



**Public comment to the
National Council on Disability
December 8, 2011**

*Submitted by Candace Cortiella, Director, The Advocacy Institute and
Kathleen B. Boundy, Co-director of the Center for Law and Education*

**How IDEA Federal Funding Anomalies and Policy Shifts
Threaten FAPE for Students with Disabilities**

The delivery of a free appropriate public education (FAPE) to the nation's 5.8 million school-age students with disabilities is being seriously threatened by a series of unrelated events about to converge. Specifically, these are (1) the long-term consequences of the unprecedented one-time spike in IDEA federal appropriations caused by the American Recovery and Reinvestment Act (ARRA), (2) the sequestration triggered by the failure of the Joint Select Committee on Deficit Reduction to develop a plan for deficit reduction requiring \$1.2 trillion in automatic across-the-board budget cuts to go into effect starting in January 2013, and (3) a new and legally flawed interpretation of the IDEA requirement governing local maintenance of effort (MOE) reflected in informal guidance issued by the Office of Special Education Programs (OSEP) at the U.S. Department of Education in June 2011.

Long-term consequences of the unprecedented one-time spike in IDEA federal appropriations caused by the American Recovery and Reinvestment Act (ARRA)

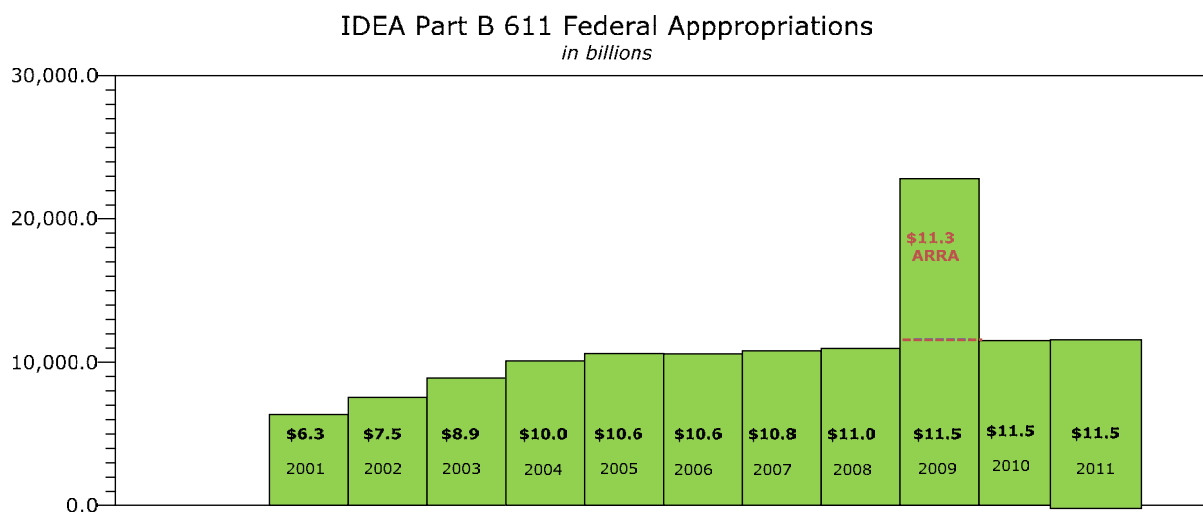
Despite continued advocacy for additional federal funding for local educational agencies (LEAs) in the annual federal budget process, appropriations for the Individuals with Disabilities Education Act remain at about half of the authorized amount (i.e., 40% of the annual per pupil expenditure or APPE)(see chart below). However, the amount of annual federal appropriations for IDEA has never **decreased** from one year to the next. (See attached Federal Special Education IDEA Part B Revenues over Time, 1977-78 to 2002-03).

However, the ARRA infused \$11.3 billion in additional IDEA federal funding in 2009, essentially doubling that year's federal funds to LEAs (see chart below). While well-intended, this one-time spike in IDEA federal funding has important long-term consequences. Among them:

- The increase in IDEA funding in 2009 triggered a little-used provision in IDEA that allows LEAs to reduce their local and state funds spent on special education by up to 50% of the amount of any increase in federal funds from one year to the next. According to data submitted to the U.S. Dept. of Education in response to a new data

collection instituted after ARRA, LEAs reduced local spending on special education under this IDEA provision by \$1.4 billion (see attached state summary). LEAs that reduced their level of expenditure on special education under this exception to the local ‘maintenance of effort’ rule, can legally remain at the reduced level in subsequent years so long as they are able to provide FAPE to their eligible children with disabilities. As illustrated in “Understanding the Impact of Recovery Act Funds, Annual Federal Funds and IDEA Provisions Over Time” (attached) an LEA that took full advantage of the IDEA 50% rule in 2009 will end up spending less on special education in subsequent years than it had in the fiscal year prior to the ARRA-IDEA windfall.

- Even for LEAs that did not reduce local spending in 2009 (either by choice or because they were not eligible to do so), the drop in available Federal funds [and in some cases State funds, if waivers have been granted by ED] is being felt. Some LEAs used ARRA funds to hire extra staff, who now must be let go. This “funding cliff” will be felt more severely than anticipated when ARRA was enacted since IDEA funding has not increased in subsequent years (2010, 2011), and will most likely remain level or decline slightly in 2012.



Sequestration triggered by the failure of the Joint Select Committee on Deficit Reduction to develop a plan for deficit reduction requiring \$1.2 trillion in automatic across-the-board budget cuts to go into effect starting in January 2013.

Cuts to the federal budget required by sequestration will have a dramatic impact on education funding. The NEA has estimated that the reduction to IDEA in 2013 will be approximately \$900 million. (Funding for Title I will be cut by \$1.1 billion. Some 2.5 million IDEA-eligible students also receive services under Title I programs.)

The sharp decline in IDEA federal funding anticipated to be brought about by sequestration will force LEAs to either reduce services beyond what is needed to provide FAPE to students with disabilities *or* supplement the shortfall with local funds—something unlikely to happen given continuing effects of the recession and the "lag time" between economic recovery in general and the effects, particularly in revenue, felt by state and local governments.

Already LEAs are feeling the pinch of reductions to state funding for education, as evidenced by a December 1, 2011 letter to OSEP by the Survival Coalition of Wisconsin Disability Organizations (attached).

Potentially untenable consequences from legally flawed interpretation of the local maintenance of effort (MOE) provisions of IDEA in informal guidance issued by the Office of Special Education Programs (OSEP).

