



# Assistance to States for the Education of Children With Disabilities

Comments to Notice of Proposed Rulemaking  
[Docket ID ED-2012-OSERS-0020]

**Contact: Stephanie Petska, Director of Special Education – Learning Support at  
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**11/27/2013**

The Wisconsin Department of Public Instruction is submitting comments to the notice of proposed rulemaking of 34 CFR Part 300, by the Office of Special Education and Rehabilitative Services, U.S. Department of Education

Mary Louise Dirrigl  
U.S. Department of Education  
400 Maryland Avenue, S.W., Room 5103  
Potomac Center Plaza  
Washington, DC 20202-2600

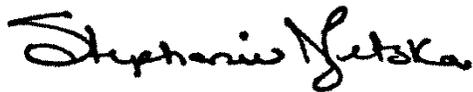
RE: Notice of Proposed Rulemaking – 34 CFR §300.203 Maintenance of Effort  
[Docket ID ED-2012-OSERS-0020]

Dear Ms. Dirrigl:

On behalf of the Wisconsin Department of Public Instruction (WDPI) and our more than 400 local education agencies (LEAs) that receive funding through Part B of the Individuals with Disabilities Education Act (IDEA), I write in response to the Office of Special Education and Rehabilitative Services' (OSERS) notice of proposed rules to 34 CFR §300.203 Maintenance of effort [Docket ID ED-2012-OSERS-0020; September 18, 2013, Federal Register (Volume 78, Number 181, pages 57324-57335)].

WDPI appreciates this opportunity to comment on these important proposed changes. In general, WDPI is supportive of these proposed rules and believes they will be helpful in increased understanding compliance with the current local maintenance of effort requirements. WDPI has provided recommendations regarding the proposed rules in relation to the eligibility standard, questions seeking clarification of the proposed rule, and experience with IDEA's maintenance of effort provision that we believe supports reconsideration of some of the assumptions in the proposed rule making notice.

Sincerely,



Stephanie Petska, Ph.D., Director  
Special Education  
Division for Learning Support

c: Anita Castro, Assistant Director of Special Education, WDPI  
Rachel Zellmer, Federal Fiscal Monitoring Consultant, WDPI  
Kathy Guralski, Federal Fiscal Monitoring Consultant, WDPI

## I. General Information

According to the federal notice, the rules are proposed to clarify and make other related changes regarding the maintenance of effort (MOE) compliance and eligibility standards, the MOE requirements for an LEA that fails to maintain effort in the prior year, and the consequences for an LEA's failure to maintain effort.

Wisconsin has 424 public school districts and 23 independent charter schools that are Local Education Agencies (LEAs) responsible for providing a free appropriate public education to students with disabilities enrolled in their schools. Each of these LEAs receives an IDEA Part B allocation annually. Every LEA is monitored annually by WDPI for the eligibility and compliance standards under 34 CFR §300.203, with all four comparisons tested and allowed exceptions taken into consideration. The MOE monitoring system has been web-based since state fiscal year (SFY) 2010.

WDPI's monitoring system aligns with the proposed rules regarding the requirements for a LEA that fails to maintain effort in the prior year and the consequences for a LEA's failure to maintain effort.

## II. LEA MOE Requirement

Standard for Determining LEA Eligibility - 34 CFR §300.203(b) Eligibility standard.

*LEAs must budget, for the education of children with disabilities, at least the same total or per capita amount, of local funds, or State and local funds, as it spent during the most recent prior year for which information is available.*

### **WDPI Comments**

As written, the proposed expansion of this statutory requirement does not allow for a LEA to take into consideration known exceptions as provided in §§ 300.204 and 300.205 when determining eligibility.

We believe that exceptions under §§ 300.204 and 300.205 are often known at the time of budget development, and that an LEA would not budget for a cost that no longer exists.

In Wisconsin, a LEA's budget is approved by an elected school board and is made available to the public. The LEA files their current year budget with WDPI in November or early December. The budget submitted to WDPI includes the amount the LEA plans to expend on the excess cost of providing special education. This is the earliest fiscal information WDPI receives and it is what is used to determine a LEA's compliance with the eligibility standard in the current fiscal year.

That budget reflects exceptions such as the following:

- A special education teacher who has retired between fiscal years and a replacement special education teacher (at a lower salary and fringe cost) is hired. By the beginning of the school year, the LEA knows of the retirement and may have already hired another teacher. The LEA is not going to budget for the retired staff salary and fringe benefit, but rather will budget for the cost of the newly hired teacher. A school board is not going to approve a budget for special education if it includes a cost in excess of the current year contract with the newly hired teacher.

