



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

JUN 20 2005

Dr. Rebecca Cort
Deputy Commissioner for Vocational and
Educational Services for Individuals
With Disabilities
New York State Education Department
One Commerce Plaza, Room 1606
Albany, NY 12234

Dear Dr. Cort:

This letter is in response to your inquiry via an email of November 12, 2004, to the Office of Special Education Programs (OSEP). In addition, this letter responds to questions raised during a June 15, 2005 conference call with you and other staff members from the New York State Education Department and members of my staff. You are requesting guidance on whether local educational agencies (LEAs) in New York can sub-allocate grant funds under section 611 and section 619 of Part B of the Individuals with Disabilities Education Act (IDEA) to counties and private preschool and school-aged providers; and if so, the allowable uses of those funds by the counties and private providers.

Under section 611(g)(1) and section 619(g)(1) of IDEA, the New York State Education Department (NYSED) must make subgrants to local educational agencies (LEAs) that have established their eligibility under section 613 of IDEA. The term local educational agency is defined in section 602(15) of IDEA and 34 CFR §300.18. OSEP clarified this issue in letters to Mr. Lawrence Gloeckler dated June 28, 1999, October 21, 1999, and November 24, 1999. According to your email of November 12, 2004, to JoLeta Reynolds and OSEP staff, a result of OSEP's clarification regarding eligible subgrantees was "State legislation that required LEAs to pass through IDEA flow-through funds in the form of a -allocation. Programs apply for these funds based on the count of students that they served the previous year."

We assume that you are referring to section 4410-b 2. and 3. of Article 89 of Chapter 16 of New York State Consolidated Laws which states that "each school district receiving an allocation of funds pursuant to [section 611 and section 619 of IDEA] shall sub-allocate such funds...to other public and private agencies providing special education services to students...who were placed in such agency by the school district's IEP team". In a May 12, 2000 letter to Mr. Lawrence Gloeckler, OSEP requested clarification that New York does not interpret section 4410-b to require LEAs to use their Part B funds to make the payment to the public or private agency. As we stated in that letter, nothing in IDEA would preclude the State from requiring LEAs to make payments to public and private agencies to pay the cost of providing special education services to students who were placed in such agency by the school district's IEP team. The LEA could use any source of funds, including Part B funds, to pay the public or private agency for the cost of providing special education and related services, as long as the IDEA funds are used by the

public or private agency in accordance with the applicable requirements of IDEA. However, the State cannot require the LEA to use its Part B flow-through funds to make the payment to the public or private agency. In a June 13, 2000 response, New York stated, “we interpret that [section 4410-b] does not require LEAs to use their Part B funds to make the payments, but they may do so or use other funding sources”.

During the conference call, you agreed to send the 2004-2005 application for IDEA funding to demonstrate that New York is not interpreting section 4410-b as requiring LEAs to pass through IDEA flow-through funds in the form of a suballocation. A Note in the section titled “State Procedures for the Disbursement of Federal IDEA Part B Flow-Through Allocations for 2004-2005” and on the worksheet to facilitate and ensure the accuracy of LEA calculations of section 611 and section 619 funds states: “Whenever this document refers to the sub-allocation of IDEA Section 611 and Section 619 funds to approved special education programs (ASEPs), or to the sub-allocation of such carryover funds to ASEPs, LEAs are required to sub-allocate and disburse funds in amounts equivalent to the federal allocation amounts attributable to students enrolled in ASEPs. At the discretion of each LEA, such disbursements may be made using federal, State or local funds.” However, the language at the top of that page states: “the State Department of Education must allocate all IDEA flow-through funds to local educational agencies (LEAs); with the LEAs appropriately sub-allocating funds to ASEPs. The per pupil amount each LEA must sub-allocate to each eligible ASEP under Section 611 and Section 619 is calculated by the LEA based on data reported in the LEAs special education child count report.” Because the language at the top of the page seems to conflict with the note at the bottom of the page, we recommend that NYSED make some revisions to its application in order to clarify that LEAs are not required to use Part B flow-through funds to make the suballocations required under section 4410-b.

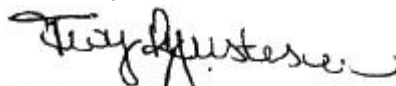
In your e-mail you indicate that the question has arisen whether counties should be allowed to apply to receive these dollars and, if they can, what are allowable uses for those funds. Again, referring to your email of November 12, 2004, you state, “Relative to the issue with the counties, some are receiving very substantial amounts of sub-allocated dollars for the large number of preschool students with disabilities who receive only one or more related service. (The county contracts directly with many independent related service providers to have these services delivered.)” As noted above, while an LEA may use IDEA funds to pay for special education and related services provided by other entities, there is no provision in IDEA that would permit LEAs, even at the direction of the State, to make subgrants of section 611 and section 619 funds, or what you refer to as suballocations, to counties and private preschool and school-age providers that operate approved special education programs (ASEPs). As we discussed during the conference call, LEAs are contracting with these entities to provide special education and related services to children with disabilities and, therefore, have a vendor relationship with these entities. The rate at which these entities are reimbursed for the cost of providing these services is set by the State in section 4410-b. The State must ensure that this rate is reasonable in light of the services provided and that it has, in setting this rate followed the same policies and procedures it uses for procurements paid for from its non-Federal funds. See 34 CFR §80.36.

You also have asked in your November 12, 2004, email and in the conference call how private preschool and school-age providers can use the sub-allocated flow through funds. Examples of how they currently use the sub-allocated funds are: extra staff development, teacher bonuses to improve recruitment and retention, graduate school tuition, innovative materials and technology, parent training and building parent relationships. You ask if these are allowable uses of the funds. Guidance on allowable uses of Part B section 611 and section 619 funds can be found in OMB Circular A-87. This circular can be accessed at http://www.whitehouse.gov/omb/circulars/a087/a87_2004.pdf. These costs are allowable if they are necessary and reasonable for proper and efficient performance and administration of the grant. However, the issue is not whether private providers can use IDEA funds for these purposes, but whether the rate of reimbursement for special education and related services to eligible students with disabilities is reasonable in light of the services being provided.

Under 34 CFR §300.230, the LEA must have on file with the State educational agency (SEA) that the amounts provided to the LEA under Part B of IDEA will be expended in accordance with the applicable provisions of 34 CFR Part 300; will be used only to pay the excess cost of providing special education and related services to children with disabilities consistent with §§300.184-300.185; and will be used to supplement State, local, and other Federal funds and not to supplant those funds. In addition, the SEA has a responsibility to ensure that LEAs are using section 611 and section 619 funds in accordance with the requirements in 34 CFR §300.230 and applicable cost principles. See 34 CFR §300.600. Both the State and the LEAs have a responsibility to ensure that section 611 and section 619 funds are used in accordance with the applicable requirements of IDEA, the Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 76 and 80 and the applicable cost principles cited above.

We will be happy to provide technical assistance on how to clarify in the IDEA application that the SEA is not requiring that LEAs use section 611 or section 619 IDEA funds to provide the suballocation required in section 4410-b. I hope this information is of assistance to you. Please contact Michael Slade, OSEP State contact for New York, at 202-245-7527 if you need further assistance.

Sincerely,



Troy R. Justesen
Acting Director
Office of Special Education
Programs