National Association of State Directors of Special Education, Inc.
225 Reinekers Lane, Suite 420, Alexandria, VA 22314
Tel: 703/519-3800 Fax: 703/519-3808 www.nasdse.org

May 16, 2016

Kristen Harper
U.S. Department of Education
550 12th Street, SW, Room 5109A
Potomac Center Plaza
Washington, DC 20202-2600

Docket ID ED-2015-OSERS-0132

Dear Ms. Harper:

On behalf of the National Association of State Directors of Special Education (NASDSE), I thank you for the opportunity to respond to the Notice of Proposed Rulemaking published in the Federal Register on March 2, 2016 regarding disproportionality in the identification and placement of students for special education under the Individuals with Disabilities Education Act (IDEA).

NASDSE represents the Part B state directors of special education, the Part B data managers and the 619 coordinators in the states, the District of Columbia, the federal territories, the Freely Associated States and the Department of Defense Education Agency. Our comments reflect input gathered from all three of these groups – the entities responsible for implementation of the regulation -- through extensive conversations that we have conducted since the NPRM was published.

NASDSE members recognize the importance of correctly identifying children and youth with disabilities, meeting their needs in the least restrictive environment through carefully crafted and implemented Individualized Educational Programs (IEPs) and ensuring that that these students are not disproportionately removed from their educational setting due to disciplinary action. It is equally important to ensure that all students, regardless of race or ethnicity, are not disproportionately and inappropriately identified as having a disability that results in limiting their access to the general education classroom. To successfully address these issues, general and special education programs and personnel will have to work together as resolving these issues deserve – and require – the attention of all school personnel as well as integration at the state level.

The reauthorization of IDEA in 2004 introduced the concept of comprehensive early intervening services to require the use of federal IDEA funds to meet the needs of students not yet identified as having a disability as an approach to addressing these issues. While local education agencies (LEAs) could voluntarily divert up to 15% of their federal funds to meet the needs of these students, LEAs that were found to have significant issues of disproportionality by their state education agency (SEA) were required to divert 15% of their federal funds for this purpose.

Since 2004, many state education agencies (SEAs) and local education agencies (LEAs) have worked to implement strategies using tools such as response to intervention (RTI), positive behavior instructional supports (PBIS), universal design for learning (UDL) and a multi-tier system of supports (MTSS) to reduce the number of inappropriate and/or over-identification of students who need services under IDEA. While some progress has been made to address these issues, there are no quick fixes to resolve deeply ingrained issues in our educational system that have to do with poverty, race, cultural competencies and the expectation that most students with disabilities can and should be educated in a general education setting and taught to high expectations. Couple these issues with a chronic lack of funding on the part of federal, state and local governments for education (see e.g., pending lawsuit in Kansas regarding funding) and teacher preparation that is not linked to the classrooms of today and it becomes apparent that CEIS alone cannot and will not solve the issue of disproportionality. It is but one tool in a toolbox that needs to be filled with a whole host of methodologies.

The previous CEIS requirements created some challenging implementation issues that the law and implementing regulations failed to address, including (1) the acknowledgement that environmental factors (e.g., high incidences of fetal alcohol syndrome in a community) might be having a disproportionate impact on identification; (2) some LEAs (e.g., charter schools acting as an LEA) might only serve students with disabilities or some LEAs might be home to a residential facility; (3) the under-identification of minority students due to the makeup of the LEA community as a whole; and/or (5) that the law called for the use of limited federal funds designed to meet the needs of students with IEPs to be diverted to serve students without disabilities.

We are pleased that the proposed regulation specifically addresses some of these problems yet other concerns remain with the proposed regulation. Our comments that follow will first address some overall issues and then address the specific questions raised by the NPRM.

General Comments

- We note that there appear to be two reasons for the NPRM: (1) to adopt a uniform risk ratio and (2) to reduce the incidence of disproportionality. Unfortunately, throughout the NRPM, the Department lists the purpose of this regulation in that order, e.g., adopting a uniform risk ratio and *then* (emphasis added) (2) reducing disproportionality. We are concerned about this emphasis on uniform data collection over developing systems to address the issues. Unfortunately, the adoption of a uniform risk ratio across all states, in and of itself, will do nothing to reduce disproportionality. Comparisons among states will not result in meaningful discussions or problem-solving.

  To reduce disproportionality, SEAs and LEAs must adopt policies and practices that address specific issues in their states and local communities. For example, some communities have high numbers of immigrants from a specific corner of the world. The need of the LEA to address those specific cultures is critically important in those LEAs, but perhaps not in other LEAs that do not have high concentrations of a particular ethnic or cultural group. Some states have LEAs specifically created to meet the needs of students with disabilities. It is not clear how a uniform risk ratio would address this issue.

  The emphasis on using a uniform method of data analysis fails to take into account vast differences in the sizes and student characteristics of LEAs. In addition, some LEAs have residential programs (where the program is counted under the LEA where it is located) where students may be placed by the courts or by parents or large medical

facilities where children may be living for extended periods of time or where parents choose to move into a district where such a facility is located. Similarly, it is not clear how a uniform risk ratio would address schools specifically designed to meet the needs of students with a specific disability.

We urge that the final regulation recognize that some flexibility is required to address these issues, which the proposed risk ratio alternate risk ratio cannot. We also urge the Department to put the emphasis in the final regulation where it belongs – on addressing disproportionality and recognizing that the use of a risk ratio is but one of many tools that SEAs and LEAs can, and should, use to address these concerns.

In addition we recommend that the Department hold a series of consultations to obtain input into implementation of alternative strategies that can be effective in reducing disproportionality.

- NASDSE members support the expansion of comprehensive early intervening services (CEIS) both to children ages 3-5 and to students with disabilities. However, the regulation is not clear as to whether Part B funds will be used for all CEIS, including services to 3-5 year olds, or whether 619 funds can be used to address this group of young children. In addition, NASDSE is unsure whether the Department has the authority to extend CEIS to 3-5 year olds. Section 618(d)(2)(B), which addresses mandatory CEIS explicitly refers back to Section 613(f), which states:

  > …A local educational agency may not use more than 15 percent of the amount such agency receives under this part… to develop and implement coordinated, early intervening services…*for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3)….* (emphasis added).
  >
  > There is no additional definition of CEIS in Section 618 of the students to be served. NASDSE would like further clarification on this from the Department.

- NASDSE members support the proposal to leave the risk ratio threshold up to the states.

- NASDSE supports the Department's proposal that states would have the flexibility to identify as having significant disproportionality only those LEAs that exceed their risk ratio threshold(s) for up to three prior consecutive years.