The current proposed language would prevent LEAs from meeting the MOE eligibility standard because the budget, approved by an elected school board, would include the exceptions that will later be allowed under the compliance standard.

In Wisconsin, LEA financial budgets are required to be filed with WDPI under state statute and reflect actual reductions in cost due to the voluntary departure of special education or related services personnel; changes in particular student costs due to the student leaving the district, graduating, aging out, or no longer needing the special education program; and the termination of costly expenditures for long-term purchases, such as vehicle used for specialized transportation.

### **WDPI Recommendations**

WDPI recommends modifying the proposed §300.203(b)(1) to read:

*(b) Eligibility standard. (1) Except as provided in paragraph (b)(2) of this section, the SEA must determine that a LEA complies with paragraph (a) of this section for purposes of establishing the LEA's eligibility for an award for a fiscal year if the LEA budgets, for the education of children with disabilities, at least the same total or per capita amount from either of the following sources as the LEA spent for that purpose from the same source, except as provided in §§300.204 and 300.205, for the most recent fiscal year for which information is available:*

*(i) Local funds only.*

*(ii) The combination of State and local funds.*

WDPI recommends modifying the proposed §300.203(b)(2) to read:

*(2) An LEA that relies on paragraph (b)(1)(i) of this section for any fiscal year must ensure that the amount of local funds it budgets for the education of children with disabilities in that year is at least the same, either in total or per capita, as the amount it spent for that purpose in the most recent fiscal year for which information is available, except as provided in §§300.204 and 300.205, and the LEA met the MOE compliance standard based on local funds only, even if the LEA also met the MOE compliance standard based on State and local funds.*

WDPI recommends modifying the proposed §300.203(b)(3) to read:

*(3) An LEA that relies on paragraph (b)(1)(i) of this section for any fiscal year and has not previously met the MOE compliance standard based on local funds only must ensure that the amount of local funds it budgets for the education of children with disabilities in that year is at least the same, either in total or per capita, as the amount it spent from local funds for that purpose in the most recent fiscal year for which information is available, except as provided in §§300.204 and 300.205.*

## **III. Significant Proposed Regulations**

### **Item A. Summary**

The proposed rule adds language to §300.203(a) to specify how a LEA meets the standard in any fiscal year based on local funds only if the LEA has not previously met the MOE compliance standard based on local funds only.

### **Item A. WDPI Request for Clarification**

WDPI seeks clarification for when there are no discernable local funds (all costs are funded by state funds or grants, and there is no tax base). In Wisconsin, independent charter schools that are LEAs do

not have a local tax base but operate on donations and a combination of state and federal funds. In those cases, is there only a comparison of state funds for eligibility and compliance purposes? Or is the test for local funds done using zero as an amount? And if a zero amount is compared to a zero amount for the local fund comparison, does that mean the LEA has met the MOE compliance standard?

**Item B. Summary**

The proposed rule adds language to §300.203(d) to clarify the consequence for a LEA that fails to maintain its level of expenditures for the education of children with disabilities. The state educational agency (SEA) would be required in a recovery action under 20 U.S.C. 1234a to return to the Department, using non-Federal funds, an amount equal to the amount by which the LEA failed to maintain its level of expenditures. Under 20 U.S.C. 1234b(a), the recipient is required to return an amount that is proportionate to the harm to the Federal interest.

**Item B. WDPI Request for Clarification**

WDPI seeks clarification on the definition of the “amount equal to the amount by which the LEA failed to maintain its level of expenditures.” If a LEA’s expenditures are compared using all four methods (local/state, local only, local/state per capita, local only per capita) and failed all four comparisons, is the amount ‘equal to the amount failed by’ the lesser amount generated by the four tests (after allowed exceptions)?

In the table below, does the ‘local only’ difference become the penalty amount?

State/Local Difference	Local Only Difference	State/Local Per Capita Difference (in aggregate)	Local Only Per Capita Difference (in aggregate)
(\$55,000)	(\$43,000)	(\$62,000)	(\$59,000)

WDPI also seeks clarification on the definition of proportionate harm to the Federal interest in MOE non-compliance. In Wisconsin, LEAs have come very close to failing at an amount greater than the allocation they received under IDEA Part B. For example, a very small LEA reduced their local costs by \$43,000 between two fiscal years with no allowed exceptions (they were tested by all four methods, and this was the lowest amount failed), but their IDEA Part B allocation for that fiscal year was \$35,000. Is the recovery of funds limited to the LEA’s award amount of IDEA Part B funds? Or is the recovery of funds limited to the amount the LEA claimed from that year’s IDEA Part B funds allocation?

