



Nothing about us without us!

September 20, 2017

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Office of the General Counsel, U.S. Department of Education
400 Maryland Avenue SW., Room 6E231
Washington, DC 20202

Re: Docket ID: ED-2017-OS-0074, Evaluation of Existing Regulations

Dear Department of Education,

The Autistic Self Advocacy Network (ASAN)¹ submits the following in response to the Department of Education's Request for Comments, "Evaluation of Existing Regulations."²

ASAN supports the Department of Education's existing regulations and guidance regarding the obligations of State Education Agencies (SEAs) and Local Education Agencies (LEAs) toward students with disabilities. In particular, ASAN supports existing DOE regulations and guidance that clarify and define the civil rights of disabled students, including: the right to an appropriate education; the right to be free of harassment and abuse; the right to use the communication methods that work best for them; and the right to receive services and supports that prepare them for competitive integrated employment. These regulations and guidance were issued after careful considerations of costs and benefits and are necessary in order to protect vulnerable students.

ASAN supports maintaining any regulations and guidance that require the Department to address the disparate impact of a school's policies on students of color and students with disabilities.

¹ ASAN, a 501(c)(3), non-profit organization, is the nation's leading self-advocacy organization by and for autistic people ourselves. Our mission is to advance the social and civil rights of Autistic people and other individuals with disabilities. For more information on ASAN, go to <http://autisticadvocacy.org/>

² Evaluation of Existing Regulations, 82 Fed. Reg. 28,431, 28,431-32 (June 19, 2017).

Many school policies are facially neutral, but nonetheless discriminatory³ and lead to a loss of educational opportunity⁴ for students with disabilities and/or students of color. These biases are more likely to be ignored or to go unreported if only reports of intentional discrimination are examined.

A school may overlook the needs of its most vulnerable students, especially students with disabilities, if it only examines some of its policies and procedures. ASAN therefore firmly supports to the Department of Education's present methodology and guidance to schools.

ASAN supports the Department of Education's Final Rule, "Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities," effective January 18, 2017 and codified at 34 C.F.R. § 300.646 and 34 C.F.R. § 300.647.

The Final Rule established a standard methodology that all state Departments of Education and LEAs must use to calculate whether there is any disproportionality in the number of children of a particular race or ethnicity: (1) identified as children with disabilities; (2) disciplined; and (3) placed in segregated settings.⁵ LEAs are required to calculate whether identification and placement disparities exist in six separate disability categories.⁶ One of these categories is autism.⁷

The continued existence of this Rule is vital. It is particularly important that LEAs continue to collect data that enables us to examine racial disparities with respect to children with disabilities, such as outcome disparities between white and African-American autistic children. Previous Department-wide disproportionality data collection efforts did not disaggregate the data according to both race *and* disability. Children of color with disabilities are overrepresented in certain disability categories and underrepresented in others. For instance, African-American children are twice as likely to be identified as having an

³ U.S. Department of Education Office of Civil Rights and U.S. Department of Justice Civil Rights Division, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014) (describing how a policy can have a disparate impact) [hereinafter "Dear Colleague Letter on Discipline"], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

⁴ Dear Colleague Letter on Discipline at 4, 5.

⁵ Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 81 Fed. Reg. 92376, 92376-464 (codified at 34 C.F.R. §§ 300.646, 300.647).

⁶ *Id.* at 92464.

⁷ *Id.*

emotional disturbance (ED),⁸ but are less likely than white children to be diagnosed as autistic.⁹

Misidentification is also common. Students of color with co-occurring disabilities are particularly at risk of imprecise identification, as one of the student's disabilities may be more or less likely to be diagnosed in a particular racial or ethnic group. This may lead to the student receiving inadequate services for their needs.

The Rule ensures that the data that LEAs collect on these disparities is accurate, thereby providing the information necessary for the state Department of Education and LEA to take steps to reduce disproportionality. Advocacy groups like ASAN also rely on disparity data in order to identify trends in how children with disabilities are being educated, and then to make recommendations to schools and administrators based on those trends.

