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October 31, 2022

TO: Office of Special Education Programs, US Dept. of Education

SUBJECT: Determinations Feedback

Submitted via email to SPPAPR@ed.gov

These comments respond to the Office of Special Education Programs' recent request for "[suggestions for improvements and innovative solutions](#)" to the current Results Driven Accountability (RDA) system. "Specifically, we are considering whether and how to use data from the current SPP/APR that can be seen in the Part B and Part C measurement tables, data from the current IDEA 618 data collections, and other publicly available data."

The Advocacy Institute submitted extensive comments in response to the [Request for Information \(RFI\)](#) regarding Executive Order 13985, Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government. Those comments are available [here](#). Many are restated within these comments along with other critical issues regarding equity.

We wish to also point out the following reports, authored by The Advocacy Institute, important to this discussion:

- [Results-Driven Accountability Needs Substantial Intervention, 2018](#)
- [Rethinking Special Education, 2018](#)
- [Federal Monitoring and Enforcement of IDEA Compliance \(2018\)](#)

We are pleased that OSEP is considering changes to the current RDA system. In fact, we had anticipated changes some years back after the Department included the following in issuing the 2019 state determinations:

"The Secretary is considering modifying the factors the Department will use in making its determinations in June 2020 as part of its continuing emphasis on results for children with disabilities. Section 616(a)(2) of the IDEA requires that the primary focus of IDEA monitoring must be on improving educational results and functional outcomes for all children with disabilities, and ensuring that States meet the IDEA program requirements, with an emphasis on those requirements that are most closely related to improving educational results for children with disabilities. The Part B proposed determinations process

will include the same compliance factors as in past years, with one addition. For the 2020 determinations, rather than weighting each compliance factor equally, OSEP is considering assigning greater weight to those compliance factors most directly related to improving results for children with disabilities. For the 2020 determinations process we are also considering, as two additional results factors, State-reported data on: preschool child outcomes and the State Systemic Improvement Plan (SSIP). Using preschool outcomes for Part B determinations is consistent with the use of the early childhood outcomes factor that has been used for Part C determinations since 2015. Use of this factor emphasizes the importance of preschool outcomes in promoting later school success for students with disabilities. The inclusion of the SSIP as a results factor in making determinations would continue OSEP's emphasis on incorporating a results-driven approach as States identify evidence-based practices that lead to improved outcomes for children and youth with disabilities. In addition, we are considering several changes to the results factors related to the participation and performance of children with disabilities on assessments, including: (1) using Statewide assessment results, rather than the NAEP performance data; (2) looking at year-to-year improvements in Statewide assessment results and taking into account the full Statewide assessment system, including alternate assessments; and (3) no longer comparing each State's assessment performance with that of other States. Finally, OSEP will be revisiting ways of measuring improvement in the graduation rate of students with disabilities. As we consider changes to how we use the data under these factors in making the Department's 2020 determinations, OSEP will provide parents, States, entities, LEAs, and other stakeholders with an opportunity to comment and provide input through OSEP's Leadership Conference in July 2019 and other meetings."

IDEA Part B State Performance Plans/Annual Performance Reports (SPP/APRs).

In this section, we discuss critical issues regarding the current SPP indicators. Overall, the current SPP/APR indicators fail to harmonize with and reinforce the Elementary and Secondary Education Act, currently reauthorized as the Every Student Succeeds Act (ESSA). **Specifically, there needs to be a sharper focus on closing achievement gaps.**

The SPP/APR indicators underwent review and revision in 2020. **We propose several revisions needed to provide performance gaps that can be used in a new Determinations system:**

Indicator 1 - Graduation. States are now required to report graduation rate using the same data used for reporting to the Department under section 618 of the Individuals with Disabilities Education Act (IDEA). Indicator 1 should be expanded to include both the gap between SWDs and non-SWDs and improvement (gap closing) targets. These calculations will, most likely, need to be done using the Adjusted Cohort Graduation Rate since states do not calculate a graduation rate that compares to the section 618 exiting data. Also, several states continue to report students as graduating with a regular high school diploma when, in fact, graduation requirements are substantially different for IDEA-eligible students. OSEP has continuously failed to monitor states' graduation requirements and inform states that are awarding regular diplomas based on fulfillment of IEP goals, for example, that such students should not be reported as having received a regular high school diploma. Failure to address this allows states and districts to continue to communicate misleading information to students and parents and ultimately results in continued lack of equity for students with disabilities.

