

**DEPARTMENT OF EDUCATION****34 CFR Part 300**

[Docket ID ED-2015-OSERS-0132]

RIN 1820-AB73

**Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities**

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend regulations under Part B of the Individuals with Disabilities Education Act (IDEA) governing the Assistance to States for the Education of Children with Disabilities program and the Preschool Grants for Children with Disabilities program. With the goal of promoting equity in IDEA, the regulations would establish a standard methodology States must use to determine whether significant disproportionality based on race and ethnicity is occurring in the State and in its local educational agencies (LEAs); clarify that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities; clarify requirements for the review and revision of policies, practices, and procedures when significant disproportionality is found; and require that LEAs identify and address the factors contributing to significant disproportionality as part of comprehensive coordinated early intervening services (comprehensive CEIS) and allow such services for children from age 3 through grade 12, with and without disabilities.

**DATES:** We must receive your comments on or before May 16, 2016.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

If you are submitting comments electronically, we strongly encourage you to submit any comments or

attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), we strongly encourage you to convert the PDF to print-to-PDF format or to use some other commonly used searchable text format. *Please do not submit the PDF in a scanned format.* Using a print-to-PDF format allows the U.S. Department of Education (the Department) to electronically search and copy certain portions of your submissions.

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using Regulations.gov, including instructions for finding a rule on the site and submitting comments, is available on the site under “How to use Regulations.gov” in the Help section.

- *Postal Mail, Commercial Delivery, or Hand Delivery:*

The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about these proposed regulations, address them to Kristen Harper, U.S. Department of Education, 550 12th Street SW., Room 5109A, Potomac Center Plaza, Washington, DC 20202-2600.

**Privacy Note:** The Department’s policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:**

Kristen Harper, U.S. Department of Education, 550 12th Street SW., Room 5109A, Potomac Center Plaza, Washington, DC 20202-2600. Telephone: (202) 245-6109.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****Executive Summary**

*Purpose of This Regulatory Action:* The purpose of these proposed regulations is to promote equity in IDEA. The specific purposes are to (1) help ensure States appropriately identify significant disproportionality based on race and ethnicity in the State and LEAs of the State with regard to identification of children as children with disabilities, the placement of children in particular educational settings, and the incidence, duration, and type of disciplinary actions (including suspensions and expulsions);

and (2) help States and LEAs address and reduce significant disproportionality in the State and the LEAs identified. Specifically, the proposed regulations will help to ensure that States meaningfully identify LEAs with significant disproportionality, and that States assist LEAs in ensuring that children with disabilities are properly identified for services, receive necessary services in the least restrictive environment, and are not disproportionately removed from their educational placements due to disciplinary removals. These proposed regulations specifically address the well-documented and detrimental over-identification of certain students for special education services, with particular concern that over-identification results in children being placed in more restrictive environments and not taught to challenging academic standards. At the same time, there have been significant improvements in the provision of special education, particularly with regard to placing children in general education classrooms with appropriate supports and services, and a commitment to instruction tied to college- and career-ready standards for all children, all of which should play a positive role in improving student outcomes. Therefore, the intention of these proposed regulations is not to limit services for children with disabilities who need them; rather, their purpose is to ensure that children are not mislabeled and receive appropriate services.

To accomplish this end, these proposed regulations would establish a standard methodology that each State must use in its annual determination under IDEA section 618(d) (20 U.S.C. 1418(d)) of whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. IDEA does not define “significant disproportionality,” and, in the Department’s August 2006 IDEA Part B regulations, the Department left the matter to the discretion of the States. Since then, States have adopted different methodologies, and, as a result, far fewer LEAs are identified as having significant disproportionality than the disparities in rates of identification, placement, and disciplinary removal across racial and ethnic groups would suggest. There is a need for a common methodology for determinations of significant disproportionality in order for States and the Department to better identify and address the complex, manifold causes of the issue and ensure compliance with the requirements of IDEA.

Further, these proposed regulations would clarify ambiguities in the existing regulations concerning significant disproportionality in the discipline of children with disabilities. Data and research show that children of color with disabilities are more likely to be suspended and expelled than white children with disabilities, and that suspensions are associated with negative student outcomes such as lower academic performance, higher rates of dropout, failures to graduate on time, decreased academic engagement, future disciplinary exclusion, and interaction with the juvenile justice system. (Lamont et al, 2013; Council of State Governments, 2011; Lee, Cornell, Gregory, & Xitao, 2011; Losen and Skiba, 2010; Brooks, Shiraldi & Zeidenberg, 2000; Civil Rights Project, 2000.)

In order to improve the review of LEA policies, practices, and procedures when significant disproportionality is found, the Department is also proposing to clarify IDEA's requirements regarding their review and, when appropriate, revision.

Finally, to help address and reduce significant disproportionality when it is found in an LEA, the proposed regulations would expand the scope of and strengthen the remedies required under IDEA. Under section 618(d) of IDEA (20 U.S.C. 1418(d)), if a State determines that significant disproportionality is occurring in an LEA, the State must require the LEA to reserve the maximum amount of funds to provide comprehensive CEIS to serve children in the LEA, particularly children in those racial or ethnic groups that were significantly overidentified. The proposed regulations would require that LEAs identify and address the factors contributing to significant disproportionality as part of the implementation of comprehensive CEIS and would expand the authorized use of funds reserved for these services to serve children from age 3 through grade 12, with and without disabilities.

Please refer to the *Background* section of this notice of proposed rulemaking for a detailed discussion of these proposals and their purposes.

### Summary of the Major Provisions of This Regulatory Action

As described below, the proposed regulations would require States to use a standard methodology to identify significant disproportionality in the State and in its LEAs, including the use of: A risk ratio or, if appropriate given the populations in an LEA, an alternate risk ratio; a reasonable risk ratio threshold; and a minimum cell size of

not more than 10 as the standard methodology to determine whether there is significant disproportionality based on race or ethnicity in the State and its LEAs.

States would retain discretion to determine the risk ratio threshold above which disproportionality is significant, so long as that threshold is reasonable and based on advice from their stakeholders, including their State Advisory Panels. States would set risk ratio thresholds for three categories of analysis:

- The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the IDEA;
- The placement of children with disabilities in particular educational settings; and
- The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

These regulations would also provide States with flexibility in determining whether significant disproportionality exists, even if a risk ratio exceeds the risk ratio threshold established by the State. States have the flexibility to choose to identify an LEA as having significant disproportionality only after an LEA exceeds a risk ratio threshold for up to three prior consecutive years. In addition, a State need not identify an LEA with significant disproportionality if the LEA is making reasonable progress in lowering its risk ratios, where reasonable progress is determined by the State.

The proposed regulations would clarify that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions of children with disabilities, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities.

Under these proposed regulations, States would also have to provide for the review and, if appropriate, revision of an LEA's policies, practices, and procedures used in the identification or placement of children with disabilities in every year in which an LEA is determined to have significant disproportionality based upon race or ethnicity. Reporting of any revisions to an LEA's policies, practices, and procedures would have to comply with the confidentiality provisions of FERPA, its implementing regulations in 34 CFR part 99, and section 618(b)(1) of IDEA.

Finally, the proposed regulations would expand the student populations that may receive comprehensive CEIS when an LEA has been identified with significant disproportionality. Funds reserved for these services under section 618(d)(2)(B) of IDEA (20 U.S.C. 1418(d)(2)(B)) could be used to serve children from age 3 through grade 12, with and without disabilities. Under current regulation, comprehensive CEIS may only serve children without disabilities, from kindergarten through grade 12. The proposed regulations would also require that, as part of implementing these services, an LEA must identify and address the factors contributing to the significant disproportionality.

The Department also intends to monitor and assess these regulations once they are final to ensure they have the intended goal of improving outcomes for all children. To that end, the Department will publicly establish metrics by which to assess the impact of the regulations. These might include a comparison of risk ratios to national averages and across States. We welcome public comment on appropriate metrics to use to monitor these regulations.

Please refer to the *Significant Proposed Regulations* section of this notice of proposed rulemaking for a detailed discussion of these proposals.

### Costs and Benefits

As further detailed in the *Regulatory Impact Analysis*, we estimate that the total cost of these regulations over ten years would be between \$47.5 and \$87.18 million, plus additional transfers between \$298.4 and \$552.9 million. The major benefits of these proposed regulations, taken as a whole, include ensuring a standard methodology for determining significant disproportionality based on race and ethnicity in the State and the LEAs in the State with regard to identification of children as children with disabilities, the placement of children in particular educational settings, and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions; ensuring increased transparency on each State's definition of significant disproportionality; establishing an increased role for stakeholders through State Advisory Panels in determining States' risk ratio thresholds; reducing the use of potentially inappropriate policies, practices, and procedures as they relate to the identification of children as children with disabilities, placements in particular educational settings for these children, and the incidence, duration, and type of disciplinary removals from

placements, including suspensions and expulsions; and promoting and increasing comparability of data across States in relation to the identification, placement, or discipline of children with disabilities by race or ethnicity. Additionally, the Department believes that expanding the eligibility of children ages three through five to receive comprehensive CEIS would give LEAs flexibility to use IDEA Part B funds reserved for comprehensive CEIS to provide appropriate services and supports at earlier ages to children who might otherwise later be identified as having a disability, which could reduce the need for more extensive special education and related services for such children at a later date.

*Invitation to Comment:* We invite you to submit comments regarding these proposed regulations and directed questions. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You also may inspect the comments in person in Room 5109A, Potomac Center Plaza, 550 12th Street SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

*Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record:* On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person

listed under **FOR FURTHER INFORMATION CONTACT**.

#### *Background*

IDEA Requirements Regarding Racial and Ethnic Disparities

Under IDEA Part B, the Department provides grants to States, outlying areas, and freely associated States, as well as funds to the Department of the Interior, to assist them in providing special education and related services to children with disabilities. There are four key purposes of the Part B regulations in 34 CFR part 300: (1) To ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepares them for further education, employment, and independent living; (2) to ensure that the rights of children with disabilities and their parents are protected; (3) to assist States, localities, educational service agencies, and Federal agencies in providing for the education of all children with disabilities; and (4) to assess and ensure the effectiveness of efforts to educate children with disabilities.

The overrepresentation of children from racial, cultural, ethnic, and linguistic minority backgrounds in special education programs has been a national concern for four decades. (Donovan & Cross, 2002.) When children of color are identified as children with disabilities at substantially higher rates than their peers, there is a strong concern that some of these children may have been improperly identified as children with disabilities, to their detriment. Misidentification interferes with a school's ability to provide children with appropriate educational services. (Albrecht, Skiba, Losen, Chung & Middleberg, 2012.) The overidentification of children of color in special education, in particular, raises concerns of potential inequities in both educational opportunities and outcomes. Overidentification may differentially diminish the opportunities of children of color to interact with teachers and others within the larger school context, especially when education is provided in separate settings. Research has found that African American, Hispanic/Latino, and American Indian/Alaska Native children and English language learners have a greater chance of receiving placements in separate educational settings than do their peers. (De Valazuela, Copeland, Huaqing Qi, and

Park, 2006.) Nationally, Black/African-American, Asian, and Native Hawaiian and Other Pacific Islander children with disabilities (ages 6 through 21) were less likely than their White peers to be inside the regular classroom 80 percent or more of the day (56 percent, 57 percent, 54 percent, and 65 percent, respectively) during the 2012–2013 school year (SY). (36th Annual Report to Congress, 2014.)

In issuing these proposed regulations, the Department's goal is to promote equity in IDEA. We want to be clear that our intention is not to deny special education services to children who need them. It is, however, to ensure that children who need special education services receive them in the least restrictive settings. It is also to ensure that children who do not have disabilities and do not need special education services are not inappropriately identified as such, and to ensure that those children receive proper educational supports through the general education system.

Congress first addressed racial and ethnic disparities in identification for special education in the IDEA Amendments of 1997 (1997 Amendments). It found that “[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates of minority children with disabilities,” Public Law 105–17, section 601(c)(8)(A) (1997), codified at 20 U.S.C. 1400(c)(12)(A), and noted that “more minority children continue to be served in special education than would be expected from the percentage of minority students in the general education population.” Public Law 105–17, section 601(8)(B)(1997), codified at 20 U.S.C. 1400(c)(12)(B).

The 1997 Amendments added the requirement that States collect and examine data to determine if significant disproportionality based on race was occurring in the identification and placement of children with disabilities. Public Law 105–17, section 618(c)(1) (1997). If States found significant disproportionality, Congress required them to review, and, if appropriate, revise the policies, practices, and procedures used in identification and placement. Public Law 105–17, section 618(c)(2) (1997).

In 2004, Congress again found that greater efforts were needed to address misidentification of children of color with disabilities, and it specifically found that “African-American children are identified as having [intellectual disabilities] or emotional disturbance at rates greater than their White counterparts;” that “[i]n the 1998–1999

school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities;" and that "[s]tudies have found that schools with predominately White students and teachers have placed disproportionately high numbers of minority students into special education." Public Law 108-446, section 601(c)(12) (2004), codified at 20 U.S.C. 1400(c)(12)(C)-(E).

Accordingly, in the Individuals with Disabilities Education Improvement Act of 2004, Congress expanded the provision on significant disproportionality in four respects: (1) Added "ethnicity" to section 618(d)(1) as a basis upon which to determine significant disproportionality (in addition to race); (2) added section 618(d)(1)(C) to require that States determine if significant disproportionality is occurring with respect to the incidence, duration, and type of disciplinary actions, including suspensions and expulsions; (3) added section 618(d)(2)(B) to require the mandatory use of funds for comprehensive CEIS; and (4) added 618(d)(2)(C) to require that LEAs publicly report on the revision of policies, practices, and procedures.

In addition to changes to the significant disproportionality provision in section 618(d) of IDEA, Congress added a requirement that States, using quantifiable indicators, monitor LEAs for disproportionate representation of racial and ethnic groups in special education and related services that is the result of inappropriate identification. Public Law 108-446, section 616(a)(3)(C)(2004), codified at 20 U.S.C. 1416(a)(3).

As such, IDEA currently requires each State to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and its LEAs in any of three categories of analysis:

- The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the IDEA (identification);
  - The placement of children with disabilities in particular educational settings (placement); and
  - The incidence, duration, and type of disciplinary actions, including suspensions and expulsions (disciplinary removals).
- Section 618(d)(1) of IDEA (20 U.S.C. 1418(d)(1)).

If a State determines that an LEA has significant disproportionality based on race and ethnicity with respect to identification or placement, then the State must: (1) Provide for the review and, if appropriate, revision of policies, practices, and procedures used in the identification or placement to ensure that its policies, practices, and procedures comply with the requirements of IDEA; (2) require any LEA identified with significant disproportionality to reserve the maximum amount of funds under section 613(f) of IDEA (20 U.S.C. 1413(f)) to provide comprehensive CEIS to serve children in the LEA, particularly children in those groups that were significantly overidentified; and (3) require the LEA to publicly report on the revision of those policies, practices, and procedures. Section 618(d)(2) of IDEA (20 U.S.C. 1418(d)(2)). These requirements are separate and distinct from the requirement that States report in their State Performance Plans/Annual Performance Reports on the percent of LEAs with disproportionate representation of racial and ethnic groups in special education and related services that is the result of inappropriate identification. Section 616(a)(3)(C) of IDEA; 20 U.S.C. 1416(a)(3)(C); § 300.600(d)(3).

Finally, section 613(f)(1) of IDEA (20 U.S.C. 1413(f)(1)) allows LEAs to voluntarily use up to 15 percent of their IDEA Part B funds (less any reduction by the LEA in local expenditures for the education of children with disabilities pursuant to § 300.205) to develop and implement CEIS,<sup>1</sup> which may include interagency financing structures, for children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade three) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

It is against this background that the Department issues this notice of proposed rulemaking (NPRM) to require a standard methodology for States to use in identifying significant disproportionality on the basis of race and ethnicity in the State and the LEAs of the State and to strengthen the statutory remedies whenever LEAs are identified. There are four parts to the

Department's proposal: A standard methodology that States must use to determine significant disproportionality; a clarification that the statutory remedies apply to disciplinary removals; a clarification that the review and revision of policies, practices, and procedures occur every year and be consistent with the Family Education Rights and Privacy Act (FERPA) (20 U.S.C. 1232g) and its implementing regulations in 34 CFR part 99 and section 618(b)(1) of IDEA; and an expansion of the allowable and required uses of IDEA Part B funds for comprehensive CEIS.

## **I. Establishing a Standard Methodology States Must Use To Determine Significant Disproportionality**

### *A. Definitions of Significant Disproportionality*

Neither IDEA nor its implementing regulations in 34 CFR part 300 define the term "significant disproportionality." While section 607(a) of IDEA (20 U.S.C. 1406(a)) explicitly authorizes the Department to issue regulations to ensure compliance with the statute, the Department has previously left the matter to the States. In the preamble to the 2006 IDEA Part B regulations, we stated that, "[w]ith respect to the definition of significant disproportionality, each State has the discretion to define the term for the LEAs and for the State in general. Therefore, in identifying significant disproportionality, a State may determine statistically significant levels." 71 FR 46540, 46738 (Aug. 14, 2006).

Thereafter, in Office of Special Education Programs (OSEP) Memorandum 07-09, April 24, 2007, the Office of Special Education and Rehabilitative Services (OSERS) stated that "[w]ith one important caveat, each State has the discretion to define what constitutes significant disproportionality for the LEAs in the State and for the State in general. The caveat is that a State's definition of 'significant disproportionality' needs to be based on an analysis of numerical information and may not include considerations of the State's or LEA's policies, practices, and procedures."

The Department, in short, has historically afforded States discretion in establishing methodologies for identifying significant disproportionality. States, in turn, have adopted a range of methodologies, including different methods for calculating disparities between racial and ethnic groups, different considerations for the duration of those

<sup>1</sup>For the sake of clarity and consistency, we refer to "comprehensive CEIS" when an LEA provides coordinated early intervening services by mandate under section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)). When an LEA voluntarily provides these services under section 613(f) (20 U.S.C. 1413(f)), we refer to them as "CEIS."

disparities, and different mechanisms for excluding LEAs from any determination of whether significant disproportionality exists.

