

October 30, 2007

Patty Guard, Acting Director
Office of Special Education Programs
U.S. Department of Education
Potomac Center Plaza
550 12th Street, S.W.
Washington, DC 20202-2641

RE: Request for clarification on fiscal questions relating to IDEA Part B

Dear Ms. Guard:

I am writing to request your office's clarification on several fiscal questions relating to the IDEA Part B. These questions have arisen as SEAs and LEAs implement the new final Part B regulations.

Topic No. 1 – Excess Cost Requirement

Questions on the excess cost calculation. Regulation § 300.202(b)(2)(i) states that an LEA “meets the excess cost requirement if it has spent at least a minimum average amount *for the education of its children with disabilities* before funds under Part B of the Act are used” (emphasis added). Regulation § 300.16 refers to Appendix A “for an example of how excess costs *must be calculated*” (emphasis added). As the first step in the calculation, Appendix A, paragraph “a.” states that “the LEA must determine *the total amount of its expenditures for elementary school students from all sources* – local, State, and Federal including Part B – in the preceding school year.” (See 71 Fed. Reg. 46,813, third column.)

Question 1a: In unexpected circumstances like a major natural disaster, LEAs may incur certain extraordinary expenditures that are not directly related to the education of its students. Does the reference to “total amount of its expenditures for elementary school students” mean that an LEA includes the total amount of expenditures for the education of its elementary school students or, literally, the total amount of all expenditures attributable to its elementary school students?

Question 1b: If the excess cost calculation refers to the total amount of expenditures for the education of its students (elementary or secondary, respectively), inasmuch as States have discretion in deciding what constitutes education based on their State law, is there any guidance as to how States are to exercise that discretion for the purpose of the excess cost calculation? For example, can a State include instructional-related expenditures and transportation expenditures, but exclude expenditures related to school food programs in the excess cost calculation?

Questions on determining excess cost compliance: Appendix A states that “Section 602(8) of the Act and § 300.16 require the LEA to compute the minimum average amount separately for children with disabilities in its elementary schools and for children with disabilities in its secondary schools. LEAs may not compute the minimum average amount an LEA must spend for the education of children with disabilities based on a combination of the enrollments in its elementary schools and secondary schools.” 71 Fed. Reg. 46813 (Aug. 14, 2006).

Question 1c: When determining whether an LEA has met the excess cost requirement, an LEA may not necessarily maintain and track expenditure data separately for elementary school students and secondary school students. Can an LEA apply the enrollment numbers of students and children with disabilities in its elementary schools to the relevant combined expenditure data on a proportional basis to determine how much non-IDEA Part B funds it has spent for the education of children with disabilities in its elementary schools?

Question 1d: When determining if an LEA has spent the required minimum average amounts for the education of children with disabilities, can an allocable portion of regular education costs (such as regular education teacher salaries for classes where children with disabilities are mainstreamed, or regular education transportation costs for children with disabilities who use such transportation) be applied, if they can reasonably be attributed to the education of children with disabilities?

Question 1e: The excess cost requirement appears to compare expenditures on the education of children with disabilities for one school year against a minimum average amount (calculated separately for elementary school level and secondary school level) that is based on expenditures for the *preceding school year*. However, for the current grant award year, *final* LEA expenditure data is often not yet available for the preceding school year. It is generally available for the second fiscal year preceding the current grant award year. Can an LEA use expenditure data from the second fiscal year preceding the current grant award year to determine its minimum average amounts for the current grant award year (i.e., for federal FY 2007 IDEA Part B funds, 2007-08 school year expenditures compared to a calculation based on 2005-06 data), or must an LEA only compare expenditure data for one school year measured against an excess cost threshold amount calculated from the preceding school year?

Topic No. 2 – LEA Maintenance of Effort Requirement

Under the State-level requirement, the 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 preceding fiscal year.” See IDEIA § 612(a)(18); 34 C.F.R. § 300.163(a). The focus is on special education and related services, or the excess costs of educating children with disabilities that arise from those children’s disability-related needs.

The local-level maintenance of effort requirement, however, focuses on “the education of children with disabilities.” See IDEA § 613(a)(2)(A)(iii); 34 C.F.R. §§ 300.203(a) & 300.203(b). The wording of this phrase could encompass not only special education and related services, or excess costs of educating children with disabilities, but also the basic cost of providing children with disabilities a public education.

Question 2: Is there a difference in the type of expenditures that must be considered under the State-level maintenance of financial support requirement at 34 C.F.R. § 300.163(a) and the type that must be considered for the local-level maintenance of effort (MOE) requirement found at 34 C.F.R. §§ 300.202 – 300.205?

Topic No. 3 – LEA Allowable Costs

In the Department’s publication of comments and discussion on the Part B regulations, one commentator stated that LEAs should be permitted to use a reasonable amount of their Part B funds to meet the Act’s requirements relating to student assessment, outcomes, complaints, and compliance monitoring, mediation and due process hearings. ED’s response was, “With one exception [mediation], nothing in the Act or these regulations would prevent an LEA from using its Part B allotment for the activities noted by the commentator, so long as the expenditures meet the other applicable requirements under the Act and regulations.” 71 Fed. Reg. 46,624 (Aug. 14, 2006). Those activities (student assessment, outcomes, complaints, and compliance monitoring, and due process hearings) are not listed under the permissive uses of funds at § 300.208.

Question 3a: Is it the Department’s interpretation that these activities are allowable pursuant to § 300.202(a) because those types of activities are “in accordance with the applicable provisions of [Part 300]”?

Question 3b: If those activities are allowable pursuant to § 300.202(a), then can IDEA Part B funds be used to pay for a reasonable amount of program costs specifically tied to an LEA meeting Part B requirements (for example, data collection and reporting to the SEA for State Performance Plan submissions),

provided such use does not violate other requirements of IDEA Part B, including excess cost, maintenance of effort, supplement, nonsupplant?

Topic No. 4 – Payment of RTI-related Costs

The new regulations permit LEAs to use a process based on the child's response to scientific, research-based intervention (RTI), as a means for determining whether a child has a specific learning disability. This RTI process could be one of multiple methods used in evaluating a child who is suspected of having a disability.

Question 4: Could an LEA use Part B funds *that are not set-aside for early intervening services* to pay for some or all of the cost of implementing RTI as part of a child find process?

Thank you for your attention to these questions.

Sincerely,

A handwritten signature in cursive script that reads "Christine Plagata-Neubauer".

Christine Plagata-Neubauer