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June 12, 2013

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** Ian Kleats

**RE: STAFF REPORT: SPECIAL EDUCATION MAINTENANCE OF EFFORT  
OVERVIEW**

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**INTRODUCTION**

The week before the 2013 legislative session was convened, the Legislature became aware of several issues surrounding possible maintenance of effort (MOE) shortfalls under the federal *Individuals with Disabilities Education Act Part B (IDEA-B)*. Uncertainty surrounding the state's special education MOE for State Fiscal Year (SFY) 10 and SFY 11 and resolution of the waiver process contributed to an especially complex and difficult appropriation process during the 2013 legislative session. On June 3, 2013, the US Department of Education (USDE) issued its response to the state's waiver requests, granting a waiver for SFY 10 and denying the waiver for SFY 11.

This staff report summarizes the:

- MOE requirements for IDEA-B;
- national IDEA-B MOE developments;
- Public Education Department (PED) waiver requests and data submissions;
- the USDE response to waiver requests;
- overview of 2013 legislative action; and
- possible unresolved policy concerns.

## MOE REQUIREMENTS FOR IDEA-B

In order for a state to be eligible for IDEA-B federal grant awards for special education, the state must fulfill certain requirements outlined in the federal Code of Federal Regulations (CFR).

Among its provisions, the CFR states that:

- a state must not reduce the amount of state financial support for special education and related services for children with disabilities below the amount of that support for the preceding fiscal year; and
- if a state fails to meet MOE and is not granted a waiver, the USDE Secretary shall reduce a future IDEA award by the same amount by which the State failed to meet the requirement.

Other provisions of the CFR state that the USDE Secretary may grant an MOE waiver under two circumstances<sup>1</sup>: (1) due to exceptional or uncontrollable circumstances including a 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 have available to them a free appropriate public education (FAPE).

Waivers can be granted for up to one year, however, there is nothing limiting a state education agency (SEA) from receiving additional waivers in subsequent years.

Further guidance from USDE<sup>2</sup> with regard to criteria used in evaluating a waiver request based on “exceptional or uncontrollable circumstances” indicates the USDE considers the following criteria:

- a natural disaster or a precipitous or unforeseen decline in financial resources of the state;
- state revenues for the year of the waiver compared to prior year and what extent the decrease was based on exceptional or uncontrollable circumstances;
- total appropriations for the year the waiver was sought and the prior year;
- the state’s level of financial support for special education and related services in the year the waiver was sought and the prior year;
- state appropriations for other agencies by category including education as a whole, and broken down by higher education, K-12, and special education;
- the state’s compliance and performance record in implementing Part B of IDEA;
- financial information from above for prior years; and
- other sources of revenue used by the state for special education.

When responding to other states waiver requests from MOE requirements, the USDE has often considered whether decreases to state financial support for special education were “equitable” relative to decreases in financial support for other state services. In the case of those states receiving a full waiver, the USDE has often cited that decreases to special education funding were less than proportionate when compared to decreases in the funding of other state services.

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<sup>1</sup> The USDE response to the PED waiver request notes that PED sought a waiver under the provisions of (1), and a waiver was *not sought* under (2).

<sup>2</sup> <http://www2.ed.gov/policy/speced/guid/idea/moe-waivers.pdf>

## **NATIONAL IDEA-B MOE DEVELOPMENTS**

Several national developments could impact the state's MOE waiver process and the possible implications of initial waiver decisions received by PED on June 3, 2013. These developments include:

- language in the most recent federal appropriations bill passed by the US Congress limiting the reduction of IDEA-B funds for failing to meet MOE to a single year; and
- a federal district court ruling, originating from South Carolina's MOE waiver requests, that the USDE must provide both written notice and an administrative hearing before its determination becomes final.

### ***Federal Appropriations Language***

Language in the continuing resolution (C.R.) for Federal Fiscal Year (FFY) 13 could mitigate the long-term impact of any reduction in IDEA-B grant awards. Prior to this legislation, the predominant factor used in determining the size of a state's IDEA-B award for the following fiscal year was the amount of the award in the preceding fiscal year, even if that award had been reduced because the state had failed to meet MOE in some previous year. This meant that a reduction, applied only once, could lower a state's allocation for each year thereafter.

The language in the C.R. provides that when a state fails to maintain effort for a given SFY, the penalty to the state's federal IDEA grant award would be incurred in the FFY in which USDE decides to make the reduction. Further, the C.R. would limit the impact of such a reduction to only one year. Because the C.R. is only effective through the conclusion of FFY 13, which ends September 30, 2013, it is unclear whether the MOE penalty provisions will remain in future C.R.s or in other federal budget legislation. On June 4, 2013, four members of New Mexico's Congressional delegation introduced a federal bill entitled the *IDEA MOE Adjustment Act* that would place similar provisions into law.

### ***South Carolina MOE Court Ruling***

The South Carolina ruling suggests that, even with the written initial determination from the USDE on PED's SFY 2010 and SFY 2011 waiver requests, PED will also have an opportunity for a hearing on the merits of the waiver requests. This may extend the time prior to which the state receives a final, rather than initial, decision. It is possible that such a hearing process could delay the final determination until after the close of SFY 13, which could result in appropriations contingencies not being fulfilled in time to rectify MOE shortfalls for that fiscal year.

This development also carries further implications because the court's ruling followed from its determination that the IDEA-B allocation reduction represented an eligibility action rather than an enforcement action. This distinction would allow a state an avenue to appeal the decision of the hearing process. For New Mexico, this avenue would begin with the federal 10<sup>th</sup> Circuit Court of Appeals, with any further appeal going to the Supreme Court of the United States.

## **PED WAIVER REQUESTS AND DATA SUBMISSIONS**

According to the USDE's June 3, 2013 response letter along with a timeline of MOE events produced by the PED for a February 2013 interagency meeting during the 2013 legislative

session, PED began to examine New Mexico's MOE status during the summer and fall of 2010 when other states began filing MOE waivers. The timeline suggests that PED began a dialogue with the USDE in February 2011, and has continued that dialogue on an ongoing basis since that time. In the spring of 2012, PED and USDE determined that an MOE waiver would be required for the state.

### ***August 2012 – Initial Waiver Request for SFY 10 and SFY 11***

As a result of its conversations with the USDE, PED submitted two separate waiver requests for SFY 10 and SFY 11, each citing a precipitous and unforeseen decline in the financial resources of the state as for a waiver from MOE requirements. The amount of the PED waiver requests were approximately \$15.3 million for SFY 10 and \$12.9 million for SFY 11. Supporting documentation for the waiver requests was submitted to USDE in correspondence dated August 17, 2012.

### ***September 2012 – Amended Waiver Request for SFY 11***

In response to questions from the USDE, the PED submitted an amended waiver request for SFY 11 on September 24, 2012. That submission revised the SFY 11 MOE shortfall to be approximately \$28.2 million, up from the \$12.9 million requested in August 2012.

### ***February 2013 – Additional Data Submission***

In December 2012, USDE contacted PED to provide informal notice of a preliminary decision on PED's waiver request. At PED's request, the USDE allowed PED to submit additional data by February 1. An additional extension was then provided to PED until February 14. PED then asked for a meeting to present its data and information and ultimately submitted information to USDE on February 18, 2013. The information submitted contained:

- a statement exercising provisions of CFR §300.230 to claim credit for up to 50 percent of an increase in federal grant awards as state financial support;
- amendments to the PED's MOE calculation, including taking credit for "workload reductions" and pension contribution swaps; and
- explanations of extenuating economic circumstances.

Among its other provisions, CFR §300.230 requires that a state pay or reimburse all local education agencies (LEAs) 100 percent of the cost of special education and related services. PED's submission asserted that the State Equalization Guarantee (SEG) distribution reimbursed the full cost of those services.

In addition to the credits against MOE claimed by PED for "workload reductions" and pension contribution swaps, PED also amended the financial support for special education provided by other state agencies. It is unclear how those new figures were calculated, but the change resulted in a narrower MOE shortfall for all years.

After accounting for these changes, PED projected MOE shortfalls to be about \$3.2 million in SFY 10 (down from \$15.3 million) and \$10.9 million in SFY 11 (down from \$28.2 million). The submission also included a projected MOE shortfall of \$11.5 million for SFY 12, although no waiver request for that year was submitted by PED at that time.

***March 2013 – Data Submission for Use of Federal State Fiscal Stabilization Funds (SFSF) and Ed Jobs Funds as State-level Financial Support***

The waiver requests and supplemental data in support of those requests for SFY 10 and SFY 11 submitted by PED to USDE appeared to consider certain federal stimulus dollars as state financial support for special education. During SFY 10 and SFY 11, the state received federal State Fiscal Stabilization Funds (SFSF) and Education Jobs (“Ed Jobs”) Funds through the federal *American Recovery and Reinvestment Act* (ARRA).

**Attachment 1**, a guidance document published by the Office of Special Education and Rehabilitative Services of the USDE, contains the conditions that must be met in order to use these federal dollars for meeting MOE. According to that guidance, a state:

- may treat SFSF as non-federal funds for the purpose of any requirement to maintain fiscal effort (i.e. MOE) under any other program that the USDE administers, such as IDEA, upon “prior approval” from the USDE Secretary; and
- need not apply for prior approval, which is instead granted should a state meet the five criteria explicitly stipulated under section H-3 of the document.

**USDE RESPONSE TO WAIVER REQUESTS**

On June 3, 2013 in a 16-page letter transmitted by facsimile and addressed to PED (**Attachment 2**), the USDE responded to the PED waiver requests for SFY 10 and SFY 11. In its response, the USDE:

- for years after SFY 09, determines that New Mexico’s required level of state financial for special education is \$461,998,168<sup>3</sup>, the level made available in SFY 09;
- for SFY 10, grants a waiver of \$48,094,194 based on “exceptional or uncontrollable circumstances”; and
- for SFY 11, rejects the waiver request in the amount of \$34,120,713.

For SFY 10, as justification for the equitability of providing a waiver, the USDE cites that the state financial support for special education declined by 10.4 percent from SFY 09, whereas the average percentage decrease from SFY 09 levels in recurring appropriations for state agencies was 11.2 percent.

