



Fall Forum 2023
Bracing For Significant Regulatory Changes




IDEA HOT TOPICS

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AGENDA

- General Supervision: OSEP Guidance
- DMS 2.0: Process and Timeline
- Common Findings from 2023 DMS Reports
- OSEP Late Liquidation Guidance
- IDEA MFS and MOE Requirements
- *In Re Wyoming Department of Education* (June 23, 2023)

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GENERAL SUPERVISION: OSEP GUIDANCE

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OSEP GENERAL SUPERVISION GUIDANCE

- Link: [State General Supervision Responsibilities under Parts B and C of the IDEA \(ed.gov\)](#)
- Key areas of clarification:
 - 1) Reasonably designed general supervision systems
 - 2) SPP/APR Reporting
 - 3) Timeline considerations for identification of noncompliance
 - 4) Correction of child-specific noncompliance
- Other guidance topics include public reporting of state, LEA, and EIS program performance, enforcement actions, and state responsibilities for general supervision during disasters.

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Q. A-1: WHAT IS GENERAL SUPERVISION?

- As a condition of receiving IDEA funds, state agencies must have a general supervision system.
- Must include monitoring to:
 - 1) improve educational results and functional outcomes for infants and toddlers with disabilities and their families and children with disabilities; and
 - 2) ensure that LEAs and EIS programs and providers meet the requirements under IDEA.
- Broader than monitoring responsibilities under IDEA Sections 616 and 642.

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NECESSARY COMPONENTS OF A REASONABLY DESIGNED STATE GENERAL SUPERVISION SYSTEM

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Q. A-3: WHAT ARE INTEGRATED MONITORING ACTIVITIES?

- Interviewing LEA and local program staff
- Conducting interviews and listening sessions with parents of children with disabilities, children with disabilities, and other stakeholders
- Analyzing local child find data across the State to determine if there are significant disparities
- Analyzing assessment data
- Examining information gleaned from the State's dispute resolution system, including State complaints and due process complaints

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Q. A-14:5 A STATE REQUIRED TO EXERCISE ITS GENERAL SUPERVISION AUTHORITY DURING DISASTERS (E.G., HUMAN-MADE, HEALTH-RELATED, OR NATURAL)?

- Yes. Even during disasters, SEAs must ensure the requirements of IDEA Part B and Part C and ensure implementation
- If traditional on-site monitoring activities are not possible during a pandemic or natural disaster, States have the flexibility to collect information needed to ensure the implementation of IDEA by LEAs or EIS programs or providers through other means and by using the multiple components of the State's general supervision system

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Q. B-2: WHAT ACTIONS MUST A STATE TAKE WHEN MADE AWARE OF A CONCERN WITH A PROGRAM OR PROVIDER'S IMPLEMENTATION OF IDEA?

- State must conduct its due diligence in a timely manner to address the area of concern and reach a conclusion in a reasonable amount of time
- Due diligence activities may include conducting clarifying legal research, interviewing staff, parents of children with disabilities, children with disabilities, and groups that represent the families and communities served by the LEAs or EIS programs or providers, and reviewing and analyzing data or information
- If State determines that the LEA or EIS program or provider is out of compliance, State must issue a written notification of noncompliance to the relevant LEA or EIS program or provider

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Q. B-10: WHAT IS THE STANDARD FOR CORRECTION OF NONCOMPLIANCE?

- State must verify that the LEA or EIS program or provider:
 - 1) is correctly implementing the specific regulatory requirements; and
 - 2) if applicable, has corrected each individual case of child-specific noncompliance, unless the child is no longer within the jurisdiction of the LEA or EIS program or provider, and no outstanding corrective action exists under a State complaint or due process hearing decision for the child (child-specific compliance)
- State must maintain documentation and evidence demonstrating that the LEA or EIS program or provider has corrected each individual case of noncompliance

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**DMS 2.0 OVERVIEW:
PROCESS AND TIMELINE**

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OSEP DMS 2.0 MONITORING TIMELINE

