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June 16, 2014

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** Ian Kleats

**RE: STAFF BRIEF: SPECIAL EDUCATION MAINTENANCE OF EFFORT  
UPDATE**

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**INTRODUCTION**

During the June 2013 interim meeting of the Legislative Education Study Committee (LESC), the committee received an overview of proceedings between the Public Education Department (PED) and the US Department of Education (USDE) concerning the New Mexico's financial maintenance of effort (MOE<sup>1</sup>) requirements under the federal *Individuals with Disabilities Education Act*, Part B (IDEA-B).

At that time, the USDE had granted the state a waiver for FY 10 from its MOE requirements based on a "precipitous and unforeseen decline in the financial resources of the state," but had denied the state's waiver request for FY 11. Based on a ruling by the federal 4<sup>th</sup> Circuit Court of Appeals pertaining to a South Carolina MOE waiver denial, the state had the opportunity to appeal the initial decision by the USDE, and PED indicated that they would.

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<sup>1</sup> MOE is also known as "maintenance of state financial support" (MSFS) in federal law and regulation. While MSFS is used in certain contexts, especially legal documents, the body of this staff brief will use MOE for consistency with previous LESC publications.

This staff brief includes:

- an overview of the MOE appeals process; and
- the status of FY 13 and FY 14 MOE appropriations.

This staff brief contains the following attachments:

- **Attachment 1, PED Memo: Update on MOE Appeal;**
- **Attachment 2, Potential MOE Shortfalls FY 12 through FY 14; and**
- **Attachment 3, FY 13 and FY 14 Appropriations and Transfers Related to State-level Maintenance of Effort Requirements for Special Education.**

## **OVERVIEW OF THE MOE APPEALS PROCESS**

In a letter (**Attachment 1**) dated May 2, 2014 to the Chairman of the LESC from Mr. Hipolito Aguilar, PED Deputy Secretary, Finance and Operations, PED indicated that it had appealed the USDE's Office of Special Education and Rehabilitative Services' (OSERS) initial denial of PED's request for a waiver of the MOE requirement under IDEA-B for FY 11.

According to that letter, as a preliminary matter, PED requested that the administrative law judge consider the question of whether 34 CFR §300.230, a regulation allowing a state to reduce its expenditures for special education by up to 50 percent of any increase in its IDEA grant, sets a new baseline for the state's MOE requirement.

The letter also indicated that, following the determination of this preliminary matter, the judge will consider which MOE calculation methodology is correct and whether the state shall be granted a waiver from the FY 11 MOE requirement.

On February 14, 2014, PED submitted a brief on the preliminary matter, state flexibility under 34 CFR §300.230 and its applicability to FY 11. Citing USDE guidance and a Congressional conference report, the brief argues that, when a state exercises flexibility under those provisions, a new baseline is set for the state's MOE in future years based on expenditures of the fiscal year in which flexibility is granted rather than funds made available (i.e. appropriations).

On March 19, 2014, OSERS submitted its own brief on the argument. OSERS argued that the flexibility provided under 34 CFR §300.230 is an exception to "supplement not supplant" limitations. On April 2, 2014, PED submitted its response brief to the OSERS argument, and a hearing was held on April 8, 2014 in Washington, D.C. at which the parties argued their respective positions before the administrative law judge.

The administrative law judge issued his initial decision on May 8, 2014. He found that the flexibility provisions under 34 CFR §300.230 were an exception to "supplement not supplant" limitations, not MOE. As a result, the judge found those provisions could not be used to set a new baseline for a state's MOE requirement, highlighting the important distinction between expenditures and funds made available. The USDE Secretary may modify or overturn the decision if he finds that it is "clearly erroneous."

PED has not announced whether a date has been set for subsequent appeals hearings.

## **STATUS OF FY 13 AND FY 14 MOE APPROPRIATIONS**

The methodology used by the USDE in its response to the waiver requests, which maintains precedence until it might be overturned through appeal, suggest potential MOE shortfalls for FY 12, FY 13, and FY 14, when corrected for an error in the calculation of 3- and 4-year old developmentally disabled grade level units.

**Attachment 2** provides estimates of those potential MOE shortfalls for those fiscal years, for which PED has not yet requested waivers from MOE requirements, based on the corrected USDE methodology and executive action to date.

Additionally, **Attachment 2** introduces a potential new methodology for calculating MOE for FY 13 and FY 14 based on possible implications of the most recent initial ruling of the administrative law judge, which is described below.