Indicator 2 – Drop-out. Beginning with the FFY 2021 SPP/APR, due February 1, 2023, states must use a single measurement for this indicator – the same data as used for reporting to the Department under

section 618 of the IDEA and that the Department uses as part of the annual determinations under section 616 of the IDEA. However, as with the use of Exiting data for Indicator 1, use of the 618 data to calculate the percent of students with IEPs dropping out of school does not have an equivalent calculation for all students. Thus, a drop-out GAP comparison cannot be made. **As with graduation data, we feel it is critical to make GAP data available on these key high school outcomes and encourage OSEP to contemplate additional drop-out calculations that could measure drop-out gap between SWDs and non-SWDs.**

Indicator 3 – Participation and performance of children with IEPs on statewide assessments: We were pleased to see the addition of several new elements in Indicator 3, including measuring participation (3A) and proficiency on state assessments on grade level achievement standards (3B) and alternate assessments (3C) as well as the gap between students with IEPs and all students on proficiency on state assessments on grade level achievement standards (3D). **However, Indicator 3D should report the gap between students with IEPs and those without disabilities rather than all students, which includes the proficiency of SWDs and, therefore, reduces the gap.** This is how NAEP data is reported and it is important to be able to compare the gaps.

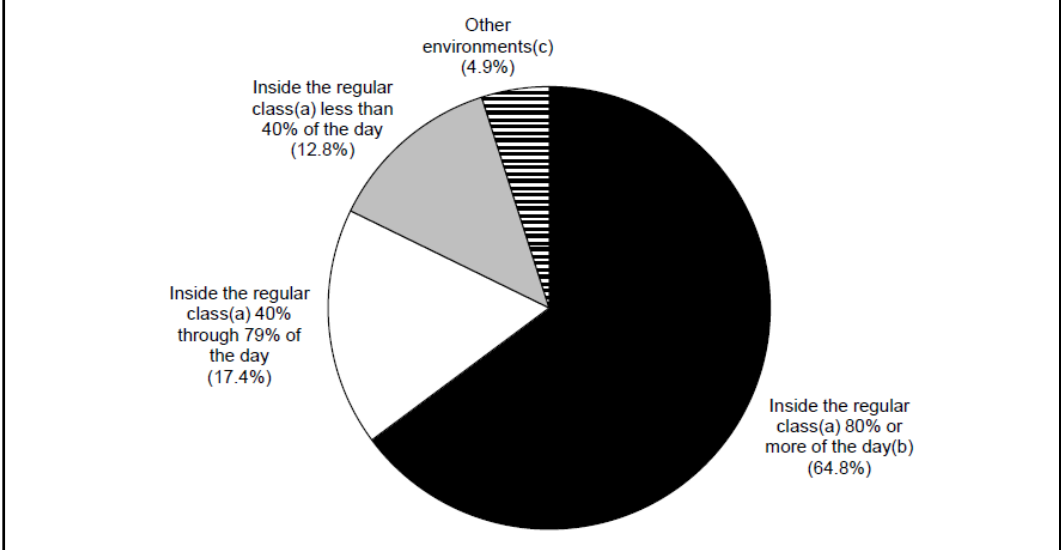
Indicator 5 - Least Restrictive Environments (LRE). OSEP fails to address the lack of improvement occurring in the mean percentage of students with disabilities served in general education settings 80% or more of the school day. The 2018 National Council on Disability report, [The Segregation of Students with Disabilities](#), also reported that there is little to no change in placement practices for students with Intellectual/Developmental Disabilities during the past 10 years. OSEP should undertake a comprehensive review of how States are interpreting the LRE clause of IDEA. This TIES report, [How states interpret the LRE clause of IDEA: A policy analysis](#), provides critical information on this issue.

