



**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES**

June 14, 2010

Bill East, Ed.D.  
Executive Director  
National Association of State Directors  
of Special Education, Inc.  
1800 Diagonal Road, Suite 320  
Alexandria, Virginia 22314

Dear Bill East:

This is in response to your letter to Mr. Charles Rose, General Counsel for the U.S. Department of Education (Department). The letter was forwarded to me for response and I am pleased to have the opportunity to address your concern.

In your letter, you challenge what you believe to be a change in the Department's policy regarding the interpretation of section 612(a)(18)(A) of the 2004 Amendments to the Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR §300.163(a), which state: "A State must not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year." You indicate that, "Since the IDEA was first enacted in 1975, state education agencies have relied on an interpretation of *state maintenance of effort* under Section 612(a) of the Act to mean *state education agency maintenance of effort*."

We must respectfully disagree with your characterization of this matter as a change in Department policy. The Department has included financial support made available by agencies other than the State educational agency (SEA) for special education and related services for children with disabilities in the calculation of State maintenance of effort since this requirement was first enacted in 1997.<sup>1</sup> At that time, Congress amended the statute, and added the following provision: "(19) MAINTENANCE OF STATE FINANCIAL SUPPORT.----(A) IN GENERAL—The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the

<sup>1</sup> Prior to the enactment of Public Law (PL) 105-17 on June 4, 1997, there was no State level maintenance of effort provision. Rather, section 613(a)(9) of PL-94-142 (the Education for All Handicapped Children Act) required that a State: "provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State."

preceding fiscal year." This language is identical to the language in section 612(a)(18)(A) of the IDEA.

Thus, the statute has never included a provision for State *educational agency* maintenance of support, but has, since the 1997 Amendments to the IDEA, included the requirement for State financial support. In the 1997 Amendments, *State* is defined at section 601(27) as follows: "The term 'State' means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas." The definition of State was not altered in the 2004 Amendments to the IDEA.<sup>2</sup>

The reference to "State" financial support in section 612(a)(18)(A) is consistent with the statutory scheme of the IDEA, which recognizes in section 612(a)(11)(B) that the responsibility of the SEA for the general supervision of Part B of the IDEA, "shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State." Similarly, section 612(a)(12) — through the establishment of interagency agreements and other requirements — also recognizes the role public agencies other than the SEA play in providing, and paying for, special education and related services. Accordingly, a plain reading of the statutes, in both the Amendments of 1997 and those of 2004, which refer to "State financial support" and not "State educational agency financial support," clearly communicate congressional intent that a State include funds made available for special education and related services for children with disabilities from all State sources, not just those made available by the SEA in its calculation of maintenance of effort.

The Office of Special Education Programs (OSEP) issued guidance in OSEP Memorandum 10-5, on December 2, 2009 (copy attached) to highlight this provision. It was only in the several months prior to issuing this Memorandum that OSEP became aware, through the heightened focus on fiscal issues generated by: (1) OSEP's most recent verification visits and questions raised during those visits; (2) the passage of the American Recovery and Reinvestment Act of 2009 (ARRA) signed on February 17, 2009 and its requirements for accountability; and (3) recent audit findings made by both the Department's Office of Inspector General and independent auditors conducting work pursuant to the Single Audit Act and *Office of Management and Budget (OMB) Circular A-133*, that some States did not understand the requirement in question.

You raise a concern that some SEAs will need to collect additional information from their sister agencies in the State and that the SEA does not have authority to require another agency to provide the needed information. However, the IDEA, like many other Federal statutes, applies to

<sup>2</sup> The definition of "SEA" changed slightly in the 2004 Amendments, but not in a way that is material to this issue. Prior to the 2004 Amendments, IDEA used the definition of SEA that is used in 34 CFR §77.1: "*State educational agency* means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law." The 2004 Amendments to the IDEA adopted the following definition of SEA: "The term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law." Section 601 (28).

the State as a whole, and not to a single agency, even though that single agency has primary responsibility for its implementation. As noted above, the IDEA contemplates that many State agencies may provide many services needed by children with disabilities pursuant to their individualized education programs, such as nursing services (often made available through State Departments of Health), job coaching (through Vocational Rehabilitation), psychological counseling (through Departments of Mental Health), and so forth. Governors and legislatures recognize and address this need through State budgets and various allocations of funds. A clearer understanding of the need for the SEA to obtain and consolidate this information - which we hoped to support with the issuance of OSEP Memorandum 10-5 - should pave the way for SEAs to access the needed information.

If individual States need assistance in meeting this requirement, the State Director of Special Education and/or the State Financial Officer who has responsibility for collecting this information should contact his or her OSEP State Contact to talk through the issues and obtain technical assistance in implementing this requirement.