### ***Appropriations for FY 13 MOE***

As detailed in **Attachment 3**, the 2013 Legislature made available an additional \$60.0 million to ensure the state met its MOE requirements for FY 13 through new appropriations or transfers of previously appropriated funds. These appropriations and transfers for FY 13 include:

- up to \$20.0 million appropriated from the Education Lockbox and driver's license fees;
- up to \$20.0 million transferred from the FY 13 State Equalization Guarantee (SEG) appropriation; and
- up to \$20.0 million appropriated from the General Fund Operating Reserve by Laws 2013, Chapter 191.

On June 18, 2013, PED certified need to the State Board of Finance (BOF) for the immediate distribution of \$16,881,452.50 of the \$20.0 million made available in Section 5 of the *General Appropriation Act of 2013*, and preliminarily certified need for the remaining approximate \$43.1 million to be booked as a contingent liability for FY 13.

It is unclear whether PED distributed the \$16.88 million authorized by the BOF. According to at least one school district, a distribution of those funds was received on the afternoon of June 30, 2013, prior to the end of the fiscal year. However, the version of the Federal Fiscal Year 2014 IDEA-B application disseminated by PED for public comment does not appear to include these funds in its estimate of FY 13 financial support for special education.

### ***Appropriations for FY 14 MOE***

As detailed in **Attachment 3**, the 2013 Legislature made available an additional \$42.0 million to ensure the state met its MOE requirements for FY 14 through new appropriations or transfers of otherwise appropriated funds. These appropriations and transfers for FY 14 include:

- up to \$10.0 million appropriated from the General Fund;
- up to \$16.0 million transferred from the FY 14 SEG appropriation; and
- up to \$16.0 million appropriated from the General Fund Operating Reserve by Laws 2013, Chapter 191.

In the *General Appropriations Act of 2014*, the Legislature:

- appropriated \$3.0 million for use in either FY 14 or FY 15 to meet MOE requirements in those fiscal years; and
- required the immediate distribution of the \$10.0 million General Fund appropriation made in 2013, language which was vetoed after executive action.

As a result of this executive action, all MOE appropriations for FY 14 made during the 2013 legislative session still require BOF approval prior to distribution. However, according to BOF staff in a phone conversation on June 6, 2014, there were no action items involving PED on the agenda for the BOF meeting scheduled for June 17, 2014.

Consequently, it does not currently appear that any of the up to \$45.0 million appropriated for special education MOE in FY 14 will be distributed before the end of the fiscal year.

#### ***Potential Implications to MOE Calculation for FY 13 and FY 14***

The initial ruling by the administrative law judge on state flexibility under 34 CFR §300.230 could have potential implications on the projection of potential MOE shortfall for all years subsequent to FY 11. Specifically, the ruling highlights an apparent legal distinction between expenditures and appropriations, and appears to suggest that appropriations, not expenditures, are the integral factor when determining MOE; that is, funds appropriated for a fiscal year, but not spent or distributed, might still be applied toward a state's MOE.

This becomes important because the Legislature appropriated an additional \$60.0 million to meet MOE obligations for FY 13, of which PED distributed only \$16.8 million. Under the newly conceived methodology based on full appropriations, the Legislature might have exceeded FY 09 MOE levels in FY 13, which could lead to potential unforeseen shortfalls in FY 14; however, the net exposure to potential reductions in federal IDEA-B funds would decrease by approximately \$25.6 million across FY 12 through FY 14.



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RECEIVED  
VIA E-MAIL

May 2, 2014

JUN 04 2014

**MEMORANDUM**

**TO:** Senator John M. Sapien, Chairman  
Legislative Education Study Committee

**FROM:** Hipolito "Paul" Aguilar  
Deputy Secretary, Finance and Operations

**RE: UPDATE ON MOE APPEAL**

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This memorandum is to update the Legislative Education Study Committee (LESC) on the status of the maintenance of effort (MOE) appeal. As the LESC is aware, the Public Education Department (PED) appealed the Office of Special Education and Rehabilitative Services' (OSERS) proposed denial of PED's request for a waiver of the MOE requirement under the Individuals with Disabilities Education Act (IDEA) for state fiscal year 2011.

As a preliminary matter, the PED requested that the administrative law judge consider the question of whether 34 CFR § 300.230, a regulation allowing a state to reduce its expenditures for special education by up to fifty percent of any increase in its IDEA grant, sets a new baseline for the state's MOE requirement. Both the PED and OSERS submitted briefs on that subject and a hearing was held on April 8, 2014 in Washington, D.C. at which the parties argued their respective positions. A decision is expected before the end of May.