ASAN supports the Department of Education's December 28, 2016 Dear Colleague letter, "Restraint and Seclusion of Students with Disabilities," and the May 2012 guidance "Restraint and Seclusion: Resource Document."

Restraint and seclusion are ineffective,¹⁰ dangerous to the point of being fatal when used improperly,¹¹ and are used in a discriminatory manner on mainly students with disabilities.¹² The Department of Education's guidelines provide substantial aid to public schools who want to keep their students safe without the excessive use of restraint and seclusion.

The Department of Education's Dear Colleague Letter describes situations in which the use of restraint and seclusion may be unlawful disability discrimination under Section 504 of the

⁸ James M. Patton, *The Disproportionate Representation of African-Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions*, *Journal of Special Education*, Spring 1998, 25-31.

⁹ Mandell et. al., *Racial/Ethnic Disparities in the Identification of Children with Autism Spectrum Disorders*, *Am. J. Public Health*, Mar. 2009, 493-98.

¹⁰ Resource Document at iii ("Furthermore, there continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques").

¹¹ Government Accountability Office (GAO), GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* 1, 5, 8, 9, 10 (May 19, 2009) (finding that use of restraints that restricted the child's breathing resulted in the death of the child in some of the cases studied by the GAO).

¹² Dear Colleague Letter on Restraint and Seclusion at 2 (citing Department of Education, Office of Civil Rights, *2013-2014 Civil Rights Data Collection: A First Look* 4 (updated Oct. 28, 2016), www.ed.gov/ocr/docs/2013-14-first-look.pdf).

Rehabilitation Act.¹³ It outlines what a school must do to comply with Section 504, and what the school should do if it finds that the use of restraint and seclusion on a particular student was in violation of Section 504.¹⁴ The guidance specifically describes situations in which restraint and seclusion may violate the student's right to a free and appropriate public education (FAPE).¹⁵

The Department of Education's 2012 guidance states that restraint and seclusion should be used *only* when a child is at risk of seriously injuring themselves or others.¹⁶ The Department of Education outlines fifteen principles that school administrators, teachers, state educational agencies, parents, and other stakeholders can use when developing policies around restraint and seclusion.¹⁷ It also recommends the use of methodologies that reduce the risk that restraint and seclusion will be needed, such as the use of positive behavioral interventions and supports (PBIS).¹⁸

ASAN supports: (1) the July 25, 2000 joint Dear Colleague letter "Prohibited Disability Harassment," (2) the October 26, 2010 "Dear Colleague letter on Harassment and Bullying"; (3) the August 20, 2013 Dear Colleague Letter "Bullying of Students with Disabilities"; and (4) the October 21, 2014 Dear Colleague letter, "Responding to Bullying of Students with Disabilities." It firmly supports the continuation of the Department of Education's investment into bullying prevention, as represented by its partnership with the Department of Health and Human Services to produce the website Stopbullying.gov and other initiatives.

Bullying and harassment of autistic students is extremely common, and this bullying can have a significant negative impact on the ability of autistic students to learn.¹⁹ ASAN firmly

¹³ U.S. Department of Education, Office of Civil Rights, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* 5, 8-12 (Dec. 28, 2016) [hereinafter "Dear Colleague Letter on Restraint and Seclusion"], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>.

¹⁴ Dear Colleague Letter on Restraint and Seclusion at 17-21.

¹⁵ *Id.* at 11-13.

¹⁶ U.S. Department of Education, No. ED-OSE-09-O-0058, *Restraint and Seclusion: Resource Document* (2012), [Hereinafter referred to as "Resource Document"], <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

¹⁷ Resource Document at 13-21.

¹⁸ *Id.* at 2, 13.

