



Advocates for Children of New York

Protecting every child's right to learn

July 28, 2014

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Re: Docket No. ED-2014-OSERS-0058

Dear Assistant Secretary Yudin and Mr. Ringer:

Advocates for Children of New York, Inc. (“AFC”) appreciates the opportunity to provide written comments in response to the U.S. Department of Education’s (“ED”) Request for Information (“RFI”) on Significant Disproportionality Under Section 618(d) of the Individuals with Disabilities Education Act (“IDEA”). Our comments focus on racial disproportionality in the identification, placement, and discipline of children with disabilities in New York City. We believe our comments will provide the Department relevant information and useful context as it considers what actions to take to address these significant issues at the federal level.

For over forty years, AFC has worked with low-income families and families of color to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, such as representing children and families in proceedings under the IDEA and assisting students who are being removed from school for disciplinary reasons, and also works on institutional reform of educational policies and practices through advocacy and litigation. AFC advocates for positive alternatives to discipline, such as using behavior modification techniques rather than having the student removed from school for an extended period of time.

Disproportionate Identification of Black Students with Emotional Disturbance Classification

New York City data and AFC’s experiences reflect the continued disturbing national



trend that students of color with disabilities are disproportionately labeled with certain disability classifications.¹ Recently released data from the 2012-2013 school year indicates that New York City disproportionately identifies Black students with an Emotional Disturbance classification (“ED”). Black students are three times more likely than their non-Black peers to be identified as ED.² Though Black students are just 27.2% of the overall student population, and 31.1% of all students with disabilities in New York City, they represent 53.1% of all students classified as ED.³ This disproportionality reflects many years of AFC’s own data and client experiences. For instance, during the last school year, for the 993 cases for which AFC collected data on our clients’ race and disability classification, Black students made up 35.4% of all clients with disabilities, but 51.7% of our clients classified as ED.

The disproportionate classification of Black students as ED is cause for alarm. Both national research and our own on-the-ground experiences in New York City reveal that Black students classified as ED are more likely to be removed from the general education population.⁴ Moreover, overrepresentation of Black students classified as ED correlates with a disparity in adverse outcomes: placement in low-track educational setting, suspension, drop-out, and juvenile and criminal justice involvement.⁵ Indeed, according to New York City Department of Education (“DOE”) data, in 2012-2013, a majority of adjudicated delinquents in non-secure placements were classified as ED.⁶

¹ NAT’L ASS’N OF SCH. PSYCHOLOGISTS, POSITION STATEMENT 2 (2013), *available at* http://www.nasponline.org/about_nasp/positionpapers/Racial_Ethnic_Disproportionality.pdf; EDWARD FERGUS, DISTINGUISHING DIFFERENCE FROM DISABILITY: THE COMMON CAUSES OF RACIAL/ETHNIC DISPROPORTIONALITY IN SPECIAL EDUCATION 3 (2010), *available at* http://www.aft.org/pdfs/teachers/teach11materials/t11_reducingh1.pdf; *see generally* CONN. STATE DEP’T OF EDUC., GUIDELINES FOR IDENTIFYING AND EDUCATING STUDENTS WITH EMOTIONAL DISTURBANCE (2012) [hereinafter CONN. GUIDELINES], *available at* http://www.sde.ct.gov/sde/lib/sde/pdf/publications/edguide/ed_guidelines.pdf; ARISE COALITION, EDUCATE! INCLUDE! RESPECT! (2009), *available at* <http://arisecoalition.org/Include!%20%20Educate!%20%20Respect!.pdf>.

² *See* INDP. BUDGET OFFICE, NEW YORK CITY PUBLIC SCHOOL INDICATORS: DEMOGRAPHICS, RESOURCES, OUTCOMES 11-13 (2014), [hereinafter IBO] *available at* <http://www.ibo.nyc.ny.us/iboreports/2014edindicatorsreport.pdf>.

