

**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:** Final regulations.

**SUMMARY:** The Secretary amends the 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 under IDEA, the regulations will 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 these services for children from age 3 through grade 12, with and without disabilities.

**DATES:**

*Effective Date:* These regulations are effective January 18, 2017.

*Compliance Date:* Recipients of Federal financial assistance to which these regulations apply must comply with these final regulations by July 1, 2018, except that States are not required to include children ages three through five in the calculations under § 300.647(b)(3)(i) and (ii) until July 1, 2020.

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

*Purpose of This Regulatory Action:* The purpose of these final regulations is to promote equity in IDEA. Specifically, the final 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 by disciplinary removals. These final regulations also 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.

While these regulations only establish a system for identifying significant disproportionality based on overrepresentation, the regulations acknowledge that overrepresentation may be caused by under-identification of one or more racial or ethnic groups and the regulations allow funds reserved for comprehensive CEIS to be used to address these issues if they are identified as a factor contributing to the significant disproportionality. LEAs are legally obligated to identify students with disabilities and provide the resources and supports they need to have equal access to education. Thus we, encourage States to ensure that the State's and LEAs' child find policies, practices, and procedures are working effectively to identify all children with disabilities, regardless of race or ethnicity.

IDEA requires States and local educational agencies (LEAs) to take steps to determine the existence of and address significant disproportionality in special education. The statute and regulations for IDEA, Part B, include important provisions for how States and LEAs must address significant disproportionality, including an examination of significant disproportionality and remedies where findings of significant disproportionality occur.

Under IDEA section 618(d) (20 U.S.C. 1418(d)) and § 300.646, States are

required to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in the State and the LEAs of the State with respect to the identification of children as children with disabilities, including identification as children with particular impairments; the placement of children in particular educational settings; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions. States must make this determination annually.

When a State educational agency (SEA) identifies LEAs with significant disproportionality in one or more of these areas based on the collection and examination of their data, States must: (1) Provide for the review (and if appropriate) revision of the LEA's policies, procedures, and practices for compliance with IDEA; (2) require the LEA to reserve the maximum amount (15 percent) of its Part B funds to be used for comprehensive coordinated early intervening services (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 its policies, procedures, and practices. Under the statute and regulations, each State has considerable discretion in how it defines significant disproportionality.

To address and reduce significant disproportionality, the final regulations 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.

Further, the final regulations clarify ambiguities in the existing regulations concerning significant disproportionality in the disciplining of children with disabilities. Specifically, these regulations adopt the Department's long-standing interpretation that the required remedies in IDEA section 618(d)(2) apply when there is significant disproportionality in identification, placement, or any type of disciplinary removal from placement. In addition, funds reserved for comprehensive CEIS now must be used to identify and address the factors contributing to significant disproportionality and may be used to serve children from age 3 through grade 12, with and without disabilities.

## Summary of Major Provisions of This Regulatory Action

*Significant provisions of these final regulations include:*

- §§ 300.646(b) and 300.647(a) and (b) 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;

- As part of the standard methodology, § 300.647(b)(1) requires States to set reasonable risk ratio thresholds, reasonable minimum n-sizes, reasonable minimum cell sizes, and if a State uses the flexibility described in § 300.647(d)(2), standards for measuring reasonable progress, all with input from stakeholders (including their State Advisory Panels), subject to the Department's oversight;

- § 300.647(b)(1)(iv) sets a rebuttable presumption that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30 are reasonable.

- § 300.647(d) provides 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 prior consecutive years. States may also choose not to identify an LEA with significant disproportionality if the LEA is making reasonable progress, as defined by the State, in lowering risk ratios in each of the two consecutive prior years, even if the risk ratios exceed the State's risk ratio thresholds;

- § 300.646(c) clarifies that the remedies in IDEA section 618(d)(2) are triggered if a State makes a determination of significant disproportionality with respect to disciplinary removals from placement;

- § 300.646(c)(1) and (2) 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 the Family Educational Rights and Privacy Act (FERPA), (20 U.S.C. 1232), its implementing regulations in 34 CFR part 99, and IDEA section 618(b)(1); and

- § 300.646(d) describes which populations of children 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, and, as part of implementing comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality.

*Costs and Benefits:* Due to the considerable discretion allowed States (e.g. flexibility to determine their own reasonable risk ratio thresholds, reasonable minimum n-sizes and cell size, and the extent to which LEAs have made reasonable progress under § 300.647(d)(2) in lowering their risk ratios or alternate risk ratios, we cannot evaluate the costs of implementing the final regulations with absolute precision. However, we estimate the total cost of these regulations over ten years would be between \$50.1 and \$91.4 million, plus transfers between \$298.4 and \$552.9 million. These estimates assume discount rates of three to seven percent.

*There are several benefits of the regulations that include:* Increased transparency regarding each State's definition of significant disproportionality; an increased role for State Advisory Panels in determining States' risk ratio thresholds, minimum n-sizes, and minimum cell sizes; and State review and, if appropriate, revision of the policies, procedures, and practices used in the identification, placement, or discipline of children with disabilities, to ensure that the policies, procedures, and practices comply with the requirements of IDEA; and, ultimately, better identification, placement, and discipline of children with disabilities.

Additionally, the Department believes that expanding the eligibility of children ages three through five to receive comprehensive CEIS would give LEAs new 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 in the future. The Department believes this 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 improve upon current policy, which has resulted in State definitions which vary widely and may prevent States from identifying the magnitude of racial and ethnic overrepresentation in special education. We provide further detail regarding costs and benefits in the *Regulatory Impact Analysis* section.

## General

On March 2, 2016, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (81 FR 10967) to amend the regulations in 34 CFR part 300 governing the Assistance to States for the Education of Children with Disabilities program and the Preschool Grants for Children with Disabilities program. Specifically, in the NPRM, we proposed changes to the regulation regarding significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities.

In the preamble of the NPRM, we discussed on pages 10980 and 10981 the major changes proposed in that document. These included the following:

- Adding §§ 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;

- Adding § 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 prior consecutive years. A State also has the flexibility not to identify an LEA with significant disproportionality if the LEA is making reasonable progress under § 300.647(d)(2) in lowering the risk ratios, even if they exceed the State's risk ratio thresholds, where reasonable progress is defined by the State;

- Amending current § 300.646(b) (proposed § 300.646(c)) to clarify that the remedies in IDEA section 618(d)(2) are triggered if a State makes a determination of significant disproportionality with respect to disciplinary removals from placement;

- Amending 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 the Family Educational Rights and Privacy Act (FERPA), (20 U.S.C. 1232), its implementing regulations in 34 CFR part 99, and IDEA section 618(b)(1); and

- Amending current § 300.646(b)(2) (proposed § 300.646(d)) to define which

populations of children 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, and, as part of implementing comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality.

These final regulations contain several significant changes from the NPRM, including:

- A revised § 300.646(d)(1)(ii) to include additional factors that may contribute to significant disproportionality;
- A new § 300.646(d)(1)(iii) to clarify that in implementing comprehensive CEIS an LEA must address a policy, practice, or procedure it identifies as contributing to significant disproportionality;
- A new § 300.646(e) to clarify that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS;
- A new § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.
- A revised § 300.647(a) to include a definition of comparison group, minimum n-size, and minimum cell size;
- A revised § 300.647(b)(1) to require States to set reasonable risk ratio thresholds, reasonable minimum cell sizes, reasonable minimum n-sizes, and, if a State is using the flexibility in § 300.647(d)(2), standards for measuring reasonable progress, all with input from stakeholders (including their State Advisory Panels) and subject to the Department's oversight. As revised, § 300.647(b)(1) also clarifies that a State may, but is not required to, set these standards at different levels for each of the categories described in paragraphs (b)(3) and (4);
- States may delay the inclusion of children ages three through five in the review of significant disproportionality with respect to the identification of children as children with disabilities, and with respect to the identification of children as children with a particular impairment, until July 1, 2020;
- A revision of § 300.647(b)(4) to no longer require States to calculate the risk ratio 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;

- An amendment to § 300.647(b)(5) to require States to use the alternate risk ratio when the number of children in the comparison group fails to meet either the State's reasonable minimum n-sizes or the State's reasonable minimum cell sizes;
- A new § 300.647(b)(7) requiring States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes must include a detailed explanation of why the numbers are reasonable and how they ensure appropriate analysis for significant disproportionality.
- A new § 300.647(c) to clarify that States are not required to calculate a risk ratio or alternate risk ratio if the particular racial or ethnic group being analyzed does not meet the minimum n-size or minimum cell size, or in calculating the alternate risk ratio under § 300.647(b)(5), the comparison group in the State does not meet the minimum cell size or minimum n-size; and
- A revision to proposed § 300.647(c)(2)—now § 300.647(d)(2)—to allow States the flexibility to not identify an LEA that exceeds a risk ratio threshold if it makes reasonable progress under § 300.647(d)(2) in lowering the applicable risk ratio or alternate risk ratio in each of two consecutive prior years.

We fully explain these changes in the Analysis of Comments and Changes elsewhere in this preamble.

#### Effective Date of These Regulations

As noted in the Dates section, these regulations become part of the Code of Federal Regulations on January 18, 2017. However, States and LEAs are not required to comply with these regulations until July 1, 2018, or to include children ages three through five in the review of significant disproportionality with respect both to the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

The Department recognizes the practical necessity of allowing States time to plan for implementing these final regulations, including to the extent necessary, time to amend the policies and procedures necessary to comply. States will need time to develop the policies and procedures necessary to

implement the standard methodology in § 300.647 and the revised remedies in § 300.646(c) and (d). In particular, States must consult with their stakeholders and State Advisory Panels under § 300.647(b)(1) to develop reasonable risk ratio thresholds, reasonable minimum n-sizes, reasonable minimum cell sizes, and if a State uses the flexibility in § 300.647(d)(2), standards for measuring reasonable progress. States must also determine which, if any, of the available flexibilities they will adopt. To the extent States need to amend their policies and procedures to comply with these regulations, States will also need time to conduct public hearings, ensure adequate notice of those hearings and provide an opportunity for public comment, as required by § 300.165.

Accordingly, States must implement the standard methodology under § 300.647 in school year (SY) 2018–19. In doing so, States must identify LEAs with significant disproportionality under § 300.647(d)(1) in SY 2018–2019 using, at most, data from the three most recent school years for which data are available. We note that, in the case of discipline, States may be using data from four school years prior to the current year, as data from the immediate preceding school year may not yet be available at the time the State is making its determinations (*i.e.*, final discipline data from SY 2017–2018 may not yet be available at the time during SY 2018–2019 the State is calculating risk ratios).

In SY 2018–2019, States must implement the standard methodology contained in these regulations by ensuring that the identification of any LEAs with significant disproportionality based on race and ethnicity in the identification, placement, or disciplinary removal of children with disabilities, is based on the standard methodology in § 300.647, and implements the revised remedies in accordance with § 300.646(c) and (d). In the spring of 2020, therefore, States will report (via IDEA Part B LEA Maintenance of Effort (MOE) Reduction and CEIS data collection, OMB Control No. 1820–0689) whether each LEA was required to reserve 15 percent of its IDEA Part B funds for comprehensive CEIS in SY 2018–19.

States may, at their option, accelerate this timetable by one full year. In other words, States may implement the standard methodology in SY 2017–18 and assess LEAs for significant disproportionality using data from up to the most recent three consecutive school years for which data are available.

States that choose to implement the standard methodology in § 300.647 to

identify LEAs with significant disproportionality in SY 2017–2018 may also require those LEAs to implement the revised remedies in accordance with § 300.646(c) and (d). Similarly, in SY 2017–18, States may choose to implement the revised remedies without implementing the standard methodology.

Whether a State begins compliance in SY 2017–2018 or 2018–2019, it need not include children ages three through five in the review of significant disproportionality, with respect to both the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

Finally, the delayed compliance date does not mean that States are excused from making annual determinations of significant disproportionality in the intervening years. States must still make these determinations in accordance with the current text of § 300.646.

**Public Comment:** In response to our invitation in the NPRM, 316 parties submitted comments on the proposed regulations. We group major issues according to subject under these headings:

#### I. General Comments

- Introduction
- Glossary of Terms
- Terminology
- The Department Should Await Congressional Action
- Under-Identification of Children With Disabilities by Race and Ethnicity
- Recommendations Regarding Technical Assistance and Guidance
- Causes of Racial and Ethnic Disparity That Originate Outside of School
- Causes of Racial and Ethnic Disparities That Originate in School
- Proposed Regulations Would Create Racial Quotas
- The Purpose of the Proposed Regulations
- The Cost and Burden of the Regulations
- Evaluating the Impact of the Regulation Reporting Requirements
- Additional State and Local Standards Noncompliance With IDEA
- General Opposition to the Regulation
- Comments on the Racial and Ethnic Disparities Report
- Timeline and Effective Date of the Regulation
- Appropriate Placement of Children With Disabilities
- Special Education. Generally
- Results-Driven Accountability

#### II. A Standard Methodology for Determining Significant Disproportionality (§ 300.647)

- General
- Risk Ratios (§ 300.646(b); § 300.647(a)(2); § 300.647(a)(3); § 300.647(b))
- Categories of Analysis (§ 300.647(b)(3) and (4))
- Risk Ratio Thresholds (§ 300.647(a)(7); § 300.647(b)(1) and (2); § 300.647(b)(6))

- Minimum Cell Sizes and Minimum N-Sizes (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1))
- Alternate Risk Ratios (§ 300.647(a)(1); § 300.647(b)(5); § 300.647(c)(2))
- Flexibilities—Three Consecutive Years of Data, § 300.647(d)(1)

- Flexibilities—Reasonable Progress, § 300.647(d)(2)

#### III. Clarification that Statutory Remedies

- Apply to Disciplinary Actions (§ 300.646(a)(3) and (c))

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

- Review of Policies, Practices, and Procedures—Requirements

- Guidance

- Clarifications

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

- Use of Comprehensive CEIS for Specific Populations

- Funding Comprehensive CEIS

- Implications for IEPs

- Implications for LEA Maintenance of Effort (MOE)

- General Uses of Comprehensive CEIS Funds

- Implications for Voluntary Implementation of CEIS

- Miscellany

#### *Analysis of Comments and Changes:*

An analysis of the comments and of any changes in the regulations since publication of the NPRM follows.

Generally, we do not address: (a) Minor changes, including technical changes made to the language published in the NPRM; or (b) comments that express concerns of a general nature about the U.S. Department of Education (Department) or other matters that are not germane.

#### I. General Comments

##### *Introduction*

We provide a glossary as an aid to reading and understanding the technical discussions surrounding a standard methodology for determining significant disproportionality. Some terms in this glossary are defined in these final regulations.

##### *Glossary of Terms*

**Alternate Risk Ratio** means 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 of that outcome for children in all other racial or ethnic groups in the State. (§ 300.647(a)).

**Cell Size** means the number of children experiencing of a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

**Comparison Group** consists of the children in all other racial or ethnic groups within an LEA or within the State, when reviewing a particular racial or ethnic group within an LEA for significant disproportionality.

**N-Size** means the number of children enrolled in an LEA with respect to identification, and the number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

**Population Requirement** means the minimum number of children required before a racial or ethnic group within an LEA will be reviewed for significant disproportionality, such as a minimum cell size or minimum n-size.

**Risk** means the likelihood of a particular outcome (identification, placement, or disciplinary removal) for a specified racial or ethnic group (or groups), calculated by dividing the number of children from a specified racial or ethnic group (or groups) experiencing that outcome by the total number of children from that racial or ethnic group (or groups) enrolled in the LEA. (§ 300.647(a)).

**Risk Ratio** means 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. (§ 300.647(a)).

**Risk Ratio Threshold** means a threshold, determined by the State, over which disproportionality based on race or ethnicity is significant under § 300.646(a) and (b). (§ 300.647(a)).

**Weighted Risk Ratio** means a variation on the risk ratio in which 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.

##### *Terminology*

**Comment:** None.

**Discussion:** In the NPRM, the Department noted that many States have minimum cell size requirements to restrict their assessment of significant disproportionality to include only those LEAs that have sufficient numbers of children to generate stable calculations. The Department further noted that, while different States use different definitions of “minimum cell size,” the most common definition placed a requirement on the number of children with disabilities in the racial or ethnic subgroup being analyzed. This common

definition describes the population used in the denominator when calculating the risk of placement or disciplinary removal for a racial or ethnic group.

Based on this information, the Department used the term “minimum cell size” in its description of proposed § 300.647(b)(3) and (4), in which we intended to allow States not to apply the standard methodology when analyzing for significant disproportionality with respect to identification when a racial or ethnic group in an LEA had fewer than 10 children (or, when analyzing for placement or discipline, when a racial or ethnic group in an LEA had fewer than 10 children with disabilities). Put another way, it was the Department’s intent to allow States not to apply the standard methodology when, in calculating the risk of identification, placement, or discipline for a racial or ethnic group, the denominator of the risk calculation included fewer than 10 children.

In response to the NPRM, many commenters raised concerns about the effects of particularly small groups of children on the calculation of risk for particular racial or ethnic groups and the benefits and drawbacks of setting a minimum number of children for either the numerator or denominator in the risk calculation. Upon review of these comments, the Department determined that using a single term (*i.e.*, “minimum cell size”) to refer to both of these requirements would be potentially confusing. Therefore, in this NFR, the Department uses the term “n-size” to refer to the denominator of a risk calculation and “cell size” to refer to the numerator of the risk calculation. We note that this use of terms is different than what was used in the NPRM, but we believe this differentiation will provide the greatest clarity in our discussion of the requirements of the final rule.

Consistent with this approach, we have interpreted comments regarding the proposed § 300.647(b)(3) and (4), and comments regarding risk denominators, to be referring to n-size, and refer to those comments using that terminology. Further, we have interpreted comments regarding risk numerators to be referring to cell size, and refer to those comments using that terminology.

*Change:* We have revised proposed § 300.647 to include definitions for the terms “minimum cell size” and “minimum n-size” and have utilized those terms through the regulation to increase specificity and clarity.

The Department Should Await Congressional Action

*Comments:* Some commenters argued that the Department should withdraw the proposed rule and first allow Congress to address significant disproportionality in the next reauthorization of IDEA.

*Discussion:* The Department has an obligation to implement and enforce the requirements of IDEA as they exist today. While we will work with Congress to reauthorize IDEA, including any potential changes to section 618(d), we must continue to ensure that States and LEAs are appropriately implementing the current requirements to ensure that every child has access to a free appropriate public education in the least restrictive environment. As we have stated in the NPRM, following the Government Accountability Office (GAO) report, the Department conducted its own review of State approaches, as well as a review of the extent to which States identified significant disproportionality. Additionally, we examined research related to significant disproportionality and analyzed data collected under section 618 of IDEA.

The Department’s analysis found several nationwide examples of disparity across racial and ethnic groups. For example in 2012: American Indian and Alaska Native students were 60 percent more likely to be identified for an intellectual disability, while Black children were more than twice as likely as other groups to be so identified. Similarly, American Indian or Alaska Native students were 90 percent more likely, Black students were 50 percent more likely, and Hispanic students were 40 percent more likely to be identified as a student with a learning disability. In addition, Black children were more than twice as likely to be identified with an emotional disturbance. These national-level data are troubling, given the number of States that have not identified any LEAs with significant disproportionality.

As published in the NPRM, in SY 2012–13, only 28 States and the District of Columbia identified any LEA with significant disproportionality, and of the 491 LEAs identified, 75 percent were located in only seven States. Of the States that identified LEAs with significant disproportionality, only the District of Columbia and four States identified significant disproportionality in all three categories of analysis—identification, placement, and in discipline. In short, these data suggest that there are likely LEAs that are not, but should be, identified with

significant disproportionality, and thus that many children in these districts are not receiving proper services.

The Department’s decision now to require States to follow a standard methodology is intended to promote consistency between States and to help ensure compliance with IDEA section 618(d). We are adopting the standard methodology to ensure proper implementation of the statute and so that LEAs with significant disparities, based on race and ethnicity, in identification, placement and discipline are appropriately identified; that significant disproportionality is appropriately addressed; and that children with and without disabilities receive the services they need.

*Changes:* None.

Under-Identification of Children With Disabilities by Race and Ethnicity

*Comments:* Several commenters responded to Directed Question #11 and expressed various concerns about under-identification. Other commenters did the same independently of the question. Several commenters expressed support for the Department’s efforts to remediate the problems of overrepresentation and over-identification of children with disabilities based on race and ethnicity.<sup>1</sup> However, other commenters, some citing research, asserted that the under-identification of children of color for special education and related services is a greater and more serious problem than their overrepresentation in special education, and that, by not addressing the proper problem, the proposed regulations would allow harm to children of color to continue. One commenter stated that lawyers around the country have noted a systemic neglect of children of color with disabilities in education systems, and another stated that many families have reported delays in the identification of disabilities and, in some cases, the misidentification of disabilities. Still other commenters shared personal experiences of under-identification. Two commenters stated that the proposed regulations should be withdrawn and revised to address this more pressing problem, and one suggested that the Department withdraw the regulation in favor of other efforts to promote the proper implementation of

<sup>1</sup> We distinguish “overrepresentation” and “underrepresentation,” which describe disparities in the relative proportion of a racial or ethnic subgroup in special education and their relative proportion in the population, from “over-identification” and “under-identification,” which describe the appropriateness of a child’s identification as a child with a disability.

child find procedures and the early and appropriate identification of children with disabilities.

*Discussion:* The Department agrees that when under-identification of children of color occurs it is problematic. These children, like all children with disabilities, are entitled to a free appropriate public education. States should ensure that their child find procedures are robust enough to appropriately identify all children with disabilities in a timely manner.

The Department's long-standing interpretation of IDEA section 618(d) (20 U.S.C. 1418(d)), has been that it requires States to address overrepresentation, not under-identification or underrepresentation, consistent with the intent of Congress when it authorized that provision. (See, Office of Special Education Programs (OSEP) Memorandum 08-09 (July 28, 2008)).

The basis for congressional action was largely due to a concern that students of color were being identified too often for special education services, and placed too frequently in segregated settings, in ways that were detrimental to their education. There is also an increased understanding that appropriate identification and delivery of special education services would ensure that students with disabilities have access to, and an opportunity to fully participate in, the general education curriculum.

We understand that overrepresentation of one racial or ethnic group that rises to the level of significant disproportionality may occur for a variety of reasons, including over-identification of that racial or ethnic group, under-identification of another racial or ethnic group or groups, or appropriate identification with higher prevalence of a disability in a particular racial or ethnic group.

For example, consider an LEA in which the risk ratio for African American students with an emotional disturbance exceeds the State determined risk ratio threshold and is identified as having significant disproportionality. The overrepresentation of African American students could be due to: (1) The LEA inappropriately identifying African American students as having an emotional disturbance and needing special education and related services even though they do not (over-identification); (2) the LEA failing to appropriately identify students in other racial or ethnic groups as having an emotional disturbance and needing special education and related even though they do (under-identification); or (3) the LEA appropriately identifying all

students in the LEA who have an emotional disturbance but underlying variations in the prevalence of those disabilities across racial and ethnic groups results in an overrepresentation of African American students.

We encourage States and LEAs to consider multiple sources of data when attempting to determine the factors contributing to significant disproportionality, including school level data, academic achievement data, relevant environmental data that may be correlated with the prevalence of a disability, or other data relevant to the educational needs and circumstances of the specific group of students identified.

*Changes:* We have added a new § 300.646(d)(1)(iii), requiring an LEA, in implementing comprehensive CEIS, to address any policy, practice, or procedure it identifies as contributing to significant disproportionality, including any policy, practice or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

*Comments:* Several commenters requested that the Department address both over-identification and under-identification based on race and ethnicity in special education. These commenters recommended that the Department require States to report racial and ethnic disparities in the identification of children with disabilities, and children with particular impairments, due to under-identification. These commenters also requested that the Department require States to provide technical assistance to LEAs with under-identification, by race or ethnicity, but not require those LEAs to implement the statutory remedies under IDEA section 618(d).

Similarly, one commenter asked the Department to amend proposed § 300.646(c)(1) to clarify that, in cases of significant disproportionality in the over-identification or the under-identification of children as children with disabilities, an LEA must undergo a review and, if necessary, revision of its policies, practices, and procedures.

One commenter suggested that addressing both over-identification and under-identification was particularly important in the context of autism and emotional disturbance identification. The commenter further observed that these are both areas where recent research has suggested that girls in particular are under-identified.

A few commenters, however, opposed any expansion of the proposed regulations to address under-identification due to concerns that this will weaken their ability to address overrepresentation. One of these

commenters stated that, when the Department previously required States to address under-identification by race and ethnicity as part of the State Performance Plan/Annual Performance Report (SPP/APR), the result was confusion among States.

*Discussion:* As we stated earlier, while this regulation only establishes a system for identifying significant disproportionality based on overrepresentation, nothing in these regulations prevents States from working with their LEAs to ensure appropriate identification of children with disabilities and address any potential under-identification that may exist. In cases where LEAs find that a factor contributing to the overrepresentation of one racial or ethnic group is the under-identification of a different racial or ethnic group, the LEA may use funds reserved for comprehensive CEIS to address that under-identification. In particular, we remind States that, consistent with IDEA child find requirements, each State must have policies and procedures to ensure that all children residing in the State who are in need of special education and related services are identified, located, and evaluated, regardless of race or ethnicity.

We also note that nothing in these regulations establishes or authorizes the use of racial or ethnic quotas limiting a child's access to special education and related services, nor do they restrict the ability of Individualized Education Program (IEP) Teams or others to appropriately identify and place children with disabilities. In fact, an LEA's use of quotas to artificially reduce the number of children who are identified as having a disability, in an effort to avoid a finding of significant disproportionality, would almost certainly conflict with their obligations to comply with other Federal statutes, including civil rights laws governing equal access to education. States have an obligation under IDEA both to identify significant disproportionality, based on race and ethnicity, in the identification of children with disabilities and to ensure that LEAs implement child find procedures appropriately and make a free appropriate public education available to all eligible children with disabilities. (20 U.S.C. 1412(a)(1), (3) and (11); 34 CFR 300.101, 300.111, and 300.149). To clarify that these regulations must be implemented in a manner that is consistent with all other requirements of this part, we have added § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or

procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

*Changes:* As described above, we have added a new § 300.646(f).

*Comment:* One commenter recommended that the Department address the under-identification of children with disabilities by supporting States and LEAs in collecting child-level data on developmental screenings and referrals for services to better understand where child find efforts are effective.

*Discussion:* We appreciate the commenter's proposal to expand awareness and understanding of child find implementation, and of the potential under-identification of children with disabilities, through better data collection. The Department is committed to ensuring that all children with disabilities are appropriately identified, evaluated, and provided with special education services. However, we believe that any requirement to collect data regarding developmental screenings and referrals would be beyond the scope of IDEA section 618(d), which directs States to collect and examine data for the purpose of identifying significant disproportionality by race and ethnicity. We believe it is more appropriate to consider the merits of the commenter's proposal separately from regulation.

*Changes:* None.

*Comments:* Several commenters requested that the proposed regulations be withdrawn until there is more research available regarding under-identification and over-identification in special education, including better information as to whether over-identification or under-identification is the more pressing problem. Similarly, one commenter stated that the regulations were based on a flawed understanding of research on racial and ethnic disparities in special education.

One other commenter asserted that the research that the Department is using to justify its current regulations to address significant disproportionality has been repeatedly identified as having serious methodological limitations, including a lack of statistical controls for known confounds.

*Discussion:* The Department agrees that there is a continued need for research to support Federal, State, and local efforts to address racial and ethnic disparities in special education, though we do not agree that the research we relied upon is flawed. We also agree that additional research is necessary to

continue to examine both over- and under-representation in special education, and the Department plans to direct additional resources to research these issues. However, we do not agree that these regulations should be delayed until further research is conducted because there is sufficient evidence of significant disproportionalities going uninvestigated or unaddressed.

We also agree that some research suggests that there are children with disabilities who are not, but should be, receiving special education services under IDEA. However, there is a corresponding body of research that children of certain races or ethnicities are disproportionately identified with disabilities, educated in more restrictive placements, and disciplined at greater rates than their peers. We do not believe that over- and under-representation in special education based on race or ethnicity are mutually exclusive. In fact, it is possible, if not probable, that both over- and under-representation are occurring, which is why the Department's effort to standardize the way in which States examine LEAs for significant disproportionality is necessary.

The Department believes that § 300.646(b), which requires States to apply a standard methodology to identify significant disproportionality due to overrepresentation, will help to build greater knowledge about existing State practice and the extent of these disparities and encourage additional research to investigate their causes and potential solutions for them. That said, States are required to ensure that they are appropriately implementing these new regulations in conjunction with appropriate child find procedures. These regulations should not be used to exclude children with disabilities from receiving services under IDEA.

*Changes:* None.

#### Recommendations Regarding Technical Assistance and Guidance

*Comment:* A number of commenters called upon the Department to provide to States and LEAs technical assistance and guidance for implementing the proposed regulations. Some commenters asserted that the Department should provide technical assistance to States in order to ensure that LEAs appropriately identify children of color, rather than under-identifying them, to avoid a designation of significant disproportionality. In the absence of sufficient supports for LEAs, the commenters stated, LEAs may implement shortcuts so that they appear to be reducing disparities. These shortcuts could include under-reporting

of disciplinary removals, under-identifying children of color as children with disabilities, or referring fewer children from overrepresented racial or ethnic groups for special education services. Similarly, another commenter stated that the Department could ensure that LEAs do not under-identify children with disabilities by supporting States' efforts to utilize appropriate cell sizes, risk ratio thresholds, and significance testing.

Other commenters recommended that the Department provide suggestions to States about evidence-based practices that may reduce disproportionality and that the Department tailor technical assistance to the needs of the agencies served.

One commenter suggested that the Department provide specific information on evaluation and identification of children who may need special education, the use of schoolwide approaches such as positive behavioral interventions and supports, developing multi-tiered systems of support to provide intensive services before referral to special education, and the use of multi-disciplinary teams of specialized instructional support personnel to support children with and without disabilities. Another commenter also requested that the Department provide research-based root cause analysis tools, targeted to each of the areas of significant disproportionality, as well as assistance with cultural responsive evaluation, appropriate academic and behavioral interventions prior to referral for special education services, and the monitoring of highly mobile children within a multi-tiered system of support.

One commenter recommended that the Department provide guidance that indicates how LEAs can compare the number of children identified, placed, or disciplined to the number of children who should have been identified, placed, or disciplined and how best to use risk ratio methods with small populations.

One commenter requested that the Department provide guidance on, monitor, and enforce IDEA provisions governing evaluation procedures and encourage States to implement school-age hearing screening programs as part of their implementation of child find.

One commenter recommended that the Department provide more technical assistance and guidance on the importance of health care providers in helping identify all children with disabilities.

Other commenters suggested that the Department enhance State capacity to train and counsel parents about IDEA,

disability, and the implications when a child is found eligible for special education and related services.

*Discussion:* We agree that supporting States and LEAs in implementing these regulations is important. The Department provides technical assistance through numerous investments funded under part D of IDEA, and it provides easy access to information from its research to practice efforts at [www.osepideasthatwork.org](http://www.osepideasthatwork.org). In general, the Department funds technical assistance centers to work with States and LEAs to provide a variety of products and services to support children with disabilities, teachers, special education service providers, policy makers, and parents of children with disabilities with the implementation of IDEA requirements, including those provisions and activities required to address significant disproportionality based on race or ethnicity. We agree with commenters that there are many distinct but overlapping provisions under IDEA that will need to be addressed to help States and their stakeholders comply with the requirements of these regulations. The Department will continue to provide technical assistance to help States and stakeholders address significant disproportionality based on race or ethnicity. In addition, the Department plans to identify new Federal resources to support States' work to implement these regulations through the Technical Assistance and Dissemination network and Department staff. When these resources are available, the Department will work to ensure that States are aware of Federal technical assistance resources that can be used to support their implementation of these regulations.

*Changes:* None.

*Comment:* One commenter requested that the Department issue guidance to States on monitoring and analyzing LEA placement data with regard to disability category, gender, ethnicity, and socioeconomic status to help create transparency in decision-making that results in LEA-level disparities.

*Discussion:* We appreciate the suggestion and will take it into consideration as we develop guidance and technical assistance for these regulations after they are published.

*Changes:* None.

#### Causes of Racial and Ethnic Disparity That Originate Outside of School

*Comments:* Several commenters stated that the proposed regulations are based on a flawed assumption, that the percentage of children of color with disabilities who receive special education and related services should

reflect the percentage of children of color in the general population. Other commenters asserted that one should expect certain subgroups of children to be identified with disabilities (or particular impairments) at higher rates than others due to the effects of poverty, concentrated poverty, poor education, lack of adequate health care parental incarceration, limited language proficiency, drug abuse, environmental toxins, the lack of specialized instructional support or parent training, and other factors that (according to the commenters) increase the risk of disabilities and the need for special education services. Others asserted that achieving proportionality among all races and ethnicities in special education is not an appropriate goal, and that the statistical assumption of equal rates of identification across all groups is erroneous.

*Discussion:* The Department recognizes that there will be variations in the proportion of individuals across racial and ethnic groups who are identified as children with disabilities. The purpose of these regulations is not to artificially force the identification rate to be equal across all subgroups or to fit any preconceived proportion. The regulation does, however, seek to promote more accurate identification of LEAs in which disproportionality between racial and ethnic groups has become significant and, therefore, possibly indicative of an underlying problem in the identification, placement, or disciplinary removal of children with disabilities.

While various risk factors associated with poverty may be associated with greater risk of disability among children, those factors are by no means determinative of whether a child should be identified as a child with a disability under IDEA. Ideally, children exposed to these risk factors are screened for developmental delays, and other academic and behavioral challenges, so that their needs may be addressed early and appropriately. Further, IDEA requires that the individual needs of children with disabilities—as opposed to their exposure to risk—be central to determining the need for special education and related services.

*Changes:* None.

*Comment:* Many commenters stated that risk factors—such as poverty, concentrated poverty, poor education, and lack of access to health care—contribute to the incidence of disability and may confound attempts to effectively examine racial and ethnic disparity in special education. Similarly, one commenter suggested that recent increases in K–12

enrollment, the number of English Learners, and the prevalence of poverty may account for increases in the number of children of color in special education.

In this same context, a few other commenters warned that a simple comparison of percentages of populations must not be taken as evidence of bias, misidentification, or racial discrimination by school officials. Rather, these commenters argued that approaches such as the risk ratio are oversimplifications that may lead to the withdrawal or denial of special education services to children who need them. Similarly, another commenter stated that there are situations where a risk ratio alone will not provide enough information to determine whether an LEA has or does not have significant disproportionality.

*Discussion:* The Department understands that there are many complex factors that may influence the need for special education services, placement decisions, and disciplinary removals, and that schools alone cannot address all of these factors, particularly those associated with poverty. The Department also understands that risk ratios do not identify the causes of significant disproportionality.

However, risk ratios do identify those LEAs where there are large racial and ethnic disparities and, where these are considered significant, States and LEAs must review the policies, procedures, and practices related to identification, placement, or discipline and, through the implementation of comprehensive coordinated early intervening services, identify and address the causes of these disparities, as appropriate. Even in situations where differential exposure to risk factors contributes to racial disparities in special education, we believe that schools may help to mitigate the effects of these risk factors by screening children early and by providing early and appropriate interventions and supports. Donovan and Cross, 2002. This is a major purpose of comprehensive CEIS, and one reason, as we discuss in the section *Expanding the Scope of Comprehensive Coordinated Early Intervening Services*, that the Department has expanded the scope of comprehensive CEIS to include children ages three through five.

*Changes:* None.

*Comments:* Many commenters expressed concern that the Department's overall approach to addressing significant disproportionality, as well as the standard methodology in § 300.647(b), fails to address the underlying causes of racial and ethnic disparities. A large number of commenters noted that there are many



societal and systemic factors that lead to disproportionality. These commenters argued that final regulations should be postponed until these other societal and systemic factors, such as access to mental health care and access to quality early-childhood education, are addressed. Another commenter argued that the issue of significant disproportionality is beyond the responsibility of educators and beyond the scope of their role, and efforts to identify and address it must take into account factors such as poverty, urbanicity, medical care accessibility, and the presence of schools specifically for children with disabilities.

One commenter requested that—once these broad societal and educational problems are addressed—States only report on special education indicators (which we understand the commenter to mean data showing racial and ethnic disparities, similar to what was proposed under § 300.646(b)(3) and (4)) until systems are in place to hold general education accountable as well. Similarly, other commenters asserted that as special education programs typically have little influence over general education programs, it will be difficult to improve services using a mandate on special education.

*Discussion:* The Department recognizes that racial and ethnic disparities in the identification, placement, and discipline of children with disabilities can have a wide range of causes, including systemic issues well beyond the typical purview of most LEAs. Again, however, this does not mean that LEAs, schools, and educators are wholly incapable of addressing, or mitigating, any of the causes of significant disproportionality. In fact, the Department believes that effective elementary and secondary education, with appropriate supports for children with and without disabilities is essential to addressing the very issues the commenters raise. Delaying the examination of data to make determinations of significant disproportionality (and the review and revision of problematic policies, practices, and procedures) until these broader issues are resolved would overlook both the statutory requirement that States annually collect and examine data and strategies currently available to address these inequities.

The commenters' concerns about holding general education accountable suggest a false dichotomy between special and general education. That is, LEAs are responsible for providing a high quality education to every child, both in general education and special education. When children are

inappropriately identified, placed, or disciplined on the basis of race or ethnicity, all parties are, and should be, held accountable. In fact, this realization of the benefits of a holistic approach to addressing the causes of significant disproportionality led to the Department's expansion of comprehensive CEIS to serve both children with and without disabilities.

*Changes:* None.

*Comment:* One commenter suggested that the Department develop funding priorities to examine the connections between race, culture, socio-economic status, and disability. Many commenters noted that additional Federal funds should be made available to address disproportionality in special education and general education programs.

*Discussion:* Although we view this as beyond the scope of these regulations, we appreciate the suggestion. The Department will take this recommendation under consideration as we develop funding priorities for fiscal years 2017 and 2018.

*Changes:* None.

#### Causes of Racial and Ethnic Disparities That Originate in School

*Comments:* Several commenters asserted that disproportionality in special education occurs due to children not receiving the necessary interventions early in their academic career. Disproportionality, according to the commenters, must be addressed in the regular educational environment and earlier in the school process, with administrators responsible for title I programs as partners, and cannot be addressed once children have been referred for evaluation for special education.

*Discussion:* The Department believes that these regulations address the commenters' concerns. Under § 300.646(d)(3), LEAs identified with significant disproportionality may use funds reserved for comprehensive CEIS to support the needs of both children with and without disabilities. Section 300.646(d) requires the State to identify and address the factors contributing to the significant disproportionality which may include a wide range of factors, some of which were mentioned by commenters. Moreover, under § 300.646(d) the LEA may not limit comprehensive coordinated early intervening services to children with disabilities. To the extent, then, that an LEA identifies the lack of early interventions in the general education program as a factor contributing to the significant disproportionality, it may use funds reserved for comprehensive

CEIS to provide access to early interventions.

As to partnering with administrators of title I programs, we understand the commenters to suggest that title I funds should be used in conjunction with CEIS funds when providing early intervening services. Title I funds may be used this way, provided that all of the requirements attached to the funds are met. Further, CEIS funds may be used to carry out services aligned with activities funded by and carried out under ESEA, if IDEA funds are used to supplement, and not supplant, funds made available under the ESEA for those activities.

*Changes:* None.

*Comments:* One commenter noted that, while research suggests that there is disproportionate representation of children of color in special education, in restrictive special education settings, and in exclusionary disciplinary actions, the commenter does not believe this is the result of discriminatory practices. The commenter suggested that the Department should, therefore, concentrate its efforts on guidance, for example, on the appropriate identification of students with disabilities from diverse backgrounds. Similarly, another commenter suggested that instead of focusing on significant disproportionality, the Department should reevaluate the causes of ineffective practices in special education and focus directly upon appropriate services for students with disabilities in special education. Another commenter made this point more generally and suggested that the proposed regulations attempt to solve a problem that may not exist.

*Discussion:* IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State. IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)) specifies that the review of—and if appropriate, revision of—policies, practices, and procedures is a consequence of, rather than a part of, a determination of significant disproportionality. Therefore, the Department does not have the authority to relieve States of their responsibility to determine whether significant disproportionality is occurring in an LEA, or require the review of policies, practices, and procedures, even in the absence of evidence showing discriminatory practices. Moreover, once identified with significant disproportionality, the LEA's review of policies, procedures, and practices and

implementation of comprehensive CEIS under § 300.646(d) could reasonably encompass determinations of whether proper identification practices are in place or determinations of the effectiveness of specific services.

Congress intended for States and LEAs to address significant disproportionality, by race and ethnicity, in special education. We noted in the NPRM various data points from our IDEA section 618 data, and using the standard methodology, indicating that children from certain racial or ethnic groups are overrepresented in special education, particularly in the categories of emotional disturbance, specific learning disabilities, and intellectual disabilities. 81 FR 10967. Further, we noted that some children are overrepresented, by race and ethnicity, with respect to their placement in restrictive settings and with respect to their exposure to disciplinary removals from placement. Therefore, we believe that the Department has both a congressional mandate and factual support for proceeding with this rule.

*Changes:* None.

*Comment:* One commenter asserted that the proposed regulations did not address the underlying issues that result in racial and ethnic disparities in the identification of children with disabilities, among them the failure to strictly follow procedures for child find, referral for evaluation, the evaluation itself, and subsequent identification of children as children with disabilities.

*Discussion:* We disagree and believe that these regulations are designed to directly address any underlying factors and IDEA noncompliance that result in or contribute to significant disproportionality.

Under § 300.646(c), States must provide for a review, and, if necessary, revision of policies, practices, and procedures to ensure compliance with IDEA's requirements if an LEA is identified as having significant disproportionality.

Under § 300.646(d)(1)(ii), an LEA identified as having significant disproportionality must reserve 15 percent of its IDEA part B funds for comprehensive CEIS, to identify and address the factors contributing to the significant disproportionality. If the underlying cause of significant disproportionality is found to be rooted in inappropriate practices, such as a failure to appropriately implement evaluation procedures, this provision would help to identify that issue and require that the problematic practices be changed. In addition, addressing the factors contributing to the significant

disproportionality could include training school personnel on the appropriate implementation of evaluation procedures.

*Changes:* None.

#### Proposed Regulations Would Create Racial Quotas

*Comment:* Many commenters asserted that proposed §§ 300.646(b) and 300.647 would put into place racial quotas that would interfere with the appropriate identification of children with disabilities based purely on the children's needs. Commenters raised concerns that the regulations might generally discourage appropriate identification of children of color, and, in so doing, harm children of color and children from low-income backgrounds. One commenter argued that the regulations will exacerbate inequality for children of color with disabilities and lead to a surge in class action lawsuits by families arbitrarily denied services based on their children's race or ethnicity. Other commenters stated that, if the determination of significant disproportionality is based strictly on numerical data, then the remedy for significant disproportionality, for some LEAs, will be denying access to special education services to children of color. One commenter suggested that to bias LEAs against serving eligible children with special education services is worse than providing these services to children who are only marginally eligible.

*Discussion:* The Department recognizes the possibility that, in cases where States select particularly low risk ratio thresholds, LEAs may have an incentive to avoid identifying children from particular racial or ethnic groups in order to avoid a determination of significant disproportionality. For this reason, § 300.647(b)(1) provides States the flexibility to set their own reasonable risk ratio thresholds, with input from stakeholders and State Advisory Panels. As part of the process of setting risk ratio thresholds, States must work with stakeholders to identify particular risk ratio thresholds that help States and LEAs to address large racial and ethnic disparities without undermining the appropriate implementation of child find procedures.

Further, nothing in these regulations establishes or authorizes the use of racial or ethnic quotas limiting a child's access to special education and related services, nor do they restrict the ability of IEP Teams to appropriately identify and place children with disabilities. In fact, an LEA's use of racial or ethnic quotas to artificially reduce the number

of children who are identified as having a disability, or inappropriately segregating children in LEAs that serve only children with disabilities, in an effort to avoid a finding of significant disproportionality, would almost certainly conflict with the LEA's obligations to comply with other Federal statutes, including civil rights laws governing equal access to education. States have an obligation under IDEA both to identify significant disproportionality, based on race and ethnicity, in the identification of children with disabilities and to ensure that LEAs implement child find procedures appropriately. (20 U.S.C. 1412(a)(3); 34 CFR 300.111). We agree that the establishment of any such quotas would almost certainly result in legal liability under Federal civil rights laws, including title VI of the Civil Rights Act of 1964 and the Constitution.

We generally believe that the appropriate and timely identification of children with disabilities and the prevention of significant disproportionality on the basis of race and ethnicity are goals that work in concert with one another. In fact, a finding of significant disproportionality could be a signal that an LEA's child find procedures are not working appropriately. One of the goals of § 300.646(b) and (c) is to help LEAs identified with significant disproportionality to review and if appropriate, revise policies, practices, and procedures—including child find procedures—to ensure compliance with IDEA.

At the same time, we are interested in the impact that these regulations may have on the appropriate identification of children with disabilities. As a result, the Department intends to conduct an evaluation of the implementation of this regulation to assess its impact, if any, on how LEAs identify children with disabilities. This evaluation will include an examination of the extent to which school and LEA personnel incorrectly interpret the risk ratio thresholds and implement racial quotas in an attempt to avoid findings of significant disproportionality by States, contrary to IDEA.

*Changes:* As described above, we have added a new § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

## The Purpose of the Proposed Regulations

*Comments:* One commenter expressed concern that the Department's discussion of the ability to grant waivers to States and the content of the NPRM's directed questions indicate that the Department understands that the proposed regulations do not provide a solution to disproportionality.

*Discussion:* The NPRM did not include any discussion regarding waivers of IDEA section 618(d). 81 FR 10967. As the commenter points out, IDEA does not include a provision that would allow either the Department, or States, to waive the statutory remedies—including the review and revision of policies, practices, and procedures and reservation of funds for comprehensive CEIS—for LEAs identified with significant disproportionality.

The Department disagrees that the directed questions in the NPRM were an indication that the standard methodology and the flexibilities included in the NPRM will not appropriately identify LEAs with significant disproportionality. Rather, these questions were a means to gather informed input from the public about, among other things, how a standard methodology (and the accompanying flexibilities) should be structured to ensure proper implementation of the requirements of IDEA section 618(d). We appreciate the many informed and thoughtful responses that we received in public comment and have made several changes to the final regulations based on input from the public to improve comparability and transparency while providing States and LEAs sufficient flexibility to appropriately identify and address significant disproportionality.

*Changes:* None.

*Comments:* A commenter generally expressed confidence in their LEAs' ability to properly determine eligibility and placement for children with disabilities and to follow board policy with regard to the discipline of all children with disabilities. The Department interpreted this comment to suggest that these regulations are not necessary.

*Discussion:* The Department agrees with commenters that, in many LEAs, school personnel and LEA officials appropriately implement IDEA's requirements. However, we interpret IDEA section 618(d) to require States to examine data and make determination whether LEAs have significant disproportionality, based on race and ethnicity, irrespective of whether the practices, procedures, and policies of the LEA are appropriate and comply

with IDEA. Given the remedies that States and LEAs must implement following a determination of significant disproportionality, we believe the statute anticipates that the significant disproportionality within the LEA may be addressed by reviewing, and if appropriate, modifying policies, practices, and procedures not in compliance with IDEA, by providing children and staff with additional supports through the implementation of comprehensive CEIS, or by doing both. IDEA section 618(d)(2)(A) and (B), 20 U.S.C. 1418(d)(2)(A) and (B).

*Changes:* None.

*Comment:* A few commenters requested assurance that the purpose of the proposed regulations was more substantive than a means of identifying a larger number of LEAs with significant disproportionality.

*Discussion:* While it is possible that more LEAs may be identified with significant disproportionality as a result of these regulations, this outcome is a consequence of, rather than the purpose of, these regulations. The purpose of these regulations is to increase comparability and transparency in the examination of data and identification of LEAs with significant disproportionality across States to ensure that States are more uniform in implementing IDEA section 618(d). As the GAO noted in its 2013 report, the flexibility States were given to define significant disproportionality, in the absence of this regulation, provided "no assurance that the problem [was] being appropriately identified across the nation." The Department believes that these revised regulations will improve implementation of IDEA section 618(d), build greater knowledge about the extent of these disparities, and provide additional opportunities for stakeholders to understand and shape how LEAs are identified with significant disproportionality.

Ultimately, the purpose of the regulations is to help ensure that LEAs are appropriately identified with significant disproportionality, however many LEAs that may be, so that the children with disabilities in those LEAs receive the services that are appropriate to each of them. Even under a possible scenario where the first years of implementing these regulations increases the number of LEAs with significant disproportionality, using comprehensive CEIS to properly address the contributing factors should also reduce the number of LEAs with significant disproportionality in subsequent years.

*Changes:* None.

*Comment:* A number of commenters noted that ensuring proper implementation of IDEA section 618(d) would reinforce existing legal protections under the Civil Rights Act of 1964, the Americans with Disabilities Act, title IX of the Education Amendments Act of 1972, and Section 504 of the Rehabilitation Act.

*Discussion:* The Department generally agrees with the commenters that the proper implementation of IDEA section 618(d) may serve to reinforce and advance civil rights for all children.

*Changes:* None.

*Comments:* None.

*Discussion:* The Department believes it would be helpful to States and LEAs to clearly state that nothing in this rule supersedes or replaces other applicable constitutional, statutory, or regulatory requirements including those related to ensuring proper implementation of IDEA requirements for child find, free appropriate public education (FAPE), or placement in the least restrictive environment (LRE). Similarly, this rule does not abrogate, conflict with, or identify a specific violation of, any Federal civil rights protection from discrimination, including discrimination based on race, color, national origin, sex, or disability. Further, in establishing the methodology required under this rule (specifically the use of risk ratios and risk ratio thresholds to determine significant disproportionality), the Department does not intend that this methodology be presumed to apply or otherwise occupy the field in other legal contexts where examination of numerical data for racial and ethnic disparities may be relevant, such as enforcement of Federal civil rights laws.

*Changes:* We have added a new § 300.646(f) to make clear that these regulations do not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

## The Cost and Burden of the Regulations

*Comment:* One commenter anticipated that the implementation of the regulations would be more costly and time intensive than the estimates in the NPRM due to the costs associated with changes to data analysis protocols, documentation and technical assistance to data personnel to assure accurate implementation, and communication with schools and communities.

*Discussion:* The Department appreciates the commenter's concern and agrees that the initial time estimates to implement the regulation were too conservative. We agree that accurate and high-quality data are necessary to ensure appropriate implementation of the regulation.

*Changes:* We have increased the time estimates for modified data collection protocols, technical assistance activities, and communication required for implementation and increased the cost estimates for these regulations. In addition, the Department increased the estimated costs associated with consulting with State Advisory Panels to account for the additional time that will now be required for States to identify reasonable minimum n-sizes, reasonable minimum cell sizes, and standards for reasonable progress.

*Comment:* A few commenters expressed concerns about the amount of staff time that will be needed to implement the regulations. These commenters argued that some States simply do not have the staff the Department suggests are needed, and that there are no additional funds being made available to States for the increase in workload, including workload required to collect and analyze data. One of these commenters therefore recommended that the regulations be withdrawn until adequate funding is provided to support the additional State personnel needed to implement the regulations. Another commenter recommended that the Department work with those States or entities with limited staff support to help them implement the requirements of the proposed regulations. The commenter further argued that, in the past, States and entities could rely on the Regional Resource Centers (RRCs) to assist them in meeting their responsibilities under IDEA. With the elimination of the RRCs, the commenter suggested that some of the currently funded data technical assistance centers be tasked with making staff members available to support the States and other entities to undertake this work. One commenter asserted that if the State's offices responsible for special education oversight are required to monitor action plans to address significant disproportionality, then these new responsibilities will dilute the State's other monitoring responsibilities.

