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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 (OSERS), Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: In order to ensure the Department's "Equity in IDEA" or "significant disproportionality" regulations effectively address significant disproportionality, the Department proposes to postpone the compliance date by two years, from July 1, 2018, to July 1, 2020. The Department also proposes 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.

DATES: We must receive your comments on or before [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under the "Help" tab.

- Postal Mail, Commercial Delivery, or Hand Delivery: The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments in response to this request, address them to Johnny W. Collett, Assistant Secretary, Office of Special Education and Rehabilitation Services, U.S. Department of Education, 400 Maryland Avenue, SW., room 5107, Potomac Center Plaza, Washington, DC 20202-2500.

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

FOR FURTHER INFORMATION CONTACT: Kate Friday, U.S. Department of Education, 400 Maryland Avenue, SW., room 5104, Potomac Center Plaza, Washington, DC 20202-2500. Telephone: (202) 245-7605, or by email at: Kate.Friday@ed.gov.

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

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this notice of proposed rulemaking. We will consider comments on proposed delayed compliance dates only and will not consider comments on the text or substance of the final regulations. See "ADDRESSES" for instructions on how to submit comments.

During and after the comment period, you may inspect all public comments about this notice of proposed

rulemaking by accessing Regulations.gov. You may also inspect the comments in person in room 5104, 400 Maryland Avenue, SW., Potomac Center Plaza, Washington, DC, between 8:30 a.m. and 4:00 p.m. Washington, DC time, Monday through Friday of each week, except Federal holidays. If you want to schedule time to inspect comments, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

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

On February 24, 2017, President Trump signed Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which established a policy "to alleviate unnecessary regulatory burdens" on the American people. Section 3(a) of the Executive Order directed each Federal agency to establish a regulatory reform task force, the duty of which is to evaluate existing regulations and "make

recommendations to the agency head regarding their repeal, replacement, or modification.” On June 22, 2017, therefore, the Department published a notice in the *Federal Register* (82 FR 28431) seeking input on regulations that may be appropriate for repeal, replacement, or modification.

As part of that regulatory review exercise, OSERS is reviewing the Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities regulations (the “Equity in IDEA” or “significant disproportionality” regulations), published in the *Federal Register* on December 19, 2016 (81 FR 92376). We are, therefore, proposing to postpone the compliance by two years in order that the Department may review the regulation to ensure it effectively addresses significant disproportionality.

Statute: Section 618(d)(1) of IDEA (20 U.S.C. 1418(d)(1)) requires every State that receives IDEA Part B funds to collect and examine data to determine if significant disproportionality based on race or ethnicity exists in the State or the LEAs of the State with respect to (a) the identification of children as children with disabilities; (b) the placement in particular educational settings of

such children; and (c) the incident, duration, and type of disciplinary actions, including suspensions and expulsions. IDEA does not define "significant disproportionality" or instruct how data must be collected and examined.

Current Regulations: The current Equity in IDEA regulations effectively define "significant disproportionality." Sections 300.646(b) and 300.647 establish a standard methodology States must use to determine whether significant disproportionality based on race and ethnicity is occurring in the State and in its local educational agencies (LEAs) with respect to the identification, placement, and discipline of children with disabilities.

In addition, if a State determines that there is significant disproportionality occurring in an LEA, section 618(d)(2)(B) of the Individuals with Disabilities Education Act (IDEA) and §300.646(d) require the LEA to reserve 15 percent of its Part B funds to be used for comprehensive coordinated early intervening services (comprehensive CEIS). Section 300.646(d)(1)(ii) requires the LEA to identify and address the factors contributing to significant disproportionality as part of implementing comprehensive CEIS. Section 300.646(d)(2) expands the

populations of children eligible for these services to include children, with and without disabilities, from age 3 through grade 12.

The significant disproportionality regulations became effective January 18, 2017, but the Department delayed the date for compliance. States are not required to begin complying until July 1, 2018, and are not required to include children ages three through five in their analyses of significant disproportionality with respect to the identification of children as children with disabilities and as children with a particular impairment until July 1, 2020.

Proposed Regulations: The Department proposes to postpone the compliance date for implementing the regulations to July 1, 2020 from July 1, 2018. The Department also proposes to postpone the compliance date for including children ages three through five in the significant disproportionality analysis to July 1, 2022, from July 1, 2020.

Reasons:

As the Department noted in the Notice of Proposed Rulemaking (NPRM) proposing the significant disproportionality regulations and again in the final rule

adopting them, the status quo for school districts across the country properly identifying children with disabilities is troubling. In 2012, American Indian and Alaska Native students were 60 percent more likely to be identified for an intellectual disability than children in other racial or ethnic groups, while black children were more than twice as likely as other groups to be so identified. Similarly, American Indian or Alaska Native students were 90 percent more likely, black students were 50 percent more likely, and Hispanic students were 40 percent more likely to be identified as having a learning disability. In addition, black children were more than twice as likely to be identified with an emotional disturbance. And yet, in SY 2012-13, only 28 States and the District of Columbia identified any LEAs with significant disproportionality, and of the 491 LEAs identified, 75 percent were located in only seven States. Of the States that identified LEAs with significant disproportionality, only the District of Columbia and four States identified significant disproportionality in all three categories of analysis-- identification, placement, and in discipline. 81 FR 92380.