³ *Id.*

⁴ David Anderson et al, Culturally Responsive Framework for Reducing Disproportionality in Special Education, Presentation at the OSPI/WASA Special Education Workshop (Aug. 2010), *available at* http://www.k12.wa.us/specialed/present/Culturally_Responsive_Framework.pdf.

⁵ Daniel Losen & Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, in RACIAL INEQUITY IN SPECIAL EDUCATION, 167, 167-94 (Daniel Losen & Gary Orfield eds. 2002)

⁶ Statistic reported by DOE personnel at Juvenile Justice Advisory Committee, Education Subcommittee meeting on July 15, 2013.



The ambiguity of the federal and New York State definitions of ED allow educators and districts much discretion to classify students with ED.⁷ Racial, cultural and ethnic biases may also influence a student’s Individual Education Program (“IEP”) Team when determining a student’s classification.⁸ For example, AFC often sees students the DOE has classified as ED despite having learning disabilities, speech and language impairments, Attention Deficit Hyperactive Disorder, or other significant impairments that impede their ability to learn. In some of these instances, the student’s behavioral challenges stem from their frustration with a lack of appropriate academic interventions, a result attributable at least in part to their ED classification.

Deficient and Inappropriate Services, Supports, and Placements

New York City has struggled to educate its ED students, a disproportionate number of whom are Black. The City’s failure to provide crucial behavioral supports to students with disabilities who demonstrate challenging behaviors provides one example. In April 2013, AFC filed a complaint with the New York State Education Department (“NYSED”) against the DOE, charging it with individually and systemically violating the law by failing to provide students with disabilities necessary behavioral supports. (See attached complaint). Specifically, we alleged that the DOE failed to provide students with disabilities with Functional Behavior Assessments (“FBAs”) and Behavior Intervention Plans (“BIPs”) – supports mandated by state law that have been shown to decrease behaviors that often result in removing students from the classroom and/or suspensions. In October 2013, NYSED issued a decision finding that ten out of the eleven schools they investigated did not comply with the state

⁷ The New York State definition of ED lends itself to subjectivity and judgment in terms of the characteristics exhibited, the length of time exhibited, and the degree to which they are exhibited:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student’s educational performance:

- (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (iii) inappropriate types of behavior or feelings under normal circumstances;
- (iv) a generally pervasive mood of unhappiness or depression; or
- (v) a tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to students who are socially maladjusted, unless it is determined that they have an emotional disturbance.”

N.Y. COMP. CODES R. & REGS. tit. 8 § 200.1(zz)(4) (2014).

⁸ See generally CT GUIDELINES, *supra* note 1; NAT’L EDUC. ASSN, TRUTH IN LABELING: DISPROPORTIONALITY IN SPECIAL EDUCATION (2007), *available at* http://www.nccrest.org/Exemplars/Disporportionality_Truth_In_Labeling.pdf.



regulations on FBAs and BIPs. NYSED ordered the DOE to change its FBA and BIP forms, provide targeted professional development on FBAs and BIPs, and submit to state monitoring.

In addition, students the DOE classifies as ED are much more likely to be removed from mainstream environments and placed in highly segregated settings – including special education classes in general education schools, and in District 75 schools, New York City’s standalone, citywide special education district.⁹ In fact, nearly two thirds of all students classified as ED in New York City are educated in segregated classrooms or buildings.¹⁰ While available data does not break down special education placements by race, based on their over-representation in the total ED student population and AFC’s own data and experience, we believe Black ED students are much more likely to be placed in segregated settings, including District 75.