*Discussion:* While we recognize that States vary widely both in their staffing and financial resources, all States that receive funds under Part B of IDEA must meet the requirements of that Act, including those outlined in IDEA section 618(d), regardless of the funding

provided under the Act. Therefore, the Department disagrees with commenters who requested that the Department delay the implementation of the regulations until adequate funding is provided to support additional State personnel for both this and other requirements of the Act.

However, the Department recognizes that there is burden associated with implementing these final regulations, and States will need varying levels of support to appropriately implement these regulations. Therefore, the Department plans to identify Federal resources to support States' work through the Technical Assistance and Dissemination network and Department staff. When these resources are available, the Department will work to ensure that States are aware of Federal technical assistance resources that can be used to support their implementation of these new regulations.

*Changes:* None.

*Comments:* Some commenters requested that the Department clarify whether the examples contained in the report in the NPRM, Racial and Ethnic Disparities in Special Education, were intended to be illustrative or were intended to be duplicated by States or LEAs in setting risk ratios. Other commenters stated that the regulations would cost large amounts of money, both up front and over time, based on the Department's report published with the NPRM, Racial and Ethnic Disparities in Special Education. One commenter stated that the actual cost of the regulation would be \$12 billion, as, according to the commenter, the Department estimated that 8,148 LEAs could be found with significant disproportionality. The commenter stated that, as the Department recommended no increase in the Federal budget for special education, the overall result of the regulation would be a reduction in Federal funding for special education. Another commenter stated that the methodology used in the Department's report would mean a five-fold increase in the number of LEAs identified in one State, which exceeds the State's capacity to address through a review of policies, practices, and procedures and through technical assistance.

Several commenters offered other projections of the number of LEAs that would be identified with significant disproportionality due to these regulations. In general, commenters provided projections based on either the Department's report—Racial and Ethnic Disparities in Special Education—or a projected number of false-positive identifications of LEAs due to small

numbers. According to many of these commenters, over 80 percent of LEAs in one State would be identified with significant disproportionality and would have to transfer tens of millions of dollars away from supporting children with disabilities. We understand this concern to reference the mandatory reservation of funds for comprehensive CEIS by LEAs that are identified with significant disproportionality. Similarly, another commenter stated that Department projects that 23 States will require 50–80 percent of all LEAs to set aside 15 percent of their Federal share for comprehensive CEIS, a redirection of some \$550 million away from direct services for special education.

*Discussion:* The Department's purpose in creating the Racial and Ethnic Disparities in Special Education report was to provide the public the number and percentage of LEAs that would be identified with significant disproportionality if the Department's example risk ratio thresholds were adopted by all 50 States and the District of Columbia. We did not intend the tables to be indicative of the actual numbers of LEAs that would be identified with significant disproportionality under the proposed regulations, although we can understand how the commenters read the report this way. The tables do not represent an estimated number of LEAs that would be identified under the final regulations, and the risk ratio thresholds included in those tables do not represent the risk ratios thresholds that States must adopt or the standard that the Department will use to determine whether or not specific risk ratio thresholds are reasonable. Under final § 300.647, States retain the flexibility to set reasonable risk ratio thresholds in excess of those identified in the table without necessarily being subject to enforcement actions. Further, as described in greater detail elsewhere, these final regulations provide States with additional flexibilities that were not included in the proposed regulations to set reasonable minimum n-sizes and minimum cell sizes, both of which we expect would reduce the number of LEAs included in the analyses and the number of so-called "false positives" (e.g., LEAs identified due to small changes in the student population that result in large changes in the risk ratio that do not represent any systemic problems giving rise to significant disproportionality). As such, we do not believe that the tables in the Department's report reflect the actual number of LEAs that will be identified

as having significant disproportionality under these final regulations.

The Department therefore does not agree with the cost estimates produced by commenters who used the report as a basis for estimating costs or the number of LEAs that will be identified with significant disproportionality.

*Changes:* None.

*Comment:* A few commenters challenged the Department's estimate in the Regulatory Impact Analysis of the NPRM of how many LEAs would be identified with significant disproportionality, stating that the regulation would significantly increase the number of LEAs identified with significant disproportionality. One commenter noted that the Department provided little explanation for its estimates that 400 to 1,200 LEAs could be affected by the regulations.

*Discussion:* As stated in the NPRM, the Department does not know with a high degree of certainty how many LEAs would be newly identified in future years, particularly given the wide flexibilities provided to States in the final regulations. To address this uncertainty, the Department used SY 2012–13 IDEA section 618 data, in which States identified 449 out of approximately 16,000 LEAs as having significant disproportionality. Using that year's data as a baseline, the Department's estimates were based on the overall number of LEAs identified with significant disproportionality roughly doubling under the proposed regulations. However, to fully examine the sensitivity of our analysis to this estimate, we also included estimates for the number of identified LEAs tripling and quadrupling over the baseline. As discussed in the NPRM, we believe it would be highly unlikely that such an increase would be realized.

*Changes:* None.

*Comment:* One commenter expressed that, if only 400 LEAs would be impacted, there is little need for the regulation.

*Discussion:* We disagree with the commenter's assertion that the likelihood that a small number of LEAs will be affected should determine the appropriateness of regulatory action. Under IDEA, each and every child with a disability is entitled to a free appropriate public education in the least restrictive environment. If the regulations can help to identify and address racial disparities in special education—which may result from inappropriate identification, placement, and discipline of children with disabilities—regulatory action is fully warranted.

*Changes:* None.

Evaluating the Impact of the Regulation

*Comment:* One commenter requested that the Department withdraw the proposed regulations due to concerns that they do not include sufficient detail to allow the public to provide informed comments. In particular, the commenter expressed concern that the proposed regulations do not include any national standard, criteria, benchmarks, or goals upon which to gauge State compliance with them. The Department interprets these comments to refer to the impact of the proposed standard methodology.

*Discussion:* In its 2013 audit, the GAO noted that the wide variability in States' approaches to identifying significant disproportionality made it difficult to determine the extent of significant disproportionality across the Nation, or the extent to which it is being addressed. The Department agrees with the GAO's assessment, and believes States' current implementation of IDEA section 618(d)—with only 28 States and the District of Columbia identifying any significant disproportionality—would not provide an appropriate baseline from which to establish benchmarks or goals for the reduction of significant disproportionality.

The Department's goal in issuing these regulations, as discussed in the NPRM, is to ensure the appropriate review of data and examination for significant disproportionality, and to help States and LEAs address and reduce significant disproportionality. To accomplish this goal, as well as facilitate a better understanding of the extent of significant disproportionality across the Nation, the Department did not propose to decide for States the point at which specific racial or ethnic overrepresentation becomes significant disproportionality; rather, the Department proposed to require States to follow a standard methodology, with flexibility to account for State differences, consistent with the GAO's 2013 recommendation. Further, a key area of flexibility, under § 300.647(b)(1)(i), allows States to set reasonable risk ratio thresholds, with input from stakeholders and State Advisory Panels, under § 300.647(b)(1)(i), subject to the Department's review and enforcement for reasonableness. As the risk ratio threshold is the point at which an LEA is determined to have significant disproportionality, this aspect of the standard methodology has a strong impact on the total cost. Accordingly, the Department's proposal to allow States to select reasonable risk ratio thresholds means that, to a great extent, the final impact of these regulations will

be determined by the States themselves. This relationship between the flexibility afforded to States, and the Department's estimates of the costs of the regulation, were explained in the NPRM. The Department continues to believe that allowing States the flexibility to set reasonable risk ratio thresholds is necessary to account for differences between States, despite the fact that Department-established risk ratio thresholds would allow for a more precise assessment of the costs of the regulation.

*Changes:* None.

*Comment:* Several commenters responded to Directed Question #13 in the NPRM, which requested suggestions for the metrics the Department should establish to assess the regulations once they are final. We received a variety of responses.

One commenter suggested that the regulations be measured by whether they reduce or eliminate the number of States and LEAs with significant disproportionality. A different commenter, by contrast, suggested that measures focus on children, not LEAs and suggested that the Department give consideration to the number of children attending LEAs identified with significant disproportionality and the proportion of all children that represents. Another made a similar suggestion, that the Department should compare proportions of children with disabilities identified, placed, and disciplined over three years—within an LEA and across LEAs with comparable demographics—to determine, first, whether there is a decrease in significant disproportionality over the years within LEAs and, second, if trends in significant disproportionality are similar across LEAs with comparable demographics. Still another suggested that the Department monitor metrics that focus on the placement of children with particular impairments—specifically, children with autism, emotional disturbance, or intellectual disability—outside of the regular classroom. The commenter argued that a child's disability should not be the determining factor for where the child spends the school day. Last, a few commenters recommended that the Department assess the regulation's impact on the appropriate identification, placement, and discipline of children with disabilities; increases in placement in the regular classroom for children of color with disabilities; increases in access to the general curriculum for children of color with disabilities; and movement of children of color from restrictive settings to placement in the regular

classroom 80 percent or more of the school day.

A few commenters suggested that the Department use monitoring metrics that include State baseline and progress data but insisted that these data not be used in any ranking or accountability ratings. Another commenter suggested that the Department monitor baseline and progress data that integrate IDEA results-driven accountability measures with measures from Federal elementary and secondary, as well as career and technical, education programs. Another commenter recommended that metrics used to assess the regulation include academic, social, and emotional outcomes.

Finally, a few other commenters interpreted the question broadly, perhaps more broadly than intended. One commenter suggested that the Department develop self-assessments for States, similar to what the Department previously provided for dispute resolution and correctional education. Another commenter suggested the Department measure impact by monitoring and enforcing the requirement in proposed § 300.647(b)(1)(i), which requires States to use advice from stakeholders.

*Discussion:* The Department appreciates the comments we received addressing what metrics should be established to assess these regulations once they become final, and will take them all into consideration. Further, as States take the steps necessary to implement the regulations, we will be in a better position to determine what evaluation metrics, monitoring, and technical assistance, will be most meaningful and appropriate.

*Changes:* None.

#### Reporting Requirements

*Comment:* A few commenters generally opposed any attempt by the Department to require States to take on additional reporting burden.

*Discussion:* We recognize the commenters' concern about reporting burden. Under IDEA section 618(d) (20 U.S.C. 1418(d)), States are required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. Prior to these regulations, the Department clarified in guidance the specific data that States must collect and review with respect to the identification of children as children with disabilities, including the identification of children with particular impairments, placement and disciplinary removals. OSEP Memorandum 08–09 (July 28, 2008).

The Department made a concerted effort, both in our prior guidance and in these final regulations, to ensure that States were only required to collect and examine data that they, and their LEAs, are otherwise obligated to collect and report to the Department and the public under IDEA section 618(a) (20 U.S.C. 1418(a)). We have added a new § 300.647(b)(7) requiring States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress and the rationales for each to the Department. Prior to the development of a new data collection to be submitted to the Department at a time and in a manner determined by the Secretary, the *EMAPS User Guide: State Supplemental Survey—IDEA* will be revised to clarify what specific information States should include within their definition of significant disproportionality. The updated survey instructions will be released in February of 2017. The Department is sensitive to the reporting burdens upon States, but believes that the additional reporting requirements created by this regulation will be minimal as States are required to select risk ratio thresholds, minimum cell sizes, and minimum n-sizes, and States will have sufficient time to prepare before that information is required. We also believe that this information will help the Department analyze the impact of this regulation. As noted in the regulation, this information will be collected in a time and manner determined by the Secretary and will not be collected until an information collection request has been completed.

*Changes:* We have added a new § 300.647(b)(7) requiring States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each to the Department at a time and in a manner determined by the Secretary. We are currently revising the *EMAPS User Guide: State Supplemental Survey—IDEA* to clarify what specific information States should include within their definition of significant disproportionality. These include requests of States to include information on risk ratio thresholds and minimum cell and n-sizes. The revised survey instructions will publish in February 2017. States will then submit SY 15–16 data.

*Comments:* Commenters requested that States each be required to submit a long-term plan to the Department for addressing significant disproportionality that includes how they will implement the new regulations and provide support to LEAs.

*Discussion:* The Department recognizes the value of States having long-term plans to reduce significant disproportionality. Indeed, we believe such an approach, including the setting of appropriate risk ratio thresholds, minimum n-sizes, and minimum cell sizes, can serve to help States identify the most pressing issues facing their students and provide adequate support to LEAs as they work to reduce significant disproportionalities.

In addition, we note that to the extent that implementation of these regulations, including establishing reasonable risk ratio thresholds, cell sizes, n-sizes and a measure for reasonable progress, would require changes to a State's policies and procedures, under § 300.165, States must conduct public hearings, ensure adequate notice of those hearings, and provide an opportunity for public comment. We would expect that States, in consulting with stakeholders, including their State Advisory Panels, would engage in planning to ensure the best results for their students. However, we believe that requiring States to report these plans to the Department would place an unnecessary burden upon them. As such, we decline to require this reporting.

*Changes:* None.

*Comments:* A few commenters suggested that the Department add a requirement for States to publicly report risk ratios, including LEA-level risk ratios, regarding placement, noting that they are rarely reported and that LEAs are rarely aware of their own performance. One commenter requested that the Department require States to publish LEA-wide data on suspensions of children of color with disabilities.

*Discussion:* Under IDEA section 618(a)(3) (20 U.S.C. 1418(a)(3)), the Department has broad authority to require States to collect, and report to the Department and the public, data and information related to Part B of IDEA. In general, the Department does not exercise this authority by including specific reporting requirements in regulations. Rather, the Department issues an information collection request, which is subject to public comment, to specify the data States must collect and report. Under the Department's current information collection (OMB Control No. 1875–0240), States are required to submit counts of children with disabilities, by race, who are (1) identified with a particular impairment, (2) placed in particular educational settings, and (3) subjected to disciplinary removals. We agree with the commenters' suggestion that all of the risk ratios and alternate risk ratios

the States calculate for their LEAs should be made public. This increased transparency allows States, LEAs, and stakeholders alike to monitor significant disproportionality and reinforces the review and revision of risk ratio thresholds, cell sizes, and n-sizes as an iterative public process within each State. The Department therefore anticipates that all risk ratios and alternative risk ratios will be made public but has not yet determined the precise time and manner for this to occur. We anticipate doing so through an information collection request, through the Department's own publication of these data, or some combination of the two.

*Changes:* None.

*Comments:* A few commenters suggested that the Department add a requirement for States to publicly report risk ratios calculated to determine disproportionate representation, under IDEA section 612(a)(24).

*Discussion:* These regulations pertain only to IDEA section 618(d) (20 U.S.C. 1418(d)), which outlines the obligation of each State to collect and examine data to determine if significant disproportionality, based on race or ethnicity, is occurring in the State and LEAs of the State with respect to the identification, placement, or discipline of children with disabilities. A different provision of IDEA—section 612(a)(24) (20 U.S.C. 1412(a)(24))—requires States, consistent with the purposes of IDEA and IDEA section 618(d), to develop policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment. Under Indicators 9 and 10 of the Part B State Performance Plan/Annual Performance Report (SPP/APR), consistent with section 616(a)(3)(C) (20 U.S.C. 1416(a)(3)(C)), States are required to report the percent of districts with disproportionate representation of racial and ethnic groups in special education and in specific disability categories that is the result of inappropriate identification. It would be outside the scope of these regulations to prescribe how States collect, calculate, or report data regarding the identification of LEAs with disproportionate representation due to inappropriate identification.

*Changes:* None.

*Comments:* One commenter requested that the Department require States to report data on all children who are deaf and hard of hearing, regardless of whether another disability is considered the child's primary disability, in its

IDEA section 618 data collection. The commenter stated that up to 55 percent of deaf and hard of hearing children are reported to have an additional disability. The commenter believed that, if they are counted in the category of their additional disability, but not in the category of hearing impairment, data on the number of deaf and hard of hearing children is incomplete or inaccurate.

*Discussion:* The Department appreciates the commenter's concern that if children who are deaf or hard of hearing are not counted in the categories of deafness or hearing impairment, but are counted in the another category that is considered the child's "primary disability," the State's section 618 data on the number of deaf and hard of hearing children is incomplete or inaccurate. The commenter's suggestion that the Department change the section 618 data collection for children who are deaf or hard of hearing is outside the scope of this regulation. We also note that children who are deaf or hard of hearing are not included as a category of analysis under § 300.647(b)(3). Therefore, States are not required to determine if significant disproportionality is occurring with respect to the identification of children who are deaf or hard of hearing.

*Changes:* None.

*Comments:* A few commenters requested that the Department require States to annually report additional discipline data—suspensions of one day or more disaggregated by impairment, race and ethnicity, gender, and English language proficiency—to the public. These commenters suggested that this data would help address the problem that children identified with deafness, blindness, or traumatic brain injury are often disciplined due to improper school discipline policies or inadequate staff training.

One commenter stated that, under IDEA section 618(a)(1), while States are already required to do this reporting, as of 2013, only 16 States had reported any discipline data for children with disabilities, and only 1 State provided the disaggregated data as required by Statute. The commenter requested that the Department reinforce for the States that compliance with the public reporting requirements of IDEA will be reviewed by the Secretary and could influence the Department's determination of whether risk ratio thresholds are reasonable.

*Discussion:* The Department declines to require States to annually report additional discipline data under IDEA section 618(a) through these regulations. Further, in the exercise of our responsibilities to ensure compliance

with IDEA, the Department annually reviews each State's SPP/APR, in which each State reports to the Secretary on the performance of the State and makes an annual determination of the State's performance under section 616(d) of IDEA (20 U.S.C. 1416(d)). The Department considers the timeliness and accuracy of data reported by the State under section 618 of IDEA, when making annual determinations for each State under IDEA section 616(d) (20 U.S.C. 1416(d)). The Department would typically address noncompliance with section 618(a) reporting requirements through this process and, as such, we decline to address them as part of this regulation.

Further, States' compliance with the requirement to report to the Department under IDEA section 618(a) is a separate issue from the State's compliance with the requirement to establish reasonable risk ratio thresholds under § 300.647 of the final regulation, which implements IDEA section 618(d). For this reason, we decline the commenters' request to consider States' reporting under section 618(a) in the Department's review of the reasonableness of States' risk ratio thresholds.

*Changes:* None.

*Comments:* One commenter requested that the Department eliminate SPP/APR Indicators 4 (rates of suspension and expulsion), 9 (disproportionate representation in special education resulting from inappropriate identification), and 10 (disproportionate representation in specific disability categories resulting from inappropriate identification). The commenter asserted that the standard methodology will require States to duplicate analyses of the same data, albeit with varying definitions, and to report it twice.

*Discussion:* We are sensitive to concerns about duplicative reporting requirements and seek to reduce them wherever possible. However, multiple distinct provisions of IDEA require States to analyze similar data sets to identify LEAs where racial or ethnic disparities exist. These provisions include IDEA sections 612(a)(24) and 616(a)(3)(C) (20 U.S.C. 1412(a)(24) and 1416(a)(3)(C)), under which States must identify LEAs with disproportionate representation that is the result of inappropriate identification; IDEA section 612(a)(22) (20 U.S.C. 1412(a)(22)), under which States must identify LEAs that have a significant discrepancy in the rate of long-term suspensions and expulsions; and IDEA section 618(d), which is the focus of these regulations. While the Department acknowledges that these provisions may require States to use similar data (*i.e.*,

identification and discipline data disaggregated by race and ethnicity), the data analysis required to identify LEAs with disproportionate representation, a significant discrepancy, and significant disproportionality is different. As States have an obligation under IDEA to comply with each of these provisions, we believe it is appropriate for the Department to monitor their implementation separately.

Further, the Department does not have flexibility to eliminate Indicators 9 and 10 of the SPP/APR—under which States report their implementation of IDEA section 612(a)(24)—as States are explicitly required to submit this information under IDEA section 616(a)(3)(C) (20 U.S.C. 1416(a)(3)(C)).

*Changes:* None.

#### Additional State and Local Standards

*Comments:* One commenter requested that the Department set State and local standards, as well as national standards, for identifying and addressing significant disproportionality.

*Discussion:* To the extent that the commenter means that the Department should, in addition to the standard methodology, require States and LEAs to adopt additional standards for identifying significant disproportionality, we believe this is unnecessary. The standard methodology in § 300.647 implements the requirement in IDEA section 618(d) (20 U.S.C. 1416(d)) that each State annually 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 with respect to the identification, placement, and discipline of children with disabilities. Section 300.647 sets common parameters for analysis, which each State must use to determine whether significant disproportionality is occurring at the State and local level. As such, there is no need for the Department to set any separate State or local standards.

To the extent that the commenter means that the Department should set State and local standards for addressing significant disproportionality once it is identified in LEAs, we believe that this is not the best approach given the potential variability in the needs of students with and without disabilities in the various States and LEAs and that further prescribing the ways that States and LEAs must respond to significant disproportionality is unnecessary at this time and in these regulations.

IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)), requires LEAs identified with significant disproportionality to reserve 15 percent of their IDEA Part B

funds for comprehensive CEIS. The Department believes that the specifics of how those funds are to be used to address the underlying factors is best left to State and local officials. The Department notes that IDEA section 613(f) (20 U.S.C. 1413(f)) already sets out examples of the kinds of activities that may be funded. Section 300.646(d) of these regulations does the same and adds, in § 300.646(d)(1)(ii), that comprehensive CEIS must be directed to identifying and addressing the factors contributing to the significant disproportionality in the LEA. Regulations specifically prescribing how this is to be done cannot possibly address the myriad circumstances and needs that local officials will encounter when determining how best to provide comprehensive CEIS.

*Changes:* None.

#### Noncompliance With IDEA

*Comments:* One commenter requested that the Department not consider a finding of significant disproportionality as a finding of noncompliance with IDEA which, as explained in OSEP Memorandum 09–02 (October 17, 2008), would require correction at the individual and systems levels within one year of the finding. IDEA sections 616 and 642 (20 U.S.C. 1416 and 20 U.S.C. 1442). The commenter stated that a finding of significant disproportionality is merely an indication that policies, practices, and procedures warrant further attention due to the number of children of a race or ethnicity that have been identified, placed, or disciplined, as opposed to an indication that the LEA has taken inappropriate action. Further, the commenter, along with one other, argued that a State would not be able to enforce the correction of non-compliance for individual children affected by disproportionality with respect to identification or placement, as these are IEP Team decisions.

*Discussion:* The Department generally agrees with the commenters' description of a finding of significant disproportionality. An LEA found to have significant disproportionality is not necessarily out of compliance with IDEA; rather, as the commenter indicated, the significant disproportionality is, among other things, an indication that the policies, practices, and procedures in the LEA may warrant further attention.

If an LEA is identified with significant disproportionality, the State must provide for review and, if appropriate, revision of policies, practices, and procedures used in identification or placement in particular education

settings, including disciplinary removals, to ensure they comply with the requirements of IDEA.

If the State identifies noncompliance with a requirement of IDEA through this review, then under § 300.600(e), the State must ensure that the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. When verifying the correction of identified noncompliance, the State must ensure that the LEA has corrected each individual case of noncompliance, unless the child is no longer within the jurisdiction of the LEA and the State determines that the LEA is correctly implementing the specific regulatory requirement(s) based on a review of updated data such as data subsequently collected through on-site monitoring or a State data system, as explained in OSEP Memorandum 09–02, dated October 17, 2008.

*Changes:* None.

#### General Opposition to the Regulation

*Commenters:* A number of commenters expressed general opposition to the proposed regulations, which they understood to cut special education funding. A few commenters expressed general opposition to the Department's proposed regulations as a whole, without further clarification.

*Discussion:* Final §§ 300.646 and 300.647 do not change the level of funding under IDEA provided to States or their LEAs. To the extent that these commenters are referring to the required reservation of funds to provide comprehensive CEIS, we note that IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) makes the reservation mandatory upon a finding of significant disproportionality in an LEA. The Department does not have the authority to alter this statutory requirement. As to the commenters who express general opposition, we set out throughout this document our reasons for proceeding with these regulations.

*Changes:* None.

#### Comments on the Racial and Ethnic Disparities Report

*Changes:* None.

*Comments:* A few commenters expressed concern that they were unable to reproduce the example risk ratio thresholds or verify the calculations published in the Department's report, Racial and Ethnic Disparities in Special Education. Other commenters requested that we publish the business rules associated with the report.

*Discussion:* We apologize for any concern or confusion the report may



have caused. We attempted to include the necessary details and explanations with the report, which we believe are responsive to the request for business rules. It was, however, not necessary, nor was it our intent, for States to reproduce the risk ratio thresholds or minimum n-size used in the report. The Department did not intend for States to adopt the risk ratios or minimum n-size in the report (referred to as “cell size” in the NPRM and the report), and the report did not account for the flexibilities provided in the regulations. Rather, the purpose of including the report was to provide the public with a set of tables showing the number and percentage of LEAs that would be identified with significant disproportionality if the Department’s example risk ratio thresholds and minimum n-size were adopted by all 50 States and the District of Columbia.

*Changes:* None.

#### Timeline and Effective Date of the Regulation

*Comment:* A number of commenters expressed concerns about the timeline for the implementation of the new regulations. One commenter stated that, if the regulations go into effect immediately, it would be costly to require States to retroactively implement the standard methodology, determine significant disproportionality, and notify LEAs. The commenter added that this timeline would present a challenge for States that have already made their significant disproportionality determinations for the next year. The commenter concluded by recommending a phase-in period for the implementation of the new standard methodology and the consequences for LEAs.

Similarly, another commenter stated that the Department should first run a pilot year in selected States. This, the commenter said, would allow States to prepare new personnel to implement the regulations (as, according to the commenter, there has been personnel turnover since the last regulation of IDEA section 618(d)); provide the Department with additional time to prepare comprehensive guidance and technical assistance; provide the Department an opportunity to determine whether these regulations are likely to address racial and ethnic disparities; and support more accurate and complete national data, due to the availability of stronger guidance. Finally, other commenters requested that the Department give States and LEAs additional time to understand the new standard methodology and

proactively make efforts to address racial and ethnic disparities.

*Discussion:* The Department agrees that additional time is needed to implement these regulations. With time for compliance delayed, we believe there is no need for a phase-in year or a pilot year in selected States.

These regulations become part of the Code of Federal Regulations on January 18, 2017. However, States and LEAs will not be required to comply with these regulations until July 1, 2018, and, in the case of § 300.647(b)(3)(iii), States may delay including children ages three through five in the review of significant disproportionality with respect both to the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

The Department recognizes the practical necessity of allowing States time to plan for implementation of these final regulations, including time to amend the policies and procedures necessary for compliance. States will need time to develop the policies and procedures necessary to implement the standard methodology in § 300.647 and the revised remedies in § 300.646(c) and (d). In particular, States must consult with their stakeholders and State Advisory Panels under § 300.647(b)(1) to develop reasonable risk ratio thresholds, a reasonable minimum n-size, a reasonable minimum cell size, and, if a State uses the flexibility described in § 300.647(d)(2), standards for determining whether an LEA has achieved reasonable progress under § 300.647(d)(2) in lowering a risk ratio. States must also determine which, if any, of the available flexibilities under § 300.647(d) they will adopt. To the extent States need to amend their policies and procedures to comply with these regulations, States will also need time to conduct public hearings, ensure adequate notice of those hearings, and provide an opportunity for public comment, as required by § 300.165.

Accordingly, States must implement the standard methodology under § 300.647 in SY 2018–19. In doing so, States must identify LEAs with significant disproportionality under § 300.647(c)(1) in SY 2018–2019 using, at most, data from the three most recent school years for which data are available. We note that, in the case of discipline, States may be using data from four school years prior to the current year, as data from the immediate preceding school year may not yet be available at the time the State is making its determinations (*i.e.*, final discipline data from SY 2017–2018 may not yet be

available at the time during SY 2018–2019 the State is calculating risk ratios).

States must ensure that the identification of LEAs with significant disproportionality based on race and ethnicity in the identification, placement, or disciplinary removal of children with disabilities in SY 2018–2019, is based on the standard methodology in § 300.647, and then implement the revised remedies in accordance with § 300.646(c) and (d). In the spring of 2020, therefore, States will report (via IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection, OMB Control No. 1820–0689) whether each LEA was required to reserve 15 percent of their IDEA Part B funds for comprehensive CEIS in SY 2018–19.

States may, at their option, accelerate this timetable by one full year. States may implement the standard methodology in SY 2017–18 and assess LEAs for significant disproportionality using data from up to the most recent three school years for which data are available. States that choose to implement the standard methodology in § 300.647 to identify LEAs with significant disproportionality in SY 2017–2018 may also require those LEAs to implement the revised remedies in accordance with § 300.646(c) and (d).

Whether a State begins compliance in SY 2017–2018 or 2018–2019, it need not include children ages three through five in the review of significant disproportionality with respect both to the identification of children as children with disabilities and to the identification of children as children with a particular impairment, until July 1, 2020.

Finally, the delayed compliance date does not mean that States are excused from making annual determinations of significant disproportionality in the intervening years. States must still make these determinations in accordance with the current text of § 300.646.

*Changes:* None.

#### Appropriate Placement of Children With Disabilities

*Comments:* Commenters expressed concerns that the Department is encouraging the placement of children with disabilities in the regular classroom, irrespective of their needs or IEP Team decisions. One commenter expressed concern at the Department’s perceived suggestion that children placed in restrictive environments receive substandard education and do not receive appropriate services. The commenter noted that, while the Department stated its intention not to

limit services for children with disabilities who need them, its suggestion that over-identification results in restrictive placements and less challenging academic standards suggests otherwise. The commenter noted that private, specialized education programs that serve children with disabilities publicly placed by LEAs are required to meet the same academic standards as public schools and that each public agency is required to ensure that a continuum of alternative placements and services is available to children with disabilities.

*Discussion:* The Department agrees with commenters that it would be inappropriate to place all children with disabilities in the general education classroom 100 percent of the time without regard to their individual needs or IEP Team decisions, including decisions about supplementary aids and services that will enable the child to be involved in, and make progress in, the general education curriculum. Section 300.115 explicitly requires that each public agency ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. Further, § 300.116 requires that each child's placement decision must be made in conformity with the least restrictive environment (LRE) provisions in §§ 300.114 through 300.118. The LRE provision in IDEA section 612(a)(5), (20 U.S.C. 1412(a)(5)) and its implementing regulation in § 300.114 require, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, be educated with children who are not disabled. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Unnecessarily removing children with disabilities from an integrated setting and concentrating them in separate schools runs contrary to the integration goal that lies at the heart of the Americans with Disabilities Act (ADA). (See, e.g., 28 CFR 35.130(b)(1)(ii), (b)(1)(iv), (b)(2); see also, *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability" under title II of the ADA).) Additionally, under § 300.116, a child's placement must be determined at least annually, be based on the child's

individualized education program (IEP), and be as close as possible to the child's home. The overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child's unique needs and circumstances and, in most cases, based on the child's IEP. Further, eligibility determinations and placement decisions must be made at the local level with parental input and in accordance with the requirements of IDEA and its implementing regulations.

These regulations do not override either the requirement under § 300.306(a) that eligibility determinations must be made by a group of qualified professionals and the parent of the child or the requirement under § 300.116(a)(1) that placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and placement options.

However, to the extent that a State identifies significant disproportionality based on race or ethnicity with respect to identification and placement in an LEA, we believe it is fully appropriate, as IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(B)) requires, for there to be a review, and, if necessary, revision, of the policies, practices, and procedures of the LEA to ensure that eligibility and placement decisions are consistent with IDEA's focus on providing children with disabilities a free appropriate public education in the least restrictive environment based on their individual needs.

*Changes:* None.

*Comments:* Many commenters raised concerns that a standard methodology would be inconsistent with the individualized nature of IDEA. Some were concerned that proposed § 300.647(b) would lead LEAs to establish strict, albeit unofficial, quotas on the numbers of children with disabilities who could be identified, placed in particular settings, or disciplined in order for the LEA to avoid being identified with significant disproportionality. These commenters stated that this practice, or any uniform mathematical calculation, would fail to consider each child's individual needs. Other commenters had similar concerns, noting that identification and placement decisions are appropriately made by IEP teams on an individual basis—based on a full, fair, and complete evaluation, consistent with IDEA's requirements—and argued that it would be inappropriate for the Department to promulgate a regulation that could exert undue pressure on those decisions. These commenters said that discipline

decisions alone should be subject to analysis for significant disproportionality, as it was the only category that was an administrative decision and not the purview of IEP teams.

*Discussion:* Under IDEA section 601(d)(1)(A) (20 U.S.C. 1400(d)(1)(A)), one of the purposes of IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. The Department disagrees with the assertion that any uniform methodology for determining significant disproportionality in LEAs would be inconsistent with IDEA's emphasis on addressing the unique needs of individual children. In fact, one of the main goals of these regulations is to help ensure, through improved implementation of section 618(d) of IDEA, that identification and placement decisions are, in fact, based on the unique needs of individual children, rather than the result of problematic policies, practices, and procedures that may differentially and inappropriately affect children in various racial and ethnic groups.

Once an LEA is identified as having significant disproportionality, it would not be appropriate for the LEA to overturn prior decisions regarding the identification of children as children with disabilities or the placement of children with disabilities in particular educational environments simply to prevent future findings of significant disproportionality.

Moreover, it is a violation of IDEA for LEAs to attempt to avoid determinations of significant disproportionality by failing to identify otherwise eligible children as children with disabilities. IDEA sections 612(a)(3)(A) and 613(a)(1), 20 U.S.C. 1412(a)(3)(A) and 20 U.S.C. 1413(a)(1). Imposing artificial numerical targets on the groups responsible for making eligibility determinations under § 300.306(a)(1) or placement decisions under § 300.116(a)(1), or restricting their ability to make eligibility determinations or placement decisions based on the unique needs of the child are also inconsistent with IDEA. IDEA requires that the individual needs of children with disabilities, as described in their IEPs, be central to determining eligibility for IDEA services and appropriate placement.

Furthermore, IDEA and its implementing regulations currently include provisions to safeguard individualized decision-making. States must ensure that all LEAs, including

those determined to have significant disproportionality with respect to identification, implement the States' child find procedures. (20 U.S.C. 1412(a)(3) and (a)(11) and 20 U.S.C. 1416 (a)(1)(C)) (34 CFR 300.111, 300.149 and 300.600). States must also ensure that LEAs comply with specific evaluation procedures under IDEA section 614(b) (20 U.S.C. 1414(b)) to determine a child's eligibility for special education services and ensure that a child's placement in a particular education setting is based on his or her IEP (§ 300.116(b)) and is in the least restrictive environment (IDEA section 612(a)(5)) (20 U.S.C. 1412(a)(5)). Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)), States must provide for an annual review, and, if appropriate, revision of policies, practices, and procedures to ensure that LEAs identified with significant disproportionality are in compliance with IDEA's requirements. Through this review process and their monitoring procedures, States have an opportunity to ensure that LEAs identified with significant disproportionality appropriately implement child find, evaluation, and placement procedures.

Last, while the Department will require all States to use a standard methodology to implement IDEA section 618(d), we believe that § 300.647(b) provides States with sufficient flexibility to prevent unintended consequences associated with the use of a numerical formula to identify significant disproportionality. When risk ratio thresholds are set too low, we believe there is some risk that LEAs may face pressure to inappropriately limit or reduce the identification of children with disabilities to avoid a determination of significant disproportionality. For this reason, we believe it is important for States to take time to consult with their stakeholders and State Advisory Panels to ensure that, when setting risk ratio thresholds, they balance the need to identify significant disproportionality in LEAs with the need to avoid perverse incentives that would inhibit a child with a disability from being identified or placed in the most appropriate setting based on the determination of the IEP Team.

*Changes:* None.

#### Special Education—Generally

*Comments:* A few commenters asserted that special education must be seen as a support for children, not as bad for children or as a punishment, and that it was inappropriate for the Department to suggest that special

education services are generally of low quality.

*Discussion:* We agree that special education and related services provided in conformity with a child's IEP are essential for children with disabilities to receive a free appropriate public education. We do not agree that we in any way suggested that special education services are of low quality or that they are a punishment of any kind. To the extent that children in particular racial or ethnic groups are disproportionately identified as children with disabilities, placed in particular educational environments, and disciplined, it is possible that the special education and related services that those children are receiving are inappropriate for their specific needs. This says nothing about the quality of the services that LEAs provide to children with disabilities generally.

*Changes:* None.

#### Results-Driven Accountability

*Comments:* Some commenters expressed concerns that the proposed regulations divert OSEP away from results-driven accountability—which includes consideration of both compliance and results data in measuring States' performance under IDEA annual determinations process—and back towards IDEA compliance alone.

*Discussion:* We disagree. The Department's re-conceptualized IDEA accountability system—results-driven accountability—is designed to support States in improving results for children with disabilities, while continuing to assist States in ensuring compliance with IDEA's requirements. We believe that an effective accountability system is attentive to both goals. High quality results do not mitigate a State's responsibility to comply with the statute, just as compliance with the statute does not reduce the imperative for States to achieve improved results for children with disabilities. While significant disproportionality has not been included as a compliance indicator in the SPP/APR, States are still responsible for complying with IDEA section 618(d) (20 U.S.C. 1418(d)), and for ensuring that LEAs identified with significant disproportionality carry out the statutory remedies. Nothing in the regulations changes these obligations, and the Department maintains its responsibility to monitor and enforce the implementation of this requirement.

*Changes:* None.

## II. A Standard Methodology for Determining Significant Disproportionality (§ 300.647)

### General

*Comments:* The Department received several comments in support of proposed § 300.647(b), which would require States to follow a standard methodology to identify significant disproportionality in the State and the LEAs of the State. Many supported particular features of the proposed methodology, including the use of a standard method to compare racial and ethnic groups and minimum n-size requirements, and others expressed support for having a general or common methodology.

One commenter also noted that proposed § 300.647(b) addressed the GAO's recommendation to develop a standard approach for defining significant disproportionality. One commenter described observing racial and ethnic disparities within LEAs that went unaddressed by States and that State definitions of significant disproportionality were so complex that they were difficult to comprehend. Other commenters stated that the standard methodology in proposed § 300.647(b) would provide much needed clarity and draw attention to potentially inappropriate policies, practices, and procedures for the identification, placement, and discipline of children with disabilities. Some of these commenters stated that common standards are the only way for the public and the Department to judge the efforts of the States and to ensure transparency in this area.

*Discussion:* The Department appreciates the comments in support of the creation of a standard methodology to identify significant disproportionality in the identification, placement, and discipline of children with disabilities. We agree that these regulations will help to improve comparability of significant disproportionality determinations across States, increase transparency in how States make determinations of LEAs with significant disproportionality, improve public comprehension of a finding of significant disproportionality (or lack thereof), and address concerns raised by the GAO.

*Changes:* None.

*Comments:* Many commenters expressed concern that the standard methodology is unnecessary, has not been sufficiently reviewed, or should be further researched before its adoption is required to prevent potential harm to States that already address significant disproportionality well. Another

commenter argued that, without substantive analysis of the intended and unintended results, it was premature to implement the standard methodology at a national level. Further, the commenter recommended that the standard methodology be subject to a pilot test to explore fiscal, data analysis, and systems change issues after a full review of public comment. Another commenter recommended that the Department postpone issuing these regulations until it had better knowledge of appropriate methods for measuring racial differences. One commenter acknowledged the complexity involved in measuring racial and ethnic disparities but stated that there is no reason why a measurement strategy cannot be selected, implemented, and studied after the regulations are in place. The Department interpreted this comment to suggest that is not necessary to study, or pilot, a particular method of measuring racial and ethnic disparities before State use of the method is required by regulation.

*Discussion:* The Department appreciates all of the comments about § 300.647(b). However, for the reasons that follow, we do not believe it is necessary to remove the requirement that States use the standard methodology in § 300.647 to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State. Further, we disagree with commenters' concerns that the standard methodology requires further research before being implemented or could cause substantial harm to States that are doing well in addressing significant disproportionality.

In developing the standard methodology, the Department drew heavily from current State practices. As we noted in the NPRM, most States, as part of their methodology for comparing racial and ethnic groups for the purpose of identifying significant disproportionality, already use a version of the risk ratio, a minimum n-size or cell size, a threshold over which LEAs are identified with significant disproportionality, and up to three years of data when making an annual determination.

States also have flexibility to tailor the standard methodology to the needs of their populations. This flexibility includes the ability to set reasonable risk ratio thresholds and reasonable minimum cell sizes and n-sizes (all with input from stakeholders, including the State Advisory Panel), the choice to use up to three years of data before making a determination of significant disproportionality, and the option to not

identify LEAs that exceed the risk ratio threshold but are making reasonable progress under § 300.647(d)(2) in lowering their risk ratios in each of the two prior consecutive years. We provided this flexibility because we believe it is appropriate for States to tailor their implementation of these regulations to their unique circumstances—and, as they feel necessary, make adjustments—rather than delay the implementation of the regulations. Nothing in the regulations prohibits States from changing their risk ratio thresholds, population requirements, or flexibilities in accordance with § 300.647 if, after implementation of the regulations, they determine that reasonable adjustments are needed.

The Department appreciates the suggestion that States pilot the standard methodology and analyze its effects prior to adopting the regulations nationwide; however, we decline to accept the suggestion. Given that the standard methodology is largely based on approaches currently in use among States, we agree with the commenter who asserted that additional study of the standard methodology after the regulations are in place, rather than before, is appropriate. Accordingly, we plan to evaluate the impact of these regulations, including the implications of using risk ratios to compare racial and ethnic groups. We also believe that the considerable flexibility provided to States will allow researchers to collect and study valuable data regarding different applications of the standard methodology across States.

*Changes:* None.

*Comments:* One commenter suggested that the States' loss of flexibility to define significant disproportionality may create other, more significant forms of inequity and inappropriate identification. The commenter did not further detail the types of inequity that might arise.

*Discussion:* While § 300.647(b) requires that all States follow a standard methodology to identify significant disproportionality, we believe that these regulations provide States with sufficient flexibility to tailor their implementation to their unique circumstances. This flexibility includes the ability to set reasonable risk ratio thresholds, reasonable minimum cells sizes and n-sizes (with input from stakeholders, including the State Advisory Panel), the choice to use up to three years of data before making a determination of significant disproportionality, and the option to not identify LEAs that exceed the risk ratio threshold but are making reasonable

progress under § 300.647(d)(2) in lowering their risk ratios in each of the two prior consecutive years.

*Changes:* None.

*Comments:* Numerous commenters noted that each State's disproportionality processes have been approved by the Department and recommended that, in lieu of these regulations, the Department address any concerns regarding disproportionality, or definitions of significant disproportionality, State by State.

*Discussion:* The Department does not believe that approach would achieve the goals of improved transparency and consistency among States. We believe that the standard methodology adopted in these final regulations is a necessary step to achieve those goals.

*Changes:* None.

*Comments:* One commenter was concerned about the Department's contention that States' current methodologies of identifying significant disproportionality were inappropriate, given that the Department's contention is based on a data analysis that uses a methodology different from the States' methodologies.

*Discussion:* The Department disagrees that the basis for these regulations is a single analysis conducted by the Department. The standard methodology provides basic guidelines to facilitate greater consistency among States, consistent with the GAO's recommendations, and to promote greater transparency in State efforts to address significant disproportionality. The recommendations of the GAO, public comments the Department received in a response to a 2014 request for information (79 FR 35154), and the Department's review of State definitions of significant disproportionality all informed the Department's decision to require that all States follow a standard methodology.

*Comments:* One commenter stated that, because there is no flexibility once an LEA is identified with significant disproportionality, States make decisions about their methodologies to ensure LEAs are not inappropriately identified for arbitrary factors unrelated to policies, practices, and procedures.

*Discussion:* While it is important for States to appropriately identify LEAs for significant disproportionality, we disagree with the commenter that identification of significant disproportionality is arbitrary if it is based on factors unrelated to an LEA's policies, practices, or procedures. IDEA section 618(d) (20 U.S.C. 1418(d)) is not intended solely to address significant disproportionality that results from inappropriate policies, practices, or

procedures. Under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)), a review of policies, practices, and procedures is a consequence of, not a part of, a determination of significant disproportionality. Under this provision, once LEAs are identified with significant disproportionality, States are required to ensure the review and, if appropriate, revision of the LEAs' policies, practices, and procedures to ensure they comply with IDEA.

*Changes:* None.

*Comments:* One commenter argued that the ability to make comparisons among States, if that is the Department's goal with these regulations, does not result in meaningful discussion or problem-solving as each State is unique.

*Discussion:* By requiring that all States follow a standard methodology, it is the Department's intent to foster greater comparability in the approaches States use to identify significant disproportionality. While States will have flexibility to determine their own reasonable risk ratio thresholds, to determine reasonable population requirements, such as a minimum n-size or cell size, and to use up to three consecutive years of data, we believe the standard methodology provides comparability that is key to promoting transparency in the States' implementation of IDEA section 618(d), and, in turn, meaningful discussion with stakeholders and State Advisory Panels regarding the State's progress in addressing significant disproportionality. These comparisons among States are currently not possible, given, for example, the vastly different methods States currently use to compare racial and ethnic groups, as was described in the NPRM.

*Changes:* None.

*Comments:* One commenter expressed concern that the Department's standard methodology is inconsistent with IDEA. The commenter stated that, when reauthorizing IDEA in 2004, Congress expanded the law's focus on issues related to disproportionality by including consideration of racial disparities and by adding certain enforcement provisions out of a "desire to see the problems of over-identification of minority children strongly addressed." The commenter noted that Congress did not define the term "significant disproportionality" or impose a methodology to determine whether significant disproportionality based on race or ethnicity in the State and its LEAs is occurring. According to the commenter, each State was left to choose its own methodology for determining whether there is significant disproportionality in the State and its

LEAs with respect to identification, placement, and discipline of racial and ethnic minority children with disabilities. The commenter argued that this intent was reflected in final IDEA Part B regulations, promulgated by the Department in August 2006, which 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." The commenter stated that, in 2006, the question of whether to impose a methodology for determining significant disproportionality was rejected by the Department as inconsistent with the law. The commenter also argued that an expansion of the Department's authority to determine whether States' risk ratio thresholds are reasonable conflicts with congressional intent, as the law does not support a national standard for determining significant disproportionality. Other commenters expressed similar concerns, stating that proposed § 300.647(b) was an example of Federal overreach—an improper attempt to control local education.

*Discussion:* We agree with the commenter that, at the time of the 2006 regulations, the Department declined to include a definition of significant disproportionality in the regulations. At the time, the Department stated that there are multiple factors to consider in making a determination of significant disproportionality—such as population size, the size of individual LEAs, and composition of State population—and determined that States were in the best position to evaluate those factors. 71 FR 46738. However, the Department did not state that a definition of significant disproportionality would be inconsistent with the law.<sup>2</sup>

The fact that the Department chose not to regulate on these issues in 2006, based on information and experience available at the time, does not preclude the Department from doing so now under our authority to issue regulations under IDEA section 607(a) (20 U.S.C. 1406(a)). Under IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)), States must collect and examine data to determine each year whether significant disproportionality based on race and ethnicity is occurring in the State and its LEAs with respect to the

<sup>2</sup> In the 2006 IDEA regulation, just prior to the Department's discussion regarding a definition of significant disproportionality, the Department did note that another commenter's suggestion was inconsistent with IDEA. This commenter had proposed that the Department amend the regulation to clarify that the determination of significant disproportionality should be based on a review of LEA policies and procedures, and not just a numerical determination. 71 FR 46738.

identification, placement, and discipline of children with disabilities. The Department has the authority to issue regulations to the extent regulations are necessary to ensure compliance with the requirements of Part B of IDEA (IDEA section 607(a) (20 U.S.C. 1406(a)). As we noted in the NPRM, the Department concurs with findings by the GAO that the variability in State definitions of significant disproportionality has made it difficult to assess the extent to which States are appropriately identifying LEAs with significant disproportionality. Based on the GAO's findings, comments received in response to a June 2014 request for information on addressing significant disproportionality under IDEA section 618(d), and the field's experience with IDEA section 618(d) over the last 12 years, the Department now believes that these proposed changes are necessary to ensure that States meaningfully identify LEAs with significant disproportionality and that the statutory remedies are implemented in a manner that addresses any significant disproportionality identified.

We do not believe that standardization of an analysis required under a Federal statute, consistent with the authority provided to us in that same statute, while providing a great deal of flexibility to States, constitutes Federal overreach. Nothing in these regulations requires the adoption of particular educational practices at the local level or seeks to exert control of local education decision-making.

*Changes:* None.

*Comments:* One commenter noted that Directed Questions #5, #9, #10, and #12 all inquire whether the Department should place future mandates, requirements, or restrictions upon the States relating to creation of risk ratio thresholds or State flexibility to define "reasonable progress." The commenter stated that additional Federal oversight in the form of mandates, requirements, or restrictions is unwarranted and inappropriate. The commenter claimed the States and their respective State boards or departments of education are most knowledgeable about the issues affecting them. As such, the commenter argued that those issues are best left to the discretion of individual States.

*Discussion:* As the Department has explained in detail, both in the NPRM and in this document, we believe these regulations are necessary to ensure consistent State action in examining LEAs for significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities. Again, as the GAO found in its 2013

study, only two percent of more than 15,000 LEAs nationwide were required in SY 2010–11 to provide comprehensive CEIS, and the Department found, in SY 2012–13 that 22 States did not identify any LEAs as having significant disproportionality.

That said, we agree that flexibility is necessary for States, and these final regulations give States the flexibility to determine reasonable risk ratio thresholds, reasonable minimum cell sizes and n-sizes, and standards for reasonable progress after consultation with stakeholders and State Advisory Panels. Section 300.647(d) of the final regulations provides additional flexibilities to States.

Under § 300.647(d)(1) a State is not required to identify an LEA with significant disproportionality until it has exceeded the risk ratio threshold set by the State for up to three years. Under § 300.647(d)(2), a State is not required to identify an LEA that has exceeded the risk ratio threshold with significant disproportionality until the LEA ceases to make reasonable progress in lowering its risk ratio in each of two prior consecutive years.

*Changes:* None.

*Comments:* One commenter stated that it is discriminatory to create a formula for how many children of color can be identified as having disabilities. Another commenter stated that the Department's proposal would force LEAs to serve children based on the Department's understanding of how many children should be served, rather than on the individual needs of each child. A number of commenters argued that individual children need to be assessed without consideration of their race, ethnicity, socioeconomic status, sexual orientation, or gender.

*Discussion:* The Department agrees with commenters that the determination of whether a child is eligible for special education services must not include consideration of his or her race, ethnicity, socioeconomic status, sexual orientation, or gender, or any numerical formula associated with these characteristics. LEAs must also follow specific evaluation procedures under IDEA section 614(b) (20 U.S.C. 1414(b)) to determine a child's eligibility for special education services.

However, we disagree that the standard methodology under § 300.647(b) represents a formula indicating how many children of color, or children in general, may be identified as children with disabilities. As we note elsewhere in this section, we believe that restricting the ability to make eligibility determinations by imposing artificial numerical targets on the groups

responsible for making eligibility determinations under § 300.306(a)(1) is inconsistent with IDEA. The standard methodology is not intended to guide determinations of eligibility for special education; rather, it is designed to help States to appropriately determine whether significant disproportionality, based on race and ethnicity, is occurring within an LEA with respect to the identification, placement, and discipline of children as children with disabilities. For LEAs determined to have significant disproportionality, the statute requires that the State provide for a review, and, if necessary, revision of policies, practices, and procedures to ensure compliance with IDEA and require each LEA to implement comprehensive CEIS to address the factors contributing to the significant disproportionality.

*Changes:* None.

*Comments:* One commenter stated that the proposed regulations do little to address significant disproportionality and that the only way to address disparities in identification is to provide guidance to States and LEAs on the appropriate identification of children with disabilities from diverse backgrounds.