*B. The 2013 GAO Study on Racial and Ethnic Overrepresentation in Special Education*

In February 2013, the Government Accountability Office (GAO) issued a study entitled “INDIVIDUALS WITH DISABILITIES EDUCATION ACT—Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education (GAO–13–137).” The GAO found that, in SY 2010–2011, States required about two percent of all school districts that received IDEA funding to use 15 percent of IDEA Part B funds for comprehensive CEIS to address significant disproportionality on the basis of race and ethnicity. Of a total of more than 15,000 districts nationwide, only 356 LEAs (roughly two percent of LEAs) were required to provide comprehensive CEIS. The GAO found that “the discretion that States have in defining significant disproportionality has resulted in a wide range of definitions that provides no assurance that the problem is being appropriately identified across the nation.” Further, the GAO found that “the way some states defined overrepresentation made it unlikely that any districts would be identified and thus required to provide early intervening services.” (GAO, 2013.)

To better understand the extent of racial and ethnic overrepresentation in special education and to promote consistency in how States determine which LEAs are required to provide comprehensive CEIS, the GAO recommended that the Department “develop a standard approach for defining significant disproportionality to be used by all States” and added that, “this approach should allow flexibility to account for state differences and specify when exceptions can be made.” (GAO, 2013.)

*C. Actions Taken by the Department Since the GAO Study*

Like the GAO, the Department is concerned that the wide range of methodologies used to determine significant disproportionality creates significant challenges in assessing whether the problem of racial and ethnic disparities is being addressed. In fact, based on data collected by the Department’s OSEP and Office for Civil Rights, the Department is concerned that many States are not identifying LEAs with large disparities in identification, placement, and

discipline, thereby depriving a number of children of the remedies enumerated in statute, including comprehensive CEIS, for populations who are overidentified. Accordingly, in recent years the Department has taken a number of steps intended to address this problem.

In a report to the President published in May 2014, the My Brother’s Keeper Task Force identified disparities in special education as a significant challenge that should be addressed. In June 2014, the Department published a request for information (RFI) inviting public comment on the GAO’s recommendation that the Department adopt a standard methodology for determining significant disproportionality. 79 FR 35154 (June 19, 2014).

The 95 commenters responding to the RFI generally fell into two broad categories: Civil rights and advocacy organizations, and SEA representatives. For the most part, civil rights and advocacy organizations strongly urged the Department to require a standard methodology that would offer States flexibility and at the same time decrease inter-State variability in methodologies for determining significant disproportionality. Most SEA representatives, in contrast, did not support the adoption of a standard methodology and asserted that a single methodology would be unlikely to fit the circumstances of different States.

SEA representatives also noted that there are a large number of districts in the country that vary greatly in population, number of children served, geographic size, student needs, per pupil expenditures, and range of services offered. These commenters noted that some States have established “intermediate school districts” that only serve children with disabilities and that there is a high incidence of disability among children in some communities because of environmental factors. These commenters argued that, in such instances, a standard methodology for determining significant disproportionality might unintentionally identify LEAs that have disparities in enrollment rather than LEAs that actually have disparities based on race and ethnicity in the identification, placement, or disciplinary removal of children with disabilities.

Other commenters argued that comprehensive CEIS (as outlined in the current regulations) may be ineffective as a tool to address significant disproportionality, since States often identify the same LEAs every year even after comprehensive CEIS has been

employed. One commenter, representing an SEA, stated that clearer guidance regarding appropriate uses of funds for comprehensive CEIS would support more widespread implementation of multi-tiered systems of support. Other commenters, including an SEA representative and a group representing special education administrators, noted that States could not presently use comprehensive CEIS under section 618(d) of IDEA to provide services and support to children with disabilities even if they represent groups with significant disproportionality with respect to disciplinary removal and placement because of the limited population of children eligible for CEIS in section 613(f) of IDEA.

Finally, the Department also undertook its own review of the State procedures for identifying LEAs with significant disproportionality. We reviewed methodologies for the 50 States, the District of Columbia, and the U.S. Virgin Islands, including whether States used the same or different methods across the three categories of analysis under section 618(d)(1) of IDEA (20 U.S.C. 1418(d)(1)) (identification, placement, and disciplinary removal).<sup>2</sup> Additional information regarding the various methodologies currently in use is available in the IDEA Data Center’s Methods for Assessing Racial/Ethnic Disproportionality in Special Education: A Technical Assistance Guide (Revised), published at [https://ideadata.org/files/resources/54480c2b140ba0665d8b4569/54c90646150ba0e04f8b457c/idec\\_ta\\_guide\\_for\\_508-051614/2015/01/28/idec\\_ta\\_guide\\_for\\_508-051614.pdf](https://ideadata.org/files/resources/54480c2b140ba0665d8b4569/54c90646150ba0e04f8b457c/idec_ta_guide_for_508-051614/2015/01/28/idec_ta_guide_for_508-051614.pdf). We examined the results of the States’ various methodologies for determining significant disproportionality by reviewing the LEAs identified based on the SY 2012–2013 IDEA section 618 data. We also analyzed data on the rates of identification, placement, and disciplinary removals submitted by the States under section 618. Further, we conducted a review of research to better understand the extent and nature of racial and ethnic disparities in special education. Through these efforts, the Department found the following.

**1. Risk Ratio Is the Most Common Method of Determining Significant Disproportionality**

At the time of our review, 45 States used one or more forms of the risk ratio method to determine significant disproportionality. As there are a

<sup>2</sup> As part of the SY 2013–2014 State Supplement Survey (SSS), each State was required to submit to the Department the methodology it uses to determine significant disproportionality.

number of different ways to calculate risk ratios for the purpose of identifying significant disproportionality, as well as alternatives to the risk ratio method, we provide an overview and background on how States are identifying LEAs with significant disproportionality.

“Standard” Risk Ratio

The “standard” risk ratio method compares the likelihood, or “risk,” that children in a particular racial or ethnic group in an LEA will be identified for special education and related services to the likelihood that children in a comparison group, usually all other children in the LEA, will be identified for special education and related services. For example, if an LEA serves 100 Black/African-American children and 15 of them are identified as being a student with a disability, the “risk” for Black/African-American children to be identified as a student with a disability would be 15 percent (15/100 = 15 percent). A risk ratio would then compare this “risk” for Black/African-American children to the “risk” for all non-Black/African-American children

in the LEA. A risk ratio calculation can also be used to compare the relative risk of placement in a particular setting or disciplinary removal. (Bollmer, Bethel, Garrison-Morgan & Brauen, 2007.) At the time of our review, 21 States used the “standard” form of the risk ratio method.

Generally, a risk ratio of 1.0 indicates that children in a given racial or ethnic group are no more likely than children from all other racial or ethnic groups to be identified for special education and related services, be identified with a particular impairment, be placed in a particular educational setting, or face disciplinary removals from placement. A risk ratio greater than 1.0 indicates that the risk for the racial or ethnic group is greater than the risk for the comparison group. Accordingly, a risk ratio of 2.0 indicates that one group is twice as likely as other children to be identified, placed, or disciplined in a particular way; a risk ratio of 3.0 indicates that one group is three times as likely as other children to be identified, placed, or disciplined in a particular way; etc.

For example, consider an LEA that serves 5,000 children, 1,000 of whom are Black/African-American. In total, there are 450 children with disabilities in the LEA, 150 of whom are Black/African-American. As such, the likelihood, or “risk,” of any particular Black/African-American student in the LEA being identified as having a disability is 15 percent (150 Black/African-American children with disabilities/1000 Black/African-American children in the LEA \* 100 = 15 percent). The likelihood of any non-Black/African-American student in the LEA being identified as having a disability is 7.5 percent (300 non-Black/African-American children with disabilities/4,000 non-Black/African-American children in the LEA \* 100 = 7.5 percent). As such, in the standard version of the calculation, the risk ratio for Black/African-American children being identified as children with disabilities in this LEA would be 2.0 (15 percent of Black/African-American children identified with disabilities/7.5 percent of non-Black/African-American children with disabilities = 2.0).

TABLE 1—EXAMPLE STANDARD RISK RATIO CALCULATION FOR IDENTIFICATION OF BLACK/AFRICAN-AMERICAN CHILDREN IN AN LEA

	Black/African-American children	Non-Black/African-American children	Total children
Children with disabilities .....	150 .....	300 .....	450
All children (with and without disabilities)	1,000 .....	4,000 .....	5,000
Risk .....	150/1,000 = 15 percent .....	300/4,000 = 7.5 percent .....	N/A
Risk ratio .....	15 percent/7.5 percent = 2.0 .....	N/A .....	N/A

Risk ratios provide little information regarding racial and ethnic disparities when the risk to a racial or ethnic group of interest is zero. In this last example, if zero Black/African-American children were identified with a disability, and the risk to non-Black/African-American children remained at 7.5 percent, the risk ratio for Black/African-American children being identified as children with disabilities would be zero (0/7.5 percent). This ratio would remain zero, irrespective of the risk to non-Black/African-American children, despite the appearance of some disparity in identification of non-Black/African-American children. While a risk ratio of zero is a fully valid and reasonable result of these calculations, it cannot, in the absence of other information, provide context about the gaps in identification rates across racial or ethnic groups.

Further, risk ratios cannot be calculated when the risk to a comparison group is zero, or when there are no children in a comparison group. In the above scenario, if the risk of

identification for Black/African-American children remains at 15 percent, but the risk to non-Black/African-American children is zero, the State cannot calculate a risk ratio for the identification of Black/African-American children because it is not possible to divide a number by zero (15 percent divided by 0 is undefined). The result would be the same if there were no non-Black/African-American children in the LEA, though the issue would arise one step earlier in the calculation of the risk for non-Black/African-American children rather than in the calculation of the risk ratio itself.

Alternate Risk Ratio

The use of the alternate risk ratio is one method for calculating risk ratios when there is an insufficient number of children in the comparison group at the LEA level to provide meaningful results (e.g., an LEA in which there are only 5 non-White children). (Bollmer et al. 2007.) Seven states use the alternate risk ratio method to compare the risk of a

subgroup in the LEA to the risk of all other subgroups in the State.

For example, consider an LEA that serves 500 children, including 495 American Indian/Alaska Native children. We assume that the LEA serves 100 children with disabilities and only one of them is not American Indian/Alaska Native. We could calculate a risk for American Indian/Alaska Native children by dividing the number of American Indian/Alaska Native children identified as children with disabilities (99) by the total number of American Indian/Alaska Native children in the LEA (495) and determine a risk of 20 percent (99/495 = 20 percent). However, when we attempt to calculate the “risk” for non-American Indian/Alaska Native children, we notice that the total number of non-American Indian/Alaska Native children in the LEA (5) is sufficiently small that it is unlikely to generate stable risk calculations from year to year in the comparison group. As such, we need to use an alternate risk ratio calculation for non-American

Indian/Alaska Native children. In this case, States would look at what the State-wide risk is for non-American Indian/Alaska Native children. In this example, we will assume the State-wide

risk for non-American Indian/Alaska Native children is 15 percent. We then compare the risk for American Indian/Alaska Native children in the LEA to the risk for non-American Indian/Alaska

Native children Statewide to calculate the “alternate risk ratio” of 1.33 (20 percent/15 percent = 1.33).

TABLE 2—EXAMPLE ALTERNATE RISK RATIO CALCULATION OF IDENTIFICATION FOR AMERICAN INDIAN/ALASKA NATIVE CHILDREN IN AN LEA

	American Indian/Alaska Native children in LEA	Non-American Indian/Alaska Native children in LEA	Non-American Indian/Alaska Native children Statewide
Children with Disabilities	99	1	30,000
All Children (with and without disabilities).	495	5	200,000
Risk	99/495 = 20 percent	N/A Below minimum cell size	30,000/200,000 = 15 percent
Alternate Risk Ratio	20 percent/15 percent = 1.33	N/A	N/A

Weighted Risk Ratio

Separately, the Department also found that 25 States used a weighted risk ratio method, which addresses challenges associated with variances in LEA demographics by using State-level demographics to standardize LEA-level distributions of race and ethnicity. When using a weighted risk ratio method, the risk to each racial and ethnic group within the comparison group is multiplied by a weight that reflects that group’s proportionate representation within the State (e.g., if one racial or ethnic group comprises only five percent of children Statewide, the risk for that racial or ethnic group in each LEA will only comprise five percent of the calculated risk for the other groups). Stated mathematically, the weighted risk ratio is calculated as follows:

$$Weighted\ Risk\ Ratio = \frac{(1-p_a)R_a}{\sum_{n \neq a} p_n R_n}$$

where  $R_a$  is the LEA-level risk for racial or ethnic group  $a$  and  $p_a$  is the State-level proportion of children from racial or ethnic group  $a$ .  $R_n$  is the LEA-level risk for the  $n$ -th racial or ethnic group and  $p_n$  is the State-level proportion of children from the  $n$ -th racial or ethnic group.

For example, consider a State with a population of school children that is 70 percent White, 10 percent Hispanic/Latino, and 20 percent Black/African-American. Within that State, LEA A has 10,000 children and very different demographics—1,000 White children, 8,000 Hispanic/Latino children, and 1,000 Black/African-American children. Of them, 20 White children (2 percent), 80 Hispanic/Latino children (1 percent), and 50 Black/African-American children (5 percent) are identified for special education and related services. In order to calculate the weighted risk

ratio, the State would first weight the risks for the various racial or ethnic groups in the LEA by the proportion of total students Statewide that are in the same racial or ethnic group. They would then divide the weighted risks similar to the procedure in the standard risk ratio. The weighted risk ratio of identification for White children in the LEA is 0.55. The standard risk ratio, however, is 1.38.

In LEA B, where demographics are more similar to the State—8,000 White children, 1,000 Hispanic/Latino children, and 1,000 Black/African-American children—and the risk of identification for each group is the same as in LEA A (there are 160 White children, 10 Hispanic/Latino children, and 50 Black/African-American children with disabilities), the standard risk ratio of identification for White children is 0.67. However, the weighted risk ratio for LEA B would be 0.55, same as LEA A.

TABLE 3—EXAMPLE STANDARD AND WEIGHTED RISK RATIO CALCULATION OF IDENTIFICATION FOR WHITE CHILDREN IN TWO LEAS

	White children in LEA A	Comparison group (i.e., Hispanic/Latino and Black/African-American children) in LEA A	White children in LEA B	Comparison Group (i.e., Hispanic/Latino and Black/African-American children) in LEA B
Percentage of LEA enrollment.	10 percent	80 percent Hispanic/Latino; 10 percent Black/African-American.	80 percent	10 percent Hispanic/Latino; 10 percent Black/African-American.
Number of children	1000	8000 Hispanic/Latino + 1000 Black/African-American = 9000.	8000	1000 Hispanic/Latino + 1000 Black/African-American = 2000.
Number of children with a disability.	20	80 Hispanic/Latino + 50 Black/African-American = 130.	160	10 Hispanic/Latino + 50 Black/African-American = 60.
Risk	20/1000 = 2 percent	(80 + 50)/(8000 + 1000) = 1.4 percent.	160/8000 = 2 percent	(10 + 50)/(1000 + 1000) = 3 percent.
Risk ratio	2 percent/1.4 percent = 1.38.	Not applicable	2 percent/3 percent = 0.67.	Not applicable.
Weighted risk <sup>a</sup>	(20/1000) × (1 - 0.7) = 0.6 percent.	For Hispanic/Latino (80/8000) × 0.1 = 0.1 percent. For Black/African-American (50/1000) × 0.2 = 1 percent.	(160/8000) × (1 - 0.7) = 0.60 percent.	For Hispanic/Latino (10/1000) × 0.1 = 0.1 percent. For Black/African-American (50/1000) × 0.2 = 1 percent.

TABLE 3—EXAMPLE STANDARD AND WEIGHTED RISK RATIO CALCULATION OF IDENTIFICATION FOR WHITE CHILDREN IN TWO LEAS—Continued

	White children in LEA A	Comparison group (i.e., Hispanic/Latino and Black/African-American children) in LEA A	White children in LEA B	Comparison Group (i.e., Hispanic/Latino and Black/African-American children) in LEA B
Weighted risk ratio .....	0.6 percent/(0.1 percent + 1 percent) = 0.55.	Not applicable .....	0.6 percent/(0.1 percent + 1 percent) = 0.55.	Not applicable.

<sup>a</sup> Assumes racial and ethnic representation at the State level is 70 percent White, 10 percent Hispanic/Latino, and 20 percent Black/African-American.

**Risk Difference**  
Fewer than five States use the risk difference method, which is similar to the risk ratio method in approach and simplicity. While both compare the risk for a racial or ethnic group of interest to the risk for a comparison group (generally, children in all other racial and ethnic groups in the LEA), the risk difference method provides a percentage point difference between the two risks, while the risk ratio method provides a quotient. For example, in an LEA where 15 percent of Black/African-American children are identified with emotional disturbance and 10 percent of children in all other racial and ethnic groups are identified with emotional disturbance, the risk difference is 5 percentage points.

TABLE 4—EXAMPLE RISK DIFFERENCE CALCULATION OF DISCIPLINE FOR BLACK/AFRICAN-AMERICAN CHILDREN IN AN LEA

	Black/African-American children	Non-Black/African-American children
Percent of children suspended fewer than 10 days.	15 percent .....	10 percent.
Risk Difference .....	15 percent – 10 percent = 5 percent .....	N/A.

The Department found that approximately five States used a variation of risk difference in which they compared the risk of an outcome for a racial or ethnic group to the risk of an outcome to a State, local, or national population. The composition method compares a racial or ethnic group's representation among all children identified, placed, or disciplined to the racial or ethnic group's representation in another context, such as LEA enrollment. Consider, for example, an LEA where American Indian/Alaskan Native children represent 24 percent of all children with disabilities suspended or expelled from school for fewer than 10 days in a given year but only represent 8 percent of the LEA's enrollment. Using the composition method, a State calculates the difference in composition by subtracting representation in LEA enrollment (8 percent) from representation in out-of-school suspensions and expulsions of fewer than 10 days (24 percent). A positive figure—16 percentage points in this case—is indicative of overrepresentation.