- In response to a question posed by the NPRM, NASDSE encourages the Department to allow states to establish different risk-ratio thresholds for each of the three categories of analysis required by the proposed regulations: identification, placement and disciplinary action.

- Uniformly, our members believe that a cell size of 10 is too small and will result in misidentifying LEAs where there are small numbers of students in a given group. While the cell size of 10 is in current use by a number of states, the states not currently using that cell size believe it won't work, particularly in very small school districts, because it will make districts with one student identified in a category appear to have a very high risk, when in fact, it is only one student compared to a small enrollment count. We urge

the Department to either allow for increases in the cell size and/or permit states to use the cell size in both the numerator and the denominator.

- The 619 coordinators note that in general, there is no mechanism in the states to collect data on discipline related to 3-5 year olds across the board (e.g., from private pre-schools) and where there is data, it is not reliable. While NASDSE understands concerns related to inappropriate removal of 3-5 year-olds from their pre-school program, we recommend that before implementing a regulation that addresses this concern that the Department work with states to address how better data could be gathered given the fragmented system of early childhood programs that exists throughout the country.

- It is important to note that we live in a mobile society and many LEAs will 'inherit' students who are already on IEPs. This may affect their 'count' of students and the regulation should address how to handle this issue.

- Our members had specific concerns about calculations made by the Department in its supplemental documentation regarding the identification of LEAs in states. State staff told us across the board that they were unable to duplicate the Department's calculations and the Department was unwilling to share how the calculations were made. We are concerned that the calculations made by the Department may not accurately reflect the true status of disproportionality in states and we urge the Department not to rely on those data in making decisions about the true nature of disproportionality in a state.

- We have special concerns about the amount of staff time that will needed to implement the regulation. Some SEA special education departments simply do not have the number of staff the Department suggests are needed and there are no additional funds being made available to SEAs for the increase in workload. It is not clear where or how the Department expects small SEAs to come up with the staff to undertake this work. We therefore recommend that the Department work with those states or entities with limited staff support to help them implement the requirements of the proposed regulation. In the past, states and entities could rely on the Regional Resource Centers to provide additional 'staff time' to undertake fulfillment of the responsibilities of IDEA. With the elimination of the RRCs, we suggest that some of the currently funded data technical assistance centers be tasked with making members of their staffs available to support the states and other entities to undertake this work.

Specific Issues Regarding the Use of a Risk Ratio

- 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. One example is with discipline rates where comparing two very low discipline rates (risks) for students with disabilities and nondisabled students can result in a high risk ratio. States should be allowed the flexibility to add additional criteria above and beyond the risk ratio and minimum cell size thresholds in order to avoid identifying significant disproportionality that is simply a result of small numbers.

- In addition to the minimum cell size concerns, it is not clear if there is an expectation as to which counts to include in the denominator of the risk calculations. Some states may use an enrollment count that is collected closer to the special education child count date,

while others use the fall enrollment counts. For the discipline calculations, some states may use a cumulative count of students rather than a snapshot count. States should be allowed to use the denominators that most closely align with the numerators of the risk calculations. Alignment refers to both the timing of the counts as well as the inclusion/exclusion of certain groups of students (e.g., parentally-placed private school students, children ages 3-5, students receiving transition services, etc.).

- Flexibility is also requested for LEAs with group homes, facilities, special programs, etc., where students with disabilities are publicly placed. States should be allowed the flexibility to add additional criteria above and beyond the risk ratio and minimum cell size thresholds in order to avoid false positives based on public placements or unusual group home situations.

- In the description of states' current practices, the minimum cell sizes used by states was addressed, however, it wasn't clear whether the minimums were applied to the numerator or denominator of the risk calculations. In discussion with several states, it appears that many states are applying the minimum criteria to the numerator of the risk calculation, not the denominator as selected in the proposed rule. Using a minimum of 10 for the denominator of the risk calculation for the reference group allows very small groups of students, with potentially only one identified student, to result in the LEA appearing to have significant disproportionality.

- Without the adoption of a numerator 'n size' criterion in the disproportionality analysis, there is an increased likelihood that an effect size (risk ratio) will not be statistically significant. Therefore, in the absence of a numerator 'n size' criterion, states will need to conduct follow-up analyses of statistical significance. Allowing states to apply the minimum cell size checks to the numerator of the risk calculations for both the reference group and the comparison group would eliminate the incidence rate issues described above and would ensure that the risk calculations are based on a sufficient, meaningful number of identified students. Applying the cell size to the numerators of the risk calculations would also eliminate the need for the alternate risk ratio calculation which would simplify the explanations of the calculations. The alternate risk ratio uses the state's risk for the comparison group when the comparison group for the LEA is either too small or has zero risk, but the racial/ethnic composition of many of these LEAs is nothing like the state's composition, which is why they don't have sufficient numbers to calculate a risk.

- Since the enactment of CEIS in IDEA 2004, states have seen unintended consequences of false positives at the LEA level. For example, one state reported that in the first year after it implemented LEA-level identification of significant disproportionality, it started with criteria somewhat like that currently proposed by the proposed rule, although a minimum cell size of 10 was applied to both numerator and denominator. After identifying approximately 30 LEAs for identification alone, state staff heard of districts telling parents that there now were quotas for identification, and no more minorities could be identified. The same state had districts appealing their student-level demographic data, providing pictures of students and questioning the ethnicity that parents had reported for their children. Thus it is important that a 'number,' alone should not be the sole calculation of disproportionality in every case.

Additional Recommendations

- NASDSE recommends that the top priority of the proposed regulation should be to address disproportionality. The implementation of a uniform risk ratio will not meet this goal. We recommend that the Department allow states the flexibility to use an alternate calculation with the submission of documentation as to why its proposed alternate approach will work better for that state.

- The proposed regulation is addressed to special educators and not the education community at large. Solutions such as better teacher training, infusing cultural competency into teacher preparation programs, expanding evidence-based practices as noted above will, in the long run, be more effective in reducing disproportionality. NASDSE recommends that the Department establish a workgroup to make recommendations for researching how to address common issues and methods to help all states impact change.

- NASDSE recommends that OSEP works with states to help them identify the root causes of disproportionality – which may differ from LEA to LEA within a state so that appropriate responses can be implemented.

- NASDSE recommends that states be allowed to define 'reasonable progress' on the part of LEAs to lower their risk ratios. This is because some LEAs may have issues that can be reasonably addressed while other LEAs may have more significant problems that cannot all be resolved in a very short period of time.