Under IDEA's local maintenance of effort (MOE) requirement each LEA must spend at least as much from local and state funds in the current year as it spent on special education costs in the preceding year unless the LEA can demonstrate that the reduction is spending is attributable to one of two types of circumstances specified in the law. One type includes, e.g., when a senior, highly paid special educator retires and is replaced by a qualified but younger, lower salaried teacher; the other type is as in the case of the ARRA funds, when an increase in federal funding triggers the 'up to 50% rule'(described above. Only when a school district can demonstrate that its reduced level of local expenditures is attributable to either of these two types of exceptions may the LEA lawfully reduce its local MOE. When an LEA reduces its local level of MOE per one of the limited exceptions, its MOE level remains at the reduced level in subsequent years (unless it is voluntarily increased by the LEA). State educational agencies (SEAs) are required to monitor annually their LEAs' MOE. An LEA that fails to maintain MOE consistent with IDEA puts in jeopardy its eligibility for future IDEA federal funding.

However, in a June 16, 2011, response to an inquiry from the National Association of State Directors of Special Education (NASDSE), the Office of Special Education Programs (OSEP), U.S. Department of Education (USED), issued a policy interpretation purportedly about the local MOE of an LEA failed to maintain its level of special education expenditures from local and state funds and could not justify a reduction attributable to either type of exception expressly set forth in IDEA, i.e., an LEA that as described, was in violation of its local MOE mandate and should rightfully be subject to review by the SEA for failing to meet the criteria for eligibility for Part B funds under IDEA (attached).

USED in its response notes the IDEA does not contain a specific provision addressing this circumstance and states "...the Department must rely on the plain language of the statute and regulation...which provide that an LEA may not reduce its level of expenditures...below the level of those expenditures for the preceding fiscal year." The letter continues, "It [the LEA] is not obligated to expend at least the amount it expended in the last fiscal year for which it met the maintenance of effort requirement. In other words, each year's LEA maintenance of effort obligation is based on the amount expended in the immediate prior fiscal year."

An LEA that fails to meet the MOE requirement is only required to expend from local and state funds the amount it expended in the immediate prior fiscal year. For example, if an LEA expended \$650,000 from local and state funds in FY 2009 and only \$600,000 in FY 2010 (without meeting any of the provisions for an allowable reduction) it failed the MOE requirement by \$50,000.

In a detailed letter-memorandum, the Center for Law and Education (attached) concludes the USED guidance is "inconsistent with the legislative history of P.L. 94-142 and the local MOE statutory provision, and is contrary to basic tenets of statutory construction and contract law," adding that "Given the current economic burden on school districts, OSEP's flawed interpretation is especially inopportune; it can be anticipated that LEAs will

transgress the statutory prohibition against reducing their local MOE outside of the expressly authorized exceptions (§613(a)(2)(A)(iii)) as a means of lowering their MOE in subsequent fiscal years resulting in further harm to the education of the nation's 5.8 million children with disabilities in need of special education.”

The June 16, 2011 informal guidance from USED has spawned an avalanche of letters to both OSEP and members of Congress. A compilation of these communications is attached.

Taken individually, any one of these events poses a serious threat to LEAs providing meaningful FAPE for our nation's special education students. Taken together, they seem destined to converge to form the single most important issue facing special education today.

However, one of these issues is certainly within all our capacity to rectify.


We ask the National Council on Disability to use its proven leadership to seek USED's rescission of the flawed interpretation of the informal guidance. We ask you to join us in communicating our shared concerns to USED and taking such additional steps as NCD is prepared to take, to resolve this serious matter.

We appreciate the opportunity to provide NCD with these comments.

Yours truly,



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Exhibit I-1. Federal Special Education IDEA Part B Revenues over Time, 1977-78 to 2002-03

School Year	Appropriation (in thousands) (a)	Special Education Child Count (in thousands) (b)	Special Education Child Count (c)	Year of Applicable Child Count (d)	Share Per Special Education Child (e)	Applicable APPE (f)	Year of Applicable APPE (g)	% Growth in Child Count (h)	Percent Increase in APPE (i)	Percent Increase in Appropriations per Special Education Child (j)	Percent Increase in Appropriations per Special Education Child (k)	% APPE (l)
77-78	\$251,770	3,485	3,485	76-77	\$72	\$1,430	75-76					5.1%
78-79	\$566,030	3,561	3,561	77-78	\$159	\$1,560	76-77	2.2%	9.1%	124.8%	120.0%	10.2%
79-80	\$804,000	3,700	3,700	78-79	\$217	\$1,736	77-78	3.9%	11.3%	42.0%	36.7%	12.5%
80-81	\$874,500	3,803	3,803	79-80	\$230	\$1,919	78-79	2.8%	10.5%	8.8%	5.8%	12.0%
81-82	\$874,500	3,941	3,941	80-81	\$222	\$2,168	79-80	3.6%	13.0%	0.0%	-3.5%	10.2%
82-83	\$931,008	3,990	3,990	81-82	\$233	\$2,354	80-81	1.2%	8.6%	6.5%	5.2%	9.9%
83-84	\$1,017,900	4,053	4,053	82-83	\$251	\$2,640	81-82	1.6%	12.1%	9.3%	7.6%	9.5%
84-85	\$1,068,875	4,096	4,096	83-84	\$261	\$2,861	82-83	1.1%	8.4%	5.0%	3.9%	9.1%
85-86	\$1,135,145	4,124	4,124	84-85	\$275	\$3,086	83-84	0.7%	7.9%	6.2%	5.5%	8.9%
86-87	\$1,163,282	4,121	4,121	85-86	\$282	\$3,356	84-85	-0.1%	8.7%	2.5%	2.6%	8.4%
87-88	\$1,338,000	4,167	4,167	86-87	\$321	\$3,510	85-86	1.1%	4.6%	15.0%	13.7%	9.1%
88-89	\$1,431,737	4,236	4,236	87-88	\$338	\$3,871	86-87	1.7%	10.3%	7.0%	5.3%	8.7%
89-90	\$1,475,449	4,347	4,347	88-89	\$339	\$4,130	87-88	2.6%	6.7%	3.1%	0.4%	8.2%
90-91	\$1,542,610	4,419	4,419	89-90	\$349	\$4,403	88-89	1.7%	6.6%	4.6%	2.8%	7.9%
91-92	\$1,854,186	4,567	4,567	90-91	\$406	\$4,704	89-90	3.3%	6.8%	20.2%	16.3%	8.6%
92-93	\$1,976,095	4,727	4,727	91-92	\$418	\$4,968	90-91	3.5%	5.6%	6.6%	3.0%	8.4%
93-94	\$2,052,728	4,896	4,896	92-93	\$419	\$5,108	91-92	3.6%	2.8%	3.9%	0.3%	8.2%
94-95	\$2,149,686	5,101	5,101	93-94	\$421	\$5,260	92-93	4.2%	3.0%	4.7%	0.5%	8.0%
95-96	\$2,322,915	5,467	5,467	94-95	\$425	\$5,429	93-94	7.2%	3.2%	8.1%	0.8%	7.8%
96-97	\$2,323,837	5,629	5,629	95-96	\$413	\$5,640	94-95	3.0%	3.9%	0.0%	-2.8%	7.3%
97-98	\$3,107,522	5,806	5,806	96-97	\$535	\$5,796	95-96	3.1%	2.8%	33.7%	29.6%	9.2%
98-99	\$3,801,000	5,978	5,978	97-98	\$636	\$6,046	96-97	3.0%	4.3%	22.3%	18.8%	10.5%
99-00	\$4,301,000	6,133	6,133	98-99	\$701	\$6,296	97-98	2.6%	4.1%	13.2%	10.3%	11.1%
00-01	\$4,976,685	6,274	6,274	99-00	\$793	\$6,631	98-99	2.3%	5.3%	15.7%	13.1%	12.0%
01-02	\$6,323,685	6,381	6,381	00-01	\$991	\$7,006	99-00	1.7%	5.7%	27.1%	24.94%	14.1%
02-03	\$7,512,533	6,483	6,483	01-02	\$1,159	\$7,499	00-01	1.6%	7.0%	18.8%	16.93%	15.5%