**Difference and Relative Difference in Composition**  
Fewer than five States use a composition method as part of their significant disproportionality

TABLE 5—EXAMPLE CALCULATIONS OF DIFFERENCE IN COMPOSITION FOR DISCIPLINE FOR AMERICAN INDIAN/ALASKA NATIVE, BLACK/AFRICAN-AMERICAN, AND WHITE CHILDREN IN AN LEA

	American Indian/Alaska Native	Black/African-American	White
Percent of children suspended fewer than 10 days .....	24	36	40
Percent of total enrollment .....	8	32	60
Difference in composition .....	24 – 8 = +16	36 – 32 = +4	40 – 60 = –20

Alternatively, a State may calculate the relative difference in composition by dividing the representation in LEA enrollment by representation in out-of-school suspensions and expulsions of fewer than 10 days (24 percent/8 percent). A number greater than one—3.0 in this case—is indicative of overrepresentation.

TABLE 6—EXAMPLE CALCULATION OF A RELATIVE DIFFERENCE FOR DISCIPLINE IN COMPOSITION IN AN LEA

	American Indian/Alaska Native	Black/African-American	White
Percent of children suspended fewer than 10 days .....	24	36	40
Percent of total enrollment .....	8	32	60
Relative difference in composition .....	24/8 = 3.0	36/32 = 1.1	40/60 = 0.7

## 2. Most States Use Risk Ratio Thresholds to Differentiate Disproportionality From Significant Disproportionality

The 45 States using the risk ratio method or one of its variations define a risk ratio threshold, over which disproportionality is considered significant. The Department found that the most common risk ratio threshold used by States was 4.0 (16 States), with 7 States each using 3.0 or 5.0.

Fewer than five States use the E-formula method to establish thresholds, which shift based on the size of the LEA analyzed. This approach can be used to develop thresholds for the risk ratio method, or for the composition method. (IDEA Data Center 2014.) The E-Formula, when used with a composition method, is:

$$E = A + \sqrt{A * \frac{(100-A)}{N}}$$

where A is the percentage of the same ethnic minority group in the LEA enrollment, N is the total special education enrollment in the LEA, and E is the maximum percentage (the resulting threshold) of the total special education enrollment in an LEA allowed for a specific ethnic minority group. For example, consider a State using a composition method, analyzing an LEA where 10 percent of the population consists of Black/African-American children and the total number of children with disabilities in the LEA is 1,000. Based on the E-formula, the threshold for that LEA for the identification of Black/African-American children would be 10.9 percent (*i.e.*,  $10 + \text{Sqrt} [(100 \times 90/1000)] = 10.9$ ). In this case, a State would find an LEA to have significant disproportionality if the risk of identification for Black/African-American children exceeded 10.9 percent. (IDEA Data Center 2014.)

## 3. Many States Have Minimum Cell Size Requirements

The Department also found that a number of States restrict their assessment of significant disproportionality to include only those LEAs that have sufficient numbers of children to generate stable calculations. When an LEA has a particularly small number of children in a particular racial or ethnic group, relatively small changes in enrollment could result in large changes in the calculated risk ratio.

For example, if an LEA identified non-American Indian/Alaska Native children as being children with disabilities at a rate of 15 percent and had identified one of its four American

Indian/Alaska Native children as having a disability, its calculated risk ratio would be 1.67 (25 percent divided by 15 percent). However, if one additional American Indian/Alaska Native student with a disability moved into the LEA, the risk ratio would increase to 2.67 (40 percent divided by 15 percent). Alternatively, if the American Indian/Alaska Native student with a disability left the LEA, the risk ratio would decrease to zero. Given the statutory consequences associated with being identified as having significant disproportionality, States have sought to minimize such large variations based on small changes in enrollment.

Overall, 30 States and the District and Columbia reported using some form of minimum cell size requirement—where the cell is generally defined as the number of children for the racial or ethnic group of interest, the number of children in the comparison group, or both—to accomplish this goal.

Of the States that use minimum cell size requirements, 11 use more than one cell definition. For example, nine States prescribe minimum cell sizes for both the number of children with disabilities in the racial or ethnic group being analyzed and the number of children with disabilities in the comparison group. That is, if an LEA does not have a sufficiently large population of children with disabilities in both the racial and ethnic group of interest and in the comparison group, the LEA will be excluded from any determination of significant disproportionality.

Some States define the cell in other ways, including the number of children enrolled in the LEA in the racial or ethnic group being analyzed (seven States) and the total number of children with disabilities enrolled in the district (1 State and the District of Columbia).

Of the 18 States that use the most common cell size definition—the number of children with disabilities in the racial or ethnic group being analyzed—9 States use a minimum cell size of 10 and 4 States use a minimum cell size of 30.

In general, the use of a minimum cell size will eliminate a certain number of LEAs from all or parts of a State's analysis. For example, if a State sets a minimum cell size of 10, any LEA with fewer than 10 children in the particular group being analyzed will be eliminated from the analysis of significant disproportionality. As the minimum cell size increases, the number of LEAs eliminated from the analysis also increases. However, while smaller minimum cell sizes increase the number of LEAs being analyzed, they also increase the chances that small changes

in enrollment will trigger a finding of significant disproportionality. (IDEA Data Center, 2014.) Note again the previous example in which a one-student change in the LEA's enrollment caused a large increase in the LEA's calculated risk ratio.

## 4. Many States Use Multiple Years of Data To Determine Significant Disproportionality

Another way States have identified significant disproportionality in LEAs with small numbers of children is to identify an LEA only after its risk ratio is above a certain threshold for a number of consecutive years (*e.g.*, two or three years). Identifying an LEA as having significant disproportionality only if it is above a threshold for multiple, consecutive years is a way of separating LEAs that have high risk ratios that are statistical anomalies from those in which there are persistent underlying problems.

For example, LEAs with generally low levels of disproportionality may experience an unexpectedly high level of disproportionality in one year due to factors that do not represent the kind of consistent, underlying problems in identification, placement, or disciplinary removals that may be addressed through comprehensive CEIS or revisions to policies, practices, and procedures. LEAs with consistent, high levels of disproportionality are more likely to need a revision of policies, practices and procedures, and, potentially, comprehensive CEIS, to address the underlying factors contributing to those high levels. (Bollmer, Bethel, Munk & Bitterman, 2014.)

Of the 23 States that use multiple years of data, 13 States require an LEA to exceed the threshold for three consecutive years before finding significant disproportionality, while 9 States require 2 consecutive years. One State requires an LEA to exceed the threshold for four consecutive years prior to making a determination.

## 5. Low Overall Identification of Significant Disproportionality Across All States and All Methodologies Used

The Department reviewed the frequency with which States identified significant disproportionality using IDEA section 618 data, and, during SY 2012–2013, 28 States and the District of Columbia identified any LEAs with significant disproportionality. Together, these States identified 491 LEAs (3 percent of LEAs nationwide), somewhat higher than the 356 LEAs identified in SY 2010–2011. The majority of the identified LEAs were in a small number

of States—75 percent of all identified LEAs were located in seven States: California (10 percent of all LEAs identified), Indiana (12 percent), Louisiana (16 percent), Michigan (4 percent), New York (16 percent), Ohio (11 percent), and Rhode Island (6 percent). Based on the Department's Digest of Education Statistics, these seven States accounted for only 20 percent of all regular school districts<sup>3</sup> in the country. (2011–12 and 2012–13.)

Of the States that identified LEAs with significant disproportionality, the Department determined that 11 States identified LEAs in only one category of analysis. For example, Alabama, Arkansas, Connecticut, Delaware, and Virginia only identified significant disproportionality with respect to identification with a particular impairment. Only the District of Columbia and four States—Georgia, Indiana, Mississippi, and New York—identified LEAs with significant disproportionality in all three categories of analysis.

#### 6. Overrepresentation and Under-Identification of Children of Color in Special Education

While decades of research, Congress, and GAO have found that the overrepresentation of children of color among children with disabilities is a significant problem, some experts and respondents to the June 2014 RFI have noted that under-identification in special education is a problem for children of color in a number of communities. These experts and respondents highlight the possibility that policies and practices intended to reduce overrepresentation may exacerbate inequity in special education by reducing access to special education and related services for children of color. (Morgan, P.L., Farkas, G., Hillemeier, M.M., Mattison, R., Maczuga, S., Li, H. & Cook, M., 2015.) Many of these experts suggest that, when taking into account differential exposure to various risk factors for disability, there is little to no evidence of over-identification for special education.

Based on child count data submitted by the States under Section 618 of the IDEA, racial and ethnic minorities are identified as being children with disabilities at a higher rate than their white peers. (U.S. Department of Education and U.S. Census Bureau, 2013.) In SY 2012–2013, for example,

Black/African-American children were 2.1 times as likely as all other children to receive special education and related services for an emotional disturbance. American Indian/Alaska Native children were 1.8 times more likely than all other racial or ethnic groups to receive special education and related services for specific learning disabilities.

At the LEA level, racial and ethnic disparities in special education are more pronounced. For example, while nationally Black/African-American children were 2.1 times more likely than their peers to be identified as having an emotional disability, the Department found that more than 1,500 individual LEAs identified at least one racial or ethnic group as having an emotional disability at 3 times or more the rate of other children in that LEA for 3 or more consecutive years (SY 2011–2012, SY 2012–2013, and SY 2013–2014).

The rate of identification of children as children with disabilities varies across racial and ethnic groups both nationally and locally. However, as noted by numerous researchers, various racial and ethnic groups may have differential exposure to a number of other risk factors for disability including, but not limited to, low socioeconomic status, low birth weight, and lack of health insurance. (Morgan, P.L., *et al.*, 2015.)

Morgan, *et al.*, (2015) compared Black/African-American, Hispanic/Latino, and other children of color to their White peers with respect to identification for one of five impairments (learning disabilities, speech or language impairments, intellectual disabilities, health impairments, and emotional disturbance). After controlling for a number of covariates, the authors found that children of color were less likely than otherwise similar White, English-speaking children to be identified as having disabilities (in some cases, by up to 75 percent).

While this study used nationally representative data from the Early Childhood Longitudinal Study—Kindergarten (ECLS–K), there were some limitations to the analysis. The authors studied a single cohort of children, limiting their ability to detect the impacts of external effects, such as changes in State or Federal policy, that may have impacted the findings. Additionally, the study was unable to include controls for local-level variation (e.g., school to school), which prior research (Hibel, Farkas, and Morgan 2010) has shown can mitigate such findings of under-identification.

A separate study examined the influence of school- and district-level characteristics—specifically racial and ethnic composition and economic disadvantage—on the likelihood of special education identification for Black/African-American and Hispanic/Latino children. (Ramey, 2015.) The author found that, on average, schools and districts with larger Black/African-American and Hispanic/Latino populations had lower rates of Black/African-American and Hispanic/Latino children receiving services under IDEA for emotional disturbances or other health impairment. Further, the author found that, in less disadvantaged districts, there is a negative correlation between the percentage of Black/African-American children in a school and receipt of IDEA services. On average, Black/African-American children in these more affluent school districts were less likely to receive IDEA services as the percentage enrollment of Black/African-American children increases. By contrast, the author found no significant association between Black/African-American enrollment and the likelihood of receiving IDEA services in more disadvantaged districts. Based on this review of recent research, and the analysis of child count data, the Department found clear evidence that overrepresentation on the basis of race and ethnicity continues to exist at both the national and local levels. The Department's review of research found that overrepresentation and under-identification by race and ethnicity are both influenced by factors such as racial isolation and poverty. However, research that investigates whether overrepresentation and under-identification of children of color in special education co-occur at the local level is inconclusive. The Department has included a directed question to specifically request public comment on strategies to prevent the under-identification of children of color in special education.

At the same time, the review also demonstrates that any effort to identify significant disproportionality in LEAs should be designed to ensure that children with disabilities receive the special education and related services that they need and not create incentives for LEAs not to identify children as children with disabilities or to place them in inappropriate educational settings. It is important to do so to ensure that all children have the opportunity to participate and succeed in the general education curriculum to the greatest extent possible.

In addition, variation across States in how they measure and determine

<sup>3</sup>Regular school districts include both independent districts and those that are a dependent segment of a local government. Independent charter schools and other agencies are not included.

significant disproportionality inherently hampers efforts at national analyses. While all of the methodologies currently being used by States have strengths and weaknesses, the application of a standard methodology will help increase our understanding of these effects in LEAs across the country and may, in time, help strengthen our understanding of the variations in rates of identification, placement, and disciplinary removals of children with disabilities of different racial and ethnic groups while also identifying best practices in reducing inappropriate practices nationwide.

#### *D. The Proposed Standard Methodology*

To determine whether significant disproportionality on the basis of race and ethnicity is occurring in the State or the LEAs of the State, the Department proposes to require States to use a standard methodology that consists of specific methods for calculating racial or ethnic disparities, specific metrics that the States must analyze for racial and ethnic disparities, limitations on the minimum cell sizes State may use to exclude LEAs from any determinations of significant disproportionality, and specific flexibilities States may consider when making determinations of significant disproportionality.

Accordingly, to determine significant disproportionality, we propose to require States to use the risk ratio method or the alternate risk ratio method (if the total number of children in the comparison group within the LEA is fewer than 10 or if the risk for the comparison group is zero, respectively).

We propose that States calculate the risk ratio, or alternate risk ratio, for each category of analysis using the following long-standing section 618 data reporting as noted by the Department in OSEP Memorandum 08–09 (July 28, 2008) and established, following notice and comment, in OMB-approved data collections 1875–0240 and 1820–0517:

- Identification of children ages 3 through 21 as children with disabilities;
- Identification of children ages 3 through 21 as children with intellectual disabilities, specific learning disabilities, emotional disturbance, speech or language impairments, other health impairments, and autism;
- Placement, including disciplinary removals from placement, of:

(1) Children ages 6 through 21 inside a regular class less than 40 percent of the day,

(2) Children ages 6 through 21 inside a regular class no more than 79 percent of the day and no less than 40 percent of the day,

(3) Children ages 6 through 21 inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities, or private schools,

(4) Children ages 3 through 21 in out-of-school suspensions and expulsions of 10 days or fewer,

(5) Children ages 3 through 21 in out-of-school suspensions and expulsions of more than 10 days,

(6) Children ages 3 through 21 in in-school suspensions of 10 days or fewer,

(7) Children ages 3 through 21 in in-school suspensions of more than 10 days, and

(8) Disciplinary removals in total.

We propose to require States to calculate the risk ratio or alternate risk ratio, as appropriate, based on a minimum cell size no greater than 10 children when analyzing identification and based on a minimum cell size no greater than 10 children with disabilities when analyzing disciplinary removal and placement. In all cases, especially those in which States opt to use a minimum cell size less than 10, States must be aware of, and conduct their analyses consistently with the confidentiality provisions of FERPA, its implementing regulations in 34 CFR part 99, and the reporting requirements of section 618(b) of IDEA.

Under the proposed regulations, States may select risk ratio thresholds appropriate to their individual needs, provided that: (a) The thresholds are reasonable and (b) the thresholds are developed based on advice from stakeholders, including State Advisory Panels. Further, risk ratio thresholds would be subject to Departmental monitoring and enforcement for reasonableness. We propose to allow States to select different risk ratio thresholds for different categories of analysis (e.g., 3.5 for intellectual disability and 4.0 for emotional disturbance). However, the use of different thresholds for different racial and ethnic groups, may violate applicable requirements of federal statutes and the Constitution.

Finally, we propose that, although States would still be required to calculate risk ratios for their LEAs to determine significant disproportionality on an annual basis, States would have the flexibility to identify as having significant disproportionality only those LEAs that exceed their risk ratio threshold(s) for up to three prior consecutive years. We also propose to allow States not to identify LEAs that exceed the risk ratio threshold if they are making reasonable progress, as determined by the State, in lowering risk ratios from the preceding year.

#### **II. Clarification That Statutory Remedies Apply to Disciplinary Removals**

When a State finds significant disproportionality based on race or

ethnicity with respect to identification or placement, IDEA and its implementing regulations require a set of remedies intended to address the significant disproportionality. The State must: (1) Provide for the review, and, if appropriate, revision of policies, practices, and procedures to ensure that they comply with the requirements of IDEA; (2) require any LEA identified with significant disproportionality to reserve 15 percent of IDEA Part B funds to provide comprehensive CEIS to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified; and (3) require the LEA to publicly report on the revision of policies, practices, and procedures. Section 618(d)(2) of IDEA (20 U.S.C. 1418(d)(2)); 34 CFR 300.646(b).

When Congress added discipline to section 618(d)(1) in 2004, it made no specific corresponding change to the introductory paragraph of section 618(d)(2). Therefore, although States are required under section 618(d)(1) to collect and examine data to determine if significant disproportionality is occurring with respect to the incidence, duration, and type of disciplinary actions in their State and their LEAs, the required actions set forth in section 618(d)(2) are not explicitly applied if a State determines that there is significant disproportionality with respect to “disciplinary actions.” The Department believes that this has resulted in a statutory ambiguity because disciplinary actions are generally removals of the student from his or her placement for varying lengths of time and may constitute a change in placement under certain circumstances. (See section 615(k) of IDEA.)

The Department has, therefore, previously taken the position that the required remedies in section 618(d)(2) apply when there is significant disproportionality in identification, placement, or any type of disciplinary removal from placement. (See 71 FR 46540, 46738 (August 14, 2006); OSEP Memorandum 07–09, April 24, 2007; OSEP Memorandum 08–09, July 28, 2008; June 3, 2008, letter to Ms. Frances Loose, Supervisor, Michigan Office of Special Education and Early Intervention.) We propose to adopt that long-standing interpretation into the Part B regulations.