¹⁹ P.R. Sterzing, P.T. Shattuck, S.C. Narendorf, M. Wagner, B.P. Cooper, *Bullying involvement and autism spectrum disorders: prevalence and correlates of bullying involvement among adolescents with an autism spectrum disorder*, 166 *Arch Pediatr. Adolescent Medicine* 1058 (2012): <https://www.ncbi.nlm.nih.gov/pubmed/22945284> (finding that 46.3% of the autistic children studied had been bullied); Connie Anderson, *IAN Research Report: Bullying and Children with ASD*, Interactive Autism Network (last updated Oct. 7, 2014):

supports the Department of Education's efforts to prevent the bullying of students with disabilities.

The Dear Colleague letters listed above represent the DOE's significant efforts to protect students with disabilities from harassment and abuse by other students. The Dear Colleague letters explain that bullying a student with a disability may violate that student's right to an education under Section 504 of the Rehabilitation Act, may be discrimination under Title II of the Americans with Disabilities Act, and clarify to what extent a school must investigate bullying to avoid violating the law.²⁰ In addition to these clarifications, the website Stopbullying.gov²¹ provides valuable information to parents, students, and teachers who want to understand and prevent the bullying of students with disabilities.

ASAN supports any effort by the Department of Education to repeal, alter or replace any of the Workforce Innovation and Opportunity Act (WIOA)'s final implementing regulations as released in June 2016, including: (a) the rule "State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage"; (b) the rule "Programs and Activities Authorized by the Adult Education and Family Literacy Act"; (c) the rule "WIOA, Miscellaneous Program Changes"; and finally the "Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions" with the Department of Justice.

The Workforce Innovation and Opportunity Act's regulations make significant, substantive improvements to the law's implementation. They emphasize high quality employment services and supports that reduce many of the barriers to work faced by autistic people and other people with disabilities.²² These improvements help us obtain real jobs in the

https://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying (finding that 63% of the autistic children studied had been bullied at least once in their lives).

²⁰ See U.S. Department of Education, Dear Colleague Letter, *Prohibited Disability Harassment: Reminder of Responsibilities under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act* (July 25, 2000) <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>; U.S. Department of Education, *Dear Colleague Letter on Harassment and Bullying* (Oct. 26, 2010); U.S. Department of Education, *Bullying of Students with Disabilities* (Aug. 10, 2013), <http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc>; U.S. Department of Education, *Responding to Bullying of Students with Disabilities* (Oct. 21, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

²¹ U.S. Department of Health and Human Services, *Stopbullying.gov*, <https://www.stopbullying.gov/index.html> (last accessed Sep. 7th, 2017).

²² See U.S. Department of Labor, U.S. Department of Education, U.S. Department of Health and Human Services, *WIOA Fact Sheet: The Big Picture* (Aug. 19, 2016), retrieved from: <https://www.doleta.gov/WIOA/Docs/Final-Rules-An-Overview-Fact-Sheet.pdf> ("The system will deliver integrated, job-driven services to job seekers, including youth and those with barriers to employment, as well as to workers and employers").

community, in the same fashion as people without disabilities. Most people with disabilities want to work. Work grants us dignity, respect, and the ability to contribute to American society as taxpayers.

For example, the rule “State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage” emphasizes competitive integrated employment as the preferred outcome for all jobseekers with disabilities. It improves access to the supported employment services that help people with disabilities attain that outcome.²³

Other critical changes that these Final Rules make include the Joint Rule’s²⁴ requirements concerning the physical and programmatic accessibility of One-Stop Centers, as well as on the accessibility of the broader workforce development system to people with disabilities.²⁵

ASAN supports the joint guidance, “Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools,” produced by the Department of Justice and the Department of Education.

The joint guidance describes what obligations a school has under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the “effective communication” requirements of Title II of the ADA.²⁶ The guidance makes clear that a school may have to provide services to establish effective communication with a student under Title II of the ADA that they are not required to provide under the IDEA.²⁷ It indicates that, under

²³ State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage; Final Rule, 81 Fed. Reg. 55630, 55631 (Aug. 19, 2016) (codified at 34 C.F.R. pts. 361, 363, 397).

²⁴ Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule, 81 Fed. Reg. 55792, 55794-796 (Aug. 19, 2016) (codified at 34 C.F.R. pts. 676, 677, 678).

