

1820-NEW Significant Disproportionality State Survey

General Comments

Comments: Many commenters argued, for various reasons, that the Significant Disproportionality State Survey (SDSS) should not be implemented. Some commenters said that the SDSS is unnecessary and likely to result in further delay and confusion in the field. Other commenters argued that the SDSS would delay implementation of the 2016 regulation, increase the likelihood that students of color with disabilities will continue to be subjected to inappropriate educational segregation, and add unnecessary burden to the work that must be done. A few commenters argued that the Department should be helping States to implement and enforce the December 2016 regulation as opposed to delaying its implementation by asking States to complete the SDSS. One commenter stated that the SDSS would lead to further confusion in the field and that the Department's true goal was to develop a legal defense to justify changes to the December 2016 regulation. Another commenter did not object to the Department's effort to gather data but only if the activity did not delay implementation of the 2016 regulation.

Discussion: We appreciate the comments regarding the Significant Disproportionality State Survey (SDSS), but the survey is meant to help implement, not to add burden to, delay, or cause confusion about the December 16, 2016, significant disproportionality regulation, which established a standard methodology States must use to determine whether significant disproportionality based on race and ethnicity is occurring in the State and local educational agencies (LEAs) of the State with respect to the identification, placement, and discipline of children with disabilities. Accordingly, we have streamlined the questions in the survey to better focus on the technical assistance (TA) needs of States.

Furthermore, the SDSS is not intended to collect the data required by the December 2016 requirements. Rather, the purpose of the SDSS is to collect voluntary information regarding the TA needs of States in implementing the significant disproportionality regulations.

Changes: We have narrowed the scope of the SDSS to focus on the TA needs of States in implementing the significant disproportionality regulations.

Comments: Several commenters stated that the implementation of the regulations placed undue burden on districts that incorrectly identified disproportionate numbers of minority students as being students with disabilities. That commenter stated further that education dollars are at a premium and use of these dollars without regard to the individual needs of each student in the district is irresponsible.

Discussion: Under IDEA section 618(d) (20 U.S.C. 1418(d)) and §300.646, States are required to collect and examine data to determine if significant disproportionality based on race and ethnicity is occurring in the State and its LEAs with respect to the identification of children as children with disabilities, including identification as children with particular impairments; the placement of children in particular educational settings; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions. States must make this determination annually. When a State educational agency (SEA) identifies a LEA with significant disproportionality, the State must: 1) provide for the review (and if

appropriate) revision of the LEA's policies, procedures, and practices for compliance with IDEA; 2) require the LEA to reserve the maximum amount (15%) of its Part B funds to be used for comprehensive coordinated early intervening services (CEIS) to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified; and 3) require the LEA to publicly report on the revision of its policies, procedures, and practices.

To the extent that this commenter is referring to the required reservation of funds to provide comprehensive CEIS, IDEA section 618(d)(2)(B) (20 U.S.C. 1418(d)(2)(B)) makes the reservation mandatory upon a finding of significant disproportionality in an LEA. The Department does not have the authority to alter this statutory requirement.

Changes: None.

Comments: Several commenters stated that there are pressing data collection matters not being considered by the SDSS. Some commenters stated that the Department should only collect non-redundant information or “new” data such as asking the States to identify the factors contributing to significant disproportionality in the local school district.

Several commenters argued that the SDSS is burdensome, redundant, and not aligned with existing data collections under the Individuals with Disabilities Education Act (IDEA). These commenters urged the Department to modify other IDEA data collections, such as the EDFacts Metadata and Process System (EMAPS) State Supplemental Survey—IDEA, to collect the data on the SDSS and provide States technical assistance to make sure that the EMAPS State Supplemental Survey data is correctly reported. These commenters further suggested that the EMAPS State Supplemental Survey and other IDEA data collections should be modified to collect all data required by the December 2016 regulation. A few commenters noted that the SDSS was voluntary and that the Department should require mandatory collection of the significant disproportionality data. These commenters argued that a voluntary survey would lead to skewed results that would over sample respondents that had strong opinions and under sample respondents that did not care about the topic.

Discussion: We are aware that there are currently established data collections that collect some, but not all, data required under the 2016 regulation. The EMAPS State Supplemental Survey is a web-based tool to provide SEAs with an easy method to report and maintain information on state policies, plans, and metadata to aid in the analysis of data collected. One section of the EMAPS data collection, MOE Reduction and CEIS, requires States to provide the State's definition on significant disproportionality, any minimum cell- or n-sizes, the number of years of data used in the calculation, and the threshold at which significant disproportionality is identified. A separate collection, IDEA Part B Section 618 Table 8 Maintenance of Effort and Coordinated Early Intervention Services, collects information regarding the dollar amount reserved for Coordinated Early Intervening Services (CEIS) and the number of children receiving CEIS disaggregated by school district. Each of these data collections were implemented prior to the 2016 rule and collect some, but not all, data required by the 2016 regulation.