#### **III. Clarification of the Review and Revision of Policies, Practices, and Procedures**

As a consequence of a State determination of significant disproportionality in an LEA, a State must provide for the review and, if

appropriate, revision of policies, practices, and procedures to ensure compliance with the requirements of IDEA. Section 618(d)(2)(A) of IDEA (20 U.S.C. 1418(d)(2)(A)). In cases where it is appropriate to make revisions to policies, practices, or procedures, the LEA must publicly report on those revisions. Section 618(d)(2)(C) of IDEA (20 U.S.C. 1418(d)(2)(C)).

Consistent with the plain language of section 618(d)(2)(A), the Department has previously interpreted the statute to require States to provide for a review of policies, practices, and procedures for compliance with the requirements of IDEA. See OSEP Memorandum 07–09. However, the Department notes that this guidance did not clearly explain that States must provide for this review in every year in which the LEA is identified with significant disproportionality.

If significant disproportionality is found in identification, placement, or discipline, a review of policies, practices, and procedures in that area must take place to ensure compliance with the IDEA. Additionally, in accordance with their responsibility under 34 CFR 300.201, in providing for the education of children with disabilities, LEAs must have in effect policies and procedures and programs that are consistent with the State's child find policies and procedures established under 34 CFR 300.111. Therefore, LEAs identified with significant disproportionality with respect to identification must continue to properly implement the State's child find policies and procedures. An annual review of policies, practices, and procedures that includes a review for compliance with the State's child find policies and procedures is intended to prevent such LEAs from inappropriately reducing the identification of children as children with disabilities.

To ensure that LEAs identified in multiple years review their policies, practices, and procedures every year in which they are identified with significant disproportionality, we propose that the regulation clarify that the review of policies, practices, and procedures must take place in every year in which the LEA is identified with significant disproportionality.

Further, as our proposed standard methodology allows States the flexibility to select a minimum cell size lower than 10, we propose to add language reminding States that public reporting of LEA revisions of policies, practices, and procedures must be consistent with the confidentiality provisions of FERPA, its implementing

regulations in 34 CFR part 99, and section 618(b)(1) of IDEA.

#### **IV. Expanding the Scope of Comprehensive Coordinated Early Intervening Services**

Under section 613(f)(1) of IDEA (20 U.S.C. 1413(f)(1)), an LEA may voluntarily use up to 15 percent of its IDEA Part B funds to provide CEIS to children in kindergarten through grade 12 (with a particular emphasis on children in kindergarten through grade three) who have not been identified as needing special education or related services but who need additional academic or behavioral support to succeed in a general education environment.

The activities that may be included in implementing these services are: (1) Professional development for teachers and other school staff to enable them to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and (2) providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction. Section 613(f)(2) of IDEA (20 U.S.C. 1413(f)(2)).

Section 618(d)(2)(B) of IDEA (20 U.S.C. 1418(d)(2)(B)) provides that, in the case of a determination of significant disproportionality, the State or the Secretary of the Interior must require any LEA so identified to reserve 15 percent of its Part B (section 611 and section 619) subgrant, the maximum amount of funds under section 613(f), to provide comprehensive CEIS to serve children in the LEA, particularly children in those groups that were significantly overidentified. Congress did not define “comprehensive,” nor did it explain how “comprehensive CEIS” differs from “CEIS” in section 613(f) of IDEA (20 U.S.C. 1413(f)). The Department's current regulations in 34 CFR 300.646(b)(2) only clarify that funds reserved for comprehensive CEIS must be used to serve particularly, but not exclusively, children from those groups that were significantly overidentified.

In OSEP Memorandum 07–09, the Department previously interpreted the terms “CEIS” and “comprehensive CEIS” to apply to children in kindergarten through grade 12 who are not currently identified as needing special education and related services but who need additional academic and behavioral support to succeed in a general education environment. Thus, we interpreted IDEA as not allowing an LEA identified with significant

disproportionality to use funds reserved for comprehensive CEIS to serve preschool children ages three through five, with or without disabilities, or children with disabilities in kindergarten through grade 12. We also did not interpret IDEA as requiring the State, as part of implementing comprehensive CEIS, to identify and address the factors contributing to the significant disproportionality. We now propose to amend the current regulation to interpret the term “comprehensive” in section 618(d)(2)(B) of IDEA to allow any LEA identified with significant disproportionality to expand the use of funds reserved for comprehensive CEIS to serve children from age 3 through grade 12, with and without disabilities.

As part of the IDEA Part B LEA Maintenance of Effort (MOE) Reduction and CEIS data collection, States are required to report on the total number of children that received CEIS during the reporting period, and the number of children who received CEIS during the two school years prior to the reporting period and received special education and related services during the reporting year. This is consistent with the information LEAs are required to report to States under IDEA section 613(f)(4) and 34 CFR 300.226(d). After these regulations are final, the Department is planning to provide guidance on what States must report in the LEA MOE Reduction and CEIS data collection and what LEAs must report to meet the requirement in IDEA section 613(f)(4) and 34 CFR 300.226(d).

We also propose to require the LEA, as part of implementing comprehensive CEIS services, to identify and address the factors contributing to the significant disproportionality. These factors may include a lack of access to scientifically based instruction, and they may include economic, cultural, or linguistic barriers to appropriate identification, placement, or disciplinary removal. Comprehensive CEIS may also include professional development and educational and behavioral evaluations, services, and supports. Requiring LEAs to carry out activities to identify and address the factors contributing to the significant disproportionality is consistent with the statutory requirement that LEAs must use funds reserved for comprehensive CEIS to serve children in the LEA, particularly children in those groups that were significantly overidentified. Comprehensive CEIS funds must be used to carry out activities to identify and address the factors contributing to the significant disproportionality. Although not specifically prohibited, we generally would not expect LEAs to use

these funds to conduct an evaluation to determine whether a child has a disability or to provide special education and related services already identified in a child's IEP.

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## Summary of Proposed Changes

These proposed regulations address what States must do to identify and address significant disproportionality based on race and ethnicity occurring in States and LEAs in the States.

These proposed regulations would—

- Add §§ 300.646(b) and 300.647(a)

and (b) to provide the standard methodology that States must use to determine whether there is significant disproportionality based on race or ethnicity in the State and its LEAs;

- Add § 300.647(c) to provide the

flexibilities that States, at their discretion, may consider when determining whether significant disproportionality exists. States may

choose to identify an LEA as having significant disproportionality after an LEA exceeds a risk ratio threshold for up to three consecutive years. A State also has the flexibility not to identify an LEA with significant disproportionality if the LEA is making reasonable progress in lowering the risk ratios even if they are still above the State's risk ratio thresholds, where reasonable progress is defined by the State;

- Amend current § 300.646(b) (proposed § 300.646(c)) to clarify that the remedies in section 618(d)(2) of IDEA are triggered if a State makes a determination of significant disproportionality with respect to disciplinary removals from placement;
- Amend current § 300.646(b)(1) and (3) (proposed § 300.646(c)(1) and (2)) to clarify that the review of policies, practices, and procedures must occur in every year in which an LEA is identified with significant disproportionality, and that LEA reporting of any revisions to policies, practices, and procedures must be in compliance with the confidentiality provisions of FERPA, its implementing regulations in 34 CFR part 99, and section 618(b)(1) of IDEA; and

- Amend current § 300.646(b)(2) (proposed § 300.646(d)) to define which student populations may receive comprehensive CEIS when an LEA has been identified with significant disproportionality. Comprehensive CEIS may be provided to children from age 3 through grade 12, regardless of whether they are children with disabilities. The proposed regulations would require that, as part of implementing the comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality.

#### Significant Proposed Regulations

We group major issues according to subject, with sections of the proposed regulations in parentheses. Generally, we do not address proposed regulatory changes that are technical or otherwise minor in effect.

#### I. A Standard Methodology for Determining Significant Disproportionality

*Risk Ratios (Proposed § 300.646(b); § 300.647(a)(2); § 300.647(a)(3); § 300.647(b)(6))*

*Statute:* Section 618(d)(1) of IDEA (20 U.S.C. 1418(d)(1)) requires every State that receives IDEA Part B funds to collect and examine data to determine if significant disproportionality based on race or ethnicity exists in the State or the LEAs of the State. IDEA does not

define "significant disproportionality" or instruct how data must be collected and examined.

*Current Regulations:* Current § 300.646(a) imposes the same requirement as the statute and does not define "significant disproportionality" or instruct how data must be collected or examined.

*Proposed Regulations:* Proposed § 300.646(b) would require that States use a standard methodology to determine whether significant disproportionality based on race or ethnicity exists in the State or in the LEAs of the State.

Proposed § 300.647(b) would require the use of risk ratios as part of the standard methodology for determining significant disproportionality.

Proposed § 300.647(a)(2) would define "risk" as the likelihood of a particular outcome (identification, placement, or disciplinary removal) for a particular racial or ethnic group within an LEA. Risk is calculated by dividing the number of children from a given racial or ethnic group identified with a disability, placed, or disciplined in the LEA by the total number of children from that racial or ethnic group enrolled in schools in the LEA.

Proposed § 300.647(a)(3) would define "risk ratio" as the risk of an outcome for one racial or ethnic group in an LEA as compared to the risk of that outcome for all other racial and ethnic groups in the same LEA. Risk ratio is calculated by dividing the risk for children in one racial or ethnic group within an LEA by the risk of that same outcome for all other racial or ethnic groups within that LEA.

*Reasons:* The Department proposes to require the use of this common analytical method for determining significant disproportionality to increase transparency in LEA identification across States for LEA, State, and Federal officials, as well as the general public. The Department proposes to require that States use the most common analytical method in use among the States during SY 2013–2014. Based on the SY 2013–14 SSS, 45 States use one or more forms of the risk ratio and, of these, 39 use the risk ratio as their sole method for determining significant disproportionality.

We acknowledge that most of the methods currently in use by States, including the risk ratio, have benefits and drawbacks. In selecting a method, the Department prioritized methods that LEAs and members of the public could easily interpret and those that would create the least disturbance in States' current methodologies for determining significant disproportionality. At the

same time, we closely examined each method's strengths and weaknesses in identifying disparities by race and ethnicity.

The risk ratio is the method that would create the least burden for States and provide the public with information that is easily interpreted (a comparison of the risk of an outcome). We also found that the potential drawbacks of the risk ratio method's utility in identifying disparities (*i.e.*, volatility when applied to small populations, inability to calculate when risk to a comparison group is zero) can be minimized through the use of minimum cell sizes, multiple years of data, and, when needed, alternative forms of the risk ratio.

In examining other methods, the Department found none that contain a balance of transparency, limited burden, and utility similar to the risk ratio. With respect to transparency and ease of comprehension, the alternate risk ratio (identical to the risk ratio, but with State-level data as the comparison group), the risk difference (another comparison of the risk of an outcome), and the composition methods (a comparison of representation in two contexts) are similar to the risk ratio. Additionally, the alternate risk ratio and risk difference methods can be used when risk to an LEA-level comparison group is zero. However, these methods are rarely used among the States.

Further, the alternate risk ratio method uses State-level data in place of LEA-level data to compare risk to racial and ethnic groups. In cases where LEA-level data are available and reliable, the Department determined that these numbers are preferable to State data. While the weighted risk ratio method is used in approximately half of the States, it is relatively more complex because it uses State-level demographic information to add weights to the standard risk ratio.

Of the possible methodologies that the Department might require States to use, we believe that the risk ratio would provide the greatest utility while resulting in the least burden on, and disturbance of, States' current methodologies for determining significant disproportionality.

*Categories of Analysis (Proposed § 300.647(b)(3) and (4))*

*Statute:* Section 618(d)(1) of IDEA (20 U.S.C. 1418(d)(1)(A)–(C)) requires States to determine whether significant disproportionality based on race or ethnicity exists in the State or the LEAs of the State with respect to identifying children as children with disabilities; identifying children as children with

disabilities in accordance with a particular impairment; placing children with disabilities in particular educational settings; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

*Current Regulations:* Current § 300.646(a) includes the same requirements as the statute.

*Proposed Regulations:* Proposed § 300.647(b)(3)(i)–(ii) and (b)(4)(i)–(viii) would provide additional specificity to the three categories of analysis required by IDEA and current § 300.646(a). These sections would impose no new data collection requirements upon States. Rather, the regulations would require States to use data they already collect, analyze, and report to the Department to identify significant disproportionality in LEAs.

For each of the enumerated racial and ethnic groups in an LEA, States would calculate the risk ratio for the identification of children ages 3 through 21 as children with disabilities and the risk ratio for identification of children ages 3 through 21 as children with—

- Intellectual disabilities;
- Specific learning disabilities,
- Emotional disturbance;
- Speech or language impairments;
- Other health impairments; and
- Autism.

For children with disabilities in each racial and ethnic group, States would calculate the risk ratio for placements into particular educational settings, including disciplinary removals—

- For children ages 6 through 21, inside a regular class more than 40 percent of the day and less than 79 percent of the day;
- For children ages 6 through 21, inside a regular class less than 40 percent of the day;
- For children ages 6 through 21, inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities, or private schools;
- For children ages 3 through 21, out-of-school suspensions and expulsions of 10 days or fewer;
- For children ages 3 through 21, out-of-school suspensions and expulsions of more than 10 days;
- For children ages 3 through 21, in-school suspensions of 10 days or fewer;
- For children ages 3 through 21, in-school suspensions of more than 10 days; and
- For children ages 3 through 21, disciplinary removals in total, including in-school and out-of-school suspensions, expulsions, removals by school personnel to an interim alternative education setting, and removals by a hearing officer.

*Reasons:* It is the Department's intention to create greater uniformity among States in the metrics used to make determinations of significant disproportionality and, at the same

time, disturb States' current operations as little as possible. The calculations we would require reflect the guidance for collecting and analyzing data for determining significant disproportionality that was provided to the States in the July 28, 2008, OSEP Memorandum 08–09 to Chief State School Officers and State Directors of Special Education. These calculations also have been established, following notice and comment, in OMB-approved data collections 1875–0240 and 1820–0517.

As explained in OSEP Memorandum 08–09, the Department does not deem disproportionality for a given metric to be significant when there are very small numbers of children involved, as is the case with certain impairments, including deaf-blindness, developmental delay, hearing impairments, multiple disabilities, orthopedic impairments, traumatic brain injuries, and visual impairments. The Department's proposed § 300.647(b)(3)(ii) includes 6 of the 13 impairments listed in 34 CFR 300.8(c), representing nearly 93 percent of all children with disabilities in SY 2012. (36th Annual Report to Congress, 2014.)

Similarly, the Department does not propose to require States to analyze data for children who received special education and related services in homebound or hospital settings, correctional facilities, or in private schools (as a result of parental placement of the child in a private school) because those numbers are typically very small and an LEA generally has little, if any, control over these placements.

The OSEP Memorandum 08–09 provides further justification of the Department's new requirements regarding calculation of significant disproportionality for placement. As IDEA requires children with disabilities to be placed in the least restrictive environment (LRE), the first placement option to be considered is the regular classroom with appropriate supplementary aides and services. For that reason, the Department proposes that States analyze disparities in placement in the regular classroom for less than 79 percent of the day, which is one of the long-standing categories States use to report educational environment data under section 618 of IDEA.

As States are currently required to annually collect and submit these data to the Department under section 618(a)(1) of IDEA, the Department anticipates that using these data to determine significant disproportionality will take minimal additional capacity.

*Risk Ratio Thresholds (Proposed § 300.647(a)(4); § 300.647(b)(1); § 300.647(b)(2) and (6))*

*Statute:* None.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 300.647(a)(4) would define “risk ratio threshold” as the threshold over which disproportionality based on race or ethnicity is significant under proposed § 300.646(a) and (b).

Proposed § 300.647(b)(1) would require States to set reasonable risk ratio thresholds for each of the categories described in the proposed §§ 300.647(b)(3) and (4). Proposed § 300.647(b)(1)(i) would require that risk ratio thresholds are based on advice from stakeholders, including their State Advisory Panels. Proposed § 300.647(b)(1)(ii) would require that risk ratio thresholds be subject to monitoring and enforcement for reasonableness by the Secretary, consistent with section 616 of the Act.

Proposed § 300.647(b)(2) would require States to apply the risk ratio thresholds to risk ratios (or alternate risk ratios, as appropriate) to each of the categories described in the proposed § 300.647(b)(3) and (4) and to the following racial and ethnic groups within each category: Hispanic/Latino of any race; and, for individuals who are non-Hispanic/Latino only, American Indian/Alaska Native; Asian; Black/African American; Native Hawaiian or Other Pacific Islander; White; and two or more races.

Proposed § 300.647(b)(6) would require States to identify as having significant disproportionality any LEA where the risk ratio for any racial or ethnic group in any category of analysis in proposed § 300.647(b)(3) and (4) is above the risk ratio threshold set by the State for that category.

*Reasons:* Using a risk ratio to determine significant disproportionality necessitates setting a threshold that marks the boundary between disproportionality and significant disproportionality.

The Department proposes limitations and requirements for establishing risk ratio thresholds to address current State practices. These proposed regulations are also intended to encourage States to differentiate LEAs with some disproportionality from LEAs with significant disproportionality. It is noteworthy that in SY 2012–2013, 21 States did not identify significant disproportionality in any LEAs. Given the degree of disproportionality across all States, the Department is concerned that a number of States using risk ratios may have, intentionally or

unintentionally, set thresholds high enough to effectively nullify the statutory requirement that they identify LEAs with significant disproportionality.

To address this, proposed § 300.647(b)(1)(ii) requires that a risk ratio threshold be reasonable and subject to Departmental monitoring and enforcement. By requiring that States abide by a standard of reasonableness, the Department may initiate enforcement action against a State that selects an unreasonable risk ratio threshold.

There are a number of factors that may influence whether a risk ratio threshold is reasonable for the State. For example, the Department may determine that a State has selected a reasonable threshold if it is likely to lead to a reduction in disparities on the basis of race or ethnicity or if it results in identification of LEAs in greatest need of intervention.

By contrast, the Department may determine that a State has selected an unreasonable risk ratio threshold if it avoids identifying any LEAs (or significantly limits the identification of LEAs) with significant disparities in order to, for example, preserve State or LEA capacity that would otherwise be used for a review of policies, practices, and procedures and reserving IDEA Part

B funds for comprehensive CEIS, or to protect LEAs from needing to implement comprehensive CEIS.