*Discussion:* While we generally agree that guidance about the appropriate identification of children with disabilities would be helpful to States and LEAs, we do not believe it is the only way to address disparities in identification. By requiring States to use a standard methodology, it is our intent to help States to make more appropriate determinations of significant disproportionality, and, consistent with IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)), help ensure that LEAs identified with significant disproportionality undergo a review, and, if necessary, revision, of policies, practices, and procedures to ensure compliance with IDEA. We believe that guidance regarding the appropriate identification of children as children with disabilities will be more valuable when paired with strategies that require LEAs determined to have with significant disproportionality to take steps to review their policies, practices, and procedures.

Consistent with the commenters' suggestion, it is the Department's intent to publish guidance to help schools to prevent racial discrimination in the identification of children as children with disabilities, including over-identification, under-identification, and delayed identification of disabilities by race.

*Changes:* None.

*Comments:* A large number of commenters opposed the standard methodology based on their view that any standard method for calculating disproportionality is inherently flawed because numbers and data cannot reveal the cause of the disproportionality.

*Discussion:* While we agree with commenters that data analysis does not identify or address the causes of numerical disparities, the identification of LEAs as having significant disproportionality nevertheless is a first step that will require LEAs to identify and address the causes of the significant disproportionality. Under § 300.646(d)(1)(ii), in implementing comprehensive CEIS, LEAs identified with significant disproportionality are required to identify and address the factors contributing to the significant disproportionality.

*Changes:* None.

*Comments:* Many commenters stated that any rules to address disproportionality in special education must be based on solid theoretical foundations and research-based, reliable mechanisms for the identification of disproportionality that are not skewed by extraneous factors and not based on single, arbitrary calculations.

*Discussion:* While we generally agree that efforts to address racial and ethnic disparities in special education should be informed by research, theory, and reliable data, we also interpret IDEA section 618(d) to require States to make a determination of significant disproportionality based on a numerical calculation and to take specific steps to address any significant disproportionality identified. This has been our long-standing position and we believe that it is the best interpretation based on the language in section 618(d) that requires States to collect and examine "data" to determine if significant disproportionality is occurring. Congress placed the significant disproportionality provision in section 618(d) and under section 618(a), States are required to provide "data" on the number and percentage of children with disabilities by race and ethnicity who are: Receiving FAPE; participating in regular education; in separate classes, separate schools or residential facilities; removed to interim alternative education setting; and subject to long-term suspensions and expulsions and other disciplinary actions. To develop a standard methodology consistent with the requirements of IDEA section 618(d), the Department drew heavily from current State practices implemented and adjusted over the course of the 12 years since the last reauthorization of IDEA.

As we noted in the NPRM, most States, as part of their methodology for comparing racial and ethnic groups for the purpose of identifying significant disproportionality, already use a version of the risk ratio and a threshold over which LEAs are identified with significant disproportionality. Further, States use population requirements—such as a minimum n-size or cell size—and up to three years of data when making an annual determination to offset the volatility of risk ratios.

The standard methodology under § 300.647 includes these features, but also provides States with flexibility to tailor them to the needs of their populations. This flexibility includes the ability to set reasonable risk ratio thresholds, reasonable minimum cell sizes and n-sizes (with input from stakeholders, including the State Advisory Panel), the choice to use up to three years of data before making a determination of significant disproportionality, and the option to not identify LEAs that exceed the risk ratio threshold but are making reasonable progress, under § 300.647(d)(2), in lowering their risk ratios in each of the two prior consecutive years.

Given that the standard methodology is largely based on approaches currently in use among States and includes a large degree of flexibility, it will help States to make appropriate, and not arbitrary, determinations of significant disproportionality.

*Changes:* None.

*Comments:* Several other commenters requested that the analysis for significant disproportionality include not only a risk ratio or other mathematical calculation but also a review of factors such as inappropriate identification, discriminatory practices, State performance indicators, graduation rates, and academic performance. One commenter suggested that the Department use a two-step approach to ensure that States are focusing on LEAs where compliance indicators may have impacted the performance of children with disabilities. The Department would first examine performance indicators and identify agencies significantly discrepant from the median. This information would then be combined with data from compliance indicators, including information on disproportionality, to determine how to provide States and LEAs with technical assistance and support. A few commenters suggested that LEAs first undergo a review for discriminatory practices, and, if none exist, no further action should be taken.

*Discussion:* Based on the plain language of IDEA section 618(d) (20 U.S.C. 1418(d)), States are required to make a determination of whether significant disproportionality, based on race and ethnicity, is occurring by collecting and examining data. We interpret this language to limit States' determinations of significant disproportionality to a review of the numerical disparities between racial and ethnic groups with respect to identification, placement, and discipline. Given this language, we do not believe it would be consistent with IDEA to allow the multi-factor standard methodology for determining significant disproportionality that the commenters suggested.

*Changes:* None.

*Comments:* Several commenters argued that, if States must adopt a standard methodology for determining significant disproportionality, then States need greater flexibility to exempt LEAs from reserving Part B funds for comprehensive CEIS.

*Discussion:* Once an LEA has been determined to have significant disproportionality in identification, placement or discipline, the LEA is required under IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) to reserve the maximum amount of funds under section 613(f) to provide comprehensive CEIS. IDEA does not include any provision that would allow the Department or States to waive the statutory remedies for LEAs identified with significant disproportionality.

*Changes:* None.

*Comments:* Some commenters likened the standard methodology to a one-size metric that would fail to account for factors that might influence measurements of significant disproportionality. These include, according to one commenter, the size of the LEA, its location, and the popularity of an LEA's programs. Similarly, one commenter noted that data may be misinterpreted in a one-size-fits-all model, especially where there are outliers that do not fit the model.

*Discussion:* The Department disagrees with the assertion that the proposed standard methodology is a one-size-fits-all approach to identifying significant disproportionality. The final regulations provide States with a great deal of flexibility within the standard methodology to identify significant disproportionality only in those LEAs with the greatest racial and ethnic disparities.

Section 300.647(b)(1) of the final regulations requires States to set reasonable risk ratio thresholds to determine the threshold above which an

LEA may be identified with significant disproportionality and to determine reasonable minimum cell sizes and n-sizes to exclude from their review for significant disproportionality those racial and ethnic groups within LEAs with too few children to calculate stable risk ratios. These standards must be based on advice from stakeholders, including State Advisory Panels. Section 300.647(d)(1) of the final regulation allows States flexibility not to identify an LEA until it has exceeded the risk ratio threshold for up to three consecutive years. Lastly, § 300.647(d)(2) allows States not to identify LEAs that exceed the risk ratio thresholds if LEAs are making reasonable progress in lowering their risk ratios in each of the two prior consecutive years.

*Changes:* None.

*Comments:* Many commenters requested that the standard methodology be flexible enough to allow LEAs to appeal any findings of significant disproportionality that are outside the control of school personnel. One commenter requested that the Department establish a waiver system, whereby LEAs could exceed risk ratio thresholds for the identification of children with disabilities without a finding of significant disproportionality, so long as the LEAs provide adequate justification.

Another commenter suggested that LEAs with specialized programs, when identified with significant disproportionality, have the option to submit an explanation to the State as to why their numerical disparities are not indicative of any inappropriate identification, placement, or discipline of children. The commenter suggested that the State then consider this explanation, along with compliance data, to determine whether a finding of significant disproportionality is appropriate.

Two commenters requested that States have flexibility to consider mitigating circumstances; the commenters shared that, as a result of one LEA's location near a children's hospital, the LEA has an identification rate for autism much higher than the State rate.

*Discussion:* The Department appreciates the request to create a waiver and appeals system for certain LEAs with risk ratios above the State-selected risk ratio threshold. However, IDEA does not allow for such a system, and we believe there are sufficient flexibilities in the final regulations to address the commenters' underlying concerns. Further, the Department believes that, even if it had the authority

to allow this system, it would be inconsistent with the goal of maximizing consistent enforcement of the statute and comparability of data across States, which were issues raised by the GAO.

*Changes:* None.

*Comments:* Several commenters included a request that States be allowed to waive the requirements of IDEA section 618(d) for very small LEAs.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and analyze data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. There is no provision in the statute that allows a State to exempt an LEA from this analysis solely because of the size of its overall enrollment.

However, with these regulations, it is our goal to help ensure that LEAs with significant disproportionality based on race and ethnicity in identification, placement, or discipline are appropriately identified and that the significant disproportionality is appropriately addressed. For certain racial and ethnic groups within small LEAs, specifically those groups with very small populations, the risk ratio method of measuring significant disproportionality is susceptible to volatility—the possibility that small changes in population will result in large changes in the risk ratio that do not represent any systemic problems giving rise to significant disproportionality. Therefore, in order to ensure that LEAs are not inappropriately identified because their data would not produce valid results, § 300.647(c) of the final regulation allows States to exclude from their review any racial and ethnic groups within LEAs that do not meet the State-set population requirements. This is consistent with various IDEA provisions that require States and LEAs to use valid and reliable data when meeting IDEA requirements. (See, IDEA section 614(b)(3)(A)(iii), requiring public agencies to use assessments that are valid and reliable; IDEA section 616(b)(2)(B)(i), requiring States to report valid and reliable data in their State Performance Plans/Annual Performance Reports (SPPs/APRs); and IDEA section 616(i)(1), requiring the Secretary to review the data collection and analysis capacity of States to ensure that data and information determined necessary for implementation of section 616 is collected, analyzed, and accurately reported to the Secretary).

*Changes:* None.

*Comment:* Several commenters requested that States be allowed to waive the standard methodology in proposed § 300.647(b) in extraordinary circumstances, including environmental disasters that may impact children's health, such as the recent water contamination in Flint, Michigan. Other commenters urged the Department to allow States discretion to determine the appropriate set-aside amount if an LEA is suffering both a fiscal and environmental crisis, or if there should even be a set-aside for LEAs that are recovering from a substantial health or environmental crisis, as the demand for basic special education programs and services for eligible children may be extremely high. One commenter urged the Department to consider the needs of children in these circumstances, rather than simple measures of disparity, to determine whether the identification of significant disproportionality is appropriate.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to 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. A specific exemption for LEAs that have experienced an environmental disaster, or other extraordinary circumstances, is not contemplated under IDEA. We think it would be inappropriate to assume that all such crises would create, or worsen, prolonged and significant racial and ethnic disparities in special education. Therefore, we do not think it would be appropriate to exempt LEAs that have experienced an environmental disaster or other extraordinary circumstances from the analysis for significant disproportionality.

If an LEA is identified with significant disproportionality, IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)) requires the State to provide for the review and, if necessary, revision, of the LEA's policies, practices, and procedures to ensure they comply with IDEA. The section also requires the LEA to publicly report on any revisions and reserve 15 percent of its IDEA Part B funds to provide comprehensive CEIS. Specifically, IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) requires an LEA identified with significant disproportionality to reserve the maximum amount of funds under IDEA section 613(f), which is 15 percent of its IDEA Part B funds, to provide comprehensive CEIS. Therefore, the Department does not have the authority to allow LEAs to adjust the amount that they are required to reserve for comprehensive CEIS.

*Changes:* None.

*Comments:* Some commenters shared their concerns that LEAs with a high population turnover due to highly mobile families or school choice might be inappropriately identified with significant disproportionality under the standard methodology in § 300.647(b). One commenter suggested that, if a school's mobility rate is significantly higher than the State average, the standard methodology should not be applied. One commenter argued that there is nothing that an LEA can do to address significant disproportionality when it is the result of children simply enrolling or moving into the LEA. Another commenter requested that the Department address the issue of transfers, both interstate and intrastate, and their potential impact on findings of significant disproportionality. One commenter stated that, in one LEA, families are transient due to military connections, making it highly likely that the children transferring into the LEA were identified with a disability outside of the LEA. One commenter supported the exclusion of transfer children from the LEA counts of children with disabilities used to determine significant disproportionality. Last, one commenter opposed the omission of highly mobile children from the State's review for significant disproportionality because children transfer in and out of LEAs, and, in general, this movement does not result in a significant net gain in children. Further, the commenter argued that omitting those children from the analysis would be burdensome for States.

*Discussion:* The Department recognizes that particular LEAs are more likely to serve high numbers of highly mobile children, including children of military families. In such LEAs, it is particularly likely that eligibility determinations were initially made by LEAs other than the one currently providing special education and related services to the student. Highly mobile children include children experiencing frequent family moves into new school districts, such as military-connected children, migrant children, children in the foster care system, and children who are homeless. There is no reason States cannot determine, in accordance with § 300.647, whether significant disproportionality is occurring in LEAs with highly mobile children. To the extent that highly mobile children make an LEA vulnerable to large swings in the risk ratio from year to year, the standard methodology will help to prevent inappropriate identification due to rapid changes in enrollment by allowing States to take into consideration up to



three years of data prior to making a determination of significant disproportionality.

However, under IDEA section 614(a)(1) (20 U.S.C. 1414(a)(1)), all children who are suspected of having a disability and who are in need of special education and related services, including highly mobile children, must be evaluated in a timely manner and without undue delay so that eligible children can receive a free appropriate public education (FAPE). (34 CFR 300.101, 300.111, and 300.201.) When a child transfers to a new school district in the same school year, whether in the same State or in a different State, after the previous school district has begun but has not completed the evaluation, both school districts must coordinate to ensure completion of the evaluation. This must occur as expeditiously as possible, consistent with applicable Federal regulations. Under IDEA section 614(a)(2)(B) (20 U.S.C. 1414(a)(2)(B)), all LEAs are required to reevaluate each child with a disability not more frequently than once a year, and at least once every three years, unless the child's parent and the LEA agree otherwise. As such, each LEA must ensure, through proper implementation of its child find procedures, appropriate identification and placement of all children with disabilities for whom it is responsible for making FAPE available, regardless of how long that child has resided in the LEA.

For this reason, and because providing that exception would be particularly complex and burdensome to implement, the Department declines the recommendation to exempt highly mobile children, or to exempt LEAs with large numbers of mobile children, from the State's analysis for significant disproportionality.

*Changes:* None.

*Comments:* A few commenters urged the Department to allow States, in implementing § 300.647(b)(3), to count only those children with disabilities identified by the LEA. Of these, one commenter noted that it would not be fair for LEAs to be held accountable for children who are not identified by the LEA's own school personnel. Another commenter stated that there are some LEAs, such as vocational LEAs and charters schools, that educate children with disabilities identified by other LEAs. According to the commenter, these LEAs are often identified with disproportionate representation and would likely be inappropriately identified with significant disproportionality under the Department's proposed standard methodology. Similarly, another

commenter recommended that States have flexibility to determine if the disproportionality based on race or ethnicity is due not to the actions of the LEA but to disparities in the enrollment of children previously identified with disabilities.

*Discussion:* Children with disabilities, like all children, may transfer from school to school for a variety of reasons, ranging from a family relocation—including relocations related to the military—to homelessness, foster care, or because they are members of migrant families, to name a few. The Department has provided guidance to States regarding how they should collect and report IDEA section 618 data, including child count data. As explained in the guidance, children who reside in one LEA but received services in another LEA should be reported by the LEA that has responsibility for providing a free appropriate public education to the children. OSEP Memorandum 08–09, Response to Question 18 and FILE C002, 2013. In general, the Department expects that States will use the same data annually submitted to the Department under IDEA section 618 to make determinations of significant disproportionality.

Further, as we discussed elsewhere in this section, the Department believes that the standard methodology contains sufficient flexibility to prevent the inappropriate identification of LEAs with specialized programs as having significant disproportionality.

*Changes:* None.

*Comments:* Many commenters requested that States have the flexibility to exempt an LEA from examination for significant disproportionality under IDEA section 618(d) if the LEA houses any residential facilities, foster homes (or high numbers of children in foster care), or group homes. One commenter stated that the standard methodology does not properly account for residential placements and the locations of facilities, including incarcerated children.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to 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. However, a specific exemption for LEAs that house residential facilities, foster homes, or group homes is not contemplated under IDEA. We also do not believe that exemption would be appropriate. There could be significant racial and ethnic disparities in LEAs that house residential facilities, foster homes, or group homes, and nothing prevents the State from doing a reliable

data analysis in those LEAs. For these reasons, the Department declines to exempt an LEA from examination for significant disproportionality under IDEA section 618(d) if it houses any residential facilities, foster homes (or high numbers of children in foster care), or group homes.

The Department has previously provided guidance on how children with disabilities placed in a residential facility or group home by an educational or noneducational agency should be counted for the purpose of calculating significant disproportionality. All children with disabilities placed in a residential facility or group home in the same State by an educational agency must be included in the calculation of significant disproportionality. However, a State should assign responsibility for counting children with disabilities placed in out-of-district placements to the LEA that is responsible for providing FAPE for those children, rather than the LEA in which the child has been placed.

Children with disabilities placed in a residential facility or group home in a different State by an educational agency should be included in a State's calculation of significant disproportionality in the LEA responsible for providing FAPE for that child (the placing LEA).

Children with disabilities placed in residential facilities or group homes in the same State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from a State's calculation of significant disproportionality if the State has valid and reliable procedures for determining which children should be excluded.

Children with disabilities placed in a residential facility or group home in a different State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from the calculation of significant disproportionality by both the State in which the child resides and the State where the residential facility or group home is located, if the State has valid and reliable procedures for determining which children should be excluded. (See, IDEA section 618(d); Questions and Answers on Disproportionality, June 2009, Response to Question B–1.)

*Changes:* None.

*Comments:* One commenter shared that, in one State, only LEAs—and not State-run facilities or group homes housed within LEAs—are accountable for significant disproportionality.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and examine data to determine whether the LEAs within the State have significant disproportionality. In general, the term “local educational agency” means a public board of education or other public authority legally constituted within a State for administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools. (See, IDEA section 602(19) (20 U.S.C. 1401(19) and 34 CFR 300.28.) For this reason, we do not expect States to determine whether State-run facilities or group homes housed within LEAs have significant disproportionality, unless those facilities or group homes are LEAs under § 300.28.

*Changes:* None.

*Comments:* A number of commenters responded to Directed Question #1 in the NPRM, which requested public input about the appropriate application of the standard methodology to LEAs serving only children with disabilities and LEAs with special schools and programs. We received comments with varying suggestions.

Several commenters stated that special schools and programs should be excluded from a State’s review of an LEA for standard methodology, whereas others stated that these special schools must be included. Numerous commenters opposed to including special schools or programs in the identification of significant disproportionality stated that States should have discretion to include children in specialized schools in their review for significant disproportionality. One commenter stated that, in one State, only LEAs are held accountable for significant disproportionality—not schools serving only children with disabilities or offering specialized programs. Another commenter inquired whether programs serving children with disabilities from multiple LEAs should be excluded from the State’s determination of significant disproportionality.

One commenter noted that, while LEAs specially constituted as special education LEAs may have the appearance of disproportionality, these LEAs have legitimate reasons for overrepresentation of certain racial and ethnic populations. One commenter stated that the standard methodology

cannot be used, as the risk ratio cannot be calculated, for an LEA that enrolls only children with disabilities. This commenter suggested that States monitor disproportionality in those LEAs through performance reports.

*Discussion:* The Department disagrees with the commenters that requested that LEAs with specialized schools or programs, and the children within those schools or programs, should be excluded from a review of significant disproportionality. IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State. As a general matter, therefore, if a special school or program is an LEA, consistent with the definition of LEA in § 300.28, and serves children with and without disabilities, the State must apply the standard methodology in § 300.647 to determine if significant disproportionality is occurring in that LEA, and all of the remedies in § 300.647(c) and (d) apply.

However, the Department has carefully considered the commenters’ concerns about LEAs serving only children with disabilities. In accordance with IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)), a State must annually collect and examine data to determine, using the standard methodology under § 300.647, if significant disproportionality is occurring in LEAs that serve only children with disabilities. Consistent with IDEA section 618(d)(2)(A) and (C), and § 300.346(c), if such an LEA is identified with significant disproportionality, the State must provide for the 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 they comply with the IDEA. The State must also require the LEA to publicly report on any revisions.

However, we note that it would be impossible for LEAs that serve only children with disabilities to comply with the requirement in IDEA section 618(d)(2)(B) following a determination of significant disproportionality. Under our interpretation of that section, LEAs must use at least some of the IDEA Part B funds reserved for comprehensive CEIS to serve children without disabilities, and we have adopted this interpretation in § 300.646(d)(3). This would require an LEA that serves only children with disabilities to reserve IDEA Part B funds to provide comprehensive CEIS, which under § 300.646(d)(3) must include services to

children without disabilities, a population that the LEA does not serve. Therefore, an LEA that serves only children with disabilities is not required to reserve 15 percent of its IDEA Part B funds to provide comprehensive CEIS.

That said, suggestions that specialized schools or programs that are housed in an LEA that serves children with disabilities and children without disabilities or only children with disabilities should be exempt from the standard methodology are inconsistent with the goal of addressing significant disproportionality, by race or ethnicity, in the most restrictive placements. By allowing States to ignore children in those placements when reviewing LEAs, the Department could inadvertently create an incentive to place children with disabilities in special schools—instead of separate classrooms. Further, as noted earlier, a State should assign responsibility for counting a child who is placed in a specialized school or program housed in an LEA to the “placing LEA,” if that LEA remains responsible for providing FAPE to that child, rather than to the LEA in which the specialized school or program is housed.

*Changes:* The Department has added § 300.646(e) to clarify that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS.

*Comments:* A few commenters suggested that States have flexibility to exclude from their review children with disabilities who are placed in special schools by non-education agencies, such as courts or mental health agencies.

*Discussion:* Children with disabilities placed in special schools in the same State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from a State’s calculation of significant disproportionality, if the State has valid and reliable procedures for determining which children should be excluded. Children with disabilities placed in a special school in a different State by a noneducational agency (e.g., court systems; departments of corrections; departments of children, youth and families; departments of social services; etc.) may be excluded from the calculation of significant disproportionality by both the State in which the child resides and the State where the residential facility or group home is located, if each State has valid and reliable procedures for determining which children should be excluded. (See, IDEA section 618(d); and Questions and Answers on

Disproportionality, June 2009, Response to Question B-1.)

*Changes:* None.

*Comments:* One commenter stated that, while LEAs specially constituted as special education LEAs may have the appearance of disproportionality, these LEAs have legitimate reasons for overrepresentation of certain racial and ethnic populations. Another commenter suggested that States, when calculating risk ratios for LEAs with specialized schools, use an alternate method of calculating risk for the racial or ethnic group of interest. The Department understood this commenter to suggest that States adjust the denominator used to calculate risk to include children from the racial or ethnic group from that LEA and children from the same racial or ethnic group from a similarly sized LEA without children with disabilities. A few commenters suggested that States should have discretion to include additional calculations of disproportionality of the LEAs with special schools. Commenters in favor of including special schools indicated that the LEAs are responsible for the children within their LEAs and, therefore, should be held accountable for those children. One commenter stated that, because children in one State remain assigned to the LEA responsible for accountability and reporting purposes, specialized populations have not had an effect on the State's ability to capture significant disproportionality data.

One commenter stated that, in its State, the data from the children placed in the specialized school are included in the receiving LEA's counts of children. A number of commenters expressed a belief that when a child is placed in a specialized school, the referring LEA should retain the child's data for this count. One commenter requested that the Department clarify the impact of the standard methodology on programs serving children with disabilities across multiple LEAs, and clarify the implications of the standard methodology for the LEA in which the program operates and LEA in which attending children are residents. The commenter asked about the possibility of sharing accountability for these children between the resident and operating (or "sending" and "receiving") LEAs.

*Discussion:* The Department considered the different approaches commenters recommended. As noted earlier, using the standard methodology under § 300.647, a State must annually collect and examine data to determine if significant disproportionality is occurring in LEAs that serve only

children with disabilities. However, we have clarified in § 300.646(e) that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS.

That said, there is no specific exemption in IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) for LEAs that house special schools and serve children with and without disabilities or only children with disabilities. We do not believe an exemption for those LEAs is appropriate because by allowing States to ignore children in special schools when reviewing LEAs, the Department could inadvertently create an incentive to place children with disabilities in special schools instead of separate classrooms, for example. For these reasons, the Department declines to exempt LEAs that house special schools and serve children with and without disabilities or only children with disabilities from a determination of significant disproportionality under IDEA section 618(d).

Further, current IDEA section 618 data collection procedures are consistent with the commenters' recommendation that children with disabilities placed in a special school should be counted by the LEA that placed the children in the special school (what one commenter refers to as the "sending LEA") and is responsible for providing FAPE to the child. (See, FILE C002, 2013 and OMB Control No. 1875-0240.) The Department expects that States will use the same data annually submitted under IDEA section 618(a) (20 U.S.C. 1418(a)) to make determinations of significant disproportionality. Consistent with the guidelines that govern that reporting, children publicly placed in special schools should be included in the enrollment counts for the LEA that is responsible for providing FAPE to the child. FILE C002, 2013. This means that many children in special schools or programs in LEAs, to the extent they are publicly placed by another LEA, will not affect LEAs count of children, for purposes of significant disproportionality, because these children are already attributed to the LEA responsible for providing FAPE to the child.

*Changes:* None.

*Comment:* Many commenters were concerned that highly regarded schools for children with disabilities with open enrollment policies often draw their children from across the State or region. In fact, one commenter expressed that families might relocate within the borders of some LEAs with reputations for higher quality services, resources, and outcomes for a particular disability.

This commenter stated that LEAs are not able to address significant disproportionality by race or ethnicity that is due to self-selection.

*Discussion:* The Department appreciates these concerns. However, data do not exist that could distinguish these LEAs from other LEAs or determine the intent of families that move into these LEAs. Further, there is no reason to exclude LEAs from the analysis for significant disproportionality because parents elect to enroll their children in LEAs with a reputation for high quality services. Therefore, the Department declines to create an exception for LEAs that include highly regarded schools with open enrollment policies that often draw their children from across the State or region.

*Change:* None.

*Comments:* In response to Directed Question #8, which inquired how best to address significant disproportionality in LEAs with homogenous populations, we received a few comments that LEAs with homogenous populations should not be examined for disproportionality, positing that "if there is no comparison group, there can be no disproportionality." However, we received more comments that indicated LEAs with homogenous populations should be included in significant disproportionality calculations. A few commenters offered that these LEAs should use an unspecified alternate method in place of, or in addition to, the standard methodology in proposed § 300.647(b). A few more commenters offered that these LEAs should use an unspecified calculation in addition to the standard risk ratio method.

Another commenter suggested that, for LEAs with homogenous populations, the Department closely analyze the performance data that States submit and use compliance monitoring to identify problems and provide technical assistance. Some commenters suggested that the data from the LEAs with homogenous populations should be compared to similarly sized LEAs, to a statewide risk ratio, or to national data.

One commenter suggested that the Department allow the use of alternate calculations to identify instances of significant disproportionality because, where no comparison group exists, it is not possible to obtain valid and reliable data by using a risk ratio or alternate risk ratio calculation. Another commenter suggested that a different risk ratio method should be used to identify significant disproportionality in homogenous populations (e.g., urban special education schools comprised primarily of children from one racial or

ethnic background), using data from LEAs or other States with more racially and ethnically diverse populations, yet similar in other demographic factors.

One commenter suggested that States undertake a longitudinal examination of homogenous LEAs over a period of five years and only take action if nearly all individuals from a race or ethnic subgroup have been identified or disciplined. This commenter disagreed with suggestions that these LEAs be compared with national or State data and suggested that comparisons to LEAs of similar size and demographics would be most appropriate. Two commenters expressed concern that homogenous LEAs would not fare well under the proposed regulations.

*Discussion:* The Department appreciates all of these suggestions. We believe it is important that States review LEAs, whenever possible, for significant disproportionality, even when LEAs may have homogenous populations. We do not agree with the suggestion that there cannot be disparity where there is no comparison group within the LEA. To the contrary, it is quite possible for children with disabilities from a particular racial or ethnic subgroup to be identified, disciplined, or placed in restrictive settings at rates markedly higher than their peers in other LEAs within the State. The fact that there is no comparison group within the LEA does not mean that the LEA should not be reviewed for significant disproportionality, particularly since IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to determine whether significant disproportionality is occurring within the State and the LEAs of the State. For this reason, under § 300.647(a) and (b)(5), States are required to calculate the alternate risk ratio—using a State-level comparison group—whenever the comparison group within the LEA does not meet the States' population requirements. While we considered commenters' suggestions to allow States to use an approach other than the alternate risk ratio to examine homogenous LEAs, we continue to believe that the alternate risk ratio is the strongest option, given its close similarity to the risk ratio in ease of calculation and interpretation. As with the risk ratio, we anticipate that the stability of the alternate risk ratio will be improved by the flexibility States have to set reasonable population requirements and use up to three consecutive years of data to identify significant disproportionality.

However, in reviewing the commenters' feedback, we recognize that there may be certain situations when using an alternate risk ratio may

not be adequate for evaluating a homogenous LEA. These instances include homogenous LEAs within homogenous States or unitary systems where an LEA and its State cover the same geographic area. In a homogenous unitary system, the risk ratio, which uses an LEA-level comparison group, and the alternate risk ratio, which uses a State-level comparison group, would be the same; therefore, if a unitary system has too small a comparison group to calculate a risk ratio, it would also have too small a comparison group to calculate the alternate risk ratio and therefore would produce an unreliable, or meaningless result. In this situation, we believe that IDEA does not require a review for significant disproportionality.

*Changes:* We have added § 300.647(c)(2), which excludes States from calculating the risk ratio or alternate risk ratio for a racial or ethnic group when, for both the risk ratio and the alternate risk ratio, there is an insufficient number of children in all other racial or ethnic groups to serve as a comparison group.

*Comment:* One commenter requested that the Department consider a unique methodology for determining significant disproportionality in LEAs with clusters of recent immigrants. This methodology should accommodate the special influences in language and culture, differences in access to education in immigrants' country of origin, or post-traumatic stress. A few commenters also noted that, as their LEA is now home to an office that provides adjustment services to refugees and immigrants, it may have the appearance of disproportionality even though it has legitimate reasons for overrepresentation of certain populations.

*Discussion:* The Department appreciates these concerns. However, there is no specific exemption in IDEA section 618(d) (20 U.S.C. 1418(d)(1)) for LEAs with clusters of immigrants. Such an exemption would not be appropriate because we believe that it is particularly important to review LEAs with clusters of recent immigrants for significant disproportionality. Therefore, the Department declines to create an exception for these LEAs.

*Changes:* None.

*Comment:* Several commenters requested that because certain LEAs have atypical demographic distributions that could create data anomalies, the Department should exempt certain types of LEAs from providing comprehensive CEIS and from reviewing, revising, and publishing, as appropriate, policies, procedures, and practices if identified

with significant disproportionality. Many commenters asserted that States should have authority to exempt LEAs from these statutory remedies if there is a small population of children, where the addition or subtraction of a few children alters a finding of significant disproportionality. Other commenters requested that LEAs with very low rates of special education identification, restrictive placements, or exclusionary discipline for all children should not be automatically required to set aside funding to provide comprehensive CEIS. The Department interprets the comment to suggest that LEAs with very low rates of identification, restrictive placement, and discipline will likely be identified with significant disproportionality due to high risk ratios. A few commenters requested further consideration of how significant disproportionality is applied to States and rural LEAs. One commenter expressed strong concerns that the regulation would, without just cause, negatively affect its small, rural LEA, where children of color make up less than five percent of the school population.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and analyze data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State.

However, the Department agrees with commenters that LEAs with small populations or small populations of specific racial or ethnic subgroups with disabilities, such as those in small rural or charter schools, could potentially produce risk ratios that are misleading due to volatility associated with calculating risk ratios for small numbers of children. The Department appreciates the feedback of commenters and agrees that a minimum n-size of 10, as proposed in the NPRM, is insufficient to account for issues related to LEAs with small populations.

We describe in the section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(b)(3) and (4); § 300.647(b)(6)), the changes to these regulations to give States added flexibility to exempt LEAs from a review for significant disproportionality when a racial or ethnic group does not meet a reasonable minimum cell size or reasonable minimum n-size set by the State with input from the stakeholders, including the State Advisory Panel.

This change will give the States increased flexibility to use a minimum cell size—a minimum number of children in the risk numerator when calculating a risk ratio—to avoid identifying LEAs with significant disproportionality due to the

identification, placement, or disciplinary removal of a small number of children. The minimum cell size should also help to prevent identification of LEAs with low prevalence of identification, placement, discipline—which may be subject to more volatile risk ratios—to the extent that these LEAs also have a small population of children.

Again, however, IDEA does not contain any provisions allowing either States, or the Department, to waive the statutory remedies once an LEA is identified with significant disproportionality. When an LEA is identified with significant disproportionality, the statute specifies that the State must require the LEA to reserve the maximum amount of funds under section 613(f)—15 percent of its IDEA, Part B funds—to provide comprehensive CEIS.

*Changes:* Please see the discussion on changes to minimum cell and n-sizes in the section *Minimum Cell Sizes and Minimum N-Sizes (§ 300.647(b)(3) and (4); § 300.647(b)(6)*.

*Comment:* One commenter requested clarification about the responsibilities of virtual schools and the LEAs within which children attending the virtual schools live. The commenter stated that there has been a significant increase in the number of children with disabilities who receive part or all of their education through virtual schools, raising the need for guidance on this issue.

*Discussion:* IDEA requires that each State make FAPE available to all eligible children with disabilities aged 3 through 21 within the State's mandated age range and residing in the State. (20 U.S.C. 1412). This includes the identification and evaluation of children with disabilities, the development of an IEP, the provision of special education and related services in the least restrictive environment, and the provision of procedural safeguards to children with disabilities and their families. The requirements of IDEA apply to States and LEAs, regardless of whether a child is enrolled in a virtual school that is a public school of the LEA or a virtual school that is constituted as an LEA by the State.<sup>3</sup> IDEA and its

implementing regulations do not make any exceptions to these requirements to allow States to waive or relax requirements for virtual schools, including those virtual schools constituted as LEAs. Therefore, the requirements that States must use to determine whether significant disproportionality based on race or ethnicity is occurring in LEAs applies to LEAs with virtual schools and to virtual schools that are constituted as LEAs, consistent with § 300.28. Letter to Texas Education Agency Associate Commissioner Susan Barnes, 2003.

*Changes:* None.

*Comment:* Another commenter observed that in its State, a high school LEA has been identified as having significant disproportionality based on the identification of children with disabilities, simply because of the combining of elementary school LEAs into one population. The commenter stated that there was no significant disproportionality at the elementary level.

*Discussion:* With regard to States that include elementary school LEAs and high school LEAs, the Department's standard methodology offers States sufficient flexibility to ensure that the identification of those LEAs is appropriate. When calculating risk ratios under § 300.647(b)(1), States are required to select reasonable minimum cell sizes (to be applied to the risk numerator) and minimum n-sizes (to be applied to the risk denominator). This will allow States to focus their attention on the most systemic disparities and avoid the identification of LEAs based on volatile risk ratios.

*Changes:* None.

*Comments:* One commenter recommended that the Department require States use to use a tiered standard methodology that takes into consideration the type, size, and poverty within an LEA.

*Discussion:* As we noted in the NPRM, part of the purpose of the standard methodology is to foster greater transparency in how States identify significant disproportionality. Given this, it is critical that the standard methodology consist of simple and easily interpreted analyses. The Department believes that a tiered methodology would be inconsistent with this goal because it would require

States to adjust the methodology for different types of LEAs, adding greater complexity and, possibly, ambiguity.

Instead of a tiered methodology, the Department has proposed a standard methodology that provides States with adequate flexibility to consider the needs of different types of LEAs. This flexibility includes the ability to set reasonable risk ratio thresholds, reasonable minimum cells sizes and n-sizes (with input from State Advisory Panels), the ability consider up to three years of data before making a determination of significant disproportionality, and the option to not identify LEAs that exceed the risk ratio threshold and are making reasonable progress in lowering their risk ratios.

*Changes:* None.

*Comments:* Many commenters requested greater clarity as to the count of children that should be used for the denominator when calculating risk ratios for a particular racial or ethnic group. One commenter noted that, for discipline risk ratios, one State uses a cumulative count of children rather than a snapshot, point-in-time count. These commenters note that States should be allowed to use the denominators that most closely align with the numerators of the risk calculations, where alignment refers both to the timing of the counts and to the inclusion or exclusion of certain groups of children (e.g., parentally placed private school children, children ages three through five, children receiving transition services, etc.)

*Discussion:* In the NPRM, we noted that, with respect to the specific categories of analysis—identification, placement, and discipline—the Department's intended to incorporate in the regulations the required categories of analysis, which are consistent with the States' current IDEA section 618 data submissions.

In reviewing LEAs for significant disproportionality with respect to identification, we generally expect that States will use the same IDEA section 618 data that is reported to the Department (for data regarding children with disabilities) and data submitted to the Institute for Education Sciences for the Common Core of Data (for enrollment data). OMB Control No. 1875-0240. In reviewing LEAs for significant disproportionality with respect to placement, we generally expect that States will use the same IDEA section 618 data that is reported to the Department. OMB Control No. 1875-0240.

In reviewing LEAs for significant disproportionality with respect to discipline, we generally expect that

<sup>3</sup> See, OSEP Dear Colleague Letter, August 5, 2016, citing Letter to Texas Education Agency Associate Commissioner Susan Barnes, December 18, 2003. As stated in the Barnes letter, ". . . IDEA requires that each State make available a free appropriate public education to all children with disabilities (as defined by the IDEA) aged 3 through 21 residing in the State (20 U.S.C. 1412(a)(1)). This includes the identification and evaluation of children with disabilities (20 U.S.C. 1412(a)(3)), the development of an individualized educational program (20 U.S.C. 1412(a)(4)), the provision of

special education and related services in the least restrictive environment (20 U.S.C. 1412(a)(5)), and the provision of procedural safeguards to children with disabilities and their families (20 U.S.C. 1412(a)(6)). The IDEA statute and its corresponding regulations do not make any exceptions to these requirements or allow States to waive or relax these requirements for virtual schools."

States will use the same section 618 data reported to the Department. For IDEA section 618 data, discipline data is a cumulative count from July 1st through June 30th, while IDEA section 618 child count and placement data is a point-in-time count that occurs in the fall. OMB Control No. 1875–0240. After the final regulations are published, the Department plans to provide States with additional guidance about the counts of children that States should use when analyzing LEA data for significant disproportionality with respect to identification, placement, and discipline.

*Changes:* None.

*Comments:* A few commenters recommended that the Department convene workgroups and invest in research to explore issues related to significant disproportionality. A few commenters recommended that the Department establish a workgroup to make recommendations for researching how to address common issues and identify the root causes of disproportionality. One commenter recommended that Department build a workgroup to identify evidence-based practices in the implementation of IDEA's child find provisions so that these practices can be distributed widely to the field. This commenter also recommended that the Department convene an expert group to identify the issues and possible solutions to under-identification, including the under-identification of children who are twice exceptional. Another commenter recommended that the Department more carefully examine the impacts of poverty on significant disproportionality, including the linkages between poverty and the identification, placement, and discipline of children with disabilities.

*Discussion:* The Department appreciates the suggestions to develop workgroups and expand research into the causes of significant disproportionality, under-identification, and evidence based practices States and LEAs can use to address significant disproportionality. The Department agrees that it will be valuable to undertake more research on the impact of these regulations and on significant disproportionality in general. We also agree that it will be beneficial to help develop communities of practice for addressing significant disproportionality and expand technical assistance to support the work of States and LEAs. After the publication of these regulations, the Department plans to identify additional resources to support expanded research and technical assistance to improve the identification,

placement, and discipline of children with disabilities.

*Changes:* None.

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

*Comment:* Several commenters responded to Directed Question #2, which requested additional strategies to address the shortcomings of the risk ratio method and inquired whether the Department should allow or require States to use another method in combination with the risk ratio method. A few commenters stated that the risk ratio has a definite advantage over other methods because it is easy to explain and duplicate. Other commenters agreed, stating that the risk ratio is relatively simple and straightforward, which is especially important for a standard methodology. Two commenters appreciated that the NPRM included a review of several possible methods for defining significant disproportionality and had no concerns with the selection of the risk ratio as the approach that is currently most widely used and best understood among States. One commenter stated that its State has primarily used the risk ratio method and found success in identifying LEAs as having significant disproportionality each year. A few commenters stated that the use of the risk ratio will provide an opportunity to make comparisons between LEAs and States to ensure children are appropriately served through IDEA.

*Discussion:* The Department appreciates the comments in support of the use of the risk ratio as part of the standard methodology. We agree that States' use of this method will help to improve comparability of significant disproportionality determinations across States, increase transparency in how States make determinations of LEAs with significant disproportionality, improve public comprehension of a finding of significant disproportionality (or lack thereof), and address concerns raised by the GAO.

*Changes:* None.

*Comments:* Several commenters expressed concerns about the risk ratio. A few of these commenters expressed that sole reliance on the risk ratio may result in a failure to fully address the problem of racial or ethnic disproportionality. A number of commenters expressed concern that, in general, the risk ratio will not provide enough information to determine whether an LEA has significant disproportionality. A few commenters were concerned that the Department

proposed the risk ratio as the standard methodology due to its ease of implementation by States and comprehension by the public rather than the robustness of the method itself in determining disproportionality in identification, placement, and discipline.

*Discussion:* In developing the standard methodology, the Department drew heavily from current State practices. As we noted in the NPRM, most States, as part of their methodology for comparing racial and ethnic groups for the purpose of identifying significant disproportionality, already use a version of the risk ratio, along with a threshold over which LEAs are identified with significant disproportionality. Further, States using a risk ratio pair this method with a minimum n-size or cell size and use up to three years of data when making an annual determination to prevent inappropriate determinations of significant disproportionality due to risk ratio volatility. While the risk ratio method will allow States to conduct simple analyses that are easy to interpret, we also believe this approach is sufficiently robust to help States to appropriately identify significant disproportionality.

While we agree with commenters that while the use of risk ratios—or any data analysis alone—does not identify or address the causes of numerical disparities, risk ratios are sufficient to determine whether an LEA has sufficiently large disparities to determine whether significant disproportionality is occurring. This determination is an important first step that will require the LEA to identify and address the causes of the significant disproportionality. Further, as we note in *A Standard Methodology for Determining Significant Disproportionality—General*, we interpret IDEA section 618(d) (20 U.S.C. 1418(d)) to require efforts to address the causes of significant disproportionality as a consequence of, rather than a part of, the determination of significant disproportionality.

*Changes:* None.

*Comments:* Several commenters requested that the Department allow the use of additional criteria to address limitations in the risk ratio method. One commenter suggested that methods in addition to, or instead of, risk and alternate risk ratio should be allowed. One commenter recommended that States adopt other risk ratio methods, provide the Department with a rationale for doing so, and that the Federal government evaluate each State's approach. Two commenters

recommended that States be allowed to demonstrate to the Department why the use of a risk ratio or alternate risk ratio may not provide the best analysis of disproportionality in their State, and then demonstrate the effectiveness of an alternate calculation. These commenters stated that the primary purpose of the regulation should be to identify significant disproportionality and that methods other than the risk ratio can be effective in doing so. A few commenters requested that the Department allow States to use multiple measures to identify LEAs with significant disproportionality. One commenter stated that States' use of multiple risk ratio methods emerged based on careful analysis of false positive identifications that occurred when applying a single risk ratio, possibly complemented by the alternate risk ratio. This commenter stated that States would not have moved to more complex measures if it were not considered important for the analysis to have integrity.

A second commenter stated that one State currently uses two measurements for disproportionality—the alternate risk ratio and the e-formula. This commenter stated that using both methods—with an appropriate minimum cell size and minimum n-size—identifies both large and small LEAs that have real racial and ethnic disparities. Another commenter encouraged the use of multiple methods of identifying LEAs, as the sole reliance on the relative risk ratio can lead to unintended results (e.g., an inability to calculate the risk ratio when a comparison group has 0 percent risk).

*Discussion:* In reviewing these comments, the Department carefully considered the need to provide States adequate flexibility to adjust the standard methodology to their needs, while ensuring that the Department's goal of promoting uniformity and transparency is addressed. As mentioned in the NPRM, a 2013 GAO study 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.)

In keeping with these recommendations, the Department believes that restricting States to the risk ratio will foster greater transparency, as well as comparability between States, and thereby strengthen the Department's ability to review and report on States' implementation of IDEA section 618(d). To allow States to generate and adopt additional criteria—even if only a second criterion—would interfere with the goal of greater comparability while adding to the complexity of the standard methodology as a whole.

However, the Department is sensitive to the commenters' concerns and has included some limited flexibilities that States may consider when making determinations of significant disproportionality. Under § 300.647, States have the flexibility to set their own reasonable risk ratio thresholds and to identify only those LEAs that exceed the risk ratio threshold for a number of consecutive years, but no more than three. Section 300.647(d)(2) also allows States to not 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 in each of two consecutive prior years. This latter flexibility enables States to identify significant disproportionality only in those LEAs where the level of disproportionality is the same or not decreasing at a reasonable rate and does not require those LEAs that are reasonably reducing disparities to implement the remedies required under IDEA section 618(d)(2), even if those LEAs have risk ratios that exceed the State's risk ratio threshold.

Last, while in the NPRM the Department proposed to allow States to set a minimum n-size of up to 10 children (or children with disabilities), the Department has amended the regulation to allow States to set reasonable minimum n-sizes, as well as reasonable minimum cell sizes, that apply to the risk numerator when calculating risk ratios. The Department's intent with this change was to allow States to account for the volatility of risk ratio calculations, deem as significant only the most systemic cases of significant disproportionality, and prevent the identification of significant disproportionality based on the enrollment of, or the LEA's responses to the needs of, one or two children. It is our belief that, by allowing States the

flexibility to determine both minimum n-sizes and minimum cell sizes, the Department has dramatically reduced the likelihood of inappropriate identifications of significant disproportionality (false positives) that could occur when broadly applying the risk ratio methodology. Further, allowing States to use minimum cell and n-sizes to determine when to use an alternate risk ratio would allow States to examine racial and ethnic groups for significant disproportionality in the absence of an LEA-level comparison group or when the comparison group has a risk of 0 percent.

With these provisions, the Department believes these regulations achieve an appropriate balance between the need for flexibilities to ensure valid data analysis when evaluating significance and the need for greater consistency among the States' systematic reviews.

*Changes:* See, discussion on changes to minimum cell and n-sizes in the section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1)). See also, discussion on the reasonable progress flexibility in the section, *Reasonable Progress*, § 300.647(c)(2).

*Comments:* A large number of commenters noted that the risk ratio method does not work well with small populations. Although most of these comments cited issues with the Department's proposed cap on minimum n-sizes, which we address in the section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1)), some commenters were concerned that the standard risk ratio method would be inappropriately sensitive to racial and ethnic disparities in smaller LEAs that have fewer children with disabilities.

Many commenters also recommended that States have flexibility to add criteria beyond risk ratio and minimum n-size to avoid inappropriately identifying significant disproportionality due to small numbers. Several of these commenters reported that a large number of LEAs in their States and regions are small and use varying benchmarks for identification. One commenter noted that this flexibility would be necessary for small LEAs, whether using a risk ratio or weighted risk ratio calculation.

A few commenters recommended that, in States with small populations, the Department permit the use of a second method of calculating risk ratio, such as the e-formula, statistical significance testing, or n-size criteria,

since small populations are vulnerable to year-to-year fluctuations and a second method helps to ensure risk is not due to chance alone. A few commenters noted that the use of the risk ratio alone, without adequate minimum n-sizes or additional significance testing, will result in many LEAs being identified as having significant disproportionality when the disproportionality is due to small numbers of children identified with disabilities, placed in restrictive settings, and disciplined, and not to any underlying cause.

*Discussion:* The Department appreciates all of these comments and has considered the suggestion to permit States to use additional methods, beyond the use of the risk ratio alone, to address the potential for false positive identification of significant disproportionality when risk ratios are applied to small populations. As discussed earlier, in the interest of increasing both comparability and transparency across States, with respect to their implementation of IDEA section 618(d), we believe it is necessary to require States to use a common analytical method for determining significant disproportionality and to allow limited flexibilities within that methodology rather than allowing or requiring additional methodologies.

For example, as discussed elsewhere in this section, the Department received various comments that the minimum n-size initially proposed in the NPRM did not adequately protect small communities. The Department agrees that additional criteria—beyond the risk ratio and minimum n-size—would help to ensure appropriate identification of LEAs with significant disproportionality. In addition to minimum n-sizes, which States may use to ensure risk denominators are sufficiently large to calculate a stable risk ratio, States may also use minimum cell sizes to ensure that risk numerators are sufficiently large to reduce the potential for false positive identification due to small numbers.

Likewise, the ability to use up to three years of data when determining significant disproportionality could be used to address the year-to-year fluctuations that may occur in a State with many small LEAs. Finally, because States, in consultation with the State Advisory Panel, must set a reasonable risk ratio threshold and a measure of reasonable progress, the Department believes that the regulations provide sufficient flexibilities for ensuring that IDEA section 618(d) can be properly implemented using this methodology.

*Changes:* See, discussion on changes to minimum cell and n-sizes in the

section *Minimum Cell Sizes and Minimum N-Sizes* (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1)). See also, discussion on the reasonable progress flexibility in the section, *Reasonable Progress*, § 300.647(c)(2).

*Comment:* Several commenters expressed concern about efforts to identify significant disproportionality in LEAs with low incidence in any of the categories of analysis. A few commenters argued that there are situations in which a risk ratio alone will not provide enough information to determine whether an LEA has or does not have significant disproportionality. For example, comparing two very low risks for discipline of children with disabilities can result in a high risk ratio, even though both the racial or ethnic group being examined and the comparison group's discipline rates are low. Similarly, a few commenters noted that sole reliance on the risk ratio can produce similar results when examining disability identification and restrictive placement.

A few commenters argued that the risk ratio is dependent on scale and may unduly penalize LEAs with a low overall prevalence in the disability or discipline categories. For example, an LEA with an overall rate of suspension for all children of less than one percent would be regarded by most as exemplary. According to the commenter, the same LEA—if it were suspending 1.5 percent of children with disabilities in one racial or ethnic group, and 0.5 percent from a comparison group—would be treated the same as an LEA that was suspending 30 percent of children with disabilities in one group, and 10 percent from a comparison group.

One commenter suggested that States have flexibility to consider a low incidence of disciplinary removals as reasonable progress, or to exempt LEAs with low incidence from any review of significant disproportionality with respect to discipline.

*Discussion:* The Department appreciates the suggestions to expand the flexibilities included in the NPRM. Under § 300.647(d)(1), States may choose not to identify any LEAs as having significant disproportionality until a risk ratio for a particular racial or ethnic group for a particular category of analysis has exceeded a risk ratio threshold for up to three consecutive years. The Department believes that, in cases where an LEA that exceeds the minimum cell and n-sizes achieves persistently low rates of disciplinary action, such as a suspension, but a particular racial or ethnic group faces

consistently disproportionate treatment over the course of multiple years, it would be appropriate for the LEA to be identified with significant disproportionality.

Further, the Department believes that allowing the use of up to three years of data provides LEAs the time and opportunity to encourage schools to use, and train personnel to use, alternatives to disciplinary removals prior to a State determination of significant disproportionality. The Department also believes that allowing States to use up to three years of data to identify significant disproportionality will promote the appropriate identification of LEAs, including LEAs with low incidence rates.

*Changes:* None.

*Comments:* Several commenters argued that the risk ratio will fail to detect significant disproportionality in areas where the risk levels in an LEA for identification, placement, or discipline are extraordinarily high for children in all racial and ethnic groups. That LEA could nevertheless have a small risk ratio. Similarly, one commenter argued that the risk ratio is an illogical measure of the association between two groups; for example, a risk ratio of 1.85 for outcome rates of 37 percent and 20 percent means the same thing as a risk ratio of 2.60 for rates of 13 percent and 5 percent.