- Phase 1 → Discovery
 - 5 months prior to engagement
 - OSEP Overview Call with State
 - State gathers and uploads documents
 - OSEP Stakeholder Engagement/Local Component
- Phase 2 → Engagement
 - Monitoring Visit Month
 - Issuance of the DMS Monitoring Report
- Phase 3 → Close-Out
 - Up to one year after issuance of DMS Monitoring Report
 - Review Evidence of Correction/TA

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OSEP DMS 2.0 MONITORING TIMELINE

- DMS Monitoring Visits will be scheduled August-January
 - Monitoring activities for Part B & Part C for a given state will occur during the same month (generally)
 - Hybrid of on-site and virtual
- Timeline by Cohort...
 - Cohort 1 in 'Engagement' or recently started 'Close-Out'
 - Cohort 2 'Engagement' scheduled Aug. 2024-Jan. 2025
 - Cohort 3 recently received notification in Oct. 2024
 - Cohort 3 to receive notification in Oct. 2025, etc.
- Impact on Determinations???

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The diagram illustrates the OSEP DMS 2.0 monitoring timeline as a continuous cycle. Key steps include:

- Notification Letter (October):** Letter identifying your Cohort assignments 2 years before DMS monitoring.
- DMS Kick-Off Call (October):** 1 year after notification OSEP will have a call to identify engagement month.
- DMS Update and Review Call (February):** Quick review with OSEP and set up dates for other calls.
- Discovery (March):** Call with OSEP to review the document request and provide access to external SharePoint.
- State Overview (April):** Call with OSEP to describe State structure.
- OSep Preparations (April):** Letter identifying your Cohort assignments 2 years before DMS monitoring.
- State Preparations (April):** Call with OSEP to describe State structure.
- Engagement Visit (August):** Generally 120 Days after the end of the Engagement month depending on complexity of issues.
- Monitoring Report (August):** Using the date of the monitoring report:
 - 6-month Status Letter
 - 1 year Close-out or additional actions required.
- Close-Out (August):** Generally 120 Days after the end of the Engagement month depending on complexity of issues.

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DMS PROTOCOLS

- Fiscal
 - Part C – Single Line of Responsibility
 - Part B – Subrecipient Monitoring Protocol
- General Supervision
 - Integrated Monitoring
 - Sustaining Compliance and Improvement
 - Data and SPP/APR
 - Child Find
- Dispute Resolution
 - State Complaint
 - Due Process
 - Mediation

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DMS REPORT THEMES: MONITORING & IMPROVEMENT

- States are not providing written notification of findings in a reasonable amount of time (generally 3 months)
- States not using all required elements for local determinations
 - Performance on compliance indicators;
 - Valid and reliable data;
 - Correction of identified noncompliance; and
 - Other data available to the State about the LEAs compliance with IDEA, including any relevant audit findings

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DMS REPORT THEMES: FISCAL MANAGEMENT

- States do not have reasonably designed system, policies and procedures, and internal controls for its subrecipient monitoring process consistent with IDEA and UGG
- Unable to ensure that every subaward is clearly identified to the subrecipient and includes the required information consistent with 2 C.F.R § 200.332(a), such as:
 - Period of Performance
 - Name of Federal Awarding Agency

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DMS REPORT THEMES: DISPUTE RESOLUTION

- Parents may not understand their rights under IDEA; procedural safeguards not being provided in native language
- Failure to track State complaints that are initially "set aside" because also the subject of pending due process hearings
- Policies and procedures related to State complaints do not address the award of a remedy for the denial of appropriate services, particularly when the child has left the original LEA
- State does not have a system in place to ensure that mediation agreements are formalized in written mediation agreement

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DMS REPORT THEMES: DISPUTE RESOLUTION

- Due Process Hearing Model Forms include information not required under IDEA, without indicating information is optional
- States do not have procedures to ensure that LEAs hold resolution meeting within 15 days of receiving notice of the parent's due process complaint or tracking 30-day resolution period requirements
- States are not tracking and ensuring implementation of due process hearing decisions in a timely manner