We appreciate the commenters suggestions to modify current IDEA data collections to collect the required significant disproportionality data and we intend to do so. We reiterate, however, that the purpose of the SDSS is separate from the data that States are required to report under 34 CFR

§300.647(b)(7). We developed the SDSS to collect voluntary information about the State's implementation of the 2016 regulation, including anticipated obstacles States may face and the extent to which States have considered safeguards to ensure compliance with Federal law. Regarding the commenters concern that a voluntary survey would produce skewed results, we reiterate that our purpose is to develop technical assistance related to the significant disproportionality requirements. The Department wishes to avoid unnecessary burden by requiring mandatory responses. States and stakeholders that choose to share information about the State's implementation of the 2016 regulation may do so through the SDSS. We will use this information to provide technical assistance through our investments under part D of IDEA and other sources to help States implement the significant disproportionality provisions.

Finally, we will review and consider modification of current IDEA data collections to collect the data required under 34 CFR §300.647(b)(7). The Department will continue to utilize opportunities and activities, such as the SDSS, to collect information to target technical assistance designed to improve implementation of the significant disproportionality regulation.

Changes: None.

Comments: Some commenters stated that the Department must follow through on its commitment made in the December 2016 regulation to conduct "an examination of the extent to which school and LEA personnel incorrectly interpret the risk ratio thresholds and implement racial quotas in an attempt to avoid findings of significant disproportionality by States." These commenters added that it is important to understand how teachers and school administrators are responding to the regulations and how parents are perceiving those responses and recommended that the Department abandon the SDSS and promptly initiate a separate survey that asks teachers and parents about the effects, if any, of new policies and practices in schools regarding the December 2016 regulation.

Discussion: The Department remains committed to examining the extent, if any, to which school and LEA personnel interpret the risk ratio thresholds and implement racial quotas to avoid findings of significant disproportionality by States. The SDSS specifically asks States to describe how they ensure that none of the State's risk ratio thresholds operate as an incentive for LEAs to establish race-based quotas in identification, placement, or discipline of children with disabilities to avoid being identified with significant disproportionality on the SDSS. We specifically asked this question, and others, as part of our obligation to make clear that the 2016 regulation does not authorize a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate any IDEA requirements or other Federal statutes, including civil rights laws governing equal access to education.

We agree with commenters that it is important to include teachers, parents, and other stakeholders in discussions regarding State implementation of the December 2016 regulation.

The Department will continue to work through its IDEA Technical Assistance and Dissemination network, which includes the Center for Parent Information and Resources, to ensure that States are aware of Federal technical assistance resources and encourage input from stakeholders to support the implementation of these regulations.

Changes: None.

Comments: Some commenters stated that many of the questions on the SDSS (e.g. the reasonableness of state-selected risk ratio thresholds, how states ensure that thresholds do not provide incentives for LEAs to establish race-based quotas, how the standard methodology address significant disproportionality, how the state is meeting training or capacity needs for personnel) are premature and require a State to be much further into the implementation of the December 2016 regulation before that State can respond to the survey questions. These commenters stated that the data worth pursuing by the Department are those related to challenges, data quality and availability issues, and unintended consequences of the regulations. These commenters further suggested that the best method to collect these data would be through conferences, blogs or conference calls.

Discussion: On July 3, 2018, the Department issued a final rule to postpone by two years the date for States to comply with the significant disproportionality rule. At that time, the Department clarified that during the delay, States could use the standard methodology or any other methodology the State had in place before the Department published the 2016 regulation to collect and examine data to identify significant disproportionality. (See 83 FR 31309, July 3, 2018). On March 7, 2019, a U.S. District Court vacated the Department's delay of the compliance date of the December 2016 regulation on significant disproportionality, which required all States to implement the December 2016 regulation.

The Department published the SDSS recognizing that States were in various stages in the implementation of the December 2016 regulation and, as such, may or may not be able to answer the questions on the SDSS. Considering this fact, we designed the SDSS to provide States and stakeholders an opportunity to provide input regarding the States' implementation of the December 2016 regulation and to comment on any anticipated barriers or other concerns the State may have identified. The Department intends to use the information gathered from the SDSS to tailor technical assistance and professional development activities, such as data quality and availability issues. We agree with commenters that technical assistance needs can be identified through various methods. We intend to continue to work with SEAs, LEAs, and stakeholders to provide supports and services through a variety of formats to help implement the provisions and activities required by the significant disproportionality rule.

Changes: None.

Comments: Several commenters asked for clarification regarding the Department's statement that the SDSS would be a re-occurring survey. These commenters argued that the survey should not be re-occurring but modified each year to capture trend data related to State implementation of the 2016 regulation. Another commenter stated that the SDSS Supporting Statement stated that the SDSS would "gather information regarding anticipated obstacles States will face and the extent to which States have considered safeguards to ensure compliance with federal law and the U.S. Constitution." That commenter stated that obstacles to compliance with the 2016 regulation had been amply addressed when the significant disproportionality final rule was published and there was no more need to discuss those issues.

