



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES  
JUN 1 2010

John Andrejack  
Office of Special Education and Early Intervention Services  
Michigan Department of Education  
P.O. Box 30008  
Lansing, Michigan 48909-7508

Dear Mr. Andrejack:

This is in response to your electronic mail (email) communication of December 16, 2009 in which you ask for guidance around three topics related to local educational agency (LEA) use of funds: (1) private school proportionate share; (2) coordinated early intervening services (CEIS); and (3) maintenance of effort (MOE). Your questions and our responses are below.

**Private School Proportionate Share**

You indicate you have “concerns regarding the opportunity for LEAs to allocate unspent proportionate share dollars to other allowable special education expenditures at the end of the 2<sup>nd</sup> year of availability.” You ask, “What happens if at the end of the second year, the amounts required to be spent for proportionate share were not expended?” You indicate that information currently in writing does not permit the reallocation of unspent funds for other allowable purposes under Part B of the Individuals with Disabilities Education Act (IDEA). Further, you ask, “[U]nder what guidelines would a decision be made that an LEA has fulfilled all of their obligations related to Parentally Placed Students in a Private Settings [*sic*] and expenditures of their Proportionate Share that would allow for the reallocation of unspent funds?”

**OSEP’s RESPONSE:** Under 34 CFR §300.132(a), an LEA must provide, to the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools, located in the school district served by the LEA, for the participation of those children in the program assisted or carried out under Part B of IDEA by providing those children with special education and related services, including direct services determined in accordance with 34 CFR §300.137. To meet this requirement, each LEA “must spend” funds received under sections 611(f) and 619(g) of the Act consistent with the formula in 34 CFR §300.133. Under 34 CFR §300.133(a)(3), if an LEA has not expended for equitable services all of the funds described in 34 CFR §300.133(a)(1) and (2) by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally-placed private school children with disabilities during a carry-over period of one additional year.

However, you’ve asked what happens if, at the end of the second year, the amounts required to be spent for proportionate share were not expended. The answer to your question depends on the

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reason why the funds were not expended. Because it is theoretically possible that an LEA has no, or few, parentally-placed private school children with disabilities, *assuming the LEA is in compliance with the child find, consultation, and other requirements related to parentally-placed private school children with disabilities in 34 CFR §§300.129 through 300.144*, the LEA may use the funds - at the end of the period during which the funds may be spent on parentally-placed private school children - to pay for other allowable Part B expenditures for that same LEA. This situation should be the exception. We emphasize that it is the clear intent of the Act that LEAs spend these funds on providing special education and related services to parentally-placed private school children with disabilities, as provided in 34 CFR §§300.129 through 300.144. Therefore, if the LEA is not in compliance with these requirements and has not expended the funds on parentally-placed private school children, the LEA must return the funds to the U.S. Department of Education (Department of Education).

The SEA is responsible for ensuring that LEAs are in compliance with these requirements. See 34 CFR §§300.149(a) and 300.600(b)(2). If an LEA has not expended the proportionate share by the end of the carry-over period, the SEA can monitor the LEA to ensure that it is meeting these requirements, including the requirement in 34 CFR §300.135 that the LEA obtain written affirmation signed by representatives of participating private schools that timely and meaningful consultation has occurred. In any event, there is no authority that permits the LEA to return the funds to the State educational agency (SEA) to be spent by the SEA or reallocated to another LEA.

#### Coordinated Early Intervening Services (CEIS)

You state in your email that, “for those LEAs that have been identified as having Significant Disproportionality, they must reserve 15% of their Part B 611 and 619 allocations and must expend that amount for CEIS. If there is an LEA that does not expend the full 15% during the 2 years of availability, would those unexpended funds be able to be reallocated and under what conditions? Or, in this case, would the requirement that they must spend the required amount be upheld? We do have a situation where this may have occurred. If this is the case, I am not sure if the LEA can reallocate, can the Intermediate School District (we have an ISD model) reallocate, or can the SEA reallocate? Or, must the funds be returned to the Federal Office?”

**OSEP’s RESPONSE:** Under 34 CFR §300.646(b)(2), the SEA must “require any LEA identified under paragraph (a) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to serve children in the LEA, *particularly*, but not exclusively, *children in those groups that were significantly overidentified* under paragraph (a) of this section.” [emphasis added]

The SEA is responsible for ensuring that LEAs identified with significant disproportionality under 34 CFR §300.646(a) reserve the maximum amount (15 percent) of Part B funds on comprehensive CEIS in accordance with 34 CFR §300.646(b)(2). See 34 CFR §§300.149(a) and 300.600(b)(2). If an LEA has not expended that amount by the end of the obligation period, the SEA can monitor the LEA to ensure that it is meeting these requirements.

