



Date: October 24, 2017

Prepared By: McCorquodale and Simon

Purpose: Understand the purpose for reconciliation of local MOE for FY11 through FY15.

Witness: Christopher Ruszkowski, Secretary-Designate, Public Education Department (invited); Christina Velasquez, Chair, Coalition of Special Education Administrators; Dr. Melville Morgan, Superintendent, Pojoaque Valley Schools; Dr. Veronica Garcia, Superintendent, Santa Fe Public Schools; and Jerry Reeder, Director of Special Services, Rio Rancho Public Schools.

Expected Outcome: Understand local-level MOE shortfall for FY11 through FY15, and potential shortfalls for FY16 and FY17.

PED Local Education Agency Special Education Maintenance of Effort Reconciliation for FY11 through FY15

Background

On September 29, 2017, the Public Education Department (PED) notified some school districts that they owed money to the U.S. Department of Education (USDE) because they had fallen short of special education local maintenance of effort (MOE) requirements pursuant to Part B of the federal Individuals with Disabilities Education Act (IDEA-B) for FY11 through FY15. PED indicated the liabilities came to light because of recently completed department reconciliation of local-level MOE. See **Attachment 1, Email Notification of Local-Level MOE Liability**. At this point, the total amount of the liabilities is unclear. LESC staff requested detailed information from PED on shortfalls by school district and charter school for each fiscal year; however, PED has not provided the requested information. A total of 55 school districts responded to an LESC survey, which indicates at least \$570 thousand in shortfalls ranging from \$1,900 to \$32,208 for 46 school districts, while nine indicated they were not notified of a liability. See **Attachment 2, Results of LESC Survey on Local-Level Maintenance of Effort Emails**. While the liabilities represent a relatively small amount of each school district's overall budget, school district special education directors have expressed concerns over the lack of an explanation from PED about how these liabilities were calculated. Additionally, discussions between LESC staff and USDE officials indicate federal regulations establish state education agencies as the entity responsible for repaying liabilities related to local-level MOE shortfalls; the state education agency (SEA) has the option of seeking repayment from local school districts.

It is not clear how many charter schools have received notices from PED. LESC staff contacted 18 charter schools to see if they had received a notice; of the eight that responded, none had received notification.

As a condition of receiving federal funds under IDEA-B, both SEA and local education agencies (LEA) are required to maintain effort annually. State-level MOE requires a state to make available at least as much funding as it did the previous year for special education and local-level MOE requires an LEA to spend at least as much as it did the previous year. These two provisions act independently of each other; a shortfall could exist at the state level but not at the local level and vice versa. Additionally, it is possible for shortfalls at the local level to exist in different amounts or at some LEAs while not at others. Notices received by school districts in September are not connected to the outstanding state-level MOE liabilities.

The Center for IDEA Fiscal Reporting (CIFR) at Wested provides technical assistance to SEAs to help them meet their federal obligation to collect and report special education fiscal data. CIFR recommended that each state has written procedures detailing the state's timeline and processes for collecting, analyzing, verifying, and reporting LEA local-level MOE data.

Requirements for Calculating Local MOE

To be eligible for federal special education grants under IDEA-B, LEAs are required to maintain at least the same amount of expenditures for students with disabilities as the LEA did in the preceding year. While federal regulations require the SEA – in New Mexico's case, PED – to maintain general supervision of their LEA's special education programs, federal officials told LESC staff that the LEA is responsible for calculating local-level MOE.

There are two standards an LEA must meet: the eligibility standard and the compliance standard.

The Eligibility Standard. The eligibility standard is used to determine whether an LEA is eligible for an IDEA-B grant in the coming fiscal year and is calculated prior to receiving an IDEA-B grant. To meet the eligibility standard, a state must determine the LEA has included in its budget at least as much as the LEA spent in the last year for which final spending information is available on the education of children with disabilities. These determinations are made for the upcoming fiscal year based on the budget the school district is preparing for the upcoming fiscal year. So, to determine eligibility for FY18, PED would compare spending for students with disabilities for the most recent year for which complete spending is available – which would be FY16 – to the amount the LEA budgeted for FY18. The FY18 budget is established at the end of FY17, when expenditures for FY17 are not complete. If the state finds an LEA is not meeting the eligibility standard, then the state retains the LEA's IDEA-B grant and provides special education services directly to children with disabilities. The SEA must provide the LEA notice and the opportunity for a hearing to determine if the LEA met the eligibility standard.

