

July 28, 2014

Via Electronic Submission

Michael K. Yudin, Acting Assistant Secretary for OSERS
Larry Ringer, Associate Division Director, OSEP
U.S. Department of Education
400 Maryland Avenue SW
Room 4032, Potomac Center Plaza
Washington, D.C. 20202-2600

Re: DREDF Comments on OSERS RFI on Significant Disproportionality and CEIS,
Docket No. ED-2014-OSERS-0058

Dear Assistant Secretary Yudin:

The Disability Rights Education & Defense Fund (DREDF) appreciates the opportunity to comment on the U.S. Department of Education (“Department”) Office of Special Education and Rehabilitative Services (OSERS) request for information (RFI) on significant disproportionality and coordinated early intervening services (CEIS). We applaud the Department for its ongoing commitment to address significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities.

Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. DREDF operates a demonstrably successful federal Parent Training and Information Center (PTI) that has served three Bay Area counties for 25 years. DREDF’s Education Advocates (who are also parents of children with disabilities) are in daily contact with California families in the disproportionately low-income and of-color communities in Alameda, Contra Costa and Yolo counties. Among the most underserved are African American and Latino students with disabilities, for whom the intervention of choice by school districts is often suspension and expulsion.

In addition to our recommendations on the definition of significant disproportionality, we address the interconnection between the lack of compliance with IDEA and the discipline crisis. From our experience, we know that minority students are too often over-looked until there is a discipline issue. In 1997 and again in 2004, when Congress amended the Individuals with Disabilities Education Act (IDEA) to set forth procedures for discipline, it also emphasized the need to develop positive behavioral supports and services to address problem behaviors **before** disciplinary issues arise. Unfortunately, the disciplinary provisions have overshadowed the evaluation and services provisions which are the crux of the IDEA mandate of a Free and Appropriate Public Education (FAPE). We urge the Department to use the shameful disparities in

discipline for IDEA students as a wake up call for scrutinizing IDEA compliance with FAPE guarantees. The fact that students who are guaranteed FAPE are being suspended at many times the rate of their non-disabled peers means that the IDEA implementation is in critical condition and in need of emergency interventions.

Background and Framework

The statistical picture of the state of special education is dim. Special education students have worse outcomes, are disproportionately segregated and are suspended more than their non-disabled peers.¹ These dire statistics are even worse for students of color with disabilities.² Too often minority students are identified for special education in order to remove them from the general education classroom. This view is further exacerbated by the segregation of students of color. It is easy to see why “special education” is often viewed as a place (and a segregated place, at that), rather than an array of services and supports. If a student of color is found eligible for IDEA services, immediately segregated and then disciplined, major red flags should be raised. This scenario implicates the very reason for the ban on disproportionate identification – that the IDEA would be used to further segregate minority children and provide no educational benefit. Unfortunately, the statistics on over-identification, segregation and disproportionate removals demonstrate that this bleak reality of IDEA implementation (or lack thereof) persists.

At the same time, we know, based on 35 years of experience serving thousands of students and their families, that the IDEA can and should benefit students who are properly referred and served. Moreover, we also know that minority students are not reaping the benefits of decades of educational advancements under the IDEA. It is not possible to address disproportionality issues in isolation from IDEA and Response to Intervention (RTI) implementation. Many students who are struggling academically or behaviorally are not disabled and could be helped by robust RTI services. For students with disabilities, prompt identification and targeted evaluations and services, including competent behavioral plans and interventions, would result in better outcomes and less discipline. Unfortunately, our minority clients are often rebuffed at every stage of the IDEA process, from evaluations, to identification, to delivery of services in the least

¹ For example, in 2010-2011, the national graduation rate for students with disabilities was 59%, compared to 79% for all students. Marie C. Stetser, & Robert Stillwell, *Public High School Four-Year On-Time Graduation Rates and Event Dropout Rates: School Years 2010–11 and 2011–12*. First Look (NCES 2014-391). U.S. Department of Education. Washington, DC: National Center for Education Statistics. Available at <http://nces.ed.gov/pubsearch>. Moreover, in 2011-2012, students with disabilities were more than twice as likely to receive an out-of-school suspension (13%) than students without disabilities (6%). *Civil Rights Data Collection, Data Snapshot: School Discipline*, (March 2014). Available at: <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

² Nationally, 36% of all black male secondary students with disabilities were suspended at least once in 2009-2010 compared to 17% of white male secondary students with disabilities. (Daniel J. Losen & Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*, The Center for Civil Rights Remedies, April 8, 2013, at 11, available at: http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf).

restrictive environment. This non-compliance with IDEA is most evident in the area of discipline. We know that punitive discipline is educationally unsound and that behavioral issues can be addressed educationally. The disproportionate use of discipline for special education students defies the very premise of the IDEA and should be admonished in every possible way by OSERS.

While we urge the most robust monitoring of both RTI and IDEA service delivery, we also know that even with good implementation, issues of racial inequity will persist unless racial bias is addressed head-on. Since students of color, both disabled and non-disabled, experience disproportionate suspensions and expulsions,³ we urge the Department to utilize every possible funding source to study the root causes of racial disparities. Since the smoking guns of explicit bias are difficult to detect, we urge the Department to encourage the investigation of the touchstones of implicit bias and the development of effective interventions.

I. Question 1: Standard Approach to Significant Disproportionality

In Question 1 of the RFI, the Department asked:

Should the Department issue proposed regulations requiring States to use a standard approach to determine which LEAs have significant disproportionality? If so, how might a standard approach properly account for State differences (e.g., population size)? If so, what should be included in such a standard approach?

Components of a Standard Definition

DREDF supports the GAO's recommendation for a standard approach that allows flexibility to account for State differences. A standard definition should include the following components:

Model Definition Should Not Focus on Relative Disparities. DREDF supports the Center for Civil Rights Remedies' suggestion that the model definition should not focus primarily on relative disparities. Relative disparities are particularly problematic for identifying trends, as decreased disparities between multiple years can hide increased risk across all races and ethnicities.⁴ The chart below illustrates a common scenario we have come across. This Northern California district narrowed its relative disparity between the 2009-2010 and 2011-2012 Civil Rights Data Collection (CRDC) surveys, but a closer look shows this result was due to a substantial increase in the rate of suspension of white students with disabilities. The suspension risk for African American students with disabilities also increased, but at a smaller rate.

³ Nationally, black students were suspended at a rate three times greater (16%) than white students (5%) in 2011-2012. *Civil Rights Data Collection, supra* note 1.

⁴ For this same reason, DREDF is critical of definitions that require LEAs to exceed a set risk ratio for multiple years before a finding of significant disproportionality.

Risk Ratio Comparison Between 2009 and 2011 CRDC Surveys, Northern California LEA

CRDC Survey Year	African American IDEA Student Suspension Risk	White IDEA Student Suspension Risk	Risk Ratio
2009	19.8%	3.6%	5.5
2011	27.8%	14.3%	1.9

Risk Level Floor. We similarly support the Center for Civil Rights Remedies call for a risk level floor. We too believe this will prevent the chance that districts with high relative ratios but low suspension use would be identified, and agree that the floor should be below the national average for all students and lowered over time.

Significant Disproportionality Determinations for Disciplinary Actions Must Include Data on Suspensions of Fewer Than 10 Days

With regard to significant disproportionality in disciplinary actions, we believe that the very small number of LEAs identified as significantly disproportionate is due, at least in part, to the fact that many State definitions of significant disproportionality only account for suspensions of greater than 10 days. This failure to account for suspensions of fewer than 10 days is an unintended consequence of Indicator 4 being so limited. The Department should prohibit States from only reporting data on Indicator 4 (suspensions of greater than 10 days), as this approach is inconsistent with the framework of IDEA Sec. 618(d) and fails to address racial and ethnic disparities in total suspensions identified by sources such as the CRDC.

IDEA Framework and OSEP Guidance. Sec. 618(d)(1)(C) requires SEAs to collect and examine data to determine if significant disproportionality based on race or ethnicity is occurring with respect to the incidence, duration, and type of disciplinary action, including suspensions and expulsions. OSEP has interpreted this provision to require a review of multiple sets of disciplinary data:

In order to determine if significant disproportionality exists for discipline, a State must consider all three areas (incidence, duration, and [type of] disciplinary actions) when examining its data. For example, a State could meet this requirement by determining whether significant disproportionality based on race or ethnicity is occurring in: the number of out-of-school suspensions of 10 days or less; the number of out-of-school suspensions (including expulsions) of greater than 10 days; the number of in-school

suspensions of 10 days or less; the number of in-school suspensions of greater than 10 days; and the total number of disciplinary removals.⁵

Consistent with this guidance, some States, such as New Mexico⁶ and Michigan,⁷ analyze disciplinary actions of various length and type. Others, like California⁸ and Arkansas,⁹ rely solely on Indicator 4B data, which measures the percent of districts that have a significant discrepancy, by race or ethnicity, in the rate of suspensions and expulsions of greater than 10 days for children with IEPs, and policies, procedures or practices that contribute to the significant discrepancy.

State definitions of significant disproportionality that rely solely on Indicator 4B data are inconsistent with both the Sec. 618(d) mandate to consider the “incidence, duration, and type of disciplinary action” and the aforementioned OSEP guidance. Moreover, these definitions improperly merge two separate analyses. Indicator 4B considers whether the LEA’s policies, procedures or practices contribute to the significant discrepancy, whereas State definitions of significant disproportionality under Sec. 618 “may not include consideration of the State’s or LEA’s policies, procedures or practices.”¹⁰ Under Sec. 618, a review of policies, practices and procedures is a consequence of, rather than a part of, a determination of significant disproportionality by race or ethnicity.

Failure to Address Racial and Ethnic Disparities in Total Suspensions. Definitions of significant disproportionality that do not account for suspensions of fewer than 10 days also mask existing racial and ethnic disparities in total suspensions. For example, in 2011-2012, the Pittsburg Unified School District reported suspending zero African American students with disabilities more than 10 days, while simultaneously reporting to the CRDC that 42.4% of African American students with disabilities received at least one out-of-school suspension. This anomaly shows California’s significant disproportionality definition does little to reduce racial and ethnic disparities.

For the above reasons, we urge the Department to prohibit States from using suspensions of greater than 10 days as the sole measure of significant disproportionality. Instead, the Department should require States to analyze multiple

⁵ OSEP Policy Memorandum 08-09 (July 28, 2008). Available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep08-09coordinatedearlyinterveningervices.doc>.

⁶ New Mexico Public Education Department (PED), *Annual Performance Report FFY 2012* at 140 (Feb.3, 2014). Available at: http://www.ped.state.nm.us/SEB/2014/NM_APR_FFY%202012_FEB_03_2014.pdf.

⁷ Michigan Department of Education, Office of Special Education, *Procedures for Calculating Significant Disproportionality—Discipline* (Oct. 2013). Available at: http://www.michigan.gov/documents/mde/Discipline_Sig_Dispro_Procedures_428458_7.pdf.

⁸ California Services for Technical Assistance and Training (CalSTAT), *Disproportionality and Significant Disproportionality* (Dec. 2012). Available at:

http://www.calstat.org/ISES/ises_december2012/ISES_handout.html.

⁹ Arkansas Department of Education—Special Education Unit, *Significant Disproportionality and Coordinated Early Intervening Services, 2013-2014 CEIS Report* (Apr. 2014). Available at: https://arksped.k12.ar.us/documents/data_n_research/201314CEISummaryReport.pdf.

