

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

RIN 1820-AB77

[Docket ID ED-2017-OSERS-0128]

**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 rule; delay of compliance date.

**SUMMARY:** The Department postpones by two years the date for States to comply with the “Equity in IDEA” or “significant disproportionality” regulations, from July 1, 2018, to July 1, 2020. The Department also postpones the date for including children ages three through five in the analysis of significant disproportionality, with respect to the identification of children as children with disabilities and as children with a particular impairment, from July 1, 2020, to July 1, 2022.

**DATES:** As of June 29, 2018, the date of compliance for recipients of Federal financial assistance to which the regulations published at 81 FR 92376 (December 19, 2016) apply is delayed. Recipients of Federal financial assistance to which the regulations published at 81 FR 92376 apply must now comply with those regulations by July 1, 2020, 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, 2022.

**FOR FURTHER INFORMATION CONTACT:**

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

**SUPPLEMENTARY INFORMATION:** On February 27, 2018, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (83 FR 8396) proposing to postpone by two years the date for States to comply with the “Equity in IDEA” or “significant disproportionality” regulations, 81 FR 92376 (December 19, 2016) (2016 significant disproportionality regulations), from July 1, 2018, to July

1, 2020. The NPRM also proposed to postpone the date for including children ages three through five in the analysis of significant disproportionality, with respect to the identification of children as children with disabilities and as children with a particular impairment, from July 1, 2020, to July 1, 2022.

There are no differences between the NPRM and these final regulations.

*Public Comment:* In response to our invitation in the NPRM, 390 parties submitted comments on the proposed regulations.

*Analysis of Comments and Changes:* An analysis of the comments follows.

**Current State Practice and Impacts on Children With Disabilities**

*Comments:* Many commenters opposed postponing the compliance date for the 2016 significant disproportionality regulations, stating in various ways that the status quo is unacceptable. A few of these commenters argued that States failed to identify significant disproportionality in the identification, placement, and discipline of children with disabilities, despite the fact that, in the commenters’ view, they should. The commenters argue that, in their view, States’ failure to identify or remedy significant disproportionality under IDEA has been a known civil rights problem for many years, that this failure has received sufficient study, and that the Department should not delay any further in addressing the issue.

Other commenters elaborated. Some stated that improperly identifying, placing, or disciplining children causes them harm by segregating them and depriving them of the services they need to receive a free appropriate public education (FAPE) in the least restrictive environment. Some stated that significant disproportionality arises from discrimination or, according to one commenter, improper or ineffective State policies. Other commenters stated that improper discipline can place children in the “school-to-prison pipeline.” Some of these commenters argued that the status quo had high, long-term social and economic costs to children with disabilities and to society. These commenters opposed postponing the compliance date so that the harm to children with disabilities may be addressed as quickly as possible.

Still others elaborated further, some sharing personal experiences and observations of the improper identification, placement, or discipline of children of color with disabilities and others providing lengthy, detailed, and scholarly discussions of significant disproportionality and of interventions

proven to be successful in, for example, addressing disciplinary issues. These commenters too opposed postponing the compliance date so that the harm to children with disabilities may be addressed as quickly as possible.

*Discussion:* The Department does not agree with the commenters that the causes of, and remedies for, significant disproportionality based on race and ethnicity in the identification, placement, and discipline of children with disabilities in LEAs across the country have received sufficient study. The Department does agree with those commenters who asserted that the status quo requires further scrutiny and study to, among other things, review the conflicting research regarding significant disproportionality and the over or under identification of children in special education. The Department also believes that the racial disparities in the identification, placement, or discipline of children with disabilities are not necessarily evidence of, or primarily caused by, discrimination, as some research indicates. See, e.g., Paul L. Morgan, et al, “Are Minority Children Disproportionately Represented in Early Intervention and Early Childhood Special Education?”, 41 Educational Researcher 339 (2012) (that higher minority identification and placement rates reflect higher minority need, not racism); John Paul Wright, et al, “Prior problem behavior accounts for the racial gap in suspensions,” 42 Journal of Criminal Justice 257 (2014) (racial gap in suspensions is not due to racism).

The over-representation of one racial or ethnic group that rises to the level of significant disproportionality may occur for a variety of other reasons. These include systemic challenges that State educational agencies (SEAs) and local educational agencies (LEAs) face in meeting the capacity and training needs of teachers and staff in properly identifying, placing, or disciplining children with disabilities.

The reasons also include, as we stated in the 2016 significant disproportionality regulations, appropriate identification where there is higher prevalence of a disability in a particular racial or ethnic group, as well as correlatives of poverty and the presence of specialized schools, hospitals, or community services that may draw large numbers of children with disabilities and their families to an LEA. 81 FR 92380-92381, 92384.

Further, courts have repeatedly noted that overrepresentation is not necessarily due to discrimination. The Supreme Court has noted that the fact that a group’s “representation” is not in “proportion” to its share of the “local

population” is not proof of discrimination. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Lower courts have similarly concluded that “disparity does not, by itself, constitute discrimination,” see *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 332 (4th Cir. 2001) (en banc), either in discipline, see *id.*; see also *People Who Care v. Rockford Board of Education*, 111 F.3d 538, 538 (7th Cir. 1997), or in special education, see *id.* at 538. In short, the presence of significant disproportionality is not necessarily an indication of underlying racial or ethnic discrimination.

As explained in the discussion of comments that follow, the Department is not certain that the standard methodology in the 2016 significant disproportionality regulations is the best method for States to identify significant disproportionality in LEAs across the country. Postponing the compliance date will give us the opportunity to thoughtfully and soundly evaluate the regulations and issues raised in this rulemaking to best ensure that all children with disabilities are appropriately identified, placed, and disciplined, and that all children get the services they need and receive FAPE in the least restrictive environment. To this end, the Department will explore how to best implement the statute in a legally viable manner that addresses over-identification, without incentivizing under-identification.

We disagree, in sum, with commenters who assumed or explicitly stated that the standard methodology in the 2016 significant disproportionality regulations is the appropriate mechanism to address problems in the status quo. The delay will also give States the opportunity to examine this issue through their own policies and procedures.

*Changes:* None.

*Comments:* A number of commenters asserted that delaying the compliance date and allowing the status quo to continue for (at least) two more years is, variously, morally wrong, the wrong message to send to children with disabilities and their families, inconsistent with the purpose of IDEA to reduce disproportionality, inconsistent with congressional intent, and a failure to champion the rights of children with disabilities.

*Discussion:* We disagree. Like the comments just discussed, these comments also assume, or state outright, that the standard methodology is the appropriate method for States to identify significant disproportionality. The Department is not certain that this

is the case. It would be wrong and inconsistent with IDEA to require a system that potentially denies services based on a child’s ethnic or racial status/group. We are concerned the 2016 significant disproportionality regulations could result in de facto quotas, which in turn could result in a denial of services based on a child’s ethnic or racial status/group. The Secretary is concerned that the regulations will create an environment where children in need of special education and related services do not receive those services because of the color of their skin.