PED guidance indicates that it determines if an LEA has met the eligibility requirement by comparing budget data from the state's Operating Budget Management System (OBMS) and notifies each LEA of the following: the local-level MOE target established in the prior fiscal year, estimated expenditures for the current fiscal year, and an LEA's annual determination letter.

The Compliance Standard. The compliance standard is used to determine whether an LEA met their MOE target after the IDEA-B grant has been made. To meet the compliance standard an LEA must actually spend at least as much as it spent in the prior fiscal year on the education of children with disabilities, subject to the reductions allowed by law. PED guidance indicates that in or before December, PED calculates the following: the local-level MOE target from the prior fiscal year; whether the level of effort increased or decreased; the annual determination for consideration for a possible reduction; and whether the department approves or disapproves of a reduction. This calculation appears to test if LEAs have met the compliance standard.

Reductions to local MOE. Five exceptions allow an LEA to reduce its level of expenditure on students with disabilities while meeting local-level MOE requirements: (1) when a



school reduces expenditures because a teacher or ancillary service provider retires, voluntarily resigns, or is dismissed for just cause; (2) when there is a decrease in special education student enrollment; (3) when a school no longer provides services to a particular child with a disability that is exceptionally costly, because the child has left the LEA, aged out of special education services, or no longer needs the program; (4) when a long-term purchase, such as equipment or construction, is completed; and (5) when the state's special education high cost fund provides additional funding for a particular student. These exceptions are referred to as MOE flexibility.

If an LEA reduces the amount of money it spends on special education when compared with the preceding year, the LEA is required to provide documentation and explanation to the SEA so it may determine if the decrease was attributed to any of the flexibility exceptions allowed for local-level MOE calculation. If the LEA meets an exception, the LEA is allowed to reduce its MOE base. However, if the LEA does not meet any of the enumerated exceptions, the LEA is considered noncompliant.

PED has exercised the option of creating an LEA high cost fund called Punte para los Niños pursuant to 34 CFR Section 300.704 (c) and 6.31.2.9 (B)(6) NMAC. The purpose of the high cost fund is to assist LEAs or state-supported educational programs in addressing supports for high-needs children with disabilities.

Failure to meet the compliance standard. If an LEA fails to meet the compliance standard, the SEA must return the amount by which the LEA failed to maintain effort to USDE. Federal guidance indicates the SEA may choose to seek reimbursement from the LEA, following applicable state procedures. Federal officials contacted by LESC staff were uncertain if the state could compel an LEA to repay the funds. According to July 2006 guidance provided by USDE to the Maryland State Department of Education on withholding funds from the current year:

“Generally, if an LEA that can provide credible assurance that in the coming year it will meet the maintenance of effort requirements, it should receive an IDEA subgrant. In addition, an SEA is not authorized to reduce a current year IDEA subgrant as a means of resolving a prior year’s maintenance of effort violation. Faced with a history of noncompliance with the MOE requirement, however, the SEA would need to carefully determine whether the LEA will meet the MOE requirement in the coming year...or whether the SEA should begin an administrative withholding action because it is not convinced that the LEA will meet the MOE requirement for the new year.”

PED's guidance indicates that if an LEA fails to meet local-level MOE requirements, PED must return the amount of funds not maintained to USDE. In its guidance, PED says it will seek to recover funds from the LEA, but does not indicate how it will do so.

Calculation Method. Federal regulations allow LEAs to make eligibility and compliance standard calculations using four different methods: overall expenditures from local funds, overall expenditures from a combination of state and local funds, per-student expenditures from local funds, or per-student expenditures from a combination of state and local funds. Regulations allow the calculation method to change from year to year, but both the MOE target and current year spending must be calculated using the same method. USDE officials indicated in the past some states have required LEAs to use a particular method or one of a selection of available methods when calculating local-level MOE. In 2015, USDE

A 2017 article from the *Journal of Special Education Leadership* noted 19 states were not using all four allowable methods to calculate local-level MOE. This may cause LEAs to spend more than required or identify LEAs as not meeting local-level MOE when a different method would have shown otherwise.

undertook rulemaking that required SEAs to allow LEAs to use any of the available methods when calculating local-level MOE.