Should the judge decide in PED's favor, the judge will then consider whether New Mexico qualifies to take a reduction under 34 CFR § 300.230. If that issue is decided in New Mexico's favor, a waiver for FY 2011, depending on how MOE is calculated, may not be necessary. If these questions are decided against New Mexico, the judge will then consider which MOE calculation methodology is the correct one and then whether New Mexico should be granted a waiver of the FY 2011 MOE requirement. These decisions will be subject to review and approval by the Secretary of the Department of Education and any final decisions of the Secretary are appealable to the Tenth Circuit Court of Appeals.

## Potential MOE Shortfalls for FY 12 through FY 14

	A	B	C
		Based on USDE Methodology (Corrected)	Based on Full Appropriation Methodology
1			
2	<b>FY 09 (School Year 2008-2009)</b>		
3	SEG for Special Education	\$ 412,109,029.91	\$ 412,109,029.91
4	Other State Agencies	\$ 36,488,718.48	\$ 36,488,718.48
5	<b>Total</b>	\$ 448,597,748.39	\$ 448,597,748.39
6			
7	<b>FY 12 (School Year 2011-2012)</b>		
8	SEG for Special Education	\$ 382,671,194.05	\$ 382,671,194.05
9	Other State Agencies	\$ 38,018,300.22	\$ 38,018,300.22
10	<b>Total</b>	\$ 420,689,494.27	\$ 420,689,494.27
11	<b>Estimated FY 2012 MOE Shortfall</b>	\$ (27,908,254.12)	\$ (27,908,254.12)
12			
13	<b>FY 2013 (School Year 2012-2013)</b>		
14	SEG for Special Education	\$ 374,159,526.73	\$ 374,159,526.73
15	Other State Agencies	\$ 44,452,884.79	\$ 44,452,884.79
16	<b>Subtotal</b>	\$ 418,612,411.52	\$ 418,612,411.52
17	2013 GAA Section 5 Appropriation	\$ 16,881,452.50	\$ 20,000,000.00
18	2013 GAA Section 6 SEG Transfer (Net <sup>1</sup> )	\$ -	\$ 16,794,144.40
19	Laws 2013, Ch. 191 Appropriation	\$ -	\$ 20,000,000.00
20	<b>Total</b>	\$ 435,493,864.02	\$ 475,406,555.92
21	<b>Estimated FY 2013 MOE Shortfall</b>	\$ (13,103,884.37)	\$ 26,808,807.53
22			
23	<b>FY 2014 (School Year 2013-2014)</b>		
24	SEG for Special Ed.	\$ 388,455,945.52	\$ 388,455,945.52
25	Other State Agencies (Estimated) <sup>2</sup>	\$ 44,452,884.79	\$ 44,452,884.79
26	<b>Subtotal</b>	\$ 432,908,830.31	\$ 432,908,830.31
27	2013 GAA Section 4 Appropriation	\$ -	\$ 10,000,000.00
28	2013 GAA Section 5 SEG Transfer (Net <sup>1</sup> )	\$ -	\$ 13,391,605.49
29	Laws 2013, Ch. 191 Appropriation	\$ -	\$ 16,000,000.00
30	<b>Total</b>	\$ 432,908,830.31	\$ 472,300,435.80
31	<b>Estimated FY 2014 MOE Shortfall</b>	\$ (15,688,918.08)	\$ (3,106,120.12)
32			
33	<b>Potential MOE Exposure FY 12 through FY 14</b>	\$ (56,701,056.57)	\$ (31,014,374.24)

## Footnotes:

<sup>1</sup>When funds are transferred out of the State Equalization Guarantee (SEG) for MOE, a portion of the transferred funds would have otherwise gone towards special education units. As a result, the net amount of additional funding for special education will be less than the total amount of SEG transfer authorized.

<sup>2</sup>The estimate for FY 14 Other State Agency expenditures is held flat from final audited FY 13 Other State Agency expenditures.

**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> ( <b>Section 5. Special Appropriations</b> )		<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> ( <b>Section 4, K. Public School Support</b> )	
	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> ( <b>Section 6. Supplemental and Deficiency Appropriations</b> )	<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> ( <b>Section 4, K. Public School Support</b> )

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> ( <b>Section 1, A. Appropriations</b> )	<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> ( <b>Section 1, A. Appropriations</b> )

<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.