Responses to Questions Raised in the NPRM

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

   States need the flexibility to determine if disproportionality is due to placement in a group home by an outside agency (e.g., a juvenile court), schools established to serve a specific disability (e.g., charter schools designed to serve students with autism or dyslexia) or in LEAs served by a major medical center that attracts families with children with specific health care needs. In addition, there are population pockets with clusters of students – often minority students – with specific health and/or academic needs (we note the specific challenges in some rural communities with disproportionate numbers of children have chronic health issues (e.g., fetal alcohol syndrome and the looming issue of children exposed to lead in drinking water in Flint, MI are but two examples). A risk ratio or alternate risk ratio alone will raise red flags about over-identification and NASDSE urges the Department to allow the use of alternate strategies to address these and other programs designed specifically to address community needs.

2. The Department is particularly interested in comments regarding strategies to address the shortcomings of the risk ratio method, which the Department has proposed to require States to use to determine significant disproportionality.

   The risk ratio method is a fairly basic calculation that has a definite advantage in being easy to explain and duplicate. However, using the risk ratio alone, without adequate

minimum cell sizes and/or additional significance testing will result in many LEAs being identified as having significant disproportionality when the disproportionality is due to small numbers of identified/placed/disciplined students, and is certainly not significant. 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. One example is with discipline rates where comparing two very low discipline rates (risks) for students with disabilities and nondisabled students can result in a high risk ratio. States should be allowed the flexibility to add additional criteria above and beyond the risk ratio and minimum cell size thresholds in order to avoid identifying significant disproportionality that is simply a result of small numbers. Using a minimum of 10 for the denominator of the risk calculation for the reference group allows very small groups of students, with potentially only one identified student, to result in the LEA appearing to have significant disproportionality, according to the proposal. Without the adoption of a numerator 'n size' criterion in the disproportionality analysis, there is an increased likelihood that an effect size (risk ratio) that meets some criterion magnitude will not be statistically significant (i.e., the effect is likely to have occurred by chance).

3. The Department has proposed to require States to determine whether there is significant disproportionality with respect to the identification of children as children with intellectual disabilities, specific learning disabilities, emotional disturbance, speech or language impairments, other health impairments, and autism. Because the remaining impairments described in section 602(3) of IDEA typically have very small numbers of children, the Department does not deem disproportionality in the number of children with these impairments to be significant. Similar to impairments with small numbers of children, should the Department exclude any of the six impairments included in the proposed § 300.647(b)(3)? If so, which impairments should be removed from consideration? Alternatively, should the Department include additional impairments in § 300.647(b)(3)?

   NASDSE believes that the category of autism should not be included. These students often arrive at school with a medical diagnosis and while that diagnosis would not automatically qualify a student for IDEA services, in most cases these students will need additional supports and/or services to participate fully in school alongside of their peers. exclude the other, lower incidence disabilities from inclusion in the calculations.

4. Consistent with OSEP Memorandum 08–09, the Department has proposed to require States to determine whether there is significant disproportionality with respect to self-contained classrooms (*i.e.,* placement inside the regular classroom less than 40 percent of the day) and separate settings (*i.e.,* separate schools and residential facilities), as these disparities suggest that a racial or ethnic group may have less access to the LRE to which they are entitled under section 612(a)(5) of IDEA. Should the Department also require States to determine whether there is significant disproportionality with respect to placement inside the regular classroom between 40 percent and 79 percent of the day, as proposed in this NPRM?

   No. The range from 40% to 79% is a wide spread that encompasses anywhere from 2.4 to 4.7 hours per 6 hour day inside the regular classroom. While only 2.4 hours in the regular classroom may be more restrictive, 4.7 hours may not be; therefore, this category is difficult to categorize other than that it is in the middle of total inclusion and total removal. Therefore, NASDSE asks the Department to remove the 40-79%

category from the placements that states are required to review for significant disproportionality purposes.

5. We seek the public's perspective on whether a federally-mandated threshold is appropriate and, if so, what that threshold should be.

   NASDSE believes that federally mandated thresholds should not be required. Given the statutory and fiscal consequences associated with being identified as having significant disproportionality, states need to be able to document their selected risk ratio threshold(s) to both OSEP and to all stakeholders in the state. Therefore it is critical that states be able to determine their own thresholds, in conjunction with stakeholders. These thresholds should be selected on their ability to identify "significant" disproportionality.

6. The Department has proposed to require States to make a determination of whether significant disproportionality exists in each LEA, for each racial and ethnic group with 10 children (for purposes of identification) and 10 children with disabilities (for purposes of placement and discipline). Does the Department's proposed minimum cell size of 10 align with existing State privacy laws, or would the proposal require States to change such laws?

   NASDSE is concerned that a minimum cell size of 10 is too low to produce statistically significant or even reliable determinations of significant disproportionality. Given that, there does not appear to be any requirement that states make the data utilized in the risk ratio calculations publically available. A state could do the calculations without publishing the data and violating privacy laws. A more pertinent question would be how the minimum cell size of 10 aligns with states' use of data for accountability purposes. Since a designation of significant disproportionality has statutory and fiscal consequences, states should have the flexibility of utilizing minimum cell sizes that align with minimum cell sizes utilized for accountability calculations/rules.

7. The Department has proposed to require that States use the alternate risk ratio method only in situations where the total number of children in a comparison group is less than 10 or the risk to children in a comparison group is zero. Are there other situations, currently not accounted for in the proposed regulations, where it would be appropriate to use the alternate risk ratio method? In these situations, should the Department require or allow States the option to use the alternate risk ratio method?

   NASDSE believes that the use of an alternate risk ratio may be appropriate in some situations but that other methodologies may also prove to be more useful in some states. NASDSE urges that the final regulation provide flexibility and 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 demonstrate the effectiveness of an alternate calculation. Again, we iterate that the primary purpose of the regulation should be to identify disproportionality and that alternate strategies may exist in some states that can be effective in doing so, even if they are not a risk ratio.

8. The Department is interested in seeking comments on how to require entities, whose population is sufficiently homogenous to prevent the calculation of a risk ratio or alternate risk ratio, to identify significant disproportionality.

   NASDSE would refer you to our response to Question 7 above and allow the use of alternate calculations to identify instances of over- or under-identification because, where no comparison group exists; it is not possible to get valid and reliable data by using a risk ratio or alternate risk ratio calculation. NASDSE specifically takes issue with a proposal by the Consortium for Citizens with Disabilities that suggests comparisons to

a national average. We suggest, rather, that it is incumbent upon states, through their oversight responsibilities, to ensure that LEAs are properly identifying and assessing students and providing appropriate services through IEPs.