¹⁰ OSEP Policy Memorandum 07-09 (Apr. 24, 2007). Available at: <http://www2.ed.gov/policy/speced/guid/idea/letters/2007-2/osep0709disproportionality2q2007.pdf>.

data sources in a manner consistent with Sec. 618(d) and OSEP Memorandum 08-09. This data should be readily available, as IDEA Section 618(a)(1)(D) requires SEAs to compile data on “incidence and duration of disciplinary actions by race, ethnicity, limited English proficiency status, gender, and disability category, of children with disabilities, *including suspensions of 1 day or more*” (emphasis added).¹¹

II. Question 2: Other Actions to Address Significant Disproportionality

In Question 2 of the RFI, the Department asked:

What actions, apart from requiring a standard approach, should the Department take to address the very small number of LEAs identified with significant disproportionality, despite data (including the data the Department collects under section 618 of the IDEA, data collected by the Department’s Office for Civil Rights, and the information in the GAO report) showing significant disparities, based on race and ethnicity, in the identification of children for special education including by disability category, educational placements, and disciplinary actions?

Addressing Both the Over and Under Inclusion of Minorities in Access to Special Education Supports and Services

DREDF believes in the promise of the IDEA to ensure disabled children a FAPE. Unfortunately, that promise has been tainted by rampant non-compliance. This is evident in the continued misidentification of African American and other students of color that too often leads to segregation and to disproportionate suspensions and expulsions. Too often, special education is viewed as the problem, rather than a critical part of the solution to disability and racial inequities. The Department needs to revive the reputation and promise of the IDEA for all students with disabilities, including racial and ethnic minorities, by ensuring IDEA compliance. DREDF does not believe that disproportionality concerns can be properly remedied without strict monitoring of IDEA compliance.

First and foremost, special education is not a place, and segregation is virtually never justified. If students of color are over-identified in certain categories (e.g., emotional disturbance (ED)) and disproportionately segregated, red flags should go up. If those students are also suspended at disproportionate rates, an inquiry should be made into whether the students are properly identified and served, or have merely been “dumped” in special education to get them out of the regular classroom.

¹¹ New Mexico, for example, uses Section 618(a)(1)(D) data in its significant disproportionality analysis. See New Mexico PED, *supra* note 6, at 140.

Likewise, the Department should be vigilant to ensure that children of color reap the benefits of special education. Unfortunately, our experience at DREDF advocating for thousands of students is that parents of students of color are often ignored or rebuffed when they seek specialized assessments and services. We see parents asking school districts for help with consistently failing grades and escalating suspensions. Many of the students we serve have invisible disabilities, such as learning disabilities, Post-Traumatic Stress Disorder (PTSD), and Attention Deficit Hyperactivity Disorder (ADHD), which dramatically affect learning. Too often it is assumed that problem behaviors and bad grades are a result of poor parenting or home and neighborhood environment if the student is African American or Latino.

For example, a Northern California school district recently denied our client's request for an assessment for her African American foster child with severe emotional issues and a two-year achievement lag on the following grounds:

It would appear that an assessment to determine possible eligibility for special education is not warranted at this time. The law specifies that assessment be completed in areas of suspected disability only after general education interventions have been implemented and have proven ineffective. In addition, if academic difficulties are believed to be the result of a lack of motivation on the part of the student, non-completion of class work, non-completion of homework, poor attendance, frequent moves, limited school experience, substance abuse, social maladjustment, and/or non-compliance, student is deemed ineligible for special education services.¹²

Although social deprivation does not automatically qualify a student for IDEA services, it is not mutually exclusive with disability, and should not be the basis of a denial to assess.¹³ This denial letter also demonstrates how schools steer low income minority parents away from special education but do not offer any other services or supports.

OSERS Must Strictly Monitor the Means by Which Disparities Are Reduced

If a stricter definition of disproportionality is adopted, as urged above, an increase in findings of significant disproportionality will inevitably lead many LEAs to reduce their IDEA enrollment. This type of corrective measure will benefit the many students of color with IEPs who do not belong in special education, particularly those needlessly segregated in self-contained settings. However, there are many students of color with disabilities who would be harmed by the cessation of special education services. Therefore, in order to safeguard against the improper exiting of minority students from

¹² Attachment 1.

¹³ In fact, because lower income children and children of color have poorer health outcomes and worse access to health care, one can expect a higher rate of disability in this group. See Children's Defense Fund, *The State of Black Children in America* at 30 (2014). Available at: http://www.childrensdefense.org/child-research-data-publications/data/2014-soac.pdf?utm_source=2014-SOAC-PDF&utm_medium=link&utm_campaign=2014-SOAC.

special education, we ask the Department to strictly monitor the means by which disparities in identification are reduced.

Improve IDEA Exiting Data. In order to prevent improper removals, the Department must improve its collection and monitoring of exiting data. Sec. 618(a)(1)(A)(iv) requires SEAs to collect data on the number of students ages 14 through 21 who stopped receiving special education and related services and the reasons why those children stopped receiving special education and related services. DREDF would like to see this provision expanded to all students exited from special education. In our experience, students of color of all ages are susceptible to improper exiting.

Moreover, the Department must require LEAs to provide more substantive explanations for “exit reason.” In 2012-2013, over 50% of students exited from special education in the Berkeley Unified School District were listed as “no longer eligible for special education” or “transfer to another program.” These vague definitions do little to protect students from improper removals, and are essentially useless for SEA oversight. Lastly, the Department should require LEAs to disaggregate exiting data by race. The collection and examination of exiting data by race would alert the Department and SEAs to troublesome patterns and provide a helpful comparison for Indicator 9 and 10 data.

Improper Use of 504 Plans. Another common scenario for our clients is for an LEA to deny IDEA eligibility for a student with a disability that adversely affects learning, but agree to a 504 plan. These 504 plans are often cursory at best, and there is no apparent reason to use the 504 route other than to avoid procedural safeguards, reduce costs or avoid a finding of disproportionate suspension under IDEA. While we strongly support the use of properly written and implemented 504 plans for students needing accommodations, students should not be denied IEPs based on improper reasons.

Parent vs. Teacher Referrals. In order to ensure that parents of color are not improperly rebuffed, we recommend that the Department require LEAs to keep data on both the race of students referred for IDEA assessments and the source of these referrals. We believe that accurate data documenting school versus parent referrals would be instructive to understanding both over and under representation of students of color in special education, as a student is less likely to be “dumped” in special education when it is his or her parent requesting the referral or asking for services.

Other Additional Data Collection and Monitoring Improvements. In addition to the data recommendations above, DREDF urges the Department to collect and monitor the following data to ensure students of color are benefitting from IDEA services: (1) the percentage of parental evaluation requests denied; (2) the percentage of students in restrictive settings transitioned back into general education; and (3) the number of students provided RTI and other pre-assessment intervention services who subsequently receive special education and related services under the IDEA.¹⁴

¹⁴ Sec. 613(f)(4) of the IDEA already requires LEAs voluntarily using CEIS funds to keep data on the number of students subsequently referred to special education. DREDF recommends the Department

Improved Monitoring of Educational Setting Data

Educational placement is a crucial, yet often overlooked piece of the disproportionality puzzle. Although Sec. 618(d) requires SEAs to monitor significant disproportionality in “the placement in particular educational settings of [children with disabilities],” it is often unclear how—or even if—SEAs perform these calculations. In our research, we have come across States that claim to use Indicator 5, despite the fact that this data is not disaggregated by race.¹⁵ We are unsure whether the California Department of Education (CDE) even monitors in this area; CDE’s website explains its methodology for significant disproportionality in identification and discipline, but is silent on educational settings.¹⁶ Similar to our recommendations regarding significant disproportionality in disciplinary actions, we urge the Department to strictly monitor the data SEAs use in their significant disproportionality in educational settings determinations. Specifically, the Department should require all SEAs to use the comprehensive educational environment data collected pursuant to Sec. 618(a)(1)(A).

To Reduce Discipline Disparities, the Department Must Ensure Students with Disabilities are Provided a FAPE

DREDF believes that the entire core of special education—the right to a FAPE—is broken if students with disabilities are disproportionately suspended. For the reasons listed below, we urge the Department to take a more preventative approach to the issue of disproportionate discipline by issuing guidance on the responsibility of LEAs to address behavioral issues educationally, as required by IDEA.¹⁷

Lack of Behavioral Interventions Prior to the Eleventh Day of Removal. IDEA 1997 emphasized a balanced approach to the issue of discipline of children with disabilities that reflected the need for orderly and safe schools and the need to address behavioral challenges through educational evaluations and interventions. Behind this approach was the understanding that appropriate IEPs with well-developed behavior intervention strategies decreased school discipline problems.

require LEAs to keep data for all types of pre-assessment interventions, including Student Study Teams (SSTs), regardless of whether these interventions are funded through CEIS.

¹⁵ *E.g.*, Mississippi Department of Education, *Coordinated Early Intervening Services* (2012). Available: http://www.mde.k12.ms.us/docs/sped-director-meeting-june-2012/CEIS_042009.ppt?sfvrsn=2.

¹⁶ California Department of Education, *CDE Guidance on Disproportionality* (2014). Available at: <http://www.cde.ca.gov/sp/se/qa/disproguidance112011.asp#guid>

¹⁷ DREDF requests that the Department issue guidance on disproportionate suspension under IDEA and Section 504 similar to the joint guidance issued by the Departments of Education and Justice on January 8, 2014 regarding school discipline under Title VI of the Civil Rights Act. U.S. Department of Education and U.S. Department of Justice. *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014). Available at: www.ed.gov/school-discipline. The guidance should set forth the elements of a claim of discrimination but also address how the over-use of suspensions may implicate noncompliance with FAPE (as set forth below).

To strike this balance, IDEA 1997 added a provision requiring the IEP Team to consider the use of positive behavioral interventions and supports for a child whose behavior impedes his or her learning or that of others (now codified at Sec. 614(d)(3)(B)(i)). As Senator Kennedy explained:

Although the bill provides more flexibility for schools to discipline students, discipline should never be used as an excuse to exclude or segregate children with disabilities **because of the failure to design behavioral management plans, or the failure to provide support services and staff training.** It is critical that schools use the new discretion with utmost care. Research tells us that suspension and expulsion are ineffective in changing the behavior of students in special education. When students with disabilities are suspended or expelled and their education is disrupted, they are likely to fall farther behind, become more frustrated, and drop out of school altogether.¹⁸ (emphasis added.)

Likewise, OSEP Director Thomas Hehir called this the “key provision in IDEA ‘97” and stated that a failure to consider such positive behavioral interventions and supports would constitute a denial of FAPE.¹⁹ OSEP guidance on IDEA 1997 added that IEP Teams should take prompt steps to address misconduct when it first appears, since such steps could eliminate the need to take more drastic measures.²⁰

In our experience, this crucial preventative measure has been completely subsumed by the “10 Day Rule” in Sec. 615(k). We have uncovered workshop presentations from school district attorneys that interpret Sec. 615(k) as giving schools 10 “free” removal days for each IDEA student—“free” in that they can be used without an IEP team meeting, behavioral intervention plan (BIP), functional behavioral assessment (FBA), or any other service or support. According to one presentation, the IDEA does not require intervention with positive behavioral interventions and supports until “Magic Day 11.”

In order to achieve the balance envisioned in IDEA 1997, LEAs must fulfill their obligation to provide FAPE to students removed for fewer than 10 days.²¹ Therefore, it is imperative that the Department issue guidance clarifying the obligations of an LEA under Sections 614(d) and 615(k), respectively. While Sec. 615(k)(1)(D) *requires* an FBA when a student is removed for more than ten days, in our experience, suspensions could be avoided by performing an FBA earlier in the IEP process. In fact, state of the

¹⁸ 143 Cong. Rec. S4318 (daily ed. May 12, 1997) (statement of Sen. Edward Kennedy).

¹⁹ Letter from Thomas Hehir, OSEP Director, to Anonymous, 30 IDELR 707 (Jun. 16, 1998).