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DMS REPORT THEMES: EARLY CHILDHOOD TRANSITION

- Failure to ensure a smooth and effective transition
 - Monitoring to ensure that the child find process is being implemented year-round
 - Validating early childhood transition data
 - Ensuring documentation regarding LEAs attending early childhood transition conferences and other implementation of key IDEA early childhood transition requirements
- Ensuring procedural safeguards are provided to all parents of potentially eligible children with disabilities

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OSEP LATE LIQUIDATION GUIDANCE

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OSEP LATE LIQUIDATION GUIDANCE

- Link: [OSEP Memo](#)
- States have 120 days to liquidate funds. 2 C.F.R. § 200.344(b).
- Liquidation period for 2021 IDEA ARP and IDEA formula grant awards is October 1, 2023, through January 28, 2024.
- After 120 day period, States may request a Phase 1 late liquidation request within 18 months of the obligation period
- State may submit its Phase 1 late liquidation request to the OSEP-MSIP Director by March 31, 2025.

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OSEP LATE LIQUIDATION GUIDANCE CONT.

All Phase I late liquidation requests must include description of allowable obligations and:

- Description of the impact of the transaction on other funds
- A clear explanation of failure to liquidate the funds in a timely manner and specific steps State is taking to avoid reoccurrence;
- A signed attestation by a high-ranking authorized official that the obligations were valid and allowable (if applicable); and
- An assurance that the funds are NOT funds returned to the SEA by the LEA (for Part B only)

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OSEP LATE LIQUIDATION GUIDANCE CONT.

- Late liquidation requests must have documentation showing that the obligations were made during the 27-month period between July 1, 2021, and September 30, 2023.
- Request must include documentation that the funds were obligated for allowable purposes.
 - Ex. Dated invoices, bills of lading, or other billing documents supporting the amount the State is requesting to liquidate.
- States should be aware that requests of less than \$10,000 may be denied consideration by OSEP.

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OSEP LATE LIQUIDATION GUIDANCE CONT.

- After the Phase I late liquidation period has closed (i.e., March 31, 2025, for FFY 2021 IDEA awards), a State may request a Phase II late liquidation.
- Phase II late liquidation requests are subject to an “extraordinary circumstances” standard
 - Much higher level of scrutiny and involve multiple layers of review, and are ultimately approved, or disapproved by the Department’s Office of the Chief Financial Officer.

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IDEA MFS AND MOE REQUIREMENTS

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What is the MFS Requirement?

Maintenance of State Fiscal Support (MFS) :

- State requirement to not reduce the amount of **state financial support** for special education and related services **made available** for children with disabilities
 - Includes ALL State funds
 - May calculate per pupil or in the aggregate.
- Subsequent years rule

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MFS Waiver

Waiver permitted under some circumstances (34 CFR § 300.163)

- May only request a waiver one fiscal year at a time
- Contact State lead at OSEP for assistance
- If waiver is granted, ED may conduct additional monitoring
- <https://www2.ed.gov/policy/speced/guid/idea/monitor/sms-partb-waivers.html>

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MFS Waiver Request Criteria

- 1) Precipitous and unforeseen decline in financial resources, considering:
 - State's revenues and total appropriations for waiver year vs. prior year
 - State's financial support for special education for waiver year vs. prior year
 - Whether the State could have supported special education and did not do so (e.g., depositing funds into emergency account v. allocating to SPED)
- 2) Natural disaster (consider scope, emergency and non-emergency appropriations, State special education allocations, etc.)
- 3) Other exceptional or uncontrollable circumstances (e.g., public health emergency)
- 4) Might also consider prior results of OSERS' monitoring of the State

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Failure to Meet State MFS

- Consequences for failure to maintain support:
 - ED reduces allocation for any FY following the FY in which the State fails to comply
 - Reduction is the same amount by which the State fails to meet the requirement
 - Following year reverts back to previous level of effort
- Ability of SEA to reduce its MOE is VERY RARE! (34 CFR § 300.230)

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Pending MA MFS Litigation

- OSERS issued a proposed final determination that Massachusetts allegedly failed to meet the IDEA MFS requirements in 2010 and 2011
- OSERS first raised these allegations in 2013 with the submission of MAs IDEA application
- BUT, OSERS did not issue its determination until January 2021 imposing the \$114 million MFS penalty against MA
 - If enforced, it would cut the state's IDEA funding by a third in 2022
- **On Appeal, ALJ and Secretary both determined that MFS is NOT SUBJECT TO ANY STATUTE OF LIMITATIONS**