9. The proposed regulation permits States to set different risk ratio thresholds for different categories of analysis (*e.g.,* for intellectual disabilities, a risk ratio threshold of 3.0 and for specific learning disabilities, a risk ratio threshold of 2.0). The Department is interested in seeking comments on whether the proposed regulation should include additional restrictions on developing and applying risk ratio thresholds. Should the Department allow or require States to use another approach in developing and applying risk ratio thresholds? Are there circumstances under which the use of different risk ratio thresholds for different racial and ethnic groups (within the same category of analysis) could be appropriate and meet constitutional scrutiny? Further, are there circumstances under which the use of different risk ratio thresholds for different categories of analysis could result in an unlawful disparate impact on racial and ethnic groups?

   NASDSE does not believe that it is necessary, nor desirable, to set different risk ratio thresholds for different racial or ethnic groups of students. It would make transparency difficult and the big picture of issues could get lost in the complex data analysis. However, we do recommend that SEAs might use different thresholds for the different categories of analyses.

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

    NASDSE does not believe that additional restrictions on a state's flexibility to define 'reasonable progress' are necessary. Additionally, quantifying these terms would be nearly impossible based on the number of states and school districts with varying circumstances such as: LEAs with group homes, facilities, special programs, etc. where students with disabilities are publicly placed or where there are LEAs with charter schools (or charter schools functioning as LEAs) who attract specific subgroups of students. Many students with disabilities enroll in charter schools having been identified in a different school, often to take advantage of the charter school's focus on special education services.

11. The Department specifically requests comments on how to support SEAs and LEAs in preventing under-identification, and ways the Department could ensure that LEAs identified with significant disproportionality with respect to identification properly implement their States' child find policies and procedures. What technical assistance or guidance might the Department put in place to ensure that LEAs identified with significant disproportionality do not inappropriately reduce the identification of children as children with disabilities or under-identify children of color in order to avoid a designation of significant disproportionality? How could States and LEAs use data to ensure that children with disabilities are properly identified?

NASDSE has had significant concerns from the initial implementation of CEIS regarding the under-identification of students in certain disability categories, which in some cases could only have been resolved by inviting new families into a community. We are pleased that the proposed regulation recognizes the problems inherent with a requirement to address under-identification. We also believe the focus should be on proper referral, evaluation, placement, and provision of services to students eligible for special education. One way of ensuring that LEAs do not inappropriately reduce identifications in order to avoid a designation of significant disproportionality is to allow states to utilize appropriate cell sizes, risk ratio thresholds and significance testing that will ensure that districts are not identified inappropriately. Another alternative would be to not require the use of CEIS based on the data alone and we believe that the proposed regulation does address this concern. As we have noted above, strategies that include professional development, widespread use of multi-tiered systems of support, positive behavioral supports can all help address ingrained issues that result in disproportionality. Understanding the importance of having a full complement of specialized instructional support personnel to ensure services are available to all students would also be helpful.

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

    NASDSE believes that the Department should not place restrictions on the use of funds for comprehensive CEIS for students who are already receiving services under Part B of IDEA. We believe that by expanding CEIS to include students with disabilities, funds can be used to ensure that they are receiving appropriate services and supports. This may include professional development, the expanded use of technology, ensuring that behavior plans are in place and appropriately implemented, implementing or expanding the use of positive behavior supports and/or a multi-tiered system of supports. NASDSE believes that it is important that strategies are targeted and aligned to specific needs and we remain concerned that additional restrictions may hinder the implementation of appropriate strategies.

13. The Department intends to monitor and assess these regulations once they are final to ensure they have the intended goal of improving outcomes for all children. What metrics should the Department establish to assess the impact of the regulations once they are final?

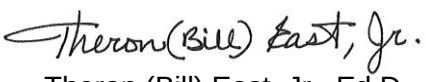
    NASDSE believes that is important to look at baseline data once an LEA is identified and the progress that the LEA makes over the three-year period of evaluation by the SEA. We do not support the use of any metrics that would compare LEAs to each other or states to each other as both LEAs and SEAs are starting at different points. Small changes may be all that is needed in one community while other LEAs would require more comprehensive initiatives.

NASDSE's Affinity Group of Data Managers has prepared a document that specifically addresses some of the concerns related to the proposed calculation and use of a risk ratio. We append these comments to the comments in this document that were gathered from the sources cited above – the Part B state directors, the 619 Coordinators and the data managers.

Again, NASDSE thanks you for the opportunity to comment on this proposed regulation and we look forward to working with the Department to ensure its successful implementation. Please

feel free to contact me at bill.east@nasdse.org or Nancy Reder at nancy.reder@nasdse.org if you have any questions regarding our comments.

Sincerely,



Theron (Bill) East, Jr., Ed.D.
Executive Director

APPENDIX

White Paper on Significant Disproportionality
Prepared by the Part B Data Managers Affinity Group at NASDSE

This white paper, which was put together by the NASDSE Data Managers Affinity Group, focuses primarily on the data/calculations/thresholds in the Notice of Proposed Rulemaking issued by the U.S. Department of Education. Note that text in italics is also included in the responses to the Directed Questions at the end of the document.

Use of risk ratio/alternate risk ratio, data sources and cell size (denominator versus numerator):

- The proposed regulations would require states to use a standard methodology to identify significant disproportionality in the state and in its local education agencies (LEAs), including the use of a risk ratio or, if appropriate given the population in the LEA, an alternate risk ratio.

- The Department of Education found that a number of states restrict their assessment of significant disproportionality to include only those LEAs that have sufficient numbers of children to generate stable calculations. When an LEA has a particularly small number of children in a particular racial or ethnic group, relatively small changes in enrollment could result in large changes in the calculated risk ratio. Given the statutory consequences associated with being identified as having significant disproportionality, states have sought to minimize such large variations based on small changes in enrollment.

  Comments
  - *The risk ratio calculation is a relatively simple calculation to explain to LEAs and other stakeholders. However, the calculation needs to be paired with appropriate minimum cell sizes in order to reduce the likelihood of identifying districts as significantly disproportionate based on very small numbers of identified students.*
  - *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. One example is with discipline rates where comparing two very low discipline rates (risks) for students with disabilities and nondisabled students can result in a high risk ratio. States should be allowed the flexibility to add additional criteria above and beyond the risk ratio and minimum cell size thresholds in order to avoid identifying significant disproportionality that is simply a result of small numbers.*
  - *Flexibility is also requested for LEAs with group homes, facilities, special programs, etc., where students with disabilities are publicly placed. States should be allowed the flexibility to add additional criteria above and beyond*

the risk ratio and minimum cell size thresholds in order to avoid false positives based on public placements or unusual group home situations.