In its Memorandum 07-09, dated April 24, 2007, the Office of Special Education Programs (OSEP) stated that:

The Department interprets the phrase “reserve the maximum amount of funds” as meaning to use the funds for early intervening services. The statute does not authorize LEAs to use these funds for any other purpose.

In addition, in its Memorandum 08-09, dated July 28, 2008, OSEP answered question 21 -- “What amount of IDEA funds may an LEA use for CEIS?” -- as follows:

It is important to consider that many of the following fiscal considerations relating to CEIS only apply when an LEA is required to reserve funds for comprehensive CEIS following the identification of significant disproportionality, pursuant to 34 CFR §300.646(b)(2). If a State identifies significant disproportionality in an LEA, the LEA must reserve the maximum amount of funds for comprehensive CEIS. The funds must be used during the period of their availability for obligation and must be used for comprehensive CEIS regardless of whether the significant disproportionality is resolved during the time that the funds are available. If significant disproportionality is not identified and an LEA chooses to use funds for CEIS, the LEA may use up to the maximum amount allowed for CEIS (15 percent) and may reallocate any unspent funds during the time that the funds are available for obligation.

Therefore, any funds not expended by the LEA for comprehensive CEIS, *when required to expend them due to significant disproportionality*, would revert to the Department of Education at the end of the obligation/expenditure period for those funds.

### **Maintenance of Effort (MOE)**

You indicate that you have been receiving many telephone calls from LEAs regarding their difficulty in meeting the MOE requirements due to significantly reduced property tax revenues. You correctly point out that there are no MOE waiver opportunities for LEAs. You state your concern that many school districts in Michigan, as well as across the country, will either not be able to receive IDEA funds or will be required to make repayments from funds that they do not have. You state that it will also be counterproductive to make sure that SEAs and LEAs expend all of the IDEA funds, only to have a significant amount returned, not because districts did not want to do the right thing and maintain effort, but due to the economic realities.

**OSEP’s RESPONSE:** The Department of Education does not have the authority to waive MOE requirements for LEAs regardless of the financial circumstances within the LEA. Rather, the Act provides two circumstances under which an LEA may lawfully reduce its level of expenditures made by the LEA from local funds for the education of children with disabilities below the level of those expenditures for the preceding year. First, under 34 CFR §300.204, notwithstanding the restriction in 34 CFR §300.203(a), an LEA may reduce the level of expenditures by the LEA under Part B of the IDEA below the level of those expenditures for the preceding fiscal year if the reduction is attributable to any of the following: (a) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related

services personnel; (b) A decrease in the enrollment of children with disabilities; (c) The termination of the obligation of the agency, consistent with Part 300, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child: (1) Has left the jurisdiction of the agency; (2) Has reached the age at which the obligation of the agency to provide a free appropriate public education (FAPE) to the child has terminated; or (3) No longer needs the program of special education; (d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities; or (e) The assumption of cost by the high cost fund operated by the SEA under 34 CFR §300.704(c).

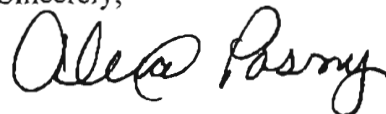
Second, under 34 CFR §300.205(a), notwithstanding 34 CFR §§300.202(a)(2) and (b), and 300.203(a), and except as provided in 34 CFR §§300.205(d) and 300.230(c)(2), for any fiscal year for which the allocation received by an LEA under 34 CFR §300.705 exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures otherwise required by 34 CFR §300.203(a) by not more than 50 percent of the amount of that excess. If an LEA exercises this authority, the LEA must use an amount of local funds equal to the reduction in expenditures under 34 CFR §300.205(a) to carry out activities that could be supported with funds under the Elementary and Secondary Education Act. 34 CFR §300.205(b). Furthermore, the authority of an LEA to reduce its MOE pursuant to 34 CFR §300.205(a) is limited by 34 CFR §300.205(c) and (d).

We recognize the challenge that States and LEAs face in these difficult economic times and remain committed to supporting your efforts to ensure fiscal accountability and to ensure that a free appropriate public education is available for all children with disabilities.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

I hope you find this information helpful. If you have questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456 or by email at [Deborah.Morrow@ed.gov](mailto:Deborah.Morrow@ed.gov).

Sincerely,



Alexa Posny, Ph.D.  
Acting Director  
Office of Special Education Programs

cc: Jacquelyn Thompson