²⁰ OSEP Policy Memorandum 97-7 (Sept. 19, 1997). Available:

<http://www2.ed.gov/policy/special/leg/idea/97-7.pdf>.

²¹ It is important to note that Sec. 615(k) allows suspensions up to 10 days “to the extent such alternatives are applied to children without disabilities.” Once an LEA or SEA has been found to use suspensions disproportionately for disabled students, the ability to suspend for 10 days without the provision of FAPE should be revoked. The purpose of the 1997 and 2004 IDEA re-authorization amendments on discipline was to allow school districts to use suspensions to discipline disabled students “to the extent” suspensions were being used to discipline non-disabled students. It would never have been contemplated that disabled students would far exceed the percentage of non-disabled students being suspended.

art implementation of the positive behavioral supports referred to in Sec. 614(d)(3)(B)(i) will in most cases require an FBA and a BIP.²²

Disparities in Sec. 618(d) Data Should Trigger a Record Review. OSERS should require States to use Sec. 618(a)(1)(D) data to ensure that students are not being punished for disability-related behavior that should have been addressed in the IEP process. If an LEA reports the disproportionate suspension of minority students, the SEA should require the LEA to develop a trigger system to identify students suspended for fewer than 10 days that may not be receiving FAPE.

In our practice, a review of a suspended student's records will likely show a problem with instruction (or lack thereof). For most of our African American clients, the only way behavior issues have been dealt with is through punitive measures. Therefore, at a minimum, a finding of significant disproportionality under Sec. 618(a)(1)(D) should trigger a review of individual student records. This review will likely show early warning signs of learning and attentional difficulties. If the student has a behavior plan, it is likely that it is inadequate and/or not followed with fidelity. Behavior plans are often routinized cut and paste jobs and are rarely based on an analysis of data. This is an area that desperately needs both monitoring and technical assistance by OSERS.

Pursuant to Sec. 614(d)(3)(B)(i), LEAs should develop protocols to ensure students with one or two suspensions are not being punished for educational deficiencies. An example of best practice in this area is illustrated by the Behavioral Support Continuum created by Fluency Plus, Inc. for the 2012 case *E.H., et al. v. Mississippi Department of Education*. This protocol calls for procedural safeguards for reviewing and revising students with disabilities IEPs and BIPs following removals from school of 2, 4, 7, and 10 days, respectively, for any disciplinary reason.²³ As explained below, a similar approach was recently endorsed by the Court in our long-running IDEA case *Emma C. v. Eastin*.

Creation of New Discipline Indicator. In previous communication with OSERS, DREDF has expressed our belief that Indicator 4 fails to adequately evaluate and monitor an LEA's provision of FAPE as required by Sec. 616(a)(3). As a result, we have urged the Department to create an Indicator based on Sec. 618(d) data that measures suspensions of fewer than 10 days to ensure LEAs are addressing the early signs of problematic behavior with positive behavioral interventions and supports. Because a recent decision in our case *Emma C. v. Eastin* validated our criticisms of Indicator 4, we renew our call for an additional discipline indicator here.

²² Clayton R. Cook et al., *Establishing and Evaluating the Substantive Adequacy of Positive Behavioral Support Plans*, 16 J. of Behav. Educ. 191, 192 (2007) ("Overall, PBS plans represent a vital aspect of the individual education plans (IEP) for students who chronically misbehave. According to IDEIA (2004), data obtained from a FBA provides the foundation upon which the PBS plan is developed").

²³ Jackson (MS) Public Schools, *Support Services/Child Find* (2013). Available at: <http://www.jackson.k12.ms.us/content.aspx?url=/page/eessupport>.

In *Emma C.*, Plaintiffs challenged the adequacy of the CDE's state-level monitoring system, arguing, *inter alia*, that the CDE's exclusive use of Indicator 4 failed to connect suspensions of any length to potential child find and FAPE violations. We further argued that the IDEA requires an individualized record review of students suspended or expelled to monitor whether a denial of a FAPE and/or behavior related to students' disabilities has caused the high rates of suspension. The Court Monitor agreed in his January 9, 2014 report, and ordered CDE to engage in corrective action steps "reasonably calculated to ensure that students with disabilities subjected to disciplinary removals for fewer than 10 days are receiving a FAPE, including any positive behavior supports necessary for them to receive FAPE."²⁴ Judge Thelton Henderson approved the Court Monitor's determinations and corrective actions on July 2, 2014. See *Emma C. v. Eastin*, 2014 WL 2989946 (N.D. Cal., July 2, 2014).

The Court Monitor's findings and Judge Henderson's subsequent order approving these findings underscore the serious deficiencies in the current discipline monitoring model. Again, we urge the Department to address these deficiencies by creating an SPP/APR Indicator that measures suspensions of 10 days or less and to require a record review to determine if the behavior should have been addressed in the IEP and if it was, whether services were delivered with fidelity.

Child Find Monitoring. The disproportionate suspension and expulsion of minority students may also implicate child find. In our practice, failing grades and suspensions are often a result of an unaddressed disability. However, the current state-level monitoring model does not adequately monitor child find requirements. The only current measures of LEA compliance with child find is Indicator 11, which monitors the timeframe between evaluation and identification, and Indicator 12, which monitors transition between Part C and Part B. As the Court Monitor in *Emma C.* explained, "an LEA can be fully compliant with these indicators yet still have children with disabilities in its jurisdiction who need special education and related services but who have not been identified, located, and evaluated."²⁵

As discussed above, we believe the Department must issue guidance on the intersection of discipline and FAPE, including how discipline may implicate child find or necessitate RTI services. Although state-level monitoring is behind in this regard, some States have taken a proactive approach to discipline and child find. For example, Connecticut regulation Sec. 10-76d-7 requires the "prompt referral to a Planning and Placement Team of all children who have been suspended repeatedly or whose behavior, attendance, including truant behavior, or progress in school is considered unsatisfactory or at a marginal level of acceptance." OSERS guidance should encourage all States to take similar action.

²⁴ Attachment 2 at 19.

²⁵ *Id.* at 7. The Court Monitor later ordered CDE to set forth such a process for students subjected to disciplinary removals for fewer than 10 days who do not currently have IEPs to ensure that such students are evaluated if they are suspected of having disabilities. *Id.* at 19.

The Department Must Enforce IDEA Data Verification and Reporting Requirements

Data Verification. The Department must take action to ensure the data collected from SEAs is reliable and accurate. In our investigations of local districts, we have come across discipline data that varies so greatly from year to year that it seems unlikely CDE has verified its accuracy. Many of the discrepancies in CDE's suspension data are due to problems with its internal data verification process, which consists of cross-referencing its two main databases, CASEMIS and CALPADS. This convoluted process often reveals inconsistent student data, which in some cases has prevented the State from ordering necessary corrective actions.

The Court Monitor in *Emma C.* also probed the CDE's verification process and ordered corrective action steps to ensure that it collects and uses accurate data for monitoring and enforcement purposes. In particular, the Court Monitor questioned CDE's exclusive use of a computer-driven verification process, and highlighted the need for in-person record reviews. For these on-site verification reviews, the Court Monitor ordered CDE to ensure each individual student record is reviewed and verified for each field in the database.²⁶

Data Reporting. In addition to data verification, the Department must also enforce IDEA data reporting requirements. Sec. 618(b)(1) requires SEAs to publicly report on the data collected pursuant to Sec. 618(a), which again includes data on suspensions of 1 day or more disaggregated by race. To DREDF's knowledge, California does not comply with this public reporting requirement. The Department must enforce this requirement and alert SEAs of their discipline data reporting requirements behind Indicator 4. One solution would be for the Department to create a state-level indicator regarding compliance with the public data reporting requirement in Sec. 618(b).²⁷

OSERS Should Initiate Research on the Role of Implicit Bias in Over and Under Inclusion in Identification, and Disproportionate Segregation and Suspensions and Expulsions of Minority Students

Research shows that even well-intentioned people have implicit biases that influence their behavior. Low expectations for minority students reflect such biases. While bias can lead to identifying minority students as disabled, it can also lead to the failure to identify a minority student as disabled. Many of DREDF's African American clients who receive exclusionary discipline have been failing academically for years,

²⁶ *Id.* at 11.

²⁷ DREDF also supports the view of the NDRN that the Department should monitor informal methods of removal in addition to suspensions and expulsions. We too have seen clients removed from instruction repeatedly and for significant periods of time through the use of shortened school days (e.g., repeated "sent homes"), forced withdrawals from school, compulsory transfer to inadequate alternative programs, homebound instruction, lengthy stays in seclusion rooms, and other methods. Despite the clear FAPE implications, schools do not document these informal removals. Therefore, we urge the Department to expand its discipline monitoring to include all types of removals, formal or informal.

with no academic interventions, and no referrals to evaluate the causes of the poor academic performance. African American parents who request a referral for an educational evaluation are often rebuffed, put off or told to provide an outside diagnosis as a condition for receiving an evaluation.

Special education assessments are particularly vulnerable to implicit biases. For example, school officials often disregard an ADHD diagnosis in favor of stereotyping a struggling black student as uncooperative, oppositional or having a conduct disorder (i.e. bad). Such systemic practices result in disproportionate suspension of students with disabilities, often for behavior that could and should be addressed through proper behavioral interventions.

Implicit Bias Research. Social science research suggests that implicit bias contributes to the disproportionate discipline of students of color and students with disabilities.

First, research indicates lack of staff diversity and inexperience with African American students in similar school districts has been associated with disproportionate discipline of African American students, at least in part because of this “cultural mismatch” between students and school staff.²⁸ School staff’s inexperience with African American students can exacerbate stereotypes and implicit associations, leading to unwarranted suspensions and other discipline.²⁹ Furthermore, white teachers can mistakenly view behaviors that are culturally appropriate for African American students as “overly aggressive, inappropriate, negative, rude, intimidating, and threatening.”³⁰ African American students whose teachers view them as hostile may in turn become more hostile or aggressive in the school environment because of negative interactions.³¹

Second, research indicates that African American students with disabilities are more likely to be subject to exclusionary discipline, such as receiving office referrals, corporal punishment, and out-of-school suspensions, and less likely to receive milder punishments (e.g., student conferences) when compared to other students with disabilities.³²

²⁸ Catherine M. Bradshaw et al., Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals, 102 J. Educ. Psychol. 508, 509 (2010).

²⁹ Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 Va. J. Soc. Pol’y & L. 181, 189-90 (2009).

³⁰ La Vonne I. Neal et al., *The Effects of African American Movement Styles on Teachers’ Perceptions and Reactions*, 37 J. of Special Education 49, 50 (2003), available at <http://coedpages.uncc.edu/cpobrie/African-Americans,bias,%20movement.pdf>; Cheryl Staats, *State of the Science Implicit Bias Review 2013*, The Ohio State University Kirwan Institute for the Study of Race and Ethnicity (2013), at *33, http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf (citing C.S. Weinstein, S. Tomlinson-Clarke & M. Curran, *Toward a Conception of Culturally Responsive Classroom Management*, 55 J. of Teacher Education, 25-38 (2004)).

³¹ Bradshaw, *supra* note 28, at 509.

³² Anna C. McFadden, et. al., *Disproportionality and discipline among Indiana’s students with disabilities: A status report*, Indiana Education Policy Center (1992).

This research, when taken as a whole, highlights the need for school-wide implicit bias analysis and training as a means of addressing disproportionate discipline. While the U.S. Department of Education has previously endorsed implicit bias training as a means of addressing disproportionate discipline,³³ we urge the Department to designate significant resources to understanding and eradicating implicit bias.