- Some states request the flexibility of using new identifications each year, rather than what amounts to legacy data for approximately 90% of the identified students. This would result in LEAs being identified as having significant disproportionality due to recent practice which would make the implementation of CEIS a more meaningful endeavor.
- *How does school choice interact with significant disproportionality? One state has nearly 400 charter schools, which may attract students of specific subgroups. Most students with disabilities enroll in the charter schools having been identified elsewhere, and often to take advantage of the school's focus on special education services. It is unclear how these schools could use the CEIS set-aside to prevent unnecessary identification.*
- *In the description of states' current practices, the minimum cell sizes used by states was addressed, however, it wasn't clear whether the minimums were applied to the numerator or denominator of the risk calculations. In discussion with several states, it appears that many states are applying the minimum criteria to the numerator of the risk calculation, not the denominator as selected in the proposed rule. Using a minimum of 10 for the denominator of the risk calculation for the reference group allows very small groups of students, with potentially only one identified student, to result in the LEA appearing to have significant disproportionality, according to the proposal.*
- *One state's analysis of data found that, in regard to statistical power, when below a denominator of 20, at least six students were needed in the numerator to get to a power of 0.8 (the standard level that's considered 'good'). What this shows most generally is that numerator n size is relevant, too, and it's fair to ask for a numerator 'n size' criterion instead of, or in addition to, a denominator criterion. A minimum cell size of 10 in the numerator would potentially result in less false positives.*
- *Without the adoption of a numerator 'n size' criterion in the disproportionality analysis, there is an increased likelihood that an effect size (risk ratio) that meets some criterion magnitude will not be statistically significant (i.e., the effect is likely to have occurred by chance). Therefore, in the absence of a numerator 'n size' criterion, it would be important for a state to conduct follow-up analyses of statistical significance (e.g., using Fisher's exact test or other appropriate tests) when risk ratios are found that surpass the state's risk ratio threshold. Supporting this, both 1) effect size and 2) statistical significance appear to have been important considerations of the Elementary & Middle School Technical Assistance Center (EMSTAC), a former OSEP-funded technical assistance center, and the Department of Education's Office for Civil Rights. This is evident from the following description of disproportionality analysis retrieved from EMSTAC's website at http://www.emstac.org/registered/topics/disproportionality/faqs.htm:*

- *"The Department of Education's Office for Civil Rights (OCR) undertakes pro-active compliance reviews of disproportionate representation. This office gathers information on the racial breakdown of general and special education enrollments in districts and states. If disparities occur in these data, OCR conducts statistical analysis using either the chi-square, fisher-exact, or Z-test to determine whether the data disparities have statistical significance."*

- *When disparities were found, it is clear that the Department of Education followed up with assessments of the statistical significance of those disparities. In contrast, the present proposal does not appear to grant states the latitude to include statistical significance testing in their disproportionality assessments; the present proposal appears to instruct states to focus only on the size of the disparity. Numerator 'n size' criteria and/or statistical significance thresholds both decrease the likelihood of identifying disproportionality when results are likely to have occurred by chance, and states should be granted the latitude to utilize these tools.*

- *Incidence rates by disability category should be considered when establishing a minimum cell size in order to not misidentify an LEA as having significant disproportionality when in fact the identification is based on a very small number of identified students. The table below shows the statewide incidence rates for one state. The enrollment column then shows the minimum number of enrolled students necessary to prevent the identification of one student from making an LEA appear to have significant disproportionality. For example, based on the table below, the state's incidence rate for students with intellectual disabilities (ID) is 1.08%. If an LEA only had one student identified as ID, but had an enrollment less than 93 students, the incidence rate (or risk for the reference group) would automatically be higher than the average, simply due to the small number of students enrolled. Using a minimum cell size of 10 in the denominator will make districts with one student identified in a category appear to have a very high risk, when in fact, it is only one student compared to a small enrollment count.*

	Incidence Rates	*Minimum Enrollment**
ID	*1.08%*	*93*
ED	*0.72%*	*139*
Sp/Lang	*3.20%*	*31*
LD	*3.39%*	*29*
OHI	*2.49%*	*40*
Autism	*1.09%*	*92*
Total	*12.71%*	*8*

  - **Minimum enrollment is minimum number of students necessary in the denominator of the risk calculation to avoid having one student in the numerator*

produce a very high risk for the reference group. For example, one Hispanic ID student out of 93 Hispanic students enrolled results in an incidence rate (or risk) of 1.08%, while one Hispanic ID student out of 10 Hispanic students enrolled results in an incidence rate (or risk) of 10%.

- *Allowing states to apply the minimum cell size checks to the numerator of the risk calculations for both the reference group and the comparison group would eliminate the incidence rate issues described above and would ensure that the risk calculations are based on a sufficient, meaningful number of identified students. Applying the cell size to the numerators of the risk calculations would also eliminate the need for the alternate risk ratio calculation which would simplify the explanations of the calculations. The alternate risk ratio uses the state's risk for the comparison group when the comparison group for the LEA is either too small or has zero risk, but the racial/ethnic composition of many of these LEA's is nothing like the state's composition, which is why they don't have sufficient numbers to calculate a risk.*
- *One state has multiple examples of LEAs that would be identified as having significant disproportionality for identification when using the minimum cell size of 10 students enrolled. The vast majority of those potentially identified LEAs have fewer than 10 students in the racial/ethnic group and disability category, and many have only one student identified. Across three years, one identified student (potentially the same student each year) had the power of producing very high risks due to the small number of enrolled students.*
  - In addition to the minimum cell size concerns, it is not clear if there is an expectation on which counts to include in the denominator of the risk calculations. Some states may use an enrollment count that is collected closer to the special education child count date, while others use the fall enrollment counts. For the discipline calculations, some states may use a cumulative count of students rather than a snapshot count. States should be allowed to use the denominators that most closely align with the numerators of the risk calculations. Alignment refers to both the timing of the counts as well as the inclusion/ exclusion of certain groups of students (e.g., parentally-placed private school students, children ages 3-5, students receiving transition services, etc.).
- Over the past ten years, states have seen unintended consequences of false positives at the LEA level. In the first year that one state implemented LEA level identification of significant disproportionality, it started with criteria somewhat like that currently proposed by the proposed rule, although a minimum cell size of 10 was applied to both numerator and denominator. After identifying approximately 30 LEAs for identification alone, state staff heard of districts telling parents that there now were quotas for identification, and no more minorities could be identified. The same state had districts appealing their student-level demographic data, providing pictures of students and questioning the ethnicity that parents had reported for their children.