For SFY 11, however, the USDE determined that it would not be equitable to grant the state its waiver request. In doing so, the USDE wrote the following:

“Because the State’s recurring revenues increased from SFY 2009 to SFY 2011 (and increased from SFY 2010 to SFY 2011), and the State accrued substantial funds in SFY 2011 that were available for special education and related services,

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<sup>3</sup> The amount USDE determined as the amount of state financial support for special education in SFY 09 appears to erroneously double-count 3- and 4-year-old developmentally disabled grade level units. It does not appear that correcting this calculation would substantially alter the reasons cited by USDE in accepting the SFY 10 waiver request or denying the SFY 11 waiver request, but would likely result in a lower base level of state financial support for special education.

the Department cannot conclude that the State experienced an ‘exceptional or uncontrollable’ circumstance in SFY 2011.”

Although SFY 12 and SFY 13 were not the subject of the waiver requests, the USDE noted in the response that data provided by PED suggests that the state may have failed to meet MOE in FY 12 by approximately \$26.4 million as well. It raised further concerns that “the State may not maintain State financial support in SFY 2013” either.

The USDE also indicated that it “does not intend to reduce New Mexico’s FFY 2013 grant award because of its failure to maintain State financial support in SFY 2011.” This may imply that the soonest any reduction to the state’s IDEA-B grant award might occur would be FFY 2014 and SFY 15, and it would give the Legislature sufficient time to appropriate monies to replace any lost federal funds.

Ten pages of the letter were devoted to the calculation of state financial support for special education that the USDE used in its determination. Among the topics considered were:

- (1) flexibility under CFR §300.230 (pg. 6 of **Attachment 2**);
- (2) “workload reductions” (pg. 10 of **Attachment 2**);
- (3) “retirement swaps” (pg. 10 of **Attachment 2**);
- (4) three- and four-year-old developmentally disabled students (pg. 11 of **Attachment 2**);
- (5) use of the state’s Training and Experience Index (pg. 11 of **Attachment 2**); and
- (6) treatment of funds through the SFSF and Ed Jobs programs (pg. 12 of **Attachment 2**).

## **OVERVIEW OF 2013 LEGISLATIVE ACTION**

### ***General Appropriation Act (GAA) of 2013 (Laws 2013, Ch. 227, partial veto)***

The *General Appropriation Act (GAA) of 2013* contains several contingent provisions related to meeting special education MOE requirements for both SFY 13 and SFY 14. In **Attachment 3, FY 13 and FY 14 Appropriations and Transfers Related to State-level Maintenance of Effort Requirements for Special Education**, these provisions are displayed graphically.

The provisions consist of both direct appropriations and transfers from other appropriations, which include:

- for SFY 13, up to \$20.0 million appropriated from the Ed Lockbox and driver’s license fees to PED as a special appropriation;
- for SFY 13, up to \$20.0 million transferred from the SFY 13 state equalization guarantee (SEG) distribution to PED as a supplemental and deficiency appropriation;
- for SFY 14, up to \$10.0 million appropriated from the General Fund to PED as a nonrecurring categorical appropriation; and
- for SFY 14, up to \$16.0 million transferred from the SFY 14 SEG distribution to PED.

### ***\*CS/HB 628, Special Education Funding (Laws 2013, Ch. 191)***

Described graphically in **Attachment 3**, \*CS/HB 628 contains two distinct sets of contingent provisions relating to meeting MOE:

- (1) for SFY 13 and SFY 14, \*CS/HB 628 could appropriate up to an additional \$20.0 million and \$16.0 million, respectively, from the General Fund Operating Reserve; and
- (2) for SFY 13 and SFY 14, if funds were transferred from the SEG, \*CS/HB 628 could appropriate up to \$20.0 million and \$16.0 million, respectively, from the operating reserve to replace any funds transferred out of the SEG.

***HB 459, Special Education Equalization Guarantee (introduced, but did not pass)***

As introduced, HB 459 proposed a change to the funding formula designed to address possible MOE shortfalls in SFY 14 and years thereafter. Among its provisions, the bill would have separated special education funding from the SEG distribution and placed it into its own unit-based equalized funding formula. This may have helped to provide a more transparent annual MOE target, to maintain equalized funding for special education, and to allow the state to address potential MOE shortfalls at the lowest cost.

After being amended by the House Appropriations and Finance Committee (HAFC) to delay the effective date until July 1, 2014, the legislation failed to pass out of the HAFC. Some concerns raised in HAFC included:

- due to the delayed effective date, there might not be a need to enact such a proposal during the current legislative session; and
- such a proposal might benefit from additional examination over the interim.

**POSSIBLE UNRESOLVED POLICY CONCERNS**

While the appropriations and transfers contained in the *GAA of 2013* and \*CS/HB 628 could address MOE requirements for SFY 13 and SFY 14, two issues remain unresolved by the legislation:

- (1) failure to fulfill contingency language for SFY 13 as a result of the amount of time needed for a final determine of SFY 10 and SFY 11 waiver requests by USDE; and
- (2) possible reduction of federal IDEA-B grant awards in SFY 15.

The first issue results from the contingency language in both appropriations bills and the possible timing of the USDE waiver decision. The two bills contain substantively different contingencies, making it possible that one contingency is fulfilled while the other is not:

- the *GAA of 2013* requires that PED certify the “program cost made available in fiscal year 2013 is insufficient to meet the maintenance of effort requirements” and obtain state Board of Finance approval to transfer and distribute funds; while
- CS/HB 628 requires that “after final negotiation and settlement with the United States department of education, the state is required to make up funding for state-level special education [MOE].”

Several scenarios present themselves with respect to these contingencies:

- projections of SFY 13 MOE shortfalls are dependent upon the USDE’s determination of the level of state financial support provided in SFY 09, which may not be resolved until after a hearing, if requested, and potentially subsequent appeals;

- PED might choose not to make the certification necessary under the *GAA of 2013* based on the USDE's preliminary calculation of state financial support;
- it does not appear that the contingency language in \*CS/HB 628 can be fulfilled until after any hearing occurs and resulting appeals are exhausted; and
- as a result, the necessary appropriations or transfers might not occur in time to prevent an MOE shortfall in SFY 13, which could result in as much as \$38.4 million of further grant reductions based on the methodology used by the USDE<sup>4</sup>.

Regarding the second issue, if the initial waiver denial for SFY 11 by the USDE is upheld following an administrative hearing, if requested, and any resulting appeals, the federal IDEA-B grant award in FFY 2014 may be reduced by the amount determined by the USDE by which the state failed to maintain its financial effort in SFY 11. During the interim, the Legislature may wish to consider whether it intends to appropriate additional resources for SFY 15 and if so, how much would be necessary.

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<sup>4</sup> The amount may change if the aforementioned error by USDE with regard to the double-counting of 3- and 4-year-old developmentally disabled grade level units is corrected.

**GUIDANCE**

**Funds for Part B of the  
Individuals with Disabilities Education Act**

**Made Available Under**

**The American Recovery and Reinvestment Act of 2009**



April, 2009  
Revised April 13, 2009  
Revised July 1, 2009  
U.S. Department of Education  
Office of Special Education and Rehabilitative Services

### **Purpose of the Guidance**

The purpose of this guidance is to provide information related to Part B of the Individuals with Disabilities Education Act funds made available under the American Recovery and Reinvestment Act of 2009. The guidance provides the U.S. Department of Education's interpretation of various statutory provisions and does not impose any requirements beyond those included in the American Recovery and Reinvestment Act of 2009 and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

The Department will provide additional or updated program guidance as necessary. If you are interested in commenting on this guidance, please send your comments to [IDEAREcoveryComments@ed.gov](mailto:IDEAREcoveryComments@ed.gov).

**Funds for Part B of the  
Individuals with Disabilities Education Act  
Made Available Under  
The American Recovery and Reinvestment Act of 2009 (ARRA) (P.L. 111-5)**

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## Introduction

The American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5) appropriates significant new funding for programs under Parts B and C of the Individuals with Disabilities Education Act (IDEA). Part B of the IDEA provides funds to state educational agencies (SEAs) and through them to local educational agencies (LEAs) to help them ensure that children with disabilities, including children aged three through five, have access to a free appropriate public education to meet each child's unique needs and prepare each child for further education, employment, and independent living. Part C of the IDEA provides funds through the Grants for Infants and Families program to each state lead agency designated by the Governor to implement statewide systems of coordinated, comprehensive, multidisciplinary interagency programs and make early intervention services available through early intervention service (EIS) programs to infants and toddlers with disabilities and their families.

The IDEA ARRA funds will provide an unprecedented opportunity for states, LEAs, and EIS programs to implement innovative strategies to improve outcomes for infants, toddlers, children, and youth with disabilities while stimulating the economy. Under the ARRA, the IDEA Part B ARRA funds are provided under three authorities: \$11.3 billion is available under Part B Grants to States; \$400 million is available under Part B Preschool Grants; and \$500 million is available under Part C Grants for Infants and Families. Preliminary information about each state's allocation is available at: <http://www.ed.gov/about/overview/budget/statetables/recovery.html>.

This document provides guidance related to the Part B IDEA ARRA funds; separate documents provide guidance related to Part C IDEA ARRA funds at <http://www.ed.gov/policy/gen/leg/recovery/guidance/idea-c.pdf> and State Fiscal Stabilization Funds under the ARRA at <http://www.ed.gov/programs/statestabilization/guidance.pdf>.

IN ORDER TO SHORTEN THIS DOCUMENT, ONLY SECTIONS C-1 THROUGH C-7, PERTAINING TO WAIVERS, AND H-1 THROUGH H-5, PERTAINING TO STATE-LEVEL MOE, WERE INCLUDED.

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## C. Waivers

- C-1.** Does the ARRA provide any additional authority for the Secretary to grant waivers for state and local maintenance of effort (MOE) and supplement not supplant requirements under IDEA?

No. The Secretary does not have any additional authority, beyond the authority that already exists in IDEA section 612(a)(17)(C) and (18), to grant waivers for state or local MOE and supplement not supplant requirements under IDEA.