III. More Effective Targeting of CEIS Funds

In Question 3 of the RFI, the Department asked:

What actions, including research- or evidence-based actions, should the Department take to: (a) Encourage greater voluntary use of funds for CEIS in LEAs showing significant disparities (but no determination of significant disproportionality, pursuant to 34 C.F.R. § 300.646), by race and ethnicity, in the rates of identification of children for special education, including identification by disability category, educational placements, and disciplinary actions; and (b) assist LEAs in more effectively targeting their use of funds for CEIS to address significant disproportionality in both districts required to use funds for CEIS (as a result of determination of significant disproportionality) and districts choosing to use funds for CEIS, in a manner that is both consistent with the requirements of the IDEA and which help to address the causes and effects of significant disproportionality?

Need for Greater Federal Oversight and Guidance on CEIS Expenditures

DREDF shares NDRN's concerns regarding the lack of federal oversight of LEA CEIS expenditures. While Sec. 618 includes a number of CEIS reporting requirements, neither the statute nor OSERS guidance require SEAs to approve or even review the CEIS plans of LEAs found to be significantly disproportionate. Given the scarcity of Part B funds and the seriousness of the problem intended to be solved, we encourage the Department to provide specific guidance to States regarding the development and state review processes for CEIS plans.

Specifically, the Department should require LEA CEIS plans to be:

³³ In *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* ("Guiding Principles"), a document released in conjunction with the January 8, 2014 Joint Dear Colleague Letter on Discriminatory Administration of School Discipline, the U.S. Department of Education recommended schools provide professional development and training to equip educators to support students in improving their behavior and to respond to student misconduct fairly, equitably, and without regard to a student's personal characteristics, including disability. *Guiding Principles* at 16-17. The Department specified that, where appropriate, schools may choose to explore using cultural competence to enhance staff awareness of their implicit or unconscious biases, and the harms associated with using or failing to counter racial and ethnic stereotypes. *Id.* at 17.

- Based on a root cause analysis, with an understanding that there may be more than one cause;
- Focused in a manner that will resolve the identified problem;
- Supported by accurate data;
- Centered around the use of evidence-based practices; and
- Evaluated at regular intervals to ensure they are achieving their goals.

For example, in California, LEAs with significant disproportionality are required to produce a Significant Disproportionality Coordinated Early Intervening Services Plan (“SD-CEIS Plan”) that includes a number of components that go beyond the IDEA requirements:

1. An overview of the LEA’s Special Self-Review of Policies, Procedures, and Practices;
2. A summary of the results of an in-depth programmatic self-assessment that identifies root causes and specific areas on which to focus efforts for reducing significant disproportionality currently found in the LEA’s special education system;
3. A narrative describing the LEA’s planned efforts for implementing coordinated early intervening services for students kindergarten through grade twelve who are not identified as needing special education or related services, but who need additional academic or behavioral support to succeed in general education;
4. A description of the relationship of the SD-CEIS Plan to existing initiatives that the LEA is currently researching or implementing.³⁴

The most crucial addition is the in-depth programmatic self-assessment to identify root causes and specific focus areas. CDE requires LEAs to choose one of three self-assessment tools, all of which were created by well-respected experts on disproportionality. For example, one such tool is Daniel J. Losen’s *Annotated Checklist for Addressing Racial Disproportionality in Special Education*, which provides for a thorough review of LEA resources; policies, procedures, and practices; and environmental factors such as implicit or unconscious biases.³⁵

IV. Conclusion

Thank you for the opportunity to provide information on these pressing issues.¹

Sincerely,

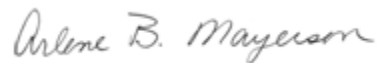
³⁴ CDE, Special Education Division, (Aug. 2012). *Technical Assistance Guide on SD-CEIS Plan*. Available at: <ftp://ftp.cde.ca.gov/sp/se/ds/CDE%20Guidance%20on%20Sig%20Dis%208-10-12v3.doc>.
³⁵ Daniel J. Losen, *Annotated Checklist for Addressing Racial Disproportionality in Special Education* (2008). Available at: http://www.createwisconsin.net/cms_files/resources/062409onlinechecklist.doc.

DREDF Comments on OSERS RFI Addressing Significant Disproportionality

Docket No. ED-2014-OSERS-058

July 28, 2014

Page 17 of 17



Arlene B. Mayerson
Directing Attorney



Robert J. Borrelle, Jr.
Equal Justice Works Fellow

Attachments: (1) IDEA Referral Denial Letter (Nov. 6, 2013)
 (2) Excerpt from Court Monitor's Determinations (Jan. 9, 2014)

ⁱ We would like to acknowledge DREDF law clerk Casey Shea for her research and editing contributions to these comments.

[REDACTED]

[REDACTED]

November 6, 2013

Dear Ms. [REDACTED],

On 10/28/13 Mrs. [REDACTED] contacted me to advise me of your letter, dated 10/28/13, requesting psychoeducational assessment to identify your cousin, [REDACTED] as a student with a learning disability. The process of reviewing available information has been completed, and the findings are below (Prior Written Notice).

It would appear that an assessment to determine possible eligibility for special education is not warranted at this time. The law specifies that assessments be completed in areas of suspected disability only after general education interventions have been implemented and have proven ineffective. In addition, if academic difficulties are believed to be the result of a lack of motivation on the part of the student, non-completion of class work, non-completion of homework, poor attendance, frequent moves, limited school experience, substance abuse, social maladjustment, and/or non-compliance, student is deemed ineligible for special education services.

Recent information you shared with [REDACTED] staff via phone conversations and during your previous SSTs for her siblings indicates that [REDACTED] has a significant past of emotional as well as physical trauma and neglect that has impacted her ability to learn. Additionally, lack of school records and your report show she has had extremely poor attendance, lack of school experience, and frequent moves throughout her educational career. These issues have thus far prevented her from making academic progress within the general education environment. As you have shared with [REDACTED] staff, this is the first time in her life that she has a stable home environment and her basic needs met.

An SST was held on 10/24/13. Information provided by the teacher at that time indicated that there are no significant concerns about [REDACTED] academic performance. It was reported that she appears to understand the concepts in class, and had been completing her homework consistently, until about two weeks prior. In addition, it was noted that she was only slightly below grade level in reading. Recent teacher reports indicate there are no significant academic concerns, and [REDACTED] is doing well both behaviorally and socially. This performance is not indicative of a learning disability.

This review of information indicates family stressors, frequent moves, and lack of basic needs being met have historically impacted [REDACTED] ability to learn. These factors are currently being addressed through a stable home environment, consistent attendance, and general education interventions at [REDACTED] Elementary. [REDACTED] has thus far been successful academically in her current general education placement. A learning disability is thus not suspected at this time.

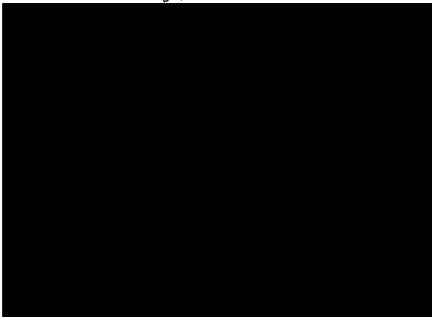


You have also recently been put in contact with the district social worker to address some of the above stated environmental issues that have impacted [REDACTED]. Additionally, counseling has been offered to assist her with some possible emotional challenges resulting from her significant history, but was declined at this time.

For the above stated reasons, a psychoeducational assessment for special education and related services is not appropriate at this time. Based on information in the above paragraphs, it is not suspected that [REDACTED] has a disability as defined in State Education Code, Title 5, section 3030 and IDEA-Part B. We are therefore informing you that this request for testing has been denied (see CFR 34 300.505 (a)(1)-(2)).

Enclosed please find a copy of your Parental Rights and Procedural Safeguards. To further discuss this matter you may request a meeting with the SST team at [REDACTED] Elementary School, or contact [REDACTED] School Psychologist.

Sincerely,



United States District Court
Office of the Court Monitor
Emma C., et al., v. Delaine Eastin, et al. (No. C96-4179 TEH)

P.O. Box 51170
Palo Alto, CA 94303-9998
(650) 329-2800 x60125
(650) 326-3410 (fax)

Mark A. Mlawer
Court Monitor

MEMO

TO: Judge Thelton E. Henderson

FROM: Mark A. Mlawer

DATE: January 9, 2014

RE: Court Monitor's Determinations Regarding Plaintiffs' State Monitoring Design and SESR Implementation Objections

I. Introduction

Pursuant to the *Second Joint Stipulation Re Amendment of Dispute Resolution Timelines in Fifth Joint Statement*, the parties have met and conferred regarding Plaintiffs' objections to the 1) design of Defendant California Department of Education's (CDE's) state special education monitoring system, and 2) implementation of the Special Education Self Review (SESR) portion of the monitoring system in Defendant Ravenswood City School District. Despite the hope expressed in the *Stipulation* that the "issues could be narrowed and/or resolved during the meet-and-confer period" (at 2), the parties have neither reached an agreement nor narrowed the issues.

Therefore, pursuant to Sections IV. B., VI. D., and VII. E. of the *Fifth Joint Statement*, the Court Monitor has made determinations below regarding Plaintiffs' objections.

II. Standards

The standards used in these determinations are those that govern state monitoring and enforcement systems in the Individuals with Disabilities Education Act (IDEA). Specific standards set forth in the IDEA will be drawn upon as needed in these determinations.

In addition, standards are set by the First Amended Consent Decree (Consent Decree) and the Court's 11/26/12 *Order Denying Motions Objecting to the Monitor's July 16, 2012 Determinations (Order)*. Section 13.0 of the Consent Decree states that CDE must

have a monitoring system that meets this standard: "...the state-level system in place is capable of ensuring continued compliance with the law and the provision of FAPE to children with disabilities in Ravenswood...." In addition, the parties' 10/24/12 *Joint Supplemental Brief Re: The Monitor's Analysis of Section 13.0 of the FACD and the Parties' Fourth Joint Statement* states that Defendant CDE "bears the initial burden of showing" that its monitoring system complies with this section of the Consent Decree (at 4).

The Court's *Order*, upholding the Monitor's determination on this issue, resulted in the following standard: "CDE's statewide monitoring system, as applied to Ravenswood," must be "implemented adequately," identify "both noncompliance and compliance appropriately based on adequate evidence and reasoning," and result "in appropriate corrective actions, the implementation of required corrective actions, and the timely correction of identified noncompliance" (at 8-9).¹

III. System Design Objections

A. Inadequate Policies and Procedures

A state educational agency (SEA) is required to "have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements..." (34 C.F.R. 300.149(b)).

Plaintiffs argue first that the "purpose and use" of the documents produced by CDE as policies and procedures is "mostly unclear," revealing the appearance of a system design that is "disorganized and inefficient" (Plaintiffs' Design Challenge, 4/12/13,² at 4-5).

CDE responds with a table of documents previously produced that constitute its policies and procedures, and argues that the "very existence" of these documents disproves Plaintiffs' claim (CDE Design Response, 5/31/13,³ at 6-7).

CDE is correct that the documents produced are monitoring policies and procedures. Plaintiffs offer no argument from these specific documents to support their contention that the policies and procedures are unclear, disorganized, or inefficient. Moreover, apart from the content specified in the regulation cited above, the regulation merely requires that the policies and procedures be in effect.

¹ Both Plaintiffs and CDE also rely to some extent for monitoring system standards on a document co-authored over a decade ago by the current Court Monitor in the *Emma C.* case. See Plaintiffs' Design Challenge, 4/12/13 at 11-12; CDE Design Response, 5/31/13 at 3-21. This document, called by CDE the *White Paper* and by Plaintiffs *Focused Monitoring-A Model for Change*, was written by external experts retained by the plaintiffs in *Angel G. v. TEA*, pre-dates the reauthorization of IDEA in 2004, and has not been adopted by this Court as a set of standards to be applied in the *Emma C.* case. Because the standards and guidance set forth in this document are irrelevant to this case, and may not be current, they will not be used in these determinations.