PED's guidance manual from January 2016 states that local-level MOE is calculated annually by PED's Special Education Bureau based on two of the methods allowed by federal regulations: overall spending from state and local funds and per-student spending from state and local funds. PED indicates when calculating per-student spending, the department considers special education enrollment on the first reporting day – the second Wednesday in October – to avoid double counting of students that may have transferred to another LEA during the school year. While PED only calculates local-level MOE based on two of the four methods allowed, federal officials told LESC staff that LEAs may use any of the four calculations when calculating local-level MOE. Ultimately, it is up to the LEA to calculate local-level MOE and an LEA could contest an SEA's finding of ineligibility if the SEA did not permit the LEA to calculate using any available method. It is not clear if the recently completed reconciliations used all four of the available methods. USDE officials indicated many LEAs use accounting systems that make it difficult or impossible to determine if funds spent on the education of children with disabilities came from local sources only; so it may be impossible for some LEAs to provide adequate documentation to the SEA to support a local-funds only calculation.

For enforcement purposes, federal law requires SEAs to make special education data available upon request to the U.S. Secretary of Education.

Expenditure of state and local funds are the only expenditures used when calculating local-level MOE. Federal funds cannot be considered in local-level MOE calculations. PED guidance indicates when calculating local-level MOE, PED considers expenditures for special education teachers and instructional assistants, as well as contracted ancillary full-time equivalent (FTE) employees such as speech or occupational therapists, interpreters, specialists, and non-instructional special educational assistants. School district officials told LESC staff the cost of benefits for these staff are not included in MOE calculations.

Emails received by school districts covered local-level MOE calculations in FY11 through FY15. It remains unclear if LEAs will face additional liabilities for FY16 and FY17. PED data reviews to determine the number of program units school districts and charter schools receive for special education ancillary staff FTE may have caused reduced expenditure at the local level, posing MOE challenges.

Issues with Calculating Local-Level MOE

According to school district officials contacted by LESC staff, the reasons for the liability remain unclear. Former PED staff indicated PED had previously identified errors in these years and completed reconciliation of FY11 through FY14 before 2015 and issued determination letters to LEAs. PED has not indicated to LEAs which calculations may have been in error. In discussions with officials at USDE, LESC staff learned that federal regulations issued in 2015 may be the cause of the recently determined liabilities. While USDE officials did not have any information on the exact causes of the liabilities in New Mexico, they noted that prior to FY15 there was widespread misunderstanding about how LEAs were required to calculate local-level MOE. USDE officials noted they began to pay more attention to local-level MOE calculations during the period in question.

One of the key issues involved is the “subsequent year rule.” Under the subsequent year rule, an LEA that fails to meet local-level MOE requirements must base future



MOE targets on the last year for which the LEA was in compliance. LEAs that fail to return spending to the level that it was in the “high watermark” year failed to meet local-level MOE. Prior to 2015, USDE officials indicate some states allowed LEAs to base their MOE target on the level of spending on the prior year’s expenditures, even if the LEA failed to maintain effort in that year. USDE officials maintain the addition of the subsequent year rule did not reflect new policy, but clarified existing policies that state and local officials were already expected to meet. It is unclear if any of the liabilities are the result of previous year violations of the subsequent year rule.

In its September emails, PED noted the department had been working on completing reconciliation of local MOE since FY15, indicating there were miscalculations in earlier determinations issued by PED. According to September 2017 meeting minutes from the New Mexico Council of Administrators of Special Education (NM CASE), PED indicated the need to reconcile FY11 through FY15 because of inaccuracies in calculating local MOE conducted by former PED staff, who have been let go. Department staff told the group they hired new certified public accountants to complete the task. While the delay in communicating these liabilities is concerning, PED indicated the delays led to considerable reductions in the liabilities. Because of the delay, LEAs have been given the option to pay the liability over two years, in FY18 and FY19. However, PED’s email notes the amount of the shortfall must be returned by the school districts to USDE, contrary to federal regulations and PED’s own guidance manual, which require the department to pay USDE.

Some LEAs informed LESC staff that determination letters are sent out at varying times of the year, lacking consistency. Also, some LEAs noted they receive their determination letters more than one year late. Another LEA indicated they contested a determination letter dated March 2015 and requested a hearing and to date, PED has not responded.