- C-2.** Under what circumstances can the Secretary waive the state-level supplement not supplant requirements?

Under IDEA section 612(a)(17)(C), the Secretary has authority to grant a waiver of the state-level supplement not supplant requirement if the state provides clear and convincing evidence that all children with disabilities in the state have FAPE available. The standards for applying for this waiver are spelled out in 34 CFR §300.164.

- C-3.** Under what circumstances can the Secretary waive the state-level MOE requirements?

Under IDEA section 612(a)(18) the Secretary has authority to grant waivers for the MOE requirement that applies to states under the Grants to States program. However, the Secretary may only grant waivers to individual states, for one fiscal year at a time, after determining that granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the state, or the state otherwise meets the standard in IDEA section 612(a)(17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the IDEA. The state's level of effort in future years reverts to the level that would have been required in the absence of a waiver.

- C-4.** What must states do to obtain a waiver under IDEA, section 612(a)(18)?

If a state determines that it will not be able to satisfy the Grants to States state-level MOE requirement, and wants to request a waiver or modification, it must submit a written request and supporting documentation justifying the request to the Secretary. The request should specify the amount of required non-Federal expenditures that the state wishes to have waived or modified.

The state should submit the waiver or modification request as soon as it determines that it does not expect to be able to meet the MOE requirement. States that are considering submitting a waiver application under IDEA, section 612(a)(18) are encouraged to review previous guidance developed by the Secretary for the purpose of granting waivers (using a similar statutory standard) to State Vocational Rehabilitation Agencies at: <http://www.ed.gov/policy/speced/guid/rsa/tac-02-02.doc>

**C-5.** What authority does the Secretary have to grant waivers of MOE to LEAs?

Although the Secretary does not have any additional authority to grant waivers to LEAs, LEAs may be eligible to reduce the total state and local expenditures otherwise required by the LEA MOE provisions of IDEA using the flexible authority contained in IDEA, section 613(a)(2)(C). For more information on the flexibility available to certain LEAs under this provision, see D-6 and D-7 in this document.

**C-6.** What is the difference between the LEA supplement not supplant provisions at section 613(a)(2)(A)(ii) (34 CFR §300.202(a)(3)) and the LEA MOE provisions at section 613(a)(2)(A)(iii) (34 CFR §300.203(a))?

Under IDEA, section 613(a)(2)(A)(iii) (34 CFR §300.203(a) and (b)), an LEA must not use funds provided under Part B of the IDEA to reduce the level of expenditures for the education of children with disabilities made by the LEA from local, or state and local, funds below the level of those expenditures for the preceding fiscal year. The standard for determining whether the MOE requirement has been met is that the LEA actually expends, in total or per capita, an equal or greater amount of local, or state and local, funds in each subsequent year. If an LEA fails to meet MOE and cannot justify the failure under 34 CFR §§300.204 or 300.205, the SEA must pay the Department, from funds for which accountability to the Federal Government is not required, the difference between the amount of local, or state and local, funds the LEA should have expended and the amount that it did.

Under IDEA, section 613(a)(2)(A)(ii) (34 CFR §300.202(a)(3)) (supplement/not supplant), Part B funds must be used to supplement state, local and other Federal funds (used for providing services to children with disabilities). If the LEA maintains (or exceeds) its level of local, or state and local, expenditures for special education and related services from year to year, either in total or per capita, then the Part B funds are, in fact, supplementing those local, or state and local, expenditures and the LEA has met its MOE and supplement/not supplant requirements.<sup>1</sup>

**C-7.** To what extent may a state or LEA use Stabilization funds to meet the MOE requirements of the IDEA, Part B program?

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<sup>1</sup> Prior to 1992, the Part B regulations also included a “particular cost test” for determining whether supplanting occurred. This requirement meant, for example, that if an LEA spent Part B funds to pay for a teacher’s salary that was previously paid for with state or local funds, a supplanting violation would occur, even though the total amount of state and local funds spent on special education is greater than the amount spent the previous year. At that time, an LEA could maintain effort but still violate the supplement/not supplant provision. The “particular cost test” was removed from the regulations by an amendment published in the Federal Register on August 19, 1992 (37 FR 37652) and that became effective on October 3, 1992. Therefore, no requirement currently exists related to supplanting “particular costs” and if an LEA maintains local, or state and local, effort, it will not violate the supplement/not supplant requirements of the IDEA.

Section 14012(d) of the ARRA provides that, “[u]pon prior approval from the Secretary,” a state or LEA may treat Stabilization funds that are used for elementary, secondary, or postsecondary education as non-Federal funds for the purpose of any requirement to maintain fiscal effort under any other program that the Department administers.

The Secretary will permit a state or an LEA to treat Stabilization funds as non-Federal funds for MOE purposes of other Federal programs only if the following criteria are met:

- The state first demonstrates to the Department, on the basis of auditable data, that it is complying with the Stabilization program MOE requirements, unless the Secretary has granted a waiver of those requirements pursuant to the criterion in section 14012(c) of the ARRA; and
- The state or LEA has available for inspection auditable data demonstrating that the portion of its Stabilization funds that it seeks to treat as non-Federal funds to meet the MOE requirements of other Federal programs was spent in such a manner that had the Stabilization funds been non-Federal funds, the Stabilization funds would have been permitted to be used in determining the state’s or LEA’s compliance with the MOE requirement of that other program.

In addition, the Secretary will be concerned if a state reduces the proportion of total State revenues that are spent on education, and will take that into consideration in deciding whether to allow a state or LEA to treat Stabilization funds as non-Federal funds for MOE purposes of other Federal programs. If a state did reduce the proportion of total state revenues spent on education, the Secretary will consider whether there were any exceptional or uncontrollable circumstances contributing to the year-to-year decreases, the extent of the decline in available financial resources, and any changes in demand for services.

The Department intends to issue further guidance on the process for obtaining the Secretary’s “prior approval” to use Stabilization funds to meet the MOE requirements of other programs.

**H. Treating Stabilization Funds as State or Local Funds for Purposes of Meeting the IDEA, Part B MOE Requirements (Section H added July 1, 2009)**

**State-level MOE**

**H-1. What is the IDEA, Part B state-level MOE requirement?**

The IDEA, Part B state-level MOE requirement (Section 612(a)(18) of the IDEA and 34 CFR §300.163) provides that a state is eligible to receive Part B funds as long as “[t]he State does 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 the preceding fiscal year.”

Under the IDEA, Part B state-level MOE requirement, states identify the amount of state funds that are expended by the state, including the SEA and other state agencies for the education of children with disabilities, including for special education and related services, and state funds that are made available to local educational agencies (LEAs) for the education of children with disabilities. For state funds that are made available to LEAs, states identify the amount of state funding, if any, that is distributed through formulae to LEAs for the education of children with disabilities.

**H-2. What Stabilization funds may be treated as state funds for the purpose of meeting the IDEA, Part B state-level MOE requirement?**

Stabilization funds are provided to states as Education Stabilization funds and Government Services Stabilization funds.

With respect to funds that are provided to states as Education Stabilization funds, with prior approval, a state may treat as state support for purposes of meeting the IDEA state-level MOE requirement, those Education Stabilization funds that are being used to replace state support for special education provided through primary funding formulae. The proportion of Education Stabilization funds that the state distributes through the state’s primary funding formulae for elementary and secondary education must be the same as the proportion of the state’s primary funding formulae for elementary and secondary education it generally treats as state support for special education for purposes of the IDEA state-level MOE requirement. Similarly, with prior approval, Education Stabilization funds that are being used to replace state support for special education provided through a special education funding formula could be treated as state support for the IDEA MOE requirement. States may not consider Education Stabilization funds that are distributed to LEAs on the basis of their proportionate share of funding under Title 1, Part A, Subpart 2 of the ESEA to be state support for the education of children with disabilities, because those funds do not replace state support for the education of children with disabilities.

With respect to funds that are provided to states as Government Service Stabilization funds, for purposes of the IDEA, Part B state-level MOE requirement, a state, with prior approval, may treat as state support for the education of children with disabilities any Government Services Stabilization funds that it uses for the education of children with disabilities, whether provided to LEAs or to other agencies.

**H-3.** What criteria will the Department apply in determining whether to give prior approval to a state's request to treat Stabilization funds as state funds for purposes of the IDEA, Part B state-level MOE requirement?

Section 14012(d) of the ARRA provides that, "[u]pon prior approval from the Secretary," a state or LEA may treat Stabilization funds that are used for elementary, secondary, or postsecondary education as non-Federal funds for the purpose of any requirement to maintain fiscal effort under any other program that the Department administers. (See H-4 below for information related to "prior approval.")

The Secretary will permit a state to treat Stabilization funds, in the amounts described in question H-2, as state funds for meeting the IDEA, Part B state-level MOE requirement only if the following criteria are met:

1. The state maintains auditable data to demonstrate that it is complying with the Stabilization program MOE requirements, unless the Secretary has granted a waiver of those requirements pursuant to the criterion in section 14012(c) of the ARRA;
2. The state maintains auditable data to demonstrate that it needs Education Stabilization funds to restore support for elementary and secondary education, or that it is using only Government Services Stabilization funds to meet state-level MOE;
3. The state maintains auditable data to demonstrate that the percentage of total state revenues available to the state that is used to support education for children with disabilities does not decrease from one year to the next;
4. The state maintains auditable data to demonstrate that the percentage of total state revenues available to the state that is used to support elementary, secondary and higher education combined does not decrease from one year to the next; and
5. To provide for proper accounting of Stabilization funds, the state identifies to each LEA the amount of Stabilization funds that it distributes to that LEA that the state is treating as state funds for the purposes of meeting the state-level MOE requirement.

**H-4.** Must a state apply to the Secretary for prior approval to treat Stabilization funds as state funds for meeting the IDEA, Part B state-level MOE requirement?