The risk ratio approach is not required by section 618(d) of the statute, which does not require any particular methodology. We would like to explore how best to implement the statute with additional flexibilities and/or protections. As explained in the discussion of comments that follows, postponing the compliance date will give us the opportunity to further evaluate the regulations and issues raised in this rulemaking.

*Changes:* None.

#### Quotas

*Comments:* Some commenters stated that the compliance date should be postponed and that the 2016 significant disproportionality regulations should, ultimately, be repealed. These commenters expressed concern that the standard methodology establishes, or will cause LEAs to establish, racial or ethnic quotas for the number of children who may be identified as children with disabilities or children with a particular disability, placed in a given placement, or disciplined.

One commenter argued that the risk of quotas justified a temporary postponement, even assuming the standard methodology makes sense in the long run. The commenter argued that due to disadvantages they face, disproportionate numbers of African-American children need special education and related services, but these disparities may sufficiently diminish in the future and African-Americans will no longer risk being denied access to special education and related services due to a quota.

Some commenters stated that LEAs would have an incentive to make decisions about identifying, placing, and disciplining children with disabilities to satisfy a quota, not on the basis of each child’s individual needs, and thus contrary to IDEA’s fundamental approach for providing each child with FAPE. Other commenters, similarly, found that the incentive for quotas are built into the

risk ratio itself because States have to make determinations of significant disproportionality by limiting the number or percentage of children of a certain race or ethnicity identified, placed, or disciplined in a certain way.

A few other commenters argued that the text of 20 U.S.C. 1418(d)(2)(B) mandates a focus on disproportionate over-identification of a minority group versus the correct rate in determining the existence of disproportionality, rather than overrepresentation compared to the population, as the standard methodology does. They argued that its use of overrepresentation compared to the population as the benchmark for disproportionality creates serious constitutional problems that should be avoided. Others similarly argued that the focus should be on “differential treatment” of minorities, not higher identification rates that merely reflect appropriate identification.

A commenter stated that racial quotas and preferences, express or implied, are impermissible under the laws of a number of States that forbid racial preferences, even when they might be allowed under Federal law. Therefore, the commenter argued, the Department ought to postpone the compliance date in order to address the implications for using the standard methodology in those States.

Still a few others noted that establishing racial or ethnic quotas could expose States, LEAs, and their officials to legal liability.

Most commenters disagreed, stating that quotas are not the goal of the rule, which instead was to create a more equitable playing field for all children. Some of these commenters elaborated that the Department and States could mitigate the risk of quotas through close monitoring of States for compliance with IDEA. Another commenter noted that quotas would be more likely if the regulations mandated a specific risk ratio threshold, which they do not.

One commenter stated that the significant disproportionality provision has been part of the law for 15 years, yet there is no evidence of any misunderstanding of the statute or that there has been insufficient time for issues to arise and be resolved.

Two commenters argued that significant disproportionality is not the only provision in IDEA that could incentivize quotas and that delaying the compliance date will not reduce these other incentives for quotas.

One commenter suggested several alternatives to delaying the compliance date including, that the Department not regulate at all, require compliance with

the 2016 significant disproportionality regulations until the Department develops a new regulation to supersede it, and to provide more technical assistance. This commenter stated that adoption of one of these alternatives would allow the Department to evaluate whether quotas are being used and how to prevent their use.

Another commenter argued that even if the substance of the 2016 significant disproportionality regulations is sound, the regulations should be postponed because the definition of disproportionality amounted to a racial classification, which constitutionally cannot be imposed by an agency until after it makes specific evidentiary findings of “widespread discrimination” of the sort that did not accompany the 2016 significant disproportionality regulations.

*Discussion:* The Secretary believes that education should fail no child because of the color of his or her skin. No child should be misidentified as a child with (or without) a disability, placed in a more restrictive setting, or improperly disciplined because of the color of his or her skin or his or her ethnic background. These are precisely the risks that the Department believes the standard methodology may pose and, therefore, we believe it is necessary to evaluate further the issues raised in this rulemaking.

Court rulings make clear that a regulatory requirement can create an illegal incentive for de facto quotas or racial preferences even when that is not the intent of the regulation, and even when the regulation purports to prohibit quotas. For example, financial “pressure” or “incentive to meet” racial “numerical goals” can violate the Constitution, even when accompanied by a stated command not to discriminate. *Lutheran Church v. FCC*, 141 F.3d 344, 352 (DC Cir. 1998). Similar principles obtain with respect to discipline and placement in the education context. *See People Who Care v. Rockford Board of Education*, 111 F.3d 528, 538 (7th Cir. 1997).

The Department is concerned that the 2016 significant disproportionality regulations may create an incentive for LEAs to establish de facto quotas in identification, placement, and discipline—or otherwise create a chilling effect on such identification—to avoid being identified with significant disproportionality and having to reserve 15 percent of their IDEA Part B subgrant to provide comprehensive coordinated early intervening services (CEIS). If, as one commenter asserts, there are other provisions in IDEA that incentivize

quotas, those are not the subject of this rulemaking exercise.

The Department attempted to address the concern about quotas in the 2016 significant disproportionality regulations by noting that quotas were prohibited and including specific language in the 2016 significant disproportionality regulations to note that nothing in the rule abrogated the right to FAPE in the least restrictive environment. The discussion in the 2016 significant disproportionality regulation disclaiming an intent to establish quotas is insufficient protection against LEAs creating de facto quotas because, regardless of the disclaimer, the regulations themselves may, in fact, incentivize quotas. In light of this and commenters’ ongoing concerns about this issue, further evaluation is needed.

We agree with commenters that the 2016 significant disproportionality regulations may create an incentive for LEAs to establish de facto quotas for the identification, placement, and discipline of children with disabilities and to artificially reduce the number of children identified, placed outside of the regular classroom, and disciplined to avoid being identified with significant disproportionality and being required to reserve 15 percent of their IDEA Part B subgrant to provide comprehensive CEIS. We are delaying the compliance date to evaluate our regulatory approach to ensure that it implements the statute in a manner that does not incentivize quotas.

Put somewhat differently, if to stay under a State-mandated risk ratio threshold, LEAs are not properly identifying, placing, or disciplining children, then LEAs are not providing special education and related services based on the needs of each individual child as IDEA requires. Instead, the individualized education program, developed and revised in accordance with IDEA requirements, as necessary, to meet the unique and specific needs of each child, is the mechanism to ensure each child receives FAPE. However, creating an environment where LEAs and schools may engage in practices designed to artificially avoid exceeding the State-established risk ratio threshold for identification, placement, and discipline over meeting each individual child’s needs, could undermine IDEA’s focus on the individual needs of each child and, in turn, individualized decision-making. We believe the issue of incentivizing quotas, and potentially undermining the focus on individualized educational determinations, is an important issue to examine further before requiring

compliance with the 2016 significant disproportionality regulations.