**Item C. Summary**

The proposed rule adds language to §300.203(a)(2)(iii) to specify that the comparison year that applies when determining compliance based on local funds only is the most recent fiscal year for which information is available and for which the LEA met the MOE compliance standard based on local funds only.

**Item C. WDPI Request for Clarification**

WDPI seeks clarification on how many years OSERS believes this comparison should include. In Wisconsin, WDPI corrected its MOE compliance monitoring in SFY 2009-10 using SFY 2008-09 as the base year. There are four years of valid and reliable MOE testing at our disposal, so if required, WDPI could determine that the last time an LEA met the local only test was in SFY 2009-10.

This could put Wisconsin LEAs at a disadvantage compared to LEAs in states where the most recent fiscal year for which information is available will be SFY 2013-14.

***Item D. Summary***

In the proposed rule, OSERS stated that “states will need to carefully review LEA applications, and compare amounts budgeted to amounts expended in prior years, to ensure that their LEAs meet the eligibility requirement.”

***Item D. WDPI Request for Clarification***

WDPI seeks clarification for “states will need to carefully review LEA applications, and compare amounts budgeted to amounts expended in prior years.” This statement implies it is a requirement that states verify the eligibility standard through financial statements. This requirement was intentionally removed from the IDEA regulations with the 2004 reauthorization of IDEA. In the June 21, 2005, Federal Register (Vol. 70, No. 118, page 35795), under Subpart C – LEA Eligibility, the regulations were revised consistent with the change in section 613(a) of the Act to require LEAs to provide assurances, rather than demonstrate to the State that they meet the eligibility conditions. Cross-references to those eligibility conditions would be updated, including demonstrating the MOE eligibility standard to establish eligibility. Prior to the 2004 reauthorization, 34 CFR §300.231(b) read “Information. The LEA must have on file with the SEA information to demonstrate that the requirements of paragraph (a) of this section are met.” The June 21, 2005 Federal Register stated that “The language in current §300.231(b) would be removed, based on the statutory change requiring LEAs to provide assurances in their applications to the State, rather than information that demonstrates their compliance.” The August 14, 2006, Federal Register final regulations removed this language.

To establish eligibility for IDEA Part B funds, Wisconsin LEAs submit an assurance covering all required items prior to the start of the fiscal year (July 1), consistent with 613(a) of the Act. This, and submitting budgets for 611 and 619 funds, is the LEA’s application in substantially approvable form, allowing the LEA to obligate IDEA funds. In December of each fiscal year, WDPI monitors the eligibility standard as a means of assisting LEAs in meeting compliance. It provides WDPI the opportunity to work with LEAs in understanding the MOE provision. However, based on the changes in the 2004 re-authorization of IDEA, we believe this is not a required review of financial statements.

WDPI also seeks clarification on the consequences of not meeting the eligibility requirement. Is the consequence not receiving their IDEA Part B allocation? If so, what happens to the LEA’s allocation? Should the funds be looked at as never ‘awarded’ and then distributed to eligible LEAs outside of the reallocation steps (§ 300.705(c))?

If a LEA is found to not be eligible one year and does not receive an IDEA Part B allocation, how does the LEA become eligible in future years? What are the comparison years when a LEA is not eligible, or does not accept, an IDEA Part B allocation for one or more years, but at a future date does wish to accept an allocation?

***Item E. Summary***

In the proposed rules, OSERS states that, “We also believe that if a LEA were permitted to reduce expenditures for the education of children with disabilities for reasons not specifically stated in the exceptions in section 613(a)(2)(B) and (C) of the Act, services for children with disabilities would likely suffer. The adjustments and exceptions that are built into the IDEA in section 613(a)(2)(B) and (C)

provide sufficient protection to LEAs faced with changed circumstances, and they also help to ensure that sufficient funding will be available in the future to provide appropriate services to children with disabilities.”

#### ***Item E. WDPI Comments***

Below are examples in Wisconsin of reductions in expenditures that do not result in reduced services. These are not allowable exceptions. The current exceptions do not provide sufficient protection to Wisconsin LEAs faced with the following changed circumstances, although the LEAs continue to have sufficient funding to provide appropriate services to children with disabilities.

#### ***State Mandated Cost Savings***

In SFY 2012, Wisconsin Act 10 impacted all Wisconsin LEAs with a state mandated reduction in the fringe benefits of all public employees, reduction in state aid paid to LEAs, and an overall reduction in the revenue an LEA was allowed to receive. Under the new law, public employees were required to meet a minimum contribution towards health insurance and pensions which entailed an increase in the amount employees paid and a reduction in the amount employers contributed.