*Discussion:* While that there may be LEAs where children with disabilities are inappropriately identified, placed in overly restrictive settings, or disciplined at higher rates than national averages, IDEA section 618 and its requirement for an annual review for significant disproportionality does not operate in isolation. There are other provisions of IDEA beyond section 618(d) that promote appropriate practices in these areas. For example, States and LEAs share responsibility for ensuring appropriate implementation of State child find procedures (IDEA section 612(a)(3)) and evaluation and reevaluation procedures (IDEA section 614(a)–(c)); children with disabilities must receive FAPE in the least restrictive environment (IDEA section 612(A)(5)); and finally, specific discipline procedures and protections must be followed (IDEA section 615(k)).

In addition, Congress included specific language that allows States to address higher incidences of discipline for children with disabilities under IDEA section 612(a)(22)(A). This provision requires that States examine data to determine if LEAs have significant discrepancies, by disability status or by race and ethnicity, in rates of long-term suspensions and



expulsions, either among the LEAs in the State or when comparing rates for disabled and nondisabled children within each LEA.

There are still other sections of IDEA that support the provision of services for children in need of behavioral supports and that could be used to address any high incidence of disciplinary removals among children with disabilities. Section 614(d)(3)(B)(i) (20 U.S.C. 1414(d)(3)(B)(i)), for example, requires IEP teams to, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

In 2016, the Department released guidance to clarify that, while IDEA section 615(k)(1)(B) (20 U.S.C. 1415(k)(1)(B)) authorizes school personnel to remove from their current placement children who violate a code of student conduct, that authority in no way negates the obligation of schools to provide behavioral supports to children with disabilities as needed to ensure FAPE. OSEP Dear Colleague Letter, August 1, 2016.

As noted earlier, significant discrepancies in the rates of long-term suspension and expulsions among LEAs in a State or when comparing rates for children with and without disabilities are addressed by IDEA section 612(A)(22), but section 618(d) does not contain comparable language mandating those examinations.

Finally, consistent with earlier discussions, the Department declines to require or allow additional criteria that would reduce the proposed levels of comparability and transparency.

*Changes:* None.

*Comments:* Many commenters suggested that the Department allow States to compare LEA risk to a risk index. Some argued that if the Department allowed States to include comparisons to risk indices in the standard methodology, States could reduce the number of LEAs identified with significant disproportionality where risk levels are very low for all groups (but where the risk ratios are high). Similarly, others recommended that while any LEA with a racial or ethnic group risk ratio above the specified risk ratio threshold would be considered for a finding of significant disproportionality, any LEA with a racial or ethnic group risk that was to some degree below the State mean risk index would not be determined to have significant disproportionality. Still other commenters suggested many variations on ways that a comparison to a risk index could be used, such as comparing

the risk of a particular outcome for a racial or ethnic group in an LEA to a statewide risk or a national risk for that same group. These recommendations addressed the use of risk indices for different areas of analysis, different racial or ethnic groups, and different disabilities. In short, the commenters suggested ways to use risk indices in conjunction with the risk ratio for all of the analysis required under § 300.647(b).

*Discussion:* To begin with, the Department understands *risk index* to mean the likelihood of a particular outcome (identification, placement or disciplinary removal) for an aggregate population of children—such as all children within a State, or all children nationally—to which risk may be compared. The Department is not aware of, and no commenters provided, a research basis for selecting a particular magnitude of difference—such as one or two percentage points—between racial or ethnic subgroup risk and a risk index that would allow the risk index to be used as a measure of significant disproportionality in a way that is not arbitrary.

That aside, LEAs must use extreme caution to avoid actions based on race or ethnicity that could violate Federal civil rights laws and the Constitution. Moreover, LEAs must ensure that the requirements for individualized decisions about evaluations, placement, and disciplinary removals are properly and fully implemented.

Under IDEA, a child's identification, placement, and discipline are determined through specific individualized means. The Department has determined that allowing or requiring States to compare and control for racial or ethnic group risk and an overall risk index—that is, including in the standard methodology measures that would require States to adjust for, and thereby artificially mandate, the overall incidence of identification, placement, or discipline—would create strong incentives for impermissible quotas in overall identification, placements, and disciplinary removals. The Department believes that restrictions that would inhibit the ability of an evaluation team to make eligibility determinations, a placement team to make placement decisions based on the child's unique needs, or an IEP Team to determine if conduct subject to discipline was a manifestation of the child's disability, would result in violations of IDEA section 612(a)(3) (child find), section 614(a)–(c) (evaluation and reevaluation) section 612(a)(5) (placement in the least restrictive environment), or section 615(k) (disciplinary removals).

As such, the Department believes that creating an exception to a determination of significant disproportionality based on a comparison between racial or ethnic group risk and a risk index, or modifying the standard methodology to include this use of the risk index, would undermine the determinations required under 618(d) and create strong incentives to violate IDEA's requirements for identification, placement, and disciplinary removals.

The Department appreciates the various suggestions for addressing certain potential issues when using risk ratios to identify LEAs with significant disproportionality. In line with the GAO's recommendations, the Department also believes that restricting States to the risk ratio will foster greater transparency, as well as comparability between States, and thereby strengthen the Department's ability to evaluate States' implementation of IDEA section 618(d). To allow States to add additional criteria—even if only a second criterion—would reduce comparability between States' approaches while adding to the complexity of the standard methodology as a whole and creating additional burdens.

*Changes:* None.

*Comments:* Several commenters requested that States be permitted to use risk difference along with, or instead of, risk ratios because it has a number of advantages over the risk ratio for measuring racial and ethnic disparities.

First, commenters stated that risk differences can be calculated even when the comparison group has a risk level of zero, and therefore the risk ratio cannot be calculated. According to commenters, the most serious racial disparities are those in which only one racial or ethnic group is subjected to the harshest disciplinary actions; for this reason, commenters supported the use of risk difference to properly analyze significant disproportionality in suspensions and expulsions exceeding 10 days.

Second, commenters argued that risk differences could capture disparities in LEAs that have very high rates of restrictive settings and disciplinary exclusion for all groups. Commenters expressed their concerns that those LEAs would be overlooked if risk ratios alone are used.

Third, as discussed elsewhere in this section, commenters stated that risk difference can ensure that significant disproportionality would not be triggered when incidence levels are very low for all groups.

Finally, commenters stated that risk differences are easy to calculate,

interpret, and use to compare LEAs. These commenters suggested that the Department define a range of acceptable risk difference thresholds and review each State's thresholds for reasonableness. The commenters also expressed that, because risk differences are simple to calculate and easy to understand, the Department should not find it difficult to review States' risk difference thresholds for reasonableness. Further, commenters suggested that, as most of the States finding zero LEAs with significant disproportionality use a risk ratio, the preferences of States for risk ratios should not prejudice the Department against the use of risk difference in addition to, or instead of, a risk ratio.

*Discussion:* The Department carefully considered the optional use of a second measure of significant disproportionality, either instead of or in addition to, the risk ratio. The Department agrees that risk difference has certain advantages that the risk ratio does not. However, the Department also believes that, at the present time, the risk ratio also has advantages not shared by the risk difference.

First, as risk ratio method is widely used by States, its strengths and weaknesses are well known, as are the approaches needed to address its shortfalls (*e.g.*, multiple years of data and minimum n-sizes and minimum cell sizes). While we agree that the risk difference can be calculated when risk in the comparison group is zero, and may help States to avoid inappropriate identification of LEAs with low incidence rates, we believe that the standard methodology, as a whole, allows States to appropriately measure racial and ethnic disparities in LEAs experiencing these issues. Further, while risk differences may identify racial and ethnic disparities when LEAs have high incidence rates, we believe there are other provisions of IDEA beyond section 618(d) that promote appropriate practices to address those high incidence rates, which we list earlier in this section.

Second, due to the widespread use of risk ratio thresholds, the Department anticipates that § 300.646(b), which would require States to follow a standard methodology, will create less burden for States if the methodology includes a more common measure of racial and ethnic group disparity. Based on the Department's review of State definitions of significant disproportionality, as noted in the NPRM, fewer than five States used risk difference, while nearly 45 States used some form of the risk ratio (*e.g.*, risk ratio, alternate risk ratio, weighted risk

ratio), and 21 used the risk ratio proposed in the Department's standard methodology.

Third, the States' experience with risk ratios provides the Department with some historical knowledge of what risk ratio thresholds have previously been considered as indicative of significant disproportionality. In the NPRM, we noted that, of States utilizing a risk ratio, 16 States used a risk ratio threshold of 4.0, while seven States each used thresholds of 3.0 and 5.0. This history will help inform the Department's review of reasonableness. With so few States utilizing risk difference, this same history is not available to the Department. For these reasons, the Department considers the risk ratio to be superior to risk difference as the primary measure of racial and ethnic disparities for the standard methodology.

Further, the Department does not believe the benefits of the risk difference outweigh the consequences. While the risk difference method may serve to clarify the significance of racial disproportionality between LEAs with identical risk ratios, its application would still require the development of a threshold of risk difference for determination of significant disproportionality. The use of two different thresholds for significant disproportionality is contrary to the objective of promoting consistency and transparency in how States determine disproportionality, as recommended by the GAO report. In addition, we believe that the measures implemented in these final regulations to promote consistency and transparency also will lead to more appropriate identification of significant disproportionality and do not believe that the low incidence of identification in the past is a result of the risk ratio method itself.

*Changes:* None.

*Comments:* Two commenters asserted that the weighted risk ratio is the most accurate and effective measurement because it allows the State to standardize across LEAs that are very different. These commenters argued that, while the risk ratio is simple and straightforward, the weighting of findings using State data provides standardization that makes comparability across LEAs possible. These commenters also argued that the weighted risk ratio formula is not too difficult for States to utilize. Further, commenters argued that the States currently using a weighted risk ratio—nearly half of all States—would be prohibited from doing so under proposed § 300.647(b), apparently because of its complexity and lack of

public understanding—rather than specified weaknesses in the methodology itself. Some commenters suggested allowing States to calculate significant disproportionality using either the risk ratio method or the weighted risk ratio method. One commenter stated that the weighted risk ratio ensures that two LEAs are treated similarly if the risk for the racial or ethnic group of interest is the same in both LEAs, even if the racial demographics in each LEA are different.

Other commenters, meanwhile, supported regulations that would disallow States' use of the weighted risk ratio. These commenters agreed that weighted risk ratios add a high level of complexity that makes the decision to identify an LEA difficult for the layperson to follow. These commenters stated as well that weighted risk ratios are not necessary if the alternative risk ratio is available. One of these commenters stated that it was important for special education administrators to be able to calculate current racial and ethnic disparities independent from a State report, which is based on prior year data. A few commenters stated that the use of the weighted risk ratio alone, without adequate minimum n-sizes or additional significance testing, would result in many LEAs being identified as having significant disproportionality when the disproportionality is due only to small numbers of children identified with disabilities, placed in restrictive settings, and disciplined. Some commenters observed that the Department's proposal did not include permission to use weighted risk ratio but requested that the Department explicitly prohibit its use.

*Discussion:* As we noted in the NPRM, with a weighted risk ratio, the comparison group is adjusted by adding different weights to each racial and ethnic group, typically based on State-level representation. The weighted risk ratio method has the drawback of volatility across years, similar to the risk ratio, but does not support straightforward interpretation as well as the risk ratio does.

Given that we proposed three mechanisms to help States account for risk ratio volatility—(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 n-size and cell size requirements—the Department previously determined that the potential benefits of the weighted risk ratio method were exceeded by the costs associated with complexity and decreased transparency. Although the final regulations adopt additional

flexibility, and potential variability, through the requirement for a minimum cell size, the Department continues to believe that use of the weighted risk ratio is not justified for the same reasons.

While a number of States currently use the weighted risk ratio method, the Department believes that method fails to provide LEAs and the public with a transparent comparison between risk to a given racial or ethnic group and risk to peers in other racial or ethnic groups, as the risk ratio and alternate risk ratio methodologies are designed to do. We believe that the final regulations, as drafted, clearly disallow use of the weighted risk ratio as part of the standard methodology and that additional clarification on this point is not necessary.

*Changes:* None.

*Comment:* A few commenters stated that States should be encouraged to add a test of statistical significance to the standard methodology. Two commenters requested that the Department allow States to use appropriate tests of statistical significance to assess the statistical significance of any preliminary result produced through risk ratio analysis.

Another commenter suggested that, if the Department only allows States to set a minimum n-size, it should allow States to conduct a test of statistical significance to determine if the risk ratio is truly significant.

*Discussion:* Statistical significance testing is applicable only to samples rather than population data, and therefore is not an appropriate method of determining significant disproportionality in an LEA. As we noted in the NPRM, States have access to population data, including actual counts of children identified with a disability, placed into particular settings, or subjected to a disciplinary removal from placement. With this information, States can simply calculate whether an LEA's risk ratio for a given subgroup is different from the risk ratio for a comparison group.

*Changes:* None.

*Comment:* A commenter argued that, when calculating a risk ratio, White children would be a more appropriate comparison group than "all other racial and ethnic groups" as specified in the definition of "risk ratio" in the proposed § 300.647(a)(3) (now § 300.647(a)(6)). To help States make use of this comparison, while ensuring that White children are not precluded from the States' review for significant disproportionality, the commenter recommended that States be required to calculate both the Department's

proposed risk ratio and a second risk ratio where White children replace all other racial and ethnic groups. The commenter noted that the additional data analysis and reporting burden associated with the addition of this risk ratio would be negligible. Another commenter recommended that, in addition to the risk ratio, the Department allow States to compare all racial or ethnic groups to the State risk index for White children only, in order to prevent States from identifying significant disproportionality in LEAs where risk for a given racial or ethnic group is low.

*Discussion:* The Department acknowledges that, in general, it may be a common practice to utilize White children as a comparison group when examining data for racial and ethnic disparities. However, for purposes of IDEA section 618(d), it would be inappropriate to use one method for children of color with disabilities—a comparison to White children—and a separate method for White children in which they are compared to all other racial and ethnic groups. We do not find it appropriate for one racial or ethnic group to be treated differently from the others in these regulations.

*Changes:* None.

#### Categories of Analysis (§ 300.647(b)(3) and (4))

*Comment:* One commenter stated that, in one State, children with disabilities are not categorized by impairment, noting that IDEA does not require that children be classified by their disability. The commenter requested that, to preserve this State's current policy, the Department revise proposed § 300.647(b)(3) to clarify that States need only calculate risk ratios for particular impairments if those States or their LEAs identify children with particular impairments.

*Discussion:* The Department does not believe that a revision to § 300.647(b)(3) is necessary to allow a State that currently does not classify children by disability to continue in its current practice. The standard methodology in § 300.647 does not require States to classify children by impairment in order to comply with the requirement to identify and address significant disproportionality. Rather, under § 300.647(b)(3), the State is required to review those racial or ethnic groups within LEAs that meet the State's population requirements, including a minimum cell size. Because a State that does not classify children by disability would, in assessing LEAs for significant disproportionality, have a cell size of zero for each of the impairments

enumerated under § 300.647(b)(3)(ii) for all racial and ethnic groups and for all LEAs, that State would not be required to calculate risk ratios for any of the impairments. Under § 300.647(b)(3)(i), however, the State must calculate risk ratios for the category of all children with disabilities, by racial and ethnic group.

*Changes:* None.

*Comments:* Several commenters responded to Directed Question #3 in the NPRM, which inquired whether the Department should remove any of the six impairments from, or add additional impairments to, proposed § 300.647(b)(3)(ii). That section listed the impairments that States must examine in determining whether an LEA has significant disproportionality with respect to the identification of particular impairments.

One commenter responded that the Department need not expand the list of impairments because the remaining impairments under IDEA section 602(3) that could be added to those listed in § 300.647(b)(3)(ii) are low incidence, and the qualifying factors for these are so specific, that there is limited room for varying interpretations that might lead to significant disproportionality. Two commenters recommended that all six impairments included in proposed § 300.647(b)(3)(ii) remain if the Department allows States to limit their review of significant disproportionality only to those racial and ethnic groups where at least 10 children (or, as an alternative, at least 15 children) have been identified with that particular impairment. One commenter asserted that all impairments listed in proposed § 300.647(b)(3)(ii) should remain and that the Department should further include all of the impairments in IDEA section 602(3), including those impairments enumerated under IDEA section 603(3)(B) that are applicable to children, aged 3 through 9, who experience developmental delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development. Another commenter also supported the inclusion of developmental delay in States' review for significant disproportionality.

Two commenters recommended that blindness, orthopedic impairment, and hearing impairments be added to the list of impairments in proposed § 300.647(b)(3)(ii).

*Discussion:* The Department agrees that it is unnecessary to require States to examine the seven low-incidence impairments listed in IDEA section 602(3) and in § 300.8 that were not

included in proposed § 300.647(b)(3)(ii) for significant disproportionality. Given the low incidence of these impairments, the Department continues to believe that disproportionality based on race or ethnicity will not be reliably identified as systemic or otherwise indicative of persistent underlying problems. Further, given that the Department has not previously required States to examine these impairments, doing so now would impose a new data analysis burden that the Department does not believe is necessary. For this same reason, the Department declines to add to § 300.647(b)(3)(ii) blindness, orthopedic impairment, hearing impairments, or the developmental impairments applicable to children aged three through nine defined under IDEA section 602(3)(B).

*Changes:* None.

*Commenter:* One commenter recommended the use of an alternative risk ratio method to capture the disability categories in IDEA section 602(3). The commenter suggested that the alternative risk ratio method be used when a racial or ethnic group does not meet a minimum population requirement for any of the disability categories. The commenter suggested this approach to help address the possible under-identification of hearing loss.

*Discussion:* Again, the Department believes that it is unnecessary to require States to examine the seven low-incidence impairments listed in IDEA section 602(3) that were not included in proposed § 300.647(b)(3)(ii) for significant disproportionality. Given the low incidence of these impairments, disproportionality based on race or ethnicity may not be reliably identified as systemic or otherwise indicative of persistent underlying problems, and the Department has not previously required States to examine these impairments. Nothing, however, would prevent a State from examining low-incidence disabilities for racial and ethnic disparities—or for disproportionate overrepresentation—if it chose to do so. Moreover, while a State may choose to review an LEA's policies, procedures, and practices for compliance with IDEA requirements related to identification and evaluation under its separate general supervisory authority in IDEA section 612(a)(22) or monitoring authority in section 616, the consequences set out in IDEA section 618(d)(2) and these regulations, including mandating the use of comprehensive CEIS, do not apply.

*Change:* None.

*Comments:* One commenter recommended that the Department

exclude any of the six impairments from a review for significant disproportionality that were not part of the research base informing the 2004 IDEA regulations related to significant disproportionality in special education.

According to the commenter, concerns regarding overrepresentation in special education were limited to the identification of intellectual disabilities, specific learning disabilities, and emotional disturbance.

*Discussion:* We decline to make the commenter's requested change to § 300.647(b)(3). IDEA section 618(d) (20 U.S.C. 1418(d)) requires that States examine LEAs for significant disproportionality based on race and ethnicity in the identification of particular impairments. We believe there is a sufficient statutory basis to extend the requirement for States to examine LEAs for significant disproportionality to all of the impairments included in IDEA section 602(3); however, the Department has determined that, given the low incidence of several of the listed impairments, it may be difficult to reliably identify significant disproportionality with respect to these impairments that is systemic or otherwise indicative of persistent underlying problems.

*Change:* None.

*Comments:* One commenter recommended that under proposed § 300.647(b)(3)(ii), States should not be required to examine LEAs for significant disproportionality in the identification of children with specific learning disabilities. This commenter noted that some States have put in place a process whereby children must receive certain services—specifically, response to intervention—prior to being identified with specific learning disabilities. This commenter suggested that the use of evidence-based interventions has reduced the number of children requiring special education services.

*Discussion:* The Department appreciates the comment and agrees that the provision of multi-tiered systems of support, such as response to intervention, can be useful and important in serving children with disabilities. At the same time, we note that States and LEAs have an obligation under §§ 300.304 to 300.311 to ensure that the evaluation of children suspected of having a disability is not delayed or denied because of the implementation of specific strategies or interventions. Under § 300.307, States must adopt criteria for determining whether a child has a specific learning disability. The criteria adopted by the State: (1) Must not require the use of a

severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability; (2) must permit the use of a process based on the child's response to scientific, research-based interventions; and (3) may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability. (34 CFR 300.307, OSEP Memorandum 11-07, January 21, 2011).

We decline to revise § 300.647(b)(3)(ii) as suggested by the commenter. In its 37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (2015) (37th IDEA Annual Report), the Department noted that the percentage of the resident population ages 6 through 21 served under IDEA, Part B, identified with specific learning disabilities was 39.5 percent of children, the highest of all impairments.

The fact that specific learning disabilities, as a category, has the highest incidence of all the impairments recognized by IDEA suggests that it may be one of the most important disability categories to review for significant disproportionality. Moreover, given that it is a high-incidence category, removing specific learning disabilities from the analysis may have the unintended effect of increasing identification of this impairment to minimize any appearance of racial and ethnic disparities in the identification of children with impairments that are subject to examination for significant disproportionality. To prevent this possibility and encourage the appropriate identification of children with disabilities, the Department believes it best to continue to require States to review LEAs for significant disproportionality with respect to specific learning disabilities.

*Changes:* None.

*Comments:* Several commenters recommended that the Department remove autism from the list of impairments under proposed § 300.647(b)(3)(ii) that States must examine in LEAs for significant disproportionality. Of these commenters, one noted that autism identification generally follows a medical diagnosis. Several explained that some States require that a medical evaluation be conducted or a medical diagnosis be considered before a child can be identified with autism. Several others generally noted that it is rare that an LEA diagnoses a child as having autism. As a result, one commenter concluded, any over-identification of autism may be attributable to a medical professional in the LEA and not

necessarily indicative of an issue in the LEA itself. Another commenter noted that, since a diagnosis of autism is not under the control of the LEA, the LEA would have no means or capacity to remedy and correct a finding of significant disproportionality.

Several other commenters stated that a failure to provide children with special education services after a medical diagnosis of autism could result in noncompliance with IDEA. Finally, several commenters examined the Department's report—*Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity (2015)*—and found that the most egregious disparities with respect to autism applied to White children. These commenters believed that requiring LEAs to address significant disproportionality with respect to White children was not the intention of IDEA.

With respect to special education eligibility determinations, a last commenter stated that LEAs generally do not make clinical diagnoses. Rather, LEAs and schools are charged with determining whether children meet State and Federal criteria to be eligible for special education and require specialized instruction.

*Discussion:* In its 37th Annual Report, the Department noted that the percentage of the resident population of children with autism ages 6 through 21 served under IDEA, Part B, increased markedly between 2004 and 2013. Specifically, the percentages of three age groups—ages 6 through 11, 12 through 17, and 18 through 21—that were reported under the category of autism were 145 percent, 242 percent, and 258 percent larger in 2013 than in 2004, respectively.

Given those increases, and to encourage the appropriate identification of children with disabilities, the Department believes it best to continue to require States to review LEAs for significant disproportionality with respect to autism.

We further note that, even if disparities in an LEA's identification of autism tend to result from disparities in the medical diagnosis of autism, it may be the case that the latter disparities are due to factors such as unequal access to medical care, which may result in children not being referred for an evaluation. In this instance, the broader use of developmental screening for young children—which may be supported using comprehensive CEIS—may help to identify children in other racial or ethnic groups that may currently be underrepresented among children with impairments such as

autism that may follow a medical diagnosis.

Last, we disagree with the commenters' suggestion that IDEA section 618(d) was not intended to address significant disproportionality that impacts White children. The plain language of IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to identify significant disproportionality, based on race or ethnicity, without any further priority placed on specific racial or ethnic groups. For that reason, the Department believes that the statute directs States to address significant disproportionality impacting all children.

*Changes:* None.

*Comments:* A number of commenters recommended that the Department remove other health impairments (OHI) from the list of impairments under proposed § 300.647(b)(3)(ii) that States must examine for significant disproportionality. Of these, some commenters noted that some States require that a medical evaluation be conducted, or a medical diagnosis be considered, before a child is determined to have OHI. Still others noted that it is rare for an LEA to diagnose a child with OHI and that failure to provide children with special education services when an evaluation indicates OHI could result in non-compliance with IDEA. One commenter stated that, since a diagnosis of OHI is not under the control of the LEA, the LEA would have no means or capacity to remedy and correct a finding of significant disproportionality. Finally, some commenters stated that the Department's data show that the most egregious disproportionality with respect to OHI applies to White children, but requiring LEAs to address significant disproportionality with respect to White children was not the intention of IDEA.

With respect to special education eligibility determinations, a last commenter stated that LEAs generally do not make clinical diagnoses. Rather, LEAs and schools are charged with determining whether children meet State and Federal criteria to be eligible for special education and require specialized instruction.

*Discussion:* In its 37th Annual Report, the Department noted that the percentage of the resident population with OHI ages 6 through 21 and served under IDEA, part B, increased markedly between 2004 and 2013. Specifically, the percentages of three age groups reported—ages 6 through 11, 12 through 17, and 18 through 21—were 45 percent, 624 percent, and 104 percent larger in 2013 than in 2004, respectively.

Given recent increases in the percentage of children identified with OHI, and to encourage the appropriate identification of children with disabilities, the Department believes it best to continue to require States to review LEAs for significant disproportionality in OHI. Also, we note that, even if disparities in the identification of OHI tend to result from disparities in the medical or clinical diagnosis of OHI, it may be the case that the latter disparities are due to factors such as unequal access to medical care, which may result in children not being referred for an evaluation. In this instance, the broader use of developmental screening for young children—which may be supported using comprehensive CEIS—may help to identify children in other racial or ethnic groups that may currently be underrepresented in disability categories, like OHI, that may follow a medical diagnosis.

Last, we disagree with commenters' suggestion that IDEA section 618(d) was not intended to address significant disproportionality that impacts White children. The plain language of IDEA section 618(d) requires States to identify significant disproportionality, based on race or ethnicity, without any further priority placed on specific racial or ethnic groups. For that reason, the Department believes that the statute directs States to address significant disproportionality impacting all children.

*Changes:* None.

*Comment:* Several commenters responded to Directed Question #4 of the NPRM, which inquired whether the Department should continue to require States to review LEAs for significant disproportionality based on race or ethnicity in the placement of children with disabilities inside the regular classroom between 40 percent and 79 percent of the day.

Multiple commenters suggested that the Department continue the requirement. Of these commenters, a few noted that this type of placement data is already collected by States and might be helpful in addressing other issues of disproportionality. One commenter advocated for leaving this placement in the regulations and noted that 50 percent of the day is the equivalent of lunch, recess, gym, morning meeting, and art class. In the commenter's opinion, placement in the classroom only 50 percent of the day is a significant amount of isolation, and may mean a potential lack of access to the general education curriculum.

One commenter stated that research shows that almost every child of color

with disabilities who takes an alternate assessment based on alternate academic achievement standards is segregated from their peers for all or most of the day, and that the lack of integration in the regular classroom is associated with lower performance on State general assessments. The commenter suggested that this information supports the continued inclusion of placement inside the regular classroom between 40 percent and 79 percent of the day in States' review for significant disproportionality.

Conversely, a few commenters expressed their preference that the Department not require States to review for significant disproportionality placement in the regular classroom between 40 and 79 percent of the school day. These commenters noted that data regarding this placement provides little information about the severity of a child's disability, the classroom supports the child receives, or the quality of the services in that setting. Many commenters noted that 40 percent to 79 percent of the school day covers a wide range that encompasses anywhere from 2.4 to 4.7 hours. These commenters stated that while only 2.4 hours in the regular classroom may be more restrictive, 4.7 hours may not be; therefore, this placement is difficult to categorize.

Several commenters noted that it is generally meaningless to draw conclusions about the percentage of time a child is in a regular class and whether it means the LEA has provided services in the least restrictive environment.

One commenter asserted that one State may have difficulty collecting data regarding this placement, as the State reports placement using different percentages of time spent in the regular classroom (*i.e.*, 20 percent or less, less than 60 percent and greater than 20 percent, 60 percent or more). The commenter expressed concern that requiring States to change their placement categories would require changes to State special education regulations, resulting in significant increases in paperwork and resource expenditures.

Additionally, several commenters stated that reporting additional placement data will be a burden for LEAs and will not provide useful information.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and LEAs of the State with respect to the placement of children with disabilities.

To meet their general data reporting obligations under IDEA section 618(a) (20 U.S.C. 1418(a)), States currently submit to the Department a count of children with disabilities, disaggregated by race and ethnicity, who are placed inside the regular classroom between 40 percent and 79 percent of the day, inside the regular classroom less than 40 percent of the day (*i.e.*, inside self-contained classrooms) and inside separate settings (*i.e.*, separate schools and residential facilities). OSEP Memorandum 08–09 and FILE C002, OMB Control Nos. 1875–0240 and 1820–0517. Consistent with this reporting requirement, the Department initially proposed requiring States to review each of these three placements for significant disproportionality, as racial and ethnic disparities in these placements may suggest that some children with disabilities have less access to the least restrictive environment to which they are entitled under IDEA section 612(a)(5) (20 U.S.C. 1412(a)(5)). The Department did not include in the NPRM any requirements that States expand the scope of their data collection with respect to placement.

However, the Department asked Directed Question #4 to ascertain whether States and LEAs should be required to determine whether there is significant disproportionality in LEAs with respect to placement in the regular classroom between 40 percent and 79 percent of day. After reviewing the perspectives shared by commenters, the Department agrees to no longer require that States determine whether significant disproportionality, by race or ethnicity, is occurring within an LEA with respect to placement in the regular classroom between 40 percent and 79 percent of the day. The Department acknowledges that there could be significant qualitative differences in the opportunities for interaction with nondisabled peers for students at the lower end of this range and students at the upper end. While the Department emphasizes that placement decisions must be individualized, we also recognize that, given these differences, for students on the lower end of this range, there could be unintended incentives to improperly place them in settings where they spend less classroom time with nondisabled students rather than more. Given the qualitative differences and the broad range of class time addressed in this category, we no longer believe that addressing significant disproportionality in LEAs with regard

to this placement category is appropriate.

The Department appreciates the comments supporting the proposed requirement and we recognize that an examination of the placement of children with disabilities outside of the regular classroom more than 40 percent of the day and less than 79 percent of the day could, in some limited cases, help to highlight systemic issues. In the Department's view, on balance, the continued use of this category for determining significant disproportionality is not warranted.

*Changes:* The Department has revised proposed § 300.647(b)(4) to remove the requirement that States identify significant disproportionality with respect to the placement of 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.

*Comment:* One commenter expressed concern that the standard methodology requires States to examine risk ratios for each placement type separately, rather than recognizing their interconnectedness. The commenter suggested, for example, that an LEA could evade a finding of what the commenter calls "significant discrepancy" by moving children from partial inclusion to a substantially separate classroom. The commenter stated that this would cause the LEA to not be identified with "significant discrepancy" with respect to the number of children being educated in partially inclusive settings. The commenter concluded that this approach would not create the right incentives for LEAs.

*Discussion:* We appreciate the commenter's concern. The Department has heard from several commenters regarding our initial proposal to require States to review for significant disproportionality the placement of children with disabilities in the regular classroom for no more than 79 percent of the day and no less than 40 percent of the day. After reviewing the comments, we agree that this placement covers too broad a range of hours within the school day to help States to identify significant disproportionality with respect to placement. In considering this commenter's perspective, we find it may also be the case that, to avoid a determination of significant disproportionality with respect to placement in the regular class for no more than 79 percent of the day and no less than 40 percent of the day, LEAs may have an incentive to shift children with disabilities from this more inclusive placement to self-contained

classrooms or separate schools. With this in mind, the Department will remove the proposed language requiring States to review LEAs, or their racial or ethnic groups, for significant disproportionality with respect to placement in the regular classroom for no more than 79 percent of the day and no less than 40 percent of the day from § 300.647(b)(4). With this change, the Department has narrowed States' review of significant disproportionality to the most restrictive placements, including self-contained classrooms, separate schools, and residential facilities. We believe that § 300.647(b)(4), as revised, encourages LEAs to focus on placing children in the proper setting by requiring them to analyze only the most significant removals from the regular classroom.

*Changes:* As discussed above, the Department has revised proposed § 300.647(b)(4) to remove the requirement that States identify significant disproportionality with respect to the placement of 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.

*Comment:* Several commenters noted that the Department should not expand data collection regarding disproportionality in placements as discretion regarding placement is not entirely within the hands of the LEA. Instead, these commenters asserted, placement involves difficult decisions by IEP Teams, including parents, that can change significantly from year to year (and sometimes throughout the year). The commenters added that the only way to address significant disproportionality would be to change a child's educational placement, which by law is the decision of an IEP Team that includes the parents. We interpreted these comments to refer to the requirements of § 300.116(a)(1), which specifies that placement is to be determined by a group of persons, including the parents, and other persons knowledgeable about the child. One commenter expressed concern that LEAs will stop thinking about the individual needs of the child and instead include them in regular classes to avoid a determination of significant disproportionality.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) explicitly requires States to review LEAs for significant disproportionality based on race and ethnicity with respect to placement, and, when significant disproportionality is identified, to (1) require LEAs to undergo a review and, if appropriate, revision of policies, practices, and

procedures; (2) publicly report on any revisions; and (3) reserve 15 percent of their IDEA Part B funds for comprehensive CEIS. This statutory language is consistent with the mandate that all children with disabilities receive special education and related services in the least restrictive environment. (IDEA section 612(a)(5) (20 U.S.C. 1412(a)(5))).

When LEAs have significant disproportionality with respect to placement, the LEA must review its policies, practices, and procedures to ensure that the policies and procedures conform with IDEA requirements and that the practice of placement teams in implementing these policies and procedures is also consistent with IDEA—such as involving parents in placement decisions, and ensuring placement decisions are made in conformity with least restrictive environment requirements. (34 CFR 300.114 and 116(a)(1)). In any case, these regulations do not include an expansion of data collections to support State review for significant disproportionality in placement. In Question 14 of OSEP Memorandum 08–09 (July 28, 2008), the Department clarified that States had an obligation to use the data collected for reporting under IDEA section 618 and must, at a minimum, examine data for three of IDEA section 618 reporting categories: Children who received educational and related services in the regular class no more than 79 percent of the day and no less than 40 percent of the day, children who received special education and related services in the regular class for less than 40 percent of the day, and children who received special education and related services in separate schools and residential facilities. However, as we note in this section of this document, the Department is revising proposed § 300.647(b)(4) to no longer require States to review LEAs for significant disproportionality with respect to placement in the regular class no more than 79 percent of the day and no less than 40 percent of the day.

*Changes:* None.

*Comment:* Several commenters expressed that it is worth noting how much time a child spends in a self-contained classroom as it is a unique placement.

*Discussion:* The Department agrees and has retained the requirement that States review LEAs for significant disproportionality with respect to placement in the regular classroom less than 40 percent of the day. In general, when children spend less than 40 percent of the day in the regular classroom, the Department considers

most of these children to be placed in self-contained classrooms.

*Changes:* None.

*Comment:* One commenter noted that the populations reviewed under proposed § 300.647(b)(3) do not align with the populations reviewed under proposed § 300.647(b)(4). The commenters specifically noted that none of the subsections under § 300.647(b)(4) reference the six specific impairments enumerated under § 300.647(b)(3)(ii). The commenter also noted that the two provisions include differences in the ages of the children reviewed. The commenter requested that the Department revise both provisions so that the populations reviewed for significant disproportionality are consistent across the review of identification, placement, and discipline.

*Discussion:* In OSEP Memorandum 08–09, the Department previously provided guidance on the data that IDEA section 618(d) requires States to examine to determine if significant disproportionality based on race and ethnicity was occurring with respect to the identification, placement, or discipline of children with disabilities. This data is consistent with that already required of States to meet their reporting obligations under IDEA section 618(a), and which were established, following notice and comment, in OMB-approved data collections 1875–0240 and 1820–0517. FILE C002, 2013. As we noted in the NPRM, the Department intentionally designed § 300.647(b)(3) and (4) to mirror the guidance previously provided in OSEP Memorandum 08–09, and current data collection requirements, so as not to introduce confusion or add unnecessary burden.

*Changes:* None.

*Comments:* Various commenters requested that the Department extend the list of placements that States must review to determine whether significant disproportionality based on race or ethnicity is occurring within their States.

Several commenters requested that the Department require States to review LEAs for significant disproportionality in the placement of children in hospital, homebound and correctional settings, as well as private schools, if they include more than 10 children. Several commenters specifically argued that children with disabilities in correctional education programs should be included, generally, in the calculations for significant disproportionality.

Commenters reported that, according to advocates and attorneys, the number of children with disabilities placed in homebound or tutoring programs—and,

as a consequence, provided with only one or two hours of instruction a day—is increasing due to unaddressed disability-related behaviors in school and efforts to reduce the use of suspension and expulsion. In many cases, according to the commenters, no attempt is made to provide these children with supplementary aids and services in less restrictive settings. The commenters stated that these practices likely have a greater impact on low-income families and children of color and concluded that the need to review this low-incidence placement for significant disproportionality is worth the risk of false positive identification of LEAs.

Further, commenters stated that LEAs play a role in the placement of children with disabilities in correctional facilities through the use of school-based arrests and juvenile justice referrals. One commenter clarified that States need to answer the question of whether children with disabilities were receiving special education services and supports in correctional facilities and whether there is significant disproportionality in those placements.

*Discussion:* The Department continues to believe that it is inappropriate to require States to examine placement in correctional facilities, or in homebound or hospital settings, given that LEAs generally have little, if any, control over a child's placement in those settings. Further, given that the Department has not previously required States to examine data to determine if significant disproportionality is occurring in these placements, a new requirement that States examine these placements in LEAs would represent a new data analysis burden that the Department does not believe is warranted.

*Change:* None.

*Comments:* A commenter requested that the Department require States to: (1) Report the number and proportion of inmates in correctional facilities within the State who have been identified as children with disabilities and are receiving special education services, and (2) make a determination of significant disproportionality, by disability status, with respect to placement in correctional facilities.

*Discussion:* We decline to require States to take either action. First, States already report to the Department counts of children with disabilities in correctional facilities as part of IDEA Part B Child Count and Educational Environments Collection. OMB Control No. 1875–0240 and File C002, 2013. Further, IDEA section 618(d) (20 U.S.C. 1418(d)) explicitly requires States to

collect and examine data to identify significant disproportionality by race and ethnicity in the LEAs of the State. Insofar as correctional facilities are not constituted as LEAs in the State, IDEA section 618(d) does not require States to conduct a significant disproportionality analysis there, and it would be an inappropriate expansion of the statutory requirement to mandate that analyses. However, to the extent that the educational programs in specific correctional facilities or systems are constituted as LEAs, States are required under IDEA to assess whether there is significant disproportionality by race and ethnicity whenever the populations are of sufficient size.

*Changes:* None.

*Comment:* One commenter requested that the Department require States to measure disparities in placement within separate schools for children who are blind and children who are deaf. (0221, 0227). The commenter stated that these schools often have separate sub-campuses or separate residential placements and academic tracks for children with multiple disabilities, and that is likely that children of color with disabilities are at greater risk of placement into these sub-campuses.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires SEAs to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State or the LEAs of the State. Accordingly, unless a separate school is an LEA in its own right, it will not be reviewed for significant disproportionality.

Further, as we have stated elsewhere in this document, a State must annually collect and examine data to determine, using the standard methodology in § 300.647, if significant disproportionality is occurring in LEAs that serve only children with disabilities. However, we have clarified in § 300.646(e) that LEAs that serve only children with disabilities are not required to reserve IDEA Part B funds for comprehensive CEIS.

*Changes:* None.

*Comment:* One commenter expressed concern that disciplinary removal data may not be collected consistently. The commenter stated that proposed § 300.647(b)(4) allows States to either compare rates for children with disabilities to rates for nondisabled children within an LEA or compare among LEAs for children with disabilities in the State.

A second commenter requested that the Department clarify whether a State might use the same calculation to determine significant disproportionality

with respect to disciplinary removal that it currently uses to identify significant discrepancy for purposes of APR/SPP Indicator 4. The commenter added that the State currently compares children with disabilities to children without disabilities within an LEA, and does not make comparisons between children with disabilities across LEAs.

*Discussion:* We appreciate the comments seeking to interpret or recommend the comparisons required under § 300.647(b)(4). This provision does not require, nor does it allow, States to compare children with disabilities to children without disabilities within an LEA or across LEAs for the purpose of identifying significant disproportionality. Rather, § 300.647(b)(4) requires States to compare children with disabilities in one racial or ethnic group to children with disabilities in all other racial groups within an LEA. When reviewing a racial or ethnic group within an LEA with a comparison group that does not meet the State's population requirements, the State will compare children with disabilities in one racial or ethnic group to children with disabilities in all other racial or ethnic groups within the State.

Moreover, we note that unlike the language in IDEA section 618(d), the language in section 612(a)(22) expressly provides for an examination of data for significant discrepancies (in the rates of long-term suspensions and expulsions of children with disabilities) among the LEAs in the State or compared to rates of nondisabled children in those LEAs. Thus, Congress knew how to require comparisons and expressly did so in IDEA section 612(a)(22), but not in sections 618(d), which is the subject of these regulations.

*Change:* None.

*Comments:* One commenter suggested that the Department remove from proposed § 300.647(b)(4)(vi), (vii) and (viii) all mention of in-school suspensions, as the term is not defined and the implementation of in-school suspension varies greatly from LEA to LEA.

*Discussion:* We generally expect that States will review LEAs for significant disproportionality using the same IDEA section 618 data reported to the Department. Under the IDEA Part B Discipline Collection, in-school suspension is defined as “instances in which a child is temporarily removed from his/her regular classroom(s) for disciplinary purposes but remains under the direct supervision of school personnel, including but not limited to children who are receiving the services in their IEP, appropriately participate in



the general curriculum, and participate with children without disabilities to the extent they would have in their regular placement. Direct supervision means school personnel are physically in the same location as students under their supervision.” OMB Control No. 1875–0240; Data Accountability Center, 2013.

*Change:* None.

*Comments:* A few commenters requested that the Department modify the proposed regulations to require States to collect and analyze data to determine if significant disproportionality by English language proficiency or gender is occurring with respect to the identification, placement, or discipline of children with disabilities. These commenters argued that IDEA provides the Department with authority to require States to submit demographic data on children with disabilities beyond race and ethnicity. Some of these commenters stated that the ability to disaggregate and cross-tabulate data is essential to understanding disparities in treatment between subgroups of children. One commenter noted that, according to the NPRM, English Learners are at greater risk for being disproportionately identified as children with a disability. This commenter stated that there are other demographic factors—beyond race and ethnicity—that should be considered when evaluating significant disproportionality across identification, placement, and discipline, including socioeconomic and linguistic status.

A few commenters cited research suggesting that school-age boys are over-identified as having disabilities, while school-age girls are under-identified. A last commenter stated that gender deserved heightened attention, especially as it relates to identification for autism and emotional disturbance.

*Discussion:* IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring with respect to the identification, placement, and discipline of children with disabilities in the State or the LEAs of the State. The Department believes that requiring, or permitting, analysis for significant disproportionality based on sex, English language proficiency, or socioeconomic status is beyond the scope of IDEA section 618(d) and inappropriate for these regulations. Accordingly, the Department will only require States to identify significant disproportionality based on race and ethnicity and will not require States to expand their review to include significant disproportionality based on factors such as sex, English language

proficiency, or socioeconomic status. As with other areas of review, there is nothing in IDEA that would prevent review of data for significant disproportionality based on factors such as sex or English language proficiency. In addition, States may choose to review policies, procedures, and practices of an LEA for compliance with IDEA requirements under its general supervisory authority in IDEA section 612(a)(11) or monitoring authority in section 616; however, the consequences of a determination of significant disproportionality based on other factors not set out in these regulations—*e.g.*, sex or English language proficiency—may not include mandating the use of comprehensive CEIS as set out in IDEA section 618(d)(2) and these regulations.

*Changes:* None.

*Comments:* A large number of commenters offered perspectives as to whether children ages three through five should be included in States’ review for significant disproportionality in the identification of children as children with disabilities and in the identification of children as children with a particular impairment.

Several commenters expressed that it is inappropriate to consider ages three through five in a determination of significant disproportionality, as some LEAs are not responsible for early intervention. One commenter stated that data used to identify significant disproportionality is also used in Indicators 9 and 10 of the SPP/APR, in which States have been instructed to use data only on children ages 6 through 21. The commenter requested that the age ranges used to identify disproportionate representation under IDEA section 612(a)(24) (20 U.S.C. 1412(a)(24)) and those used to identify significant disproportionality under IDEA section 618(d) (20 U.S.C. 1418(d)) remain consistent. Another commenter noted that the proposed regulations require States to report data on three through five year olds that is not currently reported. This commenter noted that States cannot calculate data regarding placement for children ages three through five because there are no peers in the regular classroom to compare the numbers. Two commenters noted that most States do not have a data collection mechanism to make determinations of whether significant disproportionality, based on either identification or discipline, for children ages three and four, is occurring. These commenters urged the Department to eliminate the requirement to determine significant disproportionality for three and four year olds. Another commenter

built on this argument, stating that, in a State without universal preschool, a majority of the children enrolled in public preschool are children with disabilities ages three to five. The commenter stated that this disproportional loading of preschool children into the analysis will result in the identification of nearly all of one State’s small regional elementary LEAs.

One commenter suggested that the Department require States to review LEAs for significant disproportionality with respect to identification only among children age 6 through 21. Other commenters noted that the inclusion of preschool-aged children is problematic because, without universal preschool, there is no reliable method for determining the total population of children ages three through five and, therefore, no appropriate denominator for the risk calculation. One commenter noted that, because preschoolers without disabilities do not have the same guarantee of a free appropriate public education as their peers with disabilities, States would have to use general census data, rather than enrollment, to identify the population of three and four year olds for purposes of determining significant disproportionality. In one State, according to one commenter, the State is the LEA responsible for the education of children with disabilities ages three through five. Given this context, the commenter expressed concern that the requiring States to review ages three through five for significant disproportionality will create a disincentive to offer non-mandated early intervention programs.

Conversely, several commenters suggested that the Department require States to review the identification of three through five year old children with disabilities only when there is a valid comparison or reliable baseline group within the public school.

A number of commenters generally supported the Department’s proposal to lower the age range for the calculation of disproportionality for identification and discipline from ages 6 to 21 to ages 3 to 21. Commenters noted that lowering the age limit of each State’s review of significant disproportionality in both identification and discipline is an important step in addressing the importance of the preschool years, and focusing attention on early childhood discipline.

*Discussion:* The Department has previously issued guidance explaining which specific disability categories, types of discipline removals, and placements that States must review for significant disproportionality based on

race and ethnicity under IDEA section 618(d). OSEP Memorandum 08–09, July 28, 2008. This guidance included only those identification categories, disciplinary removals, and placements—as well as the age ranges to be reviewed for each—that were consistent with the data collection that States submit to the Department each year to satisfy their reporting obligations under IDEA section 618(a) (20 U.S.C. 1418(a)). OMB Control Nos. 1875–0240 and 1820–0517 and File C002, 2013. At present, States submit to the Department data on children identified with any disability, autism, intellectual disability, emotional disturbance, specific learning disabilities, other hearing impairments, speech and language impairment for ages 3 through 21, and data on discipline removals for children ages 3 through 21.

It was the Department's intention to align the proposed regulations, to the extent possible, with IDEA section 618 data collection requirements so as to avoid any new data collection burden and any new data analysis burden on the States. At the same time, however, we must balance our desire to minimize burden with our interest in ensuring that children are not mislabeled. As this may be especially critical for young children, we agree with commenters that including children ages three through five is a meaningful step in recognizing the importance of preschool and early childhood education.

To that end, the Department will maintain the requirement for States to examine populations age 3 through 21, for purposes of significant disproportionality due to identification. We also agree, however, that the inclusion of children ages three through five in the State's review for significant disproportionality—with respect to the identification of disabilities and impairments—may create some complications or additional burden related to data collection and comparison. We acknowledge, for example, that some LEAs do not yet provide universal preschool, making a determination about the total population of children ages three through five more difficult. We also recognize that this collection would not correspond with current Indicators 9 and 10 of the SPP/APR, which focus on children ages 6 through 21.

As it is our expectation that States will use the same IDEA section 618 data reported to the Department to examine LEAs for significant disproportionality, we anticipate that States will use their IDEA, Part B child count data (rather than Federal census data) to examine significant disproportionality for

children ages 3 through 21. Additionally, to provide States more time to modify State analyses and consider how to identify and address factors associated with significant disproportionality in children with disabilities ages three through five, the Department will delay the requirement for including children ages three through five in their examination of significant disproportionality—with respect to the identification of disabilities and impairments—until July 1, 2020, in anticipation of more widespread provision of preschool programs in the future.

We disagree that States do not have data collection procedures to review LEAs for significant disproportionality due to discipline for populations ages 3 through 21, as States are currently required to collect data for purposes of IDEA section 618(a). For that reason, we will leave unchanged the requirement that States examine populations ages 3 through 21 for purposes of identifying significant disproportionality due to discipline.

Finally, we disagree that requiring the review of children ages three through five for significant disproportionality will create a disincentive for States or LEAs to offer non-mandated early intervention programs. We believe that early education and early intervention can have a number of salutary effects—not least being the reduced need for later, more intensive services—that serve as ample incentive for States to invest in these programs. Moreover, even in those instances in which States, not LEAs, are responsible for the provision of early intervention, the benefits of ensuring that this population is not subject to significant disproportionality outweigh any potential disincentives. Therefore, we will delay the inclusion of children ages three through five in the review of significant disproportionality with respect to the identification of children as children with disabilities, and with respect to the identification of children as children with a particular impairment, until July 1, 2020.

*Changes:* None.

*Comments:* Several commenters suggested that the Department allow States to use a single factor analysis and consider the total disability population when calculating disproportionality with respect to placement. We understood these comments to suggest that the Department allow States to identify LEAs with significant disproportionality based on the extent to which race or ethnicity is predictive of a child's placement.

*Discussion:* As we discussed in *Under-Identification of Children with Disabilities by Race and Ethnicity*, the Department interprets IDEA section 618(d) (20 U.S.C. 1418(d)) to require States to identify significant disproportionality based on race and ethnicity, irrespective of the causes of the disparity. The statute anticipates that the investigation of the causes of the disparity will take place after the significant disproportionality has been identified, as part of the implementation of the statutory remedies provided for under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)). For this reason, we decline to allow States to identify LEAs with significant disproportionality based on the extent to which the State believes race or ethnicity may predict the placement of a child with a disability.

*Changes:* None.

*Comments:* Several commenters offered perspectives on the requirements for States to review LEAs for significant disproportionality with respect to disciplinary removals.

A number of commenters recommended that the Department eliminate the requirement to calculate disciplinary removals of 10 days or fewer, both in-school and out-of-school, in proposed § 300.647(b)(4)(iv)–(vii). Of these, some commenters suggested that the requirement itself is excessive and punitive. Some commenters suggested that schools need some flexibility to manage behavior. These short-term removals, other commenters stated, respond to behaviors that are best managed through IEPs and are typically not as serious as the behaviors that give rise to removals of more than 10 days. Still other commenters stated that the requirement hampers school officials' ability to manage behavior, indicating that LEAs may feel constrained in their options for short-term removals if removals of fewer than 10 days and removals of 10 days or more are treated in the same way in the significant disproportionality calculation. In addition, these commenters stated that, by not requiring the review of short-term removals, the Department would enable States to focus more on the disproportionate results for schools placing children in disciplinary settings more than 10 days, which constitutes a change of placement.