Additionally, **OSEP should:**

- Require states to report Indicator 5 data by disability category.
- Take steps to improve the integrity of the data reported under Section 618 regarding “educational environments.” Specifically, a definition of “regular class” should be added to the 618 documentation to make clear that reporting that a student is spending time in a class that reflects natural proportions. Too often schools put most/all students with disabilities into one general education classroom making for a class that does not reflect the general school population.
- Revise the components of Indicator 5 to better align with the 618 data collection. Specifically, add a component for reporting the percentage of SWDs that are inside the regular class 40% through 79% of the day. The current components of Indicator 5 (see table below) leave out this important portion of SWDs – 17.4 percent reported in the latest annual (43rd) report to Congress (see Exhibit 29 below) and creates confusion since the percentages do not sum to 100 percent.

A. Inside the regular classroom 80% or more of the day;
B. Inside the regular classroom less than 40% of the day;
C. In separate schools, residential facilities, or homebound/hospital placements

Exhibit 29. Percentage of students ages 5 (school age) through 21 served under IDEA, Part B, by educational environment: Fall 2019



SPP Target setting.

As pointed out in the recent comments provided by the Consortium for Constituents with Disabilities (CCD) Education Task Force regarding general supervision, OSEP should “End the practice of allowing states to use a [nominal] percent increase target setting and reporting mechanism(s). Revise and improve the target setting in ways that assure states set indicator expectations that are reasonably aspirational and ambitious, not derived from prior-year baselines. Stop states from grading on a self-drawn curve, which generates inflated praise and gives undue credit for meeting meaningless targets.”

The six year targets set for Indicators in the 2022 SPP/APR submission show OSEP’s continued acceptance of targets that result in little if any meaningful improvement. Our recent Special Reports examine two of the Indicator 3 targets as well as Indicator 5, and call out states that propose improvement that is not [statistically significant](#):

- [Examining Annual Targets for Indicator 3B: Proficiency for Children with IEPs on Statewide Assessments](#)
- [Examining Annual Targets for Indicator 3D: Gap in Proficiency for Children with IEPs and All Students on Statewide Assessments](#)
- [Examining Annual Targets for Indicator 5: Educational Environments](#)

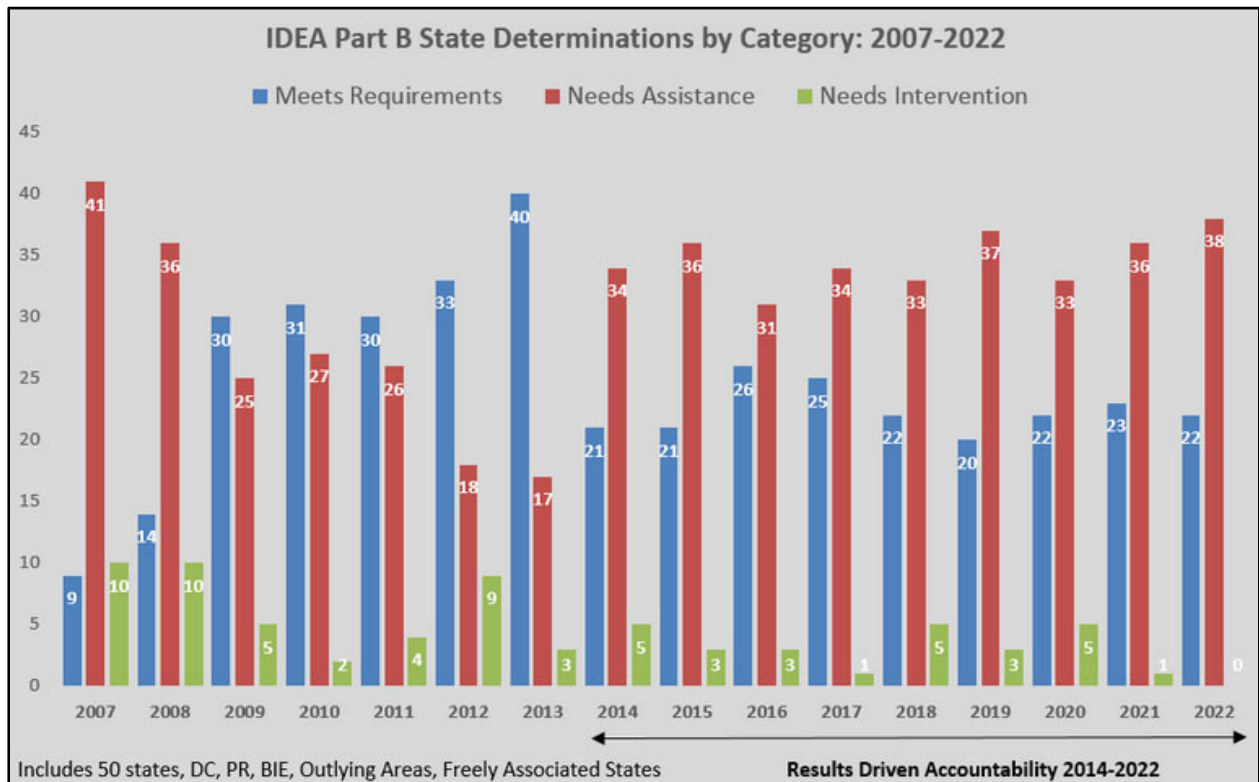
The current target setting approach makes it difficult to meaningfully incorporate these indicators into a new system for annual state determinations since, as we discuss in the annual determinations section, the current practice of rank-ordering states for scoring several indicators should be discontinued and, ideally, replaced with a system that focuses on states’ performance against targets.