No. The Secretary grants prior approval to a state to treat Stabilization funds as state funds for purposes of IDEA, Part B state-level MOE so long as a state meets the criteria in H-3. In other words, if a state meets the criteria in H-3, it has prior approval from the Department to treat Stabilization funds as state funds for purposes of meeting IDEA, Part B state-level MOE. If a state does not meet the criteria in H-3, and has not received specific prior approval from the Department under the circumstances described in H-5, it does not have prior approval and may not treat Stabilization funds as state funds for purposes of meeting the IDEA, Part B state-level MOE requirement.

**H-5.** If the percentage of total state revenues used to support education has decreased from one year to the next, is it still possible for a state to treat Stabilization funds as state funds for the purpose of meeting the IDEA, Part B state-level MOE requirement?

Because the state would not meet criterion #4 described in the response to question H-3, it would not have prior approval from the Department by virtue of meeting those criteria. However, in this circumstance, a state, by letter to the Department, could specifically request prior approval to treat Stabilization funds as state funds for the purpose of meeting IDEA, Part B state-level MOE. The request must address whether there were any exceptional or uncontrollable circumstances contributing to the year-to-year decreases, the extent of the decline in available financial resources, and any changes in demand for educational services.

Only if the Department grants specific prior approval based on the state's request, would a state in this circumstance be able to treat Stabilization funds as state funds for the purpose of meeting the IDEA, Part B state-level MOE requirement.



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

Hanna Skandera  
Secretary of Education  
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JUN - 3 2013

Dear Secretary Skandera:

This letter responds to the State of New Mexico's (State or New Mexico) requests for waivers from the requirement to provide State financial support for special education and related services for State fiscal years (SFY) 2010 (July 1, 2009 through June 30, 2010) and SFY 2011 (July 1, 2010 through June 30, 2011) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1).<sup>1</sup> Specifically, on August 10, 2012 New Mexico sought waivers in the amount of \$15,287,339.55 for SFY 2010 and \$12,900,658.37 for SFY 2011. On September 24, 2012, New Mexico revised its waiver request for SFY 2011 to \$28,187,997.52. We appreciate the time and effort New Mexico took to provide the initial and supplemental data and information.<sup>2</sup>

<sup>1</sup> The requirement that a State not reduce the amount of State financial support made available for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, is in 20 U.S.C. §1412(a)(18)(A). That requirement is known as "maintenance of State financial support" or, more commonly, "maintenance of effort." For purposes of this letter, references to maintenance of effort or maintenance of fiscal support refer to the requirement in 20 U.S.C. §1412(a)(18)(A).

<sup>2</sup> The New Mexico Public Education Department (NMPED) first submitted data to the Department on March 7, 2012, which indicated a failure to maintain financial support in SFYs 2010 and 2011. After a series of telephone and email communications between NMPED and Department staff, NMPED submitted requests for waivers for both SFY 2010 and SFY 2011 on August 10, 2012 (supplemented by additional letters on August 17, 2012). The Department submitted additional questions to NMPED on September 11, 2012. NMPED responded on September 24, 2012. The Department contacted NMPED on December 4, 2012 to provide informal notice of a preliminary decision on NMPED's waiver requests. NMPED asked for, and received, 30 days to submit additional information. Prompted by information provided by NMPED in the December 4, 2012 conversation, the Department submitted additional questions to NMPED on December 10, 2012. On December 20, 2012, NMPED asked for a one week extension to January 11, 2013, which was granted. On January 10, 2013, NMPED asked for an additional extension to February 1, 2013, which was granted. On January 29, 2013, NMPED asked for an additional extension to February 14, 2013, which was granted. On February 13, 2013 NMPED asked for a meeting to present its data and information. At the Department's request, NMPED provided the information in writing on February 18, 2013. At the February 22, 2013 meeting, the Department asked for additional information in response to new substantially different data and claims made by NMPED in its February 18, 2013 submission. NMPED provided the additional information on February 28, 2013 and March 2, 2013. During a phone conversation on April 3, 2013, the Department raised additional questions and NMPED responded to those questions by letter on April 11, 2013. In addition to the communications listed above, there have been numerous phone conversations and email communications between NMPED and the Department during this period.

As an initial matter, we note that, through its many submissions, the State submitted different sets of data and claims in support of, and in some cases, inconsistent with, its original waiver requests. While some of the additional information submitted by the State was in response to specific questions from U.S. Department of Education (Department) staff, much of the data and information, and many of the claims, submitted by New Mexico on February 18, 2013, were substantially new. Because the Department must have valid and reliable data on which to base its decisions, in the Department's April 22, 2013 communication with the State, we asked NMPED to provide data "certified by the appropriate official in NMPED, or the appropriate official in the State of New Mexico." NMPED did not certify the data it provided in its May 3, 2013 response to the Department. However, in order to process the State's request in a timely manner, the Department is proceeding, using, in part, the data included in the State's May 3, 2013 response.<sup>3</sup>

Based on the data and information supplied by NMPED, the Department has determined that it is equitable, due to exceptional or uncontrollable circumstances, to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), permitting New Mexico to reduce the amount of State financial support for special education and related services, or otherwise made available because of the excess costs of educating those children, by \$48,094,194 for SFY 2010. In addition, the Department has determined that it is not equitable due to exceptional or uncontrollable circumstances to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), permitting New Mexico to reduce the amount of State financial support for special education and related services, or otherwise made available because of the excess costs of educating those children, by \$34,120,713 for SFY 2011.

Finally, the Department has determined that New Mexico's required level of State financial support for special education and related services in SFYs 2010 through 2013 is the level made available by the State in SFY 2009, or \$461,998,168.<sup>4</sup> (The differences between the amount of the waivers requested by New Mexico and the amount of the waiver granted in SFY 2010 and denied in SFY 2011 are a result of decisions the Department made, discussed below, relating to the claims made by New Mexico that affect the calculation of the amount of required State financial support for special education and related services for each of these years.)

### **Waiver Requests for SFYs 2010 and 2011**

A State is eligible for a grant under Part B of the IDEA if the State submits a plan (application) that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets certain conditions. 20 U.S.C. §1412(a) and 34 CFR §300.100. Specifically, under 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a), a 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 the preceding fiscal year. New Mexico has provided such

<sup>3</sup> Should the Department determine, through audit or any other means, that the data provided by NMPED were inaccurate, we reserve the right to reopen consideration of the issues discussed in this letter, and take appropriate actions.

<sup>4</sup> This figure assumes that the State maintained financial support in SFY 2009.

assurances in its applications for Part B funds in all relevant years and the Department awarded Part B funds to the State based, in part, on those assurances. This eligibility requirement provides LEAs within the State with an expectation of at least level State funding for special education and related services.

Despite these assurances, on December 4, 2012, NMPED asserted in a telephone conversation with Department staff that New Mexico may reduce the amount of State financial support for special education and related services under certain circumstances, including when children with disabilities move from one level of service to another, or otherwise need less costly services. This assertion is unsupported by the statute. Accordingly, when weighing the equities of New Mexico's waiver request submitted under 20 U.S.C. §1412(a)(18)(C)(i), the Department may not, and did not, take into consideration these assertions made by NMPED. Rather, another provision in the IDEA allows the Department to grant a waiver of the requirement to maintain State financial support if a State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education (FAPE), notwithstanding the State's failure to maintain fiscal effort. 20 U.S.C. §1412(a)(18)(C)(ii). This other waiver provision, *not sought* by New Mexico, provides fiscal relief to States that wish to reduce the amount of State financial support made available for special education and related services and also provide a FAPE to all eligible children with disabilities in the State.

Regardless of whether a State is granted a waiver, a State has a continuing obligation to ensure that a FAPE is made available to all eligible children with disabilities, as required under 20 U.S.C. §1412(a)(1) and 34 CFR §300.101. Thus, while we are permitted to waive the requirement in 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a) for a State, for one fiscal year at a time, if we determine that granting a waiver would be equitable due to exceptional or uncontrollable circumstances (such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State), 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), we do so carefully and reluctantly, given the importance we place on maintaining State financial support for our most vulnerable students.

#### SFY 2010

In reviewing the August 10, 2012, request for a waiver, as part of our review of "equitability," we considered all of the information provided by the State in all of its submissions. Based on that data and information, we have determined that New Mexico experienced a precipitous and unforeseen decline in its financial resources in SFY 2010. General Fund recurring revenues decreased 9.79 percent in SFY 2010 when compared to SFY 2009. Total State recurring appropriations were higher than recurring revenues in SFY 2010, necessitating a sizable transfer of funds out of the State's General Reserve Fund. The State finished SFY 2010 with \$278 million in that Fund, representing 5.2 percent of recurring appropriations in that year. Although a \$278 million balance at the end of the year in New Mexico's General Reserve Fund is substantial, as late as January 2010, the State was projecting a 2.5 percent ending balance in its rainy day fund, and the volatility of revenue projections during a year when State revenues were declining at a precipitous rate made it difficult for New Mexico to predict accurately the amount it would maintain in its rainy day fund at the end of that fiscal year. To be clear, when weighing the equities of a waiver request for a fiscal year, particularly when a State had a surplus or

ending balance that year, the Department does not take a rigid formulaic approach. Rather, we carefully consider all the factors raised by a State and examine each of them as they relate to one another.

Having determined that a State experienced an exceptional or uncontrollable circumstance, we examine whether a State treated special education equitably when compared to other State programs. In the case of New Mexico, we compared appropriations in SFY 2010 to appropriations in SFY 2009, and conclude that it did so. The percentage decrease in State financial support for special education and related services (10.4 percent) was smaller than the average percentage decrease in recurring appropriations across agencies (11.2 percent) in SFY 2010 when compared to the immediate prior year, SFY 2009.

In addition, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a FAPE available to all children with disabilities in SFY 2010.

#### SFY 2011

In reviewing the August 10, 2012, request for a waiver for SFY 2011, as part of our review of "equitability," we considered all of the information provided by the State in all of its submissions. Based on that data and information, we have determined that New Mexico did not experience an exceptional or uncontrollable circumstance, such as a precipitous and unforeseen decline in its financial resources, in SFY 2011. Indeed, the State's data establish that General Fund recurring revenues *increased* 1.66 percent in SFY 2011 when compared to SFY 2009. (Moreover, General Fund recurring revenues *increased* 12.7 percent in SFY 2011 when compared to SFY 2010.)