While a number of States rely on statistical significance tests and confidence intervals to set risk ratio thresholds, there may be some cases in which these may be unreasonable when compared with racial and ethnic disparities in the LEAs of the State. In States with non-normal distributions of LEA risk ratios, individual LEAs that significantly deviate from the typical range of risk ratios in other LEAs in the State (*i.e.*, outliers), or a small number of total LEAs, a risk ratio threshold set two standard deviations above the Statewide average risk ratio may fail to identify LEAs in which significant racial or ethnic discrepancies exist in the identification, placement, and/or discipline of students with disabilities. Solely because a risk ratio threshold is the result of an objective calculation does not guarantee that the resulting threshold itself would be considered reasonable when it is compared to the racial and ethnic disparities taking place at the LEA level.

Further, for States that identified no LEAs with significant disproportionality in SY 2012–2013, a standard of reasonableness will help to determine whether the State’s choice of risk ratio threshold was appropriate. For example,

selection of a risk ratio threshold that results in no determination of significant disproportionality may nonetheless be reasonable if a State has little or no overrepresentation on the basis of race or ethnicity. Put another way, a risk ratio threshold under which no LEAs are determined to have significant disproportionality could be reasonable if there is little or no overrepresentation on the basis of race or ethnicity in the LEAs of the State, much less significant disproportionality.

In a case where a State does have some degree of racial or ethnic disparities, a risk ratio threshold that results in no determination of significant disproportionality may nonetheless be reasonable if none of its LEAs are outliers in a particular category when compared to other LEAs nationally. There are many ways that a State might make this comparison, and we provide one example here.

For identification, we used IDEA section 618 data to, first, calculate a national median risk ratio based on LEA-level risk ratios, and, second, identify outlier LEAs based on the national median. The Department repeated this procedure for placement and disciplinary removal to develop 15 risk ratio thresholds, as outlined in Table 7.

TABLE 7—NUMBER AND PERCENTAGE OF LEAS EXCEEDING A RISK RATIO THRESHOLD, EQUALING TWO MEDIAN ABSOLUTE DEVIATIONS ABOVE THE MEDIAN OF ALL LEAS,<sup>ab</sup> IN SY 2011–12, SY 2012–13, AND SY 2013–14

Metrics used to measure three categories of analysis (identification, placement, and disciplinary removals)	Risk ratio threshold (based on two median absolute deviations above the median for LEA risk ratios <sup>c</sup> )	Percent of LEAs <sup>d</sup> exceeding the risk ratio threshold for three years (SY 2011–12, SY 2012–13, and SY 2013–14)
All disabilities .....	1.67	16.7
Autism .....	2.41	11.9
Emotional disturbance .....	2.96	9.2
Intellectual disabilities .....	2.48	12.8
Other health impairments .....	2.38	11.5
Specific learning disabilities .....	1.97	15.2
Speech or language impairments .....	2.03	10.6
Inside regular class 40 percent through 79 percent of the day .....		
Inside regular class less than 40 percent of the day .....	1.65	5.1
Separate settings .....	2.13	3.1
In-school suspensions ≤10 days .....	1.97	3.5
In-school suspensions >10 days .....	2.94	0.5
Out-of-school suspensions/expulsions ≤10 days .....	2.01	5.7
Out-of-school suspensions/expulsions >10 days .....	3.00	1.3
Total removals .....	1.87	6.9

<sup>a</sup> N = 17,371 LEAs.

<sup>b</sup> Excludes LEAs in one State, for any of the identification metrics, and all but one LEA in a second State, for the disciplinary removal metrics.

<sup>c</sup> Medians and MADs exclude risk ratios of 0.

<sup>d</sup> Only includes LEAs with outlier risk ratios for those racial and ethnic groups with at least 10 children.

Additional information regarding the Department’s example may be found at <http://www2.ed.gov/programs/osepidea/>

[618-data/LEA-racial-ethnic-disparities-tables/index.html](http://www2.ed.gov/programs/osepidea/618-data/LEA-racial-ethnic-disparities-tables/index.html).

In proposing § 300.647(b)(1)(ii), it is the Department’s intention that the

States’ selection of risk ratio thresholds be subject to a Departmental monitoring and enforcement for reasonableness. If

the Department identifies a State that may have an unreasonable threshold, it would notify the State and request clarification regarding how the State believes the selection of risk ratio thresholds is reasonable. If a State provides an insufficient response, the Department would notify the State that it is not in compliance with the IDEA regulation requiring the State to set a reasonable risk ratio threshold, and the Department would take an enforcement action that is appropriate and authorized by law. Enforcement actions range from requiring a corrective action plan, imposing special conditions on the State's IDEA Part B grant, designating the State as a high-risk grantee, or withholding a portion of the State's IDEA Part B funds. The Department anticipates that the requirement of reasonableness in proposed § 300.647(b)(1) will not only help ensure the statutory requirement is meaningful but will also result in States requiring those LEAs with the largest disparities to direct resources to identify and correct practices that may violate not just IDEA but also Federal civil rights laws that prohibit discrimination on the basis of race, color, and national origin, such as Title VI of the Civil Rights Act of 1964. Nothing in this proposed regulation will limit or insulate an LEA or SEA from enforcement action under other statutes. Proposed § 300.647(b)(1) would require States to select reasonable risk ratio thresholds that effectively identify LEAs with large racial and ethnic disparities, so that their policies, practices, and procedures may be reviewed consistent with section 618(d)(2)(A) of IDEA. This valuable self-examination may, depending upon the factual circumstances in the State or the LEA, reduce the risk of further compliance concerns.

Proposed § 300.647(b)(1)(i) would clarify the role of the State Advisory Panel in determining the risk ratio thresholds. Under section 612(a)(21)(D) of IDEA (20 U.S.C. 1412(a)(21)(D)), State Advisory Panels have among their duties a responsibility to "advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 618." As the selection of risk ratio thresholds will affect the data SEAs will submit to the Department under section 618 of IDEA—including the LEAs identified with significant disproportionality and the reason for the identification—the State Advisory Panel should have a meaningful role in advising the SEA on these selections.

Proposed § 300.647(b)(1) would clarify that States may set a different

risk ratio threshold for each of the categories in proposed § 300.647(b)(3) and (4). States may need different thresholds in order to reasonably identify significant disproportionality for categories with different degrees of disparity. For example, if the LEAs in a State, on average, identify any one racial or ethnic group for emotional disturbance at a rate three times that of all other children but use disciplinary removals for any one racial or ethnic group at a rate five times that of all other children, the State may find it difficult to set a single threshold that would be reasonable for both emotional disturbance and disciplinary removals.

In directed question 9, the Department has requested public comment on the proposed requirements regarding the development and application of risk ratio thresholds. The use of different risk ratio thresholds for different racial and ethnic groups may be constitutionally impermissible.

Lastly, proposed § 300.647(b)(2) would provide a complete list of the racial and ethnic groups that each State must analyze as part of the approach to defining and identifying significant disproportionality. This list of racial and ethnic groups is the same list of groups required for States' current IDEA section 618 data submissions, as explained in the Department's Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education. 72 FR 59266 (October 19, 2007).

Again, within these guidelines, there are many ways a State may set reasonable risk ratio thresholds. For example, States may choose an appropriate value based on previous experience with particular thresholds (e.g., if, in the past, LEAs with risk ratios above 2.5 were, after a review of policies, practices, and procedures, found to be non-compliant with the requirements of IDEA, while those under that threshold were generally not), or they may calculate the value using a data analysis that complies with proposed § 300.647(b)(2).

*Minimum Cell Sizes (Proposed § 300.647(b)(3) and (4))*

*Statute:* None.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 300.647(b)(3) and (4) would require a minimum cell size no greater than 10 for risk ratio calculations. Specifically, to determine significant disproportionality in identification, States would calculate, for each LEA, risk ratios for all racial and ethnic groups that include a minimum number of children not larger than 10. To determine significant

disproportionality in placement, including disciplinary removals from placement, States would calculate, for each LEA, risk ratios for all racial and ethnic groups that include a minimum number of children with disabilities not larger than 10.

*Reasons:* The proposal to use a minimum cell size no greater than 10 would ensure that States examine as many racial and ethnic groups for significant disproportionality in as many LEAs as possible while minimizing the effect that minor variations in the number of children in a given racial or ethnic group, or in the comparison group, have on LEAs risk ratios.

For example, the graduation of a relatively small number of children with disabilities, while not reflecting any change in the policies, practices, and procedures of the LEA, could result in a large change in the calculated risk ratio for a particular category of analysis, particularly if those graduating children represented a sizable proportion of the total number of children with disabilities in a given racial or ethnic group.

The minimum cell size included in proposed § 300.647(b)(3) and (4) would allow States to exclude certain LEAs from a determination of significant disproportionality based on the number of children in the racial or ethnic group of interest and the number of children with disabilities in the racial or ethnic group of interest. For example, if an LEA has fewer than 10 Hispanic/Latino children, then the State may choose to exclude that LEA from a determination of whether significant disproportionality exists in the identification of Hispanic/Latino children. If an LEA has fewer than 10 Hispanic/Latino children with disabilities, then the State may choose to exclude that LEA from a determination of whether significant disproportionality exists in the placement or disciplinary removal of Hispanic/Latino children with disabilities.

Selecting an appropriate minimum number of children necessary to include an LEA in the State's analysis of significant disproportionality can be difficult. If the minimum cell size is too small, more LEAs would be included in the analysis, but the likelihood of dramatic, statistically anomalous, changes in risk ratio from one year to the next would increase. By contrast, if the minimum number is set too high, a larger number of LEAs would be excluded from the analysis and States would not identify as many LEAs with significant disparities as there might be.

Current research demonstrates that a minimum cell size of 10 provides for a reasonable analysis without excluding too many LEAs from a determination of whether significant disproportionality on the basis of race exists. (Bollmer, et al., 2007; IDEA Data Center 2014).

*Alternate Risk Ratios (Proposed § 300.647(a)(1); § 300.647(b)(5))*

*Statute:* None.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 300.647(b)(5) would require States to use the alternate risk ratio in place of the risk ratio when, for any analysis category, an LEA has fewer than 10 children in the comparison group—all other racial and ethnic groups in the LEA—or the risk for children in all other racial and ethnic groups is zero.

Proposed § 300.647(a)(1) would define “alternate risk ratio.” Like risk ratio, alternate risk ratio measures the risk of an outcome for one racial or ethnic group in the LEA, but compares it to the risk of that outcome for all other racial and ethnic groups in the State, not all other racial and ethnic groups in the LEA. An alternate risk ratio is calculated by dividing the risk for children in one racial or ethnic group within an LEA by the risk of that same outcome for all other racial or ethnic groups within the State.

*Reasons:* As explained in the discussion of minimum cell sizes, a risk ratio can produce more volatile results when applied to small numbers. Setting an appropriate minimum cell size is one way of addressing this limitation when there are too few children in the racial or ethnic group of interest. However, when an LEA has too few children in the comparison group—fewer than 10—experts recommend the use of the alternate risk ratio. (Bollmer, et al., 2007.) With the alternate risk ratio, the State population replaces the LEA population for the comparison group, permits the calculation, and produces results that are less volatile. Further, a risk ratio cannot be calculated at all if there are no children in the comparison group, or if the risk to children in the comparison group is zero (because a number cannot be divided by zero). In these specific cases, the Department has proposed to require States to use the alternate risk ratio as the method for measuring disparities in the LEA.

*Flexibilities (Proposed § 300.647(c))*

*Statute:* None.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 300.647(c) would provide States with additional flexibility in making determinations of significant

disproportionality. In proposed § 300.647(c)(1), although States would still calculate annual risk ratios for their LEAs, they would have the flexibility to identify only those LEAs that exceed the risk ratio threshold for a number of consecutive years, but no more than three.

Proposed § 300.647(c)(2) would allow States not to identify LEAs that exceed the risk ratio threshold if they demonstrate reasonable progress, as determined by the State, in lowering the risk ratio for the group and category from the immediate preceding year.

*Reasons:* It is the Department’s intention to reduce the likelihood that LEAs will be inappropriately identified with significant disproportionality by allowing States the flexibility to identify only those LEAs showing significant racial and ethnic disparities over a number of consecutive years. Measures of disproportionality can be variable if the number of children included in the analysis is small, as may be the case in small LEAs or in LEAs with a small racial or ethnic subgroup. However, LEAs are less likely to be identified based on volatile data if multiple years of data are taken into consideration. (IDEA Data Center, 2014.)

This flexibility also adopts an existing common practice among States. Based on the SY 2013–14 SSS, 23 States require that LEAs exceed a specified level of disparity for multiple years for at least one category of analysis for at least one racial or ethnic group before the LEA is identified as having significant disproportionality. Of these 23 States, 13 require 3 consecutive years of risk ratios exceeding an established threshold. The Department proposes to allow States to use up to three prior consecutive years of data before an LEA is identified, which reflects the current most common practice among the States. States using this flexibility must use data from prior school years to determine whether any LEAs in their State should be identified as having significant disproportionality in the first (or second, as appropriate) year after the proposed regulation is adopted.

Finally, with this regulation, the Department intends to empower States to focus their attention on those LEAs in which the level of disproportionality is not decreasing. We intend to allow States to leave undisturbed IDEA Part B funds that may be achieving the goal of reducing disparities in certain LEAs, as evidenced by reasonable progress determined by the State, in lowering their risk ratio, even though the LEA has a risk ratio that exceeds the State’s risk ratio threshold.

**II. Clarification That Statutory Remedies Apply to Disciplinary Actions (Proposed § 300.646(a)(3) and (c))**

*Statute:* Section 618(d)(1)(C) of IDEA (20 U.S.C. 1418(d)(1)(C)) specifies that a State must provide for the collection and examination of data with respect to the incidence, duration, and type of disciplinary actions, including suspension and expulsions, to determine if significant disproportionality with respect to race and ethnicity is occurring in the State or the LEAs of the State. Section 618(d)(2) of IDEA (20 U.S.C. 1418(d)(2)) specifies the actions a State must take if it finds significant disproportionality based on race or ethnicity in the identification of children as children with disabilities or in their placement in particular educational settings. A State must provide for the review and, if appropriate, revision of the policies, practices, and procedures used in the identification or placement to ensure that these policies, practices, and procedures comply with the requirements of IDEA. The State must also require any LEA identified with significant disproportionality to reserve 15 percent of its IDEA Part B subgrant to provide comprehensive CEIS to children in the LEA, particularly children in those groups that were significantly overidentified, and require the LEA to publicly report on the revision of policies, practices, and procedures.

*Current Regulations:* Current § 300.646(a)(1) and (b)(1) restate the statute largely verbatim. Current § 300.646(a)(1) requires LEAs to provide comprehensive CEIS particularly, but not exclusively, to children in those groups that were significantly overidentified.

*Proposed Regulations:* Proposed § 300.646(a)(3) would clarify that disciplinary actions under IDEA are considered removals from current placement, which is consistent with current § 300.530. Proposed § 300.646(c) would clarify that the State must implement the statutory remedies in section 618(d)(2) to address significant disproportionality with respect to disciplinary removals from placement.

*Reasons:* Ensuring that States implement the statutory remedies will help address significant disproportionality in disciplinary removals from placement.

Proposed § 300.646(c) is based, in part, on the use of the term “placement” in the introductory paragraph of section 618(d)(2). The Department reads the term “placement” to include

disciplinary removals of children with disabilities from their current placement, in accordance with section 615(k)(1) of IDEA (20 U.S.C. 1415(k)(1)). A disciplinary removal of up to 10 school days is considered a removal from placement under section 615(k)(1)(B) (“[s]chool personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities)”), while a disciplinary removal from placement that exceeds 10 school days is considered a change in placement under section 615(k)(1)(C).

To the extent that section 618(d)(2) of IDEA specifies the remedies that States and LEAs must implement following a determination of significant disproportionality with respect to placement, the Department seeks to clarify that these remedies also follow a determination of significant disproportionality with respect to disciplinary removals from placement of any duration.

This reading of “placement” aligns with OSERS’ prior interpretations and guidance both on this issue—as outlined in the OSEP Questions and Answers on Discipline Procedures, Revised June 2009—and the determination required under section 618(d)(1).

### III. Clarification of the Review and Revision of Policies, Practices, and Procedures (§ 300.646(c))

*Statute:* Section 618(d)(2)(A) (20 U.S.C. 1418(d)(A)) requires the State or the Secretary of Interior to provide for the review, and if appropriate, revision of policies, practices, and procedures to ensure compliance with the requirements of IDEA. Section 618(d)(2)(C) (20 U.S.C. 1418(d)(C)) requires LEAs identified as having significant disproportionality to publicly report on any revisions to policies, practices, and procedures.

*Current Regulation:* Current § 300.646(b)(1) and (3) restate the statute largely verbatim.

*Proposed Regulation:* Proposed § 300.646(c)(1) would clarify that the review of policies, practices, and procedures must be conducted in every year in which any LEA is identified as having significant disproportionality.

Proposed § 300.646(c)(2) would restate the statutory requirement that, in the case of a determination of significant disproportionality, the LEA must publicly report on the revision of

policies, practices, and procedures and add new language requiring that the report be consistent with the confidentiality provisions of FERPA and its implementing regulations in 34 CFR part 99, and section 618(b)(1) of IDEA.

*Reasons:* While the Department interprets section 618(d)(2)(A) of IDEA to require States to provide for an annual review of policies, practices, and procedures resulting from a determination of significant disproportionality, the requirement that LEAs identified in multiple years must review their policies, practices, and procedures every year in which they are identified with significant disproportionality is not sufficiently clear in the current regulation.

When LEAs review and revise their policies, practices, and procedures, and publicly report on those revisions, there is a risk of disclosing personally identifiable information, particularly if the subgroup under examination is particularly small (e.g., 10 American Indian/Alaska Native children in an LEA, five of whom are children with disabilities). To reduce the risk of disclosing personally identifiable information, we have proposed § 300.646(c)(2) to clarify that LEA reporting on the revision of policies, practices, and procedures be consistent with the confidentiality provisions of FERPA, its implementing regulations in 34 CFR part 99, and section 618(b)(1) reporting requirements.