Some commenters recommended removing the requirement for calculating total disciplinary removals under proposed § 300.647(b)(4)(viii) so as not to double count removals. The commenter also stated that it is unfair to treat LEAs that have a few short-term suspensions where behaviors are resolved through changes in IEPs in the

same way as LEAs that have repeated removals of more than 10 days and make no changes in IEPs or services for the children involved.

One commenter suggested that, to reduce confusion, the Department should rewrite proposed § 300.647(b)(4) to separate disciplinary removals from educational placements and place them under a heading of discipline. The commenter stated that data must be collected on exclusionary removals of all students with disabilities, regardless of the restrictiveness of the setting in which they are served.

One commenter expressed concern that, by including the entire range of disciplinary options in the required risk ratio calculations—from alternative education settings to removals by a hearing officer—the Department will force schools to constantly watch their data for quota targets for each type of discipline because there are no acceptable options not subject to the test for significant disproportionality.

Finally, one commenter requested that only discretionary discipline actions be monitored for significant disproportionality.

*Discussion:* The Department appreciates all of these comments. We disagree, however, with several and believe that many of these comments misstate either the discipline requirements or the requirements in these regulations. First, it is not clear to the Department that determining whether significant disproportionality exists for suspensions of any length in any way burdens the overall ability of LEAs or schools to manage behavior. Further, § 300.646(c) is intended, in part, to identify systemic issues in discipline practices, whether discretionary or not, in order to correct them and improve the ability of schools to manage behavior overall. Examining LEAs for significant disproportionality in discipline gives State and local school officials the opportunity to see where policies, procedures and practices should be changed—to determine, for example, whether schools might do more to manage behavior through IEPs, services, and supports which could be used to address or reduce both short-term and long-term suspensions. We especially note that under IDEA section 615(k) and the current regulations at §§ 300.530 and 300.531, there is significant involvement by the IEP Team members in making a range of decisions related to discipline including manifestation determinations and interim alternative settings for services. Likewise, in 2016, the Department released guidance to clarify that, while IDEA section

615(k)(1)(B) (20 U.S.C. 1415(k)(1)(B)) authorizes school personnel to remove from their current placement children who violate a code of student conduct, that authority in no way negates the obligation of schools to provide behavioral supports to children with disabilities as needed to ensure FAPE. OSEP Dear Colleague Letter, August 1, 2016.

We further disagree that collecting discipline data in any way leads to the punitive treatment of LEAs. When we published the NPRM, States already were required under § 300.646(a) to determine whether there was significant disproportionality in disciplinary removals of fewer than 10 days, disciplinary removals of more than 10 days, and total disciplinary removals, and States were already obligated to collect and report the data upon which these determinations were made. See, OMB Control No. 1875-0240; OSEP Memorandum 07-09, April 24, 2007. The requirements under § 300.647(b), therefore, cannot reasonably be considered excessive.

Further, while calculating risk ratios for total disciplinary removals under § 300.646(b)(4)(vii) does involve using the data already included in § 300.646(b)(4)(iii) through (vi), is the Department does not view this as double counting but as an amalgamation of various types of removals. That is, § 300.646(b)(4)(vii) is intended to allow for a separate review of disciplinary removals that could include lower-incidence disciplinary actions that may happen too rarely to allow for a stable risk ratio calculation. This is similar to the inclusion, in § 300.646(b)(3)(i), of categories of disabilities set out in § 300.646(b)(3)(ii) and all other categories, including low-incidence disabilities.

With respect to the comment suggesting that the Department reorganize § 300.647(b)(4), we believe that the current structure is sufficiently clear to avoid confusion. The Department further disagrees that the requirements under § 300.647(b)(4) will force LEAs to develop quota targets for different types of discipline so as to avoid a finding of significant disproportionality. Nothing in these regulations is intended to require LEAs to overturn appropriate prior decisions or to otherwise affect individual decisions regarding the identification of children as children with disabilities, the placement of children with disabilities in particular educational environments, or the appropriate discipline of children with disabilities.

Finally, nothing in § 300.647 is intended to unfairly target those LEAs

that have a few short-term suspensions where behaviors are resolved through changes in IEPs by grouping these districts with those that have repeated removals of more than 10 days, whether or not the IEP Teams make changes in IEPs or services for the children involved. It is true that all LEAs are subject to the same State methodology for determining significant disproportionality, and every LEA where the State determines there is significant disproportionality is subject to the same statutory remedies of reserving 15 percent of IDEA Part B funds for comprehensive CEIS and reviewing, and revising, if appropriate, policies, practices, and procedures related to disciplinary removals. One of the purposes of the analyses, however, is to identify and address significant disproportionality that is indicative of systemic or otherwise persistent underlying problems, which may not be revealed when there are too few short-term or long-term suspensions, whether or not behaviors are proactively resolved through changes in IEPs.

*Changes:* None.

*Comments:* One commenter expressed a concern regarding the completeness of IDEA section 618 data with respect to the disciplinary removals of children ages three through five. The commenter stated that the field of early childhood often does not use the terms suspension or expulsion to describe a disciplinary removal.

*Discussion:* As we have discussed previously, the Department designed § 300.647(b)(4) to mirror IDEA section 618(a) (20 U.S.C. 1418(a)) provisions with respect to the collection of discipline data and the use of these data to review disciplinary removals, as explained in our previous guidance. OSEP Memorandum 08-09 (July 28, 2008). This guidance clearly specified our interpretation that States' review for significant disproportionality with respect to disciplinary removal must include children with disabilities, ages three through five.

That said, the Department generally agrees with the commenter that data completeness and quality is important and will consider ways to support the work of States to properly collect and report data to the Department, especially in situations where a State's terminology differs from the Department's data definitions.

*Changes:* None.

*Comment:* A commenter expressed concerns about the inclusion of residential facilities in proposed § 300.647(b)(4), as LEAs are generally not the agency responsible for placing children in residential facilities. In the

commenter's State, children are counted in the LEA where the facility is located.

*Discussion:* When States examine their data to determine whether an LEA has significant disproportionality, the Department expects that States will use education placement data that is consistent with those submitted to the Department for purposes of IDEA section 618(a) and OMB Control No. 1875-0240. Final § 300.647(b)(4) is consistent with these data collection requirements and with the Department's previous guidance regarding States' review of significant disproportionality with respect to placement in residential facilities. (See, IDEA section 618(d); and Questions and Answers on Disproportionality, June 2009, Response to Question B-1.) We repeat the Department's position here for convenience.

We interpret IDEA section 618(d) to require States to include, or exclude, a child with a disability in its calculation of significant disproportionality depending on the agency that placed the child in a residential facility and the location of the residential facility. All children with disabilities placed in a residential facility in the same State by an educational agency must be included in the calculation of significant disproportionality. For purposes of calculating significant disproportionality, however, a State should assign responsibility for counting a child with a disability placed in an out-of-district placement to the LEA that is responsible for providing FAPE for the child (the "sending" LEA) rather than the LEA in which the child has been placed (the "receiving" LEA). Children with disabilities placed in residential facilities or group homes in the same State by a noneducational agency (e.g., court systems, Department of Corrections, Department of Children, Youth and Families, Social Services, etc.) may be excluded from a State's calculation of significant disproportionality. Children with disabilities placed in a residential facility in a different State by an educational agency should be included in a State's calculation of significant disproportionality in the LEA responsible for providing FAPE for that child (the sending LEA). Children with disabilities placed in a residential facility in a different State by a noneducational agency (e.g., court systems, Department of Corrections, Department of Children, Youth and Families, Social Services, etc.) may be excluded from the calculation of significant disproportionality by both the State in which the child resides and

the State where the residential facility is located.

*Changes:* None.

Risk Ratio Thresholds (§ 300.647(a)(7); § 300.647(b)(1) and (2); § 300.647(b)(6))

*Comments:* One commenter questioned whether proposed § 300.647(b)(1) requires States to identify additional LEAs and noted that, expressing concern that the potential costs of the regulations outweigh the benefits. The commenter noted that, in the NPRM, the Department stated that it would examine each State's risk ratio threshold to determine its reasonableness.

*Discussion:* The section in the NPRM containing the analysis of costs and benefits, and the same section in this document, states that the standard methodology, applied nationwide, will likely result in more LEAs identified with significant disproportionality. That is different, however, than requiring States to identify additional LEAs. Under §§ 300.646 and 300.647, States are not required to identify additional LEAs.

Similarly, while the Department stated that the risk ratio thresholds selected by the States would be subject to its review, the Department did not state that this review must strictly adhere to a particular outcome that may be overly burdensome to States. In general, the Department does not intend to require States to submit their risk ratio thresholds for approval prior to the implementation of the standard methodology. Rather, after these regulations take effect, the Department will monitor States for any use of risk ratio thresholds that may be unreasonable and take steps, as needed, to ensure the States' compliance with § 300.647(b)(1).

To ensure that the Department may accurately and uniformly monitor all risk ratio thresholds for reasonableness, we have added a requirement that each State report to the Department all of its risk ratio thresholds and the rationale for each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through an information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's information collection request.

*Changes:* The Department has added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all risk ratio thresholds developed under § 300.647(b)(1)(i)(A) and the rationale for each.

*Comments:* A number of commenters raised issues with respect to the process by which States will develop reasonable risk ratio thresholds. Several of these commenters strongly supported the Department's proposal to require States to involve their State Advisory Panels in setting the thresholds. One of these commenters added that we should require States currently using a method similar to the standard methodology to review their thresholds with stakeholders prior to gaining Department approval. One commenter requested that the Department, prior to the issuance of the final regulations, clarify the process by which States would assess the reasonableness of their proposed risk ratio thresholds.

Other commenters suggested that the Department require States to use a uniform standard-setting process to inform the State Advisory Panels in developing risk ratio thresholds. One commenter suggested that the Department require States to undertake a standard-setting process with stakeholders, including the State Advisory Panels, to revisit their existing risk ratio thresholds using the new calculations; generate impact data using these thresholds; and then apply different thresholds to examine the impact upon disability subgroups, placement categories, and impairments. The commenter also recommended that States' risk ratio thresholds, as well as their business rules for the application of the thresholds, be publicly posted. The commenter further suggested that States reexamine risk ratio thresholds every three years to study their impact, adjust for population changes or new research, and to revise the opportunities for stakeholder input. Finally, these commenters urged the Department to require States to include epidemiologists on State Advisory Panels.

*Discussion:* We agree with commenters that State Advisory Panels should play a critical role in the development of States' reasonable risk ratio thresholds. Under IDEA section 612(a)(21)(D)(iii) (20 U.S.C. 1412(a)(21)(D)(iii)), 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 States will submit to the Department under the IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection required under IDEA section 618—including the LEAs identified with significant

disproportionality and the category or categories under which the LEA was identified (*i.e.*, identification, identification by impairment, placement, or discipline)—the State Advisory Panel should have a meaningful role in advising the State on methods to use in establishing reasonable risk ratio thresholds for determining significant disproportionality.

However, while the Department does not preclude either a State or State Advisory Panel from undertaking a standard-setting process and evaluating impact data in developing a reasonable risk ratio threshold, we do not find it necessary to prescribe the exact steps States must take in order to gain input from State Advisory Panels in that process. Likewise, at this time, the Department does not intend to mandate a specific process by which a State and its State Advisory Panel should assess the reasonableness of its proposed threshold, nor do we currently find it necessary to require States to reestablish their risk ratio thresholds every three years. As a State has the flexibility to establish its own reasonable risk ratio threshold, and is required to do so with input from its State Advisory Panel, the Department expects that either or both entities may, at any time, seek to reexamine whether the State's risk ratio threshold continues to be reasonable. Absent any indication that this practice would not be effective, the Department currently prefers to allow States and State Advisory Panels the flexibility to review and revise risk ratio thresholds as necessary or appropriate, rather than increase their burden by requiring regular reviews or mandating a specific standard-setting process.

Finally, while epidemiologists may be useful stakeholders for States as they create reasonable risk ratio thresholds, we believe that States have sufficient expertise to determine the appropriate composition of their State Advisory Panels.

*Changes:* None.

*Commenter:* A few commenters recommended that the Department ensure that the regulations outline specific ways that States and LEAs can meaningfully include all stakeholders in addressing significant disproportionality. The commenters recommended that States be required to demonstrate outreach and incorporation of diverse stakeholder input and advice in setting thresholds and addressing significant disproportionality through: Documentation of outreach to stakeholders (including efforts to recruit a diverse State Advisory Panel); posting of detailed minutes of State Advisory

Panel meetings; transparent publication and communication about State efforts to set reasonable risk ratio thresholds; demonstration of how stakeholder feedback was incorporated in defining final thresholds above which disproportionality is significant; demonstration of stakeholder input in reviewing and revising State policies, practices, and procedures related to the identification or placement of children with disabilities in LEAs identified as having significant disproportionality; and transparency in noting State efforts and progress in remedying significant disproportionality.

*Discussion:* We do not believe it necessary to outline in these regulations the specific ways that States must document their efforts to involve stakeholders in the development of risk ratio thresholds. Under IDEA section 612(a)(21)(D)(iii) (20 U.S.C. 1412(a)(21)(D)(iii)), State Advisory Panels already 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.” Given these and other long-standing responsibilities, it is the Department's belief that States already have in place processes and procedures to secure input from their State Advisory Panels. Further specific requirements for stakeholder involvement could add a new data collection or reporting burden on States, which we do not believe is necessary. As most of the commenters' suggestions would dramatically increase paperwork burden for States, and because we believe there are already sufficient procedures in place for States to work with their State Advisory Panels, the Department declines to include those requirements in these regulations.

As discussed elsewhere in this analysis of comments, we also note that public participation in the adoption and amendment of policies and procedures needed to comply with IDEA Part B is already addressed by IDEA section 612(a)(19) and § 300.165. To the extent that commenters sought requirements for public participation requirements beyond the ones contained in those provisions, we decline to adopt them for the reasons discussed above.

*Changes:* None.

*Comments:* One commenter expressed concerns that these regulations will weaken the role of State Advisory Panels and other stakeholder groups in each LEA. Another commenter asked the Department to clarify the authority of State Advisory Panels under the proposed regulations.

*Discussion:* We believe that these regulations help make more explicit and strengthen the role of State Advisory Panels and other stakeholders in how States identify significant disproportionality. Section 300.647(b)(1)(ii)(A) requires consultation with stakeholders, including the State Advisory Panels, in developing the State's risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for determining reasonable progress under § 300.647(d)(2). As discussed elsewhere in this analysis of comments, we also note that public participation in the adoption and amendment of policies and procedures needed to comply with IDEA Part B is addressed by IDEA section 612(a)(19) and § 300.165 would apply, as appropriate. This helps to ensure greater public awareness, transparency, and input into how States establish these values and implement these regulations.

Further, in the future, the Department anticipates that all risk ratios and alternative risk ratios will be made public but has not yet determined the precise time and manner for this to occur. We anticipate doing so through an information collection request, through the Department's own publication of these data, or some combination of the two. This will help reinforce the review and revision of risk ratio thresholds, cell sizes, and n-sizes as an iterative public process within each State.

*Changes:* None.

*Comments:* A few commenters asserted that, as State Advisory Panels have limited family participation, Parent Training and Information Centers and Community Parent Resource Centers should be required participants in States' implementation of the standard methodology.

*Discussion:* The Department agrees with commenters about the importance of the meaningful involvement of families in the development of reasonable risk ratio thresholds. We note that State Advisory Panels are composed of individuals “involved in, or concerned with, the education of children with disabilities,” and must include “parents of children with disabilities.” 20 U.S.C. 1412(a)(21)(B). Section 300.647(b)(1)(i) requires that States involve stakeholders, including State Advisory Panels, in the development of each State's risk ratio thresholds.

This advisory role is within the scope of the statutory responsibility of State Advisory Panels to advise States in developing evaluations and reporting on data to the Department under IDEA

section 618. IDEA section 612(a)(21)(D)(iii); 20 U.S.C. 1412(a)(21)(D)(iii). While IDEA does not include a similar statutory requirement for either Parent Training and Information Centers or Community Parent Resource Centers, nothing in these regulations that would prevent a State, or other members of the State Advisory Panel, from consulting with those entities in the development of risk ratio thresholds. To the extent that States believe that their input would be valuable, we encourage States to include Parent Training and Information Centers and Community Parent Resource Centers in their deliberations regarding the standard methodology.

*Changes:* None.

*Comments:* A number of commenters responded to Directed Question #9, which inquired, in part, whether there are any 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.

A few commenters expressed their general support for allowing States to use different risk ratio thresholds for different categories of analysis. Of these, one commenter specifically supported allowing three different risk ratio thresholds—one for identification, one for placement, and one for disciplinary removals. Other commenters noted that, given the varying incidence rates and resulting cell sizes across disability categories, placements, and discipline rates, different risk ratio thresholds would be important in helping to ensure that any identified disproportionality is indeed significant. A last commenter noted that States should be allowed to consider setting different risk ratio thresholds for different categories of analysis (e.g., analysis of identification, placement, and discipline) if those thresholds are consistent with advice from stakeholders, including State Advisory Panels.

Some commenters indicated only partial support for using different risk ratio thresholds for different categories of analysis. Of these, one commenter supported the use of different thresholds for the analyses regarding disciplinary removals, as well as different thresholds for placement categories, but suggested that all thresholds used to analyze impairments must be consistent. Other commenters agreed that thresholds used to determine significant disproportionality in identification should not change for each impairment.

Several commenters expressed concerns about, or opposed the use of, different risk ratio thresholds for

different categories of analysis. Of these, some suggested that different risk ratio thresholds would impede transparency for parents, educators, and the public at large; impede Federal efforts to monitor States; and make it difficult to understand why some LEAs would be identified as having significant disproportionality and not others. Two commenters suggested that the language allowing different thresholds for different categories of analysis appeared unconstitutional.

Several commenters cautioned that States should not be permitted to set higher risk ratios for the categories where racial disproportionality is most likely to negatively impact historically disadvantaged groups of children. Some of these commenters suggested that this flexibility would allow States to avoid identifying LEAs where disparities have historically been most problematic. These commenters noted that racial disparities in special education—notably, identification of intellectual disability and emotional disturbance, and placement outside the regular classroom—were the result of local efforts to use disability identification and placement to resist desegregation requirements and deny children of color access to the regular classroom and curriculum.

One commenter noted that the LEAs in one State have historically (1) only over-identified Black children in intellectual disability; (2) mostly over-identified Hispanic children in speech and language impairment; and (3) over-identified Black and Native American children in emotional disturbance and specific learning disabilities. This commenter and another commenter stated that when specific races are mostly or always over-identified in specific disability categories, then the use of different risk ratio thresholds for different categories of analysis may result in unlawful disparate impact on racial and ethnic groups.

One commenter suggested that the use of different thresholds for different disability categories might allow States to conceal disproportionality in disability categories that are commonly known to be significantly disproportionate.

*Discussion:* The Department agrees with commenters that States may need different risk ratio thresholds in order to reasonably identify significant disproportionality for categories with different degrees of incidence rates, and, therefore, different degrees of disparity. The Department sees no specific legal obstacle to setting different thresholds for different categories of analysis, though we recognize that it is possible

that any race-neutral threshold, just like any race-neutral policy, could have a disparate impact. In addition, as we state later in this section, setting different risk ratio thresholds for different racial or ethnic groups within the same category of analysis is unlikely to withstand constitutional scrutiny.

Further, under § 300.647(b)(1), the Department intends for States to have the flexibility to set reasonable risk ratio thresholds for each impairment and for various placements and disciplinary removals. With this provision, States have the flexibility to set up to 15 different risk ratio thresholds. While the Department understands commenters' concerns that States could set race-neutral risk ratio thresholds that may have a disparate impact on a particular race or ethnicity based on historical numbers, in the Department's view, a requirement to apply uniform race-neutral risk ratio thresholds across all impairments would be unlikely to address this concern. We believe that States will have greater flexibility to establish reasonable risk ratio thresholds that do not have a disparate impact based on race or ethnicity if allowed to set different thresholds for different disability categories. As it works with States as they determine their risk ratio thresholds, the Department will decide whether additional guidance in analyzing potential disparate impact in setting reasonable risk ratio thresholds is necessary. For general guidance about the application of the legal theory of disparate impact in other contexts, please see the joint Department of Education and Department of Justice Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> and the Department of Education Dear Colleague Letter on Resource Comparability at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

While we acknowledge that allowing States to set multiple risk ratio thresholds may mean some increase in the complexity of the standard approach, we do not believe that permitting multiple risk ratio thresholds substantively impedes the goals of improved transparency or comparability in State implementation of the standard methodology. For any one category of analysis—emotional disturbance, for example—it will still be possible to compare the reasonable risk ratio thresholds each State uses to identify significant disproportionality. Meanwhile, we believe that allowing

States this flexibility actually increases the likelihood that they may take action to address racial and ethnic disparities in each of the categories of analysis, rather than limit their efforts to only those categories with the greatest disparities.

The involvement and impact of State Advisory Panels in the State's setting of risk ratio thresholds is discussed elsewhere in this analysis of comments.

*Changes:* None.

*Comment:* Directed Question #9 also inquired whether there are any 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. A number of commenters opposed the use of different risk ratio thresholds for different racial or ethnic groups of children. One commenter stated that different thresholds for different racial or ethnic groups would not be useful or fair. Two commenters believed that allowing different thresholds for different racial or ethnic groups would make transparency difficult and make data analysis much more complex. Another commenter noted that, with different risk ratio thresholds, one could not make comparisons across racial or ethnic groups. One commenter noted that these thresholds would not likely meet constitutional scrutiny.

*Discussion:* The Department agrees with the concerns raised by the commenters. We believe that the use of different risk ratio thresholds, by race or ethnicity within the same category of analysis, would be unlikely to meet constitutional scrutiny because it is difficult to articulate a compelling justification for analyzing certain groups differently based on their race or ethnicity. For this reason, the Department will not change § 300.647(b)(2), which clarifies that the risk ratio thresholds developed for each category of analysis (under § 300.647(b)(1)) must be the same for each racial and ethnic group.

*Changes:* None.

*Commenters:* Several commenters suggested that the Department establish a cap above which States may not establish a risk ratio threshold, or otherwise limit States to a range of risk ratio thresholds.

A few commenters suggested 3.0 as a cap. One of the commenters noted that, in the years between 2006 and 2009, six States increased their risk ratio thresholds and asked that the Department establish an absolute maximum risk ratio threshold of 3.0 (based, according to the commenter, on

two median absolute deviations above the national median of all LEA risk ratios). Another commenter suggested a risk ratio threshold cap of 2.0. Still another commenter noted that using risk ratio thresholds over 2.0 may well mask significant disproportionality in identification, especially for impairments where children of color with disabilities have historically been over-identified, such as intellectual disability and emotional disturbance.

Several commenters suggested that the Department recommend a range within which States may choose to set their risk ratio threshold. These commenters recommended a range between 1.5 and 3.0, with some flexibility to allow States to use higher thresholds. The commenters suggested that, so long as the State has identified some LEAs in the prior two years and is able to provide evidence that it will identify some LEAs using a threshold that is higher than the recommended range, the State be allowed to set risk ratio thresholds that exceed the established range. Two commenters believed that no State with a risk ratio exceeding a level of two times discrepant or above the national average should be allowed to identify zero LEAs as having significant disproportionality.

*Discussion:* The Department considered and rejected the possibility of establishing an absolute cap on the States' choice of risk ratio thresholds and limiting States' choice to a range of thresholds. At this time, the Department has not identified a sufficient, broadly applicable justification on which to establish these limitations at any specific threshold. In lieu of a mandate that all States use the same risk ratio thresholds, or set thresholds within limits established by the Department, § 300.647(b)(1) requires States to develop risk ratio thresholds that are reasonable and to consider the advice of stakeholders in establishing these thresholds. Moving forward, we will review State policies and practices to determine whether there emerges a standard practice or set of practices that may provide sufficient rationale for those limitations.

As mentioned earlier in this section, we have added a requirement that States submit to the Department the risk ratio thresholds they set and the rationales for setting them. Though the principal purpose of the requirement is to enable the Department's uniform monitoring of risk ratio thresholds, submitting risk ratio thresholds and their underlying rationales will inform the Department's review of the question of the need for a nationwide risk ratio threshold.

*Changes:* As mentioned above, the Department has added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all risk ratio thresholds, the standard for measuring progress under § 300.647(b)(1)(i)(A)–(D) and the rationale for each.

*Comment:* A number of commenters requested additional clarification regarding how the Department will determine whether States' risk ratio thresholds are reasonable. Of these, some commenters' requests were general in nature. One commenter noted that, theoretically, the provision could allow States to continue to set unreasonably high standards that will continue to result in the identification of few or no LEAs. Another commenter suggested that the Department presume risk ratio thresholds for certain categories of analysis to be unreasonable—if there has been consistent overrepresentation in a category—and require States to provide a reasonable justification. A few commenters noted that, if States are given too much flexibility to set their risk ratio thresholds, then the requirement that they collect and analyze data to identify significant disproportionality becomes less meaningful or results in little meaningful information. Another commenter expressed concern that a standard of reasonableness, without further qualification in the regulations, might be result in a different determination of reasonableness from State to State, and from year to year.

Other commenters recommended that the Department use specific definitions of reasonableness. One commenter expressed concern that the Department's proposal offers no national standard, criteria, benchmarks, or goals and targets on which to gauge State compliance with the proposed regulations and requested that the Department withdraw the regulations until it can clearly specify its standard of "reasonableness." One commenter requested that the Department notify all States of any Federal enforcement action taken to ensure the reasonableness of a State's risk ratio threshold.

Other commenters recommended that the Department make clear that States that did not identify a single LEA in any area in the past, or that identified very few LEAs because of an unreasonably high threshold, will be unlikely to have their threshold deemed "reasonable" if it exceeds a set range, or remains unchanged (even if falling within a range recommended by the Department).

Some commenters suggested that the Department include factors unique to each State when considering the reasonableness a risk ratio threshold. One commenter suggested that the Department consider both the racial and ethnic composition of States and LEAs and the presence of factors correlated with disability when evaluating risk ratio thresholds. Other commenters suggested that the Department provide States the flexibility to establish risk ratio thresholds that reflect the composition of States' and LEAs' unique demography.

One commenter suggested that, so long as the State's proposed risk ratio threshold represents a decision that is unbiased, data-driven, and responsive to the particular needs of the State, it should be deemed reasonable when analyzed by the Department.

*Discussion:* We appreciate all of the comments regarding the Department's review of a State's risk ratio thresholds. It is our intention to clarify in forthcoming guidance the specific processes the Department will use to review for reasonableness a State's risk ratio thresholds, including information on how, and under what circumstances, the Department will undertake this review. In the interim, however, States may choose to consider the four conditions that the Department included in the NPRM in their development of risk ratio thresholds.

First, if the selected threshold leads to a reduction in disparities on the basis of race or ethnicity in the State or if it results in identification of LEAs in greatest need of intervention, then the Department may be more likely to determine that a State has selected a reasonable threshold. Second, the Department may be more likely to determine that a State has selected an unreasonable risk ratio threshold if the State avoids identifying any LEAs (or significantly limits the identification of LEAs) with significant disproportionality 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. Third, the Department noted that establishing a risk ratio threshold solely on an objective calculation does not guarantee that the Department would consider the resulting threshold to be reasonable when examined in light of racial and ethnic disparities taking place at the LEA level. As States have access to population data, there is no need to use statistical methods to make inferences

about the population data using sample data. Fourth, a State's selection of a risk ratio threshold that results in no determination of significant disproportionality may nonetheless be reasonable, particularly if that State has little or no overrepresentation on the basis of race or ethnicity.

Given this, § 300.647(b)(1)(ii), and § 300.647(b)(7), under which any State's selection of risk ratio threshold is submitted to the Department and subject to its monitoring and enforcement for reasonableness, we disagree with those commenters concerned that allowing States to set their own reasonable risk ratio thresholds will allow them to set inappropriately high thresholds or that this flexibility will undermine the value of the required data collection and analysis. While States have the flexibility to set reasonable risk ratio thresholds and will not be required to seek Departmental approval of risk ratio thresholds prior to the implementation of the standard methodology, the Department intends to review risk ratio thresholds, and, in cases where a risk ratio threshold may not appear reasonable on its face, request that a State justify how the risk ratio threshold is reasonable. If, upon review of a State's explanation, the Department determines that the threshold is not reasonable, the Department may notify the State that it is not in compliance with the requirement in these regulations to set a reasonable risk ratio threshold. The Department may then take appropriate enforcement action authorized by law, ranging from requiring a corrective action plan, to imposing special conditions, to designating the State as high-risk status, to withholding a portion of the State's IDEA Part B funds. While we currently do not intend to issue a separate notification to all States in each instance in which the Department takes enforcement action with respect to any one State, we note that many of the aforementioned examples of possible enforcement actions result in publicly available information.

Like the commenters, we believe it possible that States currently not identifying LEAs with significant disproportionality are using risk ratio thresholds that are not reasonable (for those States that are using the risk ratio as part of their current methodology for determining significant disproportionality). However, while we currently believe it would be unlikely for any State to have no significant disproportionality in any category of analysis, for purposes of these regulations, we do not find it appropriate to automatically consider a

State's selection of risk ratio threshold unreasonable solely because no LEAs are identified. Theoretically, if risk ratio thresholds were always unreasonable simply because no LEAs were identified, it would be impossible for a State to resolve its significant disproportionality. In this circumstance, significant disproportionality would become an ever-moving target, where States would be forced to reduce thresholds again and again, potentially to a degree where disproportionality could no longer be considered significant. That is, the Department does not believe that any and all levels of disparity are significant.

The Department also agrees with commenters that a State's unique characteristics can be helpful for the State and its stakeholders to consider when developing risk ratio thresholds. We believe it is reasonable, for example, for States to consider the racial and ethnic composition of the State and LEAs, unique enrollment demographics, as well as factors correlated with disability, when developing their risk ratio thresholds. These considerations should not, however, serve as bases for setting risk ratio thresholds that could allow LEAs with significant disproportionality not to be identified. In the end, the Department will assess the reasonableness of a given threshold by examining its capability to identify and address disproportionality that is significant and by taking into consideration all facts that bear upon the choice of a risk ratio threshold. The Department will, in short, determine reasonableness in the totality of the circumstances.

Finally, the Department agrees with commenters that unbiased, data-driven decision-making, tailored to the needs of a State, would more likely lead to the creation of a reasonable risk ratio threshold. However, we remind these commenters that, in setting risk ratio thresholds, States should do so with the intent of helping LEAs to identify, investigate, and address significant disproportionality.

*Changes:* None.

*Comment:* Several commenters requested the Department create a safe harbor for risk ratio thresholds that States could voluntarily adopt with the knowledge that it is reasonable under these regulations. Of these, one commenter suggested that the safe harbor be set in advance of the effective date of the regulations in order to ensure that the thresholds set by States do not result in an unlawful disparate impact on racial and ethnic groups and to minimize costs to States to correct risk ratio thresholds found to be



unreasonable. Another commenter recommended that the Department consider risk ratio thresholds within a range of 2.5 to 3.5 as a safe harbor. One commenter urged the Department to monitor whether States using thresholds higher than 2.0 are indeed capturing instances of significant disproportionality where they occur. Another commenter recommended that the final regulations include additional clarity regarding the criteria the Department will use to determine if a State's established threshold is reasonable, especially if risk ratio threshold is greater than those published in the Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race and Ethnicity.

*Discussion:* We appreciate the comments, in response to Directed Question #5, about a possible "safe harbor" that would allow States to set risk ratio thresholds that they know would be considered reasonable by the Department. The Department does not believe, however, that it is in a position to mandate a particular risk ratio threshold. We have yet to justify the establishment of specific requirements regarding thresholds, including ranges, "safe harbors," or other limitations. Moving forward, however, we intend to review State policies and practices to determine whether there emerges a standard practice or set of practices that may provide sufficient rationale for a particular threshold, a range of thresholds, or a cutoff under which the Department would consider a threshold reasonable.

We note that the Department's published set of example risk ratio thresholds—in Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity—were intended to provide the public with an illustration of racial and ethnic disparities in special education, and provide examples of what reasonable risk ratio threshold might look like. It was not the intent of the Department, in publishing those examples, to offer these thresholds to States as a "safe harbor," to suggest that higher thresholds could not be reasonable, or to otherwise restrict States' to those example thresholds. Further, we note the risk ratio thresholds were calculated with consideration for the standard methodology as proposed in the NPRM. Now that the Department has amended portions of the standard methodology—including the provisions regarding population requirements—the risk ratio

thresholds published in the report no longer function as appropriate examples.

*Changes:* None.

*Comments:* One commenter suggested that the median absolute deviation (MAD) may be inappropriate as a method to compute risk ratio thresholds. The commenter requested that the Department explain and justify, prior to the issuance of the final regulations, the use of risk ratio thresholds that exceed two MADs above the national median to determine significant disproportionality. The commenter also requested more detailed guidance to assist States in running this calculation on their own.

*Discussion:* The Department did not intend to mandate that States use median absolute deviations as a method to compute risk ratio thresholds; rather, the approach was intended to illustrate one way to develop risk ratio thresholds that might be considered reasonable given national IDEA section 618 data. While acknowledging that the NPRM could have provided greater clarity on this point, it was not the Department's prime objective to suggest that States use median absolute deviations on their own to calculate risk ratio thresholds. This is especially true given that States, in examining only their own data, would have fewer LEAs, and, therefore, fewer risk ratio calculations from which to calculate the MADs, which could lead to significantly higher, and potentially unreasonable, risk ratio thresholds.

The Department intends to provide guidance to States regarding how to work with stakeholders, and review data, to set reasonable risk ratio thresholds.

*Changes:* None.

*Comment:* A number of commenters responded to Directed Question #5, which inquired whether the Department should, at a future date, mandate national maximum risk ratio thresholds. Some commenters opposed this possibility outright. One commenter noted that a single national standard may not be feasible across the wide variety of regional, State, and local differences.

Commenters strongly supported allowing States to determine, in conjunction with stakeholders, how their own thresholds will identify disproportionality that is significant. Other commenters supported leaving States flexibility to set their own thresholds, so long as the Department is able to ensure that those thresholds are reasonable. Some commenters noted that, given the statutory and fiscal consequences associated with

significant disproportionality, States need to be able to defend their selected risk ratio thresholds to the States' constituents, which include legislators, State Education Departments, and LEAs. One commenter noted that each State is unique, and has its own plans with respect to IDEA and other Federal education programs to address those needs. The commenter concluded that requiring the same risk ratio thresholds in every State would fail to recognize each State's uniqueness. A number of commenters expressed support for permitting States to retain the 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. One commenter stated that, if there is to be a mandated Federal requirement for consistent calculation of significant disproportionality across States using a risk ratio formula, States must be granted flexibility in applying those calculations and setting thresholds without onerous Federal involvement.

On the other hand, a few commenters strongly believed that the Department should move toward mandating that all States use the same risk ratio threshold. One commenter generally noted that a clear picture of national disparities was precluded due to different States using different thresholds for significant disproportionality.

*Discussion:* The Department recognizes the potential advantages and disadvantages of setting national risk ratio thresholds, and we thank the commenters for their thoughtful input on this important issue. At this time, the Department does not believe it has identified a sufficient justification for mandating any particular national risk ratio thresholds. However, moving forward, we will review State policies and practices to determine whether there emerges standard industry practice that may provide sufficient rationale at a later date for such a requirement.

*Changes:* None.

Minimum Cell Sizes and Minimum N-Sizes (§ 300.647(a)(3) and (4); § 300.647(b)(1)(i)(B) and (C); § 300.647(b)(3) and (4); § 300.647(c)(1))

*Comments:* This "comment/response/changes" section is not intended to respond to specific comments, but rather to provide a general introduction to minimum cell and n-sizes, and lay the foundation for responding to specific comments in the following sections.

*Discussion:* Risk ratios may produce unreliable results when the calculation is done with small numbers of children in a particular category of analysis, and this could result in LEAs being inappropriately identified with significant disproportionality. The most common method States use to address this problem is to identify a minimum number of children who must be enrolled in an LEA within a specific racial or ethnic group or experiencing a particular outcome in order for the LEA to be analyzed for significant disproportionality. That is, risk ratios are not calculated for a specific racial or ethnic group within a specific category of analysis if LEAs do not have or enroll a minimum number of children from that racial or ethnic group within that category of analysis or a minimum number of children not in that racial or ethnic group experiencing that particular outcome.

In this regulation, we refer to these minimum population requirements as minimum cell sizes and minimum n-sizes. (As noted elsewhere in this document, the term “minimum n-size” in this document aligns with the use of the term “minimum cell size” in the NPRM and the term “minimum cell size” herein refers to the number of children in a particular racial or ethnic group or groups experiencing a particular outcome.) As the minimum cell size and minimum n-size increase, the relative stability of the calculated risk ratios tends to increase. However, as these minimum population requirements increase, the number of districts that are excluded from the analysis in one or more specific categories of analysis also increases. The Department believes that States can balance the risks of inappropriately identifying districts because of small minimum cell sizes or n-sizes against the risk of inappropriately excluding large numbers of districts from analysis because of particularly large minimum cell sizes or n-sizes.

In the NPRM, we proposed that States would be required to use a minimum n-size (the number of children in a particular racial or ethnic group enrolled in an LEA) of not more than 10 to determine significant disproportionality. We received numerous comments about the importance of allowing States to establish an additional minimum cell size requirement (a minimum number of children within a race or ethnicity experiencing a particular outcome in an LEA). Those comments are set out and discussed in greater detail elsewhere in this section. Upon reflection, we agree with the commenters, and thus in the

final regulations, we will require States to set minimum n-sizes and cell sizes.

Additionally, as discussed elsewhere in this section, the proposed requirement of minimum n-size of 10 was questioned by a number of commenters. Following publication of the NPRM, we became aware of significant vulnerabilities in applying the analysis utilized in the primary article on which we relied to support the n-size requirements in the NPRM to the standard methodology. Therefore, in these final regulations, we do not include an n-size of 10 or less, but rather specify that the n- and cell sizes States set must be reasonable. We also establish in § 300.647(b)(1)(iv)(A) and (B), a rebuttable presumption that a minimum cell size of no greater than 10 and n-size of no greater than 30 are reasonable. A rebuttable presumption, in this context, means that, in reviewing minimum cell sizes and n-sizes established by States for reasonableness, and absent additional information to the contrary, the Department would consider a State’s use of 10 or less for cell size and 30 or less for n-size to be reasonable.

A Department review of data submitted through the IDEA State Supplemental Survey for school year 2013–14 found that States that used risk ratios in their determinations of significant disproportionality tended to set their cell size or n-size requirements at 30 or less. Based on these data, the Department determined that cell sizes of 10 and n-sizes of 30 would allow the majority of States currently using risk ratios to retain their already established population requirements. We note that, to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data suppression to protect privacy. We also note that reasonable n-sizes and cell sizes could be less than 10 and 30 if smaller numbers are needed to maximize the number of LEAs examined for significant disproportionality. This is particularly relevant in categories of analysis where LEAs have small numbers, such as discipline. States, in making these determinations in consultation with their stakeholders, including State Advisory Panels, must carefully balance inclusion of LEAs and volatility.

*Changes:* Changes made in response to this issue are discussed in more depth throughout this section.

*Comment:* One commenter stated that, in the description of States’ current population requirements in the NPRM, it was not clear whether the requirements described by the

Department were minimum n-sizes or minimum cell sizes. The commenter further asserted that, in discussions with States, it appeared that many States are using a minimum cell size, and not a minimum n-size, as was proposed in the NPRM. One commenter expressed confusion as to whether the Department intended to allow States to set a minimum cell size of up to 10 children, or a minimum n-size of up to 10 children, or both.

*Discussion:* The Department intended with proposed § 300.647(b)(3) and (4) to limit States’ selection of minimum n-size to a figure no larger than 10. The NPRM included no provisions allowing States to set a minimum cell size. However, as we note earlier in this section, we agree with the commenters that States should be allowed to use a minimum cell size, in addition to a minimum n-size, in order to prevent inappropriate determinations of significant disproportionality.

To ensure that these provisions are clear, we have also included in the notice a definition of minimum n-size and a definition of minimum cell size.

*Changes:* We have revised § 300.647(a) to include a definition of minimum n-size and a definition of minimum cell size.

*Comment:* A few commenters agreed that, in combination with proposed § 300.647(c)(1) allowing States to determine significant disproportionality by looking across three consecutive years of data, it is appropriate to have a minimum n-size in the calculation of significant disproportionality under proposed § 300.647(b). These commenters stated that this will mean that the greatest number of LEAs will be able to examine their practices and to use funds to remediate the concerns they find.

*Discussion:* With § 300.647, it is the Department’s goal to support State efforts to appropriately identify LEAs with significant disproportionality. We agree with the commenters’ suggestion that, when LEAs are appropriately identified, they will benefit from the review (and, if necessary, revision) of policies, practices, and procedures, and from comprehensive CEIS. We also agree with the commenters that a reasonable minimum n-size, as well as the flexibility to use up to three consecutive years of data, will help States to both reduce and account for risk ratio volatility before making a determination of significant disproportionality. In this way, States can focus their efforts on LEAs with consistently high risk ratios, which may indicate systemic racial and ethnic disparities in need of intervention.

*Changes:* None.

*Comment:* A large number of commenters expressed their general support for efforts to standardize minimum n-sizes. Several commenters expressed support for retaining proposed § 300.647(b)(3) and (4), with a minimum n-size of 10, and expressed concerns about using a higher figure that would exclude racial and ethnic groups from a review for significant disproportionality. One commenter noted that States' selection of high minimum n-sizes for each racial and ethnic group, such as 25 or higher, has likely been one method of reducing the identification of significant disproportionality. The commenter expressed concerns that large n-sizes would weight monitoring towards large urban LEAs and inappropriately exclude smaller LEAs.

*Discussion:* The Department agrees with commenters that, as minimum n-sizes increase, fewer LEAs and fewer subgroups within LEAs are examined for significant disproportionality using the standard methodology. N-sizes that are too high increase the likelihood that States may fail to analyze and identify LEAs with highly disproportionate rates of identification, placement in particular settings, or discipline among racial and ethnic groups as having significant disproportionality. In such instances, States and LEAs may miss important opportunities to review and, if necessary, revise policies, practices, and procedures to ensure that all children are provided with the supports that they need to be successful.

The Department initially proposed in § 300.647(b)(3) and (4) to limit States' selection of minimum n-size (referred to as cell size in the NPRM) to a figure no larger than 10, based on an understanding that this figure represented an appropriate balance between two competing interests: the need to examine as many LEAs (and as many racial and ethnic groups within LEAs) as possible for significant disproportionality and the need to prevent inappropriate identification of LEAs due to risk ratio volatility. Smaller minimum n-sizes will include a larger number of LEAs in a State's annual analysis for significant disproportionality. However, smaller minimum n-sizes increase the volatility of the risk ratio, *i.e.* small changes in data from year to year could cause large changes in the risk ratio that do not reflect any other underlying change.

Our use of the proposed requirement for the minimum n-size of 10 was questioned by a number of commenters. Following publication of the NPRM, we became aware of significant

vulnerabilities in the application of the analysis behind the primary article on which we relied to support that proposal. Therefore, in these final regulations, we will not include the proposed minimum n-size requirement of 10, but rather specify that States must set, with input from stakeholders, a reasonable minimum n-size and cell size.

That said, § 300.647(b)(1)(iv)(A) and (B) establish a rebuttable presumption that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30 are reasonable. The Department's review of data submitted through the IDEA State Supplemental Survey for school year 2013–14 found that States that used risk ratios in their determinations of significant disproportionality tended to set their cell size or n-size requirements at 30 or less. Based on these data, the Department determined that cell sizes of up to 10 and n-sizes of up to 30 would allow the majority of States currently using risk ratios to retain their already established population requirements.

We also note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy. We note as well that, in adopting the rebuttable presumption, the Department is, in part, responding to the requests of commenters for flexibility in the standard methodology. We think this addition provides significant flexibility to States in implementing the standard methodology.

Further, as stated in § 300.647(b)(1)(iv), the Department will review the States' selections of risk ratio thresholds for reasonableness. To ensure that the Department may accurately and uniformly monitor all cell and n-sizes for reasonableness, and to inform our policy position, we have added a requirement in § 300.647(b)(7) that each State report to the Department all of its cell and n-sizes and the rationale for each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through an information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's information collection request.

If the Department identifies a State that may have unreasonable minimum cell or n-sizes, it would notify the State and may request clarification regarding how the State believes the minimum cell or n-sizes the State is using are reasonable. If a State provides an insufficient response, the Department

would notify the State that it is not in compliance with § 300.647(b)(1)(i)(B) or (C), and the Department may take any 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.

Generally, while there are a number of factors that may influence whether certain minimum cell or n-sizes are reasonable for a State, the optimal choice will be a balance between the need to examine as many LEAs (and as many racial and ethnic groups within LEAs) as possible for significant disproportionality and the need to prevent inappropriate identification of LEAs due to risk ratio volatility. For example, the Department is more likely to consider minimum cell and n-sizes to be reasonable if, in comparison to lower minimum cell and n-sizes, it substantially reduces the volatility of risk ratio calculations. By contrast, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if it results in the widespread exclusion of a racial or ethnic group from review for significant disproportionality in any of the categories of analysis. The Department may also consider smaller minimum cell or n-sizes to be reasonable for categories of analysis with lower incidence, such as some placement and discipline categories, to increase the number of LEAs analyzed despite the possibility of additional volatility. Further, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if they result in the widespread exclusion of LEAs from any review for significant disproportionality. As such, the Department has added in § 300.647(b)(7) a requirement that the rationales submitted for the minimum cell- and n-sizes not presumptively reasonable must include a detailed explanation of why these numbers are reasonable and how they ensure that the State is appropriately analyzing LEAs for significant disproportionality.

*Changes:* We have revised proposed § 300.647(b)(3) and (4) to no longer limit States to a minimum n-size of up to 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than

30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comments:* Many commenters stated that Federal investigators (which the Department interpreted to refer to the GAO) did not recommend that the Department set minimum n-sizes.

*Discussion:* We agree that the GAO did not specifically recommend that the Department establish a minimum n-size. However, the GAO did recommend that the Department establish a standard method for determining significant disproportionality, and nothing in the GAO report precludes a minimum n-size as part of the standard methodology. Indeed, to the extent that establishing a minimum n-size is consistent with establishing a standard methodology, it is in keeping with the GAO's primary recommendation.

*Changes:* None.

*Comments:* A large number of commenters expressed their strong opposition to any attempt by the Department to place limits on States' minimum n-sizes. Many commenters noted that there is no Federal n-size in the latest authorization of the ESEA or other Federal education laws.

*Discussion:* When possible, the Department prefers to provide States and LEAs with comparable policy provisions across programs, so long as those provisions meet the individual needs of both programs. However, nothing in the ESEA or IDEA precludes the Department from establishing requirements and provisions regarding the minimum n-size used for the analysis for significant disproportionality under IDEA section 618(d) that are different from the provisions affecting school accountability under ESEA.

Further, we believe that some limitation on States' selection of minimum cell and n-sizes is appropriate. As we note earlier in this section, as minimum cell and n-sizes increase, fewer LEAs and fewer racial and ethnic subgroups within LEAs are examined for significant disproportionality using the standard methodology. As a result, it becomes increasingly likely that States may fail to identify LEAs with highly

disproportionate rates of identification, placement in particular settings, or discipline among racial and ethnic groups as having significant disproportionality. For this reason, we believe it appropriate to limit States' choice of minimum cell and n-sizes to those that meet a standard of reasonableness that will be monitored and enforced by the Department.

*Changes:* As discussed previously, we have revised proposed § 300.647(b)(3) and (4) to no longer limit States to a minimum n-size of up to 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comments:* One commenter stated that Congress, in recent Federal education legislation, considered and rejected a federally imposed minimum n-size, clearly showing its preference that those decisions be left to States. Another commenter suggested that, in mandating that States use a Federal calculation, the regulation takes the opposite approach of the Every Student Succeeds Act, recent legislation that, according to the commenter, focuses on returning decision-making to States and LEAs, and that the matter is best left to Congress when it reauthorizes IDEA.

*Discussion:* The Department appreciates these and other recommendations to provide States additional flexibility to set n-sizes. After considering comments, the Department revised the final regulations to provide States a great deal of flexibility to set reasonable minimum n-sizes and cell sizes while balancing the need to place reasonable limits on this flexibility to ensure that as many LEAs are analyzed for significant disproportionality as is appropriate using the standard methodology. The Department has an interest in monitoring the conditions under which any LEA is so exempted from IDEA section 618(d). As we

discuss in *A Standard Methodology for Determining Significant Disproportionality* (§ 300.647)—General, as the risk ratio method of measuring significant disproportionality is susceptible to volatility, the Department aims to prevent “false positive” identification of significant disproportionality. Accordingly, States may exclude from their review any racial and ethnic groups within LEAs that do not meet State-set, reasonable population requirements, consistent with § 300.647(b)(1). Unreasonably high minimum cell or n-sizes may inappropriately exclude LEAs, or racial and ethnic groups within LEAs, from a State's review of significant disproportionality, increasing the likelihood that States may fail to appropriately identify LEAs with highly disproportionate rates of identification, placement, and discipline.

Given these issues, these regulations are an appropriate exercise of the Department's authority—in this case, to set reasonable population requirements necessary to ensure compliance with specific requirements of the statute. 20 U.S.C. 1406(a). Further, they are an appropriate exercise of the Department's authority—as the agency charged with administering IDEA (IDEA section 603(a), 20 U.S.C. 1402(a))—to monitor and enforce IDEA's implementing regulations.

When Congress begins the process of reauthorization, the Department intends to work closely with it on significant disproportionality, among other issues. In the interim, nothing in the ESEA or IDEA precludes the Department from establishing provisions regarding the minimum n-size used for the analysis for significant disproportionality under IDEA section 618(d), and it is appropriate for the Department to do so.

*Changes:* As described earlier, we have revised proposed § 300.647(b)(3) and (4) to no longer limit States to a minimum n-size of up to 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for minimum n- and cell sizes that are not

presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comments:* A large number of commenters argued that there would be confusion and less accurate data if LEAs were required to use one minimum n-size for assessment purposes and disaggregation (which the Department interpreted to refer to school assessment for purposes of ESEA accountability) and a different minimum n-size for significant disproportionality. Other commenters requested that States have the flexibility to use the same minimum n-sizes used for other Federal education programs. Another commenter stated that, in one State, the minimum n-size used for accountability purposes was 25 and that it might make sense to align the minimum n-size with that requirement.

*Discussion:* The Department appreciates the commenters' concerns about setting different population requirements across different Federal programs. When possible, the Department prefers to provide States and LEAs with comparable requirements across programs, so long as those requirements meet the individual needs of both programs.

As we discussed earlier in this section, we have adjusted our original proposal to allow States to set their own reasonable minimum n-sizes based on input from stakeholders, including State Advisory Panels, subject to the Department's monitoring and enforcement for reasonableness. With this change, States may set minimum cell and n-sizes comparable to what they use for other Federal programs.

However, to the extent that aligning population requirements between ESEA and IDEA would result in a minimum cell or n-size that is unreasonable for purposes of IDEA section 618(d)—that is, it would result in a failure to identify LEAs with significant disproportionality who are identifying or disciplining certain racial and ethnic subgroups, or placing them in restrictive settings, at highly disproportionate rates—the choice of cell or n-size would not comply with the requirements of IDEA.

*Changes:* None.

*Comments:* A large number of commenters felt that, generally, States are best positioned to determine minimum n-size.

*Discussion:* In the NPRM, the Department proposed to limit States' selection of a minimum n-size to a figure no larger than 10. Again, however, after further consideration and review of public comment, the

Department has modified the final regulations to provide States greater flexibility in determining reasonable minimum n- and cell sizes.