In contrast to the fiscal situation in SFY 2010, in SFY 2011 General Fund recurring revenues exceeded recurring appropriations by \$195,153,200. The State's data also demonstrate that, at the end of SFY 2011, the State had accumulated \$500,800,000 in its General Reserve Fund and, therefore, had more than sufficient revenues to maintain fiscal effort at the required level. Because the State's recurring revenues increased from SFY 2009 to SFY 2011 (and increased from SFY 2010 to SFY 2011), and the State accrued substantial funds in SFY 2011 that were available for special education and related services, the Department cannot conclude that the State experienced an "exceptional or uncontrollable" circumstance in SFY 2011. Accordingly, I have determined that it is not equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) permitting New Mexico to reduce State financial support for special education and related services for SFY 2011.

#### SFYs 2012, 2013, and 2014

While this letter and notice relate only to the State's request for waivers for SFYs 2010 and 2011, the Department notes that the data provided by NMPED indicate that the State failed to maintain State financial support for special education and related services in SFY 2012 by approximately \$26.4 million. The Department is also concerned that the State may not maintain State financial support in SFY 2013, which ends on June 30, 2013. Finally, we note that the

State's application for FFY 2013 Part B IDEA, grant funds does not provide the required assurance related to maintenance of State financial support for special education and related services for the 2013 – 2014 program year (SFY 2014). Given the number of claims and issues raised by NMPED, the Department believes it is reasonable to provide NMPED time to review this letter and consider whether it intends to seek a waiver for SFY 2012, take all steps necessary under New Mexico law to ensure that that the State maintains State financial support for special education and related services in SFY 2013, and provide the required assurance in its FFY 2013 Part B grant application prior to July 1, 2013. The Department will be addressing each of these issues with NMPED in the near future.

### **Calculation of State Financial Support**

#### Background

On December 10, 2012, the Department asked NMPED about the methodology the State used to calculate the amount of State financial support made available for special education and related services. Specifically, on that date, the Department noted apparent discrepancies between NMPED's prior submissions regarding the amounts made available through New Mexico's State Equalization Guarantee (SEG) school funding formula and the amounts described in publicly available documents published by NMPED.<sup>5</sup>

In the State's February 18, 2013 response, and subsequently in response to questions by the Department,<sup>6</sup> NMPED provided information related to the following issues or claims: (1) flexibility in 20 U.S.C. §1413(j); 34 CFR §300.230; (2) "workload reductions"; (3) "retirement swaps"; (4) the State's program for 3- and 4-year-old developmentally disabled students<sup>7</sup>; (5) Training and Experience Index; and (6) treatment of funds made available under the State Fiscal Stabilization Fund program and the Education Jobs program. Finally, NMPED asserts that, in a year following a failure to maintain State financial support, its required level of State financial support for special education and related services drops to the amount made available in the year in which it failed to maintain State financial support. Each of these issues is discussed below.

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<sup>5</sup> Among others, "New Mexico Public School Finance Statistics, 2009-2010 Actual and 2010-2011 Estimated," School Budget and Finance Analysis Bureau, New Mexico Public Education Department. Accessible online at <http://ped.state.New Mexico.us/ped/SchBudg-StatBooks.html>

<sup>6</sup> Representatives from the New Mexico Legislature contacted the Department and called into question whether the data included in the State's February 18, 2013 communication accurately captured all of the State financial support made available for special education and related services through the SEG. In an exercise of due diligence, the Department sought additional information from NMPED to clarify the issues raised by the members of the legislature.

<sup>7</sup> State officials have referred to these students as "developmentally disabled" or "developmentally delayed." Due to the discrepancy, we use "developmentally disabled" for consistency.

Exercise of the Flexibility under 20 U.S.C. §1413(j); 34 CFR §300.230

On February 18, 2013, NMPED submitted a letter notifying the Department that NMPED was exercising the flexibility in 20 U.S.C. §1413(j); 34 CFR §300.230 (hereinafter referred to as 34 CFR §300.230) for SFY 2010.<sup>8</sup> This provision provides that “[f]or any fiscal year for which the allotment received by a State under § 300.703 exceeds the amount the State received for the previous fiscal year and if the State in school year 2003-2004 or any subsequent school year pays or reimburses all LEAs within the State from State revenue 100% of the non-Federal share of the costs of special education and related services, the SEA, notwithstanding §§ 300.162 through 300.163 (related to State-level nonsupplanting<sup>9</sup> and maintenance of effort), and § 300.175 (related to direct services by the SEA) may reduce the level of expenditures for the education of children with disabilities by not more than 50 percent of such excess.” 34 CFR §300.230(a). However, “the Secretary prohibits the SEA from exercising the authority in [34 CFR §300.230(a)]” if the “Secretary determines that an SEA is unable to establish, maintain, or oversee programs of FAPE that meet the requirements of [Part B], or that the State needs assistance, intervention, or substantial intervention under § 300.603.” 34 CFR §300.230(b).

In accordance with 34 CFR §300.230(b), the Department prohibits NMPED from exercising the authority in 34 CFR §300.230(a) for SFY 2010 because the Department determined in June 2009 and in June 2010 that the State did not meet the requirements of Part B of the IDEA.<sup>10</sup> NMPED’s February 18<sup>th</sup> submission stated that New Mexico “received ‘meets requirements’ status under 34 CFR § 300.603 for SFY 2010, the year of the reductions.” New Mexico seeks to rely on a determination of “meets requirements” that it received in June 2011, almost a full year after the end of SFY 2010, because the State claims that the June 2011 determination was “for SFY 2010.” This is incorrect. Consistent with the requirement in 34 CFR §300.603(b), the

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<sup>8</sup> In that letter, NMPED noted SFY 2009 budgeted expenditures of \$351,208,152 and claimed \$28,447,658.89 in allowable reductions from 15 separate programs. NMPED claimed that 34 CFR §300.230 therefore allowed a reduction of State-level expenditures to \$322,760,494 in SFY 2010. NMPED then used the calculated amount of the reductions (\$28,447,658.89) – which used budgeted expenditures – and applied it against amounts made available (appropriations) to claim that the required level of effort under 34 CFR §300.230 was actually \$406,749,670. NMPED then provided data indicating that \$422,912,455.51 was made available in SFY 2010, \$414,175,550.27 in SFY 2011, and \$405,826,449.08 in SFY 2012. The flexibility in 34 CFR §300.230 permits an eligible State to reduce actual expenditures -- not budgeted expenditures -- made by the State in the year that the State exercises the flexibility. In the State’s May 3, 2013 letter to the Department, NMPED provided actual expenditures for each of SFYs 2009, 2010, and 2011. Those data indicated that the calculated level of State expenditures on special education and related services decreased by \$34,453,186 from SFY 2009 to SFY 2010.

<sup>9</sup> The Department is not raising issues with the requirement to supplement and not supplant in this letter; all otherwise relevant references to that requirement are omitted from this letter.

<sup>10</sup> NMPED raised the possibility of exercising the flexibility in 34 CFR §300.230 with Department staff informally in the spring of 2012. Thereafter, the Department advised NMPED informally that it did not meet the criteria in 34 CFR §300.230(a) because it did not receive a “meets requirement” determination in June 2010, and therefore, could not use the flexibility in that provision of the IDEA for SFY 2010. New Mexico also did not receive a “meets requirements” determination in June 2009, immediately preceding its SFY 2010. When making a decision whether to exercise the flexibility in 34 CFR §300.230(a), it is reasonable for a State to rely on a determination that it receives during, or immediately before, the State fiscal year in which it seeks to exercise the flexibility.

Department's annual determination in June 2011 of "meets requirements" was "based on the information provided by the State in the State's annual performance report, *information obtained through monitoring visits, and any other public information made available...*" (emphasis added). In other words, when the Department made its June 2011 determination, it did not consider only data in the State's annual performance report that covered the 2009 – 2010 school year.<sup>11</sup> Rather, the Department considered monitoring and other information about New Mexico available to the Department through the date of its June 2011 determination, well after the end of SFY 2010. Accordingly, the State may not rely on a determination made almost one year after the end of its State fiscal year in order to exercise the flexibility in 34 CFR §300.230.

In addition, NMPED has not established that it "pays or reimburses all LEAs within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services."<sup>12</sup> Based on information from Don Moya, Chief Financial Officer, Albuquerque Public Schools (APS), we understand that at least some LEAs within New Mexico commingle State and local education funds and do not, or cannot, separately account for which funding stream supports the non-Federal share of special education and related services. Presumably, because LEAs do not track separately State and local dollars for special education and related services, NMPED sought to establish that it pays or reimburses 100 percent of the non-Federal share of special education and related services, by demonstrating that the amount of State funds made available for special education and related services to each LEA through the State funding formula, the SEG, is greater than the amount of reported LEA expenditures on the education of children with disabilities (MOE Expenditures). To put it more simply, NMPED's position is that if it makes available \$10 to an LEA for special education and related services and the LEA reports spending \$10 or less on the non-Federal share of the costs of special education and related services, then the State has established that it pays for or reimburses that LEA 100 percent of the non-Federal share of the costs of special education and related services.<sup>13</sup>

To support its claim, on February 28, 2013, NMPED submitted email communications between six LEAs (selected by NMPED) and NMPED, in which the LEAs were asked to verify data provided to them by NMPED. These data included "MOE Expenditures" for SFY 2010 and the SEG special education allocation for that year for each LEA. In each instance, the SEG special education allocation to the LEA (State financial support for special education and related services) was greater than the MOE Expenditures reported by the LEA. All six LEAs verified

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<sup>11</sup> Indeed, New Mexico's annual performance report includes data from more than one school year.

<sup>12</sup> On April 10, 2012, in a telephone call between NMPED and the Department, NMPED indicated that local funds were used to support special education and related services in the State, but that they were for special education and related services beyond those required to be provided. NMPED subsequently withdrew that statement. In addition, in a February 26, 2013 telephone conversation between representatives from the New Mexico Legislature and the Department, the representatives indicated that local funds were used to support special education and related services in the State. In a telephone call from (APS) on February 22, 2013, the Chief Financial Officer, Don Moya informed the Department that local funds are used for special education and related services in APS. While the Department does not rely on these statements, they prompted questions and concerns about whether New Mexico may appropriately exercise flexibility under 34 CFR §300.230.