Appropriations (Column b) source: Annual Reports to Congress on the Implementation of the Individuals with Disabilities Education Act and unpublished FY 2002-2003 data from the Office of Special Education Programs (OSEP), U.S. Department of Education. (Figures exclude appropriations for studies and evaluations.)
 Special education child count (Column c) source: Annual Reports (include counts from the Bureau of Indian Affairs and Outlying Areas).
 APPE source: Unpublished data from the National Center for Education Statistics (NCES), provided by the Office of Special Education Programs (OSEP), U.S. Department of Education.

Table 8 State Summaries 2009

STATE	2009 All Disabilities Ages 6-21	TOTAL \$ REDUCTION IN LOCAL FUNDS TAKEN IN SY 2009-10 (in millions)
Alabama	75,739	28.2
Alaska	15,906	0
Arizona	111,526	23.3
Arkansas	52,174	8.6
California	601,645	335.8
Colorado	72,438	6.8
Connecticut	60,719	18.0
Delaware	16,847	NA
District of Columbia	10,688	0
Florida	341,632	175.2
Georgia	160,579	105.0
Hawaii	17,502	21.4
Idaho	23,855	14.1
Illinois	276,621	87.9
Indiana	153,493	17.2
Iowa	60,369	52.3
Kansas	55,865	7.0
Kentucky	87,180	27.2
Louisiana	75,167	NA
Maine	28,923	0
Maryland	90,486	0
Massachusetts	151,026	0.1
Michigan	203,728	NA
Minnesota	106,653	0
Mississippi	54,339	0
Missouri	114,166	56.1
Montana	15,491	0
Nebraska	39,758	0.2

Table 8 State Summaries 2009

STATE	2009 All Disabilities Ages 6-21	TOTAL \$ REDUCTION IN LOCAL FUNDS TAKEN IN SY 2009-10 (in millions)
Nevada	41,243	5.9
New Hampshire	27,120	1.5
New Jersey	212,615	40.2
New Mexico	39,197	5.4
New York	396,567	0.2
North Carolina	166,749	12.8
North Dakota	11,602	1
Ohio	240,060	49.6
Oklahoma	87,378	27.8
Oregon	71,116	7.3
Pennsylvania	264,409	55.6
Rhode Island	23,429	0
South Carolina	90,161	0.9
South Dakota	15,219	8
Tennessee	106,158	26.8
Texas	403,492	25.4
Utah	59,102	3.2
Vermont	12,413	0
Virginia	147,714	38.7
Washington	112,166	49.1
West Virginia	40,415	11.3
Wisconsin	109,774	20.4
Wyoming	11,822	NA
TOTALS	5,764,436	\$ 1,375.50

IDEA Money Watch

because we need to know where the money goes

Understanding the Impact of Recovery Act Funds, Annual Federal Funds and IDEA Provisions Over Time

A presentation of www.IDEAmoneywatch.com



Sunnyvale School District Your Town, USA

- 5000 students
- 500 students with IEPs (10%)



IDEA Money Watch

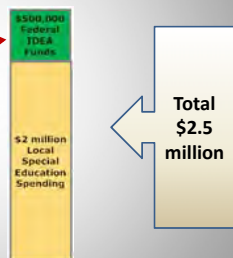


Sunnyvale School District

2008

Spent:

- \$500,000 in annual Federal IDEA funds
- \$2 million local funds on special education (excess cost)



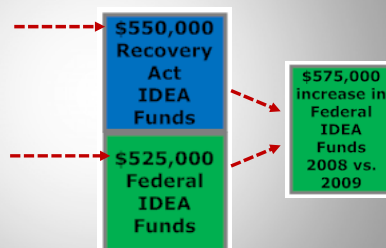
IDEA Money Watch



Sunnyvale School District

2009

- Received \$550,000 in Recovery Act IDEA funds
- Received \$525,000 in Federal IDEA funds (+2%)



IDEA Money Watch



Sunnyvale School District

- All Recovery Act IDEA funds considered 2009 funds;
- Can be obligated anytime between Feb. 19, 2009 and Sept. 30, 2011;
- Subject to IDEA provision allowing reduction in local spending on special education when federal funds increase from one year to the next (up to 50% of increase).