This problem – placement in highly segregated and inappropriate classrooms and school buildings – is particularly acute for students with disabilities returning from court-ordered settings, some of the most vulnerable students in the DOE. While some of these students progress academically in their court-ordered settings, their educational prospects upon release, including whether they remain in school, depends largely on the setting in which they are placed when they return to the community. Too often, the DOE inappropriately funnels these students into District 75, even when they were not in District 75 prior to their placement in a court-ordered setting, or when they no longer require such restrictive placements. DOE data for the 2012-2013 school year, as of January 6, 2013, and our own experiences support this conclusion. We have seen parents of students returning from court-ordered settings who belong in less restrictive placements than District 75 receive an ultimatum: either place your child in a District 75 school or declassify your child from special education entirely. And even where parents are not faced with this Hobson’s choice, recent research indicates that students returning from court-ordered settings are disproportionately more likely to be assigned to high schools with higher percentages of high needs students, and to high schools the DOE has decided to close or phase out.¹¹ These practices lead to intolerable outcomes: the city’s neediest students are either denied the free appropriate public education (“FAPE”) to which they are

⁹ See COUNCIL OF THE GREAT CITY SCHS., IMPROVING SPECIAL EDUCATION IN NEW YORK CITY’S DISTRICT 75 at 13-17 (2008), available at <http://arisecoalition.org/District75Report.pdf>.

¹⁰ IBO, *supra* note 2, at 14 tb.2.7D. More startlingly, according to the DOE’s own data, less than 6% of students classified as ED receive counseling as a related service. *Id.*

¹¹ See ANNENBERG INST. FOR SCH. REFORM, OVER THE COUNTER, UNDER THE RADAR: INEQUITABLY DISTRIBUTING NEW YORK CITY’S LATE-ENROLLING HIGH SCHOOL STUDENTS 1, 9-12 (2013), available at http://annenberginstitute.org/sites/default/files/OTC_Report_0.pdf.



entitled under the IDEA or are warehoused with other high-needs students in the city's lowest performing high schools.

Imposition of Improper and Illegal Discipline

Finally, across the nation, it is well-documented that students of color, students with disabilities, and students of color with disabilities are disproportionately suspended from school.¹² Because harsh discipline practices are linked to involvement with the juvenile and criminal justice systems, this phenomenon has come to be known as the "School-to-Prison Pipeline."¹³ New York City is not immune to this problem.¹⁴ Although students with disabilities comprise only 12% of the student population in New York City public schools, they received 34% of all student suspensions in the 2012-2013 school year.¹⁵ Similarly, though Black students make up just 27% of total student enrollment, they received 52.8% of all suspensions.¹⁶

Further, New York City has not consistently provided IDEA protections to the students with disabilities it suspends. As you are aware, federal and state laws afford special protections to students with disabilities in discipline proceedings to ensure that they are not subject to long term suspension for behavior that constitutes a manifestation of their disabilities. However, from our experiences representing clients in Manifestation Determination Reviews ("MDRs"), reviewing records of clients unrepresented at MDRs, and conferring with DOE employees and other advocates, we have found that DOE employees frequently do not understand the MDR requirements, misapply the legal standard, fail to review and consider all relevant information in the student's file, and fail to follow the DOE's own guidance documents. In fact, DOE employees regularly find that a student's conduct was not a manifestation of her or his disability, despite ample evidence to the contrary. This leads to unwarranted and illegal discipline of students with disabilities, generally, and students of color with disabilities, in particular, and ultimately results in a denial of a FAPE and a violation of the IDEA.

¹² See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE & OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3-5 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

¹³ N.Y.C. SCH.-JUSTICE P'SHIP TASK FORCE, REPORT AND RECOMMENDATIONS iii (2013), available at <http://www.nycourts.gov/ip/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>.

¹⁴ *Id.*

¹⁵ N.Y.C. DOE, STUDENT SAFETY ACT DATA 2012 – 2013; N.Y.C. DOE, J-Form, <https://reports.nycenet.edu/Cognos84sdk/cgi-bin/cognosisapi.dll> (last visited July 28, 2014).

¹⁶ *Id.*



Thank you again for the opportunity to provide comments on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dawn Yuster'.

Dawn Yuster, Esq.
Project Director
School Justice Project

A handwritten signature in black ink, appearing to read 'Nicholas Sheehan'.

Nicholas Sheehan
Skadden Fellow
School Justice Project