<sup>13</sup> We also note that NMPED reported that it was "impossible to accurately determine the amount spent annually [by LEAs]." This calls into question all of the State's LEA MOE Expenditure calculations.

the information provided to them by the NMPED. However, the communication from APS submitted by NMPED included a note that “the disability allocation will always exceed the MOE expenditures because a significant group of ancillary providers, social workers, are included in the allocations, but they are not included in the allowable expenditures for MOE. In addition, the MOE expenditures exclude benefits.” Thus, APS reported, in effect, that the LEA MOE Expenditures do not include all of the funds expended by APS for the education of children with disabilities.

Publicly available documents published by NMPED<sup>14</sup> support and explain the information provided in APS’ note. Those documents indicate that NMPED calculates LEA MOE compliance under the IDEA by only counting expenditures with specific job classification codes and object codes in the NMPED’s Operating and Budget Management System (OBMS). The document indicates that NMPED permits LEAs to include in their MOE Expenditures funds expended for only job classification codes 51100 (Salaries Expense), 51200 (Overtime Expense), and 51300 (Additional compensation). The job code for “Guidance Counselor/Social Worker” is not listed among the job codes included in calculation of LEA MOE.<sup>15</sup> NMPED also does not include expenditures under object codes related to Educational Retirement, FICA Payments, Medicare Payments, Health and Medical Premiums, Life, Dental, Vision, or Worker’s Compensation, among others.

On April 11, 2013, in response to questions raised by the Department, NMPED addressed this issue and confirmed that it does not include the cost of benefits when calculating LEA MOE Expenditures, but permits LEAs that have the capability to include these figures if approved by NMPED. NMPED further explained that “[i]n SFY 2010, the state provided approximately \$385 million for special education in formula funding while districts spent about \$305 million. The difference includes sufficient funding to cover the cost of benefits on a statewide basis.”<sup>16</sup> NMPED also noted in its April 11, 2013 letter that “the [OBMS] does not segregate benefits, either mandatory or voluntary, by employee type including teachers, related service providers and instructional assistants in the accounting system.”

The Department was not satisfied with NMPED’s explanation, and in its April 22, 2013 letter to NMPED, stated that “benefits for special education and related services providers represent a considerable source of financial support for special education and related services, and must be included in the state’s calculation of LEA expenditures.” Accordingly, that letter asked NMPED

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<sup>14</sup> “New Mexico’s Integrated Special Education Accountability System – A Comprehensive Monitoring Approach to Improving Outcomes for Students with Disabilities,” November 2011. Available online at <http://www.ped.state.New Mexico.us/SEB/technical/ISEASpercent20Novemberpercent202011.pdf>

<sup>15</sup> In a telephone conversation on April 8, 2013, representatives from NMPED also indicated that social workers are not included in the State’s LEA MOE calculations, and explained in its April 11, 2013 letter that, “since social workers provide services for a number of different students and programs school-wide and district-wide are not specifically or solely assigned to special education students, it is not possible at the state level to track the individual assignments of each social worker.”

<sup>16</sup> The Department notes that this amount included \$34,021,045 in State Fiscal Stabilization Funds and that the State is not permitted to treat these funds as State funds for this purpose, as discussed more fully below.

to devise a methodology for calculating the amount expended by LEAs for benefits, provide a narrative description of that methodology, and provide a set of certified data reflecting the new methodology.

NMPED's May 3, 2013 response did not certify the data it provided, and NMPED objected to the inclusion of benefits, even if based on a reasonable estimate, explaining that the State's accounting system does not disaggregate benefits by type of teacher, "making it impossible to accurately determine the amount spent annually." Nevertheless, to comply with the Department's request, NMPED proposed an estimate of 18.2 percent for benefits (for SFY 2010). NMPED developed this estimate by first determining the proportion of total statewide expenditures for salaries. NMPED then applied that percentage (66.7 percent for SFY 2010) to the calculated LEA MOE Expenditures. This reduced number was then multiplied by 18.2 percent (for SFY 2010) in order to calculate the amount expended on mandatory benefits by LEAs for special education and related services.<sup>17</sup> For the reasons outlined in footnote 17, the Department does not believe that the methodology proposed by NMPED is reasonable, and in fact, underestimates the amount of funds that LEAs expend for special education and related services. Nevertheless, using the State's own methodology to estimate the cost of benefits, the data establish that the State does not pay 100 percent of the costs of special education and related services in two (Roswell and Las Cruces) of the six LEAs selected by NMPED as examples.<sup>18</sup>

For all of the reasons discussed above, NMPED has not established that New Mexico "pays or reimburses all LEAs within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services." Therefore, as indicated above, pursuant to

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<sup>17</sup> NMPED declined to approximate expenditures on all benefits, arguing that estimating "voluntary benefits (e.g. medical, dental or vision insurance, employee assistance or prepaid legal services) is not practical because of the differences among individual employees." The Department has serious concerns about this methodology and believes that it underestimates the amount actually expended by LEAs on benefits for special education and related services providers. Publicly available documents indicate that NMPED calculates LEA MOE compliance under the IDEA by using specific job classification codes and object codes related to compensation. See footnote 14. Specifically, NMPED's current LEA MOE calculations only include salaries, overtime, or additional compensation. Therefore, 100 percent of the calculated LEA MOE Expenditures are "salaries," not the 66.7 percent that NMPED proposes to use.

Additionally, according to publicly available documents published in the NMPED School Finance & Analysis Bureau's Stat Book for 2009-2010, State wide expenditures on benefits in that year totaled approximately 31.4 percent of State wide expenditures on compensation. Therefore, 18.2 percent likely underestimates the actual amounts expended on benefits. Across all funds in SFY 2010, expenditures for salaries totaled approximately \$1,896.1 million and expenditures for benefits totaled approximately \$595.3 million, for an average benefit ratio of 31.4 percent. According to NMPED, LEAs expended \$278.6 million on salaries for special education and related services providers in 2009-2010. Assuming only 28 percent for benefits (below the average), that totals \$356.6 million in the cost of special education and related services. However, in that year, New Mexico only made available \$351.6 million through the SEG.

<sup>18</sup> Even when including only an 18.2 percent estimated amount for benefits, the State provided Las Cruces with \$28,738,426 for special education through the SEG, but Las Cruces would have accumulated \$29,915,883 in LEA MOE Expenditures. When including only an 18.2 percent estimated amount for benefits, the State provided Roswell with \$9,538,135 for special education through the SEG, but Roswell would have accumulated \$9,856,144 in LEA MOE Expenditures.

34 CFR §300.230(b), the Department prohibits New Mexico from exercising the authority in 34 CFR §300.230(a) for SFY 2010.

#### Workload Reduction

In its February 18, 2013 letter, NMPED “adjusted the data previously submitted to OSEP on June 20, 2012 to adjust for the changes in level of services.” Specifically, the State sought to amend its amount of State financial support for special education and related services in SFYs 2010, 2011, and 2012 on the basis of changes in the FTE/Membership counts for Ancillary service providers, A/B Level students with disabilities, C Level students with disabilities, D Level students with disabilities, and 3- and 4-year-old Developmentally Disabled students. In other words, NMPED sought to reduce its required level of State financial support by claims that as children with disabilities moved from one category to the next, they needed less costly services. However, as noted above, the IDEA does not permit States to make adjustments or otherwise calculate their compliance with 20 U.S.C. §1412(a)(18)(A) on the basis of these claims. See the discussion above of the waiver provision in 20 U.S.C. §1412(a)(18)(C)(ii). Further, we note that the service levels of children with disabilities necessitated an *increased* cost through the SEG in SFYs 2010 and 2011. However, these increased costs were offset by reductions in ancillary service providers. Therefore, NMPED is seeking to adjust its required levels of State financial support based largely on reductions in personnel, and not based on the required service levels of students.<sup>19</sup> In any event, New Mexico may not take “workload reduction” into consideration when calculating the amount of State financial support made available for special education and related services.

#### Retirement Swap

NMPED’s February 18, 2013 letter to the Department also proposed to adjust previously submitted data in order to account for a “retirement swap” in the State in SFYs 2010, 2011, and 2012. Specifically, beginning in SFY 2010, the State decreased the required employer contributions for retirement accounts, *e.g.*, from an LEA, and correspondingly increased the required employee contributions for retirement accounts for employees earning more than \$20,000 per year. The State sought to add the reduced amount of required employer contributions to the amount of its State financial support for special education and related services in SFYs 2010, 2011, and 2012. In other words, the State sought to make it appear as if the amount of State financial support for special education and related services had decreased less dramatically by taking credit for the share of retirement contributions now borne by certain employees.

In a meeting on February 22, 2013, NMPED clarified that the increased employee contributions did not change the overall amount of State funds made available to support special education and related services, but simply the amounts that LEAs were required to expend in support of

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<sup>19</sup> In SFY 2010, the State calculated a reduced cost (“workload reduction”) of \$5,882,400.15 due to a reduction in the number of ancillary service providers. In that same year, the service level changes of students accounted for an increased cost of \$959,350.82. In SFY 2011, the State calculated a reduced cost (“workload reduction”) of \$9,388,077.93 due to a reduction in the number of ancillary service providers. In that same year, the service level changes of students accounted for an increased cost of \$3,413,711.53.

retirement costs. Because shifting the burden of retirement benefits onto LEA employees did not change the overall amount of funds made available by the State in SFYs 2010, 2011, or 2012, and would result in inaccurate calculations of State financial support, the State cannot include the "retirement swap" in its calculations for purposes of demonstrating compliance with 20 U.S.C. §1412(a)(18)(A).