### IV. Expanding the Scope of Comprehensive Coordinated Early Intervening Services (§ 300.646(d))

*Statute:* Section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) requires any LEA identified as having significant disproportionality to reserve the maximum amount of funds under section 613(f) to provide comprehensive CEIS to serve children in the LEA, “particularly children in those groups that were significantly overidentified.”

*Current Regulation:* There are minor differences between the statutory language and current § 300.646(b)(2). Current § 300.646(b)(2) requires comprehensive CEIS for children in the LEA, “particularly, but not exclusively, children that were significantly overidentified.”

*Proposed Regulation:* Proposed § 300.646(d)(1) and (2) would amend current § 300.646(b)(2) to require the State to permit an LEA identified with significant disproportionality to provide comprehensive CEIS to preschool children ages 3 through 5, with or without disabilities, and children with disabilities in kindergarten through grade 12. The proposed regulation

would also require the LEA, as part of implementing comprehensive CEIS, to identify and address the factors contributing to the significant disproportionality, which may include a lack of access to evidence-based instruction and economic, cultural, or linguistic barriers to appropriate identification, placement, or disciplinary removal.

Proposed § 300.646(d)(3) would prohibit LEAs from limiting the provision of comprehensive CEIS to children with disabilities.

In directed question 10, the Department has requested public comment regarding restrictions on the use of comprehensive CEIS for children already receiving services under Part B of the IDEA.

*Reasons:* We have determined it is appropriate to expand the population of children that can be served with IDEA Part B funds reserved for comprehensive CEIS to include children with disabilities (while prohibiting the exclusive use of comprehensive CEIS for children with disabilities) and preschool children with and without disabilities. We have also determined that it is appropriate to require LEAs, in implementing comprehensive CEIS, to identify and address the factors contributing to the significant disproportionality.

Regarding the use of comprehensive CEIS for children with disabilities, commenters responding to the June 2014 RFI noted that providing comprehensive CEIS only to children without disabilities is unlikely to address racial and ethnic disparities in the placement or disciplinary removal of children with disabilities. Commenters specifically questioned how comprehensive CEIS could address significant disproportionality in an LEA as to placement if IDEA Part B funds reserved for comprehensive CEIS can only be used for children who are not currently identified as needing special education and related services.

The Department agrees with the commenters and proposes to allow LEAs to use IDEA Part B funds reserved for comprehensive CEIS to serve children with disabilities in order to provide services that address factors contributing to significant disproportionality related to placement, including disciplinary removals from placement. However, recognizing the statutory emphasis on early behavioral and academic supports and services before children are identified with a disability, the Department proposes to prohibit LEAs from limiting services solely to children with disabilities.

Regarding the use of comprehensive CEIS for preschool children, the Department notes that there is robust research supporting the conclusion that the early childhood years are a critical period in the development of children's language, social, and cognitive skills. (National Research Council and Institute of Medicine, 2000.) A child's early years set the foundation for later school success. Providing engaging and supportive learning opportunities as early as possible, particularly for children with and at risk for, delays and disabilities, can change developmental trajectories and set children on a path for achieving expected developmental and learning outcomes. Participation in preschool programs is also associated with significantly lower rates of special education services between the ages of 6 and 18. (Reynolds et al., 2001.) When young children enter kindergarten with skills behind their same age peers, they often have difficulty catching up and instead fall further behind.

Disparities in early literacy skills put many children at risk for diminished later school success. By 18 months of age, gaps in language development have been documented when comparing children from low-income families to their more affluent peers. (Fernald, Marchman, & Weisleder 2013; Hart and Risely, 1995.) Additionally, scores on reading and math were lowest for first-time kindergartners in households with incomes below the Federal poverty level and highest for those in households with incomes at or above 200 percent of the Federal poverty level. (Mulligan, Hastedt, & McCarroll, 2012.) Racial disparities have also been identified in the early literacy and math skills of children entering kindergarten with White children, on average, having higher reading and math scores than children of color with the exception of Asian children. (Mulligan, Hastedt, & McCarroll, 2012.)

Research has underscored the critical role high-quality preschool programs can play to help address these disparities by providing a variety of rich early learning experiences and individualized supports needed to foster children's development and learning. However, Black/African-American children and children from low-income families are the most likely to be in low-quality settings and the least likely to be in high-quality settings. (Center for American Progress, 2014.) In one large State, Hispanic/Latino children make up two-thirds of children entering kindergarten, but, of all racial and ethnic groups, are least represented in the State's preschool programs. (Valdivia, 2006.)

Additionally, research suggests that there are racial disparities in the receipt of early intervention and early childhood special education services. For example, researchers found that racial disparities emerged by 24 months of age. African-American children are almost five times less likely to receive early intervention services under Part C of IDEA, and by 48 months of age, African-American children are disproportionately underrepresented in preschool special education services. (Feinberg et al., 2011; Rosenberg et al., 2008; Morgan et al., 2012.) Providing high-quality early intervention services can increase children's language, cognitive, behavioral, and physical skills and improve their long-term educational outcomes. (Morgan, Farkas, Hillemeir & Maczuga, 2012.)

Finally, data indicate that specific groups of children are being disproportionately expelled and suspended from their early learning settings, a trend that has remained virtually unchanged over the past decade. Children most in need of the benefits of preschool programs are the ones most often expelled from the system. Recent data indicate that African-American boys make up 18 percent of preschool enrollment but 48 percent of preschoolers suspended more than once. Hispanic/Latino and African-American boys combined represent 46 percent of all boys in preschool but 66 percent of their same-age peers who are suspended (see <http://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ec-expulsions-suspensions.pdf>). While more research is needed to understand the impacts of disciplinary removal on preschool children, research shows the detrimental impacts on their older peers. Expulsion and suspension early in a child's education predicts expulsion or suspension in later grades. (Losen and Skiba, 2010.) Children who are expelled or suspended are as much as 10 times more likely to experience academic failure and grade retention. (Lamont et al., 2013.)

Using IDEA Part B funds to provide comprehensive CEIS to preschool children with or without disabilities may help improve early intervening services available and over time reduce significant disproportionality. Specifically, IDEA Part B funds reserved for comprehensive CEIS could be used to implement program-wide models of interventions, such as positive behavioral interventions and supports and response to intervention, to increase the quality of the learning environment for all preschool children and provide explicit instruction and individualized

interventions for those who need additional support.

Comprehensive CEIS could also be used to increase the capacity of the workforce to support all children's cognitive, social-emotional, and behavioral health. For example, early childhood personnel could receive specific professional development on promoting children's social-emotional and behavioral health or ensuring that children with disabilities receive appropriate accommodations to support their full participation in inclusive classrooms.

Additionally, comprehensive CEIS could be used to train preschool program staff to conduct developmental screenings and make appropriate referrals to ensure that children are linked to services and receive supports as early as possible, minimizing the negative impact of developmental delays and maximizing children's learning potential. Using IDEA Part B funds to provide comprehensive CEIS to preschool children with and without disabilities may help provide high-quality preschool services and promote targeted workforce professional development focused on promoting the social-emotional and behavioral health of all children.

Requiring LEAs to use funds reserved for comprehensive CEIS to carry out activities to identify and address the factors contributing to the significant disproportionality may ensure that LEAs are using these funds to focus on activities designed to address the significant disproportionality. Directing LEAs to target the use these funds in this manner is consistent with the statutory purpose of the reservation of funds, which is to serve children in the LEA, particularly children in those groups that were significantly overidentified.

In sum, we believe that allowing LEAs also to use IDEA Part B funds to provide comprehensive CEIS to preschool children ages three through five, with or without disabilities, to children with disabilities in kindergarten through grade 12, and requiring LEAs to identify and address factors contributing to the significant disproportionality, is consistent with the purposes of the statutory remedies, which are designed to assist LEAs in addressing significant disproportionality in identification, placement, and disciplinary removal.

#### *Directed Questions*

The Department seeks additional comment on the questions below.

(1) The Department notes that a number of commenters responding to the RFI expressed concern that the use

of a standard methodology to determine significant disproportionality may not be appropriate for certain types of LEAs.

How should the proposed standard methodology apply to an LEA that may be affected by disparities in enrollment of children with disabilities (*e.g.*, LEAs that house schools that only serve children with disabilities and school systems that provide specialized programs for children with autism or hearing impairments, etc.)?

(2) The Department is particularly interested in comments regarding strategies to address the shortcomings of the risk ratio method, which the Department has proposed to require States to use to determine significant disproportionality. While this method is the most common method in use among the States, the Department is aware that other methods may have advantages and disadvantages. Risk ratios are influenced by the number of children in an LEA and in the racial or ethnic group of interest. In cases where the risk to a comparison group is zero, it is not possible to calculate a risk ratio. The Department has proposed a number of strategies to address the drawbacks of the risk ratio, including a minimum cell size and flexibility with regard to the number of years of data a State may take into account prior to making a determination of significant disproportionality. In addition, the Department has proposed that States use an alternate risk ratio in specific circumstances when the risk ratio cannot be calculated.

Should the Department allow or require States to use another method in combination with the risk ratio method? If so, please state what limitation of the risk ratio method does the method address, and under what circumstances should the method be allowed or required.

(3) The Department has proposed to require States to determine whether there is significant disproportionality with respect to the identification of children as children with intellectual disabilities, specific learning disabilities, emotional disturbance, speech or language impairments, other health impairments, and autism. Because the remaining impairments described in section 602(3) of IDEA typically have very small numbers of children, the Department does not deem disproportionality in the number of children with these impairments to be significant.

Similar to impairments with small numbers of children, should the Department exclude any of the six impairments included in the proposed § 300.647(b)(3)? If so, which

impairments should be removed from consideration? Alternatively, should the Department include additional impairments in § 300.647(b)(3)?

(4) Consistent with OSEP Memorandum 08–09, the Department has proposed to require States to determine whether there is significant disproportionality with respect to self-contained classrooms (*i.e.*, placement inside the regular classroom less than 40 percent of the day) and separate settings (*i.e.*, separate schools and residential facilities), as these disparities suggest that a racial or ethnic group may have less access to the LRE to which they are entitled under section 612(a)(5) of IDEA.

Should the Department also require States to determine whether there is significant disproportionality with respect to placement inside the regular classroom between 40 percent and 79 percent of the day, as proposed in this NPRM?

(5) The Department has proposed to require States to develop risk ratio thresholds that comply with specific guidelines (*i.e.*, States must select a reasonable threshold and consider the advice of stakeholders). We have proposed these guidelines in lieu of a mandate that all States use the same risk ratio thresholds. At this time, the Department does not intend to set mandated risk ratio thresholds and proposes that States should retain the flexibility to select risk ratio thresholds that best meet their needs. However, we seek the public's perspective on whether a federally-mandated threshold is appropriate and, if so, what that threshold should be. This information may inform potential future regulatory efforts to address racial and ethnic disparities under section 618(d) of IDEA. As noted above, the Department has no intention to set a federally-mandated threshold through this current regulatory action. Further, we seek the public's perspective as to what risk ratio thresholds the Department might consider as "safe harbor" when reviewing State risk ratio thresholds for reasonableness.

Should the Department, at a future date, mandate that States use the same risk ratio thresholds? If so, what risk ratio thresholds should the Department mandate? What is the rationale or evidence that would justify the Department's selection of such risk ratio thresholds over other alternatives? Lastly, what safe harbor should the Department create for risk ratio thresholds that States could voluntarily adopt with the knowledge that it is reasonable pursuant to this proposed regulation? Public comments regarding this last question may be used to inform

future guidance regarding the development of risk ratio thresholds and the Department's approach to reviewing risk ratio thresholds for reasonableness.

(6) The Department has proposed to require States to make a determination of whether significant disproportionality exists in each LEA, for each racial and ethnic group with 10 children (for purposes of identification) and 10 children with disabilities (for purposes of placement and discipline).

Does the Department's proposed minimum cell size of 10 align with existing State privacy laws, or would the proposal require States to change such laws?

(7) The Department has proposed to require that States use the alternate risk ratio method only in situations where the total number of children in a comparison group is less than 10 or the risk to children in a comparison group is zero.

Are there other situations, currently not accounted for in the proposed regulations, where it would be appropriate to use the alternate risk ratio method? In these situations, should the Department require or allow States the option to use the alternate risk ratio method?

(8) The Department has proposed to require States to make a determination of whether significant disproportionality exists in the State and the LEAs of the State using a risk ratio or alternate risk ratio. The statutory requirement in section 618(d)(1) of IDEA applies to the Secretary of the Interior and States, as that term is defined in section 602(31) of IDEA (which includes each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas). However, the Department notes that, for some of these entities, performing a risk ratio or alternate risk ratio calculation in accordance with these proposed regulations may not be possible because of the lack of a comparison group of sufficient size (at least 10 children for purposes of identification and at least 10 children with disabilities for purposes of placement or disciplinary removals). As such, the Department is interested in seeking comments on how to require entities, whose population is sufficiently homogenous to prevent the calculation of a risk ratio or alternate risk ratio, to identify significant disproportionality.

(9) The proposed regulation permits States to set different risk ratio thresholds for different categories of analysis (*e.g.*, for intellectual disabilities, a risk ratio threshold of 3.0 and for specific learning disabilities, a

risk ratio threshold of 2.0). The Department is interested in seeking comments on whether the proposed regulation should include additional restrictions on developing and applying risk ratio thresholds.

Should the Department allow or require States to use another approach in developing and applying risk ratio thresholds? Are there circumstances under which the use of different risk ratio thresholds for different racial and ethnic groups (within the same category of analysis) could be appropriate and meet constitutional scrutiny? Further, are there circumstances under which the use of different risk ratio thresholds for different categories of analysis could result in an unlawful disparate impact on racial and ethnic groups?

(10) The Department has proposed to require States to identify significant disproportionality when an LEA has exceeded the risk ratio threshold or the alternate risk ratio threshold and has failed to demonstrate reasonable progress, as determined by the State, in lowering the risk ratio or alternate risk ratio for the group and category from the immediate preceding year. While States would have flexibility to define “reasonable progress”—by establishing uniform guidelines, making case by case determinations, or other approaches—the Department’s proposal would only allow States to withhold an identification of significant disproportionality in years when an LEA makes discernable progress in reducing their risk ratio. The Department is interested in seeking comments on whether to place additional restrictions on State flexibility to define “reasonable progress”.

(11) Research indicates that some LEAs may under-identify children of color. While the focus of these regulations is on overrepresentation, the Department specifically requests comments on how to support SEAs and LEAs in preventing under-identification, and ways the Department could ensure that LEAs identified with significant disproportionality with respect to identification properly implement their States’ child find policies and procedures.

What technical assistance or guidance might the Department put in place to ensure that LEAs identified with significant disproportionality do not inappropriately reduce the identification of children as children with disabilities or under-identify children of color in order to avoid a designation of significant disproportionality? How could States and LEAs use data to ensure that

children with disabilities are properly identified?

(12) The Department has proposed to require States to use comprehensive CEIS to identify and address the factors contributing to significant disproportionality. The Department is interested in seeking comments on whether additional restrictions on the use of funds for comprehensive CEIS are appropriate for children who are already receiving services under Part B of the IDEA.

(13) The Department intends to monitor and assess these regulations once they are final to ensure they have the intended goal of improving outcomes for all children.

What metrics should the Department establish to assess the impact of the regulations once they are final?

Please explain your views and reasoning in your responses to all of these questions as clearly as possible, provide the basis for your comment, and provide any data or evidence, wherever possible, to support your views.

#### *Executive Orders 12866 and 13563*

##### Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an “economically significant” rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles stated in the Executive order.

This proposed regulatory action is a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles,

structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things, and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and

(5) Identify and assess available alternatives to direct regulation, including providing economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing these proposed regulations only upon a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In this Regulatory Impact Analysis we discuss the need for regulatory action, alternatives considered, the potential costs and benefits, net budget impacts,

assumptions, limitations, and data sources.

#### *Need for These Regulations*

As we set out in detail in our preamble, the overrepresentation of children of color in special education has been a national concern for more than 40 years. In its revisions of IDEA, Congress noted the problem and put a mechanism in place through which States could identify and address significant disproportionality on the basis of race and ethnicity for children with disabilities.

Again, after review of its data, if a State finds any significant disproportionality based on race and ethnicity, it must provide for the review and, if appropriate, revision of the policies, practices, and procedures used for identifying or placing children; require the LEA to publicly report on any revisions; and require the LEA to reserve 15 percent of its IDEA Part B subgrant to provide comprehensive CEIS to children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified.

IDEA does not define “significant disproportionality,” and, in our August 2006 regulations, the Department left the matter to the discretion of the States. Since then, States have adopted different methodologies across the country, and, as a result, far fewer LEAs are identified as having significant disproportionality than the disparities in rates of identification, placement, and disciplinary removal across racial and ethnic groups would suggest, as noted by the GAO study and supported by the Department’s own data analysis. There is a need for a common methodology for determinations of significant disproportionality in order for States and the Department to better identify and address the complex, manifold causes of the issue and ensure compliance with the requirements of IDEA.

In addition, there is a need to expand comprehensive CEIS to include children from age 3 through grade 12, with and without disabilities, and to require LEAs to provide comprehensive CEIS to identify and address factors contributing to the significant disproportionality. The current allowable uses of comprehensive CEIS funds do not allow LEAs to direct resources to those children directly impacted by inappropriate identification nor does it allow LEAs to provide early intervening services to preschool children, which could reduce the need for more extensive services in the future. Therefore, expanding the provision of

comprehensive CEIS to preschool children allows LEAs to identify and address learning difficulties in early childhood, reducing the need for interventions and services later on.

#### *Alternatives Considered*

The Department reviewed and assessed various alternatives to the proposed regulations, drawing from internal sources and from comments submitted in response to the June 2014 RFI.