Some commenters noted that compliance with numerical thresholds can have unintended consequences and have, in some instances, resulted in the denial of FAPE to children with disabilities. For example, as some commenters also noted, in the State of Texas, the SEA’s Performance-Based Monitoring and Analysis system measured the percentage of children identified as children with disabilities and receiving special education and related services under IDEA against a standard identification rate of 8.5 percent. Although exceeding 8.5 percent was not prohibited, because LEAs were measured against a numerical standard that would determine the level of monitoring the LEA would receive, LEAs around the State reduced the number of children they identified as children with disabilities under IDEA to no more than 8.5 percent of their student populations, thereby potentially depriving many children of the special education and related services to which they were entitled under IDEA.

Here, under the standard methodology, exceeding the risk ratio threshold may result in an LEA being identified with significant disproportionality, which would result in the LEA being required under IDEA section 618(d)(2) to reserve 15 percent of its IDEA Part B (section 611 and section 619) funds for comprehensive CEIS. We want to evaluate whether the numerical thresholds in the 2016 significant disproportionality regulations may incentivize quotas or lead LEAs to artificially reduce the number of children identified as children with disabilities under the IDEA. While Texas has eliminated the 8.5 percent indicator, it is a clear example of what can happen when schools are required to meet numerical thresholds in conjunction with serving children with disabilities.

Even if the regulations would not lead to any rigid racial quotas, postponement would still be appropriate. Risk ratios are determined by comparing the risk of a particular outcome for children in one racial or ethnic group to the risk of that outcome for children in all other racial and ethnic groups. This renders risk ratios racial classifications subject to constitutional scrutiny. *See, e.g., Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999).

The Federal government cannot impose or incentivize such racial classifications until *after* it makes findings of widespread discrimination necessitating their use. *See Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996);

*Middleton v. City of Flint*, 92 F.3d 396, 405 (6th Cir. 1996). The Department did not make any such findings in the **Federal Register** notice accompanying its 2016 significant disproportionality regulations. See 81 FR at 92381, 92384. So even if one assumes that the text and substance of the regulations are sound, and States should ultimately be required to comply with them, the procedural predicate for requiring such compliance is not yet present, because their basis was not adequately articulated.

We disagree with one commenter's assertion that the nearly 15 years of implementation of the most recent amendments to the IDEA makes it less likely that the 2016 significant disproportionality regulations could result in the use of quotas. Prior to the 2016 significant disproportionality regulations, as many other commenters note, while many States used versions of the risk ratio, States had varying methodologies for identifying significant disproportionality, and the majority of States would be implementing methodologies consistent with the 2016 significant disproportionality regulations for the first time.

Regarding the commenters' suggested alternatives—including close monitoring of States for compliance with IDEA, mandating a specific risk ratio threshold, and establishing an appropriate identification rate—some are not feasible. In adopting the 2016 significant disproportionality regulations, we considered specifying risk ratio thresholds and identification rates but could not arrive at a non-arbitrary way to do so. That has not changed.<sup>1</sup> As to monitoring, we are not certain that compliance-driven monitoring will, by itself, effectively address the factors contributing to significant disproportionality or enable the Department to best support States to improve their systems. Because monitoring may not be able to resolve applicable issues, we will evaluate the question during the delay as part of our review of the 2016 significant disproportionality regulations. However, as a matter of general practice and in keeping with the Department's commitment to continuous improvement, we are looking at all of our processes, including monitoring, to ensure they are effectively leveraged to

support States in efforts to ensure that all children with disabilities receive appropriate special education and related services.

The Secretary is reluctant to implement a methodology that may result in encouraging quotas or significantly reducing the number of children with disabilities identified, placed, and disciplined, and cause more of the very same effects upon children in States around the country.

Instead, the Department will delay the compliance date for two years while we evaluate what the comments make clear is a complex question.

*Changes:* None.

#### **Fairness to States—Work Already Done**

*Comment:* A number of commenters argued that the Department should not postpone the compliance date as a matter of fairness. For States already close to full implementation of the regulations—and a few commenters stated this was many, if not all, States—a postponement so close to the original compliance date would disregard their compliance efforts to date, disregard the costs of these efforts to date, reward States that have not been so diligent, and potentially cause confusion. Some of these commenters, therefore, suggested that if the Department were to postpone the compliance date, States that choose to do so should be permitted to implement the 2016 significant disproportionality regulations for school year (SY) 2018–19, as originally planned.

Other commenters disagreed, noting that some States need additional time to implement or study the standard methodology and comprehensive CEIS. Still others noted that the Department should provide TA to States that need it and that some States are already reducing significant disproportionality by implementing multi-tiered systems of support, though neither of these are particularly affected by delaying the compliance date.

*Discussion:* We recognize the time, effort, and resources States have already committed to implementing the regulations. Delaying the compliance date does not disregard this important work. The NPRM proposing the delay did not propose to preclude States from continuing their efforts and using the standard methodology, or any other methodology for that matter, during the two-year delay. States may implement the standard methodology or may use any methodology of their choosing to collect and examine data to identify significant disproportionality in their LEAs until the Department evaluates the regulations and issues raised in this

rulemaking. Note, some States have communicated to the Department that they need additional time to properly implement the 2016 significant disproportionality regulations, and this delay will provide that time to those States as well as allow the Department to evaluate these important issues further.

The delay of the compliance date does not, of course, affect a State's annual obligation under IDEA section 618(d)(1) to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in the State and LEAs of the State with respect to the identification, placement and discipline of children with disabilities. In addition, the State must ensure that if an LEA is identified with significant disproportionality, it implements the remedies in IDEA section 618(d)(2), which includes review and, if appropriate, revision of policies, procedures, and practices; publicly reporting on any revisions; and reserving 15 percent of IDEA Part B funds to provide comprehensive CEIS.

But to determine whether significant disproportionality exists in its LEAs in SY 2018–2019 and SY 2019–2020, during the period of this delay, a State may use the methodology it had in place before the Department published the 2016 significant disproportionality regulations, or any other methodology for collecting and examining data to identify significant disproportionality that the State deems appropriate. The Department will work with States to provide technical assistance where it is needed.

*Changes:* None.

#### **Limitations in the Standard Methodology**

*Comment:* A number of commenters argued that the Department should delay implementation of the 2016 significant disproportionality regulations because of limitations in the standard methodology itself: Given the number of categories of analysis, there is likely to be some kind of significant disproportionality in LEAs with large populations; risk ratios and alternate risk ratios are less meaningful measures in LEAs with small or homogenous populations; and there are often data quality and data availability issues.

By contrast, a number of other commenters argued that the Department should not delay implementation of the regulations because the standard methodology works well—providing States with flexibility to address their individual student populations—or well enough that any limitations in the

<sup>1</sup> We would like to explore how best to implement the statute with additional flexibilities and/or protections. Even if, upon additional review, the Department were to determine that a risk ratio methodology is permissible, it could only be implemented after making a finding to that effect and if rigorous legal safeguards and protections are guaranteed.

methodology may be addressed through implementation.

*Discussion:* We recognize the merits of both positions. Given our concern about quotas reducing the number of children identified with disabilities and depriving them of needed special education and related services, we believe it is more prudent to delay the compliance date and address that concern through a review of the standard methodology before States are required to implement the regulations rather than during implementation.

As to the other possible shortcomings the commenters pointed out, these are issues we fully anticipate will be addressed during our review of the standard methodology.

*Changes:* None.