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LEA Maintenance of Effort

The general rule:

- An LEA may not reduce the amount of local, or state and local, funds that it spent for the education of CWDs below the amount it spent for the preceding fiscal year.
- Subsequent years rule

Two components:

- Eligibility standard- 34 CFR 300.203(a)
- Compliance standard - 34 CFR 300.203(b)

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LEA MOE: Four Ways to Calculate

Comparison of total expenditures using local funds only	Comparison of total expenditures using State and local funds	Comparison of the per pupil amount using local funds only	Comparison of the per pupil amount using State and local funds
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(34 CFR § 300.203(b))

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Allowable Exceptions (Reductions) to LEA MOE

1. The voluntary departure or departure for just cause, of special education or related services personnel;
2. A decrease in the enrollment of CWDs;
3. A CWD with an exceptionally costly program (as determined by SEA) left the LEA, aged out, or no longer needs the program;
4. The termination of costly expenditures for long-term purchases (equipment, construction, etc.);
5. The assumption of cost by the high-cost fund operated by the SEA

(34 CFR § 300.204)

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LEA MOE Exceptions (Reductions)

For any fiscal year for which an LEA's IDEA allocation exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures for the education of children with disabilities otherwise required by not more than 50 percent of the amount of that excess

- Must use the reduction on ESSA allowable activities

(34 CFR § 300.205(d) & 300.226(a))

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Limitations on Reducing LEA MOE

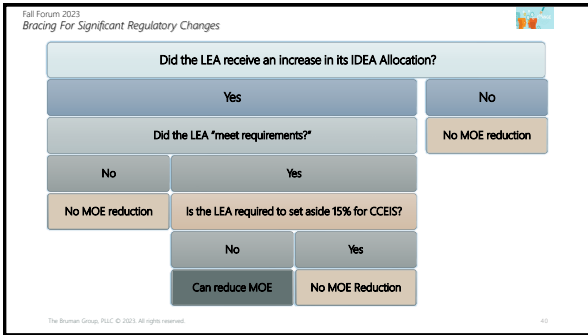
- If an LEA elects to set-aside funds for voluntary CEIS, the LEA must subtract any CEIS set-aside from the LEA MOE reduction amount. 34 CFR § 300.205(d) & 300.226(a)
- The LEA, however, is prevented from reducing its MOE, if:
 1. The LEA is identified as having significant disproportionality
 - The LEA must set aside 15% of the IDEA funds for comprehensive CEIS (CCEIS) to address factors contributing to significant disproportionality.

OR

2. The LEA does not "meet requirements"

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Failing the Compliance Standard

- SEA payback to ED with nonfederal funds:
 - Lesser of the amount of the failure, or the LEA's entire Part B subgrant for that fiscal year
 - Can use most favorable method
- SEA can use State procedures to recover funds from LEA

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LEA MOE Subsequent Years Rule

- If LEA fails to meet MOE requirements → the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required in the absence of that failure, not the LEA's reduced level of expenditures
(34 CFR § 300.203(c))

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In Re Wyoming Department of Education (June 23, 2023)

- **ISSUE:** May funds raised by local property taxes that are designated and treated as "State funds" under State law, but not "recaptured" for allocation by a State agency, be included in a State's MFS calculation?
 - April 17, 2023: ALJ issued Initial Decision in favor of the SEA.
 - OSERS appealed to the Secretary
- OSERS argued that the \$9,072,121 of not-redistributed funds are "state funds" in name only and are actually "local-level" financial support
- The Secretary upheld the ALJ decision and determined that the funds are state funds for the purposes of MFS, since the funds are controlled by state statute and there is no discretion of the funds at the local level
 - Notes unique statutory framework unique, unlikely other states would use this to avoid the MFS requirement
 - Cautions State should consider options within or changes to its system
- Link: <https://oha.ed.gov/oha/files/2023/06/2022-38-O-S.pdf>

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Questions?



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