In addition, PED procedures for calculating local-level MOE could have contributed to these liabilities. A 2012 site visit from the federal Office of Special Education Programs concluded New Mexico did not have procedures and practices that are reasonably designed to implement selected grant requirements related to LEA determinations. The required action to this finding included written procedures that explain PED’s mechanism to consider LEA audit findings when making determinations. It is unclear what steps PED took to rectify these issues.

Difference from State-Level MOE

IDEA-B also requires states to meet MOE requirements. These requirements differ from those at the local-level. A state must “make available” at least as much funding for students with disabilities as the state made available in the previous year. Unlike local-level MOE requirements, states are not allowed to reduce MOE targets based on declining special education enrollment.

Federal law allows two exceptions for the requirement that states make available at least as much funding as in the prior year:

1. If the state can demonstrate an “exceptional or uncontrollable circumstance,” including a natural disaster or “precipitous and unforeseen decline in the financial resources of the state,” or;
2. If the state provides clear and convincing evidence that all children with disabilities are receiving a free, appropriate public education.

In FY10, USDE granted New Mexico a waiver from state-level MOE requirements due to a decline in financial resources. A waiver for FY11 was not granted.

In New Mexico, the bulk of funding made available for students with disabilities is distributed through the public school funding formula, but also includes funding allocated to certain state agencies. In FY16, the last year for which audited financial information is available, \$401 million of the \$445 million school districts and charter schools generated for special education program units, including program units generated for ancillary services FTE staff, counted toward state-level MOE calculations. The remaining special education formula funding, generated for gifted-only students is not considered in state-level MOE calculations. In addition to formula funding, funding for certain state agencies — the New Mexico School for the Deaf, the New Mexico School for the Blind and Visually Impaired, the Division of Vocational Rehabilitation, the Children, Youth and Families Department, and the Corrections Department — for the education of students with disabilities is included in state-level MOE calculations. Audited state agency funding totaled \$49 million in FY16. When combined with formula funding, a total of \$450 million was made available for students with disabilities, more than the \$445 million made available in FY15.

PED remains in discussion with the USDE regarding state-level MOE shortfalls in FY11 through FY14. In early 2016, PED informed the Legislature it had reached a “settlement in principle” with USDE that would require the state to increase its MOE target by \$3 million each year for five years and commit \$9 million per year for targeted special education initiatives, although the \$3 million added to the MOE target could come from the \$9 million in targeted initiatives. The settlement would have required the state to spend \$75 million in the next five years and an additional \$15 million every year thereafter to settle the \$85.7 million liability. To date, it does not appear PED and USDE have finalized a settlement agreement. Additionally, Legislative staff have requested updated information on FY17 and FY18 revenues made available at the state level from PED, but have yet to receive data that have been made available to the legislature for use in identifying potential MOE shortfalls over the past several years. The department did not implement language in Paragraph 2 of Subsection G of Section 2 of Laws 2016 (2nd S.S.) Chapter 6, which allowed the department to ensure state-level MOE was met in FY17, and PED staff have indicated it is likely a shortfall exists for FY17.

MOE Shortfall
(in millions)

Year	Shortfall
FY10*	\$46.3
FY11	\$35.2
FY12	\$29.4
FY13	\$8.4
FY14	\$12.7
FY15	\$0.0
TOTAL	\$85.7

Source: LESC Files
*Waiver granted; not included in total

Simon, Joseph

Subject: FW: Local MOE Reconciliation

From: Aguilar, Paul J, PED [mailto:PaulJ.Aguilar@state.nm.us]
Sent: Friday, September 29, 2017 3:50 PM
To: Morgan, Dr. Mel
Cc: Ortiz, Michelle
Subject: Local MOE Reconciliation

Good afternoon Superintendent,

As you may know, today is my last day with the PED and I wanted to get information to you before I depart. It was my intent to visit with you personally but time has gotten away from me. As such, I am reaching out by email.

I have been trying to get local special Ed MOE reconciled for about the last three years and have run into some internal roadblocks. These have been cleared up and we have recently completed the reconciliation of local MOE for the 10-11, 11-12, 12-13, 13-14 and 14-15 school years. This work led to considerable reductions in the liability for school districts, however some liability still exists. For your district, that amount is \$19,862.00.