² This document is cited below as PDC.

³ This document is cited below as CDE Design Response I.

Turning next to the content of the documents, Plaintiffs allege that CDE does not have policies and procedures that address a number of required topics:

- monitoring implementation of its enforcement activities;
- making determinations annually and reporting annually about the performance of each local educational agency (LEA) using specific categories;
- taking specific actions after making compliance determinations;
- placing primary focus of monitoring activities on improving educational and functional results/outcomes, and ensuring compliance with IDEA requirements with an emphasis on those most closely related to improved results for students;
- using quantitative indicators and such qualitative indicators as are needed to measure performance adequately in the priority areas, which include, but are not limited to, free appropriate public education (FAPE) in the least restrictive environment (LRE), state exercise of general supervision, and child find;
- establishing measurable and rigorous targets for indicators in the priority areas, and collecting valid and reliable data to report annually; and
- ensuring noncompliance is corrected as soon as possible, and in no cases later than one year after the SEA identifies noncompliance (PDC at 5-6; paraphrased with quotations and citations omitted).

CDE describes the documents listed in the table of policies and procedures referenced above as "specific written procedures for the implementation of *every aspect* of the development and implementation of its monitoring system..." (CDE Design Response I at 6; emphasis added). But when it turns to Plaintiffs' specific objection that its policies and procedures do not address the listed requirements, CDE attempts to dispose of this point in a single sentence: "Further, the policies and procedures do address the IDEA monitoring and enforcement requirements listed in Plaintiffs challenge" (CDE Design Response I at 7). No arguments are offered, nor are specific references to any parts of the listed documents, to support this assertion.

Further, as part of its challenge to CDE's monitoring and enforcement policies and procedures, Plaintiffs include a list of additional alleged flaws in the policies and procedures (PDC at 6-7; lettered a-e and organized under its policies and procedures challenge). Plaintiffs write that their document will "review in detail each of the three primary components of CDE's statewide monitoring system (annual district level data collection and analysis, SESR, and VR⁴) and demonstrate that each of these components suffers from...major design flaws" (PDC at 7-8). Each of these alleged design flaws will be considered below as raised by Plaintiffs in the context of the primary components of CDE's monitoring system. To the extent that any aspect of the monitoring system is found by these determinations to be inadequate to meet the standards set by the statute, Consent Decree, and/or the Court's *Order*, the remedy for such inadequacies must include, in addition to any necessary substantive changes to its monitoring and

⁴ Verification Review (Monitor's note).

enforcement system set forth in the specific determinations, adequate policies and procedures reflecting those changes.

Monitor's Determination: Plaintiffs have not shown that CDE's monitoring policies and procedures are disorganized, unclear, or inefficient. CDE has not demonstrated that it has policies and procedures that address the requirements specified above.

Therefore, CDE shall engage in corrective action steps to demonstrate through a submission to the Monitor and the parties that it has policies and procedures in effect that fully address the requirements in Plaintiffs' list by either 1) supporting its assertion by specific references to the documents in its table for each of the requirements in Plaintiffs' list, or 2) developing policies and procedures that address the requirements.⁵

B. Inadequate Staffing and Training

Plaintiffs allege that CDE's staffing of its monitoring functions is inadequate, and that its staff is not properly trained (PDC at 6, 19; at 19 Plaintiffs state that they "have not found any clear documentation" that staffing, training, and oversight of monitors is adequate). The argument offered to support this conclusion is that some of the alleged failures of CDE's monitoring system (this set of alleged failings are noted in a paragraph at PDC 19-20) are "demonstrated" by CDE documents showing a number of districts that did not correct noncompliance within one year as required, and the small number of districts that received a Verification Review (VR) in recent years (PDC at 20). Plaintiffs also cite their 3/8/13 comments on CDE's 2/22/13 response on these specific issues.

CDE does not offer a response to these arguments in either its Design Response I or in its 8/26/13 Supplemental Response.⁶ But in CDE's 2/22/13 document, CDE included budgetary information regarding all of its quality assurance processes, staffing charts for its Special Education Division, staff assignments, sample duty statements, minimum qualifications for positions, information regarding contractors that perform specific tasks related to monitoring, and a description of its formal and informal training, peer mentoring, and special training (at 1-3). While the information provided by CDE is illuminating, CDE offers no clear argument as to how this information shows that its staffing is adequate, and its staff adequately trained, to fulfill its monitoring and enforcement responsibilities as envisioned by the statute and the controlling documents of the *Emma C.* case.

Although CDE offers no argument in response, Plaintiffs' arguments fall far short of showing that monitoring staffing and training are inadequate to fulfill CDE's responsibilities. First, Plaintiffs do not set forth any standards by which the adequacy of state monitoring system staffing and training could be judged. Second, even if the assumption is made that CDE's monitoring system has the many failings Plaintiffs say it

⁵ For all corrective actions set forth in these determinations, the parties shall have an opportunity to comment on CDE submissions.

⁶ This document is cited below as CDE Design Response II.

has, it does not follow that inadequate staffing and training are responsible for that; while that could be the case, establishing such a connection requires specific evidence.⁷ Third, Plaintiffs' 3/8/13 comments on these topics, cited in their PDC, consist largely of questions for CDE and requests for documents, with one exception--staff vacancies. Plaintiffs note that CDE's monitoring staffing chart shows "some" vacancies, including vacancies that are "longstanding and apparently key positions" (Plaintiffs' 3/8/13 comments at 2). But Plaintiffs do not show that this state of affairs has had a deleterious effect on CDE's monitoring efforts; instead, they pose additional questions. While the Monitor has previously made plain his agreement with Plaintiffs' contention in their 3/8/13 comments that "CDE's system design cannot pass muster if it lacks necessary staffing" (at 2),⁸ Plaintiffs do not show that this is the case.

Monitor's Determination: Plaintiffs have not shown that CDE's monitoring functions are inadequately staffed, or its monitors inadequately trained, such that CDE cannot meet the standards set by the controlling documents of this case.

However, as CDE has not demonstrated the adequacy of its monitoring staffing and training, and as inadequacies in these areas may come to light during CDE's implementation of the corrective actions called for in these determinations, the Monitor may reconsider this determination in light of any new facts that emerge.

C. Annual Collection of District Information

1. Too Limited Data Collection

Plaintiffs argue that CDE's annual collection of data is "largely" based on its California Special Education Management Information System (CASEMIS) database, and that CASEMIS data include "little if anything" that focuses on the statutory requirement to improve student results and outcomes by measuring performance in the priority areas of FAPE in the LRE and child find. Arguing that the federal State Performance Plan (SPP) indicators are too limited for this purpose, Plaintiffs provide lists of data they believe could and should be collected by CDE, data that in their view would speak more adequately to performance in the priority areas. Responding to CDE's claim that additional sources of information on results and outcomes are used by CDE to tailor SESRs and VRs, Plaintiffs respond that these two components of the monitoring system are ineffective,⁹ and that this claim from CDE ignores Plaintiffs'

⁷ As shown in Section III. E. 1. below, CDE conducts very few VRs. But it is unknown to the Monitor whether this is a result of inadequate staffing, as Plaintiffs have not submitted evidence showing that it is.

⁸ In an exchange of correspondence on 2/4/13 with counsel for CDE related to Plaintiffs' initial submission of system-design objections, the Monitor wrote, "... CDE argues that the submission exceeds the scope of the *Fifth Joint Statement* in that it raises non-design issues such as funding and staffing... Regarding funding and staffing, if a well-designed monitoring system had insufficient funding or staffing, or inadequately trained staff, then such a system could arguably fail to meet standards in the statute and/or controlling documents of this case. Thus, these issues do not exceed the scope of the inquiry into the state monitoring system's efficacy to which the parties have agreed" (Mlawer to Tillman, at 2).

⁹ For determinations on these issues see Sections III. D. and E. below.

point regarding the *annual* collection of data. Further, using CDE's response to the federal Critical Elements Analysis Guide (CrEAG) document, Plaintiffs note that CDE did not include Indicator 5 (LRE) among the ways it uses data to identify noncompliance, and argue that CDE's responses show that CASEMIS data are "evaluated for very limited purposes" (PDC at 18, 21-23).

Regarding CASEMIS data, CDE argues that this database is the "primary" source of information for federal reporting of required data, but not the sole source of information used to inform its monitoring activities. CDE lists the additional data it collects: local budget and service plans, data-based findings of noncompliance, ongoing compliance history (due process results, complaints, and timely correction of noncompliance), SPP indicators, compliance determinations, and significant disproportionality (CDE Design Response I at 8). However, CDE does not show that these additional pieces of data are adequate to measure performance in the priority areas of FAPE in the LRE and child find, the argument advanced by Plaintiffs, nor does it explain with precision how the data are used on an annual basis.

Instead, CDE argues that it does not have to collect data for monitoring purposes on any indicators other than those set forth as part of the federally mandated SPP document. After citing the regulatory requirement that states must "use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas" (34 C.F.R. § 300.600(d)), CDE goes on to argue that the statute does not require SEAs to create targets in priority areas outside the SPP, citing § 300.601(a)(3): "As part of the State performance plan, each State must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in § 300.600(d)." CDE then shows that each SPP indicator falls under one of the priority areas, citing the federal Office of Special Education Program's (OSEP's) *Part B Indicator Table*, and that these indicators "reflect" the priority areas and are "meant to work in conjunction with, and not separate from, the priority areas" (CDE Design Response II at 2).

CDE's argument here attempts to evade Plaintiffs' critique and misreads the regulatory requirements. Plaintiffs are not arguing that additional indicators must be added to the state's SPP¹⁰; rather, they argue that *for monitoring purposes* the SPP indicators and CASEMIS data are collectively insufficient to measure performance in the priority areas of FAPE in the LRE and child find. Hence, CDE's citation to § 300.601, a section entitled "State performance plans and data collection," is inapposite to Plaintiffs' argument. The relevant requirements are at § 300.600, which is entitled "State monitoring and enforcement." As CDE offers only a truncated quotation from § 300.600 (d), it is important to look at the relevant regulations from § 300.600(c-d) in full:

(c) As a part of its responsibilities under paragraph (a) of this section [a(1) requires monitoring], the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in

¹⁰ Thus the Monitor makes no determination on this issue.

paragraph (d) of this section, *and* the indicators established by the Secretary for the State performance plans.

(d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators *as are needed to adequately measure performance in those areas*:

- (1) Provision of FAPE in the least restrictive environment.
- (2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in § 300.43 and in 20 U.S.C. § 1437(a)(9).
- (3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.
(emphases added)

Subsection (c) plainly requires the use of indicators adequate to measure performance in the priority areas for monitoring purposes *in addition to* the SPP indicators. Subsection (d) stresses that the qualitative indicators used must be adequate to measure performance in these areas, and that quantifiable indicators must be used in each of the priority areas.