In Wisconsin, due to the limited types of cost that state special education categorical aid reimburses, the majority of special education staff salaries and benefits are funded with local and state dollars. These are the expenditures that are used to monitor MOE compliance. The new law resulted in a reduction in all costs, completely beyond the control of the LEAs or school boards, and was equally applied to all school district employees. The level of special education services, provided by the same individuals that were providing the services prior to the implementation of Act 10, did not decrease. These mandated cost savings, established through state law, are not exceptions built into IDEA. In addition, with the state revenue decreased, the freed up funds generated from the mandated cost savings could not be used towards new special education costs because the LEAs were limited at a district level on their expenditures. To meet MOE compliance, LEAs were forced to either move costs off of the IDEA Part B grant or move funds from general education (which were under the same mandated cost savings) to special education.

Wisconsin saw the number of LEAs that failed all four comparison tests more than triple from 78 in SFY 2011 to 240 in SFY 2012. The number of LEAs that went on to fail MOE compliance jumped from 6 (penalty amount of \$98,806) to 24 (penalty amount of \$2,572,352). To meet the MOE compliance standard since the implementation of Act 10, many LEAs have moved costs that they had previously charged to the IDEA Part B grants to local funds. This has resulted in a substantial increase in unspent IDEA Part B funds being carried from year to year.

#### ***Health Insurance Costs***

With the rise in health insurance costs over the years, and the decrease in the revenue Wisconsin LEAs were allowed to receive and spend, LEAs struggled to determine ways to reduce or even control health insurance costs. As a result, many LEAs are moving towards “self-insurance” rather than going through a third-party vendor. As a result, they may realize large savings. However, with self-funded plans, costs are dependent on the actual claims for the year and these savings may not ultimately be determined until after the close of the fiscal year.

The level of special education services provided by the same individuals that were providing the services prior to the insurance change did not decrease. Costs savings through a change in health insurance

providers is not an allowable exception in IDEA. The following chart demonstrates how an LEA sees a reduction in costs due to an insurance change:

	3 <sup>rd</sup> Party Insurer	Self-Insured	Actual Claims	LEA's Actual Costs
SFY 2012	\$100,000	\$0	\$70,000	\$100,000
SFY 2013	\$0	\$100,000	\$70,000	\$70,000

In this example, the LEA lowered costs by \$30,000 between SFY 2012 and SFY 2013. This particular cost reduction is not an allowable exception under the regulations, so if a LEA failed all four MOE comparison tests, and had no allowed exceptions, the penalty would be \$30,000 cash. There was no reduction in services due to the switch in health insurance providers, only a reduction in the cost of the employees' benefit.

In the case of self-insurance, there is simply no way for a LEA to predict the amount of cost savings incurred during a fiscal year because health care claims are submitted by employees through the last month of the fiscal year. A LEA could believe it was on track to meet compliance based on predicted health care actual costs, only to fall short if claims are less than predicted in the final month.

Another issue that has a huge impact on small LEAs happens when an individual makes a change to his or her health care coverage. A special education teacher that switches from family coverage to single coverage could save the LEA \$6,000 a year. That \$6,000, on a small budget, does not get absorbed by any other increases. Small LEAs have resolved this by moving existing costs from their IDEA grant to local funds to "fill the gap" created by the change in health insurance coverage to meet MOE compliance.

*Transportation*

Like health insurance costs, transportation makes up a large portion of an LEA's expenditures. When looking at how to reduce LEA costs, transportation routes are rebid or reevaluated – sometimes moving from a LEA run system to a contracted system. Although the services remain exactly the same, cost savings generated by an efficient, responsible public agency is considered non-compliance under IDEA's MOE provision.

WDPI understands that cost saving measures should be encouraged and the funds that are saved should be reinvested into special education programs for additional, new costs. Ideally that works. However, in Wisconsin, LEAs have seen major cuts in the amount of state and local revenue which funds the majority of special education costs. They do not have the ability to reinvest the cost savings – state funds simply are not available.

**Item E. WDPI Recommendation**

WDPI wholly supports the purpose of the MOE compliance standard. The law puts protections in place to ensure that LEAs do not reduce services to students with disabilities during times of economic hardship. However, only using a monetary measure to determine this compliance standard does not take into account a changed economic landscape in which costs such as transportation and health insurance have artificially inflated the measure of services. In addition to expenditure data, flexibility should be built into the law to allow an LEA to demonstrate compliance with MOE by proving that the level of services provided in the current year is not less than the prior year. To address the unpredictability of health insurance costs, an LEA could demonstrate compliance by comparing the

number of special education and related services staff full-time equivalency between fiscal years. To address costs such as transportation, an LEA could demonstrate compliance by providing information on contracted costs and that the level of services are exactly the same between years, and that the cost is less through a restructuring or re-bidding process.