The Department is concerned, however, given the public comments it has received in response to its

general solicitation in 2017 on regulatory reform, that the Equity in IDEA regulations may not appropriately address the problem of significant disproportionality. We therefore propose to postpone by two years the compliance dates for the regulations so that we may review all of the issues raised and determine how to better serve children with disabilities.

A number of commenters suggested, for example, that the Department lacks the statutory authority under IDEA to require States to use a standard methodology, pointing out as well that the Department's previous position, adopted in the 2006 regulations implementing the 2004 amendments to IDEA, was that States are in the best position to evaluate factors affecting determinations of significant disproportionality.

Similarly, one detailed comment expressed concern that the standard methodology improperly looks at group outcomes through statistical measures rather than focusing on what is at the foundation of IDEA, namely the needs of each individual child and on the appropriateness of individual identifications,

placements, or discipline. Further, a number of commenters suggested that the standard methodology would provide incentives to LEAs to establish numerical quotas on the number of children who can be identified as children with disabilities, assigned to certain classroom placements, or disciplined in certain ways.

Finally, still other commenters suggested that the Department could not accurately assess the impact of the regulations given that it did not provide any standards by which it would assess the required "reasonableness" of State risk ratio thresholds and that calculations of significant disproportionality should be better aligned with State Performance Plan indicators, including the percent of districts that have a significant discrepancy, by race or ethnicity, in the rate of suspensions and expulsion for children with disabilities (Indicator 4B), and the percent of districts with disproportionate representation of racial and ethnic groups in special education and related services (Indicator 9) and in specific disability categories (Indicator 10) that is the result of inappropriate identification.

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

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

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

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

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net

benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

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

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

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

We are issuing this proposed regulatory action only upon a reasoned determination that its benefits justify its costs. 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 previous section, we are proposing this regulatory action in order to delay implementation of a regulation that we are concerned may not meet its fundamental purpose, namely to properly identify and address significant disproportionality among children with disabilities. We propose the delay as well to give the Department, the States, and the public additional time to study the questions involved and determine how to better serve children with disabilities.

Alternatives Considered

The Department considered proposing a delay of the compliance dates for different lengths of time and decided

upon two years as an appropriate length, given a realistic measure of how long it takes the agency to develop, propose, and promulgate complex regulations. In the Department's experience, one year is too little time as a general matter and, for these regulations in particular, given the amount of work on this issue the Department has already done, three years is too long.

Analysis of Costs and Benefits

The Department has analyzed the costs of complying with the proposed regulatory action. While postponing the obligation to comply with the regulations would not place any new requirements on States, the delay in the compliance date would reduce costs over the 10 years relative to the baseline set out in the December 2016 final rule.

The Department estimates that this regulatory action would generate cost savings between \$10.9 and \$11.5 million, with a reduction in transfers of between \$59.6 and \$63.0 million. These savings are driven by two separate, but related factors: fewer States implementing the regulations during the 2018-19 and 2019-20 school years and, as a result, the lower number of LEAs identified as having significant disproportionality in each of those years under the standard methodology.

In developing our estimates, the Department assumed that a small number of States, who may already be prepared, or nearly prepared, to implement the regulations on July 1, 2018 will continue to do so, regardless of any delay in the compliance date. We also assume that a subset of States will implement the regulations in the following school year (2019-20), with the remainder of States waiting until the 2020 compliance date to implement the regulations. We assume that 10 States would implement the revised regulations on July 1, 2018, five States would implement them as of July 1, 2019, and the remaining 40 would wait until July 1, 2020.

Further, the Department estimates that the number of LEAs identified with significant disproportionality in each year as a result of the revised regulations would be reduced due to the delay in implementation. Previously, the Department estimated that 400 new LEAs would be identified each year. We estimate that the delay in compliance date would result in only 80 additional LEAs being identified in the 2018-2019 school year (a reduction of 320) and only 100 additional LEAs identified in the 2019-20 school year (a reduction of 300). These estimates assume that the number of additional LEAs identified each

year is roughly proportional to the number of States that implement the revised regulations.¹

Executive Order 13771

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), we have estimated that this proposed regulatory action will not impose any additional costs.

Regulatory Flexibility Act Certification

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

The U.S. Small Business Administration (SBA) Size Standards define "small entities" as for-profit or nonprofit institutions with total annual revenue below \$7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000. These proposed regulations would affect all LEAs, including

¹ This calculation of savings includes a change to the baseline in the December 2016 final rule due to an incorrect calculation in the 3 percent discount rate, shown in detail in the cost analysis spreadsheet posted in the docket with this document. This calculation of cost savings does not change any of the assumptions regarding wage rates, hours of burden, or number of personnel that were discussed in the final rule. The assumptions upon which the cost-benefit calculations in the final rule are based are being evaluated by the Department as part of the review of the final rule itself.

the estimated 17,371 LEAs that meet the definition of small entities. However, we have determined that the proposed regulations would not have a significant economic impact on these small entities. As stated earlier, this proposed regulatory action imposes no new 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 contact person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. Free Internet access to the official edition of the *Federal Register* and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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List of Subjects in 34 CFR Part 300

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

Dated: February 23, 2018.

Johnny W. Collett,
Assistant Secretary for Special
Education and Rehabilitative
Services.

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