Risk Ratio thresholds:

- NPRM: States may select risk ratio thresholds appropriate to their individual needs, provided that: (a) the thresholds are reasonable and (b) the thresholds are developed based on advice from stakeholders, including State Advisory Panels. Further, risk ratio thresholds would be subject to Department monitoring and enforcement for reasonableness.

Comments

- The risk ratios used in the Racial and Ethnic Disparities in Special Education document appear to be fairly low for some categories, especially when used to identify significant disproportionality, as opposed to any level of disproportionality. It appears that the example thresholds were derived from all races/ethnicities, not just the minority races/ethnicities that are the focus of the equity concern.

Use of up to three years:

- NPRM: Although States would still be required to calculate risk ratios for their LEAs to determine significant disproportionality on an annual basis, States would have the flexibility to identify as having significant disproportionality only those LEAs that exceed their risk ratio threshold(s) for up to three prior consecutive years.

Comments

- This flexibility is appreciated.

Reasonable progress:

- NPRM: We also propose to allow States not to identify LEAs that exceed the risk ratio threshold if they are making reasonable progress, as determined by the State, in lowering risk ratios from the preceding year.

Comments

- Please allow states to determine the amount of reduction in risk ratios that would be considered reasonable.

Inclusion of 3-5 year olds in Identification:

- NPRM: Identification of children ages 3 through 21 as children with disabilities (page 10978)

Comments

- The denominator of the risk calculation for identification categories is LEA enrollment. In states that do not have universal pre-K programs, there is often not a reliable pre-K count that could be used as a proxy for enrollment. Also, many states use similar calculations for significant disproportionality and disproportionate representation (SPP/APR indicators 9 and 10), and the SPP/APR requirements includes only ages 6-21.
- Consider changing the age range for the identification categories to 6-21 to align with enrollment counts and the SPP/APR requirements for Indicators 9 and 10.

Use of 40-79% placements:

- NPRM: Placements including (1) Children ages 6-21 inside a regular class less than 40 percent of the day, (2) Children ages 6 through 21 inside a regular class no more than 79 percent of the day and no less than 40 percent of the day, (3) Children ages 6 through 21 inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities or private schools (page 10978).

Comments

- *The range from 40% to 79% is a wide spread that encompasses anywhere from 2.4 to 4.7 hours per 6 hour day inside the regular classroom. While only 2.4 hours in the regular classroom may be more restrictive, 4.7 hours may not be; therefore, this category is difficult to categorize other than that it is in the middle of total inclusion and total removal. Therefore, please consider removing the 40-79% category from the placements that states are required to review for significant disproportionality purposes.*

Discipline:

- NPRM: 1) Children ages 3 through 21 in out-of-school suspensions and expulsions of 10 days or fewer, 2) Children ages 3 through 21 in out-of-school suspensions and expulsions of more than 10 days, 3) Children ages 3 through 21 in in-school suspensions of 10 days or fewer, 4) Children ages 3 through 21 in in-school suspensions of more than 10 days, 5) Disciplinary removals in total (page 10978).

Comments

- For SPP Indicator 4B, states are allowed to either use a comparison within districts (students with disabilities to nondisabled students) or across districts (students with disabilities only). If a state uses the comparison within districts for both Indicator 4B and current significant disproportionality calculations, is it acceptable to continue to do so under the proposed rule?
- State or LEA regulations or policies that require a student be removed when a weapon or drugs are brought to school will impact discipline data and cannot be controlled by the district. This is another good reason to apply a minimum cell size to the numerator of the reference group's calculation instead of the denominator, so that a small number of incidents won't automatically make an LEA appear to have significant disproportionality in discipline rates.
- LEA that may remove a child for a three day in-school suspension and address the issue properly through IEP revision/services would be "dinged" in the same manner as another LEA that continues to remove a student resulting in more than a 10 days' suspension with no change in IEP/services to address student needs.
- What if low discipline rates for students with disabilities and nondisabled students still result in a high risk ratio? Can states be allowed the flexibility to determine that low rates of removals are "reasonable progress" or can low rates of removals be sufficient reason to remove an LEA from the calculations/analysis?

Monitoring and assessing of regulations:

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

Comments

- *An appropriate metric would include established baseline and progress data across states to monitor and assess the impact of these regulations. It would not be appropriate to utilize this data in any ranking, or results based accountability ratings or determinations based on established cut points or national averages.*

One More Issue

- In the proposed regulations, the word "over-identified" is used as a universal term. Use of that term could lead people's minds solely to identification when it also should mean discipline and placement. We suggest using the word "overrepresented" to avoid confusion.

Directed Questions

The Department seeks additional comment on the questions below.

(1) The Department notes that a number of commenters responding to the RFI expressed concern that the use of a standard methodology to determine significant disproportionality may not be appropriate for certain types of LEAs. How should the proposed standard methodology apply to an LEA that may be affected by disparities in enrollment of children with disabilities (*e.g.,* LEAs that house schools that only serve children with disabilities and school systems that provide specialized programs for children with autism or hearing impairments, etc.)?

- States need the flexibility to determine if disproportionality is due to group homes, facilities, special programs, etc., where students with disabilities are publicly placed, or where there are special programs for students with disabilities. States should be allowed the flexibility to add additional criteria above and beyond the risk ratio and minimum cell size thresholds in order to avoid false positives based on public placements or unusual group home or programs situations.
- How does school choice interact with significant disproportionality? One state has nearly 400 charter schools, which may attract students of specific subgroups. Most students with disabilities enroll in the charter schools having been identified elsewhere, and often to take advantage of a school's focus on special education services. It is unclear how these schools could use the CEIS set-aside to prevent unnecessary identification.

(2) The Department is particularly interested in comments regarding strategies to address the shortcomings of the risk ratio method, which the Department has proposed to require

States to use to determine significant disproportionality. While this method is the most common method in use among the States, the Department is aware that other methods may have advantages and disadvantages. Risk ratios are influenced by the number of children in an LEA and in the racial or ethnic group of interest. In cases where the risk to a comparison group is zero, it is not possible to calculate a risk ratio. The Department has proposed a number of strategies to address the drawbacks of the risk ratio, including a minimum cell size and flexibility with regard to the number of years of data a State may take into account prior to making a determination of significant disproportionality. In addition, the Department has proposed that States use an alternate risk ratio in specific circumstances when the risk ratio cannot be calculated. Should the Department allow or require States to use another method in combination with the risk ratio method? If so, please state what limitation of the risk ratio method does the method address, and under what circumstances should the method be allowed or required.