### 3 and 4 Year Olds

In a telephone call with NMPED on April 8, 2013 and in a letter dated April 11, 2013, NMPED indicated that students in the State's 3- and 4-year-old developmentally disabled program are served through the State's IDEA Part B program and "are eligible for funding only if they meet eligibility requirements for special education services." NMPED's May 3, 2013 letter to the Department also stated that, "while these students do receive the services they are eligible for, they receive a core academic program as well. Base units in the funding formula provide the cost of general education teachers, other staff and materials that are focused on the non-special education portion of the program." Therefore, NMPED sought to exclude a part of the cost of this program in its calculation of State financial support for special education and related services.

However, the sole purpose of the program for 3- and 4-year-old developmentally disabled students is to provide special education services and/or meet the requirements of those students' individualized education programs. The State does not provide a "core academic program" to any 3- or 4-year-old child who is not enrolled in this program and receiving special education services. Moreover, the program is operated through the State's IDEA Part B program. Accordingly, the "base units" associated with students enrolled in the State's 3- and 4-year-old developmentally disabled programs must be included in the State's calculation of State financial support for special education and related services. The Department included the full amount of State financial support for special education and related services for 3-and 4-year olds in its recalculation of New Mexico's amount of State financial support for special education and related services.<sup>20</sup>

### Training and Experience Index

With respect to the "Training and Experience Index" in the SEG, NMPED explained in a phone conversation on April 8, 2013, and by letter on April 11, 2013, that it did not include these multipliers in its calculation of the amount of State financial support for special education and related services because they were based on a wide array of teacher credentials and qualifications, not limited to those for special education teachers. As such, because the "Training and Experience Index" in any given year could increase based on the credentials and experience of regular education personnel, none of the additional generated funding would be used to support special education and related services. The Department accepts the State's explanation and has not used the "Training and Experience Index" in its recalculation of the amount of State financial support for special education and related services.

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<sup>20</sup> As a practical matter, the inclusion of these amounts increased the amount of New Mexico's shortfall in SFY 2010 and decreased the amount of the State's shortfall in SFY 2011.

### State Fiscal Stabilization Funds and Education Jobs Program Funds

In response to questions raised by the Department, NMPED notified the Department in its February 18, 2013 submission that the State treated \$34,021,044.28 of State Fiscal Stabilization Funds (SFSF) as State funds for the purposes of meeting the requirement in 20 U.S.C. §1412(a)(18)(A) to maintain State financial support in SFY 2010. NMPED also reported that it treated \$3,836,795.83 in SFSF funds and \$10,337,554.53 in Education Jobs Program (Ed Jobs) funds for that same purpose in SFY 2011. In that submission, the State indicated that it “followed the guidance on ARRA funding for IDEA Part B, revised July 1, 2009, provided by OSERS at C-7 (‘To what extent may a state or LEA use Stabilization funds to meet the MOE requirements of the IDEA, Part B program?’) as well as the ‘Part B MOE Guidance for States on the Education Jobs Fund Program’ dated May 2011.” However, the data supplied by NMPED indicate that the State does not meet the criteria in those guidances to treat those funds as non-Federal funds, and therefore, the Department has not included these amounts as State funds in its recalculation of the amount of State financial support for special education and related services.<sup>21</sup>

Section 14012(d) of the American Recovery and Reinvestment Act of 2009 (ARRA) provides that “[u]pon prior approval from the Secretary,” a State may treat SFSF funds that are used for elementary, secondary, or postsecondary education as non-Federal funds for the purpose of any requirement to maintain fiscal effort under any other program that the Department administers. Section 14012(d) is also applicable to the Ed Jobs program. The criteria for prior approval to treat SFSF and Ed Jobs funds as State funds for the purpose of maintaining effort in Part B of the IDEA are found in section H of the Office of Special Education and Rehabilitative Services guidance entitled “Funds for Part B of the [IDEA], Made Available under [ARRA] (P.L. 111-5)”, revised July 2009, and in “Part B IDEA MOE Guidance for States on the Education Jobs Fund Program”, May 2011.<sup>22</sup>

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<sup>21</sup> Even if New Mexico disagrees with our determination regarding whether the State had “prior approval” under Section 14012(d) of ARRA to treat SFSF and Ed Jobs funds as State funds for the purposes of the maintenance of financial support requirement in SFY 2010, because we have determined that it would be equitable to grant a waiver for that year, this determination has no effect on the outcome for New Mexico with respect to SFY 2010.

<sup>22</sup> Specifically, the following criteria, each of which must be met, are outlined in those guidance documents:

- Criterion 1: The State maintains auditable data to demonstrate that it is complying with the SFSF/Ed Jobs programs’ maintenance of effort requirements. A State may meet this requirement for the SFSF program if the Secretary has granted a waiver of those requirements pursuant to the criterion in section 14012(c) of the ARRA.
- Criterion 2: With respect to the SFSF funds, the State maintains auditable data to demonstrate that it needs Education Stabilization funds to restore support for elementary and secondary education, or that it is using only Government Services Stabilization funds to meet State-level maintenance of effort. With respect to Ed Jobs funds, the State maintains auditable data demonstrating that it needs Ed Jobs funds to restore support for special education and related services.
- Criterion 3: The State maintains auditable data to demonstrate that the percentage of total State revenues available to the State that is used to support education for children with disabilities does not decrease from one year to the next.

The data submitted by NMPED do not establish that the State met criterion 3 – “The State maintains auditable data to demonstrate that the percentage of total State revenues available to the State that is used to support education for children with disabilities does not decrease from one year to the next.”<sup>23</sup> On March 2, 2013, the State submitted information purporting to demonstrate that the proportion of State revenues made available in support of the education for children with disabilities increased from 7.74 percent in SFY 2009 to 8.12 percent in SFY 2010 before dropping to 7.52 percent in SFY 2011. We noted in our April 22, 2013 letter to the State that the revenue data used to make these calculations differed from the data provided on August 17, 2012, February 14, 2013, and February 18, 2013. Further, we noted that it appeared that NMPED included SFSF and Ed Jobs funds themselves as “State” funds for the purpose of calculating its support for special education and related services in order to meet this criterion and that this was not permissible. See “Guidance on the Maintenance-of-Effort Requirements in

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- Criterion 4: The State maintains auditable data to demonstrate that the percentage of total State revenues available to the State that is used to support elementary, secondary, and higher education combined does not decrease from one year to the next.
  - Criterion 5: To provide for proper accounting of SFSF/Ed Jobs funds, the State identifies to each local LEA the amount of SFSF/Ed Jobs funds that it distributes to that LEA that the State is treating as State funds for the purposes of meeting the State-level MOE requirement.

<sup>23</sup> Since the State did not meet criterion 3, it is not necessary to address the manner in which the State did not meet criteria 4 and 5. However, in order to provide a complete response to NMPED, the Department notes the following. With respect to criterion 4, on March 2, 2013, NMPED provided data purporting to show that the proportion of total State revenues used to support elementary, secondary, and higher education increased from 56.47 percent in SFY 2009 to 56.52 percent in SFY 2010 before dropping to 55.12 percent in SFY 2011. However, as the Department noted in its April 22, 2013 communication to NMPED, the revenue data used by NMPED to make these calculations differed both from the data provided in the State’s August 17, 2012, February 14, 2013, and February 18, 2013 communications and the revenue data used to support the State’s claims under criterion 3. Furthermore, if the “Total Revenues” used by the State to calculate the proportion of support for the education of children with disabilities were used to calculate the proportion of support for elementary, secondary, and higher education, that latter proportion would have decreased from SFY 2009 to SFY 2010 and from SFY 2010 to SFY 2011.

We also note that the State’s calculations in regards to criterion 4 used “General Fund Expenditures” rather than amounts appropriated. Had the State calculated the proportion on the basis of appropriated amounts and the “Total Revenues+Reserve Used,” the proportion of support for elementary, secondary, and higher education would have decreased from SFY 2009 to SFY 2010 and from SFY 2010 to SFY 2011. NMPED indicated that it believed that its calculations with respect to criterion 4 were “consistent in all PED submissions listed and agree with data submitted by the New Mexico Legislative Finance Committee on February 14, 2013.” The Department disagrees with this assertion. Because of the discrepancies noted in our April 22, 2013 communication with the State and the fact that, had the State used amounts appropriated in its March 2, 2013 submission, it would not have met criterion 4 in either year, we believe that the State does not meet criterion 4 in SFY 2010 or SFY 2011.

With respect to criterion 5, the State indicated that “in SFY10 and SFY11 when SFSF and Ed Jobs funds were used to fund LEAs, a unit value was created for each funding source; one unit value for general fund, one unit value for the SFSF funds and one unit value for the Ed Job funds so such funds could be differentiated.” To be clear, criterion 5 does not address whether a State separately tracks funds from the SFSF and Ed Jobs programs to LEAs. It specifically addresses whether the State identifies to each LEA the amount that the State is treating as State funds for the purposes of meeting the State-level maintenance of effort requirement. New Mexico has not demonstrated that it informed LEAs of the amount of funding that it distributed to them that it was treating as State funds for the purposes of meeting State-level maintenance of effort. Therefore, we do not believe that New Mexico has established that it met criterion 5 for either year.

the State Fiscal Stabilization Fund Program, January 2010” (p. 2 – “The data used to determine levels of support must include only *State* support for education...Federal funds are not considered part of State support”).

In its May 3, 2013 letter to the Department, NMPED concurred with the Department’s analysis of the State’s data with respect to criterion 3 above but provided additional data to support its claims. The State’s data for the amount of State revenues made available in support of the education for children with disabilities excluded the 3- and 4-year-old base units, included the retirement swap numbers, and included the workload reductions. The State also included “reserves used” in its calculation of “total State revenues available”. The State’s calculation in its May 3 submission purports to indicate that the proportion of total State revenues available to support special education and related services increased from 7.6 percent in SFY 2009 to 7.9 percent in SFY 2010 before decreasing to 7.5 percent in SFY 2011, conceding that the State did not meet this criterion for SFY 2011.<sup>24</sup> In any event, the State did not meet criterion 3 for SFY 2010 or SFY 2011.