As CDE does not offer an argument for the adequacy of the SPP indicators and its specified additional areas of data collection to measure performance in the priority areas, it is unnecessary to spend much time on this issue. While the Monitor will not make a determination on the specific items in Plaintiffs' lists of suggestions for additional areas of data collection, one example from this list will suffice to show the inadequacy of the SPP indicators for monitoring purposes, the area of child find. The relevant regulation on this issue requires the state to have policies and procedures in effect that ensure that all children with disabilities in the state "who are in need of special education and related services, are identified, located, and evaluated" (§ 300.111(a)). The SPP indicators that speak to this priority area are Indicators 11 and 12. But Indicator 11 only measures the percentage of students referred for evaluation who received timely evaluations and eligibility determinations, and Indicator 12 only measures whether children referred from Part C of the IDEA to Part B have IEPs in effect by their third birthday. If a student was not referred for evaluation and not served by Part C, the student will not be included in these indicators. Clearly, an LEA can be fully compliant with these indicators yet still have children with disabilities in its jurisdiction who need special education and related services but who have not been identified, located, and evaluated. Thus, the SPP indicators are not fully adequate to measure performance in the priority areas.¹¹

¹¹ With respect to the child find example, it should also be noted that 1) CDE already collects relevant data, special education enrollment data, for Indicators 9 (disproportionate representation in special education) and 10 (disproportionate representation in specific disability categories); and 2) CDE has proposed a pilot quality assurance process for Ravenswood for the 2013-14 school year that would use

Turning next to Plaintiffs' argument that CDE's responses show that CASEMIS data are evaluated for purposes that are too limited and their related Indicator 5 (LRE) argument, Plaintiffs cite CDE's 3/22/13 response at 9-11 and 2/22/13 response at 13. In the 3/22/13 document CDE argues as follows:

The requirement is not to collect data but to monitor LEAs in the state (34 CFR 300.600(d)) using quantifiable indicators and using such qualitative indicators as are needed to adequately measure performance in those areas. This requirement is not about selection but is about the activities onsite that produce findings of compliance or noncompliance. The CDE asserts that it uses quantifiable (the SPP/APR¹² indicators) and such qualitative indicators (parent input, complaints history, and due process findings) to select items to be included in all reviews and to select individual items to be included in a review that are unique to a particular district. (at 9, emphasis in original)

CDE's approach here again ignores Plaintiffs' argument, which concerns annual data collection. Further, in order to use indicator and other data for any purpose, including on-site monitoring, the data must first be collected; hence, the requirement also involves collecting necessary data. As selection for on-site or other monitoring activities is part of a monitoring system, CDE's attempt to drive a wedge between selection and monitoring does not persuade. A monitoring system that complies with the statute uses data adequate to measure performance in the priority areas to drive its activities, including selection for those activities.

With respect specifically to LRE data, while Plaintiffs attempt to read too much into CDE's CrEAG response, CDE's response reinforces the concern discussed above. Plaintiffs regard CDE's failure to list LRE data among the ways it uses data to identify noncompliance as an "inexcusable oversight" (PDC at 23). CDE responds that the CrEAG is not an official submission to OSEP, and that the document was ultimately withdrawn by OSEP as it was not approved by the federal Office of Management and Budget as a data-collection vehicle. CDE goes on to argue that particular placement levels do not establish compliance or noncompliance with the LRE requirements, and

these data as a factor in compliance determinations, selection for VR and as an element of the VR monitoring plan (for the latter two issues if the district's data fell outside a target range) (*Quality Assurance Process Pilot, Ravenswood City School District 2013-14*, at 9-10). With respect to the VR monitoring process, CDE also proposes a methodology for conducting child find monitoring as part of its VR pilot proposal for Ravenswood (*Verification Review Policy and Procedure Guide, Ravenswood City School District 2013-14*, at 56-59). While CDE's proposal suffers from a lack of precision regarding the use of these data in determinations and VR selection, and a too-limited approach to child find monitoring in the VR process, the proposal takes clear steps in the right direction. However, the proposed pilot has not been accepted by the other parties and, thus, is irrelevant to these determinations. Moreover, a proposal for a pilot project, and one that is limited to Ravenswood, is clearly not part of the state-level system "in place," as required by Consent Decree § 13.0.

¹² Annual Performance Report (Monitor's note).

adds that its monitoring system "tests" how placement decisions are made by IEP Teams (CDE 2/22/13 Response at 13).

CDE is correct that the CrEAG is not an official document, and also correct that placement levels alone cannot determine compliance or noncompliance with the LRE requirements. However, even if the assumption is made that the approach to LRE monitoring in the SESR and VR processes is adequate, that again is not the claim Plaintiffs are advancing here. While CDE's statements on the CrEAG document should be treated as irrelevant, CDE has not shown that it uses LRE data annually for monitoring purposes outside of the SESR and VR processes, and if so how, such that *potential* LRE violations that placement data may suggest are investigated and, if found to be violations, corrected.

Monitor's Determination: CDE has not demonstrated that it collects data adequate to measure performance in the priority areas for monitoring.

Therefore, CDE shall engage in corrective action steps to ensure that it collects data adequate to measure performance in the priority areas for monitoring. CDE shall set forth through a submission to the Monitor and the parties all data it will collect, analyze, and evaluate on an annual basis for monitoring purposes. For each type of data, CDE shall describe with precision how it will be used annually, including identifying the specific levels of data that will result in specific CDE monitoring and enforcement activities. In addition, CDE shall fully set forth in this submission the basis for its belief that these data are collectively adequate to measure performance in the priority areas. The necessity of further corrective actions will be determined after review of the submission.

2. Inadequate Systems to Ensure Valid and Reliable Data

Plaintiffs allege that CDE's annual activities to validate the data it collects are insufficient to ensure the data are accurate. Specifically Plaintiffs argue that CDE's data verification is "computer-driven and mostly limited to mistakes identified by software," and that CDE fails to request back-up materials from districts, use specific methods to cross-check data, monitor itself to ensure consistency across districts, and evaluate analyses "interjected" by data collectors other than districts. In addition, Plaintiffs question whether CDE actually analyzes qualitative information instead of converting it into quantitative information, state again their conclusion that CDE does not collect sufficient qualitative information, and assert that CDE does not have any evaluative criteria for qualitative information that would allow providers of special education and related services to improve their performance (PDC at 23-25).

In response, CDE describes its approach to data accuracy verification as a "double-validation process." The process includes CASEMIS file validations that look for logical inconsistencies and year-to-year anomalies. CASEMIS data are also "cross-verified" with California Longitudinal Pupil Achievement Data System (CALPADS) data; results of this analysis for the 2011-12 school year showed a match of basic student information at 94% accurate or higher. In addition, special education staff members perform unspecified statistical analyses on the data. Further, CDE compares CASEMIS

data to IEPs and student records during VRs and SESR follow-up visits. This process looks at the accuracy of a limited set of fields in the CASEMIS database, and appears to have begun for 2012-13 VRs and follow-ups to the 2011-12 SESRs.¹³

With one exception, Plaintiffs' critique of CDE's approach to ensuring the accuracy of data consists of a series of largely unsupported assertions rather than of arguments supported by evidence. Plaintiffs do not show that any qualitative information is converted to quantitative information, nor do they state clearly why such a process would be inadequate; do not identify which types of data would require back-up materials and explain why that would be necessary; do not explain why CDE's data verification activities do not ensure consistency across districts; do not identify any data collected or analyses performed by third parties, or explain why such data or analyses should be treated any differently from other data; do not acknowledge that CDE does, in fact, use specific tools and procedures to validate and cross-check data (CASEMIS/CALPADS), or explain why the procedures employed by CDE are inadequate; and do not identify qualitative information that requires evaluative criteria in order to facilitate improvements in provider performance. Plaintiffs cite to their 3/8/13 comments at 6-9, but that document is of little help, as Plaintiffs do not support these specific concerns in these comments.

However, Plaintiffs offer a clear argument that CDE data verification is largely limited to software-identified inaccuracies. They add in their 3/8/13 comments that the fields subjected to the on-site validation process are too limited (but do not identify additional fields they believe should be validated), and that this process is further limited to "rare" VRs and once-every-four-years SESRs (Plaintiffs' 3/8/13 comments at 6, 8).

As set forth above, CDE engages in a variety of data validation activities. But CDE does not include in its responses the results of those activities, leaving an important question unanswered: how accurate has CDE found the reported data to be? While the software tests and checking databases against each other can find potentially inaccurate data, the most reliable results on data accuracy will come from the comparison of reported data with the actual content of student records. As these results were not conveyed in CDE's responses, the adequacy of CDE's data validation efforts cannot be currently judged against the scope of the potential problem. In addition, while the results of testing CASEMIS against CALPADS were conveyed by CDE for the eight fields tested (a 94%+ accuracy level), in addition to the test only looking at eight fields of very basic student information, what is unknown is whether the CALPADS database itself has been found to be accurate at a high level. Further, the CDE document (*CASEMIS CALPADS Data Matching Project*, undated) appears to show that over 99,000 students had records in CASEMIS but not in CALPADS (at 2), and does not state the number and percentage of students for whom data matched in all fields tested. These results do not inspire confidence in the accuracy of data collected by CDE. The issue of the accuracy of CALPADS data has additional importance as CDE is now

¹³ CDE Design Response I at 10, CDE Design Response II at 6-7, CDE 2/22/13 Response at 5-9; CDE's "2011-12 SESR Followup Review: CASEMIS Student Level Data Verification"; CDE's "2011-12 SESR Followup Reviews: CASEMIS Data Verification Protocol."

apparently relying on this database for suspension/expulsion data (CDE Design Response I at 11; see Section III. C. 3. c. below).

Monitor's Determination: Plaintiffs have not shown that qualitative information is converted to quantitative information, nor why such a process would be inadequate; what types of data require back-up materials, nor why that would be necessary; that CDE's data verification activities do not ensure consistency across districts; that data collected or analyses are performed by third parties; and that any qualitative information requires evaluative criteria in order to facilitate improvements in provider performance. CDE has not demonstrated that its data validation activities are adequate to ensure that it is collecting and using accurate data for monitoring and enforcement purposes.

Therefore, CDE shall engage in corrective action steps to ensure that it collects and uses accurate data for monitoring and enforcement purposes. For each type of data identified in response to the determination made at Section III. C. 1. above, CDE shall set forth through a submission to the Monitor and the parties the results of its data validation activities for that type of data in the last three school years. The submission should clearly indicate which data validation activity was used to reach each result. For results from the on-site data validation activities, CDE should ensure that the submission shows the number and percentage of students for whom all fields checked were found to be fully accurate, and the percentage accuracy for each field in the database. For any type of data identified by CDE for which it has not validated accuracy, CDE shall set forth the steps necessary to do so. In addition, as CDE has stated that it has made findings of noncompliance related to data accuracy as a result of its on-site data validation efforts (CDE Design Response I at 10, CDE Design Response II at 7), the submission should identify the number of such findings made, and the number and percentage of districts that were found noncompliant through its on-site activities in the 2012-13 school year. The necessity of further corrective actions will be determined after review of the submissions.

3. Too Limited Follow-Up with Districts

a. APR Measure/ Annual Correction of Noncompliance

Plaintiffs argue that CDE's claims to identify and correct noncompliance on an annual basis are not supported by any documents CDE produced, with the exception of what Plaintiffs regard as the "flawed APR measure." Plaintiffs accuse CDE of using this annual public reporting vehicle unevenly. In support of this claim, using the 2012 reports they note that in response to Ravenswood's low state assessment proficiency rates (Indicator 3) CDE required action by the District, but did not require action for the District's failure to meet Indicator 11 (timely assessments). In addition, Plaintiffs point out what in their view is a lack of uniformity in the application of "action required" on the APR measure: action was not required of other districts that failed to meet targets on performance indicators. Plaintiffs offer the examples of two districts that did not

have action required for low performance on state assessments, while action was required of a district with much higher levels of proficiency (PDC at 16, 17, 25).