- The risk ratio method is a fairly basic calculation that has a definite advantage in being easy to explain and duplicate. However, using the risk ratio alone, without adequate minimum cell sizes and/or additional significance testing will result in many LEAs being identified as having significant disproportionality when the disproportionality is due to small numbers of identified/placed/disciplined students, and is certainly not significant.
- The risk ratio calculation is a relatively simple calculation to explain to LEAs and other stakeholders, however, the calculation needs to be paired with appropriate minimum cell sizes in order to reduce the likelihood of identifying districts as significantly disproportionate based on very small numbers of identified students.
- 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. One example is with discipline rates where comparing two very low discipline rates (risks) for students with disabilities and nondisabled students can result in a high risk ratio. States should be allowed the flexibility to add additional criteria above and beyond the risk ratio and minimum cell size thresholds in order to avoid identifying significant disproportionality that is simply a result of small numbers.
- In the description of states' current practices, the minimum cell sizes used by states was addressed, however, it wasn't clear whether the minimums were applied to the numerator or denominator of the risk calculations. In discussion with several states, it appears that many states are applying the minimum criteria to the numerator of the risk calculation, not the denominator as selected in the proposed rule. Using a minimum of 10 for the denominator of the risk calculation for the reference group allows very small groups of students, with potentially only one identified student, to result in the LEA appearing to have significant disproportionality, according to the proposal.
- One state's analysis of data found that, in regard to statistical power, when below a denominator of 20, at least six students were needed in the numerator to get to a power of 0.8 (the standard level that's considered 'good'). What this shows most generally is that numerator 'n size' is relevant, too, and it's fair to ask for a

numerator ’n size’ criterion instead of or in addition to a denominator criterion. A minimum cell size of 10 in the numerator would potentially result in less false positives.

- Without the adoption of a numerator 'n size' criterion in the disproportionality analysis, there is an increased likelihood that an effect size (risk ratio) that meets some criterion magnitude will not be statistically significant (i.e., the effect is likely to have occurred by chance). Therefore, in the absence of a numerator 'n size' criterion, it would be important for a state to conduct follow-up analyses of statistical significance (e.g., using Fisher's exact test or other appropriate tests) when risk ratios are found that surpass the state's risk ratio threshold. Supporting this, both 1) effect size and 2) statistical significance appear to have been important considerations of the Elementary & Middle School Technical Assistance Center (EMSTAC), a former OSEP-funded technical assistance center, and the Department of Education's Office of Civil Rights. This is evident from the following description of disproportionality analysis retrieved from EMSTAC's website at http://www.emstac.org/registered/topics/disproportionality/faqs.htm:
- "The Department of Education's Office for Civil Rights (OCR) undertakes pro-active compliance reviews of disproportionate representation. This office gathers information on the racial breakdown of general and special education enrollments in districts and states. If disparities occur in these data, OCR conducts statistical analysis using either the chi-square, fisher-exact, or Z-test to determine whether the data disparities have statistical significance."
- When disparities were found, it is clear that the Department of Education followed up with assessments of the statistical significance of those disparities. In contrast, the present proposal does not appear to grant states the latitude to include statistical significance testing in their disproportionality assessments; the present proposal appears to instruct states to focus only on the size of the disparity. Numerator 'n size' criteria and/or statistical significance thresholds both decrease the likelihood of identifying disproportionality when results are likely to have occurred by chance, and states should be granted the latitude to utilize these tools.
- Incidence rates by disability category should be considered when establishing a minimum cell size in order to not misidentify an LEA as having significant disproportionality when in fact the identification is based on a very small number of identified students. The table below shows the statewide incidence rates for one state. The enrollment column then shows the minimum number of enrolled students necessary to prevent the identification of one student from making an LEA appear to have significant disproportionality. For example, based on the table below, the state’s incidence rate for students with intellectual disabilities (ID) is 1.08%. If an LEA only had one student identified as ID, but had an enrollment less than 93 students, the incidence rate (or risk for the reference group) would automatically be higher than the average, simply due to the small number of students enrolled. Using a minimum cell size of 10 in the denominator will make districts with one student identified in a category appear to have a very

high risk, when in fact, it is only one student compared to a small enrollment count.

	Incidence Rates	Minimum Enrollment*
ID	1.08%	93
ED	0.72%	139
Sp/Lang	3.20%	31
LD	3.39%	29
OHI	2.49%	40
Autism	1.09%	92
Total	12.71%	8

- *Minimum enrollment is minimum number of students necessary in the denominator of the risk calculation to avoid having one student in the numerator produce a very high risk for the reference group. For example, one Hispanic ID student out of 93 Hispanic students enrolled results in an incidence rate (or risk) of 1.08%, while one Hispanic ID student out of 10 Hispanic students enrolled results in an incidence rate (or risk) of 10%.

  Allowing states to apply the minimum cell size checks to the numerator of the risk calculations for both the reference group and the comparison group would eliminate the incidence rate issues described above and would ensure that the risk calculations are based on a sufficient, meaningful number of identified students. Applying the cell size to the numerators of the risk calculations would also eliminate the need for the alternate risk ratio calculation which would simplify the explanations of the calculations. The alternate risk ratio uses the state's risk for the comparison group when the comparison group for the LEA is either too small or has zero risk, but the racial/ethnic composition of many of these LEAs is nothing like the state's composition, which is why they don't have sufficient numbers to calculate a risk.

- One state has multiple examples of LEAs that would be identified as having significant disproportionality for identification when using the minimum cell size of 10 students enrolled. The vast majority of those potentially identified LEAs have fewer than 10 students in the racial/ethnic group and disability category, and many have only one student identified. Across three years, one identified student (potentially the same student each year) had the power of producing very high risks due to the small number of enrolled students.

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

should the Department exclude any of the six impairments included in the proposed § 300.647(b)(3)? If so, which impairments should be removed from consideration? Alternatively, should the Department include additional impairments in § 300.647(b)(3)?

- No additional comments.

(4) Consistent with OSEP Memorandum 08–09, the Department has proposed to require States to determine whether there is significant disproportionality with respect to self-contained classrooms (*i.e.,* placement inside the regular classroom less than 40 percent of the day) and separate settings (*i.e.,* separate schools and residential facilities), as these disparities suggest that a racial or ethnic group may have less access to the LRE to which they are entitled under section 612(a)(5) of IDEA. Should the Department also require States to determine whether there is significant disproportionality with respect to placement inside the regular classroom between 40 percent and 79 percent of the day, as proposed in this NPRM?

- No. The range from 40% to 79% is a wide spread that encompasses anywhere from 2.4 to 4.7 hours per 6 hour day inside the regular classroom. While only 2.4 hours in the regular classroom may be more restrictive, 4.7 hours may not be; therefore, this category is difficult to categorize other than that it is in the middle of total inclusion and total removal. Therefore, please consider removing the 40-79% category from the placements that states are required to review for significant disproportionality purposes.