In summary, because we do not believe that the State met the criteria to treat SFSF and Ed Jobs funds as State funds for the purposes of meeting the maintenance of financial support requirements of the IDEA, we have determined that the State did not have “prior approval” to treat these funds as State funds for the purposes of the maintenance of financial support requirement. As such, these funds must be excluded from calculations of State financial support for special education and related services in SFY 2010 and SFY 2011.

#### Required Level of Support in a Subsequent Year

On September 17, 2012, and again on May 3, 2013, NMPED asserted that, in SFY 2011, it was only required to maintain State financial support for special education and related services at the level maintained in SFY 2010, a year in which the State has conceded that it failed to maintain support at the same level maintained in SFY 2009. The Department advised NMPED that the IDEA provides that “[i]f, for any year, a State failed to meet the requirement [to maintain support], including any year for which the State is granted a waiver ... the financial support required of the State in future years ... shall be the amount that would have been required in the absence of that failure and not the reduced level of the State’s support.” 20 U.S.C. §1412(a)(18)(D). Thereafter, on September 24, 2012, NMPED increased its waiver request for SFY 2011 from \$15,287,339.55 to \$28,187,997.92, but noted that it was amending the request because of the Department’s position on this issue and “reserves the right to argue the amount of the reductions to its Section 611 allocation would be the amount of the original request.”

NMPED has offered no explanation or rationale for its position. The Department reiterates that the language in 20 U.S.C. §1412(a)(18)(D) is clear. Accordingly, when providing an assurance in its application that it has policies and procedures in place to ensure compliance with 20 U.S.C.

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<sup>24</sup> Had the State excluded “reserves used” and the workload reductions and retirement swaps from its calculations, the proportion would have decreased from SFY 2009 to SFY 2010 and from SFY 2010 to SFY 2011. We also note that, had the State excluded “reserves used” from its calculation and used the revised amounts made available outlined above, the proportion would have decreased from SFY 2009 to SFY 2010 and again from SFY 2010 to SFY 2011.

§1412(a)(18)(A), and in ensuring compliance in SFY 2013 and thereafter, the Department expects that New Mexico will maintain State financial support for special education and related services at a level that would have been required in the absence of a failure to maintain financial support or the receipt of a waiver from the Department.

### **Notice and Opportunity for a Hearing**

When a State fails to maintain State financial support for special education and related services at the level required by law, the Department “shall” reduce the allocation of funds to the State under 20 U.S.C. §1411 (“section 611 allocation”) “for any fiscal year following the fiscal year in which the State fails” to maintain State financial support by the same amount by which the State fails to meet the requirement. 20 U.S.C. §1412(a)(18)(B) and 34 CFR §300.163(b).

Accordingly, the Department proposes to make a final determination that New Mexico is not eligible for a portion of its section 611 grant under the IDEA, \$34,120,713, because of its failure to maintain State financial support for special education and related services in SFY 2011. 20 U.S.C. §1412(d)(2).

This notice advises NMPED that it may request a hearing pursuant to the procedures in 34 CFR §§300.179 through 300.183 in connection with the Department’s proposed decision to deny eligibility to New Mexico for \$34,120,713 of its section 611 Part B IDEA grant because of its failure to maintain State financial support for special education and related services by that amount in SFY 2011. To request a hearing, NMPED must submit a letter to Andrew J. Pepin, Office of Special Education and Rehabilitative Services, 400 Maryland Avenue SW, Room 5106, Potomac Center Plaza, Washington, D.C. 20202-2600 (facsimile number 202-245-7638) within 30 calendar days after it receives this notice. The filing date for any written submission by a party under 34 CFR §§300.179 through 300.184 is the date the document is hand-delivered; mailed; or sent by facsimile transmission. 34 CFR §300.183(a)-(b). (In this case, therefore, NMPED must submit a letter requesting a hearing within 30 calendar days from the date that this letter was sent to NMPED by facsimile transmission.)

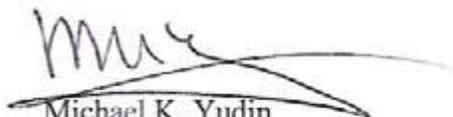
If NMPED does not request a hearing, this decision shall be final and the Department will work with NMPED to determine a date for the reduction in its section 611 Part B grant award. If NMPED requests a hearing, the date for a reduction in the State’s Part B grant will be determined only after a final determination by the Secretary on the State’s waiver request. In any event, the Department does not intend to reduce New Mexico’s Federal fiscal year 2013 IDEA Part B grant award because of its failure to maintain State financial support in SFY 2011.

### **Conclusion**

We remind the State that if the Department determines through an audit, or other means, that the State failed to maintain State financial support in SFY 2010 at the level permitted by this waiver, or in any other fiscal year, the Department will be required to propose the reduction of the allocation of funds to the State under section 611 of the IDEA for any fiscal year following the fiscal year in which the State fails to maintain financial support by the same amount by which the State fails to meet the requirement. 20 U.S.C §1412(a)(18)(B) and 34 CFR §300.163(b). In addition, the Department may take action to recover funds as provided for in section 452(a)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. §1234a(a)(1).

We also want to make clear to the State that, when making decisions about its level of State financial support for special education and related services in SFY 2013, New Mexico should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services at the level made available by the State in SFY 2009, or \$461,998,168. The Department may undertake additional monitoring of New Mexico's implementation of Part B of the IDEA should we believe that to be necessary to assess whether a FAPE is still being made available to all eligible children with disabilities, even though the State has been granted the waiver described above. In addition, in light of the New Mexico Individuals with Disabilities Education Act State Advisory Panel's duties in 20 U.S.C. §1412(a)(21)(D), particularly its duty in 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike", with a long horizontal flourish extending to the right.

Michael K. Yudin  
Delegated the authority  
to perform the functions  
and duties of the Assistant  
Secretary for Special  
Education and  
Rehabilitative Services

cc: New Mexico IDEA State Advisory Panel

Sent by facsimile transmission on June 3, 2013

Chart 1. FY 13 and FY 14 Appropriations and Transfers Related to State-level Maintenance of Effort Requirements for Special Education

		For FY 13			For FY 14		
		Occurs if...	Appropriates	Transfers	Occurs if...	Appropriates	Transfers
General Appropriation Act of 2013 (Laws 2013, Ch. 227)	Step 1)	<ul style="list-style-type: none"> <li>• PED certifies that the program cost made available in FY 13 is <b>not</b> sufficient to meet MOE requirements; and</li> <li>• PED obtains Board of Finance approval to transfer and distribute funds.<sup>1</sup></li> </ul>	\$20.0 million special appropriation <u>to PED</u> to ensure MOE requirements are met in FY 13. <sup>2</sup> (Section 5. Special Appropriations)		<ul style="list-style-type: none"> <li>• PED certifies that the program cost made available in FY 14 is <b>not</b> sufficient to meet MOE requirements; and</li> <li>• PED obtains Board of Finance approval to transfer and distribute funds.<sup>1</sup></li> </ul>	\$10.0 million <u>to PED</u> for a categorical Supplemental Special Education Maintenance of Effort Distribution to ensure MOE requirements are met in FY 14. <sup>2</sup> (Section 4, K. Public School Support)	
	Step 2)	<ul style="list-style-type: none"> <li>• PED certifies that the program cost and the \$20.0 million special appropriation are <b>not</b> sufficient to meet MOE requirements; and</li> <li>• PED obtains Board of Finance approval to transfer and distribute funds.<sup>1</sup></li> </ul>		Up to \$20.0 million transferred <u>to PED from the SEG</u> if program cost in the SEG and the special appropriation are <b>not</b> sufficient to meet MOE requirements in FY 13. <sup>2,3 &amp; 4</sup> (Section 6. Supplemental and Deficiency Appropriations)	<ul style="list-style-type: none"> <li>• PED certifies that the program cost and the \$10.0 million categorical Supplemental Special Education Maintenance of Effort Distribution are <b>not</b> sufficient to meet MOE requirements; and</li> <li>• PED obtains Board of Finance approval to transfer and distribute funds.<sup>1</sup></li> </ul>		Up to \$16.0 million transferred <u>to the categorical Supplemental Special Education Maintenance of Effort Distribution from the SEG</u> if the program cost in the SEG and the categorical appropriation are <b>not</b> sufficient in FY 14. <sup>2,3 &amp; 4</sup> (Section 4, K. Public School Support)

If the appropriations and transfers in the *General Appropriation Act (GAA) of 2012 and 2013* are **not** sufficient, then certain provisions of \*CS/H 628 (Laws 2013, Ch. 191) may take effect.

		For FY 13		For FY 14	
		Occurs if...	Appropriates	Occurs if...	Appropriates
*CS/H 628 (Laws 2013, Ch. 191)	Step 3)	<ul style="list-style-type: none"> <li>• after final settlement with the US Department of Education (USDE) the state is required to make up funding for state-level MOE; and</li> <li>• the appropriations for that purpose provided in the GAA of 2012 and 2013 are <b>not</b> sufficient.</li> </ul>	Up to \$20.0 million appropriated <u>to PED from the operating reserve</u> . <sup>2</sup> (Section 1, A. Appropriations)	<ul style="list-style-type: none"> <li>• after final settlement with the US Department of Education (USDE) the state is required to make up funding for state-level MOE; and</li> <li>• the appropriations for that purpose provided in the GAA of 2012 and 2013 are <b>not</b> sufficient.</li> </ul>	Up to \$16.0 million appropriated <u>to PED from the operating reserve</u> . <sup>2</sup> (Section 1, A. Appropriations)

<sup>1</sup> Language to require review with the Legislative Finance Committee and Legislative Education Study Committee was line item vetoed.

<sup>2</sup> The PED shall not distribute or transfer more than is necessary to meet the MOE requirements for that fiscal year.

<sup>3</sup> If transfers from the SEG are necessary, the FY 13 and or FY 14 FINAL unit value shall be reset accordingly.

<sup>4</sup> If the state transferred money from the SEG to meet MOE requirements and the US Department of Education rejects that transfer, the amount transferred from the SEG in FY 13 and FY 14 shall be appropriated from the operating reserve to the SEG distribution and the secretary shall adjust the final unit value in accordance with the amount transferred.