At the same time, we continue to believe that the Department has an interest—pursuant to OSEP's statutory obligation to ensure States' implementation of IDEA section 618(d)—in ensuring that States do not unreasonably exclude LEAs, or racial and ethnic groups within LEAs, from their review. Thus, we will monitor and enforce with regard to n- and cell-size reasonableness.

To ensure that the Department may accurately and uniformly monitor all cell and n-sizes, and to inform our policy position, we have added a requirement in § 300.647(b)(7) that each State report to the Department all of its cell and n-sizes and the rationale for each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through an information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's information collection request.

Generally, while there are a number of factors that may influence whether certain minimum cell or n-sizes are reasonable for a State, the optimal choice will be a balance between the need to examine as many LEAs (and as many racial and ethnic groups within LEAs) as possible for significant disproportionality and the need to prevent inappropriate identification of LEAs due to risk ratio volatility. For example, the Department is more likely to consider minimum cell and n-sizes to be reasonable if, in comparison to lower minimum cell and n-sizes, they substantially reduce the volatility of risk ratio calculations. By contrast, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if they result in the widespread exclusion of a racial or ethnic group from review for significant disproportionality in any of the categories of analysis. The Department may also consider smaller minimum cell or n-sizes to be reasonable for categories of analysis with lower incidence, such as some placement and discipline categories, to increase the number of LEAs analyzed despite the possibility of additional volatility. Further, the Department is more likely to determine that a State has selected unreasonable minimum cell or n-sizes if they result in the widespread exclusion of LEAs from any review for significant disproportionality. As such, the Department has added in § 300.647(b)(7)

a requirement that the rationales submitted for the minimum cell- and n-sizes which are not presumptively reasonable must include a detailed explanation of why these numbers are reasonable and how they ensure that the State is appropriately analyzing LEAs for significant disproportionality.

*Changes:* Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable which must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comments:* Many commenters noted that a minimum n-size of 10 will result in many LEAs, particularly small LEAs, being identified with significant disproportionality. One commenter stated that the Department should do away with regulatory language that would lead to the identification of almost every LEA, as, when this result occurred under another Federal education statute, subsequent legislative efforts reversed much of what the regulations intended to accomplish.

*Discussion:* As we note earlier in this section, the Department has amended its original proposal to restrict States to a minimum n-size no greater than 10, and, instead, will require States to set reasonable minimum cell and n-sizes. We believe this change to be responsive to both of the comments raised.

However, we wish to note that, in circumstances where a State has identified a large number of LEAs, it is not necessarily the case that these determinations are inappropriate. By requiring States to follow the standard methodology under § 300.647, it is the Department's intent to support more appropriate identification of significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities. If, in implementing the standard methodology (which will include State-selected risk ratio thresholds, a State-selected minimum n-

size, and a State-selected minimum cell size) the State identifies a large number of LEAs, it may indicate the need for a broad-based State effort to improve practices and policies to address racial and ethnic disparities in special education.

In cases where small LEAs are disproportionately, and inappropriately, identified with significant disproportionality due to the use of a low minimum cell or n-size, it may be appropriate for a State to review its data, and consult with stakeholders and State Advisory Panels, to determine whether adjustments should be made to the State's implementation of the standard methodology.

*Changes:* We have amended § 300.647(b)(3) and (4) to no longer restrict States to a minimum n-size of 10. Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. The rationales for n-sizes and cell sizes that are not presumptively reasonable which must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comment:* One commenter added that, if States used a minimum n-size of 10, then many States and LEAs would spend a significant amount of time, money, and labor on addressing issues that may not be able to be simply changed by utilizing early intervening dollars. Other commenters have experienced issues with small n-sizes, where LEAs are identified and must develop solutions for problems that rarely existed. Still more commenters stated that, with an n-size of 10, it will be virtually impossible for LEAs identified with significant disproportionality to correct the disparity. One commenter expressed concerns that flaws in the proposed regulation—specifically, the potential for LEAs to implement mandatory comprehensive CEIS due a finding of significant disproportionality that is the result of small numbers of children—will make it impossible to identify

metrics that could evaluate the connection between a finding of significant disproportionality in an LEA and improved outcomes for all children.

Other commenters generally stated that a small LEA might be identified with significant disproportionality due to a few new families enrolling in the LEA with a child already diagnosed with autism.

*Discussion:* As we note earlier in this section, the Department has amended its original proposal so that it no longer restricts States to a minimum n-size no greater than 10. Instead, the Department will require States to set reasonable minimum cell or n-sizes. We believe this change to be responsive to the comments raised by reducing the likelihood that an LEA may be identified with significant disproportionality due to minor changes in LEA enrollment. We agree with commenters that States should focus on systemic cases of significant disproportionality—rather than LEAs with simple numerical disparities based on the enrollment or changing needs of one or two children—and that the statutory remedies provided under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)) will be most effective in addressing the needs of LEAs with systemic racial and ethnic disparities.

*Changes:* As noted above, § 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Sections 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comment:* One commenter noted that a minimum n-size of 10 was empirically validated, and, based on literature, could guarantee risk ratio reliability.

Two commenters stated that there is a significant increase in reliability in moving from a minimum n-size of 5 to 10 and a slightly greater increase when cell size moved up to 15. According to one commenter, one State chose to use a minimum n-size of 15, rather than 10,

in recognition of slightly greater reliability and LEA feedback. One commenter supported giving States flexibility to select a minimum n-size between 10 and 15. Another commenter supported a minimum n-size of 15 only if States made a determination of significant disproportionality based on a single year of data.

Two commenters stated that using a minimum n-size of 10 can lead to problems with reliability when using the risk ratio. The commenters stated that, in the case of an n-size of 10 in the denominator, very small numbers can lead to unstable estimates of the risk index, leading to large swings in the risk ratio and a possible finding of significant disproportionality for very few children identified in the target group. Commenters opposing a cap of 10 for the minimum n-size offered other suggestions: A few suggested 20, many suggested 30, and a few suggested 40. One commenter stated that a minimum n-size of 25 or higher has likely been one method of reducing the identification of significant disproportionality.

*Discussion:* The Department generally agrees with commenters that risk ratios are not reliable when calculated for a racial or ethnic group with too few children. As multiple commenters have expressed their concern that a minimum n-size of 10 may be small, and have provided a list of consequences that may ensue if minimum n-sizes are too low to safeguard against volatility (e.g., resistance to identifying children as children with disabilities or identifying children of a particular race or ethnicity as having disabilities, inability of small LEAs to resolve significant disproportionality, vulnerability of LEAs to small changes in enrollment), we now believe that it is appropriate to allow States flexibility to set their own reasonable minimum cell and n-sizes. We also find it appropriate that the States consult with stakeholders prior to setting minimum cell and n-sizes, as was done in one State mentioned by a commenter.

In the NPRM, the Department proposed to limit States' selection of minimum n-size to a figure no larger than 10, based on an understanding that this figure represented an appropriate balance between risk ratio reliability and LEA inclusion. Bollmer, J., Bethel, J., Garrison-Mogren, R., & Brauen, M., 2007. However, upon further examination of the study, which relied on 2001–2002 data from a non-representative, non-random sample of three States—we now believe that the study includes too many limitations to

provide the basis to mandate a national minimum n-size of 10.

In these final regulations, States must set reasonable cell and n-sizes, and in § 300.647(b)(1)(iv)(A) and (B), we are establishing a rebuttable presumption that a minimum cell size of no greater than 10 and n-size of no greater than 30, respectively, are reasonable thresholds. Again, as we stated earlier in this section, support for these thresholds includes information we have from the IDEA State Supplemental Survey, which shows that States tend to set their n-size or cell size at 30 or less. We also note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy. We do not have comparable or sufficient support for a national n-size of less than 30.

States have the option, but are not required, to set the same cell or n-size for each category of analysis. States should consider, in consultation with their stakeholders, the impact of minimum n- and cell sizes in conjunction with the risk ratio thresholds they select for each category of analysis. The Department encourages States to consider a smaller minimum n-size for categories of analysis where LEAs have small numbers, such as discipline. States, in making these determinations in consultation with their stakeholders, including State Advisory Panels, must carefully balance inclusion of LEAs and volatility. Further, in certain circumstances such as when coupled with a larger minimum n-size, it may be reasonable for a State to select a minimum cell size of zero or one. However, the Department notes that selecting different n- or cell sizes based on race or ethnicity is problematic and could raise issues of constitutionality. As we evaluate additional data and information in the future, we may consider whether there is additional guidance we can provide to States about what constitutes a reasonable cell or n-size.

*Changes:* Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the

rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comments:* Some commenters noted that a minimum n-size of 10 is unrealistic and will result in unintended and inappropriate negative consequences for the LEAs (including charter schools) in one State. One commenter observed that, in its State, parent choice and charter schools create unique configurations in enrollment that may give the appearance of significant disproportionality when a minimum cell size of 10 is used. A large number of commenters noted that the Department must allow States to use minimum n-sizes greater than 10 to reduce the likelihood of "false positives" due to small numbers. One commenter claimed that a minimum n-size of 10 would impact one State's ability to screen out false positive findings of significant disproportionality of White children, given that many LEAs in the State are homogenous.

*Discussion:* As we note earlier in this section, the Department has amended its original proposal so that it no longer restricts States to a minimum n-size no greater than 10. Instead, the Department will require States to set reasonable minimum cell and n-sizes.

*Changes:* As noted previously, § 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comment:* A few commenters described the experience of one State that previously used a minimum n-size of 10, with a risk ratio threshold of 2.0, to review LEAs for significant disproportionality. The commenters did not provide the number of years taken

into consideration. These commenters stated that the State experienced a number of unintended consequences.

First, the LEAs in the State perceived the calculations to be an implicit quota system, where LEAs delayed or refused to evaluate children for possible identification and parents were led to believe that the LEA had already exceeded a limit on the number of children in their racial group that could be identified. Second, LEAs questioned the ethnicity reported by parents, and more than one LEA provided photos of individual children and requested that their reported ethnicity be changed. Third, when the State used a minimum n-size of 10, it had to greatly increase the amount of State staff time devoted to identifying which calculations produced false positives. Meanwhile, both LEAs and State-level staff devoted considerable resources to the creation of corrective action plans and the implementation of prevention activities that impacted only one or two children. Fourth, the approach to identifying significant disproportionality often resulted in calculations that were not statistically significant.

The commenter further stated that, after the State adjusted its minimum n-size and risk ratio threshold to align with the State's accountability plan, it had better confidence that those LEAs that were identified had potential to benefit from the required comprehensive CEIS and corrective action planning.

One commenter provided a list of factors that, according to the commenter, unduly influenced an LEA's risk of identification with significant disproportionality when the State's minimum n-size was 10. The list includes small, rural LEAs with court-placed children from urban areas, families who adopt several non-White children with disabilities, charter schools with a special education focus, LEAs receiving families of color moving out of urban areas, and single events resulting in the discipline of multiple children.

*Discussion:* We appreciate commenters' sharing their experience implementing IDEA section 618(d). The example provided highlights some of the methods that comprise the standard methodology as required under § 300.647, including a minimum n-size and a risk ratio threshold.

We think the commenters' experience with a minimum n-size of 10 and how it potentially contributed to the inappropriate identification of LEAs with significant disproportionality is instructive. We note that, along with a minimum n-size of 10, the State also

used a relatively low risk ratio threshold of 2.0, which could have exacerbated issues of inappropriate identification of LEAs with significant disproportionality. The Department believes that it is important for States to consider both the impact of the reasonable minimum cell and n-sizes they select in conjunction with their selection of reasonable risk ratio thresholds. These factors can all potentially contribute to an inappropriate determination of significant disproportionality.

As we note earlier in this section, the Department has amended its original proposal in the NPRM, which should address the concerns raised by these and other commenters. These final regulations do not restrict States to a minimum n-size of no greater than 10. Instead, the Department will require States to set reasonable minimum cell and n-sizes.

Finally, we disagree with the commenters' suggestion that LEAs should only be identified with significant disproportionality if they have racial and ethnic disparities that are statistically significant. Given that States have access to population data on the identification, placement, and discipline of children with disabilities, tests of statistical significance are inappropriate for States' determination of significant disproportionality given that those analyses are intended to be used to draw inferences when working with sample data.

*Changes:* As noted previously, § 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under § 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comment:* A number of commenters expressed concerns that the Department provided insufficient research support for its minimum n-size in proposed § 300.647(b)(3) and (4). Specifically, many commenters stated that there is no

data available to support 10 as an appropriate number for a minimum n-size. Other commenters noted that the Department provided little rationale for selecting 10 for the minimum n-size, instead of any other number.

*Discussion:* The Department recognizes commenters' concerns regarding the appropriateness of the research base to support our proposal to limit States to a minimum n-size no larger than 10. At the time of the NPRM, the Department's proposal was based on an understanding that this figure represented an appropriate balance between risk ratio reliability and LEA inclusion. However, upon further examination of the study, which relied on 2001–2002 data from a non-representative, non-random sample of three States, we now find that the study includes too many limitations to provide a basis for a minimum n-size of 10. Bollmer, J., Bethel, J., Garrison-Mogren, R., & Brauen, M., 2007.

Accordingly, the Department has amended the regulation so that it does not mandate a national minimum n-size. We will, rather, specify that States must set, with input from stakeholders, reasonable minimum n-size and cell sizes. In addition, § 300.647(b)(1)(iv)(A) and (B) establish a rebuttable presumption that a minimum cell size of 10 and n-size of 30, respectively, are reasonable thresholds. Again, as we stated earlier, Department review of data submitted through the IDEA State Supplemental Survey for school year 2013–14 found that States that used risk ratios in their determinations of significant disproportionality tended to set their cell-size or n-size requirements at 30 or less. Based on these data, the Department determined that cell-sizes of no greater than 10 and n-sizes of no greater than 30 would allow the majority of States currently using risk ratios to retain their already established population requirements. We note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy.

*Changes:* Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable. We have added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all n- and cell sizes developed under

§ 300.647(b)(1)(i)(B) and (C) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comment:* A large number of commenters provided input as to whether the Department should allow States to set a minimum cell size—to apply to the numerator when calculating risk for a racial or ethnic group—as well as the appropriateness of particular minimum cell sizes. These commenters strongly cautioned the Department against limiting States solely to a minimum n-size of 10 when reviewing racial or ethnic groups within an LEA, as, in the absence of any consideration for the minimum cell size, these reviews will lead to false positive identifications of LEAs with significant disproportionality. A large number of commenters suggested that the Department allow States to adopt a minimum cell size, particularly when reviewing for significant disproportionality in the identification of children with disabilities, to decrease the likelihood of false positive identifications of significant disproportionality.

A few commenters stated that using only a minimum n-size of 10 allows very small groups of children—and potentially only one identified child (or one newly enrolled child with a disability)—to result in the LEA appearing to have significant disproportionality. Other commenters warned that, based on their previous experience with small n-sizes, having only one child in a subgroup has previously caused LEAs to be cited for significant disproportionality. One commenter provided examples of the number of LEAs, by State, that would be flagged for significant disproportionality, based on one child, if the Department's original proposal were implemented.

A few commenters stated that, without the adoption of a minimum cell size, there is an increased likelihood that a risk ratio of a certain size will be likely to have occurred by chance. Another commenter argued that the identification, placement, or discipline of a single child from a particular racial or ethnic group could occur by chance.

*Discussion:* The Department appreciates the commenters' suggestion to allow States to select a minimum cell size. The standard methodology, as originally proposed in § 300.647, did not contemplate minimum population requirements other than minimum



n-size when examining racial and ethnic groups within LEAs for significant disproportionality. However, we agree with the commenters that States should be allowed to use minimum cell sizes, as a component of the standard methodology in addition to a minimum n-size, in order to prevent inappropriate determinations of significant disproportionality, such as a finding of significant disproportionality based only on one or two children.

States will have the flexibility to set their own reasonable minimum cell sizes, limited, as is the selection of risk ratio threshold, by consultation with stakeholders, including the State Advisory Panels. It should be noted that States have the option to set a minimum cell size of zero or one if the State and its stakeholders believe their selection of a reasonable minimum n-size addresses the issues associated with small populations or low incidence categories of analysis.

Accordingly, we have amended the regulation to allow States to select reasonable minimum cell sizes in the standard methodology.

*Changes:* We have amended proposed § 300.647(b)(1) to require States to select a reasonable minimum cell size with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement.

*Comment:* One commenter noted that most disabilities are rare events, meaning that only one or two percent of the children will be identified as having them. As a result, when analyzing LEA-level data, many LEAs will have no children with a given disability, and for an LEA in which children are identified, the result may be a large risk ratio. One commenter stated that LEAs with only 10 children in any given racial or ethnic group will be automatically disadvantaged for low incidence disabilities like autism, intellectual disability, and emotional disturbance, which the commenter cited as having an incidence rate of one percent or less. The commenter concluded that, even if an LEA qualifies only one child of a racial or ethnic group in any of the three categories, it will be found to have significant disproportionality.

*Discussion:* We appreciate these commenters for raising their concerns regarding the low incidence of some impairments. In general, we agree with the commenters that LEAs with low incidence rates are likely to have more volatile risk ratios.

We have amended proposed § 300.647(b)(1)(i) to require States to select reasonable minimum cell sizes. With this change, States' use of minimum cell sizes will prevent the

inappropriate identification of LEAs with low incidence rates to the extent that those rates coincide with small populations of children.

*Changes:* Section 300.647(b)(1)(i)(B) requires States to set reasonable minimum cell sizes.

*Comment:* Two commenters warned that LEAs identified with significant disproportionality due to only one or two children will continue to be identified due to those children so long as they remain in school. Another commenter argued that the identification, placement, or discipline of a single child from a particular racial or ethnic could occur by chance, and is not sufficient to demonstrate bias or discrimination within an LEA. A few commenters expressed concern that, if LEAs are identified with significant disproportionality based on one or two children, the regulation could discourage LEAs from identifying children of color with disabilities, or encourage LEAs to stigmatize the child that is identified. One commenter stated that there may be FERPA issues inherent in basing a determination of significant disproportionality on a single child, especially if the child's recent enrollment pushes the LEA's risk ratio over the State's threshold.

*Discussion:* We agree with the commenters that a number of negative outcomes could result if LEAs are at risk of being identified with significant disproportionality based on the identification, placement, or discipline of only one or two children. We have amended proposed § 300.647(b)(1) to require States to select a reasonable minimum cell size so that, when a racial or ethnic group of interest within an LEA has too few children experiencing a particular outcome, the State is not required to calculate the risk ratio for that racial or ethnic group, for that outcome, for that LEA. We believe this amendment to be responsive to the concerns the commenters' raised.

*Changes:* Section 300.647(b)(1)(i)(B) requires States to set a reasonable minimum cell size.

*Comment:* To avoid risk ratio volatility, a few commenters noted that minimums should apply to both the numerator and denominator. These commenters indicated that allowing States to apply the minimum cell size to the numerator of the risk calculations for the target racial or ethnic group would ensure that the risk calculations are based on a sufficient number of identified children. One commenter noted that, among the current population requirements employed by the States, one requirement was a minimum cell size for all impairments.

*Discussion:* We agree with commenters that allowing the use of a minimum cell size and a minimum n-size will help prevent risk ratio volatility. We have amended the regulation to allow States to set both a reasonable minimum cell size and a reasonable minimum n-size.

*Changes:* Section 300.647(b)(1)(i) now requires States to select reasonable minimum cell and n-sizes, with advice from stakeholders, including the State Advisory Panel, subject to the Department's enforcement. Section 300.647(b)(1)(iv)(A) and (B) state that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30, respectively, are presumptively reasonable.

*Comment:* One commenter suggested that the Department allow States the flexibility to choose a minimum cell size between two and four, and not so high that the State overlooks disproportionality for low-incidence populations. The commenter noted that, for one western State, if the minimum cell size is set at 10, only about 10 percent of significant disproportionality findings would be for non-White children because of the small size of those populations. A number of commenters supported a minimum of 10, if applied to both the minimum cell size and minimum n-size. Two commenters suggested that a minimum cell size of at least six or greater would remove the possibility of an LEA being flagged for significant disproportionality based on chance. A few commenters noted that a minimum cell size and a minimum n-size for the target racial and ethnic group are necessary to avoid the inappropriate identification of LEAs and requested a minimum cell size of five to avoid false positive identification of significant disproportionality. Several commenters suggested the use of specific minimum cell sizes when calculating the risk of identification of a particular disability for a racial or ethnic group. A few commenters encouraged a minimum cell size of five children with a particular disability. Many more commenters encouraged minimum cell size of 10 children with a particular disability. One commenter noted that a minimum cell size of at least 10 is necessary for reliability and privacy and to avoid findings of significant disproportionality based on very small numbers of children. This commenter supported giving States flexibility to select a minimum cell size between 10 and 15. A few commenters noted that a minimum cell size of five would result in fewer false positive identification of significant disproportionality.

*Discussion:* The Department appreciates the suggestions to select various minimum cell sizes in order to limit risk ratio volatility and the potential for inappropriate finding of significant disproportionality. In response to these comments, these final regulations provide States the flexibility to set their own reasonable minimum cell sizes, limited, as is the selection of risk ratio threshold, by consultation with stakeholders, including the State Advisory Panels and subject to the Departments monitoring and review for reasonableness. Accordingly, as with n-size, to ensure that the Department may accurately and uniformly monitor all cell sizes, we have added a requirement that each State report to the Department the cell sizes it selects and the rationale for selecting each. The Department has not yet determined the precise time and manner of these submissions, but it will do so through a subsequent information collection request. States are not obligated to comply with this reporting requirement until the Office of Management and Budget approves the Department's request.

As to reasonableness of cell sizes in general, the Department assumes that a minimum cell size of up to 10 may be reasonable for most States. Of commenters that suggested a particular minimum cell size, all but one requested that the Department allow States to use a minimum cell size of up to 10. The Department also found that—based on a review of the SY 2013–2014 State Supplement Survey (SSS)—States that used risk ratios in their determinations of significant disproportionality tended to set their cell-size or n-size requirements at 30 or less. Based on these data, the Department determined that cell- of 10 and n-sizes of 30 would allow the majority of States currently using risk ratios to retain their already established population requirements. We note that to the extent States publicly report their calculations or share data with stakeholders, the cell size of 10 is a recognized standard in data privacy.

Further, when reviewing States' minimum cell sizes for reasonableness, the Department may consider the same criteria used for minimum n-size, with one addition: the Department is more likely to consider a minimum cell size reasonable if, in comparison to a lower minimum cell size, it substantially reduces the potential that an LEA will be identified with a significant disproportionality based on small fluctuations in the number of children.

The Department encourages States to consider a smaller minimum n-size for categories of analysis with particularly

low incidence, as appropriate, in order to include a larger percentage of LEAs in the review for significant disproportionality. Further, in certain circumstances such as when coupled with a larger minimum n-size, it may be reasonable for a State to select a minimum cell size of zero.

The Department will continue to collect data and review research to help refine the selection of reasonable minimum cell sizes in order to ensure that States are reviewing as many LEAs for significant disproportionality as possible while limiting the volatility of risk ratios if cell sizes that are too low. The obligation to report cell sizes and their rationales will assist in this effort.

*Changes:* The Department has added § 300.647(b)(7), which requires States to report to the Department, at a time and in a manner specified by the Secretary, all cell sizes selected under § 300.647(b)(1)(i)(B) and the rationale for each. Rationales for n- and cell sizes that are not presumptively reasonable must include a detailed explanation of why the cell- and n-sizes chosen are reasonable and how they help ensure an appropriate analysis for significant disproportionality.

*Comment:* One commenter suggested that the Department consider scaling the minimum n-size to be larger for lower incidence disabilities.

*Discussion:* As we note earlier in this section, § 300.647(b)(1) requires States to select reasonable minimum cell sizes. Nothing in these final regulations precludes a State from setting higher minimum cell sizes or n-sizes for particular categories of analysis based, in part, on the level of incidence of a particular disability and the potential impact it could have on the volatility of calculated risk ratios. However, as noted previously, any minimum cell size or n-size set by the State, in consultation with stakeholders, must be reasonable. With this change, States' use of minimum cell sizes, along with States' flexibility to use up to three consecutive years of data to make a determination of significant disproportionality, should prevent the inappropriate identification of LEAs due to low incidence rates in either the racial or ethnic group of interest or the comparison group.

*Changes:* None.

*Comment:* One commenter argued that a minimum cell size would be particularly important when analyzing LEAs for significant disproportionality due to suspensions and expulsions. The commenter stated that LEAs cannot fully control the administration of disciplinary removals, as State or LEA regulations may require a child to be moved when weapons or drugs are

brought in the school. The commenter concluded that a minimum cell size would prevent those incidents from resulting in a finding of significant disproportionality for the LEA.

*Discussion:* We agree with the commenter that a single incident that requires a mandatory disciplinary removal generally should not result in a finding of significant disproportionality by race and ethnicity and that States should have the flexibility to focus on their efforts on LEAs with consistently high risk ratios, which may indicate systemic racial and ethnic disparities in need of intervention. We believe that the standard methodology is responsive to the commenter, as, under § 300.647(b)(1), States may establish reasonable minimum cell sizes and, under § 300.647(d)(1), States may use up to three consecutive years of data prior to making a determination of significant disproportionality.

However, we also believe that, in cases where an LEA experiences multiple incidents requiring a mandatory removal, and, as a result, a particular racial or ethnic group faces consistently disproportionate treatment over the course of multiple years, it would be appropriate for the LEA to be identified with significant disproportionality.

*Changes:* None.

*Comments:* Two commenters noted that, when the n-size of a risk calculation falls below 20 children, at least 6 children are required in the numerator to achieve sufficient statistical power for results to be reliable.

*Discussion:* The Department agrees that the selection of minimum cell sizes should be made with consideration for minimum n-sizes and encourages States to take any interactions between the two into account when setting these two minimums. Further, we would encourage States to also take into consideration how its particular combination of reasonable risk ratio threshold, minimum n-sizes, and minimum cell sizes will help or hinder its efforts to identify significant disproportionality.

*Changes:* None.

*Comment:* A few commenters responded to Directed Question #6 in the NPRM, which inquired whether the Department's proposed limit on minimum n-size aligned with State privacy laws.

A few commenters indicated that Department's proposal to allow States to set a minimum n-size up to 10 was compliant with State privacy laws. Other commenters noted that a minimum n-size of 10 would not

comply with State privacy laws, but that a minimum cell size of 10 would. One of these commenters noted that a minimum cell size of less than 10 would raise privacy concerns. One commenter stated that a Federal statistical agency recommended a minimum population requirement of 10 for confidentiality purposes. (The Department was unable to determine whether the commenter intended to refer to cell size or n-size.)

A few commenters spoke more generally about the relationship between minimum cell sizes, minimum n-sizes, and privacy. One commenter noted that a minimum cell size requirement would resolve the issue of publishing data that violates privacy laws. However, a few commenters stated that, as there did not appear to be any requirement that States make the data utilized in the risk ratio calculations publicly available, the issue of privacy was not applicable. One commenter questioned how, if the Department limits minimum n-sizes to 10 for significant disproportionality, and States choose higher minimum n-sizes for other calculations to safeguard privacy, the inconsistency would be explained to the public.

One commenter recommended that the Department research the implications of its proposal for existing State privacy laws with the goal of ensuring the privacy rights of children with disabilities. Another commenter generally recommended that the Department require FERPA protections in situations in which there are fewer than 10 children in a group.

*Discussion:* We appreciate the thoughtful comments that we received on this issue and recognize that, at particular minimum n-sizes and minimum cell sizes, States would potentially have to suppress some data prior to public reporting, as they do in other reporting instances. As State and Federal privacy laws apply, additional privacy protections in these regulations are not necessary.

*Changes:* None.

*Comment:* A number of commenters requested that States have flexibility to apply both a minimum n-size and a minimum cell size to the comparison group. Commenters indicated that allowing States to apply the minimum cell size to the numerator of the risk calculations for the comparison group would ensure that the risk calculations are based on a sufficient number of identified children. One commenter suggested that the Department allow States to adopt a minimum cell size that will decrease the likelihood of identifying an LEA as having significant

disproportionality when the results are likely to have occurred by chance.

Another commenter strongly opposed the use of a minimum cell size for the comparison group, if the result was that the racial or ethnic group of interest would not be reviewed for significant disproportionality. The commenter expressed concern that the starkest disparities would be overlooked in racially homogenous LEAs.

*Discussion:* In reviewing the commenters' suggestions and perspectives, we were not always certain whether the commenters assumed that a population requirement, when applied to a comparison group, would (1) determine whether a particular racial or ethnic group in an LEA would be exempted from a review of significant disproportionality, or (2) determine whether the alternate risk ratio was necessary to review that racial or ethnic group.

We believe the challenge associated with an inappropriately low minimum cell size or minimum n-size for racial and ethnic groups is similar to those that arise when dealing with comparison groups—namely, risk ratio volatility. For this reason, it is our intent that, under § 300.647(b)(5), States will use their reasonable minimum cell sizes and n-sizes to determine whether there is an adequate number of children in the comparison group to calculate the risk ratio or if the alternate risk ratio must be used.

In general, the Department does not believe that the absence of a comparison group—or a small comparison group—within an LEA is a sufficient basis to exclude a racial or ethnic group from States' review for significant disproportionality. It is the Department's intention, rather, that States calculate the alternate risk ratio—using a State-level comparison group—when the comparison group within the LEA includes too few children for a reliable analysis or when the risk to the comparison group within the LEA is zero.

However, we have also added § 300.647(c)(2) to clarify that, when the alternate risk ratio is required, and the comparison group within the State does not meet the minimum cell size or minimum n-size, the State is not required to calculate either the risk ratio or alternate risk for the applicable racial and ethnic group and category.

*Changes:* We have added § 300.647(c)(2) to allow States to not calculate either the risk ratio or alternate risk ratio for a given racial or ethnic group if the comparison groups at the LEA level and State level do not meet

the State's minimum n-sizes and minimum cell sizes.

*Comment:* A large number of commenters strongly suggested that the Department not mandate an n-size of 10 be applied to number of children in the comparison group as this might lead to false positives.

*Discussion:* As we note earlier in this section, the Department has amended its original proposal so that it no longer restricts States to a minimum n-size no greater than 10. Instead, the Department will require States to set reasonable minimum n-sizes. We believe this change to be responsive to the comments raised by reducing the likelihood that an LEA may be identified with significant disproportionality due to small numbers of children.

*Changes:* None.

*Comment:* One commenter stated that a minimum cell size need not apply to the comparison group, as the commenter recommends that States use a different approach, including a risk ratio and risk difference to examine LEAs that are mostly homogenous. The Department interprets the comment to suggest that, as risk difference should be used to analyze homogenous LEAs, and can be calculated even when a comparison group has a cell size of zero, there is no need for a minimum cell size for the comparison group.

*Discussion:* As we explain earlier in *Risk Ratios* (§ 300.646(b); § 300.647(a)(2); § 300.647(a)(3); § 300.647(b)), we decline to allow States to use risk difference to examine LEAs for significant disproportionality. States are required under § 300.646(b)(3), (4), and (5) to calculate the risk ratio—or the alternate risk ratio—and these methods cannot be calculated when the comparison group has a cell size of 0, and cannot be calculated reliably when the comparison group has a low cell or n-size. For these reasons, we disagree with the commenter and will require States to apply minimum cell sizes to comparison groups, under § 300.646(b)(5), to determine whether the alternate risk ratio will be used in place of the risk ratio.

*Changes:* None.

*Comments:* A number of commenters requested that, without the flexibility to include both a minimum n-size and a minimum cell size, States be allowed to include a test of statistical significance to determine whether the risk ratio is statistically different from the risk ratio threshold. Other commenters inquired about the use of statistical significance tests on specific pieces of the risk calculation prior to a finding of significant disproportionality.

*Discussion:* Given that States have access to population data on the identification, placement, and discipline of children with disabilities, tests of statistical significance would be inappropriate.

Further, the Department notes that commenters generally wanted States to have the flexibility to conduct these tests in the absence of flexibility to use minimum cell sizes. Given that States may set their own reasonable minimum cell sizes and minimum n-sizes, we believe the commenters' concerns to be addressed without allowing the use of statistical significance testing.

*Changes:* None.

*Comments:* A large number of commenters requested that the Department offer States flexibility to determine how to apply a minimum population requirement to LEAs. These commenters wanted States to have flexibility to add additional criteria beyond the minimum n-size to avoid identifying significant disproportionality that is simply the result of small numbers. One commenter noted that a minimum n-size of 10 fails to account for the overall size of an LEA. Another commenter noted that one State uses a population requirement for the general student population. A few commenters encouraged the Department to allow States to consider, in implementing the standard methodology, the size of the racial and ethnic group size in relation to the size of the LEA. One commenter requested flexibility to use additional criteria beyond a minimum n-size, such as requiring 30 or more children with an IEP for calculations.

*Discussion:* The Department recognizes that there are multiple ways that States could use data on the number of children in an LEA to determine whether to exclude that LEA from its analysis for significant disproportionality. For example, it is possible to devise a system in which LEAs that do not have at least 500 children enrolled are not subject to the standard methodology, or one in which an LEA is excluded from analyzing a particular racial or ethnic group if that group constitutes less than 1 percent of total enrollment in an LEA. However, we believe that exclusions on these bases would be inappropriate, as they are not closely related to concerns about data volatility and could result in an inappropriately high number of LEAs being excluded. Further, as every child with a disability is entitled to a free appropriate public education in the least restrictive environment, regardless of the size of the LEA or the proportion of enrolled children who are in their

particular racial or ethnic subgroup, we believe it would be inappropriate to allow the exclusion of LEAs for reasons unrelated to data volatility. We believe that State flexibility to set reasonable minimum cell sizes and minimum n-sizes is sufficient to address commenters' concerns regarding small numbers of children.

*Changes:* None.

*Commenter:* A commenter recommended that the Department require States to report risk ratios that are corrected—using advanced mathematical methods of correction or estimation—when LEAs have a cell size of zero.

*Discussion:* In developing the standard methodology, the Department placed a priority on selecting methods that were easy to comprehend, that supported transparency, and that facilitated comparisons between States' approaches to identifying significant disproportionality. With a population requirement, such as the minimum cell size included in § 300.647(b)(1), LEAs can easily determine which racial and ethnic groups the State will review for significant disproportionality, and what categories of analysis will be reviewed. Further, they can calculate for themselves the likely outcome of the review.

While the commenters' suggestion might enable States to review additional LEAs for significant disproportionality, it would do so at the cost of transparency, given the complexity of the analysis. For this reason, the Department declines to require States to use this analysis.

*Changes:* None.

*Comment:* One commenter stated that population requirements have varied between LEAs, with some having a minimum of just 9 children while other LEAs have set the minimum as large as 30 children. The commenter expressed concern that population requirements that require a greater number of children may result in significant disproportionality being missed entirely in some LEAs.

*Discussion:* We agree with the commenter that, in general, LEAs with significant disproportionality may be overlooked if either minimum n-sizes or minimum cell sizes are too large. For this reason, under § 300.647(b)(1), States will be required to set reasonable minimum cell sizes and reasonable minimum n-sizes with input from State Advisory Panels, and the States' chosen population requirements would also be subject to the Department's enforcement of reasonableness. Further, this provision requires States to identify and apply minimum n-sizes and minimum

cell sizes. LEAs will not be permitted to set their own population requirements to determine whether the LEA, or if the racial and ethnic groups within the LEA, will be reviewed by the State for significant disproportionality.

*Changes:* None.

Alternate Risk Ratios (§ 300.647(a)(1); § 300.647(b)(5); § 300.647(c)(2))

*Comment:* A number of commenters responded to Directed Question #7 in the NPRM, which requested public input regarding the use of the alternate risk ratio method in situations where the comparison group does not meet the minimum n-size. Directed Question #7 also asked for input on whether the use of the alternate risk ratio method would be appropriate in other situations.

Some commenters opposed the use of an alternate risk ratio method. Of these, some stated that an alternate risk ratio method would seldom be appropriate because, in some States, few LEAs have demographics that are similar to the State's overall demographics. This commenter suggested that using an alternate risk ratio method will increase the likelihood of false positive identification of LEAs with significant disproportionality. A number of commenters expressed concern that, with the alternate risk ratio, LEAs would be dependent upon States to provide the data to calculate their risk ratios. These commenters expressed a preference for calculations that LEAs would run independent of the State. Another commenter expressed opposition to a standard methodology in general and stated that the alternate risk ratio method is similarly deficient because it fails to take into account factors, such as poverty, that could affect the need for special education services. Similarly, some commenters stated that, while the use of an alternate risk ratio method may be appropriate in certain situations, the Department should further consider allowing States to use methodologies other than a risk ratio.

A few commenters expressed support for the use of an alternate risk ratio approach in limited situations, such as when subgroup sizes are small in number, or when the risk ratio is volatile across three years of data. Other commenters supported the Department's proposal to allow States to use the alternate risk ratio in instances where the total number of children in a comparison group is less than 10 or when the risk to children in a comparison group is zero.

*Discussion:* Under proposed § 300.647(b)(5), States would have used the alternate risk ratio, instead of the

risk ratio, whenever the comparison group at the LEA-level had an n-size of fewer than 10 children (or children with disabilities, as appropriate) or had a risk of 0 percent (*i.e.*, had a cell size of 0). This requirement was designed to prevent the possibility that States might, from LEA to LEA, choose from either the risk ratio or alternate risk ratio with the goal of avoiding an identification of significant disproportionality.

As the Department has revised § 300.647(b)(1) to allow States, with input from stakeholders (including the State Advisory Panel), to set reasonable minimum n-sizes and minimum cell sizes, we have likewise revised § 300.647(b)(5) to require States the use of the alternate risk ratio when, within an LEA, the comparison group does not meet either a reasonable minimum n-size or minimum cell size. While the flexibility to determine reasonable minimum n-sizes and minimum cell sizes will not allow States the option to simply choose, from LEA to LEA, whether to apply the alternate risk ratio due to concerns about risk ratio volatility, it would provide States the ability to avoid risk ratio volatility due to small comparison group sizes. Likewise, the ability of a State to determine reasonable minimum cell sizes and minimum n-sizes should provide sufficient flexibility to avoid false positives identification of significant disproportionality that might result when examining small target or comparison groups.

With respect to the comment regarding the potential difficulty in obtaining State data for use in the alternative risk ratio, we note that the requirement to analyze LEAs is applicable to States, and States have access to the State-wide data necessary to use when applying the alternate risk ratio method. In reviewing LEAs for significant disproportionality with respect to identification, we generally expect that States will use the same IDEA section 618 data that is reported to the Department for data regarding children with disabilities, and data submitted to the Institute for Education Sciences for the Common Core of Data, for enrollment data. OMB Control No. 1875–0240. In reviewing LEAs for significant disproportionality with respect to placement or discipline, we generally expect that States will use the same section 618 data reported to the Department. For IDEA section 618 data, discipline data is a cumulative count from July 1st through June 30th, while IDEA section 618 child count data is a point-in-time count that occurs in the fall. OMB Control No. 1875–0240.

We disagree with commenters that the Department should allow States to consider additional factors that might affect significant disproportionality. Under the current regulations, the GAO noted 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 [of significant disproportionality] is being appropriately identified across the nation.” It was this finding by the GAO, public comments the Department received in a response to a 2014 request for information (79 FR 35154), and the Department’s review of State definitions of significant disproportionality that convinced the Department to issue regulations to require that all States follow a standard methodology. The Department believes that the proposed standard methodology—including the use of the risk ratio or alternative risk ratio method—is a necessary step to achieve those goals.

*Changes:* We have revised § 300.647(b)(5) to require States the use of the alternate risk ratio when, within an LEA, the comparison group does not meet either a reasonable minimum n-size or minimum cell size, as determined by the State in accordance with revised § 300.647(b)(1).

*Comment:* A number of commenters suggested the Department provide the flexibility to allow States to determine when and under what circumstances the alternate risk ratio method would be most appropriate. One of these commenters noted that one State currently uses the alternate risk ratio in all instances and urged the Department to allow this State to continue to do so rather than limiting the use of the alternate risk ratio method to those situations when the risk ratio method is not applicable. According to the commenter, the LEAs in this State are familiar with the alternate risk ratio and understand its calculation. In addition, the commenter asserted that the alternate risk ratio provides the ability for comparability of results among the LEAs in the State.

Other commenters asserted that while flexibility to use the alternate risk ratio may be appropriate, a requirement to use the alternate risk ratio method was not. Some of these commenters argued that the alternate risk ratio, which uses the State’s risk for the comparison group, is inappropriate in States in which the racial and ethnic composition of LEAs differs significantly from that of the State. These commenters indicated that allowing States to use a minimum cell size for both the racial or ethnic group of interest and the comparison

group would eliminate the need for the alternate risk ratio calculation.

Another commenter noted that the use of an alternate risk ratio for some LEAs or some subgroups within an LEA will create disparities in the application of the regulation. The commenter requested that States have the flexibility to use either the risk ratio or the alternate risk ratio for all of the LEAs and subgroups within the State.

Still another commenter suggested that the Department allow, but not require, the alternate risk ratio method, stating that, while the alternate risk ratio may solve the problem of low cell size for the comparison population, it precludes an accurate measure of disproportionality because it relies on a comparison of two dissimilar populations. According to the commenter, if referral rates in an LEA are high in general, application of the risk ratio method would not suggest significant disproportionality; use of the alternate risk ratio method, however, where the LEA’s generally high referral rates would be compared to the State’s average referral rates, would result in all groups being found to be disproportionate. This commenter further stated that the alternate risk ratio will create a substantial risk in States with predominantly White rural areas that a large number of LEA findings will be due to significant overrepresentation for White children. The commenter questioned whether Congress, in framing IDEA in 2004, intended to address the disparate treatment of White children. The commenter argued that, while the issue of over-referral to special education could be an issue for OSEP or SEAs to address, comprehensive CEIS should be a vehicle to monitor significant disproportionality, not referral rates.

Another commenter noted that, when an LEA suspends just one or two children of one racial or ethnic group and none of any other racial or ethnic group, the alternate risk ratio will kick in and, due to small numbers that produce a high risk for one particular racial or ethnic group, a high alternate risk ratio will be produced and trigger a finding of significant disproportionality. Other commenters arrived at a similar conclusion: They advised the Department to not require the use of the alternate risk ratio calculation as, according to them, it only provides a viable option for examining racial or ethnic disparities in a limited number of circumstances (*e.g.*, when the comparison group does not meet the minimum n-size or cell size), failing to address very small target populations.

*Discussion:* We appreciate the comments regarding the required use of the alternate risk ratio. With respect to comments suggesting that the Department permit States to apply the alternate risk ratio whenever they deem it appropriate, we reiterate that the alternate risk ratio may be used only when the risk ratio method is not available. As we stated in the NPRM, it is the Department's position that, whenever possible, analyses for significant disproportionality under IDEA section 618(d) should compare identification, placement, and discipline rates in an LEA to those rates for other racial and ethnic groups in the same LEA.

We disagree with commenters suggesting that States should have flexibility to exclude from a review of significant disproportionality those racial or ethnic groups within LEAs that do not have a sufficiently large comparison group. For similar reasons, we disagree with commenters objecting to the alternate risk ratio due to demographic differences between the State and LEA. The Department believes that, in racially or ethnically homogenous LEAs—including rural, predominantly White districts—and LEAs with markedly different demographic characteristics than a State, there is a possibility that a particular racial or ethnic group is identified, placed, or disciplined, at markedly higher rates than their peers. In these cases, the absence of a comparison group should not excuse either the State or the LEA from their responsibility under IDEA section 618(d) to identify and address significant disproportionality.

We disagree with the suggestion that IDEA section 618(d) was not intended to address significant disproportionality that impacts White children. The plain language of IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to identify significant disproportionality, based on race or ethnicity, without any further priority placed on specific racial or ethnic groups. For that reason, the Department believes that the statute directs States to address significant disproportionality impacting all children with disabilities.

We further disagree with commenters that an alternate risk ratio requirement does not measure racial and ethnic disparity. Most measures of racial and ethnic disparity include some comparison of risk; in the case of the alternate risk ratio, the comparison is not to a State risk index, but to a State-level comparison group (e.g., Black children in an LEA, compared with non-Black children in the State).

Finally, with respect to the possibility that, for any one LEA with high referral rates across all groups, all racial and ethnic groups could trigger a finding of significant disproportionality if an alternate risk ratio is required, we do not believe that there is a high likelihood of that scenario occurring. The alternate risk ratio would only be utilized in cases where, for a particular racial or ethnic group, there is a small comparison group at the LEA-level or the comparison group's risk is zero at the LEA-level. Likewise, the flexibility to set reasonable minimum cell sizes and minimum n-sizes should allow States to avoid identifying LEAs based on a small number of children in a particular group. In either case, it is likely that the racial and ethnic groups that comprise the comparison group would not be reviewed for significant disproportionality, as, per § 300.647(c)(1), States will have the flexibility to exclude from their review for significant disproportionality those racial and ethnic groups they do not meet both a minimum n-size and minimum cell size.

*Changes:* None.

*Comment:* One commenter suggested that the alternate risk ratio would be appropriate in situations where an LEA is home to highly specialized programs for children with autism or hearing impairments, or where the mobility rate is significantly discrepant from the State average.

*Discussion:* We disagree. As we stated in the NPRM, it is the Department's position that, whenever possible, analyses for significant disproportionality under IDEA section 618(d) should compare identification, placement, and discipline rates in an LEA to those rates for other racial and ethnic groups in the same LEA. Generally, variations from statewide trends is not an ideal indicator of whether significant disproportionality exists, which is why the Department initially proposed to limit the use of the alternate risk ratio to instances in which the comparison group is particularly small or the risk to that group is zero. In instances where an intra-LEA analysis either does not create mathematical quandaries (i.e., dividing by zero) or does not rely on particularly small comparison groups, racial and ethnic groups within an LEA should be compared with other groups within the LEA. Under § 300.647(b)(5), the Department will limit the use of the risk ratio to instances where the comparison group does not meet either the State's reasonable minimum cell size or minimum n-size.

In instances where LEAs have highly specialized programs, LEAs should work to ensure that these programs are equally accessible to all children eligible for the program, regardless of race or ethnicity. Similarly, LEAs should ensure that decisions to place particular children with disabilities in segregated settings are based on the individual needs of those children consistent with civil rights laws. Unnecessarily removing children with disabilities from an integrated setting and concentrating them in separate schools runs contrary to the integration goal that lies at the heart of the Americans with Disabilities Act (ADA). (See, e.g. 28 CFR 35.130(b)(1)(ii), (b)(1)(iv), (b)(2); see also, *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability” under title II of the ADA).)

Further, as discussed earlier, the level of student mobility in an LEA does not obviate that LEA's obligation under IDEA to ensure that all children with disabilities have access to a free appropriate public education in the least restrictive environment. LEAs should ensure that they are meeting this obligation for all children, and that they are doing so without regard to a child's race or ethnicity.

Finally, it is not clear to the Department how a calculation of an alternate risk ratio, rather than a risk ratio, would result in a more accurate assessment of significant disproportionality for LEAs with specialized programs or highly mobile student populations.

*Changes:* None.

*Comments:* One commenter suggested that if an SEA uses multiple years of data, and an LEA's racial composition requires the use of the alternate risk ratio in one year, then the State should have the flexibility to use the alternate risk ratio in the other years to determine significant disproportionality. The commenter suggested, for example, that an SEA using three years of data be permitted to apply the alternate risk ratio to years one and three of the data even if the alternate risk ratio was only triggered in year two of the data.

*Discussion:* The Department does not believe it appropriate to allow States to use the alternate risk ratio for LEAs in the years just prior to, or immediately following, years when it is required to do so because the comparison group does not meet the State's reasonable minimum n-size or reasonable minimum cell size. As we stated in the NPRM, it is the Department's position that, whenever possible, LEA data is

preferable to State-wide data for the purpose of identifying significant disproportionality as they best represent the practices of the LEA and the experiences of the children enrolled in the LEA. 81 FR 10967. In years when an LEA has a sufficiently large population of children, or children with disabilities, to meet the State's reasonable minimum cell size and minimum n-size, it is the Department's preference that States use the LEA's information to identify if significant disproportionality is taking place.

*Changes:* None.

#### Flexibilities—Three Consecutive Years of Data, § 300.647(d)(1)

*Comment:* One commenter expressed concern that allowing States to identify LEAs with significant disproportionality by examining up to three prior consecutive years in proposed § 300.647(c)(1) is ambiguous. Further, the commenter stated that it is not clear whether the regulation is written to mean that an LEA could be identified in the year in which their data exceeded the State-defined threshold or if the LEA could exceed the threshold for three years and then be determined to have significant disproportionality in the fourth year. If the regulation is written to mean the latter, the commenter expressed that four years is an unnecessarily long delay. Another commenter stated that it is unclear whether the State may begin consideration of the three years of data on the date the regulations go into effect.

*Discussion:* The Department appreciates the opportunity to clarify this flexibility. Under final § 300.647(d)(1), States may make a determination that an LEA has significant disproportionality after the LEA has exceeded a risk ratio threshold for a particular racial or ethnic group and category of analysis for up to three prior consecutive years preceding the identification. Under this provision, a State is prohibited from waiting four years to identify an LEA with significant disproportionality if it has exceeded the State's risk ratio threshold for up to three prior consecutive years. The use of the term "prior" is meant to clarify that any determination of significant disproportionality uses the most recent year for which data are available and up to two previous consecutive years of data.

For example, if a State is making a determination in the 2018–2019 school year, it can rely on up to three years of data to make its determinations (e.g., 2015–2016, 2016–2017, and 2017–2018). If an LEA exceeds the risk ratio

threshold for a particular racial or ethnic group for a particular category of analysis in each of those years, the State must identify that LEA as having significant disproportionality. The fact that the determination made in 2018–2019 is based, in part, on data from 2015–2016 does not constitute a delay of four years to make a determination, but is a result of data lags that occur regardless of how many prior years of data a State analyzes (e.g., 2018–2019 child count, placement, and discipline data are not typically available in time for States' determinations in the 2018–2019 school year).

The flexibility to determine significant disproportionality after one, two, or three consecutive years was designed to account for volatility—small changes in data from year to year that may cause large changes in a risk ratio and cause an LEA to be identified with significant disproportionality. Allowing States to take into consideration up to three consecutive years of data provides an opportunity for the States to determine which LEAs have significant disproportionality on the basis of consistently elevated risk ratios, rather than what may be a single year increase.

Also, as we noted in the NPRM, using three consecutive years of data was the most common approach to identifying significant disproportionality among the States in 2012–2013. Of the 23 States that reported using multiple years of data in the SY 2012–2013 State Supplement Survey (SSS), 13 States required an LEA to exceed the threshold for three consecutive years before finding significant disproportionality, while 9 States required 2 consecutive years.

*Changes:* None.

*Comment:* Regarding proposed § 300.647(c)(1), a large number of commenters expressed support for requiring, rather than allowing, States to rely on three years of data before making a determination of significant disproportionality. Several other commenters supported States choosing to identify an LEA as having significant disproportionality only after the LEA exceeds a risk ratio threshold over a period of time (such as three consecutive years) as a matter of best practice to avoid the identification of significant disproportionality due to data anomalies.

*Discussion:* Final § 300.647(d)(1) will permit, but not require, States to rely on up to three years of data in order to make a determination of significant disproportionality. The Department believes that States should have the flexibility to make a determination of significant disproportionality based on

one, two, or three consecutive years of data. The Department also believes that this flexibility will help States both account for year-to-year volatility in the risk ratio and focus on LEAs with consistently high risk ratios.

At the same time, we do not believe it appropriate to require States to use three consecutive years of data—rather than two consecutive years, or only one year—prior to identifying significant disproportionality. Given the flexibility States will have under § 300.647 to set reasonable population requirements—which will also reduce risk ratio volatility—reasonable risk ratio thresholds, and standards for reasonable progress, States may determine that a particular combination of these methods appropriately identifies significant disproportionality using one or two years of data. In these cases, the Department does not want to require States to wait an additional year, or an additional two years, to make an identification of significant disproportionality when they have confidence that the racial and ethnic disparities within an LEA require more immediate intervention.