#### Limitations Not Directly Related to the Standard Methodology

*Comment:* A number of commenters argued that the Department should delay the compliance date of the 2016 significant disproportionality regulations for reasons mostly unrelated to the standard methodology: That the causes of significant disproportionality, such as a lack of access to adequate healthcare and other correlatives of poverty, are larger societal issues outside of the control of schools and that research is unclear whether the problem of significant disproportionality is over-identification or under-identification of children with disabilities. Some of these commenters argued that Congress is better suited to address all these issues, while others argued that the schools should be given the opportunity afforded by postponing the compliance date to attempt to address the causes of significant disproportionality.

A few commenters drew the opposite conclusion from similar observations. They asserted that the standard methodology should be left to go into effect in July 2018 and schools and governments can work together to address the broad issues surrounding the issue of, and the root causes of, significant disproportionality. One commenter advocated that disproportionality should be measured as both over-identification and under-identification in each category of identification for special education and related services.

Still other commenters supported a delay and suggested repeal of the 2016 significant disproportionality regulations for financial reasons: LEAs identified with significant disproportionality must reserve 15 percent of their IDEA Part B funds to implement comprehensive CEIS, which

could shift funding from children with disabilities and increase State maintenance of fiscal support requirements. One commenter noted that significant disproportionality should be addressed using a different source of funding than IDEA. Another noted that the reservation of funds could negatively affect LEAs that themselves do not have significant disproportionality but are located within, or are members of, Educational Service Agencies that are identified with significant disproportionality. One commenter noted that the reservation of 15 percent of funding was excessive in an instance where a change to policies, procedures, and practices would result in eliminating significant disproportionality within their LEA, and another suggested the Department allow States additional exemptions to limit LEAs from being required to reserve 15 percent of their funding if the LEAs met certain criteria.

*Discussion:* Though issues concerning comprehensive CEIS arise from statutory requirements and not the 2016 significant disproportionality regulations, these other observations further demonstrate the complexity of the issues presented by the 2016 significant disproportionality regulations. We anticipate these will be included in our broader evaluation of the regulations going forward. Changes beyond a delay in the compliance date may require a statutory or regulatory change. Commenters made these and similar arguments and observations in response to the March 2, 2016, NPRM that proposed the significant disproportionality regulations (81 FR 10968).

As we stated in the preamble to the 2016 significant disproportionality regulations: 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 (81 FR 92383–92384, causes of racial and ethnic disparity that originate outside of school); the Department has an obligation to implement and enforce the requirements of IDEA as they exist today, and we will work with Congress on any potential changes to IDEA, including to section 618(d) (81 FR 92380, the Department should await congressional action); 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 (81 FR 92380–92381, under-identification versus over-identification); 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 (81 FR 92399–92405, exemptions to LEAs, racially homogenous LEAs and those with small populations); 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 (81 FR 92442–92443, authority to use discipline as a category of analysis); regardless of IDEA funding levels, States must comply with all IDEA requirements, including the requirements related to significant disproportionality (81 FR 92446–92448, funding IDEA and comprehensive CEIS); 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 (81 FR 92451–92452, implications of comprehensive CEIS for LEA maintenance of effort). These observations further demonstrate the complexity of the issues presented by the 2016 significant disproportionality regulations. We will address these issues as appropriate in our evaluation.

*Changes:* None.

#### Limiting Comments

*Comment:* Pointing to the statement in the NPRM that “[we] will not consider comments on the text or substance of the final regulations” (83 FR 8396), a small number of commenters stated that the Department has improperly limited the comments it will consider and that it is not seeking comments with an open mind. As evidence, one commenter cited a statement by a Department spokesperson that “ED is looking closely at this rule and has determined that, while this review takes place, it is prudent to delay implementation by two years.”

*Discussion:* In inviting comment on the NPRM, we stated:

We invite you to submit comments on this notice of proposed rulemaking. We will

consider comments on proposed compliance dates only and will not consider comments on the text or substance of the final regulations. (83 FR 8396.)

We did not improperly limit comments. Rather, we asked the public to speak to the question of whether the Department should postpone the compliance date of the 2016 significant disproportionality regulations, rather than to discuss, without reference to the delay, what the text or substance of any new regulations should be.

Indeed, commenters appear to have understood this and commented on the proposed delay and the substance of the 2016 significant disproportionality regulations in connection with the delay.

The Department received approximately 25 percent more comments on the NPRM proposing postponement of the compliance date (390 parties) than it did in response to its invitation to comment on the significant disproportionality regulations in 2016 (316 parties). We received comments not only on the proposed delay of the compliance date but also on the substance of the 2016 significant disproportionality regulations themselves, the adequacy (or inadequacy) of our rulemaking process under the Administrative Procedure Act (APA), the regulatory impact analysis, the cost benefit analysis, and the statement of alternatives considered. Commenters recognized that the NPRM invited comments on the merits of the 2016 significant disproportionality regulations, with several going so far as to criticize the Department for inviting comments on issues that had already been covered in 2016.

The full statement made by a Department spokesperson indicates no more than the proposal reflected in the NPRM itself that a delay of two years would be prudent and does not connote a lack of reasonable consideration of the public's perspectives:

Through the regulatory review process, we've heard from states, school districts, superintendents and other stakeholders on a wide range of issues, including the significant disproportionality rule. Because of the concerns raised, the department is looking closely at this rule and has determined that while this review takes place, it is prudent to delay implementation for two years.

Consistent with the APA, the Department properly sought public comment on the proposal to delay the compliance date for the 2016 significant disproportionality regulations. We reviewed and considered those comments and, in this document, we are

responding in detail to all of the comments we received.

*Changes:* None.

*Comments:* A few commenters expressed concern that one of the commenters cited in the NPRM who submitted comments in response to the Department's 2017 regulatory reform notice that were critical of the 2016 significant disproportionality regulations is now employed by the Department.

One of these commenters was concerned that the Department did not timely respond to a Freedom of Information Act (FOIA) request seeking the public comments on significant disproportionality that the Department relied upon in the NPRM. This commenter, therefore, suggested that the Department should seek a second round of comments after clarifying that it will consider comments on the text and substance of the 2016 significant disproportionality regulations.

*Discussion:* There is no prohibition against any individual submitting comments on a Department rulemaking and then subsequently accepting employment at the Department. In addition, other commenters expressed similar concerns regarding the regulations and the Department took all of these into account in its analysis. With respect to the FOIA request, the comments that informed the NPRM are a matter of public record, as are all of the comments we received in response to the Department-wide regulatory review. Given the availability of those comments, we do not agree with the commenter that the nature of the Department's response to a FOIA request requires that we establish a second comment period.

*Changes:* None.

#### **Justification Under APA**

*Comment:* Many commenters asserted that the Department did not adequately justify delaying the compliance date because there has been no change in circumstances since the publication of the 2016 significant disproportionality regulations. These commenters point out that the Department's only stated justifications for the delay are topics that were already subject to notice and comment and addressed in the 2016 significant disproportionality regulations. These topics included discussions of the Department's statutory authority, the examination of group outcomes through statistical measures rather than the individual needs of each child, incentives for racial quotas, lack of clear guidance on "reasonableness," and alignment with State Performance Plan indicators.