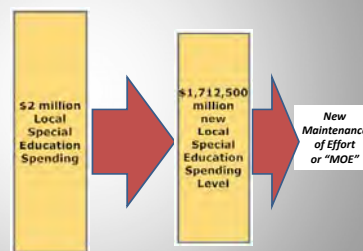
IDEA Money Watch



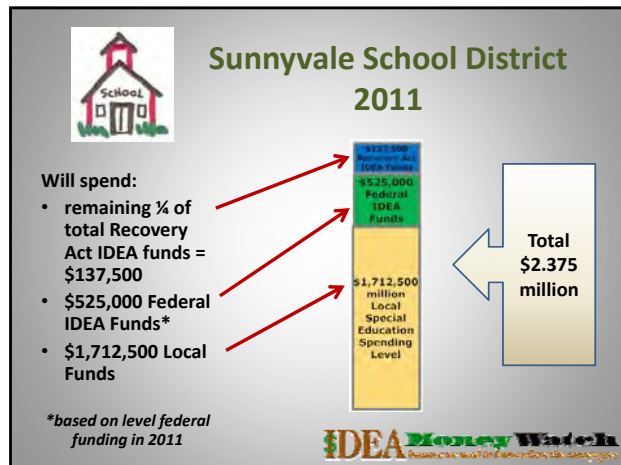
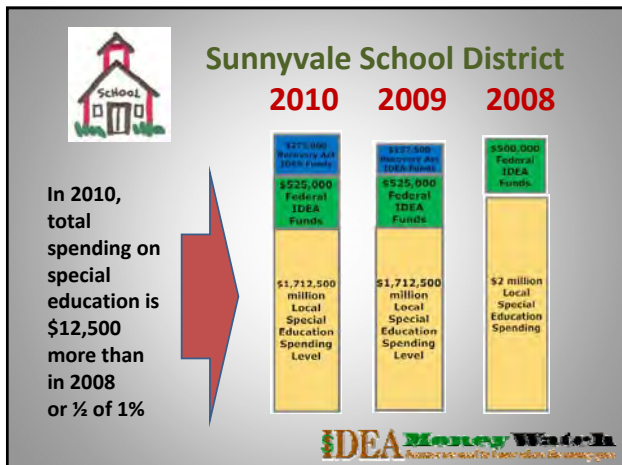
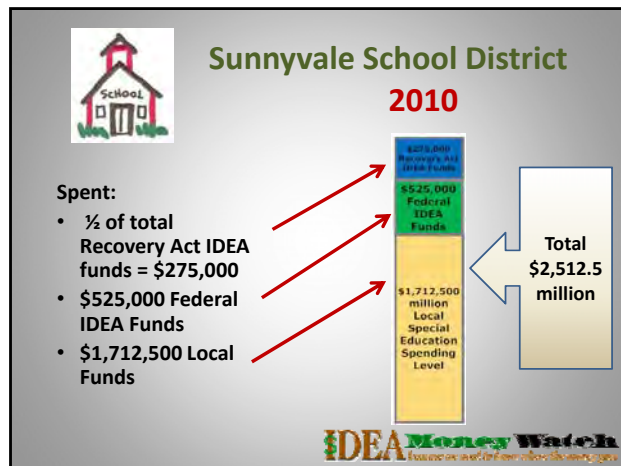
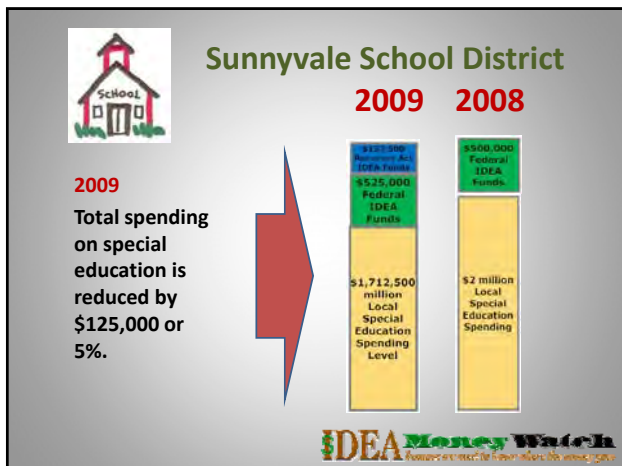
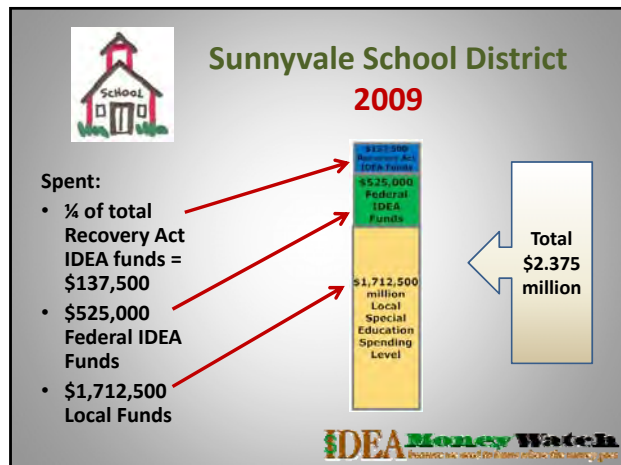
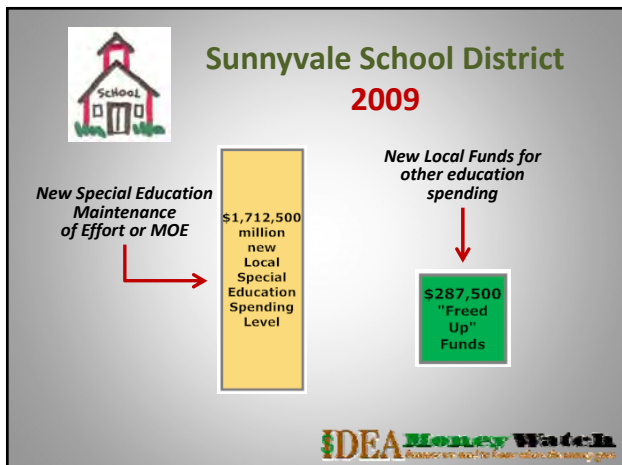
Sunnyvale School District