*Changes:* None.

*Comment:* Many commenters expressed general support for allowing States to use up to three consecutive years of data, under proposed § 300.647(c)(1), prior to making a determination of significant disproportionality. One commenter expressed support for allowing up to three consecutive years of data, so long as States continue to be required to annually calculate risk ratios to determine significant disproportionality. That same commenter argued that analyzing three consecutive years of data gives LEAs more advanced notice, flexibility, and support in which to implement systemic changes before a finding of significant disproportionality can occur. A few commenters expressed that allowing States to wait for more than three consecutive years—that is, longer than the period specified in the Department's proposal—before identifying significant disproportionality would mean that thousands of misidentified, misplaced, and over-disciplined children would continue to be denied the high quality education they need.

*Discussion:* The Department appreciates the commenters' support and believes that this flexibility will help States account for volatility in risk ratios. Allowing States to take into consideration the data of up to three consecutive years provides an opportunity for the States to focus their efforts on LEAs with consistently high

risk ratios year over year, rather than only those with a single year of a high risk ratio. Further, we agree with the commenter's interpretation of proposed § 300.647(c)(1) (now § 300.647(d)(1)) that States must examine their LEAs for significant disproportionality every year. The flexibility in this section allows the State to limit their findings of significant disproportionality to LEAs that exceed the State's risk ratio threshold for up to three prior consecutive years, as is already the common practice in a number of States. As we noted in the NPRM (81 FR 10985), based on the SY 2013–14 State Supplement Survey, 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. We therefore agree with the comment that a longer period of analysis would not be appropriate.

*Changes:* None.

#### Flexibilities—Reasonable Progress, § 300.647(d)(2)

*Comment:* Many commenters expressed support for proposed § 300.647(c)(2) allowing States to exempt LEAs from a determination of significant disproportionality if they show reasonable progress.

*Discussion:* The Department appreciates commenters' support for this flexibility. We believe it is important to allow States the flexibility to not identify LEAs with significant disproportionality if, for example, a prior review and revision of policies, practices, and procedures and effective use of funds for comprehensive CEIS has resulted in a reasonable reduction in risk ratios in each of the two prior consecutive years. In such an LEA, a continued finding of significant disproportionality, including an ongoing annual review of policies, practices, and procedures, may actually divert State attention from LEAs in which substantial problems continue to occur and are not improving.

*Changes:* None.

*Comments:* Two commenters asked for additional Federal guidance regarding what constitutes reasonable progress because allowing States to interpret "reasonable progress" may allow LEAs to "backslide." One commenter stated that the Department should place restrictions on the definition of "reasonable progress" if trend data indicates that different rates of progress are appropriate for different

demographic groups across identification, placement, and discipline. Other commenters recommended clearly defining "reasonable progress" and including a rubric for determining whether the State is correctly applying "reasonable progress" and monitoring trends across States for appropriate definitions of reasonable progress. Finally, one commenter posited that, without a clearer definition of reasonable progress, the flexibility may become a loophole allowing States to avoid identifying LEAs.

*Discussion:* We appreciate commenters' concerns regarding the reasonable progress flexibility. While the Department believes that States should retain broad flexibility to set a standard for "reasonable progress," it was not our intent to allow States unfettered flexibility in this area. We have revised the regulations to ensure that a State's standard for reasonable progress is meaningful, and to reduce the likelihood that an LEA might meet the standard due to reductions in risk ratios resulting from a data anomaly. Under final § 300.647(d)(2), LEAs must be making reasonable progress in lowering the risk ratio or alternate risk ratio for the group and category for each of the two prior consecutive years, rather than the immediate preceding year. As such, if an LEA is not reducing risk ratios over each of the two prior consecutive years, a State cannot exercise this flexibility. Further, we have revised § 300.647(b)(1), to require each State to consult with its stakeholders, including State Advisory Panels, before setting a standard for reasonable progress. This revision also clarifies that the State's standard for reasonable progress, under § 300.647(d)(2), is subject to the Department's monitoring and enforcement for reasonableness.

While, in the NPRM, the Department suggested that States might make a determination of "reasonable progress" on a case-by-case basis, we no longer find this degree of flexibility to be appropriate. While States would retain the flexibility to set a standard for reasonable progress—including the flexibility to set a standard that requires different risk ratio reductions for each of the categories in paragraphs (b)(3) and (4)—this standard must be developed with the advice of stakeholders, including the State Advisory Panel, and implemented uniformly across the State. We do not, however, believe that a standard that requires different risk ratio reductions for LEAs that exceed the State's risk ratio threshold for different

racial or ethnic groups would meet constitutional scrutiny.

The proposed regulations also included additional restrictions to how a State may implement § 300.647(d)(2), which we retain in these final regulations. If an LEA is reducing risk ratios generally, but not for the specific group and category for which its risk ratio exceeded the State's risk ratio threshold, a State cannot exercise this flexibility. Similarly, if an LEA exceeds the risk ratio threshold in four areas and is making reasonable progress in only three of them, a State could not use this flexibility to not identify the LEA with significant disproportionality in the area in which the LEA is not making reasonable progress. Therefore, while States can determine specific standards for what constitutes reasonable progress (e.g., a reduction of the risk ratio by 0.5 in each of the two prior consecutive years), they can do so only within a specified set of circumstances.

In sum, the Department does not believe that this flexibility represents an unchecked loophole for States. The Department plans to monitor States' implementation of this flexibility and, as appropriate, will provide technical assistance on best practices as they become evident. The Department may also take appropriate enforcement action, ranging from requiring a corrective action plan, to imposing special conditions, to designating the State as high-risk status, to withholding a portion of the State's IDEA Part B funds.

*Changes:* We have revised § 300.647(b)(1) to clarify that the State's standard of "reasonable progress" must be developed with the advice of stakeholders, including State Advisory Panels, and is subject to the Department's monitoring and enforcement for reasonableness. We have also revised § 300.647(b)(1) to clarify that a State may, but is not required to, set the standards for measuring reasonable progress at different levels for each of the categories described in paragraphs (b)(3) and (4). In addition, we have revised § 300.647(d)(2) to require that an LEA make reasonable progress in reducing the appropriate risk ratio (or alternate risk ratio) in each of two prior consecutive years, rather than the immediate preceding year.

*Comments:* Several commenters supported giving States significant flexibility in defining "reasonable progress," and emphasized that there should be no additional restrictions on State flexibility to define "reasonable progress."



*Discussion:* We appreciate the commenters' perspective. While we believe that States should have broad flexibility to set a standard for "reasonable progress," it was the Department's intent to restrict States to only those standards that are reasonable and are indicative of meaningful progress. As we note earlier in this section, we believe that two changes to regulation are necessary to help States to select a standard that is reasonable and to reduce the likelihood that data anomalies will prevent the appropriate identification of LEAs with significant disproportionality.

*Changes:* We have revised § 300.647(b)(1) to clarify that the State's standard of "reasonable progress" must be developed with the advice of stakeholders, including State Advisory Panels, and is subject to the Department's monitoring and enforcement for reasonableness. We have revised § 300.647(d)(2) to require that an LEA make reasonable progress in reducing the appropriate risk ratio (or alternate risk ratio) in each of the two prior consecutive years, rather than the immediate preceding year.

*Comment:* A commenter requested clarity regarding the best way to determine whether an LEA has achieved reasonable progress such that a determination of significant disproportionality is no longer required.

*Discussion:* In general, the Department expects that States implementing the revised final § 300.647(d)(2) will examine LEAs for reasonable progress in reducing their risk ratios in each of the two prior consecutive years. For example, a State may choose to review LEAs for significant disproportionality in SY 2018–2019 based on data from SYs 2017–18, 2016–17, and 2015–16. Should the State identify an LEA that exceeds a particular risk ratio threshold for all three years, the State has the option, under final § 300.647(d)(2), not to make a finding of significant disproportionality if the LEA has achieved at least a reasonable decrease in their risk ratios between SYs 2015–2016 and 2016–17, and between SYs 2016–2017 and 2017–2018. The State does not have the option to postpone a finding of significant disproportionality if the LEA has only achieved a decrease in their risk ratios over a multiple year period; that is, if an LEA reduced its risk ratio from 2015–2016 to 2017–2018, but not from 2015–2016 to 2016–2017, the State does not have the flexibility to not identify the LEA as having significant disproportionality if it otherwise exceeds the State's risk ratio threshold. So long as an LEA exceeds a risk ratio

threshold, the LEA must make continuous progress, in each of the two prior consecutive years, in reducing its risk ratio to avoid a finding of significant disproportionality.

*Changes:* None.

*Comment:* One commenter stated that, in a State that uses three years of data, the data used to consider a determination of significant disproportionality is old and likely includes a substantial number of children who no longer attend the LEA. The commenter also stated that, because of the time it will take for the LEA to develop a plan, and report to the Department any improvement, years will have passed between the original identification of significant disproportionality and data showing the results of LEA-level changes.

*Discussion:* We recognize that, given the time necessary to collect, prepare, and analyze data, the information States will use to identify significant disproportionality may be delayed a number of years, particularly when States are also exercising the flexibility under § 300.647(d)(1) to consider up to three prior consecutive years of data. The data analyzed may indeed include children no longer enrolled within the LEA. However, the data lag is, in part, necessary to ensure accuracy of the information on which findings are based. It would be impossible for a State to make a determination of significant disproportionality regarding discipline for the current year based on the current year's data, as the school year is currently ongoing and the State would therefore be basing determinations on incomplete data. These limitations do not reduce the value of these analyses, particularly as IDEA section 618(d) was intended to address those LEAs with systemic racial and ethnic disparities in special education, rather than providing specific relief to specific children with disabilities. Other provisions of IDEA are meant to address the individual rights of children with disabilities to a free appropriate public education in the least restrictive environment.

*Changes:* None.

*Comments:* Two commenters suggested that reasonable progress should be defined so that it is meaningful.

*Discussion:* We agree with the commenters that the standard for reasonable progress should represent a meaningful degree of improvement in the performance of the LEA. To ensure this, the Department will now require States to consult with stakeholders, including State Advisory Panels, prior to setting a standard for reasonable progress under § 300.647(d)(2). Further,

each State's standard for reasonable progress will be subject to the Department's monitoring and enforcement for reasonableness.

In addition, States should set their reasonable progress standards based on whether the progress realized by LEAs in lowering risk ratios represents a meaningful benefit to children in the LEA, rather than statistical noise or chance. To increase the likelihood that States' standards will accomplish this goal, the Department will now allow States to make a determination of reasonable progress only after an LEA has made reasonable progress in reducing its risk ratio in each of the two prior consecutive years.

*Changes:* We have revised § 300.647(b)(1) to clarify that the State's standard for "reasonable progress" must be developed with the advice of stakeholders, including State Advisory Panels, and is subject to the Department's monitoring and enforcement for reasonableness. We have revised § 300.647(d)(2) to require that an LEA make reasonable progress in reducing the risk ratio (or alternate risk ratio) in each of the two prior consecutive years, rather than only from the immediate preceding year.

*Comments:* One commenter suggested that, to show reasonable progress, an LEA must consistently reduce risk ratios across a three year period and requested clarification as to how consistent progress must be for a State using three years of data.

*Discussion:* The Department appreciates the recommendation. We understood the commenter to be recommending that, when looking across a three year period (e.g., 2015–16, 2016–17, and 2017–18), an LEA should both show a year to year decrease in their risk ratio and an overall downward trend across the period, regardless of whether the first year of the period (e.g., 2015–16) was a decrease from the preceding year (e.g., 2014–15). We agree with the commenter that the LEA should make progress each year in reducing its risk ratio, and have revised the regulations to allow States to not identify an LEA with significant disproportionality if the LEA achieves reasonable progress, under § 300.647(d)(2), in reducing its risk ratio (or alternate risk ratio) from the preceding year in each of the two prior consecutive years. We believe this mirrors the recommendation of the commenter. We decline to require that LEAs reduce their risk ratio over a longer period of time, as it would require States to examine four or more years of data to determine whether the LEA had achieved reasonable progress.

Under the revised regulation, the Department will allow States to implement both § 300.647(d)(1) and (2) using only three prior consecutive years of data.

For example, State A has a risk ratio threshold of 3.0 and two LEAs in the State have risk ratios 3.6 (LEA 1) and 4.3 (LEA 2) in SY 2020–2021. If the State opts to use the reasonable progress flexibility, the State would have to examine the risk ratios for those LEAs,

for the particular group and category, for the two preceding years. If LEA 1 had a risk ratio of 4.9 in 2018–2019 and a risk ratio of 4.3 in 2019–2020, the State could determine that this LEA had demonstrated reasonable progress in reducing its risk ratios and not make a determination of significant disproportionality (assuming a reduction from 4.9 to 4.3 to 3.6 met the State’s identified standard).

However, if LEA 2 had a risk ratio in 2018–2019 of 4.9 and a risk ratio of 3.6 in 2019–2020, the State must identify that LEA as having significant disproportionality because it did not reduce its risk ratio in each year for two consecutive years. Even though the risk ratio of 4.3 in 2020–2021 is less than the risk ratio in 2018–2019, the increase from 2019–2020 to 2020–2021 means the LEA has not made reasonable progress in reducing its risk ratio.

TABLE 1—EXAMPLE RISK RATIOS BY YEAR IN DEMONSTRATING REASONABLE PROGRESS

	2019	2020	2021	Notes
LEA 1 .....	4.9	4.3	3.6	State can determine LEA made reasonable progress because of decrease in risk ratio from prior year for two consecutive years.
LEA 2 .....	4.9	3.6	4.3	State may not determine LEA made reasonable progress because risk ratio increased from 2020 to 2021.

*Changes:* None.

*Comment:* A commenter suggested that the Department allow States to determine that an LEA has made reasonable progress if the LEA provides evidence that it is actively addressing the significant disproportionality, regardless of whether the LEA’s data reflects that progress has been achieved.

*Discussion:* As noted above, § 300.647(d)(2) allows a State not to identify an LEA with significant disproportionality if it is making reasonable progress in lowering the risk ratios for the group or category in each of the two prior consecutive years. Further, IDEA section 618(d) (20 U.S.C. 1418(d)) requires States to base their determination of significant disproportionality on a collection and examination of data. For these reasons, States are not permitted to use information other than data on racial and ethnic disparities to distinguish whether significant disproportionality is occurring within an LEA or to determine whether that LEA is making reasonable progress under § 300.647(d)(2).

*Changes:* None.

*Comments:* One commenter stated that providing States with the flexibility not to identify LEAs demonstrating reasonable progress in lowering the risk ratio will not remedy matters of identification due solely to small cell size. The Department interpreted this comment to suggest that proposed § 300.647(c)(2) will not prevent the inappropriate identification of LEAs due to small populations of children.

*Discussion:* The Department agrees with the commenter and did not intend for proposed § 300.647(c)(2) (now § 300.647(d)(2)) to prevent the identification of LEAs with significant

disproportionality due to the volatility in risk ratios that can result from small numbers of children. Two other provisions are intended to address that issue. Under § 300.647(b)(1)(i)(B) and (C), States must set minimum n-sizes and minimum cell sizes. If a particular racial or ethnic group being analyzed in an LEA does not meet the minimum n-size and minimum cell size established by the State, the State is not required to use the standard methodology. We believe that this flexibility is sufficient to address concerns about identification of an LEA as having significant disproportionality on the basis of small numbers of children.

*Changes:* None.

*Comment:* Multiple commenters expressed concerns with the use of risk ratio as a measurement of reasonable progress under proposed § 300.647(c)(2). These commenters argued that absolute reductions in risk, and not risk ratios, should be used to measure progress, especially for restrictive placements and discipline.

*Discussion:* The Department appreciates the concerns raised by commenters. However, as noted above, IDEA section 618(d) (20 U.S.C. 1418(d)) is primarily concerned with significant disproportionality across racial and ethnic groups, rather than the specific rates of identification, placement in particular settings, or discipline for children with disabilities. As such, we believe it would be inappropriate to provide States the flexibility not to identify an LEA with significant disproportionality on the basis of a criterion that is not related to the relative numbers of children (or children with disabilities) experiencing

a particular outcome across racial or ethnic groups.

*Changes:* None.

*Comments:* A number of commenters stated that risk ratios are inappropriate measures of progress when the underlying risk of placement in restrictive settings or of disciplinary removal is unacceptably high. For example, they argued that increasing the risk level for the lower incidence group in the risk ratio comparison would also reduce the risk ratio but not the overall exclusion of children from the classroom; according to the commenters, that scenario should never be considered reasonable progress. Commenters stated that a necessary component of any State’s determination of reasonable progress must be that the racial or ethnic group with the highest risk level sees a reduction in its risk level.

*Discussion:* The Department recognizes and appreciates the commenters’ concerns. For several years, the Department has worked to assist States to strengthen behavioral supports to children with the goal of reducing schools’ reliance on suspensions and expulsions. For this reason, the Department appreciates that commenters examined this component of the regulation for potential unintended incentives that could inhibit the progress of States and LEAs in reducing disciplinary removals. However, in considering the issues that the commenters have raised, the Department disagrees that allowing States to use the risk ratio to measure reasonable progress with respect to disciplinary removals would create an incentive to raise rates of suspension or expulsion.

We find it highly unlikely that LEAs would respond to a finding of significant disproportionality by systematically seeking out children with disabilities in other racial or ethnic groups and suspending or expelling them solely to meet the State's definition of reasonable progress. Further, to the extent that an LEA was engaging in those practices, we would expect a State to take strong administrative action to prevent them, as they clearly represent a denial of a free appropriate public education in the least restrictive environment.

The Department has worked to provide educators and schools with easy access to information regarding school discipline reform. Tools, data, and resources are available at [www.ed.gov/school-discipline](http://www.ed.gov/school-discipline).

*Changes:* None.

*Comment:* One commenter noted that, in general, reducing discipline frequencies will tend to increase, not reduce, relative difference in discipline rates.

*Discussion:* We recognize that, in an LEA that is generally reducing rates of discipline for all children with disabilities, it may become markedly more difficult to demonstrate reasonable progress in lowering risk ratios. For example, if an LEA suspended 15 percent of Hispanic children with disabilities and 3 percent of all other children with disabilities, it would have a risk ratio of 5.0. In order to demonstrate a reduction in the risk ratio of 0.1, the LEA would have to reduce the suspension rate for Hispanic children with disabilities to 14.7 percent if the rate for all other children remained the same. However, if the LEA reduced the suspension rates for non-Hispanic children with disabilities to 2 percent, an LEA would actually have to reduce its suspension rate for Hispanic children with disabilities to 9.8 percent to achieve the same 0.1 reduction in their risk ratio, a much larger reduction for the same "effect size." Nonetheless, the difficulty of demonstrating reasonable progress in lowering the risk ratio does not invalidate the worthy goal of reducing disparities on the basis of race and ethnicity. Further, we note that, to the extent that the number of children with disabilities being suspended or expelled in an LEA decreases below the State's minimum cell size, a State is not required to use the standard methodology for determining whether there is significant disproportionality in the LEA.

*Changes:* None.

*Comment:* One commenter suggested that proposed § 300.647 include a flexibility to not identify LEAs with

significant disproportionality if the State can identify through a review of data that the disproportionality is not the result of the actions of the LEA.

*Discussion:* The Department recognizes that States have a vested interest in ensuring that their support of LEAs identified with significant disproportionality is appropriately targeted and may wish to avoid the statutory remedies in the event that an LEA with apparently strong policies, practices, and procedures nonetheless has significantly disproportionate rates of identification, placement and discipline for particular racial or ethnic groups. However, as noted above, IDEA section 618(d) (20 U.S.C. 1418(d)) clearly establishes that the basis for a finding of significant disproportionality is a disparity in the identification, placement and discipline of children on the basis of race and ethnicity and the review of policies, practices, and procedures a consequence of, rather than a part of, a determination of significant disproportionality. As such, the Department is precluded from waiving, or allowing States to waive, such a finding on the basis of criteria unrelated to those disparities. Further, regardless of whether any particular disparity in the identification, placement, and discipline of children on the basis of race and ethnicity can be linked to a specific LEA action, LEAs may still benefit from the review and, if necessary, revision of their policies, practices, and procedures and the reservation of funds for comprehensive CEIS to address those disparities.

*Changes:* None.

*Comment:* None.

*Discussion:* Upon further consideration of the regulatory language originally proposed under § 300.647(c)(2), we believe that provision includes an inappropriate, and potentially confusing, reference to alternate risk ratio thresholds. Under § 300.647(b)(1), States are required to establish one or more reasonable risk ratio thresholds, and, under § 300.647(b)(6), identify an LEA with significant disproportionality if any of the LEA's risk ratios or alternate risk ratios exceed the reasonable risk ratio threshold. The Department did not include in § 300.647 any provision that would allow States to establish an alternate risk ratio threshold—both risk ratios and alternate risk ratios are to be compared to the State's reasonable risk ratio threshold.

While it was the Department's intention, with proposed § 300.647(c)(2), to allow States the flexibility to not identify an LEA that exceeds a risk ratio threshold when the

LEA makes reasonable progress in reducing the risk ratio or alternate risk ratio for the applicable racial and ethnic group and category of analysis, the proposed provision inappropriately extended this flexibility to circumstances where LEAs exceeded an alternate risk ratio threshold. This gives the mistaken impression that States have the option to create separate alternate risk ratio thresholds.

*Changes:* We have revised proposed § 300.647(c)(2), now § 300.647(d)(2), to remove the reference to an alternate risk ratio threshold.

### III. Clarification that Statutory Remedies Apply to Disciplinary Actions (§ 300.646(a)(3) and (c))

*Comments:* A number of commenters supported our clarification in proposed § 300.646(c) that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions for children with disabilities, including suspensions and expulsions, just as they address significant disproportionality in the identification and placement of children with disabilities—by ensuring the review of and, if necessary, the revision of and reporting on LEAs' policies, practices, and procedures and by setting aside 15 percent of Part B IDEA funds to provide comprehensive CEIS.

*Discussion:* We appreciate commenters' support for the proposed regulation that would incorporate the Department's long-standing position on this issue.

*Changes:* None.

*Comments:* One commenter argued that the clarification, even if it embodies a long-standing position of the Department, misreads the statute. The plain language of IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)) requires States to determine whether in the State and its LEAs there is significant disproportionality with respect to race and ethnicity in the identification, placement, and discipline of children with disabilities. Section 618(d)(2) (20 U.S.C. 1418(d)(2)), however, only mentions identification and placement. As such, the commenter argued that the application of the statutory remedies based on a finding related to discipline was not supported by the statute, a reading the commenter stated was supported by a number of canons of statutory construction.

*Discussion:* As we stated in the NPRM, when Congress added discipline to IDEA section 618(d)(1) (20 U.S.C. 1418(d)(1)), it made no corresponding change to IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)), which created an ambiguity because IDEA section

618(d)(2) does not explicitly state that the remedies in IDEA section 618(d)(2) apply to removals from placement that are the result of disciplinary actions. The Department reads the term “placement” in the introductory paragraph of section 618(d)(2) to include disciplinary actions that are also removals of the child from his or her current placement for varying lengths of time, including removals that may constitute a change in placement under certain circumstances. IDEA section 615(k)(1), 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).

The Department is the agency charged with administering IDEA and has the authority under IDEA section 607(a) (20 U.S.C. 1406(a)) to issue regulations to ensure compliance with the specific requirements of IDEA. Therefore, the Department has the authority to resolve the statutory ambiguity and incorporate into the regulations its long-standing interpretation, which is and has been that the required remedies in IDEA 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.)

*Changes:* None.

*Comments:* Some commenters sought stronger monitoring, technical assistance, and guidance from the Department on significant disproportionality in discipline, others wrote in favor of applying discipline consistently, and one commenter asked the Department to establish national criteria for disciplining children and consistent guidelines for documenting and reporting disproportionate disciplinary actions.

*Discussion:* While these issues are largely beyond the scope of these regulations, we appreciate the

opportunity to address them. We agree with the commenters that discipline should be applied consistently regardless of race or ethnicity. The Department has recently engaged in extensive outreach, technical assistance, and guidance activities related to discipline, which can be found online at [www.ed.gov/rethinkdiscipline](http://www.ed.gov/rethinkdiscipline). However, many aspects of this issue, including establishing national standards for school discipline, are beyond the Department’s statutory authority in the context of these regulations.

*Changes:* None.

*Commenters:* One commenter recommended a minor wording change in the regulation, to reduce confusion. This commenter suggested that the Department rewrite proposed § 300.647(b)(4) so that disciplinary removals, or proposed § 300.647(b)(4)(iv) through (viii), are separated from educational placements in proposed § 300.647(b)(4)(i) through (iii), and placed under a heading of discipline. The commenter argued that “given that many students with disabilities are removed from regular class settings, it is important to make clear that data must be collected on exclusionary removals of all students with disabilities regardless of the restrictiveness of the setting in which that are served.”

*Discussion:* We do not think it necessary, nor appropriate, to change proposed § 300.647(b)(4) so that disciplinary removals are separated and placed under a heading of discipline. As written, § 300.647(b)(4) is consistent with the language of IDEA section 618(d) (20 U.S.C. 1418(d)), which directs States to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring with respect to “the incidence, duration and type of disciplinary actions, including suspensions and expulsion”. As we explained in the NPRM, we interpret the statute to require States to apply the statutory remedies if an LEA is identified with significant disproportionality with respect to disciplinary removals from placement. Therefore, we decline to change proposed § 300.647(b)(4) so that disciplinary removals are separated and placed under a heading of discipline.

*Changes:* None.

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

##### Review of Policies, Practices, and Procedures—Requirements

*Comments:* A number of commenters supported proposed § 300.646(c) and our clarifying the requirement for the annual review of an LEA’s policies, practices, and procedures in the case of a determination of significant disproportionality. One commenter noted that this review can change the behavior of LEAs that are improperly identifying children for special education and related services. Other commenters, however, objected to proposed § 300.646(c), stating that an annual review was unnecessary and burdensome.

Another commenter objected and suggested that most significant disproportionality arises as a result of poor practices, a problem not addressed by a review of policies and procedures. This commenter recommended that the review of policies and procedures only occur when an LEA amends its policies or procedures. Another commenter suggested that no review be required if an LEA’s policies, procedures, and practices are compliant with IDEA, appropriate, and fair, and suggested that a review occur only once every three years or at the end of a CEIS “cycle.” Additional commenters argued that the underlying issues affecting disproportionality in an LEA do not change as quickly as annually, and so the annual review, which can be expensive, does not make sense.

*Discussion:* As we stated in the NPRM, the requirement to review policies, practices, and procedures subsequent to a determination of significant disproportionality would impose no new obligations. Under IDEA section 618(d) (20 U.S.C. 1418(d)), every year a State is required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring the State and the LEAs of the State with respect to the identification, placement, and discipline of children with disabilities. Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)) and final § 300.646(c)(1), the review of policies, practices, and procedures must be conducted in every year in which an LEA is identified as having significant disproportionality. As the review and determinations occur annually, each year an LEA is identified as having significant disproportionality represents a separate determination and therefore triggers the requirements of IDEA section 618(d)(2). As such, the

requirements of final § 300.646(c)(1) are consistent with the statute and the Department does not have the authority to reduce the frequency of the review or change the conditions under which it is required by statute.

We understand and appreciate the complexity of the many social and societal factors that contribute to disproportionality. Nonetheless, under IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)), the review of policies, procedures, and practices must occur in every year in which an LEA is identified with significant disproportionality.

*Changes:* None.

*Comments:* A number of commenters suggested that the Department emphasize that, under proposed § 300.646(c)(1), an annual review of an LEA's policies, practices, and procedures in the case of a determination of significant disproportionality should include making certain that the LEA adheres to child find procedures; conducting robust and timely screenings and assessments, manifestation determinations, and functional behavioral assessments; and developing appropriate IEPs and behavioral intervention Plans.

Another commenter suggested that the review should include a review of any disciplinary practices that disrupt a child's placement, even if the disruption does not amount to a change in placement, such as a suspension for fewer than 10 days.

*Discussion:* We appreciate the commenters' suggestions regarding the scope of review required whenever a LEA reviews its policies, practices, and procedures subsequent to a determination of significant disproportionality. Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)) the State must provide for the review, and if appropriate, revision of policies, procedures, and practices used in the area in which an LEA is identified with significant disproportionality (identification, placement or disciplinary removals) to ensure they comply with the requirements of IDEA.

For example, in an LEA identified with significant disproportionality with respect to identification, the State must provide for the review of policies, practices, and procedures used in identification. This should include a review of child find and evaluation policies, practices, and procedures to ensure they comply with IDEA. Consider that LEA Y has a risk ratio for identification of white students as students with autism that exceeds the State-defined risk ratio threshold. As a result, the State identifies LEA Y as

having significant disproportionality and provides for a review of the LEA's policies, procedures, and practices as required by IDEA section 618(d)(2)(A). This review results in the LEA identifying that it has a long-standing practice of requiring students to have a medical diagnosis of autism in order to receive special education services as a child with autism. However, minority students in LEA Y were much less likely to be able to obtain such a diagnosis for a number of reasons, including a lack of consistent care and early screening and referral conducted by health professionals. Given that LEAs are not allowed, under the IDEA, to set eligibility criteria for special education and related services absent a State-wide requirement or criteria that is consistent with the IDEA (*i.e.*, the child's parent does not incur a cost for the medical diagnosis and the requirement does not result in a delay in the special education and related services that are required for a child to receive a free appropriate public education) and the fact that the State where LEA Y is located does not require a medical diagnosis for autism, the LEA's practice is inconsistent with IDEA.

In this instance, the overrepresentation that resulted in the LEA being identified with significant disproportionality in the identification of white children as children with autism is due to under-identification of minority children, as a result of a district practice that does not comply with the requirements of the IDEA and a failure of the LEA to appropriately screen children and help them secure diagnostic testing. To address the significant disproportionality, the LEA must eliminate or revise its practice of requiring students to have a medical diagnosis of autism in order to receive special education services. In addition, the LEA could address the impact of that criteria by using funds reserved for comprehensive CEIS to increase developmental screenings.

Similarly, for an LEA identified with significant disproportionality with respect to discipline, the State must provide for the review of policies, practices, and procedures used in the discipline of children with disabilities. This should include a review of the LEA's policies, practices, and procedures related to manifestation determinations, functional behavioral assessments, or behavioral intervention plans or school-wide discipline rules to ensure they comply with IDEA.

*Changes:* None.

## Guidance

*Comments:* A number of commenters, remarking upon the complexity of the various underlying social and societal causes that may contribute to significant disproportionality and the limited ability of schools to provide a remedy through a review of its policies, practices and procedures, asked for additional oversight and guidance from the Department. Some sought evidence-based practices that address economic, cultural, and linguistic barriers to instruction. Others invited the Department to consult with the States to find alternative means of addressing the causes of significant disproportionality.

*Discussion:* Under IDEA section 618(d)(2)(A) (20 U.S.C. 1418(d)(2)(A)), when States make a determination of significant disproportionality, they must provide for the review and, if appropriate, revision of the policies, procedures, and practices used in the identification, placement or discipline of children with disabilities. The purpose of the review is to determine if the policies, practices, and procedures comply with the requirements of IDEA. The review is statutorily required by IDEA section 618(d)(2) as a consequence of a determination of significant disproportionality in an LEA.

The Department understands that not all factors contributing to a determination of significant disproportionality can be remedied through a review of policies, practices, and procedures. However, when aligned with the other remedies required in final § 300.646(c) and (d), we believe that the review of policies, practices and procedures can be a valuable tool to LEAs when addressing significant disproportionality. IDEA does not prohibit States from using remedies, other than those required in § 300.646(c) and (d), to address significant disproportionality in conjunction with those required in § 300.646.

That said, as we evaluate additional information and research in the future, we will consider whether there is further guidance or technical assistance we can provide that will make evidence-based practices available.

*Changes:* None.

## Clarifications

*Comment:* One commenter asked whether, under proposed § 300.646(c)(2), an LEA must publicly report on the revision of policies, practices, and procedures if it concludes after review of its policies, practices, and procedures that no change is necessary.

*Discussion:* No, an LEA is not required to publicly report if no

revisions to its policies, practices, or procedures are necessary.

*Changes:* None.

*Comments:* One commenter supported the Department's clarification, in proposed § 300.646(c)(2), that LEAs must safeguard children's individual confidential information when publicly posting any revisions to policies, practices, and procedures.

*Discussion:* We appreciate the commenter's support for incorporating into the regulation that LEAs must safeguard children's individual confidential information when publicly posting any revisions to their policies, practices, or procedures.

*Changes:* None.

*Comment:* Another commenter requested that the Department clarify whether and how the annual review of policies, practices, and procedures are not duplicative of a one-year verification process for correcting noncompliance as required by § 300.600(e) and explained in OSEP Memorandum 09–02. The commenter stated that, as correction of noncompliance in larger LEAs generally takes up to one year, a requirement that LEAs repeat review of policies practices, and procedures the following year is duplicative.

*Discussion:* A State's identification of significant disproportionality within an LEA is not the same as a finding of noncompliance. An LEA identified with significant disproportionality is not necessarily out of compliance with IDEA; rather, the significant disproportionality is an indication that the policies, practices, and procedures in the LEA warrant further attention. If an LEA is identified with significant disproportionality, the State must provide for review and, if appropriate, revision of policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure they comply with the requirements of IDEA. If the State identifies noncompliance with a requirement of IDEA through this review, the State must ensure, in accordance with § 300.600(e), that the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. As explained in OSEP Memorandum 09–02 when verifying the correction of identified noncompliance, the State must ensure that the LEA has corrected each individual case of noncompliance, unless the child is no longer within the jurisdiction of the LEA and the State determines that the LEA is correctly implementing the

specific regulatory requirement(s) based on a review of updated data such as data subsequently collected through on-site monitoring or a State data system. If in a subsequent year, the LEA continues to be identified with significant disproportionality, the State must continue to provide for a review of policies, practices, and procedures to determine if there is any new or continuing non-compliance with IDEA. The fact that an LEA was previously identified with noncompliance through the review process does not relieve the State of its responsibility to conduct an annual review of the LEA's policies, practices, and procedures. We note that while IDEA section 618(d)(2)(A) requires that States provide for the review of policies, practices, and procedures, the State may select another entity, such as the LEA, to actually conduct the review.

*Changes:* None.

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

##### **Use of Comprehensive CEIS for Specific Populations**

*Comments:* Most commenters supported proposed § 300.646(d)(2), which would expand the population of children who can be served with IDEA Part B funds reserved for comprehensive CEIS to include children with disabilities and children ages three through five, with and without disabilities. One commenter provided a legal argument supporting the Department's interpretation of IDEA to allow the use of comprehensive CEIS to serve children with disabilities and children ages three through five. The commenter argued that canons of statutory construction support the Department's position. Further, the commenter added that the proposed flexibility ensures that an LEA can address the significant disproportionality in ways appropriate to the context. The commenter also stated that the flexibility to serve children with disabilities recognizes that these children have the potential to develop behavioral needs if their disability is misidentified, if their placement is inappropriate, or if they receive inappropriate behavioral assessments and plans. Another commenter noted that the expansion of comprehensive CEIS removes a source of inequity in previous interpretations, in which the very children treated disproportionately could not be the beneficiaries of comprehensive CEIS. One commenter argued that providing comprehensive CEIS only to non-

disabled children is unlikely to address significant disproportionality in the discipline of children with disabilities.

Most commenters supported the use of funds reserved for comprehensive CEIS for children with disabilities and preschool children ages three through five, with and without disabilities. Some of these commenters elaborated on their reasons for supporting § 300.646(d)(2), noting that research on early intervention shows that it improves outcomes and reduces disproportionality. One noted that the existing requirement that comprehensive CEIS funds be used only for non-disabled children was a disincentive to change inappropriate practices in special education. Another commenter noted that the change would make clear that children with disabilities can participate in whole-school programs meant to address disproportionality, and a few stated that the change would be consistent with the September 14, 2015, statement by Federal agencies on including children with disabilities in early childhood programs. U.S. Department of Education & U.S. Department of Health and Human Services, 2015.

*Discussion:* We appreciate the commenters' support for the proposal, and agree that the expansion of comprehensive CEIS to include children with disabilities and children ages three through five, with and without disabilities, is consistent with IDEA section 618(d) (20 U.S.C. 1418(d)) and will help LEAs to better address significant disproportionality.

*Changes:* None.

*Comments:* Several commenters argued that the Department lacks the authority to expand the population that can be served with IDEA Part B funds reserved for comprehensive CEIS under IDEA. In particular, they argued that proposed § 300.646(d)(2) is inconsistent with IDEA because IDEA section 613(f) (20 U.S.C. 1413(f)) allows LEAs to voluntarily reserve IDEA Part B funds to provide coordinated early intervening services only to children in kindergarten through grade 12 who have not been identified as needing special education and related services.

These commenters also noted that proposed § 300.646(d)(2) represents a change in the Department's position. The commenters pointed out that OSEP Memorandum 08–09, dated July 28, 2008, stated that IDEA section 613(f) permits "IDEA funds for CEIS for children in kindergarten through grade 12 . . . who are not currently identified as needing special education or related services . . . ." The commenters also pointed out that the Department's

preamble to the 2006 IDEA Part B regulations, in discussing current § 300.226, stated that early intervening services “are for children who are not currently identified as needing special education or related services.” 71 FR 46626 (August 14, 2006).

*Discussion:* We disagree that the Department lacks the authority to permit LEAs identified with significant disproportionality to use IDEA Part B funds reserved for comprehensive CEIS to serve children with disabilities and preschool children ages three through five, with and without disabilities. We acknowledged in the NPRM that the Department has 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. (81 FR 10979)

The Department proposed to change its interpretation in a proper and legally permissible manner. Under IDEA section 607(a) (20 U.S.C. 1406(a)), the Secretary has the authority to issue regulations to the extent regulations are necessary to ensure compliance with the requirements of Part B of IDEA. Based on information in the 2013 GAO report, comments received in response to the June 2014 request for information expressing concern about the effectiveness of comprehensive CEIS, and the Department’s experience over the last twelve years in implementing IDEA section 618(d) (20 U.S.C. 1418(d)), the Department believes that these changes are necessary to ensure that the statutory remedies are implemented in a manner that meaningfully addresses any significant disproportionality identified.

Our proposal to change our interpretation was based on careful review of the statutory language and legislative history of the significant disproportionality provision in IDEA section 618(d) (20 U.S.C. 1418(d)).

Under IDEA section 613(f) (20 U.S.C. 1413(f)), an LEA may voluntarily reserve up to 15 percent of its IDEA Part B funds to provide coordinated early intervening services to students in kindergarten through grade 12 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 (K–12 children). IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) provides that in a case of a determination of significant disproportionality, an LEA must reserve the maximum amount of funds under

section 613(f) (15 percent of its IDEA Part B funds) 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” in IDEA section 618(d) differs from the “CEIS” in IDEA section 613(f). Congress’ inclusion of the term “comprehensive” in one provision and not the other creates an ambiguity. Therefore, the Department has the authority to interpret the term “comprehensive CEIS.”

We believe that this interpretation is consistent with the legislative history of this provision, which indicates that in prior versions of the bills, the House used the phrase “comprehensive coordinated prereferral support services” in section 618(d) and section 613(f) and that the Senate version did not include any provision for using section 613(f) funds for CEIS in section 618(d)(2)(B) but did use the phrase “coordinated, early intervening educational services” in section 613(f). In the final conference bill and enacted statute, however, without a clear explanation, Congress used “comprehensive” to describe CEIS only in section 618(d)(2)(B)—omitting the term from section 613(f).

We also believe that our interpretation, under final § 300.646(d), is reasonable given the purpose of the statutory remedies in IDEA section 618(d)(2) (20 U.S.C. 1418(d)(2)). Other commenters, both to the NPRM and to the June 2014 request for information, agreed and noted that States currently cannot use IDEA Part B funds reserved for comprehensive CEIS to provide services to children with disabilities, even if they were in the groups with significant disproportionality in identification, placement, and disciplinary removal. In other words, it is difficult for the very children whose significant disproportionality gives rise to the requirement to provide comprehensive CEIS to directly benefit from comprehensive CEIS.

It is our intent that § 300.646(d) improve comprehensive CEIS as a remedy for significant disproportionality. For example, as we noted in the NPRM, providing comprehensive CEIS to preschool children may help LEAs to address significant disproportionality in identification by allowing funds reserved for comprehensive CEIS to be used to provide more timely supports and services to younger children. For example, an LEA identified with significant disproportionality might use

IDEA Part B funds reserved for comprehensive CEIS to implement universal screening to better identify and support children with developmental delays before they enter kindergarten. These activities will also assist in ensuring that children with disabilities in the LEA are appropriately identified.

Further, as we noted in the NPRM, providing comprehensive CEIS to children with disabilities is more likely to address significant disproportionality in placement and discipline by allowing LEAs to directly improve the supplementary aids and services and positive behavioral interventions and supports provided to children with disabilities. We believe that final § 300.646(d)(2) is, therefore, consistent with the purpose of the statutory remedies, which is to reduce significant disproportionality.

Section 300.646(d)(2) does not address voluntary CEIS, implemented under IDEA section 613(f) (20 U.S.C. 1413(f)) and IDEA Part B funds an LEA voluntarily reserves for CEIS must be used to serve students in kindergarten through grade 12 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.

*Changes:* None.

*Comments:* Some commenters did not support the expansion of comprehensive CEIS to preschool children with or without disabilities. Some of these commenters stated that comprehensive CEIS was unproven and ineffective and that “more of the same” does not make for good public policy. Others took a broader view, stating that disproportionality in race and ethnicity has many causes beyond the ability of schools and LEAs to solve, such as poverty, drug abuse, incarceration, and the disproportionality of adverse childhood experiences among children of color. Expanding the use of comprehensive CEIS funds, some of these commenters stated, cannot address these causes, and, therefore, redirecting IDEA funds to comprehensive CEIS is unfair to the LEAs and the children who stand to lose the use of, and services funded by, the money diverted. Some commenters noted that, generally, comprehensive CEIS would negatively impact LEAs, especially small LEAs, by adversely impacting their ability to provide for the needs of children with disabilities.

*Discussion:* We understand that disproportionality is deeply complicated and that many social and societal causes may contribute to racial

disparities in special education. Nonetheless, the Department has an obligation to work within the statutory framework in IDEA and with the tools it provides.

The Department recognizes that providing comprehensive CEIS will not, by itself, eliminate all causes of racial and ethnic disproportionality and that LEAs cannot reach all of the causes of disproportionality. There are, however, causes of significant disproportionality that LEAs can address and effects that LEAs can mitigate. It is our intention that, in implementing final § 300.647(d)(1)(ii), an LEA will identify and address the factors that contribute to the significant disproportionality by carrying out activities that LEAs typically conduct, such as providing services and supports to students or professional development to staff.

We do not regard using comprehensive CEIS funds to identify and address factors contributing to the significant disproportionality and allowing LEAs to provide comprehensive CEIS to preschool children and children with disabilities as “more of the same.” Previously, IDEA’s implementing regulations did not require LEAs to identify and address factors contributing to the significant disproportionality as part of their implementation of comprehensive CEIS. In addition, we believe allowing LEAs to use funds reserved for comprehensive CEIS to serve children with disabilities is more likely to address significant disproportionality in placement and discipline. For example, as one commenter suggested, if LEAs can use IDEA Part B funds reserved for comprehensive CEIS to implement a schoolwide program to address problems in discipline and serve both children with and without disabilities, then significant disproportionality in discipline may be reduced or eliminated. Similarly, using funds reserved for comprehensive CEIS to serve preschool children, where their needs can be assessed and addressed early, is likely to address significant disproportionality in the identification of children with disabilities.

Based on its identification of the factors contributing to the significant disproportionality, an LEA may use IDEA Part B funds reserved for comprehensive CEIS to provide a targeted array of services and supports to address those factors, including professional development and educational and behavioral evaluations, services and supports in both the general and special education population. Section 300.646(d) underscores the importance of allowing

an LEA to determine which factors contribute to a determination of significant disproportionality and how to effectively target IDEA Part B funds reserved for comprehensive CEIS to address those factors.

It is important to note that while States are required to include preschool children in the State’s determination of significant disproportionality related to discipline and to identification (beginning July 1, 2020), final § 300.646(d)(2) allows, but does not require, LEAs to provide comprehensive CEIS to preschool children, with or without disabilities (unless, under § 300.646(d)(1)(ii), a State determines that there is significant disproportionality in an LEA, and the LEA determines that providing comprehensive CEIS to preschool children is necessary to address the factors contributing to the disproportionality).

*Change:* None.

*Comments:* One commenter recommended that the Department revise proposed § 300.646(d)(3) to limit the use of comprehensive CEIS for children with disabilities to an established proportion, set by the Department and based on an evidence-based determination of the relative advantages of (1) early intervention to prevent disparities in disability identification and (2) subsequent interventions to address disparities in placement and disciplinary removal.

*Discussion:* While we agree with the commenter that apportioning funds reserved for comprehensive CEIS based, in part, on the expectation that specific uses will lead to reducing significant disproportionality in the area or areas in which the LEA is identified, we do not believe it would be appropriate to set a single, national percentage of funds to be dedicated to each allowable activity under comprehensive CEIS. Those decisions are best made by LEAs based on determining the best ways to address the specific issues that face each LEA, in accordance with final § 300.646(d)(1)(ii). Therefore, we decline to make this change.

Further, under final § 300.646(d)(3), an LEA may not limit the provision of comprehensive CEIS to children with disabilities. Therefore, an LEA must use some of the funds reserved for comprehensive CEIS to serve children 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. However, we decline to limit the amount of comprehensive CEIS funds an LEA may use to serve children

with disabilities because we want to give each LEA the flexibility to determine the amount of funds it will use for children with disabilities based on its analysis of the factors contributing to significant disproportionality in the LEA.

*Change:* None.

*Comments:* Some commenters, stating both that IDEA is underfunded and that there is a possibility of additional reservations of IDEA Part B money for comprehensive CEIS, argued that IDEA funds should be used primarily or exclusively for children with disabilities, not children without disabilities. One of the commenters suggested an amendment to the language at § 300.646(d)(3) which prohibits LEAs from providing comprehensive CEIS solely to children with disabilities.

*Discussion:* We understand these comments to refer to proposed § 300.646(d)(3), which prohibits LEAs from providing comprehensive CEIS solely to children with disabilities. As we explained in the NPRM at 81 FR 10986, recognizing the statutory emphasis on providing early behavioral and academic supports before a child is identified, we believe allowing LEAs to provide comprehensive CEIS only to children with disabilities works directly against the aims and intentions of IDEA. For example, limiting comprehensive CEIS solely to children with disabilities would prohibit an LEA from providing early behavioral and academic supports and services to children before they are identified as having a disability, which is one way to reduce significant disproportionality in the identification of children as children with disabilities. Limiting comprehensive CEIS solely to children with disabilities would prohibit an LEA from using IDEA Part B funds reserved for comprehensive CEIS to implement a schoolwide program to address problems in discipline, which is one way to reduce significant disproportionality in discipline. Therefore, the Department declines to revise § 300.646(d)(3) to allow LEAs to provide comprehensive CEIS solely to children with disabilities.

Under final § 300.646(d)(1)(ii), LEAs would have to use IDEA Part B funds reserved for comprehensive CEIS to identify and address the factors contributing to the significant disproportionality identified by the State. Nothing in the regulations prohibits an LEA from providing comprehensive CEIS primarily, but not exclusively, to children with disabilities.

*Changes:* None.



*Comments:* One commenter noted that the prohibition in proposed § 300.646(d)(3) on using comprehensive CEIS funds solely for children with disabilities does not make sense in the context of placement in a restrictive educational setting because only children with disabilities who have IEPs are subject to this kind of placement.

*Discussion:* We agree that final § 300.646(d)(3) prohibits an LEA identified with significant disproportionality in placement from using comprehensive CEIS funds solely to provide comprehensive CEIS to children with disabilities. However, we note that, in many instances, circumstances in the LEA that may give rise to disproportionate placement in segregated settings may have an impact on children with and without disabilities. We encourage LEAs that are identified with significant disproportionality to closely examine their policies, practices, and procedures to identify the root causes of their disproportionality and target their use of funds reserved for comprehensive CEIS to address those causes. There are appropriate ways that an LEA identified with significant disproportionality related to placement may use IDEA Part B funds reserved for comprehensive CEIS for children without disabilities. For example, an LEA may provide professional development to regular education teachers on the supports that they can provide to enable a child with a disability to be educated in the regular class and participate in extracurricular and other nonacademic activities with nondisabled children. We understand some LEAs may find that there are a number of children without disabilities who are impacted by the same root cause in other ways and could also benefit from the funding.

*Changes:* None.

*Comments:* One commenter objected on practical grounds to proposed § 300.646(d)(2) and the use of comprehensive CEIS funds for preschool children. The commenter indicated that, in some States, the range of possible placements for preschool children with disabilities includes settings where the State does not have general supervision authority to regulate discipline procedures or practices or require data reporting.

*Discussion:* We appreciate the commenter's concern and note that under final § 300.646(d)(2), an LEA may, but is not required to, use funds reserved for comprehensive CEIS for children ages three through five.

Separately, we note that under IDEA section 612(a), a State must make FAPE available to all eligible children with

disabilities residing in the State, including children with disabilities aged three through five, and in some States, two year old children who will turn three during the school year. Thus, all of the requirements in Part B of IDEA apply equally to all preschool children with disabilities. The SEA must ensure that a child with a disability, including a preschool child, who is placed in or referred to a private school or facility by a public agency is provided special education and related services in conformity with his or her IEP and at no cost to the parents; is provided an education that meets the standards that apply to education provided by the SEA and LEAs, including the requirements of IDEA; and has all of the rights of a child with a disability who is served by a public agency. (See, 34 CFR 300.146.)

*Changes:* None.

#### Funding Comprehensive CEIS

*Comment:* A number of commenters indicated that IDEA has never been fully funded, and a few of these commenters stated that they could not support proposed § 300.646(d) until Federal funding under Part B of IDEA is increased. Commenters stated that, as current IDEA funding only covers a fraction of special education's high total cost, some LEAs choose to devote the full amount of their Federal dollars to special education.

*Discussion:* The Department understands the concern about reserving IDEA Part B funds to provide comprehensive CEIS when IDEA is not funded at the maximum level allowed under IDEA section 611(a)(2)(B). However, under IDEA section 618(d) (20 U.S.C. 1418(d)), an LEA found to have significant disproportionality based on race or ethnicity must reserve 15 percent of its IDEA B funds for comprehensive CEIS while continuing to properly identify children in need of special education and related services and to provide them with a FAPE in accordance with the requirements of IDEA and its implementing regulations. Under IDEA sections 612(a)(11) and 616(a)(1)(C) (20 U.S.C. 1412(a)(11) and 1416(a)(1)(C)), the State must conduct monitoring activities to ensure that all LEAs meet these statutory requirements.

*Changes:* None.

*Comment:* Some commenters opposed proposed § 300.646(d), concerned that it would result in LEAs reserving more money for comprehensive CEIS. This, these commenters stated, may or may not address significant disproportionality but would create hardships for children with disabilities and their teachers and staff, such as reduced services and the inability to

hire special education teachers and other support staff. Other commenters noted that some LEAs already struggle to support the needs of children with disabilities. One commenter noted that any reduction in funding for special education services would be harmful, due to increases in the number of children identified with autism.

*Discussion:* The Department appreciates the commenters' concerns and recognizes that LEAs function within challenging funding environments. However, regardless of IDEA funding levels, States must comply with all IDEA requirements, including the requirements related to significant disproportionality.