Annual Determinations.

As we detailed in our 2018 report, [Results-Driven Accountability Needs Substantial Intervention](#), the Results Matrix used in the current Determinations process is almost completely disconnected from other elements of RDA and should be completely dismantled as soon as possible.

The RDA theory of change was based on the fact that compliance had improved dramatically over the years following implementation of the annual state determination process required by the amendments to IDEA in 2004 (see 2007-2013 in Table 1 below). At the same time, the proficiency of students with disabilities showed barely any improvement. Thus, the Department reasoned that if the emphasis shifted to include both compliance and results, the performance of students with disabilities would respond in kind. However, the anticipated change in student performance was depressed by the elements used in the Results Matrix and, importantly, in the way the elements are scored.

TABLE 1.



Specifically, the following issues with the current Determinations system should be addressed in a revised system:

- Relies too heavily on NAEP.** Given every other year in Grades 4 and 8, NAEP results are reported only at the state level, making it impossible for states to investigate NAEP performance at the LEA or school level in order to foster improvement. Since NAEP is given every other year, the same data must be used for two determination cycles. NAEP does not capture the students with disabilities who take a state’s alternate assessments, as these students do not participate in NAEP, nor does it

include students with disabilities who attend specialty schools or those who cannot participate on NAEP with allowable accommodations. **A revised Determinations system should eliminate or greatly reduce attention to NAEP. Use of NAEP (if any) should focus on each State’s GAP between SWDs and Non-SWDs.**