CDE responds that it will avoid the use of "action required" in the future on this report, and will instead simply report on whether or not the target was met. CDE states that its APR measure "in substance, will continue (1) to correct, within a year, all findings of noncompliance for the compliance indicators applicable to LEAs...." This appears to contradict CDE's comment on this subject in its 3/22/13 response, in which it described its APR report in the following manner: "The APR indicator report is just that--a report. Findings of noncompliance are made through other means--the data-based noncompliance process, the disproportionality reviews and through SESRs and VRs." CDE argues that the lack of an "action required" column for Indicator 11 in the report does not indicate that no action was required on this issue: it asserts that it notified the District of this area of noncompliance in a letter and required corrective action within a year. While CDE cites its data-based monitoring and technical assistance guide in support of this point, it does not attach or link to the letter it claims to have sent.

After describing its process for identifying and correcting noncompliance with the APR compliance indicators, CDE turns to Plaintiffs' example from the performance indicators, Indicator 3, and argues that the discrepancy between the treatment of districts pointed to by Plaintiffs is due to nothing more than the districts for which action was not required not meeting the minimum "n" size for CDE to make accountability determinations, citing its *Accountability Workbook*. On the performance indicators more generally, CDE claims to assess performance annually in the selection process for VRs, through which it is "more likely to select an LEA with low proficiency on performance indicators...." Elsewhere it writes that that the "performance measures are monitored through the SESR or VR" (CDE Design Response II at 4-6; CDE 3/22/13 Response at 13-14).

In spite of the inconsistency in the two CDE documents cited regarding the purpose of the APR indicator report, Plaintiffs' concern about the report is misdirected. CDE is required by the statute to report annually about the performance of each LEA (§ 300.600(a)(4)), must do so using the targets in the SPP¹⁴ within 120 days of submitting its APR each year (§ 300.602(a) and (b)(1)(i)(A)), and cannot report information on performance that would not be statistically reliable or result in disclosure of information that could identify individual students (§ 300.602(b)(3)). CDE is not required by the regulations to use this report as a tool to directly improve compliance or performance; it is simply a vehicle for public reporting.

Second, as noted above Plaintiffs regard the APR Measure as the sole means CDE identified in its documents through which it identifies and corrects noncompliance annually (PDC at 25). But CDE has also provided links to what it regards as "extensive evidence" that aspects of this are accomplished through other means (CDE's 3/22/13 Response at 13; CDE Design Response II at 5). Plaintiffs offer no arguments based on

¹⁴ The regulation also requires the use of the priority areas in the annual report, but as Plaintiffs do not specifically raise this issue, the Monitor will not make a determination on it.

these documents and, thus, the Monitor makes no determination related to them. However, CDE must support its claim regarding its identification and correction of noncompliance in Ravenswood with the relevant compliance indicators (but for Indicator 4, see Section III. C. 3. c. below). As CDE has claimed that it monitors the performance indicators through the SESR and VR processes, including the VR selection process, the adequacy of these processes for this purpose--considered in light of Plaintiffs' objections--will be discussed below.

Monitor's Determination: Plaintiffs have not shown that CDE's LEA APR reports are inconsistent, nor have they shown that CDE is required to use these reports for compliance purposes. In addition, Plaintiffs have not shown that CDE lacks effective means for identifying and correcting noncompliance with compliance indicators annually.

However, within 60 days of the date of this memo, CDE shall submit to the Monitor and parties all documents relevant to, and showing the adequacy of, its monitoring of Indicator 11 and 12 in Ravenswood for the last three years. The necessity of further corrective actions will be determined after review of the submission.

b. Use of Determinations

Plaintiffs turn next to the annual determinations required by IDEA, and claim that CDE has put forth no evidence that it uses these determinations in any part of its monitoring system or in its annual reviews. Plaintiffs, however, do not explain their view of how the IDEA requires determinations to be used as part of an SEA monitoring system. Plaintiffs do not regard the responses made by CDE on the issue of the use of determinations as "meaningful," and critique two documents produced by CDE: while they agree that one undated document "purports" to apply the determinations, they state that it "cannot be confirmed to be a CDE monitoring document"; the other, a sample letter sent to a district, Plaintiffs do not regard as evidence supporting CDE's claim. Plaintiffs' PDC does not state the reasons for the latter judgment, although their 3/8/13 comments which they cite in support on this point appear to describe this document as "vague, ambiguous, unclear and lacks timeframes for response, see e.g., sample letter to district re failures to meet SPPI measures" (PDC at 16-17, 25-26; Plaintiffs' 3/8/13 comments at 13¹⁵).

CDE addresses determinations in several places in its responses to Plaintiffs' objections. It states that it makes determinations annually, and that the determinations are "dispositive" of the issues LEAs must address in their SESRs. In addition, the annual data collection for the determinations "pinpoints" the issues LEAs must address in their SESRs. CDE also notes that it "has available" both determinations and VR

¹⁵ This comment by Plaintiffs also includes the claim that "OSEP has registered the same concerns with respect to CDE's failure to make determinations annually consistent with the above requirements," citing Exhibit 5 (at 2) of CDE's 9/24/12 Request for Judicial Notice. But the second page of this 2012 OSEP letter responding to CDE's submission of its FFY 2010 APR and revised SPP does not state any concerns regarding CDE's performance on determinations; it appears to be merely a reminder to the state to make the determinations.

findings to make findings of noncompliance. Citing its pilot proposal, CDE claims that determinations are calculated based on SPP indicators (reflecting in CDE's view the priority areas), and indicators for audits and timely correction of noncompliance. One of CDE's attachments to its 2/22/13 document is a 10/1/12 sample letter to districts conveying determinations for 2010-11. According to this document the indicators used in CDE's determinations for that year include Indicators 4A, 4B, 9, 10, 11, 12, timely and complete reporting, and audit findings. Timely correction of noncompliance is also listed in the table in the letter, but CDE states there that this item was not used in the determinations for that year (CDE 10/1/12 sample letter at 3).

Another attached document, entitled *California Local District Compliance Determination Process Under Section 616, IDEA 2004*, is undated and not on CDE letterhead. This document explains how CDE arrives at determinations. Points are awarded for each of the indicators noted above in the sample letter in accordance with standards stated in the document (4=meets requirements, 3=needs assistance, 2=needs intervention, and 1=needs substantial intervention). To arrive at the overall determination, CDE sums the determination for each indicator and divides by the number of indicators with numerical values (excluding not applicable and not calculated). Regardless of whether a district's overall determination is needs assistance (NA), needs intervention (NI), or needs substantial intervention (NSI), the document prescribes identical next steps, that the LEA "must" seek technical assistance from its assigned CDE consultant (at 14); however, the document also states that additional sanctions "may apply" to districts that were NA or NI for two or more consecutive years (at 15). NSI districts are not mentioned (CDE Design Response I at 8, 13, 16, 19; CDE Design Response II at 1-3; attachment to CDE 3/22/13 Response at 7; attachments to CDE 2/22/13 Response at 13).

CDE is required by the regulations to make determinations "about the *performance* of each LEA" annually using the four specified categories (§ 300.600(a)(2); emphasis added). As part of its responsibilities under paragraph (a)--which include monitoring at (1), determinations at (2), enforcement at (3), and annual reporting at (4)--CDE "*must use* quantifiable indicators and such qualitative indicators as are needed to adequately measure *performance* in the priority areas identified in paragraph (d) of this section, *and* the indicators established by the Secretary for the State performance plans" (§ 300.600 (c); emphases added). Again, the list of priority areas identified at (d) include FAPE in the LRE; state exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services; and disproportionate representation of racial and ethnic groups in special education (to the extent the representation is the result of inappropriate identification). The determination categories available to CDE are set forth at § 300.603(b)(1), which also states that the determinations should be "[b]ased on" the information in the APR, "*information obtained through monitoring visits, and any other public information made available...*" (emphasis added). The enforcement steps that flow from the determinations are listed at § 300.604(a)-(c), and additional enforcement steps at § 300.608.

Setting aside once again CDE's proposal for a pilot for Ravenswood for the reasons set forth above, except to note on this issue as well that the proposal takes steps in the right direction, CDE's process for making annual determinations does not comply with the statutory requirements. The determinations are required to be "about" performance, and CDE is further required to use indicators in its determinations that are adequate to measure performance in the priority areas in addition to the SPP indicators. Yet it is plain from the process described in CDE's documents that its determinations have been limited to the compliance indicators, in addition to timely/complete reporting of data and audit findings. CDE attempts to take refuge behind an OSEP guidance to states on this subject, citing a 2009 federal document that allows states, in spite of the clear regulatory requirements for determinations, to only consider compliance indicators, valid and reliable data,¹⁶ correction of identified noncompliance,¹⁷ and other data available to the state about districts' compliance with the statute (CDE Design Response II at 2-3). But, in addition to the absence of an argument for its position from the regulatory requirements for determinations, CDE does not mention that OSEP now acknowledges the conflicts between the statutory requirements and its former approach to determinations, and is shifting in a more defensible direction. As OSEP wrote in 2012:

The current system places heavy emphasis on procedural compliance without consideration of how the requirements impact student learning outcomes. *In order to fulfill the IDEA's requirements, a more balanced approach to determining program effectiveness in special education is necessary.*

...The Department is required to annually make determinations of each State's performance status using data from the APR and other publicly available data. The designation "meets requirements" should acknowledge a State's effectiveness in improving outcomes for children with disabilities relative to other states and to the nation. Determinations under RDA will be based on States' overall performance on a set of priority indicators and other relevant data rather than only on compliance indicators.¹⁸

CDE is required to use indicators adequate to measure performance in its annual determinations.

In addition, CDE's determinations process is not based on "information obtained through monitoring visits." While it appears that timely correction of noncompliance was at least intended to be included but was not for the 2010-11 school year, limiting the inclusion of monitoring information in determinations to just whether noncompliance

¹⁶ However, CDE's indicator for determinations looks for timeliness and completeness of data reporting, not validity and reliability.

¹⁷ However, timely correction of noncompliance was not considered by CDE for 2010-11.

¹⁸ OSEP, Results-Driven Accountability in Special Education, Summary, April 5, 2012, at 1-2; emphasis added (<http://www2.ed.gov/about/offices/list/osers/osep/rda-summary.pdf>).

has been corrected timely has no basis in the IDEA's requirements. Further, basing the SESR in part on the determinations is laudable, but has the relation between monitoring and determinations backwards: the determinations are to be based in part on monitoring findings. Moreover, the failure to use current monitoring findings as a factor in the determinations can also produce results that strain common sense. For example, if CDE makes findings of noncompliance in a district and has not yet verified that the noncompliance has been corrected, CDE's process appears to allow it to label such a district "meets requirements" at the same point in time during which it is in possession of information showing that the district does not, in fact, meet all requirements.

Further, CDE's documents related to determinations are unduly vague regarding the consequences of certain determinations. One cannot determine in accordance with the Consent Decree whether the state-level system in place is or is not capable of ensuring continued compliance with the law and the provision of FAPE to children with disabilities in Ravenswood without clarity regarding the consequences of NA, NI or NSI determinations. Stating that unspecified additional sanctions "may apply" to certain districts does not provide the needed clarity.

Finally, CDE's documents do not include any the Monitor has been able to locate that convey the determinations CDE has applied to Ravenswood in recent years, nor data regarding CDE's use of the four categories of determinations statewide. As the parties and Court have a good deal of information regarding compliance in Ravenswood in recent years, CDE's determinations for the District may be instructive.

Monitor's Determination: CDE has not demonstrated that its process for making determinations is compliant with the statute or Consent Decree.