Under IDEA section 618(d) (20 U.S.C. 1418(d)), an LEA found to have significant disproportionality based on race or ethnicity must reserve 15 percent of its IDEA B funds for comprehensive CEIS. Under § 300.646(d)(1)(ii), in implementing comprehensive CEIS, the LEA must identify and address the factors contributing to the significant disproportionality. We acknowledge that the provision of comprehensive CEIS has the potential to benefit both special education and general education. However, we emphasize that the LEA has the flexibility to determine, based on its identification of factors contributing to the significant disproportionality identified in the LEA, which activities will be funded using IDEA Part B funds reserved for comprehensive CEIS.

*Changes:* None.

*Comment:* Some commenters noted that ESEA, rather than IDEA, is the most appropriate mechanism for providing children not yet identified with disabilities with support and that IDEA is not the appropriate vehicle for addressing significant disproportionality. These commenters also stated that other Federal funds, such as those made available through title I of the ESEA, as amended, should also be used to provide comprehensive CEIS.

*Discussion:* The Department supports the flexible use of Federal funds, particularly in the area of school-wide reforms, as long as the Federal funds are used in accordance with applicable requirements. To that end, we issued guidance on maximizing flexibility in the administration of Federal grants. OESE Letter to State Directors (September 13, 2013).

Further, we note that section 613(f)(5) of IDEA states that funds an LEA voluntarily reserves for CEIS may be used to carry out services aligned with activities funded by, and carried out

under, ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for those activities. Thus, if IDEA funds an LEA voluntary reserves for CEIS, or is required to reserve for comprehensive CEIS, do not supplant ESEA funds, they may be used to supplement school improvement activities conducted under other programs, such as title I, that are being implemented in an LEA. See, IDEA section 613(f)(5) (20 U.S.C. 1413(f)(5)); OSEP Memorandum 08–09 (July 28, 2008).

That said, however, the Department does not have the authority to require the reservation of funds under the ESEA pursuant to a determination of significant disproportionality under IDEA unless specified in law.

*Changes:* None.

*Comments:* A number of commenters objected to proposed § 300.646(d), which would require an LEA, upon a determination of significant disproportionality by the State, to reserve 15 percent of its IDEA Part B funds, the “maximum amount of funds under section 613(f),” for comprehensive CEIS. These commenters argued that the requirement is rigid and unnecessarily redirects money from children with disabilities. The commenters suggested a variety of alternatives to requiring reservation of IDEA Part B funds to address significant disproportionality.

Some commenters suggested limiting the requirement for reserving 15 percent of IDEA Part B funds to only those circumstances in which a State finds an LEA uses discriminatory policies, practices, and procedures in implementing IDEA. Some commenters suggested taking the 15 percent from unspecified administrative costs or sources other than IDEA Part B funds. Others suggested that LEAs found with significant disproportionality be required to create remediation plans that may include reserving IDEA Part B funds for comprehensive CEIS. Still others suggested allowing LEAs to remedy significant disproportionality using whatever percentage of IDEA funds (up to 15 percent) is appropriate to the circumstances and the interventions needed. One commenter suggested that the Department provide an exemption from the 15 percent mandate for LEAs that already remedy significant disproportionality effectively. Another encouraged the Department to approach the regulation by providing supports, rather than administering punitive action, such as providing additional funds and support to LEAs with disproportionate disciplinary actions and identification

methods, since the root cause of disproportionality is an under-informed or under-resourced work force. A few commenters suggested eliminating the 15 percent mandate altogether or to allow Congress to address the issue in the next reauthorization of IDEA.

*Discussion:* We appreciate both the range of ideas suggested and the difficulties that reserving 15 percent of IDEA Part B funds may cause LEAs. Nevertheless, the language of IDEA section 618(d)(2)(B) is explicit: “the State shall . . . require” any LEA identified with significant disproportionality “to reserve the maximum amount of funds under section 613(f) to provide” comprehensive CEIS to serve children in the LEA. Under section 613(f)(1), the maximum amount that can be reserved is 15 percent of the amount of IDEA Part B funds the LEA receives for any fiscal year. Therefore, the Department lacks the authority either to vary the amount that must be reserved or to eliminate the requirement altogether.

Further, each LEA, in implementing comprehensive CEIS, may carry out activities that include professional development, behavioral evaluations, hiring reading or math specialists or providing other supports and services that the LEA has determined will address the factors contributing to the significant disproportionality. In addition, under certain conditions, comprehensive CEIS funds may be used in combination with funds available under title I to supplement school improvement activities that are being implemented in the LEA to address an “under-informed and under-resourced” work force, as long as IDEA funds and ESEA funds are used in accordance with applicable program requirements. See, OESE Letter to State Directors (September 13, 2013).

*Changes:* None.

*Comments:* A few commenters asked whether funds for providing comprehensive CEIS to preschool children under proposed § 300.646(d)(2) would have to come from funds awarded to an LEA under IDEA Part B section 611, IDEA section 619, or both.

*Discussion:* Neither the final regulations nor IDEA specify the specific source of funding (section 611 or section 619) from which an LEA is required to reserve funds if it is determined that said LEA has significant disproportionality. While the amount of the 15 percent reservation must be calculated on the basis of both the LEA’s section 611 and 619 allocations, LEAs retain full flexibility regarding whether they actually take the reservation from section 611 funds,

section 619 funds, or both. LEAs also retain this flexibility regardless of the age of the children receiving comprehensive CEIS.

*Changes:* None.

*Comment:* None.

*Discussion:* When an LEA is identified as having significant disproportionality, it is required to reserve funds for the provision of comprehensive CEIS. This requirement is, clearly, an LEA-level requirement. Each LEA is required to maintain documentation that 15 percent of its IDEA Part B funds were reserved for that purpose and that those funds were used to support allowable activities under § 300.646(d). However, an LEA does have flexibility in how these funds are allocated within the LEA how these funds are expended. Nothing in these regulations prevents an LEA from distributing funds reserved for comprehensive CEIS to its schools to carry out activities authorized under final § 300.646(d), nor are there requirements for the process an LEA must use when deciding how to allocate those funds if they choose to do so. As such, if an LEA determines that it is best able to address the root cause of the identified significant disproportionality by providing a portion of its reserved funds to a particular subset of schools to support comprehensive CEIS activities, it is permitted to do so under these regulations, so long as it ensures that those funds are expended in accordance with final § 300.646(d). Under § 300.202(a)(1), an LEA must expend IDEA Part B funds in accordance with the applicable provisions of Part B. Under 34 CFR 76.731, an LEA must keep records to show its compliance with program requirements. Therefore, an LEA must maintain documentation to demonstrate that it expended IDEA Part B funds reserved for comprehensive CEIS in accordance with final § 300.646(d).

In a growing number of LEAs nationwide, schools are implementing the flexibilities provided under ESEA section 1114(b) to consolidate Federal funds in a schoolwide program. Section 300.206(a) makes clear that IDEA Part B funds may be consolidated in such a school and instructs States and LEAs how to calculate the amount of funds that may be used for this purpose. Further, § 300.206(b)(1) and (2) provide that these funds must be considered Federal Part B funds for the purposes of calculating LEA MOE and excess cost under § 300.202(a)(2) and (3), and that these funds may be used without regard to the requirements of § 300.202(a)(1). Regardless, the LEA is still responsible for meeting all other requirements of

IDEA Part B, including ensuring that children with disabilities in schoolwide program schools “[r]eceive services in accordance with a properly developed IEP [individualized education program]” and “[a]re afforded all of the rights and services guaranteed to children with disabilities under the Act [IDEA].” See, § 300.206(c)(1) and (2).

LEAs are not prohibited from providing funds reserved for comprehensive CEIS to schools operating a schoolwide program. Further, the requirement to reserve funds for comprehensive CEIS does not override the flexibilities described in § 300.206. Instead, LEAs are only required to ensure that any school operating a schoolwide program to which it provides funds for comprehensive CEIS is able to appropriately document that at least the amount of funds provided to the school for that purpose were so expended. For example, if an LEA provides \$100 of the funds it has reserved for comprehensive CEIS to a school implementing a schoolwide program, that school is not required to separately track and account for those funds if it is otherwise consolidating IDEA Part B funds. Instead, the LEA would only need to ensure that it can document that the school spent at least \$100 on allowable activities under comprehensive CEIS. It is not required to demonstrate that the school expended \$100 of IDEA Part B funds. We believe that this interpretation of the applicable statutes and regulations provide maximum flexibility to both schools and LEAs in implementing both title I schoolwide programs and comprehensive CEIS.

*Changes:* None.

#### Implications for IEPs

*Comments:* Many commenters responded to the Department’s Directed Question #12, which sought comments on whether additional restrictions, beyond the requirement in § 300.646(d) to use comprehensive CEIS to identify and address the factors contributing to significant disproportionality, on the use of comprehensive CEIS funds, are appropriate for children who are already receiving services under Part B of IDEA. Most commenters objected to any restriction of how comprehensive CEIS funds should be used for children already receiving services under Part B of IDEA. Instead, these commenters discussed the many supports and services where comprehensive CEIS could be used to enhance student progress. For example, some suggested that the funds be used to provide functional behavioral assessments (FBAs) and behavioral intervention

plans (BIPs). Additionally, the commenters noted that comprehensive CEIS funds could be used to train key personnel on how to develop effective FBAs and BIPs or other instructional supports. Some of these commenters stated that local officials are best positioned to say how comprehensive CEIS funds should be used and that they should not be limited in their choices in how to address significant disproportionality.

*Discussion:* We appreciate the concerns expressed by the commenters and note that the services and activities they mention—training and professional development on effective FBAs and BIPs, a review of behavioral intervention and supports included in IEPs, positive behavioral interventions and supports, multi-tiered systems of supports—are all permitted under § 300.646(d)(1)(i) (“An LEA may carry out activities that include professional development and educational and behavioral evaluations, services, and supports . . .”). These services and activities are also permitted under § 300.646(d)(1)(ii) to the extent that they address factors that the LEA has identified as contributing to the significant disproportionality identified in the LEA. We agree that local officials should have the flexibility and discretion to decide how comprehensive CEIS funds are best allocated and spent.

Under proposed § 300.646(d)(1)(ii), the LEA must use comprehensive CEIS funds to address factors contributing to the significant disproportionality identified by the State. These factors may include, as enumerated in proposed § 300.646(d)(1)(ii), 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. This requirement is fundamental to the use of comprehensive CEIS funds, and it carries with it a practical limitation: An LEA may use comprehensive CEIS funds for training and professional development and behavioral evaluations and supports, such as FBAs, BIPs, and positive behavioral interventions and supports, but only to the extent that it is doing so to address the factors identified by the LEA as contributing to the significant disproportionality identified by the State. Therefore, if comprehensive CEIS funds are used to provide services that address factors contributing to the significant disproportionality identified by the State, then the fact that those services are also identified in some children’s IEPs does not make the services

impermissible or the expenditures improper. Conversely, however, we generally would not expect that using comprehensive CEIS funds for the purpose of providing services already identified on a child’s IEP would address factors contributing to the significant disproportionality identified by the State, as is required by proposed § 300.646(d).

*Changes:* None.

*Comment:* One commenter asked for further explanation about how including children with disabilities within the scope of comprehensive CEIS under proposed § 300.646(d)(2)(ii) would affect services provided to these children in accordance with their IEPs. The commenter stated that, if a child is receiving services under an IEP, then receiving comprehensive CEIS is “contradictory.” In particular, the commenter asked whether the provisions guaranteeing FAPE to a child with disabilities takes precedent over provisions governing comprehensive CEIS, who decides which services a child gets, and whether proposed § 300.646(d) created a two-tiered system of services that could treat some children unfairly.

*Discussion:* We believe that the commenter’s concerns conflate the obligation to provide FAPE to a child with disabilities and the obligation to reserve 15 percent of IDEA Part B funds upon a finding by the State of significant disproportionality.

To begin with, it is optional under final § 300.646(d)(2) for an LEA to use IDEA Part B funds reserved for comprehensive CEIS to serve children with disabilities. If an LEA chooses to do so, this in no way affects any child’s entitlement to a FAPE.

In implementing comprehensive CEIS, an LEA must identify and address the factors contributing to the significant disproportionality identified by the State. As we stated earlier, these services may, but do not necessarily, overlap with services identified on a child’s IEP, given that we generally would not expect that using funds reserved for comprehensive CEIS to provide services already identified on a child’s IEP would address factors contributing to the significant disproportionality identified by the State. The fact that services provided as comprehensive CEIS may in some cases overlap with services already identified on a child’s IEP does not relieve the LEA of its responsibility to ensure that all of the special education and related services and supplementary aids and services identified on a child’s IEP are provided to that child in accordance with his or her IEP. There is no

contradiction, no displacement of IEP services by comprehensive CEIS services, and no “two-tier” system created.

To the extent that the commenter is concerned about there being insufficient Part B funds to fund services to children with disabilities if 15 percent of an LEA’s IDEA Part B funds are reserved for comprehensive CEIS, we address that issue under *Use of Comprehensive CEIS for Specific Populations* elsewhere in this document.

#### Implications for LEA Maintenance of Effort (MOE)

*Comment:* A few commenters asked whether extending comprehensive CEIS to children with disabilities would increase LEA maintenance of effort (MOE) expenditures under § 300.203. Several commenters indicated that they did not support these regulations because it could increase the amount of local, or State and local, funds an LEA would be required to expend for the education of children with disabilities to meet the LEA MOE requirement in subsequent years including years in which an LEA is no longer identified with significant disproportionality.

For example, one commenter wrote that if an LEA shifts special education spending from its Part B funds to local funds in order to meet its obligation to set aside 15 percent of its Part B funds for comprehensive CEIS, its local MOE expenditure increases. However, when the LEA is no longer identified with significant disproportionality, the LEA can’t subsequently reduce its local MOE expenditures. Further, to ensure that LEAs maintain their local expenditures in case of a year-over-year reduction in IDEA, Part B allocation, some commenters requested that the Department require that the maximum amount of funds available for comprehensive CEIS be reduced by the reduction in the subgrant. Similarly, another commenter noted that, given that IDEA is underfunded, the regulation would force LEAs to pass tax increases so that local funds could support the regulation. Other commenters expressed that, since special education must be provided regardless of Federal funding, LEAs will be forced to use State and local funds to backfill 15 percent used for comprehensive CEIS.

*Discussion:* Using IDEA Part B funds reserved to provide comprehensive CEIS for children with disabilities may, but does not necessarily, affect the amount of local, or State and local funds, an LEA must expend to meet the MOE requirement in § 300.203.

Generally, under § 300.203(b), an LEA may not reduce the amount of local, or State and local, funds that it spends for the education of children with disabilities below the amount it spent from the same source for the preceding fiscal year. The calculation is based only on local, or State and local—not Federal—funds.

We understand that when an LEA identified with significant disproportionality is required to use 15 percent of its IDEA Part B funds for comprehensive CEIS, it should consider the effect that decreasing the available IDEA Part B funds might have on the amount of local or State and local funds an LEA must expend to meet the LEA MOE requirement. As one commenter noted, if under § 300.646(d) an LEA is required to reserve 15 percent of its IDEA Part B funds for comprehensive CEIS after a determination of significant disproportionality, it may choose to use local, or State and local, funds to provide special education and related services to children with disabilities to replace IDEA Part B funds used to provide comprehensive CEIS. If that is the case, then the higher level of local, or State and local, expenditures for the education of children with disabilities becomes the LEA’s new required level of effort for the subsequent year.

The effect would be the same under prior § 300.646 if, after a finding of significant disproportionality, an LEA reserved 15 percent of its IDEA Part B funds for comprehensive CEIS and increased by 15 percent the amount of local, or State and local, funds it used to provide special education and related services to children with disabilities.

In short, § 300.646(d) makes no changes to the regulations governing LEA MOE.

We note that an LEA identified with significant disproportionality will not be able to take advantage of the LEA MOE adjustment that would otherwise be available under § 300.205 because of the way that the MOE adjustment provision and the authority to use Part B funds for CEIS are interconnected. As a result, no matter how much is available for comprehensive CEIS or for the MOE adjustment, an LEA that is required to reserve the maximum 15 percent of its Part B allocation for comprehensive CEIS will not be able to use § 300.205(a) to reduce its MOE obligation.

Appendix D to part 300 of the Code of Federal Regulations sets out a number of examples for the basic calculation. We provide the following example involving practical applications over multiple fiscal years.

Generally, an LEA may reserve IDEA Part B funds that it is required to reserve for comprehensive CEIS either from the funds awarded for the Federal fiscal year (FFY) following the date on which the State identified the significant disproportionality or from funds awarded from the appropriation for a prior FFY. For example, State X uses data on identification collected for school year 2015–2016, which is reported in April 2016, to make a determination in February 2017 that LEA Y has significant disproportionality related to identification and therefore must set aside 15% of its IDEA Part B funds for comprehensive CEIS. The State makes this determination before FFY 2017 funds become available on July 1, 2017. The LEA has the following three options. The LEA may set aside: (1) 15 percent of the funds that the LEA receives from its FFY 2017 IDEA Part B allocation (available for obligation from July 1, 2017, through September 30, 2019); (2) 15 percent of the funds that the LEA received from its FFY 2016 IDEA Part B allocation (available for obligation from July 1, 2016, through September 30, 2018); or (3) 15 percent of the funds that it received from the FFY 2015 IDEA Part B allocation (available for obligation from July 1, 2015 through September 30, 2017) only if the LEA did not use the adjustment to reduce its required level of effort in the fiscal year covering school year (FY) 2015–2016 under § 300.205.

If an LEA selects option 1, the LEA will not be able to use the adjustment to reduce its required level of effort under § 300.205 in FY 2017–2018.

If an LEA selects option 2, the LEA will not be able to use the adjustment to reduce its required level of effort under § 300.205 in FY 2016–2017.

An LEA can only select option 3 if the LEA did not use the adjustment in § 300.205 to reduce its required level of effort in FY 2015–2016. Because FY 2015–2016 would have ended at the time the LEA is identified with significant disproportionality in February 2017, the LEA would already know whether it used the adjustment in § 300.205 to reduce its required level of effort in FY 2015–2016, and if it had done so, could not use its FFY 2015 IDEA Part B funds to provide comprehensive CEIS because of the way the MOE adjustment provision and the authority to use IDEA Part B funds for comprehensive CEIS are interconnected.

Information describing the actions that States and LEAs must take to meet MOE requirements and answers to frequently asked questions about LEA MOE can be found at [www2.ed.gov/about/offices/list/osep/policy.htm](http://www2.ed.gov/about/offices/list/osep/policy.htm).

(See, OSEP Memorandum 08–09, Coordinated Early Intervening Services (CEIS) under Part B of the Individuals with Disabilities Education Act (IDEA) dated July 28, 2008, response to Question #23.)

*Changes:* None.

*Comment:* Some commenters indicated that an expansion of the allowable uses of comprehensive CEIS to include K–12 children with disabilities and preschool children with and without disabilities would cause a significant increase in the burden associated with the Department's IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection. Others suggested that the Department will have to expand this data collection to account for the additional children served by, and for the funds spent on, comprehensive CEIS. Some commenters suggested that the Department require States to submit data on CEIS expenditures, disaggregated to show spending related to identification, placement, and disciplinary removals.

*Discussion:* Current § 300.226(d) requires each LEA that implements CEIS to report to the State on the number of children who received CEIS and the number of those children who subsequently received special education and related services under Part B during the preceding two-year period (*i.e.*, the two years after the child has received CEIS). 71 FR 46540, 46628 (Aug. 14, 2006). A State's decision to provide comprehensive CEIS to children with disabilities and preschool children with or without disabilities may expand the number of children who receive CEIS and may increase the numbers reported. We are sensitive to the practical difficulties that might arise. After these regulations become final, the Department will consider what, if any, modifications to IDEA Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection may be needed to assist States and LEAs in meeting their obligations under IDEA section 613(f)(4) (20 U.S.C. 1413(f)(4)) and 34 CFR 300.226(d)). As we noted in the NPRM, after finalizing these regulations, the Department intends to provide additional guidance on relevant data collection and reporting requirements. (81 FR 10979).

*Changes:* None.

#### General Uses of Comprehensive CEIS Funds

*Comments:* Commenters suggested many uses for IDEA Part B funds reserved for comprehensive CEIS. These

included a wide variety of detailed suggestions for training and professional development in particular subject areas or in interventions, assessments, and forms of instruction; hiring teachers and staff with specific credentials, licenses, or experience; implementing various school-wide programs; and investing in technology.

Some of these commenters asked the Department whether comprehensive CEIS funds, when used to identify and address the factors contributing to significant disproportionality, could be “braided” with other funds.

*Discussion:* While the commenters suggested important uses for IDEA Part B funds reserved for comprehensive CEIS, the question of whether they are permissible uses of those funds depends upon a State's specific finding and analysis of significant disproportionality. That is, funds reserved for comprehensive CEIS must be used in accordance with the requirements of § 300.646(d)(1)(i) and (ii). Under § 300.646(d)(1)(i), comprehensive CEIS funds may be used to carry out a broad range of activities that “include professional development and educational and behavioral evaluations, services, and supports.” Under § 300.646(d)(1)(ii), comprehensive CEIS funds must be used to identify and address factors contributing to the significant disproportionality identified by the State.

Finally, CEIS funds may be combined with other Federal funds, provided that the applicable requirements for both funding streams are met. On September 13, 2013, the Department issued guidance on maximizing flexibility in the administration of Federal grants. OESE Letter to State Directors.

*Changes:* None.

*Comments:* Some commenters supported proposed § 300.646(d)(1)(ii), which would require that in implementing comprehensive CEIS, an LEA must identify and address the factors contributing to significant disproportionality. These commenters stated that this promotes improved outcomes and a more focused use of resources and further added that the exercise of identifying and addressing contributing factors promoted better transparency and accountability when addressing significant disproportionality. Other commenters asked that the Department provide specific technical assistance to help States and LEAs to identify these factors and evidence-based practices to address significant disproportionality in the LEA. One of these commenters pointed out that there are practical limitations

on personnel and funds and, therefore, that States' ability to provide assistance to LEAs is limited. Another commenter noted that simply requiring LEAs to identify and address the factors contributing to disproportionality does not provide sufficient guidance or information for an LEA to know what those factors would be or how to bring about systems change. That commenter further noted that multiple indicators, beyond the risk ratio, might be necessary to self-assess and determine effective methods of addressing these factors. One commenter stated that, unless States are required to assist LEAs in their efforts to identify and address the factors contributing to the significant disproportionality, this portion of the § 300.646(d)(1)(ii) will be meaningless.

*Discussion:* We recognize the commenters' concern that LEAs would like additional guidance or information on identifying and addressing the factors that may contribute to significant disproportionality. Therefore, we have added examples such as inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality to the list of factors in § 300.646(d)(1)(ii) that may contribute to significant disproportionality. We encourage LEAs identified with significant disproportionality in identification that determine the overrepresentation of one racial or ethnic group is occurring due to under-identification of another racial or ethnic group or groups, to consider how differences in academic achievement levels may contribute to the significant disproportionality in identification.

We have also added a new § 300.646(d)(1)(iii) to clarify that as part of implementing comprehensive CEIS, an LEA must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice, or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups). An LEA has the discretion as to how to address the policy, practice or procedure, by eliminating, revising or changing how it is implemented to ensure that it does not contribute to the significant disproportionality, including that it does not result in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

In addition, the Department intends to issue guidance to provide responsible

public agencies with information to assist them in meeting their obligations under IDEA and its implementing regulations, including those provisions related to significant disproportionality. To that end, the Department maintains a technical assistance and dissemination network of services and supports that address a variety of topics. For more information, see

[www.osepideasthatwork.org](http://www.osepideasthatwork.org).

**Changes:** We have revised § 300.646(d)(1)(ii) to include additional factors that may contribute to significant disproportionality and added a new § 300.646(d)(1)(iii) to clarify that in implementing comprehensive CEIS, an LEA must address policies, practices, or procedures it identifies as contributing to significant disproportionality.

**Comment:** One commenter noted that, while administrators may choose to use Federal funding for de-leading, this type of expenditure may not be a wise use of Federal special education resources.

**Discussion:** While using funds reserved for comprehensive CEIS for de-leading activities is not specifically prohibited by the final regulations, it is our intention that LEAs will identify and address the factors that contribute to the significant disproportionality identified by the State by carrying out activities that LEAs typically conduct, such as providing services and supports to students or professional development to staff. We agree with the commenter that using funds reserved for comprehensive CEIS for de-leading activities may not be an effective use of IDEA Part B funds reserved for comprehensive CEIS, especially given other potential funding sources available for de-leading activities and the amount of funds that may be needed to carry out these activities. We note that under IDEA section 605 (20 U.S.C. 1404), an LEA must obtain approval from the State prior to using IDEA Part B funds for equipment, construction, or alteration of facilities. See also, 2 CFR 200.439.

**Changes:** None.

#### Implications for Voluntary Implementation of CEIS

**Comments:** Many commenters provided recommendations to address the low utilization rate of voluntary CEIS under IDEA section 613(f)(20 U.S.C. 1413(f)). A number of these commenters suggested that the Department should, or asked whether the Department intended to, extend voluntary CEIS to children with disabilities and children ages three through five under current § 300.226 (“voluntary CEIS”). One commenter in particular noted that this would enable

States and LEAs to provide CEIS prior to being identified for significant disproportionality and would address the current low rate of voluntary CEIS use among LEAs.

Further, commenters noted that the voluntary use of IDEA funds to provide early intervention services comes with additional reporting requirements.

**Discussion:** Under IDEA section 613(f) (20 U.S.C. 1413(f)), 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 3) 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. Therefore, the Department lacks the authority to expand the population of children who can be provided voluntary CEIS under IDEA section 613(f).

As to reporting requirements, the State must report in the IDEA Part B LEA Maintenance of Effort Reduction and Coordinated Early Intervening Services data collection on the amount of IDEA Part B funds each LEA in the State voluntarily uses for CEIS and, consistent with the information each LEA must report annually to the State under § 300.226(d), the total number of children who 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 for each LEA. See, [www.ed.gov/edfacts](http://www.ed.gov/edfacts) for further information.

**Changes:** None.

**Comments:** A few commenters, though not opposing proposed § 300.646(d)(2), noted that including children with disabilities and children from ages three through five within the scope of comprehensive CEIS, but not voluntary CEIS, could create some practical difficulties. One of these commenters noted that this would create different reporting requirements for comprehensive and voluntary CEIS. Another commenter stated that having different reporting requirements was burdensome and asked that the disparate reporting requirements be streamlined. Still another commenter noted that the different eligibility requirements for comprehensive CEIS might create budgeting, accounting, or documentation problems because voluntary CEIS funds cannot be freely substituted for comprehensive CEIS funds. Services for children with disabilities begun with funds reserved

for comprehensive CEIS, for example, could not be continued with funds reserved for voluntary CEIS, which cannot be used to provide comprehensive early intervening services to preschool children.

**Discussion:** We are sensitive to the practical difficulties that might arise from the differences between comprehensive and voluntary CEIS. As part of the Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection, States must report data submitted by LEAs, pursuant to IDEA section 613(f)(4) and § 300.226(d), including the total number of children who 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.

After these regulations become final, the Department will consider what, if any, modifications to the Part B Maintenance of Effort (MOE) Reduction and Coordinated Early Intervening Services (CEIS) data collection may be needed to assist States and LEAs in meeting their obligations under IDEA section 613(f)(4) (20 U.S.C. 1413(f)(4)) and § 300.226(d).

However, the Department disagrees with commenters that the differences in eligibility between CEIS and comprehensive CEIS will present significant challenges to LEAs working to address significant disproportionality and to prevent its reoccurrence. Consider an LEA that includes children with disabilities in its implementation of comprehensive CEIS, and, in so doing, successfully addresses the factors contributing to the significant disproportionality. In a year in which the State does not identify the LEA with significant disproportionality, the LEA is not required to reserve 15 percent of its IDEA Part B funds for comprehensive CEIS. The LEA may not use funds it voluntarily reserves under IDEA section 613(f) (20 U.S.C. 1413(f)) to provide children with disabilities with CEIS; however, the LEA may continue to serve these children using its IDEA, Part B funds in accordance with § 300.202 and IDEA section 613(a)(2)(A) (20 U.S.C. 1413(a)(2)(A)). Further, the LEA may not use funds it voluntarily reserves under IDEA section 613(f) (20 U.S.C. 1413(f)) to provide CEIS to preschool children ages three through five who are not in kindergarten; however, the LEA may continue to serve preschool children with disabilities ages three through five using its IDEA, Part B funds in accordance with § 300.202 and IDEA

section 613(a)(2)(A) (20 U.S.C. 1413(a)(2)(A)).

*Changes:* None.

#### Miscellany

*Comment:* Some commenters argued that proposed § 300.646(d) would create an incentive to not identify children for special education and related services in order to reduce disproportionality numbers and show that comprehensive CEIS is working.

*Discussion:* As we noted earlier in this document, under *General—Proposed Regulation Would Create Racial Quotas*, the Department recognizes the possibility that, in cases where States select particularly low risk ratio thresholds, LEAs may have an inappropriate incentive to avoid identifying children from particular racial or ethnic groups in order to avoid a determination of significant disproportionality and the reservation of IDEA Part B funds for comprehensive CEIS. However, these actions would be inconsistent with IDEA's child find requirements in section 612(a)(3) (20 U.S.C. 1412(a)(3)) and the evaluation requirements in section 612(a)(7) and section 614(a)–(c) of IDEA (20 U.S.C. 1412(a)(7) and 20 U.S.C. 1414(a)–(c)). All these provisions require an individualized determination of whether a child has a disability and the nature and extent of the special education and related services that a child needs. IDEA requires that these decisions be based solely on the individual needs of the child, and not to avoid a determination of significant disproportionality. For this reason, § 300.647(b)(1) provides States the flexibility to set their own reasonable risk ratio thresholds, with input from stakeholders and State Advisory Panels. It is the Department's expectation that, as part of the process of setting risk ratio thresholds, States will work with stakeholders to identify particular risk ratio thresholds that help the State to address large racial and ethnic disparities without undermining the appropriate implementation of child find and evaluation procedures. We note that States have an obligation under IDEA both to identify significant disproportionality, based on race and ethnicity, in the identification of children with disabilities and to ensure that LEAs implement child find and evaluation procedures appropriately. (20 U.S.C. 1412(a)(3); 34 CFR 300.111).

*Changes:* None.

*Comments:* A commenter suggested that, in proposed § 300.646(d)(2), the Department replace the term “over-identified” with “overrepresented” to avoid misconceptions that the clause

only refers to the over-identification of disabilities.

*Discussion:* We appreciate the commenter's concern, however, the language in question is taken directly from IDEA and therefore we decline to change it. Section 300.646(d)(2) refers to comprehensive coordinated early intervening services. The underlying statute, IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)), specifically provides that States must require LEAs identified with significant disproportionality under section 618(d)(1) to reserve the maximum amount of funds under 613(f) to provide comprehensive coordinated early intervening services to children in the LEA, “particularly children in those groups that were significantly overidentified” under section 618(d)(1).

*Changes:* None.

*Comment:* One commenter suggested that the Department require States to specify, as part of their reporting on comprehensive CEIS, a listing of the types of technical assistance and professional development that will be offered to LEAs.

*Discussion:* While the Department encourages States to make technical assistance available to LEAs, and the Department intends to do the same, we decline to require States to specify, as part of their reporting on comprehensive CEIS, a listing of the types of technical assistance and professional development that will be offered to LEAs. We believe that the benefit of reporting on the technical assistance that will be offered to LEAs would not justify the burden of requiring States to collect and report this information to the Department.

*Changes:* None.

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### 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 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 final regulations only upon a reasoned determination that their benefits 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 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 the preamble to the NPRM, 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. For a description of how the significant disproportionality statutory provisions apply to States and LEAs along with the corresponding remedies, please refer to the text of the preamble.

Also, as stated in the preamble, 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 may be anticipated given the widespread disparities in rates of identification, placement, and disciplinary removal across racial and ethnic groups, as noted by the GAO study and supported by the Department’s own data analysis. The lack of consistency, and relatively low number of LEAs identified as having significant disproportionality, raises concerns about whether the prior approach was being implemented to meet Congress’ intent to address racial and ethnic disparities in special education and to ensure compliance with IDEA. Therefore, there is a need for a common methodology for States to apply when making determinations of significant disproportionality, to address the complex, manifold causes of the issue and ensure compliance with the requirements of IDEA.

In addition, there is a corresponding 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 IDEA Part B funds reserved for comprehensive CEIS prohibit LEAs from directing resources to children with disabilities directly impacted by inappropriate identification, placement, or discipline and also prohibit LEAs from providing early intervening services to preschool children. This latter prohibition is especially problematic, since early intervening services have been shown to 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

Currently, IDEA does not define “significant disproportionality” or prescribe to States how it must be measured. As a result, States have adopted numerous methodologies for determining if LEAs demonstrated significant disproportionality based on race and ethnicity. In the NPRM, the Department proposed that all States use a standard methodology—the risk ratio—to make determinations of significant disproportionality in the LEAs of the State. The Department reviewed and considered various alternatives to the proposed regulations submitted by commenters in response to the NPRM.

The Department considered comments requesting that the Department withdraw the NPRM and not require States to apply a standard methodology to identify significant disproportionality. Some of these commenters suggested that the Department first pilot a standard methodology in several States, gather that data for analysis, and then provide resources and technical assistance to help States and LEAs address significant disproportionality. Other commenters stated that LEAs are better positioned to determine the factors that contribute to significant disproportionality and are uniquely positioned to address those factors without the imposition of a standard methodology that did not consider local demographics. Other commenters stated that schools had no control over the poverty, health factors or other social ills that contribute to disability and that mandating a standard methodology would do nothing to address those issues or the number of children of color in special education. The Department’s effort to establish a standard methodology for States and LEAs to determine whether significant disproportionality exists based on race or ethnicity is designed to: (1) Address Congress’ concern “that more minority children continue to be served in special education than would be expected from the percentage of minority children in the general education.” IDEA section 601(c)(12)(B) (20 U.S.C. 1400(c)(12)(B)); and (2) address the GAO report (GAO–13–137) which stated that the Department’s oversight of racial and ethnic overrepresentation in special education is hampered by the flexibility States have to individually define significant disproportionality. The GAO recommended that the Department, to promote consistency, develop a standard approach to defining significant disproportionality to be used

by all States. As to the potential impact of a standard methodology, the Department acknowledges that mandating a standard methodology to measure significant disproportionality will not resolve poverty, poor health and environmental conditions or other factors thought to contribute to significant disproportionality. However, the Department believes that 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 applying the risk ratio method to determine significant disproportionality, the proposed regulations required States to use a standard methodology which included a risk ratio, or if appropriate, an alternate risk ratio; a reasonable risk ratio threshold; and a minimum n-size (referred to as “cell size” in the NPRM) as the standard methodology to determine whether there is significant disproportionality based on race or ethnicity in the State and its LEAs. States would have to analyze an LEA for significant disproportionality if the LEA had at least 10 children in a racial or ethnic group (for purposes of identification), or at least 10 children with disabilities in the racial or ethnic group (for purposes of placement or discipline). In general, most comments about the minimum n-size addressed the tension between setting a n-size too low and producing unreliable results and setting a n-size too high and exempting LEAs from being reviewed for significant disproportionality. Many commenters opposed the n-size limitation of 10 and requested that it be raised to 30 or 40, or eliminated entirely and leave the n-size to State discretion. These commenters argued that a larger minimum n-size is necessary for reliable analysis to avoid LEA identification for significant disproportionality based on a very small numbers of children. Other commenters expressed support for the Department’s minimum n-size proposal of 10 but were willing to accept an increase to 15, to ensure that the maximum number of LEAs is reviewed for significant disproportionality. The Department recognizes that 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 n-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 disproportionality as there might be. The Department has amended its proposal of a minimum n-size of 10 and will now allow States to select reasonable minimum n-sizes and reasonable minimum cell sizes, based on advice from stakeholders including State Advisory Panels and subject to monitoring and enforcement for reasonableness, that strike a balance between volatility and inclusion of LEAs in the analysis for significant disproportionality.

Many commenters agreed with the Department's requirement that all States use the risk ratio as the standard methodology for determining significant disproportionality. These commenters noted that the use of a common analytical method for determining significant disproportionality would increase transparency in LEA identification across States for LEA, State and Federal officials, as well as the general public. However, some commenters indicated that the Department should not allow States to set a reasonable risk ratio threshold or allow States to vary the application of the risk ratio analysis to account for State differences. These commenters stated that methodological alignment across States is needed to advocate on behalf of children with disabilities, reduce time and effort needed for data analysis and to enact appropriate policies, procedures and practices to address disproportionality on the basis of race or ethnicity. The Department considered these concerns and acknowledges the need for a common methodology for determinations of significant disproportionality in order to better identify and address the complex causes of significant disproportionality. However, as some commenters noted, LEAs vary widely as to size and population. Some LEAs include specialized schools, hospitals or community services that may draw large numbers of children with disabilities and their families. States are better positioned to identify and address the factors contributing to significant disproportionality in the LEAs. The final regulations allow States, in the determination of significant disproportionality, to set reasonable risk ratio thresholds, reasonable minimum cell sizes and reasonable minimum n-

sizes, based on advice from stakeholders including the State Advisory Panel.

#### Discussion of Costs, Benefits and Transfers

The Department has analyzed the costs of complying with the final requirements. Due to the considerable discretion the final regulations provide States (e.g., flexibility to determine their own risk ratio thresholds, reasonable minimum n-sizes and cell sizes, and the extent to which LEAs have made reasonable progress under § 300.647(d)(2) in lowering their risk ratios or alternate risk ratios), we cannot evaluate the costs of implementing the final regulations with absolute precision. However, we estimate that the total cost of these regulations over ten years would be between \$50.1 and \$91.4 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 requirements, taken as a whole, would include: Ensuring increased transparency regarding each State's definition of significant disproportionality; establishing an increased role for State Advisory Panels in determining States' risk ratio thresholds, minimum n-sizes, and minimum cell sizes; 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, along with the incidence, duration, and type of disciplinary removals from these placements, including suspensions and expulsions; and promoting and increasing comparability of data across States in relation to the identification, placement, and 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 new 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 these children in the future.

#### Benefits

The Department believes this 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 enhance the overall level of transparency regarding the appropriateness of State-level policies, practices, and procedures as they relate to the identification, placement, and discipline of children with disabilities in LEAs. 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 meaningful 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, minimum n-sizes, and minimum cell sizes 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 disparities 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 IDEA and have the capacity 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 those disciplinary actions. (Council of State Governments, 2011.)

The Department believes that suspensions and expulsions can often be avoided, particularly if LEAs use 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 final regulations clarify 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 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 § 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 also be used to support children with disabilities and children ages three through five, the final regulations 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 later be identified as having a disability, which could reduce the need for more extensive special education and related services for these children in the future.

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 final regulations.

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

#### Number of LEAs Newly Identified

In order to accurately estimate the fiscal and budgetary impacts of these regulations, the Department must estimate not only the costs associated with State compliance with these 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 will 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, these estimates are highly sensitive to those assumptions. In 2012–2013, the most recent year for which data are available, States identified 449 out of approximately 16,000 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.

These 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 regulations may not result in any additional LEAs being identified as having significant disproportionality. However, we believe that this is unlikely and therefore would represent an extreme lower bound estimate of the cost of this regulation.

We believe it is much more likely that the 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, minimum n-sizes, and minimum cell sizes 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, minimum n-sizes, and minimum cell sizes States will set in consultation with their State Advisory Panels and therefore do not know the number of LEAs that would be identified under those new thresholds. However, for purposes of these cost estimates, we assume that those changes would result in 400 additional LEAs being identified each year nationwide. This number represents an approximately ninety percent increase in the overall number of LEAs identified by States collectively each year. The Department assumes that changes in State policies and procedures are one potential and likely outcomes of these regulations; therefore, the number of new LEAs that may be identified is also reflected in our cost estimates.

As noted in the Costs and Burden of the Proposed Regulations section, the Department does not agree with commenters who assert that these final regulations will result in determinations of significant disproportionality for nearly half the LEAs in the country. Therefore, we have not changed the number of LEAs identified and corresponding costs associated with those LEAs. The Department also believes that changes in the final regulations, outlined in the Minimum Cell Sizes and Minimum N-Sizes Section, that allow States to set reasonable minimum n-sizes and cell sizes within the bounds prescribed in the preamble will likely result in far fewer LEAs identified than some commenters predict.

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 are 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.

#### General Changes in the Cost Estimates From the NPRM

The Department has increased the estimated cost of these regulations in

response to both changes to the final regulations and comments from the public. The final regulations require States to set reasonable minimum n-sizes, minimum cell sizes, and if the State uses the flexibility described in § 300.646(d)(2), standards for determining reasonable progress in consultation with their State Advisory Panels, which could result in additional burden for Federal and State level staff. States will also have some additional burden associated with reporting these data to the Department. The Department also agrees with commenters that the NPRM likely underestimated the time required to modify data collection protocols, technical assistance activities, and communication required to implement the rule. We have therefore increased the estimated number of hours to better reflect the work required to adequately implement these regulations in a number of sections, including the “State-level Review and Compliance With the New Rule,” the “Annual Calculation of Risk Ratios and Notification of LEAs,” and the “Federal Review of State Risk Ratio Thresholds” sections. Finally, the Department modified the State level cost estimates in the NPRM because the final regulations do not require the use of the standard methodology when both the LEA and the State fail to meet the State’s minimum n-size and minimum cell size. Therefore, in this final estimate, the Department removed costs associated the Bureau of Indian Education (BIE) because BIE will not typically have a comparison group and mathematically cannot calculate risk ratios for any racial or ethnic group. This change resulted in a slight decrease for State level costs associated with BIE.

#### Cost of State-Level Activities

These regulations 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. These regulations require States to set and report to the Department risk ratio thresholds, 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; (2) set and report to the Department reasonable minimum n-

sizes and minimum cell sizes consistent with the limitations outlined in these regulations, and; (3) if a State uses the flexibility described in paragraph (d)(2), set and report standards for determining whether LEAs have made reasonable progress under § 300.647(d)(2) in lowering their risk ratios or alternate risk ratios. Finally, these regulations 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 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 and report to the Department risk ratio thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress, 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 final regulations, States will have to take time to review the regulations, determine how these regulations will 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, Guam, American Samoa, and the Virgin Islands of \$234,345.<sup>4</sup>

Since no State currently calculates significant disproportionality using the exact methodology in this regulation, each State will need to modify its data collection tools. To estimate the cost per State, the Department doubled the time estimates contained in the NPRM. We assume that State employees would likely include a Database Manager (\$52.32) and a Management Analyst (\$44.64) at 32 hours each for a total one-

time cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$170,648. 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 will 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, the Department doubled the previous time estimates from the NPRM. We assume that State employees would likely include a Special Education Director (\$63.04) for 6 hours, 5 Management Analysts (\$44.64) for 32 hours, 2 Administrative Assistants (\$25.69) for 16 hours, a Computer Support Specialist (\$35.71) for 4 hours, and 2 lawyers (\$61.66) for 32 hours, for a total one-time cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$683,748.

Additionally, changes under § 300.646(d) 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 will have to review their existing processes to ensure that LEAs are provided with appropriate support to identify these contributing factors and use funds for comprehensive CEIS in ways that are appropriately targeted to address those 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, Guam, American Samoa, and the Virgin Islands of \$117,922.

Under the new regulations, States must also determine risk ratio thresholds, minimum n-sizes, minimum cell sizes, and a standard for reasonable progress, based on the advice of stakeholders, including State Advisory Panels, as provided under IDEA section 612(a)(21)(D)(iii). In order to estimate

<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 [www.bls.gov/oes/current/999201.htm](http://www.bls.gov/oes/current/999201.htm)) multiplied by an employer cost for employee compensation of 1.57 (see [www.bls.gov/news.release/ecec.toc.htm](http://www.bls.gov/news.release/ecec.toc.htm)).

the cost of implementing these requirements including the new requirement that States set reasonable minimum n-sizes and cell sizes, the Department doubled the previous time estimates from the NPRM. We assume that the average State would likely initially meet this requirement in Year 1 and revisit the thresholds and cell sizes 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 16 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 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

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

<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.

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 4 hours, one State employee in a managerial position (\$51.50) for 32 hours, one Management Analyst (\$44.64) for 32 hours, and one Administrative Assistant (\$25.69) for 32 hours. Based on these participants, we estimate that consultation with the State Advisory Panels would have a cumulative one-year cost of \$578,988 for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

New § 300.647(b)(7) will require States to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each to the Department at a time and in a manner determined by the Secretary. To estimate the cost per State, we assume that State employees would likely include a Database Manager (\$52.32) for 5 hours and a Management Analyst (\$44.64) for 20 hours for an annual cost for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands of \$63,491.

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

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

New § 300.647 requires every State to annually calculate significant disproportionality for each LEA using a risk ratio or alternate risk ratio method in every category of analysis (as defined in this document) that meets the minimum n-size and cell size requirements, as determined by the State. States are required to identify LEAs above the risk ratio threshold with significant disproportionality. When making a determination of significant disproportionality, States will be

<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.

allowed to use up to three years of data, and take into account whether LEAs demonstrate reasonable progress, under § 300.647(d)(2), in lowering their risk ratios or alternate risk ratios. To estimate the annual cost per State, the Department doubled the time estimates included in the NPRM. In this notice of final regulations, we assume that State employees involved in this calculation will include 3 Management Analysts (\$44.64) for 48 hours and one Administrative Assistant (\$25.69) for 12 hours for an annual cost of \$370,500 for the 50 States, the District of Columbia, Puerto Rico, 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. We assume 400 new LEAs will be identified with significant disproportionality, resulting in an annual cost of \$7,719.

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

States are required to provide for the review and, if appropriate, 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 1 Management Analyst (\$44.64) for 6 hours for each LEA. We assume 400 new LEAs are identified with significant disproportionality each year, the annual cost would be \$150,621 for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

States are required to ensure that LEAs identified with significant disproportionality 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 funds for comprehensive CEIS. Any LEAs fitting into this category will 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 these 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 two-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 \$901,016.

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 funds 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 0.25 hours for

each LEA. If we assume 400 new LEAs are identified with significant disproportionality, the annual cost would be \$4,464.

#### Federal Review of State Risk Ratio Thresholds

Under § 300.647(b)(1)(iii), the risk ratio thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress established by States are 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, minimum n-sizes, minimum cell sizes, and standards for reasonable progress and then monitor the thresholds, minimum n-sizes, minimum cell sizes, and standards for reasonable progress again in any year in which a State changes these standards. To estimate the annual cost of reviewing risk ratio thresholds, minimum n-sizes, minimum cell sizes, and the standards for reasonable progress, the Department assumes the new requirements would increase staff time four fold. We assume that Department staff involved in these reviews would likely include one management analyst at the GS-13 level (\$73.95<sup>10</sup>), and take 4 hour each for the 50 States, the District of Columbia, Puerto Rico, 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 \$3,058 at a 7 percent discount rate.

#### 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 2011-2012, the Department estimates that 15 percent of the average LEA section 611 and section 619 subgrants 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

<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 [www.bls.gov/oes/current/999201.htm](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 [www.bls.gov/oes/current/999201.htm](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.

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

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 final rule, the 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 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 changes, for the 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 regulation because we consider it highly unlikely that there would be no additional LEAs identified. As noted above, the Department's estimate 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 risk ratio thresholds and reasonable n-size and cell size requirements 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 final rules. In order to estimate an upper bound, the Department assumes that States could set much more aggressive thresholds or small n-size or cell size requirements 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 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 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 three percent discount rate.

TABLE 2—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, reporting data) .....	\$3,362,902	\$3,362,902	\$3,362,902
Annual calculation of risk ratios and notification of LEAs .....	4,821,062	4,921,510	5,122,405
Review and, if necessary, revision of policies, practices, and procedures .....	0	56,312,177	168,722,536
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

**Paperwork Reduction Act of 1995**

This final rule contains information collection requirements that are approved by OMB under OMB control number 1820-0689. It also contains a new regulatory requirement, in § 300.647(b)(7), that implicates the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA). We will meet all applicable PRA requirements before we collect any information pursuant to the new requirement.

**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 the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not 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 program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is

available via the Federal Digital System at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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**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: December 12, 2016.

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

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary of Education amends 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, 3474, 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 educational 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.* Except as provided in paragraph (e) of this section, 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.

(ii) Must identify and address the factors contributing to the significant disproportionality, which may include, among other identified factors, a lack of access to scientifically based instruction; economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings; inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality.

(iii) Must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

(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.

(e) *Exception to comprehensive coordinated early intervening services.* The State or the Secretary of the Interior shall not require any LEA that serves only children with disabilities identified under paragraphs (a) and (b) of this section to reserve funds to provide comprehensive coordinated early intervening services.

(f) *Rule of construction.* Nothing in this section authorizes a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate the requirements of this part, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible 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 of a particular outcome for children in one racial or ethnic group within an LEA by the risk of that outcome for children in all other racial or ethnic groups in the State.

(2) *Comparison group* consists of the children in all other racial or ethnic groups within an LEA or within the State, when reviewing a particular racial or ethnic group within an LEA for significant disproportionality.

(3) *Minimum cell size* is the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

(4) *Minimum n-size* is the minimum number of children enrolled in an LEA with respect to identification, and the minimum number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups.

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



ethnic group or groups enrolled in the LEA.

(6) *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.

(7) *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)—

(1)(i) The State must set a:  
 (A) Reasonable risk ratio threshold;  
 (B) Reasonable minimum cell size;  
 (C) Reasonable minimum n-size; and  
 (D) Standard for measuring reasonable progress if a State uses the flexibility described in paragraph (d)(2) of this section.

(ii) The State may, but is not required to, set the standards set forth in paragraph (b)(1)(i) of this section at different levels for each of the categories described in paragraphs (b)(3) and (4) of this section.

(iii) The standards set forth in paragraph (b)(1)(i) of this section:

(A) Must be based on advice from stakeholders, including State Advisory Panels, as provided under section 612(a)(21)(D)(iii) of the Act; and  
 (B) Are subject to monitoring and enforcement for reasonableness by the Secretary consistent with section 616 of the Act.

(iv) When monitoring for reasonableness under paragraph (b)(1)(iii)(B) of this section, the Department finds that the following are presumptively reasonable:

(A) A minimum cell size under paragraph (b)(1)(i)(B) of this section no greater than 10; and

(B) A minimum n-size under paragraph (b)(1)(i)(C) of this section no greater than 30.

(2) The State must apply the risk ratio threshold or thresholds 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) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section 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) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section 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 less than 40 percent of the day;

(ii) 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;

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

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

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

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

(vii) 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) The State must calculate an alternate risk ratio with respect to the categories described in paragraphs (b)(3) and (4) of this section if the comparison group in the LEA does not meet the minimum cell size or the minimum n-size.

(6) Except as provided in paragraph (d) of this section, the State must 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.

(7) The State must report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for measuring reasonable progress selected under paragraphs (b)(1)(i)(A) through (D) of this section, and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes not presumptively reasonable under paragraph (b)(1)(iv) of this section must include a detailed explanation of why the numbers chosen are reasonable and how they ensure that the State is appropriately analyzing and identifying LEAs with significant disparities, based on race and ethnicity, in the identification, placement, or discipline of children with disabilities.

(c) *Exception.* A State is not required to calculate a risk ratio or alternate risk ratio, as outlined in paragraphs (b)(3), (4), and (5) of this section, to determine significant disproportionality if:

(1) The particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size; or

(2) In calculating the alternate risk ratio under paragraph (b)(5) of this section, the comparison group in the State does not meet the minimum cell size or minimum n-size.

(d) *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 a 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 up to three prior consecutive years preceding the identification; and

(2) The LEA has exceeded the 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 in each of the two prior consecutive years.

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

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