- **Uses a different metric for graduation.** ESSA requires states to use the four year Adjusted Cohort Graduation Rate (ACGR) for goal setting and accountability purposes (identifying high schools in need of improvement). States must use the ACGR and the graduation goals in their state ESSA plan for their State Performance Plan and Annual Performance Report. The RDA Matrix uses an “event rate” for measuring graduation and scoring. The two rates vary significantly. This discrepancy should be corrected (see comments under Indicators). **A revised Determinations system should attach greater weight to graduation rates than other elements.**
- **Does not measure performance on general state assessments.** As noted in our 2018 report, [Results-Driven Accountability Needs Substantial Intervention](#), since 2015, there has been no Results Matrix element that addresses the performance of students with disabilities on the state’s general assessment. ESSA requires States to establish ambitious long-term goals and measurements of interim progress for the performance of students with disabilities on state assessments in reading and math. IDEA requires that all students with disabilities participate in statewide testing. ESSA requires States to include at least 95 percent of students with disabilities in annual state assessments. Unlike NAEP, state assessments are aligned to each States’ academic content standards. Thus, performance on state assessments is a much more complete picture of how students with disabilities are performing. In addition, performance on state assessments is a primary indicator of state ESSA accountability systems. Since the purpose of moving to the RDA system was to provoke more attention to the performance of students with disabilities (i.e., gap closing) then performance gaps should be a key element of determinations. **A revised Determinations system should place significant value on the GAP between SWDs and Non-SWDs (not all students) on state assessments.**
- **Does not measure performance or participation of students with the most significant cognitive disabilities who are assessed via a state’s alternate assessment aligned with alternate academic achievement standards (AA-AAAS).** These students—approximately 10 percent of students with disabilities—are completely ignored in the current Results Matrix system (as noted above, these students do not participate in the NAEP). **A revised Determinations system should include a measure of how SWDs are performing on the State’s AA-AAAS as well as whether the State is complying with the ESSA requirement that limits the percentage of all students who can participate in the State’s AA-AAAS (section 1111(b)(2)(D)(i)(I)). Several States have been permitted to exceed the cap for multiple years, as reported in our tracking: [Status of State-level Waivers to Exceed the One Percent Cap on Alternate Assessments](#).**
- **Does not measure rates of suspension and expulsion.** Rates of suspension and expulsion are only considered in the context of significant disproportionality (Indicator 4) and only for rates of **long-term** suspensions and expulsions (more than 10 days during the school year). The Civil Rights Data Collection indicates that, in 2017-18, [students with disabilities served under IDEA represented 13.2% of the total student enrollment and received 23.3% of all expulsions with educational services and 14.8% of expulsions without education services](#). **A revised Determinations system should place significant value on the GAP between SWDs and Non-SWDs on all types of disciplinary practices.**

- **Fails to consider Least Restrictive Environments (LRE).** As noted under Indicators, there is little to no improvement occurring across years in the percentage of SWDs spending time in general education. **A revised Determinations system should include a measure of how the State is performing on Indicator 5 including examination by disability category in addition to all SWDs (as reported in 618 data).** Without this deeper analysis, States can show overall improvement without any improvement in placement for SWDs with Intellectual Disabilities and other categories with a long history of segregation. Here again, the annual targets that OSEP has accepted for Indicator 5 are woefully inadequate making it meaningless to use meeting targets as a gauge for LRE as reported in our Special Report: [Examining Annual Targets for Indicator 5: Educational Environments](#). This is one area where rank ordering of states (discussed below) may be useful.
- **Fails to adequately consider Significant Disproportionality.** OSEP must step up its oversight of the [Equity in IDEA regulations](#). To date, few LEAs have been identified as having significant disproportionality under the new regulations. To step up enforcement, OSEP might identify States that have never once identified any districts for any reason and ask such States for explanations. We also support further changes/refinements submitted by the Center for Civil Rights Remedies.
- **Fails to consider Chronic Absenteeism.** A majority of States selected chronic absenteeism as the sole or one of the indicators of school quality or student success in their ESSA accountability plans. The SWD subgroup has one of the highest rates of chronic absenteeism so this attention has required States to explore reasons for absenteeism specific to SWDs in order to improve rates. Chronic absenteeism is also reported as a significant issue for SWDs as schools have returned to normal following closures due to the COVID pandemic. Chronic absenteeism is a major contributor to the poor academic performance of SWDs. **A revised Determinations system should include a measure of how the State is performing on SWD absenteeism versus non-SWDs.**
- **Fails to consider issues raised in IDEA written state complaints.** Currently States report on the IDEA written state complaints as part of Section 618 Dispute Resolution without any regard for the number of state complaints filed, the percentage of complaint decisions that found non-compliance or the specific violations. As noted in the NCD report, [Federal Monitoring and Enforcement of IDEA Compliance \(2018\)](#), “State complaints and the investigation reports produced by SEAs can serve as critical sources of information in OSEP monitoring activities. An analysis of the issues raised in state complaints and findings of noncompliance should be a standard part of monitoring activities by SEAs and OSEP.” **A revised Determinations system should include a component on IDEA written state complaints.**
- **Relies too heavily on scoring based upon rank ordering of States.** Half of the possible points (12 of 24) in the current Results Matrix system are based on how a State ranks among all States on the element. This approach results in one-third of states always failing to earn any points regardless of how SWDs perform compared to students without disabilities in the state or how much improvement and/or gap closing has occurred. **In other words, under the current Determinations system, it is mathematically impossible for all states to achieve a “meets requirements” rating given the heavy use of scoring based on rank ordering of States. This scoring approach has resulted in virtually no change in the determinations since 2014 as shown in Table 1 above.**