Commenters responding to the RFI recommended that the Department address confusion about two IDEA provisions intended to address racial and ethnic disparities in identification for special education: (1) Section 618(d) of IDEA, under which States must collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State in identification, placement and disciplinary removals and (2) section 612(a)(24) of IDEA, under which States must have in effect policies and procedures to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities. Commenters requested that the Department develop a single definition such that “significant disproportionality” and “disproportionate representation” would have the same meaning to reduce confusion and bring these two provisions of the law into greater alignment. The Department examined these statutory provisions, along with a third provision addressing racial and ethnic disparities, section 612(a)(22)(A) of IDEA, which requires States to examine data to determine if LEAs have significant discrepancies in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to such rates for nondisabled children within such agencies. The Department determined that efforts to define these three concepts—significant disproportionality, disproportionate representation, and significant discrepancy—to remove their distinguishing characteristics and increase their alignment could contravene the relevant statutory provisions.

Commenters also recommended that the Department create a model methodology for determining significant disproportionality against which State methodologies would be evaluated and approved or rejected. The Department determined that such a strategy would not clarify for States the minimum

requirements for making determinations of significant disproportionality and would significantly delay the States’ implementation of an approved methodology. In addition, the Department had concerns that such an approach would increase burden on many States in the event that initial submissions of a methodology were rejected, creating the need for additional State submissions.

Internally, the Department considered an alternate definition of risk ratio threshold that would have limited States to using a range of numerical thresholds, not to exceed a maximum set by the Department. The Department posited that such limitations might assist States in identifying more LEAs with significant disproportionality where large disparities in identification, placement and disciplinary removal exist. The Department, however, acknowledges concerns raised in certain comments to the June 2014 RFI that mandated thresholds might fail to appropriately account for wide variations between States, including LEA sizes and populations. The Department is also aware that, in the case of the identification of children with disabilities, setting risk ratio thresholds too low might create an adverse incentive—encouraging LEAs to deny children from particular racial or ethnic groups access to special education and related services to prevent a determination of significant disproportionality. Given these competing concerns, the Department asks a directed question in this NPRM regarding the strengths and weaknesses of mandating specific risk ratio thresholds. The Department also considered allowing States to continue to use the weighted risk ratio method. The proposed regulations, however, limit the States to the risk ratio and, if appropriate, the alternate risk ratio methodologies, specify the conditions under which each must be utilized, and disallow the use of the weighted risk ratio. The Department’s purpose in directing States to use the risk ratio and alternate risk ratio methods are (1) to improve transparency with respect to determinations of significant disproportionality across States through the use of a common analytical method and (2) to limit the burden of a transition to a new method for States as 41 States already use some form of the method. While a number of States currently use the weighted risk ratio method, that method fails to provide LEAs and the public with a transparent comparison between risk to a given racial or ethnic group and its peers, as

the risk ratio and alternate risk ratio methodologies do. Instead, with a weighted risk ratio approach, the comparison is adjusted by adding different weights to each racial and ethnic group, typically based on State-level representation and is intended to improve risk ratio reliability when size of certain racial and ethnic groups are small. Given that the Department's proposal already includes three mechanisms for addressing risk ratio reliability—(1) the alternate risk ratio, (2) the allowance for using up to three consecutive years of data before making a significant disproportionality determination, and (3) the minimum cell size requirement—the Department determined that the potential benefits of the weighted risk ratio method were exceeded by the costs associated with complexity and decreased transparency.

The Department also considered maintaining the current regulations and continuing to allow States full flexibility to use their own methodology for significant disproportionality determinations. However, given that 22 States plus the Virgin Islands identified no LEAs with significant disproportionality in 2012–2013 and the evidence of some degree racial and ethnic disparity among LEAs in every State, the Department determined that the a standard methodology would help States to fulfill their statutory obligations under IDEA.

#### *Discussion of Costs, Benefits and Transfers*

The Department has analyzed the costs of complying with the proposed requirements. Due to the considerable discretion the proposed regulations would provide States (*e.g.*, flexibility to determine their own risk ratio thresholds, whether LEAs have made reasonable progress reducing significant disproportionality), we cannot evaluate the costs of implementing the proposed regulations with absolute precision. However, we estimate that the total cost of these regulations over ten years would be between \$47.5 and \$87.1 million, plus additional transfers between \$298.4 and \$552.9 million. These estimates assume discount rates of three to seven percent. Relative to these costs, the major benefits of these proposed requirements, taken as a whole, would include: Ensuring increased transparency on each State's definition of significant disproportionality; establishing an increased role for State Advisory Panels in determining States' risk ratio thresholds; reducing the use of potentially inappropriate policies, practices, and procedures as they relate

to the identification of children as children with disabilities, placements in particular educational settings for these children, and the incidence, duration, and type of disciplinary removals from placements, including suspensions and expulsions; and promoting and increasing comparability of data across States in relation to the identification, placement, or discipline of children with disabilities by race or ethnicity. Additionally, the Department believes that expanding the eligibility of children ages three through five to receive comprehensive CEIS would give LEAs flexibility to use additional funds received under Part B of IDEA to provide appropriate services and supports at earlier ages to children who might otherwise later be identified as having a disability, which could reduce the need for more extensive special education and related services for such children at a later date.

#### *Benefits*

The Department believes this proposed regulatory action to standardize the methodology States use to identify significant disproportionality will provide clarity to the public, increase comparability of data across States, and draw attention to how States identify and support LEAs with potentially inappropriate policies, practices, and procedures as they relate to the identification, placement, and discipline of children with disabilities. The Department further believes that methodological alignment across States will improve upon current policy, which has resulted in numerous State definitions of significant disproportionality of varying complexity that may be difficult for stakeholders to understand and interpret. The wide variation in definitions and methodologies across States under current policy also makes it difficult for stakeholders to advocate on behalf of children with disabilities, and for researchers to examine the extent to which LEAs have adequate policies, practices, and procedures in place to provide appropriate special education and related services to children with disabilities. We believe that a standardized methodology will accrue benefits to stakeholders in reduced time and effort needed for data analysis and a greater capacity for appropriate advocacy. Additionally, we believe that the standardized methodology will accrue benefits to all children (including children with disabilities), by promoting greater transparency and supporting the efforts of all stakeholders to enact appropriate policies, practices, and procedures that

address disproportionality on the basis of race or ethnicity.

Requiring that States set reasonable risk ratio thresholds based on the advice from State Advisory Panels will also give stakeholders an increased role in setting State criteria for identifying significant disproportionality. The Department hopes that this will give States and stakeholders an opportunity, and an incentive, to thoughtfully examine existing State policies and ensure that they appropriately identify LEAs with significant and ongoing discrepancies in the identification of children with disabilities, their placements in particular educational settings, and their disciplinary removals. Further, we hope that States will also take this opportunity to consult with their State Advisory Panels on the States' approaches to reviewing policies, practices, and procedures, to ensure that they comply with the IDEA and that States are prepared and able to provide appropriate support.

In addition, there is widespread evidence on the short- and long-term negative impacts of suspensions and expulsions on student academic outcomes. In general, suspended children are more likely to fall behind, to become disengaged from school, and to drop out of a school. (Lee, Cornell, Gregory, & Xitao, 2011; Brooks, Shiraldi & Zeidenberg, 2000; Civil Rights Project, 2000.) The use of suspensions and expulsions is also associated with an increased likelihood of contact with the juvenile justice system in the year following such disciplinary actions. (Council of State Governments, 2011.)

The Department believes that suspensions and expulsions can often be avoided, particularly if LEAs utilize appropriate school-wide interventions, and appropriate student-level supports and interventions, including proactive and preventative approaches that address the underlying causes or behaviors and reinforce positive behaviors. We believe that the proposed regulation clarifies each State's responsibility to implement the statutory remedies whenever significant disproportionality in disciplinary removals is identified and will prompt States and LEAs to initiate reform efforts to reduce schools' reliance on suspensions and expulsions as a core part of their efforts to address significant disproportionality. In so doing, we believe that LEAs will increase the number of children participating in the general education curriculum on a regular and sustained basis, thus accruing benefits to children and society through greater educational gains.

Under section 613(f) of IDEA and 34 CFR 300.226, LEAs are not authorized to voluntarily use funds for CEIS to serve children with disabilities or children ages three through five. By clarifying that comprehensive CEIS can be used to also support children with disabilities and children ages three through five, the proposed regulation will allow LEAs to direct resources in a more purposeful and impactful way to improve outcomes for those children in subgroups that have been most affected by significant disproportionality. For example, LEAs would be able to use comprehensive CEIS to expand the use of Multi-Tiered Systems of Support, which could help LEAs determine whether children identified with disabilities have access to appropriate, targeted supports and interventions to allow them to succeed in the general education curriculum. Additionally, by expanding the eligibility of children ages three through five to receive comprehensive CEIS, LEAs identified as having significant disproportionality will have additional resources to provide high-quality early intervening services, which research has shown can increase children's language, cognitive, behavioral, and physical skills, and improve their long-term educational outcomes. LEAs could use funds reserved for comprehensive CEIS to provide appropriate services and supports at earlier ages to children who might otherwise be identified later as having a disability, which could reduce the need for more extensive special education and related services at a later date.

While the Department cannot, at this time, meaningfully quantify the economic impacts of the benefits outlined above, we believe that they are substantial and outweigh the estimated costs of these proposed rules.

The following section provides a detailed analysis of the estimated costs of implementing the proposed requirements contained in the new regulation.

#### *Number of LEAs Newly Identified*

In order to accurately estimate the fiscal and budgetary impacts of this proposed regulation, the Department must estimate not only the costs associated with State compliance with these proposed regulations, but also the costs borne by any LEAs that would be identified as having significant disproportionality under this new regulatory scheme that would not have been identified had the Department not regulated. However, at this time, the Department does not know, with a high degree of certainty, how many LEAs would be newly identified in future

years. Given that a large proportion of the cost estimates in this section are driven by assumptions regarding the number of LEAs that SEAs might identify in any given year, our estimates are highly sensitive to our assumptions regarding this number. In 2012–2013, the most recent year for which data are available, States identified 449 out of approximately 17,000 LEAs nationwide as having significant disproportionality. For purposes of our estimates, the Department used this level of identification as a baseline, only estimating costs for the number of LEAs over 449 that would be identified in future years.

The proposed regulations largely focus on methodological issues related to the consistency of State policies and do not require States to identify LEAs at a higher rate than they currently do. As such, it is possible that these proposed regulations may not result in any additional LEAs being identified as having significant disproportionality. However, we believe that this scenario is unlikely and therefore would represent an extreme lower bound estimate of the cost of this proposed regulation.

We believe it is much more likely that the necessary methodological changes required by this proposed regulation will provide States and advocates with an opportunity to make meaningful and substantive revisions to their current approaches to identifying and addressing significant disproportionality. To the extent that States and State Advisory Panels, as part of the shift to the new standard methodology, establish risk ratio thresholds that identify more LEAs than they currently do, it is likely that there will be an increase in the number of LEAs identified nationwide. We do not specifically know what risk ratio thresholds States will set in consultation with their State Advisory Panels and therefore do not know the number of LEAs that would be identified by such new thresholds. However, for purposes of these cost estimates, we assume that such changes would result in 400 additional LEAs being identified each year nationwide. This number represents an approximately ninety percent increase in the number of LEAs identified by States each year. The Department assumes that changes in State policy are potential and likely outcomes of these proposed regulations; therefore, the number of new LEAs that may potentially be identified should be reflected in our cost estimates.

To the extent that States identify fewer than 400 additional LEAs in each

year or that the number of LEAs identified decreases over time, the estimates presented below will be overestimates of the actual costs. For a discussion of the impact of this assumption on our cost estimates, see the Sensitivity Analysis section of this Regulatory Impact Analysis.

#### *Cost of State-Level Activities*

The proposed regulations would require every State to use a standard methodology to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State with respect to the identification of children as children with disabilities, the placement in particular educational settings of these children, and the incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions. The proposed regulations require States to set a risk ratio threshold, above which LEAs would be identified as having significant disproportionality, and provide States the flexibility to: (1) Use up to three years of data to make a determination of significant disproportionality, and; (2) consider, in making determinations of significant disproportionality, whether LEAs have made reasonable progress at reducing disproportionality. Finally, this regulation would clarify that LEAs must identify and address the factors contributing to significant disproportionality when implementing comprehensive CEIS.

#### *State-level Review and Compliance With the New Rule*

The extent of the initial burden placed on States by the proposed regulation will depend on the amount of staff time required to understand the new regulation, modify existing data collection and calculation tools, meet with State Advisory Panels to develop a risk ratio threshold, draft and disseminate new guidance to LEAs, and review and update State systems that examine the policies, practices, and procedures of LEAs identified as having significant disproportionality.

To comply with the proposed regulations, States would have to take time to review the proposed regulations, determine how these proposed regulations would affect existing State policies, practices, and procedures, and plan for any actions necessary to comply with the new requirements. To estimate the cost per State, we assume that State employees involved in this work would likely include a Special Education Director (\$63.04), a Database Manager (\$52.32), two Management Analysts (\$44.64), and a Lawyer

(\$61.66), at 16 hours each for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, the Bureau of Indian Education (BIE), Guam, American Samoa, and the Virgin Islands of \$238,610.<sup>4</sup>

Since no State currently calculates significant disproportionality using the exact methodology being proposed in this regulation, each State would need to modify its data collection tools. To estimate the cost per State, we assume that State employees would likely include a Database Manager (\$52.32) and a Management Analyst (\$44.64) at 16 hours each for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands of \$86,880. While we recognize that these costs will vary widely from State to State, we believe that this total represents an appropriate estimate of the costs across all States.

States would also need to draft, issue, and disseminate new guidance documents to LEAs regarding these regulatory changes, including a discussion of any new data collection tools or processes and revised procedures for identifying and notifying LEAs. We assume States would have to communicate changes in policy and would likely use a mixture of teleconferences, webinars, and guidance documents to ensure that LEAs understand and comply with revised policies. To estimate the cost per State, we assume that State employees would likely include a Special Education Director (\$63.04) for 3 hours, 5 Management Analysts (\$44.64) for 16 hours, 2 Administrative Assistants (\$25.69) for 8 hours, a Computer Support Specialist (\$35.71) for 2 hours, and 2 lawyers (\$61.66) for 16 hours, for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands of \$348,090.

Additionally, proposed changes under § 300.646(d) would require LEAs identified as having significant disproportionality to use funds reserved for comprehensive CEIS to identify and address the factors contributing to significant disproportionality. States would have to review their existing processes to ensure that LEAs are provided with appropriate support to identify such contributing factors and

<sup>4</sup> Unless otherwise noted, all hourly wages are loaded wage rates and are based on median hourly earnings as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) multiplied by an employer cost for employee compensation of 1.57 (see <http://www.bls.gov/news.release/eccc.toc.htm>).

use funds for comprehensive CEIS in ways that are appropriately targeted to address such contributing factors. To estimate the cost per State, we assume that State employees involved in these activities would likely include a Special Education Director (\$63.04) for 4 hours, 2 Management Analysts (\$44.64) for 16 hours, an Administrative Assistant (\$25.69) for 2 hours, and a Manager (\$51.50) for 8 hours for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands of \$120,070.

Under the new regulations, States must also determine a risk ratio threshold based on the advice of stakeholders, including State Advisory Panels, as provided under section 612(a)(21)(D)(iii) of IDEA. In order to estimate the cost of implementing these requirements, we assume that the average State would likely initially meet this requirement in Year 1 and revisit the thresholds every five years thereafter. We further assume that the meetings with the State Advisory Panels would include at least the following representatives from the statutorily required categories of stakeholders: one parent of a child with disabilities; one individual with disabilities; one teacher; one representative of an institution of higher education that prepares special education and related services personnel; one State and one local education official, including an official who carries out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act; one Administrator of programs for children with disabilities; one representative of other State agencies involved in the financing or delivery of related services to children with disabilities; one representative of private schools and public charter schools; one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; one representative from the State child welfare agency responsible for foster care; and one representative from the State juvenile and adult corrections agencies. To estimate the cost of participating in these meetings for the required categories of stakeholders, we assume that each meeting would require eight hours of each participant's time (including preparation for and travel to and from the meeting and the time for the meeting itself) and use the following national median hourly wages<sup>5</sup> for full-time

<sup>5</sup> Wages in this section do not reflect loaded wage rates.

State and local government workers employed in these professions: postsecondary education administrators, \$44.28 (1 stakeholder); primary, secondary, and special education school teachers, \$35.66<sup>6</sup> (1 stakeholder); State social and community service managers, \$32.86 (5 stakeholders); local social and community service managers, \$37.13 (1 stakeholder); other management occupations, \$40.22 (1 stakeholder); elementary and secondary school education administrator, \$42.74 (1 stakeholder).<sup>7</sup> For the opportunity cost for the parent and individual with disabilities, we use the average median wage for all workers of \$17.09. We also assume that State staff would prepare for and facilitate each meeting, including the Special Education Director (\$63.04) for 2 hours, one State employee in a managerial position (\$51.50) for 16 hours, one Management Analyst (\$44.64) for 16 hours, and one Administrative Assistant (\$25.69) for 16 hours. Based on these participants, we estimate that consultation with the State Advisory Panels would have a cumulative one-year cost of \$294,760 for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands.

#### *Annual Calculation of Risk Ratios and Notification of LEAs*

In addition to the initial costs outlined above, States would incur annual costs associated with calculating risk ratios, making determinations of significant disproportionality, and notifying LEAs of determinations.

Proposed § 300.647 would require every State to annually calculate significant disproportionality for each LEA using a risk ratio or alternative risk ratio method in every category of analysis (as defined in this notice of proposed rulemaking) that meets the minimum cell size (with the minimum cell size being a number, 10 or lower, determined by the State). States would then be required to identify LEAs above the risk ratio threshold with significant disproportionality. When making a determination of significant

<sup>6</sup> Hourly earnings were estimated using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) divided by the number of workdays and hours per day assuming 200 workdays and 8 hours per day.