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.

Please do not hesitate to contact my office if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Alexa Posny". The signature is written in a cursive, flowing style.

Alexa Posny, Ph.D.

Enclosure

Contact Persons  
Name: Ruth Ryder  
Telephone: 202-245-7513  
Name: Deborah Morrow  
Telephone: 202-245-7456

December 2, 2009

OSEP 10-5

MEMORANDUM

TO: Chief State School Officers  
State Directors of Special Education  
FROM: Alexa Posny /s/  
Acting Director  
Office of Special Education Programs  
SUBJECT: Maintenance of State Financial Support under the  
Individuals with Disabilities Education Act

Since the Office of Special Education Programs (OSEP) began focusing on the fiscal requirements of the Individuals with Disabilities Education Act (IDEA) in 2007, the heightened scrutiny has given rise to requests for clarification of several of those provisions. In addition, the passage of the American Recovery and Reinvestment Act of 2009 on February 17, 2009, requires States and local educational agencies (LEAs) to examine the fiscal requirements in a new light and to be in a position to account for each of those requirements with increasing detail and specificity. One of the provisions which OSEP has been asked to clarify is found at 34 CFR §300.163, Maintenance of State financial support.

Under 34 CFR §300.163(a), "a State must not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year." The question has been asked whether this provision specifically means the support for special education and related services provided by the State educational agency (SEA) or whether, in computing its maintenance of financial support for special education and related services, the SEA must include support provided by other State agencies, such as a State Department of Health or a State Vocational Rehabilitation Agency.

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Under section 602(31) of the IDEA and 34 CFR §300.40 of the Part B implementing regulations, "State" is defined as each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas. Under section 602(32) of the IDEA and 34 CFR §300.41 of the regulations, "State educational agency" is defined as the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

The reference to "State financial support" in 34 CFR §300.163 is not limited to only the financial support provided to or through the SEA, but encompasses the financial support of all State agencies that provide or pay for special education and related services, as those terms are defined under the IDEA, to children with disabilities. Because 34 CFR §300.163(a) requires that a State not reduce its financial support from year to year for special education and related services, a State must include in its calculation of financial support under 34 CFR §300.163(a), any financial support for special education and related services provided by any State agency. The SEA is one of those agencies and likely provides or supervises the administration of the majority of the State's support for special education and related services but possibly not all the States financial support for special education and related services. For example, payment by the State Vocational Rehabilitation Agency from State funds for job coaching services to youth with disabilities pursuant to an individualized education program (IEP) would be included in the calculation of the maintenance of State financial support for special education and related services. Likewise, if the State Department of Health provides psychological counseling or other mental health services to children with disabilities pursuant to their IEPs, the cost of such services would also be included in the calculation under 34 CFR §300.163. In other words, a State needs to include in its calculation of 'State financial support for special education and related services' funds other agencies provide to the SEA for such services, funds other agencies provide directly to LEAs for the services, and funds other agencies directly pay to staff or contractors for the delivery of the services pursuant to an IEP.

The State financial support provided by the SEA for special education and related services is, of course, also included in the calculation required by 34 CFR §300.163. This includes State funding for special education staff, the cost of monitoring and carrying out other State administrative duties related to special education, and the cost of any direct services provided by the SEA, as well as any State funds provided to public agencies (including LEAs) in the State for the purpose of providing special education and related services.

The standard of State financial support provided at 34 CFR §300.163(a) is a different standard than the LEA maintenance of effort (MOE) standard delineated at 34 CFR §300.203(b). The LEA standard at 34 CFR §300.203(b) requires that an LEA both budget, in each subsequent year, at least the same amount that it expended in the most recent prior year for which information is available, and expend,

from year to year, at least the same amount that it expended in the previous year. The comparison, for LEA MOE compliance, is expenditures from year to year. For SEAs, the comparison is the amount of

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State financial support provided (made available) for special education and related services from year to year, regardless of the amount actually expended.

The consequences are also different for an LEA and a State if they fail to meet the required standard. If a State fails to maintain the required level of financial support for special education and related services, under 34 CFR §300.163(b), the Secretary of Education reduces the allocation of funds under section 611 of the IDEA for any fiscal year following the fiscal year in which the State fails to comply with the requirement of 34 CFR §163(a) by the same amount by which the State fails to meet the requirement. If an LEA fails to maintain fiscal effort, the SEA must return to the U.S. Department of Education, an amount equal to the amount by which the LEA failed to maintain effort. This repayment must be from non-Federal funds or from Federal funds for which accountability to the Federal government is not required.

If you have questions regarding these provisions, please contact Ruth Ryder at 202-245-7513 or Deborah Morrow at 202-245-7456.