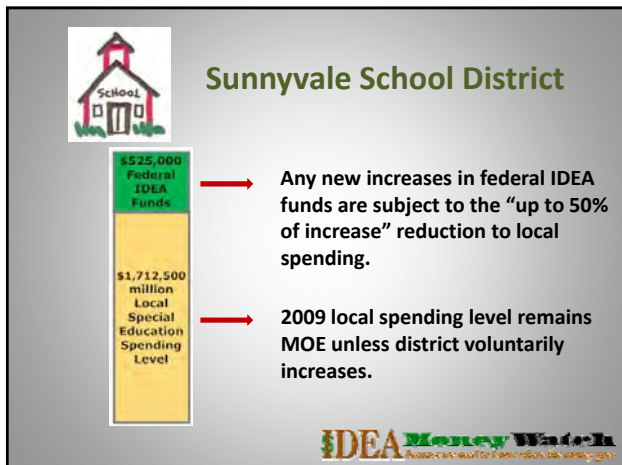
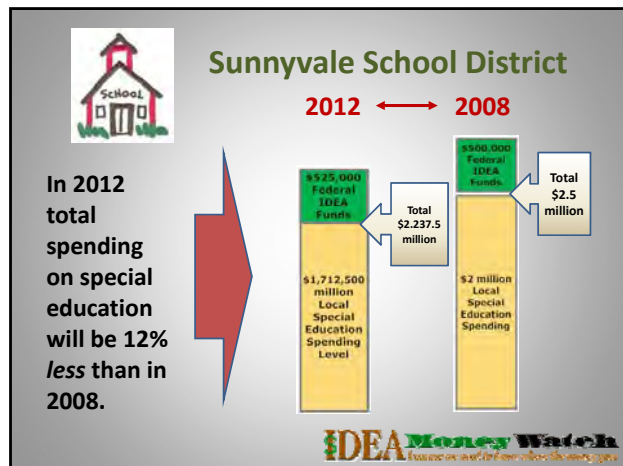
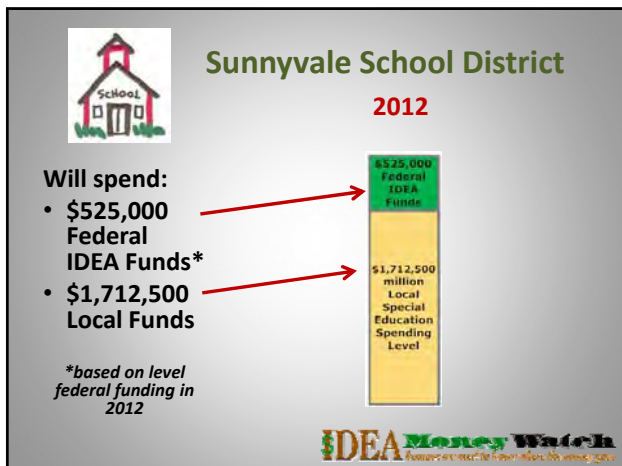
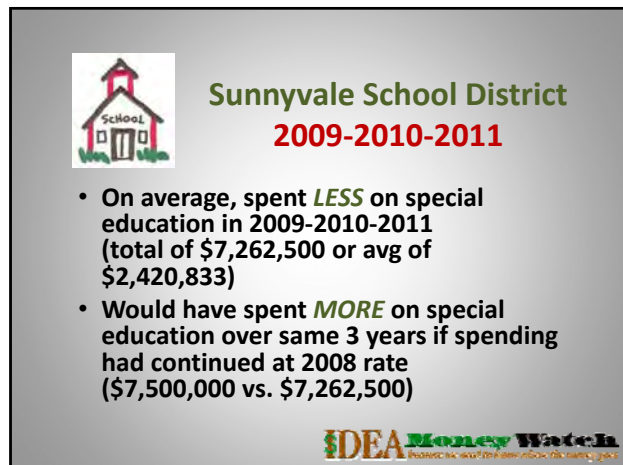
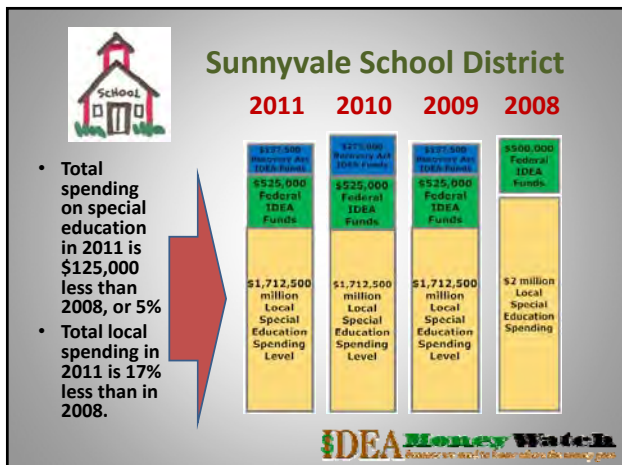
2009

- Exercised IDEA option to reduce local spending on special education by 50% of increase in 2009 over 2008 or \$287,500.



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December 1, 2011

Melody Musgrove, Director
Office of Special Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-7100

RE: IDEA Local Maintenance of Effort – Wisconsin

Dear Dr. Musgrove:

We have become aware that Wisconsin school districts are actively seeking waivers of IDEA Maintenance of Effort (MOE) beyond those currently allowed by law (see attached letter). On behalf of the Survival Coalition of Wisconsin Disability Organizations we ask that you reject those requests. Instead, we suggest that you reinforce with the State of Wisconsin the requirement of local educational agencies (LEAs) to meet their MOE obligations and for the State to monitor LEAs on an annual basis to ensure they are meeting their MOE obligations.

As the state's largest cross-disability coalition comprised of more than 40 state and local organizations and groups, we support people with disabilities of all ages to be full participants in community life, including their schools. While we acknowledge difficult financial times over the past three years which have made state and local education budgeting decisions particularly tenuous, **our state legislature has made deliberate choices in education funding priorities that have put pressure on LEAs to reduce school funding. This should not result in decreased funding at the local level for the provision of a Free and Appropriate Public Education (FAPE) for students with disabilities.**

Specifically the Wisconsin legislature passed the 2011-13 biennial budget earlier this year which contained sweeping changes to public school funding, including the second largest single-year reduction in per pupil spending among 46 states nationally.¹ These education cuts occurred at the same time the Governor and state legislature prioritized other spending and voted to increase the overall budget by two percent.

¹ Oliff, P, Leachman, M., New School Year Brings Steep Cuts in Funding for Schools, Center for Budget Policy and Priorities, <http://www.cbpp.org/cms/index.cfm?fa=viewid=3569>, 2011.

The Congressional intent in IDEA related to local MOE is clear: maintain and protect levels of funding for students with disabilities and the LEAs' abilities to provide FAPE, particularly during difficult fiscal times. Congress has already provided for limited exceptions to local MOE in 20 USC 1413(a)(2)(B); 34 CFR 300.204 or 20 USC 1413(a)(2)(C), 34 CFR 300.205 which allow appropriate flexibility, including exceptions that recognize reduced local expenditures in cases of voluntary departures or retirements of staff, decreased student enrollment, and the termination of high cost circumstances.

The Wisconsin Department of Public Instruction (DPI) reports that due to state budget cuts 97% of the state's public school districts (411 of 424) will receive less state education funding for the 2011-12 school year than the previous year. The median decrease in state school education funding for FY 12 for districts is 9.98%.² The budget also mandated a change in Wisconsin revenue limit policy resulting in a loss of \$1.6 billion in revenue authority. Until this year Wisconsin's revenue cap law allowed local school districts the ability to raise local property taxes sufficiently to keep up with inflation and thus meet the gap in education expenditures.³ However, this budget, for the first time in Wisconsin history, reduces local school district's ability to raise revenue by 5.5%.