<sup>7</sup> Hourly earnings were estimated using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) divided by the number of work weeks and hours per week assuming 52 weeks and 40 hours per week.

disproportionality, States would be allowed to use three years of data, and take into account whether LEAs demonstrate reasonable progress at reducing significant disproportionality. To estimate the annual cost per State, we assume that State employees involved in this calculation would likely include 3 Management Analysts (\$44.64) for 24 hours and one Administrative Assistant (\$25.69) for 6 hours for an annual cost of \$188,620 for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands.

After identifying LEAs with significant disproportionality, States would have to notify LEAs of their determination. We assume that a State employee in a managerial position (\$51.50) would call each identified LEA with the assistance of one Administrative Assistant (\$25.69) and take approximately 15 minutes per LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$7,720.

#### *Review and Revision of Policies, Practices, and Procedures*

States are required to provide for the review and, if appropriate, the revision of policies, practices, and procedures related to the identification, placement, and discipline of children with disabilities to ensure the policies, practices, and procedures comply with requirements of IDEA and publicly report any revisions. We assume States will ensure LEAs are complying with these requirements through desk audits, meetings or phone calls with LEAs, analysis of data, or sampling of IEPs and evaluations. To estimate the annual cost at the State level, we assume that State employees would likely include one Special Education Director (\$63.04) for 0.5 hours, one State employee in a managerial position (\$51.50) for 1 hour, one Administrative Assistant (\$25.69) for 1 hour, and 2 Management Analysts (\$44.64) for 6 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality each year, the annual cost would be \$150,620 for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands.

Many States require LEAs identified with significant disproportionality to review their policies, practices, and procedures related to the identification, placement, and discipline of children with disabilities to ensure the policies, practices, and procedures comply with requirements of IDEA. We assume this would require LEAs to examine data,

identify areas of concern, visit schools, review IEPs and evaluations, and review any other relevant documents. To estimate the annual cost to review policies, practices, and procedures at the LEA level, we assume that LEA employees would likely include one District Superintendent (\$85.74) for 5 hours, one local employee in a managerial position (\$58.20) for 60 hours, one local Special Education Director (\$66.52) for 20 hours, two local Administrative Assistants (\$28.43) for 15 hours, four Special Education teachers (\$58.47<sup>8</sup>) for 2 hours, and two Education Administrators (\$70.37<sup>9</sup>) for 8 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost to LEAs would be \$3,079,030.

After reviewing their policies, practices, and procedures related to the identification, placement, and discipline of children with disabilities, LEAs are required, if appropriate, to revise those policies, practices, and procedures to ensure they comply with requirements of IDEA. We assume LEAs will have to spend time developing a plan to change any policies, practices, and procedures identified in their review based on relevant data. To estimate the annual cost to revise policies, practices, and procedures we assume that LEA staff would likely include one District Superintendent (\$85.74) for 2 hours, one local employee in a managerial position (\$58.20) for 60 hours, one local Special Education Director (\$66.52) for 20 hours, and two local Administrative Assistants (\$28.43) for 8 hours for each LEA. If we assume half of the new LEAs identified with significant disproportionality (200 LEAs) would need to revise their policies, practices, and procedures the annual cost would be \$1,089,730.

#### *Planning for and Tracking the Use of Funds for Comprehensive CEIS*

LEAs identified with significant disproportionality are required by statute to reserve 15 percent of their IDEA Part B allocation for comprehensive CEIS. Any LEAs fitting

<sup>8</sup> Hourly earnings were estimated using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) divided by the number of work days and hours per day assuming 200 workdays and 8 hours per day.

<sup>9</sup> Hourly earnings were determined using the annual salary for this job classification as reported in the May 2014 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics (see <http://www.bls.gov/oes/current/999201.htm>) divided by the number of work weeks and hours per week assuming 52 weeks and 40 hours per week.

into this category would also have to plan for the use of funds reserved for comprehensive CEIS. To estimate the annual cost of planning for the use of IDEA Part B funds for comprehensive CEIS, we assume that LEA employees involved in such activities would likely include one District Superintendent (\$85.74) for 1 hour, one local employee in a managerial position (\$58.20) for 16 hours, one local Special Education Director (\$66.52) for 4 hours, and one local Budget Analyst (\$49.97) for 24 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$992,890.

LEAs reserving IDEA Part B funds for comprehensive CEIS will also have to track the actual use of those funds. We assume LEAs will have to commit staff time to ensure they are meeting the fiscal requirements associated with the use of funds for comprehensive CEIS. To estimate the annual cost of tracking the use of funds for comprehensive CEIS, we assume that one local Budget Analyst (\$49.97) would be required for 8 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$159,900.

LEAs providing comprehensive CEIS are also currently required to track the number of children served under comprehensive CEIS and the number of children served under comprehensive CEIS who subsequently receive special education and related services during the preceding 2-year period. To estimate the annual cost of tracking children receiving services under comprehensive CEIS, we assume that LEA employees would likely include one Database Manager (\$50.63) for 40 hours and one local Administrative Assistant (\$28.43) for 8 hours for each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$901,020.

States are required to annually review each LEA's application for a subgrant under IDEA Part B. As noted above, LEAs identified with significant disproportionality are required to reserve 15 percent of their Part B allocations for comprehensive CEIS and many States require LEAs to reflect that reservation as part of their application for IDEA Part B funds. To estimate the annual cost stemming from State reviews of LEA applications to ensure compliance for all newly identified LEAs, we assume that State employees would likely include one Management Analyst (\$44.64) and take .25 hours for each LEA. If we assume 400 new LEAs are identified with significant

disproportionality, the annual cost would be \$4,460.

*Federal Review of State Risk Ratio Thresholds*

Under proposed § 300.647(b)(1)(ii), the risk ratio thresholds established by States would be subject to monitoring and enforcement by the Department. At this time, the Department expects that it would conduct monitoring of all States in the first year that States set the thresholds and then monitor the thresholds again in any year in which a State changes its risk ratio thresholds. To estimate the annual cost of reviewing risk ratio thresholds, we assume that Department staff involved in such reviews would likely include one management analyst at the GS-13 level (\$73.95<sup>10</sup>), and take 1 hour each for the 50 States, the District of Columbia, Puerto Rico, BIE, Guam, American Samoa, and the Virgin Islands. If we assume the Department would have to review every State in year one, 25 States in year 2, 10 States in year 3, and 5 States in each year thereafter, the average annual cost over the ten year time horizon would be \$771.50.

*Transfers*

Under IDEA, LEAs identified with significant disproportionality are required to reserve 15 percent of their IDEA Part B allocation for comprehensive CEIS. Consistent with the Office of Management and Budget Circular A-4, transfers are monetary payments from one group to another that do not affect total resources available to society; therefore, this reservation constitutes a transfer. Using data collected under section 618 from

the SY 2011–12, the Department estimates that 15 percent of the average LEA section 611 and section 619 subgrant allocation will be \$106,220. Assuming 400 new LEAs are identified with significant disproportionality each year, the total annual transfer would be \$42,488,000. It is important to note that these formula funds would not be subgranted to new entities, but rather that the beneficiaries of these funds would change. As noted elsewhere in this NPRM, the proposed regulations clarify that funds reserved for comprehensive CEIS can be used to provide services to children with disabilities. To the extent that LEAs use their funds reserved for comprehensive CEIS to provide services to these children, the total amount of the transfer will be lower than what is estimated here.

*Sensitivity Analysis*

As noted elsewhere in the Discussion of Costs, Benefits, and Transfers, the estimated costs associated with this proposed regulation are highly sensitive to the Department’s assumption regarding the total number of LEAs nationwide that States will identify in each year. For purposes of the estimates outlined above, the Department assumed that 400 additional LEAs above the baseline of 449 would be identified in each year. However, since we do not know how many LEAs States will actually identify as a result of the proposed changes, for purpose of this sensitivity analysis, we develop and present what we consider to be reasonable upper- and lower-bound estimates. To establish a reasonable

lower-bound, we estimate that no additional LEAs above the baseline number would be identified in the out years. We believe that this would represent an extreme lower bound for the likely costs of this proposed regulation because we consider it highly unlikely that there would be no additional LEAs identified. As noted above, the Department’s choice of 400 LEAs is based on a view that at least some, if not most, States will take advantage of the opportunity presented by the transition to the standard methodology to set thresholds that identify more LEAs. We believe that this assumption of 400 LEAs above baseline represents the most reasonable estimate of the likely costs associated with these proposed rules. In order to estimate an upper bound, the Department assumes that States could set much more aggressive thresholds for identifying LEAs with significant disproportionality, ultimately identifying an additional 1,200 LEAs above baseline each year. As with the estimate of 400 LEAs, it is important to note that the proposed regulation itself would not require States to identify additional LEAs. Rather, the Department is attempting to estimate a range of potential State-level responses to the proposed regulation, including making proactive decisions to shift State policies related to identification of LEAs. In the table below, we show the impact of these varying assumptions regarding the number of additional LEAs identified on the estimated costs. Costs and transfers outlined in this table are calculated at a 3 percent discount rate.

TABLE 8—SENSITIVITY OF COST ESTIMATES TO NUMBER OF ADDITIONAL LEAS ASSUMED TO BE IDENTIFIED

Category	Costs		
	0 LEAs	400 LEAs	1,200 LEAs
State-level review and compliance with the new rule (modifying data collection tools, meeting with State Advisory Panels, drafting and issuing guidance to LEAs) .....	\$1,508,620	\$1,508,620	\$1,508,620
Annual calculation of risk ratios and notification of LEAs .....	2,454,359	2,554,807	2,755,702
Review and, if necessary, revision of policies, practices, and procedures .....	0	56,205,180	168,615,538
Planning for and tracking the use of funds for comprehensive CEIS .....	0	26,782,849	80,348,546
Category	Transfers		
Reservation of funds for comprehensive CEIS .....	0	552,867,164	1,658,601,491

*Clarity of the Regulations*

Executive Order 12866 and the Presidential memorandum “Plain Language in Government Writing”

require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?

<sup>10</sup>This loaded hourly wage rate is based on the hourly earnings of a GS-13 step 3 federal employee

in Washington, DC. (See: <https://www.opm.gov/>

[policy-data-oversight/pay-leave/salaries-wages/salary-tables/16Tables/html/DCB\\_h.aspx](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/16Tables/html/DCB_h.aspx)).

- Does the format of the proposed regulations (use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A “section” is preceded by the symbol “§” and a numbered heading; for example, § 300.646 Disproportionality.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand see the instructions in the **ADDRESSES** section.

#### *Regulatory Flexibility Act Certification*

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The U.S. Small Business Administration (SBA) Size Standards define “small entities” as for-profit or nonprofit institutions with total annual revenue below \$7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000. These proposed regulations would affect all LEAs, including the estimated 17,371 LEAs that meet the definition of small entities. However, we have determined that the proposed regulations would not have a significant economic impact on these small entities.

Pursuant to this proposed regulatory action, if States chose to increase their level of accountability with respect to disproportionality on the basis of race and ethnicity, there would be increasing costs for LEAs that have been identified with significant disproportionality as defined by the State. Nonetheless, based on the limited information available, the Secretary does not believe that the effect of these changes would be significant. The number of new LEAs identified with significant disproportionality will depend upon the extent to which States exercise their flexibility to determine reasonable progress made by LEAs at reducing significant disproportionality, the number of years of data used to make determinations of significant disproportionality, and the risk ratio thresholds set by the State. There are no

increased costs associated with this regulatory action for LEAs that are not identified with significant disproportionality.

#### *Paperwork Reduction Act of 1995*

This NPRM contains information collection requirements that are subject to be reviewed by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). These proposed regulations contain information collection requirements that are approved by OMB under OMB control number 1820–0689; these proposed regulations do not affect the currently approved data collection.

#### *Intergovernmental Review*

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of the Department’s specific plans and actions for this program.

#### *Assessment of Educational Impact*

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

#### **List of Subjects in 34 CFR Part 300**

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: February 19, 2016.

**John B. King, Jr.,**

*Acting Secretary of Education.*

For the reasons discussed in the preamble, the Secretary of Education proposes to amend title 34 of the Code of Federal Regulations as follows:

#### **PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES**

- 1. The authority citation for part 300 continues to read as follows:

**Authority:** 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

- 2. Section 300.646 is revised to read as follows:

#### **§ 300.646 Disproportionality.**

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to—

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;

(2) The placement in particular educational settings of these children; and

(3) The incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions.

(b) *Methodology.* The State must apply the methods in § 300.647 to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State under paragraph (a) of this section.

(c) *Review and revision of policies, practices, and procedures.* In the case of a determination of significant

disproportionality with respect to the identification of children as children with disabilities or the placement in particular educational settings, including disciplinary removals of such children, in accordance with paragraphs (a) and (b) of this section, the State or the Secretary of the Interior must—

(1) Provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure that the policies, practices, and procedures comply with the requirements of the Act.

(2) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (c)(1) of this section consistent with the requirements of the Family Educational Rights and Privacy Act, its implementing regulations in 34 CFR part 99, and section 618(b)(1) of the Act.

(d) *Comprehensive coordinated early intervening services.* The State or the Secretary of the Interior shall require any LEA identified under paragraphs (a) and (b) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to address factors contributing to the significant disproportionality.

(1) In implementing comprehensive coordinated early intervening services an LEA—

(i) May carry out activities that include professional development and educational and behavioral evaluations, services, and supports; and

(ii) Must identify and address the factors contributing to the significant disproportionality, which may include a lack of access to scientifically based instruction and economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings, including disciplinary removals.

(2) An LEA may use funds reserved for comprehensive coordinated early intervening services to serve children from age 3 through grade 12, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) or (b) of this section, including—

(i) Children who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment; and

(ii) Children with disabilities.

(3) An LEA may not limit the provision of comprehensive coordinated early intervening services under this paragraph to children with disabilities.

(Authority: 20 U.S.C. 1413(f); 20 U.S.C. 1418(d)).

■ 3. Section 300.647 is added to read as follows:

**§ 300.647 Determining significant disproportionality.**

(a) *Definitions*—(1) *Alternate risk ratio* is a calculation performed by dividing the risk for children in one racial or ethnic group within an LEA by the risk for children in all other racial or ethnic groups in the State.

(2) *Risk* is the likelihood of a particular outcome (identification, placement, or disciplinary removal) for a specified racial or ethnic group, calculated by dividing the number of children from a specified racial or ethnic group experiencing that outcome by the total number of children from that racial or ethnic group enrolled in the LEA.

(3) *Risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk for children in all other racial and ethnic groups within the LEA.

(4) *Risk ratio threshold* is a threshold, determined by the State, over which disproportionality based on race or ethnicity is significant under § 300.646(a) and (b).

(b) *Significant disproportionality determinations.* In determining whether significant disproportionality exists in a State or LEA under § 300.646(a) and (b), the State must—

(1) Set a reasonable risk ratio threshold for each of the categories described in paragraphs (b)(3) and (4) of this section that is:

(i) Developed based on advice from stakeholders, including State Advisory Panels, as provided under section 612(a)(21)(D)(iii) of the Act; and

(ii) Subject to monitoring and enforcement for reasonableness by the Secretary consistent with section 616 of the Act;

(2) Apply the risk ratio threshold determined in paragraph (b)(1) of this section to risk ratios or alternate risk ratios, as appropriate, in each category described in paragraphs (b)(3) and (4) of this section and the following racial and ethnic groups:

(i) Hispanic/Latino of any race; and, for individuals who are non-Hispanic/Latino only;

(ii) American Indian or Alaska Native;

(iii) Asian;

(iv) Black or African American;

(v) Native Hawaiian or Other Pacific Islander;

(vi) White; and

(vii) Two or more races;

(3) Calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section that includes a minimum number of children not to exceed 10, with respect to:

(i) The identification of children ages 3 through 21 as children with disabilities; and

(ii) The identification of children ages 3 through 21 as children with the following impairments:

(A) Intellectual disabilities;

(B) Specific learning disabilities;

(C) Emotional disturbance;

(D) Speech or language impairments;

(E) Other health impairments; and

(F) Autism.

(4) Calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section that includes a minimum number of children with disabilities not to exceed 10, with respect to the following placements into particular educational settings, including disciplinary removals:

(i) For children with disabilities ages 6 through 21, inside a regular class more than 40 percent of the day and less than 79 percent of the day;

(ii) For children with disabilities ages 6 through 21, inside a regular class less than 40 percent of the day;

(iii) For children with disabilities ages 6 through 21, inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities, or private schools;

(iv) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of 10 days or fewer;

(v) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of more than 10 days;

(vi) For children with disabilities ages 3 through 21, in-school suspensions of 10 days or fewer;

(vii) For children with disabilities ages 3 through 21, in-school suspensions of more than 10 days; and

(viii) For children with disabilities ages 3 through 21, disciplinary removals in total, including in-school and out-of-school suspensions, expulsions, removals by school personnel to an interim alternative education setting, and removals by a hearing officer;

(5) Calculate an alternate risk ratio with respect to the categories described in paragraphs (b)(3) and (4) of this section if—

(i) The total number of children in all other racial and ethnic groups within the LEA is fewer than 10; or

(ii) The risk for children in all other racial and ethnic groups within the LEA is zero; and

(6) Except as provided in paragraph (c) of this section, identify as having significant disproportionality based on race or ethnicity under § 300.646(a) and (b) any LEA that has a risk ratio or alternate risk ratio for any racial or ethnic group in any of the categories described in paragraphs (b)(3) and (4) of this section that exceeds the risk ratio

threshold set by the State for that category.

(c) *Flexibility.* A State is not required to identify an LEA as having significant disproportionality based on race or ethnicity under § 300.646(a) and (b) until—

(1) The LEA has exceeded the risk ratio threshold set by the State for a racial or ethnic group in a category described in paragraph (b)(3) or (4) of this section for three prior consecutive years preceding the identification; and

(2) The LEA has exceeded the risk ratio threshold or the alternate risk ratio threshold and has failed to demonstrate reasonable progress, as determined by the State, in lowering the risk ratio or alternate risk ratio for the group and category from the immediate preceding year.

**Authority:** 20 U.S.C. 1418(d).

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