



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

November 20, 2006

Leigh Manasevit
Brustein & Manasvit
Attorneys at Law
3105 South Street, NW
Washington, DC 20007

Dear Attorney Manasevit:

This is in response to your October 13, 2006 letter to Alexa Posny, Director, Office of Special Education Programs (OSEP). In your letter you request clarification on the final Part B implementing regulations. Specifically, you asked questions regarding the Part B regulation at §300.704(c)(9). Below, we have listed your questions and our response to each.

Question One: Should funds reserved under §300.704(c)(1)(i), but not expended before the beginning of the last year of availability for obligations are reallocated in the final year of availability? (In [the] example, this would be FY 2008.)

Response: Generally, yes, except as described below. Section 300.704(c)(9), as you note, provides that: “Funds reserved under paragraph (c)(1)(i) of this section from the appropriation for any fiscal year, but not expended pursuant to paragraph (c)(4) of this section before the beginning of the last year of availability for obligations must be reallocated to LEAs in the same manner as other funds from the appropriation for that fiscal year are allocated to LEAs under §300.705 during their final year of availability. (Emphasis added) Section 300.704(c)(4)(i) directs the State to make all annual disbursements from the high cost fund in accordance with the State plan for the high cost fund established under §300.704(c)(3).

Question Two: Do States have any discretion or flexibility that would allow them to reallocate the funds before the beginning of the last year of availability?

Response: It depends. Neither the 2004 Act or final implementing regulations make specific provisions for the discretion or flexibility about which you ask. The final implementing regulations, however, at §300.704(c)(3)(i), require the SEA to develop, not later than 90 days after the State reserves funds under paragraph (c)(1)(i) of this section, annually review, and amend as necessary, a State plan for the high cost fund. This State plan must, among other elements, establish an annual schedule by which the SEA must make its distributions from the high cost fund each fiscal year. §300.704(c)(3)(i)(E). The SEA, at its discretion, could build into its State plan’s distribution schedule reallocation before the end of the current fiscal year of all funds remaining in the high cost fund after disbursements for high cost activities permitted under the plan have been made. (In your example, this would be before the end of fiscal year 2007.)

Question Two (a): In [the] example, is there any way in which a State could reallocate the funds in FY2007 if it is clear that no annual disbursements are going to be made in FY 2007?

Response: Yes, the SEA, at its discretion, could build this distribution into its State plan. (See the response in Question two above)

Question Two (b): If it became evident to an SEA that there are no LEAs in the State eligible to receive an annual disbursement from the high cost fund for that FY, can the SEA go ahead and reallocate in that FY instead of waiting until the carryover period?

Response: Yes, provided the SEA State plan allows such a determination.

Question Two (c): Would the State plan for the high cost fund have to specifically allow for this early reallocation?

Response: Yes, based on the provision at §300.704(c)(3)(i)(E) and (c)(4).

Question Three: Assuming remaining funds are reallocated in the succeeding FY (carryover period), which FY subgrant formula applies to the reallocation of funds?

Response: The formula in effect for the year in which the redistribution occurs. As you note, if the reallocation occurs in the carry-over year, the carry-over year's formula must be applied to the reallocation.

Question Four: Do the States have discretion to apply either the current FY subgrant formula (FY 2007, in [the] example) or the succeeding FY subgrant formula (FY2008 in [the] example?)?

Response: Please see the response to the prior question.

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.

We hope this response is helpful. Please feel free to let us know if we can be of further help.

Sincerely,


John H. Hager