These unprecedented cuts to general education funding in Wisconsin are responsible for the fiscal pressures local districts are experiencing causing many LEAs to look to special education spending as a way to cut their expenses. Districts are responding to a state education funding policy decision explicitly made by the Governor and approved by the state legislature. The fiscal pressure on LEAs is related to these state level decisions and not to any extrinsic crisis such as a natural disaster that might require such reductions. In addition, it is clear the Governor and state legislature were aware of the State Educational Agency MOE requirements by including adequate state special education funding to comply with state level MOE.

A survey of the Wisconsin Association of School District Administrators (WASDA) released this November shows the tangible impacts of general education funding reductions, including targeted cuts in special education. **The largest cuts in the 2011-2012 school year by districts were in special education.** Twenty-eight percent of all reporting districts indicated they cut special education positions.⁴

Budget cuts are also leading to verified class size increases with nearly six in ten students attending a district with increased class sizes in K-12.⁵ Since the beginning of this school year the state's disability protection and advocacy agency has been fielding calls from families in school districts both large and small in which it is now more difficult, if not impossible, to secure

² Wisconsin Department of Public Instruction, 2011-12 General Aid Certification, October 2011.

http://dpi.wi.gov/eis/pdf/dpinr2011_120_general_aid.pdf

³ Reschovsky, Andrew; An Analysis of the Proposal to Reduce Revenue Limits for Wisconsin School Districts; Working Paper Series La Follette School Working Paper No. 2011-003; March 2011.
<http://www.lafollette.wisc.edu/publications/workingpapers/reschovsky2011-003.pdf>

⁴ Wisconsin Association of School District Administrators, Wisconsin Department of Public Instruction; Budget Survey Analysis, November 2011.

⁵ Wisconsin Department of Public Instruction, Impact of 2011-13 Biennial Budget, Survey of School Districts by Wisconsin Association of School District Administrators (WASDA), November 2011. Survey form and raw district-by-district data: http://dpi.wi.gov/pb/11-13_budget.html

a one-on-one or general classroom aide for a student who requires this level of support. As a result of these reports, disability organizations are now surveying families directly to assess the impact of budget cuts to individual students. Results will be released early next year.

Preliminary survey results suggest that it has already become more difficult to achieve FAPE in the least restrictive environment for many students.

Although the Wisconsin legislature also enacted controversial changes to state law that require increased contributions to health care and pension costs by school employees, not all school districts are experiencing savings. In fact, survey data from school administrators analyzing the impact of these personnel changes illustrated that districts anticipated a statewide education budget gap of more than \$300 million, even after accounting for potential savings.⁶ **For all these reasons it would be inappropriate to uniformly allow for MOE exceptions related to benefits changes in Wisconsin before we know more about how these cuts are affecting student access to FAPE.**

States have the responsibility to monitor changes in special education funding to ensure that cuts in whatever form do not directly impact students with disabilities and the delivery of FAPE in the least restrictive environment. Any increase in overall MOE flexibility will simply reward the State of Wisconsin for its drastic and unprecedented cuts to its general education budget and harm even more students with disabilities, clearly not something contemplated by Congress in the MOE requirements under the IDEA.

Therefore we request that the Department of Education:

- 1) Issue guidance or a Dear Colleague letter reminding SEAs that they are responsible for monitoring LEAs' MOE obligations annually;**
- 2) Ensure that SEAs monitor LEAs, hold them accountable for meeting their MOE obligations, and publicize when LEAs meet and do not meet MOE – conducted on an annual basis;**
- 3) Do not consider any regulations or interpretations that would allow LEAs not to meet their MOE obligations.**

In addition, the Department should continue to advise direct investment in special education funding that promotes high quality personnel development and school-wide coordinated early intervening services that are both allowable uses of IDEA funds and are proven to achieve FAPE as well as the overall high quality education of students with disabilities in the general education curriculum.

Thank you for considering our request. Please contact us with additional questions.

Survival Coalition Co-Chairs

⁶ Wisconsin Association of School Boards School Administrators Alliance; Public Schools Make Key Program Cuts; May 2011. http://dpi.wi.gov/pb/pdf/budget_saa.pdf

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608-444-3842; moryan@charter.net

cc: Assistant Secretary Alexa Posny
Deputy Assistant Secretary Sue Swenson
Senator Tom Harkin, Senate HELP Committee Chairman
Senator Mike Enzi, Senate HELP Committee Ranking Member
Representative John Kline, House Education and Workforce Chairman
Representative George Miller, House Education and Workforce Committee, Senior Democrat
Senator Herb Kohl-WI
Senator Ron Johnson-WI
Representative Paul Ryan-WI
Representative Tammy Baldwin-WI
Representative Ron Kind-WI
Representative Gwen Moore-WI
Representative James Sensenbrenner-WI
Representative Tom Petri-WI
Representative Sean Duffy-WI
Representative Reid Ribble –WI
Superintendent Anthony Evers, Wisconsin Department of Public Instruction (DPI)
Stephanie Petska, Wisconsin DPI Director of Special Education
Laura Kaloi, National Center for Learning Disabilities (NCLD)
Cindy Smith, National Disability Rights Network
Katy Neas, Easter Seals



May 27, 2011

Congressman Gwen Moore
2245 Rayburn HOB
Washington, DC 20515

Dear Congresswoman Moore:

We, as members of the Cooperative Educational Service Agency #1 (CESA #1) comprised of 45 school districts representing more than 250,000 students in Southeast Wisconsin, are writing today to urge you, as a member of Congress, to change the Maintenance of Effort (MOE) requirement within the Individuals with Disabilities Education Act (IDEA) that would allow school districts that achieve cost savings through efficiencies and do not reduce special education services and/or the recent changes in employee benefit system proposed by Wisconsin Governor Walker to be held harmless under the Act. It is vitally important in these increasingly challenging economic times that Congress provide local school administrators and school boards the local control needed to achieve cost savings as we maintain excellent special education services for individuals with disabilities.

Under the Individuals with Disabilities Education Act (IDEA), a school district must maintain local special education funding amounts from one year to the next. The MOE requirement does provide for specific exceptions that school districts may apply: the voluntary departure of staff, such as retirement – but not lay-offs (since that is not voluntary); the costs of a specific special education student who has either left the district, graduated or aged out of the program; the costs of a specific special education program for a student if the student no longer requires the services; and the cost of capital equipment purchased in the prior year. If a school district reduces effort outside of these allowed exceptions, then compliance has not been met and the penalty is the repayment of funds to the US Department of Education. This repayment cannot be made with federal funds. This hurts all school districts.

For example, cost savings that do not reduce special education services such as transportation services and/or the reduction of salaries or benefits mandated by a governmental body outside the local school districts' control are not an allowable exception to lowering special education MOE under the current act.

