



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

SEP 25 2009

J. Sarge Kennedy
Fiscal/Policy Advisor
Greater California Special Education
Fiscal Support Alliance
P.O. Box 8057
Red Bluff, CA 96080

Dear Mr. Kennedy:

This is in response to your letter dated June 1, 2009 to Mr. William W. Knudsen, former Acting Director of the Office of Special Education Programs (OSEP), regarding the excess costs, supplement not supplant, and local maintenance of effort requirements in Part B of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR Part 300. Your questions and OSEP's responses are indicated below.

“Question 1. Does the requirement that the average per pupil expenditure be expended before ‘excess costs’ suggest that, first the expenditure for the general education of a student with disabilities be determined and, then, any remaining amount of average per pupil expenditure be expended for the provision of special education and related services BEFORE state and federal Part B funds can be used to pay the excess costs associated with the provision of special education and related services?”

OSEP's Response: Yes. As you stated in your letter, the last sentence of the first paragraph of Appendix A to 34 CFR Part 300 on the excess costs calculation states “a [local educational agency] LEA must spend at least the average annual per student expenditure on the education of an elementary or secondary school child with a disability before funds under Part B of the Act are used to pay the excess cost of providing special education and related services.” Appendix A provides an example of how to calculate the minimum amount of funds an LEA must spend for the education of children with disabilities prior to using funds under Part B of the IDEA. Because the education of a child with a disability may include regular education, as well as special education and related services, when determining if the LEA has spent the required minimum amount for the education of its children with disabilities, that amount can include expenditures for regular education (such as regular education teacher salaries for classes where children with disabilities are educated with children who are nondisabled), if those costs can be reasonably attributed to the education of children with disabilities. See April 8, 2008 letter to Ms. Plagata- Neubauer. Please note that an LEA must meet the excess cost requirement in 34 CFR §300.202(a)(2) before Part B funds, not State funds, are used.

“Question 2. Can the State define what expenditures are NOT ‘for elementary’ and ‘for secondary’ students and thus exclude those expenditures, in addition to those for capital outlay and debt services, from the calculation of ‘total expenditures for elementary (and secondary) students’?”

OSEP's Response: The process of computing excess cost, as set out in Appendix A to 34 CFR Part 300, requires the LEA to determine the total amount of its expenditures for elementary school

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(or secondary school) students from all sources—local, State and federal (including Part B) in the preceding school year and only capital outlay and debt services can be excluded. As you note, in the April 8, 2008 letter to Ms. Plagata-Neubauer, OSEP states that such expenditures are not limited to those made for the education of elementary school (or secondary school) students. Therefore, the LEA must include all expenditures for elementary school (or secondary school) students from all sources in its calculation, as described above, but should not include expenditures that it did not make or that were made for purposes other than for elementary school (or secondary school) students. As you mention in the example in your letter, funds provided for adult education would not have been expended for elementary school (or secondary school) students and would therefore not enter into the calculation. You also gave some examples in your letter of expenditures that are not solely for an LEA's elementary school (or secondary school) students, such as expenditures for a statewide services high speed communications system. In cases where there is not a distinct and separate cost associated with elementary school (or secondary school) students, but the funds are expended for elementary school and secondary school students, the State may provide guidance to LEAs on how to allocate that expenditure among its elementary and secondary school students. However, the State cannot advise an LEA to exclude those expenditures.

“Question 3. Does the use of the term ‘for the education of’ [in §300.203(a) and (b)] mean that the expenditures for the total education of a child with disabilities, including both general and special education (and related services) are to be considered in both the excess cost process and the supplant, not supplant process, or can those processes still focus only on the provision of special education and related services?”

OSEP's Response: An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of children with disabilities, before using Part B funds. 34 CFR §300.202(b)(2)(i). The nonsupplanting requirement is met by meeting the maintenance of effort requirements in 34 CFR §300.203(a). An LEA meets the maintenance of effort requirements if the LEA budgets, for the education of children with disabilities, at least the same total or per capita amount from either local funds only, or from the combination of State and local funds, as the LEA spent for that purpose from the same source for the most recent prior year for which information is available. 34 CFR §300.203(b)(1). Under both tests, when calculating the amount an LEA has spent on the education of children with disabilities, that amount can include expenditures for special education and related services, and regular education, if those costs can be reasonably attributed to the education of children with disabilities.

“Question 4. Does the non-supplanting requirement of State funds mean that, in meeting the excess cost and supplement, not supplant requirements, the LEA must fully expend the prior year's level of local AND STATE funds before Part B can be used for the excess costs?”

OSEP's Response: No. As stated above, the excess cost and supplement/not supplant provisions describe separate tests that LEAs must meet in order to comply with the Part B requirements around the use of Part B funds. Under the non-supplanting requirement in 34 CFR §300.202(a)(3), Federal Part B dollars must be used to supplement State, local, and other Federal funds used for providing services to children with disabilities and not to supplant those funds. As explained in our response to Question C-6 of the April 13, 2009 Guidance related to the American Recovery and Reinvestment Act (ARRA) of 2009, there is an integral relationship between an LEA maintaining effort and the supplement/not supplant requirement. The LEA must maintain (or exceed) its level of fiscal effort, using either local, or State and local, funds, on a per capita or total basis, from year

to year in order to maintain fiscal effort and ensure that it is using Federal Part B funds to supplement those funds and not to supplant them. See 34 CFR §300.203. Again, this is a separate test from the excess cost provisions.

In your February 24, 2009 electronic mail inquiry to the Department's Information Resource Center, and in a follow-up conversation with Dr. Deborah Morrow on July 15, 2009, you ask whether the language in 34 CFR §300.202(a)(2) which states that "amounts provided to the LEA under Part B of the Act must be used only to pay the excess costs of providing special education and related services [emphasis added] to children with disabilities," consistent with 34 CFR §300.202(b) and the language in 34 CFR §300.203(a) which states that "funds provided to an LEA under Part B of the Act must not be used to reduce the level of expenditures for the education of [emphasis added] children with disabilities..." is an intentional difference and what that difference means in terms of computing both excess cost and maintenance of fiscal effort.

OSEP's Response: The language in the two provisions is intentional. However, as noted above, when determining the amount an LEA has spent on the education of children with disabilities for purpose of computing both excess cost and maintenance of effort, that amount can include expenditures for special education and related services, and regular education, if those costs can be reasonably attributed to the education of children with disabilities. Once an LEA meets the excess cost requirement by spending at least a minimum average amount for the education of its children with disabilities, Part B funds must, in general, be used to pay for the provision of special education and related services to children with disabilities. That is why the language in 34 CFR §300.202(a)(2) refers to special education and related services.

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.

If you have further questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456.

Sincerely,

Patricia J. Guard
Acting Director
Office of Special Education
Programs

cc: Mary Hudler