Discussion: On page 3 of the supporting statement that was published with the SDSS, the Department stated, “This information collection is planned as a reoccurring Survey. If the collection were not conducted, the Department would be unable to fulfill its responsibilities under 34 CFR § 300.647(b)(7) and 34 CFR § 300.647(b)(1)(iii). If these data were not collected, it would hamper the Department’s ability to assess what determination metrics, monitoring and technical assistance will be most meaningful and appropriate to help States implement the requirements at 34 CFR §§300.646 and 300.647.”

We want to reiterate that the purpose of the SDSS is to collect voluntary information regarding: 1) the extent to which each State has implemented the standard methodology; 2) which steps remain for each State to be in compliance with the implementation of the 2016 regulation; and 3) what barriers are anticipated in complying with the 2016 regulation. As stated above, the SDSS data in its current form was published to assess what metrics, monitoring and technical assistance will be most meaningful and appropriate to help States implement the December 2016 rule. However, SEA, LEA and stakeholder technical assistance needs may change from year to year. The fact that the survey is re-occurring does not mean that we can’t or won’t modify some questions each year, as appropriate. However, we agree that the current language in the supporting statement may be misleading to the reader. We will correct that error.

In addition, we do not agree that all obstacles that States and LEAs may face as they implement the 2016 regulation have been fully addressed. States, LEAs, teachers, related service providers, policy makers, and parents of children with disabilities and other stakeholders may identify new and challenging considerations, perhaps not discussed in the 2016 final rule and specific to their States, as they work to implement the significant disproportionality requirements. The data collected by the SDSS will help the Department tailor its technical assistance activities to address identified issues.

Changes: We will modify language in the supporting statement to clarify that the survey, as a method to collect information, may change from year to year to help capture States’ changed TA needs. We recognize that the areas investigated by each survey may change based on perceived needs of SEAs, LEAs and other stakeholders.

Comments: Several commenters identified language that should be removed, amended or consolidated to make the SDSS a more useful tool. For example, commenters stated that it does not make sense to include questions about other methodologies a State may be using to identify significant disproportionality since the Department has made clear that States must calculate significant disproportionality for the 2018-2019 school year using the 2016 rule’s standard methodology. These commenters also offered suggestions for additional questions and data that the SDSS should include such as descriptions of how parents, teachers, and other stakeholders are included in decisions to promote equity. Other commenters asked that the SDSS query LEAs as to how the LEA identifies and addresses factors contributing to significant disproportionality. Several other commenters asserted that the SDSS questions assumed States were in full compliance with the regulation and, as a result, able to identify technical assistance and provide needed supports to LEAs. One commenter stated that state selected thresholds are identified by stakeholder recommendations and, given that fact, it was unclear what kind of response would be appropriate from the State. This commenter further stated that questions regarding how states ensure that thresholds do not provide incentives for LEAs to establish

race-based quotas are addressed by the State's general supervision monitoring system and that all States would better benefit from guidance from the Department regarding how to structure systems to effectively support and monitor LEAs to prevent race-based quotas. (0015)

Discussion: We agree with the commenters that the questions about methodologies other than the standard methodology are moot, and we have removed them from the survey.

We appreciate the commenters' suggestions for amendments to the SDSS, such as those that concern stakeholders' participation, and those that seek guidance about implementing the 2016 regulation, for example, about monitoring for quotas. We will take these suggestions and others into consideration as we develop technical assistance activities to support States and LEAs in their efforts to comply with the significant disproportionality regulations.

We disagree, however, with the commenters to the extent that their comments conclude or assume that all States are already in compliance with the 2016 regulation. Again, the SDSS is designed to help States come into compliance by identifying barriers to implementation and clarifying the requirements. The 2016 regulation requires LEAs to address the factors contributing to significant disproportionality through comprehensive CEIS, but only once the State has identified significant disproportionality in the LEA. The purpose of the SDSS is not to ask how LEAs are addressing the factors contributing to significant disproportionality, but what assistance they believe they will need in doing so. Put somewhat differently, we disagree with commenters whose questions view the SDSS as a means of monitoring compliance with the 2016 SDSS rather than a means of helping States come into compliance with the 2016 regulation in the first place.

Changes: We have removed all questions about State use of methodologies other than the standard methodology. We have also reordered the remaining sections to improve coherence, and we have added language in new Section III (Flexibilities and Reasonableness under the December 2016 Regulation) to encourage States to identify any "lessons learned" in their application of the flexibilities at §300.647(d), all to focus the SDSS on identifying the technical assistance needs of the States.

Comments: One commenter expressed concern that the Department's estimate of 2 hours per state to respond to the SDSS significantly underestimates the time it will take state agency staff to answer the questions. This commenter added that State oversight of the responses will extend time needed to complete the survey. This commenter suggested that the Department minimize burden by reducing the number of items.

Discussion: The Department appreciates the commenter's concerns and has reviewed the time estimates to respond to questions, and believes the estimates are accurate, given the narrowed scope of the survey.

Changes: We have narrowed the scope of the SDSS to focus on the TA needs of States in implementing the significant disproportionality regulations.