There is no waiver provision for school district MOE under the Act. It does not make sense to not allow such exceptions when students' needs are being met as in the previous year.

As you are aware, Governor Walker recently proposed/enacted changes to Wisconsin state law that require increased contributions to health care costs as well as pension costs by school employees. It is our hope that with an exception/waiver at the federal level, school districts in Southeast Wisconsin can fully experience the savings from these increased contributions. This change **will not reduce** the services being provided to children with disabilities and could allow for enhanced educational opportunities for every child. Your help to change the MOE is critical to achieve the efficient and most effective use of federal resources for all school districts.

As mentioned earlier, CESA #1 represents 45 school districts and over 250,000 students in Southeast Wisconsin and provides a variety of educational services including special education. With respect to this issue, all 45 school districts' speak with one voice and therefore, we respectfully request that you introduce an amendment to the IDEA that would allow an exception to the Act for this type of cost savings measure(s) by school districts.

Thank you in advance for your consideration of this important matter. If you have any questions or would like to further discuss this request, please feel free to contact our spokesperson on this issue, Blane McCann, Ph.D., Superintendent of Schools, School District of Shorewood, Shorewood, Wisconsin 53211. He can be reached at 414.963.6901 or via email at bkmccann@shorewood.k12.wi.us.

Sincerely,

*Arrowhead Union High School
District
Craig Jefson
School District of Brown Deer
Deb Kerr*

*Kettle Moraine School District
Patricia DeKlotz
Lake Country School District
Mark Lichte*

*Oconomowoc Area School District
Patricia Neudecker
Pewaukee School District
JoAnn Sternke*

*Cedarburg School District
Daryl Herrick*

*Maple Dale-Indian Hill School
District
Mary Dean*

*Port Washington-Saukville School
District
Michael Weber*

*School District of Cudahy
James Heiden*

*School District of Menomonee Falls
Keith Marty*

*Racine Unified School District
Jim Shaw*

<i>School District of Elmbrook Matthew Gibson</i>	<i>Mequon Thiensville School District Demond Means</i>	<i>Richmond School District George Zimmer</i>
<i>Fox Point-Bayside School District Rachel Boechler</i>	<i>Merton Community School District Mark Flynn</i>	<i>St. Francis School District Carol Topinka</i>
<i>Franklin Public School District Steve Patz</i>	<i>Milwaukee Public Schools Greg Thornton</i>	<i>Shorewood School District Blane McCann</i>
<i>Germantown School District Sue Borden</i>	<i>Mukwonago Area School District Paul Strobel</i>	<i>School District of South Milwaukee Rita Olson</i>
<i>Glendale-River Hills School District Larry Smalley</i>	<i>Muskego Norway School District Joe Schroeder</i>	<i>Stone Bank School District Phillip Meissen</i>
<i>School District of Grafton Jeff Pechura</i>	<i>School District of New Berlin Paul Kreutzer</i>	<i>Swallow School District Jeffery Klaisner</i>
<i>Greendale School District William Hughes</i>	<i>Nicolet High School District Rick Monroe</i>	<i>School District of Waukesha Todd Gray</i>
<i>School District of Greenfield Conrad Farner</i>	<i>Norris School District Sara Trampf</i>	<i>Wauwatosa School District Phillip Ertl</i>
<i>Hamilton School District Kathleen Cooke</i>	<i>North Lake School District Peter Hirt</i>	<i>West Allis-West Milwaukee School District Kurt Wachholz</i>
<i>Hartland-Lakeside School District Glenn Schilling</i>	<i>Northern Ozaukee School District William Harbron</i>	<i>School District of Whitefish Bay Mary Gavigan</i>
<i>Kenosha Unified School District Michele Hancock</i>	<i>Oak Creek-Franklin Joint School District Sara Burmeister</i>	<i>Whitnall School District Lowell Holtz</i>



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

JUN 16 2011

Dr. Bill East, Executive Director
National Association of State Directors of
Special Education, Inc.
1800 Diagonal Road, Suite 320
Alexandria, Virginia 22314

Dear Dr. East:

I am writing in response to your letter to me dated February 17, 2011, requesting a written response to your question about the local educational agency (LEA) maintenance of effort (MOE) requirement in 34 CFR §300.203(b).

In your letter, you ask about the following scenario:

An LEA fails to meet their maintenance of effort. As a result, the LEA pays the State educational agency (SEA) an amount equal to the shortage. The SEA then returns the money to the U.S. Department of Education.

Question: In determining the base amount that the LEA must spend the following year, do they maintain the base amount from the previous year, or reset the base amount to reflect the lower amount actually spent the previous year?

Under section 613(a)(2)(A)(iii) of the Individuals with Disabilities Education Act (IDEA) and 34 CFR §300.203(a), except as provided in 34 CFR §§300.204 and 300.205, funds provided to an LEA under Part B of the IDEA must not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA below the level of those expenditures for the preceding fiscal year. While the IDEA does not contain a specific provision that addresses the circumstance you raise with respect to LEAs¹, the Department must rely on the plain language of the statute and regulation with regard to the level of expenditures, which provide that an LEA may not reduce its level of expenditures for the education of children with disabilities "below the level of those expenditures for the preceding fiscal year." See section 613(a)(2)(A)(iii) and 34 CFR §300.203(a). Under this language, the LEA, in the fiscal year immediately following the fiscal year in which it failed to maintain effort, is obligated to expend no less than the amount it expended *in the prior fiscal year* for the education of children with disabilities from either local funds only, or from State and local funds. It is not obligated to expend at least the amount it expended in the last fiscal year for which it met the maintenance of

¹ With respect to State-level maintenance of financial support, the IDEA specifically addresses what level of support the State must maintain in a year following a year in which the State fails to maintain its required level of support. Section 612(a)(18)(D) provides that the State's level of support remains the level "that would have been required in the absence of" the failure to maintain support.

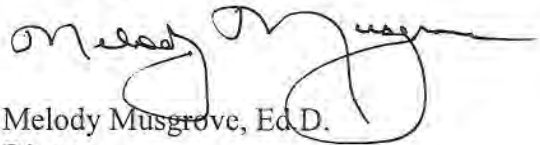
effort requirement. In other words, each year's LEA maintenance of effort obligation is based on the actual amount expended *in the immediate prior* fiscal year.

As your question assumes, in the event that an LEA fails to maintain its required level of effort, the SEA must pay the Department, from non-Federal funds or 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 expend. The SEA may then seek to recoup from the LEA, from non-Federal funds or funds for which accountability to the Federal Government is not required, the amount by which the LEA did not maintain effort. Whether the SEA seeks recovery of those funds from the LEA is a matter of State discretion.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact my office.