You will be receiving a letter from my office in the next week explaining the liability and the terms of paying it back. Although the delay in reconciling was the fault of my office the liability still exists and needs to be returned by your district to the U.S. Department of Education. Since the delay is our fault, you are being given the option of paying the entire amount in the current school year or dividing it up between this school year and next school year, the decision is yours. I apologize for the delay and wish to thank you in advance for your attention to this matter. If you have questions, please direct them to Deborah Dominguez-Clark, State Director of Special Education at Deborah.Clark@state.nm.us or at 505-827-1423

Best,

Paul

Hipolito "Paul" Aguilar
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RESULTS OF LESC SURVEY ON LOCAL-LEVEL MAINTENANCE OF EFFORT EMAILS

SCHOOL DISTRICTS INDICATED PED NOTIFIED THEM OF AN OUTSTANDING LIABILITY

SCHOOL DISTRICT	LIABILITY
1 ALAMOGORDO	\$16,000
2 BELEN	\$12,000 ¹
3 BLOOMFIELD	\$8,000 ²
4 CARLSBAD	\$6,200
5 CARRIZOZO	\$2,700
6 CLOUDCROFT	\$5,000
7 CLOVIS	\$6,200
8 CORONA	\$5,000 ¹
9 DEMING	\$6,600
10 DEXTER	\$5,011
11 ELIDA	\$7,600
12 ESTANCIA	\$15,000
13 EUNICE	\$9,000
14 FARMINGTON	\$5,500
15 FLOYD	\$7,547
16 GRADY	\$6,609
17 GRANTS	\$17,000 ¹
18 HAGERMAN	\$11,488
19 HATCH	\$8,679
20 HONDO	\$13,220
21 JAL	\$7,160
22 JEMEZ MOUNTAIN	\$9,770
23 JEMEZ VALLEY	\$12,617
24 LAS CRUCES	\$21,464
25 LOGAN	\$12,170
26 LORDSBURG	\$12,989
27 LOS ALAMOS	\$17,339
28 LOS LUNAS	\$21,695
29 LOVING	\$14,788
30 MAXWELL	\$22,000
31 MELROSE	\$6,645
32 MORIARTY	\$13,893
33 MOSQUERO	\$32,208
34 PEÑASCO	\$24,454
35 POJOAQUE	\$19,862
36 PORTALES	\$4,939
37 QUEMADO	\$13,124
38 RATON	\$25,937
39 RIO RANCHO	\$23,608
40 RUIDOSO	\$25,000
41 SILVER CITY CONS.	\$13,000
42 SOCORRO	\$1,900
43 TAOS	\$11,000 ¹
44 TEXICO	\$8,768
45 TULAROSA	\$8,299
46 VAUGHN	\$11,841
47 TOTAL	\$570,824

Source: LESC Survey

¹ Belen, Corona, Grants, and Taos indicated this was an approximate value.

² Bloomfield indicated they did not receive an email from PED but received a phone call and an estimated value.

SCHOOL DISTRICT OR CHARTER SCHOOL INDICATED PED HAD NOT NOTIFIED OF AN OUTSTANDING LIABILITY

SCHOOL DISTRICT OR CHARTER SCHOOL
1 ACADEMY OF TRADES & TECH ST. CHARTER (APS)
2 ALBUQUERQUE ³
3 ALMA D' ARTE STATE CHARTER (LAS CRUCES)
4 AMY BIEHL ST. CHARTER (APS)
5 ARTESIA ³
6 AZTEC
7 CIEN AGUAS INTERNATIONAL ST. CHARTER (APS)
8 DES MOINES
9 ESPAÑOLA
10 GILBERT L. SENA STATE CHARTER (APS)
11 HOUSE
12 MASTERS PROGRAM ST. CHARTER (SFPS)
13 SCHOOL OF DREAMS ST. CHARTER (LOS LUNAS)
14 TAOS ACADEMY ST. CHARTER (TAOS)
15 TRUTH OR CONSEQ.
16 WAGON MOUND
17 ZUNI

Source: LESC Survey

³ In conversation with LESC staff, school district officials indicated they received a call from PED, but have not yet received official correspondence from PED.