*Discussion:* The Department agrees that it discussed these topics in the 2016 significant disproportionality regulations but disagrees that this precludes the Department from re-evaluating the 2016 significant disproportionality regulations and the reasoning and evidence supporting them. The APA does not bind an agency to its earlier policy determinations, even in the absence of changed facts and circumstances, provided that the agency discloses what it is doing and why, which we have done here.

Even though the Department addressed the issue of quotas in the 2016 significant disproportionality regulations, the Department is concerned that it did not give sufficient weight to incentives for, and consequences of, express or implied racial quotas. The Department's response was, essentially, to prohibit the use or implementation of quotas, while maintaining a regulatory framework that nonetheless requires establishing numerical thresholds. As indicated, such a system may result in de facto quotas that have significant effects on the proper identification, placement, and discipline of children with disabilities. As some commenters noted, in response to a numerical threshold point in the State's Performance-Based Monitoring and Analysis System, many LEAs in Texas reduced the number of children identified as children with a disability under the IDEA. We believe the issue of incentives for, and consequences of, express or implied racial quotas warrants further examination prior to requiring compliance with the standard methodology. The Department believes it is important to postpone the compliance date of the 2016 significant disproportionality regulations now so that it may weigh the risk of denying FAPE to many children with a disability due to the potential use of quotas against the benefits of implementing the standard methodology.

*Changes:* None.

*Comment:* One commenter argued that a two-year delay will not add any additional insights into the proposed methods for reducing disproportionality beyond what has been found by previous Federal task forces, researchers, government agencies, and other experts.

*Discussion:* The Department disagrees. Even since publication of the 2016 significant disproportionality regulations, there has been further research that demonstrates the complexity of the issues presented by the 2016 significant disproportionality regulations. See, Paul Morgan, *et al.*,

“Are Black Children Disproportionately Overrepresented in Special Education? A Best-Evidence Synthesis” 83 Exceptional Children (2017) and research cited therein. The Department will use the time provided by postponing the compliance date to examine the issues raised in this rulemaking.

*Changes:* None.

*Comment:* A few commenters suggested that Executive Order 13777 was not a proper basis for delaying the compliance date. The order, these commenters argued, was designed to reduce regulatory burden, but the NPRM does not mention burden as a justification for delaying the compliance date. One commenter argued the Department proposed a delay of these regulations to meet a quota imposed by Executive Order 13777 to satisfy the regulatory reform agenda.

*Discussion:* The Department disagrees. The commenters have described the scope of Executive Order 13777 too narrowly. Under that order, the Department created a regulatory reform task force that reviewed and solicited public comment on all of the Department’s regulations and sought to identify regulations that: (i) Eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

As we have explained, the Secretary is concerned that the 2016 significant disproportionality regulations, potentially creates an express or implied incentive for LEAs to set quotas, may ultimately, and improperly, reduce the number of children identified as children with disabilities, properly placed, or disciplined. Therefore, in connection with our regulatory review under Executive Order 13777, we proposed and are now adopting a delay of the compliance date for the 2016 significant disproportionality regulations. The delay effected by this rule is justified on the basis of the

policy rationales advanced, irrespective of Executive Order 13777.

*Changes:* None.

*Comment:* Two commenters argued that the Department did not provide a reasoned basis for delaying the compliance date of the regulations and that the NPRM did not provide the public the transparency required by the APA.

*Discussion:* The Department disagrees. We have stated the reasons for proposing and delaying the compliance date in the NPRM and at length here. The Department has complied with the APA and provided the public ample opportunity to meaningfully comment on the proposal to delay the compliance dates to July 1, 2020, and July 1, 2022, respectively.

*Changes:* None.

#### Availability of Judicial Remedies

*Comment:* One commenter argued the timing of the NPRM’s publication recklessly or intentionally is so late that it prevents affected parties from having enough time to seek and obtain judicial review prior to the rule’s effective date.

*Discussion:* The Department disagrees. The timing of the NPRM was not an attempt to prevent parties from obtaining judicial review. The development of proposed rules is an involved process that takes time to complete. IDEA requires the Department to provide the public with a 75-day comment period when regulating under Part B or Part C. (IDEA section 607(c); 20 U.S.C. 1406(c).) The Department has been working diligently to propose this delay; review, consider and respond to public comment; and publish a final rule. Nothing the Department has done prevents an aggrieved party from seeking judicial review after this document is published.

The Department notes that, in any event, States may, and many States have commented that they intend to, implement the standard methodology in the 2016 significant disproportionality regulations even if the Department delays these regulations. States that choose not to implement the standard methodology may use any methodology of their choosing to collect and examine data to identify significant disproportionality in their LEAs until the Department evaluates the regulations and issues raised in this rulemaking, to best ensure that all children with disabilities are appropriately identified, placed, and disciplined, and that all children get the services they need and receive FAPE in the least restrictive environment.

*Changes:* None.

#### Comprehensive CEIS

*Comment:* Several commenters, both supportive of and opposed to postponing the compliance date, argued that the Department should maintain the expanded authorized use of funds for comprehensive CEIS under § 300.646(d)(2), whether or not it postpones the compliance date. Specifically, the commenters argued that States in either case should still be permitted to allow LEAs to use funds reserved for comprehensive CEIS to serve children from age three through grade 12, with and without disabilities. This, the commenters argued, is a reasonable reading of the statute and a reasonable remedy for significant disproportionality.

Some commenters argued that the Department did not have authority under IDEA to expand the authorized use of funds for comprehensive CEIS and that the Department should rescind this provision of the regulation. Others disagreed, stating that the Department has the authority to expand the use of funds for children three to five years old and children with disabilities and that the children most affected by significant disproportionality should have access to services provided through comprehensive CEIS.

*Discussion:* The Department understands all of the commenters’ concerns surrounding comprehensive CEIS, but the NPRM proposing the delay in the compliance date proposed no changes to the regulations governing comprehensive CEIS. The delay will give the Department the opportunity to review these issues in detail. Until the Department acts to change the regulations, however, LEAs may choose, consistent with the 2016 significant disproportionality regulations, to use IDEA Part B funds reserved for comprehensive CEIS to serve children ages three through grade 12, with and without disabilities, upon a determination of significant disproportionality, whether or not a State implements the standard methodology in the 2016 significant disproportionality regulations.

*Changes:* None.

#### Remedies for Significant Disproportionality in Discipline

*Comment:* Some commenters argued the Department did not have the authority under IDEA to include discipline as a type of disproportionality triggering action under 20 U.S.C. 1418(d)(2). Other commenters disagreed and noted that disciplinary actions can be considered a change in placement, and therefore, it is

appropriate to include discipline in the standard methodology.

*Discussion:* We appreciate the comments. 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 NPRM proposing the delay in the compliance date proposed no changes to the treatment of discipline under the 2016 significant disproportionality regulations. Until the Department evaluates the regulations and issues raised in this rulemaking, discipline remains a category of analysis for determining significant disproportionality, and the reservation of funds for comprehensive CEIS and the other statutory remedies apply upon a State's finding of significant disproportionality. The delay will give the Department the opportunity to review these issues in detail.