²⁵ Joint Rule for Unified and Combined State Plans at 55795-796; Office of Disability Employment Policy (ODEP), LEAD Center, *LEAD Center Policy Brief: Summary Description from a Disability Perspective: Final Rule Implementing Title I of the Workforce Innovation and Opportunity Act (Workforce Development Systems)* 7, 9, 11, 12, 19, 20, 21 (Aug. 19, 2016), retrieved from: http://www.leadcenter.org/system/files/resource/downloadable_version/wioa-title-i-final-rule-summary-aug.pdf.

²⁶ U.S. Department of Justice, U.S. Department of Education, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (Nov. 12, 2014), retrieved from: https://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm [hereinafter “Effective Communication Guidance”].

²⁷ Effective Communication Guidance at para. 3, 49, 50, 51 (“Further, if the special education and related services provided under the IDEA are not sufficient to ensure that communication with the student is as effective as communication with other persons, the Title II obligations have not been met”).

Title II, communication with a student with a disability must be at least as effective as communication with students without disabilities.²⁸ Furthermore, the auxiliary communication aid or service preferred by the student with a disability must be used by the school unless the district has an equally effective alternative method of communication available.²⁹

This guidance helps schools and school districts more clearly understand what the ADA requires with respect to establishing effective communication with students with disabilities. Establishing effective communication is critical for the academic success of students with disabilities. Without effective communication, students with disabilities may be unable to express opinions, participate in informed discussions, complete their assignments, or express their needs and preferences to teachers and other students.

ASAN supports the Department of Education’s July 6, 2015 Dear Colleague letter, “Speech and Language Services for Students with Autism Spectrum Disorder.”

The Dear Colleague letter affirms that autistic students must be provided with speech and language services when they require those services.³⁰ It explains that, when an Individualized Education Plan (IEP) is being developed for an autistic child, or when the child is being evaluated for special education services under Part C of the IDEA, the IEP team and school should consult speech language pathologists.³¹ The Dear Colleague letter confirms that Applied Behavioral Analysis (ABA) is not the only therapy available for autistic children and that the schools should consider the autistic child’s specific needs.³²

Speech and language services have helped many autistic children learn how to communicate.³³ The ability to communicate lies at the foundation of a successful and independent life.³⁴ Communication gives autistic people the ability to express their

²⁸ Effective Communication Guidance at para. 8 (citing 8 C.F.R. §§ 35.130 and 35.160).

²⁹ Effective Communication Guidance at para. 26-29.

³⁰ U.S. Department of Education, Dear Colleague Letter on Speech and Language Services for Students with Autism Spectrum Disorder (July 6, 2015) [hereinafter “Dear Colleague Letter on Speech and Language Services”]: <http://www.asha.org/uploadedFiles/US-Dept-Education-ASD-Services-Letter.pdf>

³¹ Dear Colleague Letter on Speech and Language Services at 1.

³² *Id.* at 2.

³³ National Institute on Deafness and Other Communication Disorders, *Autism Spectrum Disorder: Communication Problems in Children*, National Institute of Health, <https://www.nidcd.nih.gov/sites/default/files/Documents/publications/pubs/AutismSpectrumDisorder-508.pdf> (last updated May 1, 2017).

³⁴ *Id.* at pg. 2 (“Teaching children with ASD to improve their communication skills is essential for helping them reach their full potential”).

preferences and wishes, interact with others, make decisions, succeed academically, and help direct the services and supports they may receive.³⁵

ASAN urges the Department of Education to consider the potential impact of each regulation or guidance document it seeks to repeal, remove, or replace on the education of students with disabilities. For more information on ASAN's positions on each of the documents and regulations listed above, please contact Samantha Crane, our Director of Legal and Public Policy, at scrane@autisticadvocacy.org.

³⁵ University of California Office of Developmental Primary Care, *Everybody Communicates: Toolkit for Accessing Communication Assessments, Funding, and Accommodations*, <http://odpc.ucsf.edu/communications-paper/1-introduction-and-how-to-use-this-toolkit> (2017).