(5) The Department has proposed to require States to develop risk ratio thresholds that comply with specific guidelines (*i.e.,* States must select a reasonable threshold and consider the advice of stakeholders). We have proposed these guidelines in lieu of a mandate that all States use the same risk ratio thresholds. At this time, the Department does not intend to set mandated risk ratio thresholds and proposes that States should retain the flexibility to select risk ratio thresholds that best meet their needs. However, we seek the public's perspective on whether a federally-mandated threshold is appropriate and, if so, what that threshold should be. This information may inform potential future regulatory efforts to address racial and ethnic disparities under section 618(d) of IDEA. As noted above, the Department has no intention to set a federally mandated threshold through this current regulatory action. Further, we seek the public's perspective as to what risk ratio thresholds the Department might consider as ''safe harbor'' when reviewing State risk ratio thresholds for reasonableness. Should the Department, at a future date, mandate that States use the same risk ratio thresholds? If so, what risk ratio thresholds should the Department mandate? What is the rationale or evidence that would justify the Department's selection of such risk ratio thresholds over other alternatives? Lastly, what safe harbor should the Department create for risk ratio thresholds that States could voluntarily adopt with the knowledge that it is reasonable pursuant to this proposed regulation? Public comments regarding this last question may be used to inform future guidance regarding the development of risk ratio thresholds and the Department's approach to reviewing risk ratio thresholds for reasonableness.

- NASDSE believes that federally mandated thresholds should not be required. Given the statutory and fiscal consequences associated with being identified as having significant disproportionality, states need to be able to document their selected risk ratio threshold(s) to both OSEP and to all stakeholders in the state. Therefore it is critical that states be able to determine their own thresholds, in conjunction with stakeholders. These thresholds should be selected on their ability to identify "significant" disproportionality.

(6) The Department has proposed to require States to make a determination of whether significant disproportionality exists in each LEA, for each racial and ethnic group with 10 children (for purposes of identification) and 10 children with disabilities (for purposes of placement and discipline). Does the Department's proposed minimum cell size of 10 align with existing State privacy laws, or would the proposal require States to change such laws?

- A minimum cell size of 10 may be too low to produce statistically significant or even reliable determinations of significant disproportionality. There does not appear to be any requirement that states make the data utilized in the risk ratio calculations publically available. A state could do the calculations without publishing the data and violating privacy laws. A more pertinent question would be how the minimum cell size of 10 aligns with states' use of data for accountability purposes. Since a designation of significant disproportionality has statutory and fiscal consequences, states should have the flexibility of utilizing minimum cell sizes that align with minimum cell sizes utilized for accountability calculations/rules.

(7) The Department has proposed to require that States use the alternate risk ratio method only in situations where the total number of children in a comparison group is less than 10 or the risk to children in a comparison group is zero. Are there other situations, currently not accounted for in the proposed regulations, where it would be appropriate to use the alternate risk ratio method? In these situations, should the Department require or allow States the option to use the alternate risk ratio method?

- Using the alternate risk ratio puts an LEA at risk of being identified as having significant disproportionality due to changes in reporting or identification/ placement/discipline practices in other LEAs. Many LEAs want to be able to calculate and track their own risk ratios on an ongoing basis, and utilizing the alternate risk ratio makes that impossible since the state-level data is not available to them on an ongoing basis.

(8) The Department has proposed to require States to make a determination of whether significant disproportionality exists in the State and the LEAs of the State using a risk ratio or alternate risk ratio. The statutory requirement in section 618(d)(1) of IDEA applies to the Secretary of the Interior and States, as that term is defined in section 602(31) of IDEA (which includes each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas). However, the

Department notes that, for some of these entities, performing a risk ratio or alternate risk ratio calculation in accordance with these proposed regulations may not be possible because of the lack of a comparison group of sufficient size (at least 10 children for purposes of identification and at least 10 children with disabilities for purposes of placement or disciplinary removals). As such, the Department is interested in seeking comments on how to require entities, whose population is sufficiently homogenous to prevent the calculation of a risk ratio or alternate risk ratio, to identify significant disproportionality.

- We recommend that the Department allow the use of alternate calculations to identify instances of over- or under-identification because, where no comparison group exists; it is not possible to get valid and reliable data by using a risk ratio or alternate risk ratio calculation.

(9) The proposed regulation permits States to set different risk ratio thresholds for different categories of analysis (*e.g.,* for intellectual disabilities, a risk ratio threshold of 3.0 and for specific learning disabilities, a risk ratio threshold of 2.0). The Department is interested in seeking comments on whether the proposed regulation should include additional restrictions on developing and applying risk ratio thresholds. Should the Department allow or require States to use another approach in developing and applying risk ratio thresholds? Are there circumstances under which the use of different risk ratio thresholds for different racial and ethnic groups (within the same category of analysis) could be appropriate and meet constitutional scrutiny? Further, are there circumstances under which the use of different risk ratio thresholds for different categories of analysis could result in an unlawful disparate impact on racial and ethnic groups?

- States should be allowed to determine their own thresholds, in conjunction with stakeholders -- thresholds should be selected on their ability to identify "significant" disproportionality.

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

- Additional restrictions are not necessary.

(11) Research indicates that some LEAs may under-identify children of color. While the focus of these regulations is on overrepresentation, the Department specifically requests comments on how to support SEAs and LEAs in preventing underidentification, and

ways the Department could ensure that LEAs identified with significant disproportionality with respect to identification properly implement their States' child find policies and procedures. What technical assistance or guidance might the Department put in place to ensure that LEAs identified with significant disproportionality do not inappropriately reduce the identification of children as children with disabilities or under-identify children of color in order to avoid a designation of significant disproportionality? How could States and LEAs use data to ensure that children with disabilities are properly identified?

- The most productive way of ensuring that LEAs do not inappropriately reduce identifications in order to avoid a designation of significant disproportionality is to allow states to utilize appropriate cell sizes, risk ratio thresholds and significance testing that will ensure that districts are not identified inappropriately. Another option is to not require the use of CEIS based on the data alone. If an LEA's identification/placement/discipline policies, practices and procedures are all appropriate, then the LEA should not need to reserve funds for CEIS.

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

- The data managers have no specific comments in response to this question.

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

- An appropriate metric would include established baseline and progress data across states to monitor and assess the impact of these regulations. It would not be appropriate to utilize this data in any ranking, or results based accountability ratings or determinations based on established cut points or national averages.