*Changes:* None.

#### Children Ages Three Through Five

*Comment:* A few commenters, while opposed to delaying the compliance date for school-aged children, did support delaying the compliance date for including data for children ages three through five years old due to issues with data quality and availability for this age range.

Other commenters argued the Department did not provide any justification for delaying the compliance date to include data for children ages three through five, and one commenter argued that this delay would affect the collection of discipline data for this age range.

*Discussion:* We disagree that we did not provide a justification for a delay in the compliance date for children ages three through five in the analysis of significant disproportionality, with respect to the identification of children as children with disabilities and as children with a particular impairment. We cited concerns about the potential effects of implementing the standard methodology for all age ranges, and we further agree with the commenters who cited concerns about data quality and missing data. We disagree with the commenter who argued the delay would affect existing discipline data collections; the delay does not affect any existing data collections. We therefore postpone the date for States to include children ages three through five years in

their significant disproportionality analysis with respect to the identification of children as children with disabilities and as children with a particular impairment until July 1, 2022.

*Changes:* None.

#### Non-Compliance

*Comment:* One commenter argued the proposed rule seeks to delay compliance without explaining how the Department intends to ensure States and LEAs comply with IDEA in the meantime, and that the delay means that the Department has decided to ignore widespread noncompliance, an assertion made by a number of other commenters.

*Discussion:* We disagree. As we explained earlier, the delay of the compliance date does not change the State's annual obligation under IDEA section 618(d)(1) to collect and examine data to determine whether significant disproportionality is occurring in the State and LEAs of the State with respect to the identification, placement, and discipline of children with disabilities. In addition, the State must ensure that if an LEA is identified with significant disproportionality, it implements the remedies in IDEA section 618(d)(2). Notwithstanding the delay, States must continue to make these annual determinations. To do so, they may use the methodology they had in place before the Department adopted the 2016 significant disproportionality regulations, the standard methodology in the 2016 significant disproportionality regulations, or any other methodology for collecting and examining data that the State, in its discretion, deems appropriate. As part of the IDEA Part B LEA Maintenance of Effort (MOE) Reduction and CEIS data collection, States will continue to report to the Department and the public whether each LEA was identified with significant disproportionality and the category or categories of analysis under which the LEA was identified. The Department will continue its monitoring activities under IDEA. As such, the Department is not ignoring widespread non-compliance with IDEA, but instead attempting to ensure compliance with IDEA's requirements.

*Changes:* None.

#### Data

*Comment:* One commenter argued that delaying the compliance date will deny the public the opportunity to receive information to which they are entitled under IDEA regarding the identity of LEAs found by States to have significantly disproportionality and how each LEA addressed significant

disproportionality. Another commenter argued OSERS is responsible for gathering IDEA section 618(d) data on local special education disparities from State to State. The commenter further argued that OSEP should provide an LEA-level restricted-use data set for researchers only instead of only national and State level data. A number of commenters argued that delaying the compliance date deprives the public of the most-up-to-date information on significant disproportionality.

*Discussion:* We disagree. The Department is not required under IDEA section 618 to collect data that States use to identify LEAs with significant disproportionality, such as risk ratios calculated as part of a review for significant disproportionality. In fact, collection of that data would be a significant and expensive undertaking, both for the States and the Department. While States report as part of the IDEA Part B LEA Maintenance of Effort (MOE) Reduction and CEIS data collection, whether each LEA was identified with significant disproportionality and the category or categories of analysis under which the LEA was identified, the Department is not required to provide the identity of LEAs identified with significant disproportionality.

*Changes:* None.

#### Cost-Benefit Analysis

*Comment:* One commenter stated that the Department did not include the correct number of States in the Analysis of Costs and Benefits. The commenter noted the Department calculated the cost for 55 States and believed this was an error. Other commenters noted the Department underestimated the number of States that will be ready to implement the regulations on July 1, 2018.

Several commenters noted that State and local agencies have already expended resources to prepare to comply with the regulations on July 1, 2018, and that these sunk costs should be included in the analysis of costs, benefits, and transfers. Those commenters also argued that the Department needs to account for the costs associated with the resources States will have to expend to help LEAs and parents understand the delay and the subsequent confusion caused by the delay.

*Discussion:* Under IDEA section 602(31), the term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas. Therefore, the Department calculated the costs associated with this regulation for the 50 States, the District of Columbia, Puerto Rico, Guam, American Samoa,



and the Virgin Islands, or 55 "States" as defined under IDEA. We address the balance of comments on the cost-benefit analysis in the *Discussion of Costs, Benefits, and Transfers* in the cost-benefit section of this document.

*Changes:* None.

#### Alternatives Considered and Significance Under E.O. 12866

*Comments:* One commenter argued the regulatory impact analysis in the NPRM was insufficient because the Department did not include alternatives such as not regulating; providing more technical assistance and guidance to States to avoid negative outcomes; evaluating the impact of the standard methodology; or publicizing compliance reviews under Title VI of the Civil Rights Act. Another commenter acknowledged the Department considered alternatives even though they disagreed with delaying the compliance date of the regulation. The same commenter argued the regulation was not a significant regulatory action.

*Discussion:* We recognize that commenters had concern about the breadth of regulatory alternatives discussed in the NPRM and therefore have addressed additional alternatives in the regulatory impact analysis of this final rule. As for the significance of the regulations, we disagree that postponing the compliance date is not significant under the Executive Order 12866. We determined that it is significant because it raises novel legal or policy issues arising out of legal mandates. While the Department initially made that determination, it did so subject to the approval of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). We note as well that the proposal and adoption of the 2016 significant disproportionality regulations were also significant regulatory actions.

*Changes:* None.

#### Executive Orders 12866, 13563, and 13771

##### 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. Complying with the standard methodology imposes costs on regulated entities and, absent a clear understanding of the unintended consequences of the standard methodology, we believe it is appropriate to delay implementation of the 2016 significant disproportionality regulations. We believe that further review of the regulations is necessary to ensure that net benefits are maximized in the long-term and, as noted elsewhere in this notice, we believe that two years provides sufficient time for such review. 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 explained in the preamble, this regulatory action will delay the compliance date of the 2016 significant disproportionality regulations. We are concerned that those regulations may not meet their fundamental purpose, namely to ensure the proper identification of LEAs with significant disproportionality among children with disabilities. This delay will give the Department, the States, and the public additional time to evaluate the questions involved and determine how best to serve children with disabilities without increasing the risk that children with disabilities are denied FAPE.

##### Alternatives Considered

Without the delay of the July 1, 2018, compliance date, States and LEAs would be required to implement the 2016 significant disproportionality regulations. In addition to the alternatives discussed in the NPRM, the Department reviewed and considered various alternatives to the proposed rule submitted by commenters in response to the NPRM.

The Department considered comments requesting that the Department withdraw the NPRM and

require States to comply with the standard methodology and modified remedies on July 1, 2018. We are declining this suggestion because, as stated throughout this document, we are concerned, among other reasons, about the potential unintended consequences of implementing the 2016 significant disproportionality regulations and the potential denial of FAPE to children with disabilities.

