination it made. For example:

Report all risk ratio thresholds, minimum cell sizes, and minimum n-sizes used in SY 2018-2019 and the rationale for each.

Rationale: Because it appears that ED intends this Survey to take the place of a data collection that collects all the information required by 34 C.F.R. § 300.647(b)(7), it will be useful to collect the details of State decisions so that the explanation of rationales can be put in context.

- **Add:** a new item to Question VI.3 asking:

Whether States require support with identifying and addressing the factors contributing to significant disproportionality in an LEA?

Rationale: The survey already asks about challenges around this in Part IV.1, so it would make sense to ask what TA states need to support districts.

- **Add:** a new question to Part VI asking:

Describe how your State is providing support to districts to ensure parents and other stakeholders are aware of steps being taken to promote equity and address significant disproportionality [where needed] so that students are treated with fairness under the law.

Rationale: Parents and other stakeholders have engaged with ED and within States to communicate the need for change. ED must now encourage and assure that States and districts make intentional efforts to include parents and others in decision making and implementation as well as provided public access to all reported outcome. This level of engagement and transparency is necessary to protect the rights and opportunities of our children.