- **Fails to consider language services (interpreters) needed by parents of students with disabilities having limited English proficiency (LEP parents).** As stated in this [2016 IDEA administrative complaint](#) filed in Washington state, “Without these language services (interpreting, translating and sight translating), LEP parents cannot knowledgeably participate in and consent to each of the critical procedural milestones specified in IDEA – identification, eligibility determination, IEP development or dispute resolution – thereby denying these children a free appropriate public education.” The Washington state legislature recently took steps to address this issue in the state by [passing Ch. 107](#), which requires schools to develop language access plans and more. Our work has shown this to be a nationwide problem. During 2018, we conducted interviews with stakeholders from more than 20 states to gather input for the 2018 NCD report, [Federal Monitoring and Enforcement of IDEA Compliance](#). Stakeholders included representatives from PTIs, P&As, and disability organizations. In every interview, stakeholders raised the issue of significant and ongoing difficulties regarding the provision of language services for LEP parents, despite this not being under investigation. This would appear to be a violation of [34 CFR 300.322\(e\)](#) which states: “The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.” OSEP should take steps to ensure compliance with [34 CFR 300.322\(e\)](#) in order to provide LEP parents with full and equal opportunities to participate in all aspects of IDEA. Such steps could include monitoring states on the provision of qualified interpreters. (We heard stories of schools routinely using personnel for interpretation in IEP meeting who do not have any knowledge or understanding of IDEA.)

MORE TRANSPARENCY, PLEASE. We ask that, in addition to improving the Determinations system, OSEP take measures to improve the transparency of IDEA related data to the public. Specifically, this should include:

- Release of the states’ result matrix at the same time the annual determinations are released. Currently determinations are released in June and the results matrix, which provides information on how the determination was developed, is not available to the public until September.
- Speed up the timing of release of states’ SPP/APRs. Cut the time between states’ submission of annual SPP/ARP (currently February) and release of OSEP-approved SPP/APRs—a full 7 months.
- Make all information easy to find. Currently the results matrix and dispute resolution reports are embedded at the end of the SPP/ARP. These reports should be posted in an easy-to-find format.
- Begin issuing the “Data Displays” that had been posted for several years. These very helpful fact sheets provide the public with easily digestible information about special education in each state.

NEXT STEPS. While we appreciate OSEP’s efforts to cast a wide net for input regarding the current RDA system and recommendations for changes, we encourage OSEP to approach this issue with urgency. In particular, OSEP is encouraged to assemble a group (or groups) of experts—similar to the group that made [recommendations in 2012](#)—and move swiftly to produce changes to the current RDA system. Continuing to use the current annual Determinations system, with the numerous flaws pointed out in these comments and other reports, ensures that the performance of the nation’s students with disabilities will show little if any improvement.

IN CLOSING. We wish to point out the ongoing failure of OSEP to adequately monitor States' implementation of IDEA. As the 2018 NCD report, [Federal Monitoring and Enforcement of IDEA Compliance](#): found "It should be noted that no state has ever been designated as "needing substantial intervention," despite the fact that the Bureau of Indian Education has received a needs intervention determination for five consecutive years and the District of Columbia has received a needs intervention determination for 10 consecutive years. In other words, there appears to be no amount of ongoing noncompliance that rises to the level of this determination." **An improved Determinations system is only as good as OSEP's willingness to take the necessary actions when States consistently fail to implement IDEA.**

Thank you for the opportunity to provide comments. Please contact us with any questions regarding our comments or recommendations.

Sincerely,

A handwritten signature in black ink that reads "Candace Cortiella". The signature is written in a cursive, flowing style.

Candace Cortiella

Director

Email: Candace@AdvocacyInstitute.org

The Advocacy Institute is a national not-for-profit organization dedicated to services and projects that work to improve the lives of children, youth and adults with disabilities. Founded in 2000, the Institute is directed by Candace Cortiella and is located in the Washington, D.C. metropolitan area.