Other commenters noted the Department could take several steps to prevent unintended consequences without delaying the compliance date. For example, one commenter suggested the Department study whether quotas are being used and prevent their use. Other commenters suggested the Department could simply increase monitoring and enforcement of States and LEAs to prevent racial quotas or other unintended consequences. Another commenter suggested evaluating the impact of the standard methodology. Another commenter suggested the Department could provide additional technical assistance to prevent concerning outcomes. The same commenter suggested the Department initiate and publicize compliance reviews under Title VI of the Civil Rights Act to ensure States and LEAs do not adopt numerical quotas based on race. Knowing if these measures would be effective requires careful review, which we will do during this delay.

As stated in the NPRM, the Department considered delaying the compliance date for one, two, and three years. Several commenters argued the justification provided for the number of years considered was insufficient. The Department welcomes the opportunity to clarify its justification. We believe that a one-year delay would not provide the Department sufficient time to examine the potential unintended consequences of the standard methodology; especially since it will take time for States to implement and the Department to review the impact of States that decide to implement the standard methodology. The Department believes that a three-year delay would postpone compliance for longer than necessary to complete the additional evaluation we plan to undertake. Therefore, the Department determined a two-year delay would provide sufficient time to review all the complex issues raised and discussed throughout this document, including looking more closely at the alternatives the commenters offered above, and determine how better to serve children with disabilities.

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

The Department has analyzed the costs and benefits of this final rule. Due to uncertainty about the number of States that will exercise the flexibility to delay implementation of the standard methodology, the number of LEAs that would be identified with significant disproportionality in any year, and the probable effects of any delay in implementation on services for children with disabilities, we cannot evaluate the costs and benefits of this regulation with absolute precision. In the NPRM, the Department estimated that these regulations would result in a cost savings of \$10.9 to \$11.5 million over ten years.

However, a number of commenters raised concerns about our analysis, particularly noting the lack of a discussion of costs associated with these regulations and our estimation of the number of States that would exercise the flexibility to delay implementation under this regulation. The Department has reviewed these comments and has revised some assumptions in response to the information we received.

We discuss specific public comments, where relevant, in the appropriate sections below. As a result of the changes discussed below, the Department now estimates this delay will result in a net cost savings of between \$7.4 and \$7.8 million over a ten-year period, with a reduction in associated transfers of between \$41.5 and \$43.8 million.<sup>2</sup>

#### *Costs*

A number of commenters noted that our regulatory impact analysis in the NPRM did not include a discussion of costs, generally, while others specifically raised concerns regarding the likely effects of delayed implementation on the appropriate identification, placement, and discipline of children with disabilities, specifically arguing that a delay would likely result in improper identification, more restrictive placements, and more exclusionary discipline practices, all leading to higher school failures, drop outs, juvenile justice referrals or involvement, and lower quality long-term outcomes.

One commenter noted that, in the 2016 significant disproportionality regulations, the Department estimated that the benefits of the rule outweighed the estimated costs of \$50.1 to \$60.5 million. Therefore, the commenter

argued, the costs of delay (a deferral of the benefits identified in the 2016 significant disproportionality regulations) must outweigh the benefits (reduced costs).

In response to those commenters, we provide the following additional analysis. We believe that many of the commenters misunderstood the potential effects of this delay. In a number of cases, it was apparent that commenters believed a delay in the compliance date would exempt States from making annual determinations regarding significant disproportionality and requiring LEAs identified with significant disproportionality from reserving 15 percent of their IDEA Part B funds for comprehensive CEIS. That is incorrect.

With this delay, States are still required to comply with the statutory requirements of IDEA, including an annual review for significant disproportionality. The delay in the compliance date only delays the date by which States would be required to implement the standard methodology. Further, States are still required to ensure that all children with disabilities are appropriately identified and receive a free appropriate public education in the least restrictive environment. To that end, we do not believe it is reasonable to assume that the full scope of "costs" identified by commenters will result from this regulatory action.

Indeed, in the 2016 significant disproportionality regulations, the Department identified five sources of benefits from the significant disproportionality regulations: (1) Greater transparency; (2) increased role for the State Advisory Panels; (3) reduction in the use of inappropriate policies, practices, and procedures; (4) increased comparability of data across States; and (5) expansion of activities allowable under comprehensive CEIS. As many commenters noted, several of these benefits have already started to accrue.

States have worked diligently since the publication of the 2016 significant disproportionality regulations to meet the original July 1, 2018, compliance date. As part of those efforts, they have involved a wide range of stakeholders, including their State Advisory Panels, to explore the issue of significant disproportionality and their current practices. Those efforts have greatly increased the transparency around State determinations and dramatically expanded the involvement of a diverse range of stakeholders, including State Advisory Panels and groups that had not historically been involved in special education issues.

<sup>2</sup> The Department has included a copy of all calculation spreadsheets supporting this analysis in the docket folder for this notice.

Further, nothing in this final rule would prohibit States and LEAs from using funds for comprehensive CEIS to serve children ages three through five and children with disabilities. As such, the only benefits we believe could be reasonably argued to be delayed as a result of this regulatory action would be the reduction in the use of inappropriate policies, practices, and procedures, and the increased comparability of data across States.

We recognize that several commenters noted that they would use the delay to provide additional technical assistance to their LEAs to proactively resolve issues before they were identified under the standard methodology. As such, while some inappropriate policies, practices, and procedures may not be revised as a result of fewer LEAs being identified with significant disproportionality during the period of the delay, we believe that the increased focus on these issues since the publication of the 2016 significant disproportionality regulations and State technical assistance efforts in the interim may actually minimize the effects thereof. As in the 2016 significant disproportionality regulations, we are unable to meaningfully quantify the economic impacts of these costs.

Several commenters argued that the delay in compliance date would result in confusion in the field and would require States to expend resources to clarify the regulatory environment for their LEAs and parents. While we recognize that a change in State plans for implementation will need to be communicated with LEAs and parents, we do not believe that such efforts would be exceptionally time-consuming given that most States that opt to delay implementation of the standard methodology will likely continue ongoing efforts to evaluate significant disproportionality.

Nonetheless, we have revised our estimates to include the efforts of one management analyst for 160 hours for each State that opts to delay their compliance with the 2016 significant disproportionality regulations. As discussed below, we estimate there will be 35 States in this group. We believe that this amount of time would be far more than sufficient to address any and all concerns and confusion on the part of LEAs and parents regarding any delay and likely represents an overestimate of the actual burdens faced by such States. The Department estimates that this will result in a cost of approximately \$249,980.

### *Benefits*

In the NPRM, the Department's estimated cost savings were based largely on an assumption of the number of States that would implement the standard methodology on July 1, 2018, the number that would implement on July 1, 2019, and the number that would implement on July 1, 2020. A number of commenters raised concerns with our estimates because, they argued, the estimates did not appropriately capture costs already borne by States to implement the standard methodology, regardless of whether they delay implementation. However, it is clear to the Department that these costs are properly considered sunk investments, that is, expenditures already incurred by entities that cannot be recovered in any case. Regardless of whether the Department delayed the required compliance date, States would be unable to recover those expenses, and therefore it would not be appropriate to assign their value as either a cost or benefit of this action.