#### **IV. Regulatory Flexibility Act Certification**

In the proposed rules, OSERS stated that, “the Secretary has concluded that the proposed changes could result in reduced costs for States and LEAs to the extent that increased understanding of LEA MOE requirements and use of all four tests to demonstrate LEAs met MOE would result in States making fewer repayments to the Department and seeking fewer recoveries from LEAs.”

##### ***WDPI Comments***

In Wisconsin, LEAs have met MOE compliance if one of the four comparison tests (state/local, local only, state/local per capita, local only per capita) were met for an individual year. The proposed rule clarifies that the tests should be looked at individually and compared to the last year met. With this clarification, Wisconsin LEAs will find it more difficult to meet the compliance standard. LEAs will continue to move costs charged to the IDEA grant from federal funding to local funding to meet the comparison tests, leaving IDEA Part B funds either unspent or repurposed for general education through Coordinated Early Intervening Services and Title I Schoolwide activities.

In Wisconsin, IDEA Part B funds cover an average of 12% of an LEA’s special education instruction and related services costs. Medicaid revenue covers an additional 2%. The remaining costs are funded with local dollars, and the state reimburses approximately 26% of those costs. The remaining 60% of the excess cost of special education falls under LEA’s state-imposed revenue caps, competing for general state aid and local property tax dollars with other instructional, extracurricular, and operational costs. As the amount of local costs increases in order to meet the MOE compliance standard (because situations such as a decrease in health insurance costs means an LEA must “fill the gap” with local funds made by the reduction in costs), and the amount charged to IDEA Part B decreases, LEAs may start considering whether accepting the IDEA Part B funds is an economically sound decision.

The chart on the following page demonstrates the funding breakdown of a range of LEAs in Wisconsin. The amounts in the chart are for the *excess cost* of providing special education in SFY 2012 – no general education or centralized operational costs are included in these amounts.

A	B	C	D	E	F	G	H
LEA	# of SwD	Total Special Ed Expenditures	Local & State Special Ed Expenditures	Local Only Special Ed Expenditures	Part B Allocation & (% of Total SE Exp)	Part B Claimed & (% of Allocation)	MOE Failed By Amount
District 1	36	\$507,058	\$475,883	\$352,366	\$37,323 (7%)	\$31,174 (83%)	\$27,300
District 2	53	\$568,176	\$489,890	\$309,986	\$73,676 (13%)	\$78,285 (100%)	\$44,800
District 3	55	\$838,282	\$711,412	\$474,632	\$125,519 (15%)	\$126,870 (15%)	\$25,725
District 4	79	\$1,238,112	\$1,040,769	\$656,958	\$200,058 (16%)	\$197,343 (98%)	\$0
District 5	102	\$901,126	\$731,666	\$513,712	\$170,884 (19%)	\$169,459 (99%)	\$0
District 6	177	\$1,282,390	\$1,282,390	\$879,438	\$205,563 (16%)	\$0 (0%)	\$0
District 7	218	\$3,715,605	\$3,218,079	\$2,222,612	\$517,564(14%)	\$497,525 (96%)	\$73,971
District 8	705	\$9,306,299	\$8,348,808	\$5,919,026	\$1,016,329 (11%)	\$957,491 (94%)	\$38,438
District 9	1,014	\$11,643,017	\$10,800,575	\$7,369,974	\$1,377,890 (12%)	\$842,441 (61%)	\$0
District 10	1,076	\$13,542,716	\$12,839,049	\$8,856,292	\$1,651,822 (12%)	\$703,667 (42%)	\$0

**C: Total Special Education Expenditures:** All expenditures recorded in the LEAs special education account, regardless of funding source.

**D: Local & State Special Ed Expenditures:** Expenditures that were not charged to the IDEA Part B grant.

**E: Local Only Special Ed Expenditures:** The amount the LEA transferred from their general balance to cover all special education instruction and related services costs that were not covered by state funds, other LEA payments, or Medicaid.

**F: Part B Allocation & (% of Total SE Exp):** The LEA's FY 12 Allocation and percent of the allocation compared to all special education costs.

**G: Part B Claimed & (% of Allocation):** How much the LEA actually claimed and the percent of their allocation that represented