Therefore, CDE shall engage in corrective action steps to develop and implement a process for making determinations that is compliant with the statute and Consent Decree. For each type of data identified by CDE pursuant to the Monitor's Determination for Section III. C. 1. above, CDE shall set forth with precision through a submission to the Monitor and the parties whether, and if so how, the type of data will be used for annual determinations. In addition to setting forth the manner in which determinations will be calculated, the submission shall show with clarity the scores that will result in each level of determination. Further, the submission shall show how determinations will be based on information obtained through monitoring activities. The submission shall also set forth the consequences of each determination, considering the number of years an LEA is in a determination level. Finally, for each of the last five years, CDE shall also convey in its submission the determination given to Ravenswood, the reason(s) for the determination, and the number and percentage of California districts placed in each determination level.

c. Suspension/Expulsion/Disproportionate Representation

Plaintiffs argue first that CDE's monitoring system neither captures nor corrects disproportionate suspensions of students with disabilities, particularly non-white students. Citing 2009 U. S. Department of Education (USDOE) data and a 2012 UCLA

Civil Rights Project document, Plaintiffs argue that Ravenswood and other districts in the state have disproportionately high rates of suspension of students with disabilities, especially African-American students with disabilities. The UCLA document in particular shows, Plaintiffs argue, that of approximately 500 California districts Ravenswood is 43rd in the use of more than one out-of-school suspension for students with disabilities, and 11th in such suspensions of African-American students with disabilities. Plaintiffs add that these data do not count in-school suspensions, which can also affect compliance with the requirements associated with the priority areas. Plaintiffs argue that while CDE claims to collect such data through CASEMIS, it has not produced reports or systems to correct the problems indicated by the data. Responding to CDE's claim in its 2/22/13 response (at 12) that the conclusions of the UCLA study cannot be replicated using CDE data, and that the rate of suspensions and expulsions is half that reported by UCLA and "appears" to have decreased over the last three years, Plaintiffs counter that CDE's response relies on CASEMIS data which it assumes to be accurate, and adds that the USDOE data on which the UCLA study was based were collected directly from the state or districts (PDC at 26-28; Plaintiffs' 3/8/13 comments at 12).

Plaintiffs argue that because SPP Indicator 4 data are only collected for suspensions greater than 10 days, Ravenswood's alleged problems in this area are masked by CDE's exclusive use of Indicator 4 data for compliance purposes. Plaintiffs argue further that this approach does not connect suspensions of any length to potential child find and FAPE violations. In addition, Plaintiffs state that they have not identified any process for individualized review of students suspended or expelled to monitor whether a denial of FAPE and/or behavior related to students' disabilities has caused the high rates of suspension (PDC at 28).

CDE responds that suspension/expulsion data were collected through CASEMIS, but currently collected through CALPADS. It is not clear from CDE's response whether the former is continuing to collect, and will continue to collect, these data as well. CDE uses the data to identify districts that are significantly discrepant overall from the state rate of suspensions/expulsions, and districts significantly discrepant by race/ethnicity, for greater than 10 days. CDE has calculated the state rate of suspensions/expulsions for greater than 10 days as .60 and adds for unexplained reasons a 2% "variation," which sets the state "bar" at 2.6%. Districts that exceed this rate overall or by race/ethnicity are required to conduct a Special Self-Review (SSR). The SSR includes review of the district's policies, procedures and practices. CDE consultants are "available" to assist districts in this self-review process. CDE's earlier response included links to SSR instructions, a student practices review form, and a policies and procedures review form, all dated 10/12.

CDE argues that it should not be "compelled to go beyond" the OSEP requirement to collect data on suspensions/expulsions of greater than 10 days as a result of the data from the UCLA study cited by Plaintiffs. In support CDE offers two arguments: first, CDE uses 2009-10 data to show that 0% of Ravenswood students with disabilities were suspended or expelled for greater than 10 days, compared with a state average of .11%; and second, CDE disagrees with the conclusions and methodology of

the UCLA study. As noted above, CDE states that CALPADS is now collecting suspension/expulsion data beginning in the 2011-12 school year, and explains that all expulsion data is being collected, even if the expulsion's term changed or was suspended. CDE does not state whether all suspension data are being collected as well, or whether these data include in-school suspensions. Finally, CDE states that the state 2011-12 data do in fact indicate that racial/ethnic groups were suspended at different rates.¹⁹ In response to the data, CDE spotlights several initiatives and adds that a district's policies, procedures and practices related to child find and IEPs "may be" revised by CDE after "proper review" of districts' CALPADS data. No timeline or process is set forth for that review (CDE Design Response I at 10-12, 18-19; <ftp://ftp.cde.ca.gov/sp/se/ds/2011-12%20Special%20Self%20Review%20of%20Disproportionality/>).

The Monitor has made a determination above related to data accuracy. In addition, there is no need to resolve the specific dispute regarding the respective accuracy of the UCLA and CDE data in order to resolve Plaintiffs' objection on the issues of suspensions/expulsions²⁰: even if one assumes the UCLA data and conclusions to be inaccurate, Plaintiffs' argument may still persuade and reach its desired conclusion in a weaker form. In other words, any problems that Ravenswood or any other district *may have* regarding disproportionate use of suspensions of any length may not be revealed by CDE's exclusive use of Indicator 4 data for compliance purposes, as disproportionality can also exist in a district's use of removals of fewer than 10 days. Moreover, Plaintiffs have also argued that CDE's approach to this issue cannot connect suspensions of any length to potential child find and FAPE violations, and that they have not identified any process for individualized review of students suspended or expelled to determine whether a denial of FAPE and/or behavior related to students' disabilities is a causal factor in suspensions. Plaintiffs here are not quarreling with CDE's approach to Indicator 4 noncompliance, and have not offered any critique of the SSR process and instruments CDE uses for that purpose²¹; thus much of what CDE says in response, as it is based on Indicator 4 comparative data and concerns the Indicator 4 process, is not relevant to Plaintiffs' argument. After validating that the 2011-12 data show an unspecified amount of disproportionate use of

¹⁹ The press release from CDE on this subject states: "... the data show African-American students are 6.5 percent of total enrollment, but make up 19 percent of suspensions. White students are 26 percent of total enrollment, but represent 20 percent of suspensions. Hispanic students are 52 percent of total enrollment, and 54 percent of suspensions" ("State Schools Chief Tom Torlakson Releases First Detailed Data on Student Suspension and Expulsion Rates," 4/19/13).

²⁰ Nor is it possible for the Monitor to do so without collecting data in California school districts.

²¹ While Plaintiffs do not critique the SSR process and instruments, they do note in the PDC (at 30, fn. 2) that CDE has not provided additional information related to SSRs requested by Plaintiffs, including rates of SSRs, resulting findings, and follow-up visits (Plaintiffs' 3/8/13 comments at 11; CDE 3/22/13 Response at 22-23). But, as noted above, CDE has stated the circumstances that provoke SSRs related to Indicator 4, and has also produced the instructions and forms used in SSRs. As will be seen in Section III. C. 4. below, Plaintiffs are also aware that findings of noncompliance related to Indicator 4 have been made by CDE in the past. As Plaintiffs have not critiqued the process, the Monitor will not require CDE to produce additional information related to SSRs.

suspensions, CDE's response to the most important part of Plaintiffs' argument is vague regarding when the "proper review" of districts' CALPADS data will take place, what this review will consist of, the level of disproportionality that will result in a review of districts' policies, procedures and practices related to child find and IEPs, how this review will be conducted and by whom, and whether such reviews will take place annually. In addition, it has not clarified with sufficient precision the suspension/expulsion data it is collecting and whether those data include in-school suspensions.

Monitor's Determination: CDE has not demonstrated that it uses any individualized process to ensure that students with disabilities subjected to disciplinary removals for fewer than 10 days are receiving FAPE, including any positive behavior supports necessary for them to receive FAPE; nor has it set forth such a process for students subjected to disciplinary removals for fewer than 10 days who do not currently have IEPs to ensure that such students are evaluated if they are suspected of having disabilities.

Therefore, CDE shall engage in corrective action steps reasonably calculated to ensure that students with disabilities subjected to disciplinary removals for fewer than 10 days are receiving FAPE, including any positive behavior supports necessary for them to receive FAPE; and to ensure that students subjected to disciplinary removals for fewer than 10 days who do not currently have IEPs are evaluated if they are suspected of having disabilities. CDE shall set forth with precision through a submission to the Monitor and the parties the suspension/expulsion data it is collecting, the database(s) from which it is collecting those data, and whether the data include in-school suspensions; the frequency of the review of districts' CALPADS data; the substance of this review; the level of disproportionality that will result in a subsequent review of districts' policies, procedures and practices related to child find and IEPs; and how the latter review will be conducted and by whom. The necessity of further corrective actions will be determined after review of the submission.

4. Lagging Follow-Up with Noncompliant Districts

Plaintiffs argue that CDE has not consistently ensured that identified noncompliance is corrected within one year. CDE's sample letter to districts, according to Plaintiffs, is not clear regarding the one-year timeline to correct noncompliance. In addition, Plaintiffs believe that CDE documents show failure to correct noncompliance in a number of areas and districts, and point specifically to findings of noncompliance related to Indicator 4A: only 171²² out of 821 of these findings were corrected within one year. Although Plaintiffs assert that the system design "is not set up" to correct noncompliance timely, they offer no analysis to show what the design lacks in order to do so (PDC at 29; Plaintiffs' 3/8/13 comments at 7).

CDE's two major responses to Plaintiffs' objections do not respond to these concerns. In its 3/22/13 response CDE does respond in a limited way to Plaintiffs'

²² The document shows the number to be 178.

3/8/13 comment on this subject. Discussing the documents characterized in its PDC and paraphrased above, Plaintiffs wrote that these documents "demonstrate that CDE is not currently on top of the limited identified noncompliance that has continued for more than one year in a number of districts" (Plaintiffs' 3/8/13 comments at 7). CDE responded that it "does not understand what is meant by the phrase, 'not on top of.' CDE has and is tracking a large number of findings" (CDE 3/22/13 Response at 17).

Turning first to the sample letter ("NC District Letter" dated 1/15/13), Plaintiffs are correct that it is not clear regarding the timeline for compliance. However, the letter states that the CDE consultant assigned to the district would follow up with the district "to identify timelines." Further, Plaintiffs do not acknowledge that this letter concerns findings that have already passed the one-year timeline for correction; the findings were originally made in June 2011 and the data one year later showed that the noncompliance was not corrected. For that reason the letter uses the phrase "continued noncompliance," and requires the district to complete a root cause analysis (RCA) and a corrective action plan (CAP) to address the root cause of the noncompliance (at 2). CDE's "Data NC Webinar" sets 5/31 as the deadline for individual student correction, RCA and CAP, and 11/1 as the final deadline for completing all corrective actions and the Prong II review (an additional review of students to ensure that no additional violations are found) (at slide 25).

Second, while the "Noncompliant Findings Report" shows that only 21.7% of Indicator 4A violations were corrected within one year, the report also shows that 98.1% of all violations were corrected within one year (76,480 total violations were being tracked by CDE that year), which is not evidence of a systemic problem stemming from a faulty design of this aspect of CDE's monitoring system. However, CDE should account for the Indicator 4A results.

Monitor's Determination: Plaintiffs have not established that CDE is not consistently ensuring that identified noncompliance is corrected within one year, nor that the system design is not set up to correct such noncompliance timely.

However, within 60 days of the date of this memo, CDE shall submit to the Monitor and parties an explanation setting forth the reasons why only 21.7% of Indicator 4A findings of noncompliance were corrected within one year. The necessity of further corrective actions will be determined after review of the submission.

D. SESRs

1. Ineffective SESRs

Plaintiffs note that SESRs "only" take place every four years on a cyclical schedule, and assert that this frequency, when considered along with what Plaintiffs regard as the ineffectiveness of CDE's annual review process, results in a monitoring system that cannot identify noncompliance "at or approaching real time as required by law" (PDC at 30-31).

CDE construes Plaintiffs' position on this issue as "...SESRs should be conducted annually..." and argues in response that annual SESRs would not be "meaningful."