However, we do note that nothing in this regulatory action invalidates the work already performed by States. States that are prepared to implement the standard methodology on July 1, 2018, remain able to do so, and those that delay implementation until a later date would not necessarily be required to recreate the work already completed. Nonetheless, the Department has made related adjustments to its cost estimates.

Specifically, while sunk investments are not appropriately considered as a "cost" of any regulatory action, we recognize that our initial estimates did assume that States delaying compliance until 2019 or 2020 would also delay all of their start-up activities as well. To the extent that these States, or a subset of them, have already completed some of these activities, we should not have calculated a cost savings based on delaying those activities for one or two years. While we cannot determine with absolute precision how many of these activities have already been completed by States given the information provided by the public, we will assume that approximately 50 percent of start-up activities for all States delaying implementation until 2019 or 2020 have already occurred, and therefore will not calculate any cost savings associated with their delay. In addition, several commenters stated that the Department's estimates regarding the number of States that would implement the standard methodology in each year inappropriately inflated the calculated savings by estimating more States would delay implementation than was

reasonable. Further, information received by the agency outside of this regulatory action, as well as other publicly available information, indicate that more than the 10 States initially estimated by the Department are likely to implement the standard methodology on July 1, 2018.

Given this information, the Department has revised its estimated number of States implementing the standard methodology in each year. While the public comment raised this issue, it did not provide information on how many States, or which specific States, will implement the standard methodology on any given timeline. Given that we do not otherwise have data with regard to this matter, we cannot estimate these numbers with absolute precision. While we believe it is likely that a significant subset of States will choose to delay implementation of the standard methodology given the new flexibility under this rule, our revised estimates assume that 20 States will implement the 2016 significant disproportionality regulations on July 1, 2018. We further assume 10 States will implement the standard methodology on July 1, 2019, with the remainder doing so on July 1, 2020, if the standard methodology is required by law then.

To the extent that more than 35 States take advantage of this new flexibility, these assumptions will result in an underestimate of actual cost savings of this final rule. For an analysis of the likely effect on the estimated cost savings of fewer States implementing the standard methodology on July 1, 2018, see the *Sensitivity Analysis* section of this document. In line with these revised estimates, we also estimate that 150 additional LEAs will be identified with significant disproportionality in Year 1, 220 in Year 2, and 400 in Year 3. Note that these assumptions are based on the number of States implementing the standard methodology in each year. At this time, the Department has received no information that would lead it to adjust its original estimated number of LEAs that would be identified in each year outside of a revision of the number of States.

Given the revised assumptions noted above, the Department now estimates that the rule will result in \$7.6 to \$8.0 million in gross cost savings (benefits) over ten years.

### *Transfers*

As noted in the NPRM, the Department's calculation of total transfers under the rule is based on the number of LEAs newly identified as

having significant disproportionality in each year and then multiplying that total by 15 percent of the average LEA allocation. To improve comparability of estimates and provide greater transparency for the public, the Department has not updated baseline assumptions regarding the average required reservation per LEA for comprehensive CEIS. Given the revisions to our estimates discussed above, the Department now estimates that this rule will result in a net reduction in transfers of between \$41.5 and \$43.8 million over a ten-year period.

*Sensitivity Analysis*

The Department’s estimated costs and benefits of this final rule are driven

largely by the estimated number of States that choose to implement the standard methodology in each year. As such, we have conducted an analysis to demonstrate the sensitivity of our estimates to these assumptions. In the table below, we note the estimated net cost savings, calculated at a 7 percent discount rate, for eight different scenarios. The scenarios are combinations of what we believe to be extreme upper and lower bound estimates of (1) the number of States implementing the standard methodology on July 1, 2018, and (2) the number of States delaying implementation for the full two years (until July 1, 2020).<sup>3</sup>

In addition to these extreme upper and lower bounds, we also provide estimates using the primary assumptions of the estimates described above. For the number of States implementing the standard methodology on July 1, 2018, we use an upper bound of 40 States and a lower bound of 15. For purposes of the number of States delaying implementation for the full two years, we use an upper bound which assumes all States not implementing on July 1, 2018 will delay the full two years and a lower bound which assumes that no States will opt to delay the full two years, but will only delay for a single year—until July 1, 2019.

TABLE 1—IMPACT ON ESTIMATED COSTS AT SEVEN PERCENT DISCOUNT RATE OF VARIED ASSUMPTIONS

|   | Number of States delaying for 2 years |                  |               |
|---|---------------------------------------|------------------|---------------|
|   | Upper bound                           | Primary estimate | Lower bound   |
| Number of States implementing standard methodology on July 1, 2018: |                                       |                  |               |
| Upper Bound .....   | (\$3,688,937)                         | †                | (\$2,074,891) |
| Primary estimate .....  | (8,391,391)                           | (7,361,007)      | (4,716,579)   |
| Lower Bound .....   | (9,729,101)                           | (8,115,057)      | (5,470,627)   |

† No estimate is provided as a combination of the upper bound estimate of the number of States implementing the standard methodology on July 1, 2018 (40), and the primary estimate of the number delaying until July 1, 2020 (25) is not possible.

As a result of these analyses, the Department believes it is reasonable to assume that, even when factoring in the potential unquantified costs of this action, this final rule represents a deregulatory action with net cost savings to regulated entities. We will further evaluate the analyses and assumptions upon which the cost-benefit calculations are made along with the regulations and issues raised in this rulemaking, to best ensure that all children with disabilities are appropriately identified, placed, and disciplined, and that all children get the services they need and receive FAPE in the least restrictive environment.

*Executive Order 13771*

This final rule is considered an E.O. 13771 deregulatory action. Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), we have estimated that this proposed regulatory action will not impose any net additional costs.

*Regulatory Flexibility Act Certification*

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

The U.S. Small Business Administration (SBA) Size Standards define “small entities” as for-profit or nonprofit institutions with total annual revenue below \$7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, LEAs, or special districts), with a population of less than 50,000. These regulations would affect all LEAs, including the estimated 17,371 LEAs that meet the definition of small entities. However, we have determined that the regulations would not have a significant economic impact on these small entities. As stated earlier, this regulatory action imposes no new net costs.

*Paperwork Reduction Act of 1995*

This regulatory action does not contain any information collection requirements.

*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.

*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**.

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You may also access documents of the Department published in the **Federal Register** by using the article search

<sup>3</sup> The number of States implementing the standard methodology in July 1, 2019 is a function

of the other two assumptions, and therefore does not need a separate range of assumptions.

feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**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.

Accordingly, the date of compliance for recipients of Federal financial assistance to which the regulations published at 81 FR 92376 (December 19, 2016) apply is delayed. Recipients of Federal financial assistance to which the regulations published at 81 FR 92376 apply must now comply with

those regulations by July 1, 2020, 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, 2022.

Dated: June 28, 2018.

**Johnny W. Collett,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

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