Sincerely,

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

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

CENTER FOR LAW AND EDUCATION

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reply to:

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202-986-3000

August 17, 2011

Melody Musgrove, Director
Ruth Ryder, Deputy Director
Office of Special Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-7100

Re: Informal Guidance - interpretation of section 613

Dear Dr. Musgrove and Ms. Ryder:

The Center for Law and Education (CLE) requests that the Office of Special Education Program (OSEP) reconsider and rescind its “informal guidance” concerning the local maintenance of effort (MOE) requirement under § 613 of the Individuals with Disabilities Education Improvement Act (IDEA) issued June 16, 2011, in response to a letter of inquiry from Dr. Bill East, Executive Director of the National Association of State Directors of Special Education. CLE believes that OSEP’s interpretation of §613, as applied to the factual scenario presented in the letter of inquiry, is inconsistent with the legislative history of P.L. 94-142 and the local MOE statutory provision, and is contrary to basic tenets of statutory construction and contract law. Given the current economic burden on school districts, OSEP’s flawed interpretation is especially inopportune; it can be anticipated that LEAs will transgress the statutory prohibition against reducing their local MOE outside of the expressly authorized exceptions (§613(a)(2)(A)(iii)) as a means of lowering their MOE in subsequent fiscal years resulting in further harm to the education of the nation’s 5.9 million children with disabilities in need of special education.

As enacted, §613(a)(2) of IDEA expressly provides that LEAs must use Part B funds only to pay for the excess or additional cost of providing specialized instruction and related services to children with disabilities, and that these funds must be used to supplement other Federal, State, and local funding for special education and shall not supplant such funds. In general, funds received under Part B must not be used by LEAs to reduce the level of local expenditures made by the LEA for special education and related services from one year to the following year (i.e., a 100% MOE). A financial principle found in multiple Federal education statutes, MOE, as applied in the context of IDEA, penalizes local recipients of Part B funds if they reduce their non-Federal spending on special education. In adopting this provision of IDEA, however, Congress expressly recognized specific, limited circumstances in which LEAs may legitimately reduce local spending and not be penalized under the local MOE requirement.

In subparagraphs (B) and (C) of §613(a)(2), Congress expressly authorized **two types of exceptions** that exempt LEAs from the local MOE, thereby enabling LEAs to reduce the level of local expenditure for special education from the preceding fiscal year. LEAs that fall within the type of exception authorized by either subparagraph may legitimately reduce local spending and not be penalized under the local MOE requirement.

- Under **subparagraph (B)**, an LEA is able to reduce the level of local expenditures in specific situations that result in legitimate, reduced expenditures at the local level, for example, when senior (more highly paid) special education personnel retire and are replaced with more junior (and lower paid) yet qualified personnel, or when a child with a disability whose educational needs required provision of very costly special education programming moves out of the district, or such student is no longer of eligible school-age for special education, or the termination of costly expenditures for long-term purchases.
- Under **subparagraph (C)**, an LEA is authorized to use up to 50% of any increase in its Part B grant to “reduce the level of expenditure” for special education [§613(a)(2)(C)(I)] provided that LEAs exercising this option use an amount equal to the savings to carry out activities authorized by the ESEA or for early intervening services if the SEA had made a finding against the LEA. In the most recent reauthorization of IDEA, through P.L. 108-446, Congress amended this second type of exception which previously authorized an LEA to “treat as local funds” up to 20% of any annual increase in its IDEA grant (after attaining a set dollar amount that had been reached in 1999).

Neither of these two different types of expressed statutory exceptions to local MOE are at issue in OSEP’s informal guidance on §613. Their relevance is only that Congress, consistent with the legislative history of IDEA, adopted the financial principle of MOE and then established two types of exemptions for LEAs to reduce legitimately their local MOE. These limited and different types of exceptions to local MOE were enacted and subsequently reauthorized, most recently in 2004, as part of the continuing amendments to IDEA.

In its reply letter of June 16, 2011, characterized as ‘informal guidance,’ OSEP responded in essence to the following question:

When an LEA (i) was *not* authorized to reduce its local MOE because it had not met either of the two types of exceptions statutorily authorized by §613(a)(2)(A)(iii) and described in subparagraphs (B) and (C), and nonetheless, (ii) violated the local MOE requirement by failing to spend the same amount of local special education funds – e.g., in FY 11 as it expended the preceding year (FY 10) – must that LEA, in order to meet its local MOE the subsequent fiscal year (FY 12), make local expenditures for special education based on its local MOE for FY 10, or based on the *reduced* amount it actually expended in FY 11 –i.e., the year when the LEA failed to meet its local MOE in violation of its obligation under IDEA?

OSEP concludes *without analysis* that in FY 12 such an LEA must *only meet the reduced level* of FY 11, the year when it did ***not meet its local MOE in violation of IDEA***. OSEP reaches this conclusion by first suggesting that the statutory provision [§613(a)(2)(iii), (B), (C)] does not address the particular question raised by Dr. East’s inquiry then, rather incongruously, purports to rely upon the plain language of the statute for its justification. **We disagree; neither premise is correct and OSEP’s conclusion lacks a rational basis.**

The language of the applicable statutory provision cannot be more clear. Section 613 of IDEA states that as a **condition of qualifying for Federal funds**, an LEA providing for the education of children with disabilities within its jurisdiction, must meet the fiscal requirements including principles of supplement not supplant and maintenance of effort (MOE) which, in general, require that local spending on special education not be reduced from one year to the next (i.e., a 100% MOE). §613(a)(2)(A)(iii). A brief review of the legislative history of P.L. 94-142 indicates that one key reason for the law being enacted as a civil rights law under the Fourteenth Amendment and a grant-in-aid statute under the Spending Clause was

the inability of States and local school districts to provide sufficient financial resources to meet their constitutional duty to educate children with disabilities. S. Rep. No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S.C.C. A.N. 1425, 1431; 121 Cong. Rec. 23702 (1975)(remarks of Rep. Madden). The Senate observed that passage of P.L. 94-142 would “greatly change the Federal role in the education of ...children [with disabilities]...” 121 Cong. Rec. 19498 (remarks of Sen. Dole); that “a strong supportive Federal role was necessary if States were to meet their responsibility to ...children [with disabilities].” 121 Cong. Rec. 19482 (remarks of Sen. Randolph). From the House debate also emerged what would become the prevailing view that Federal funds were to be used for the excess costs of educating students with disabilities and “in no way would Federal funds be used to supplant State and local funds unless every ...child [with a disability] in the State is receiving a free appropriate public education.” 121 Cong. Rec. 23704 (1975)(statement of Rep. Brademas). There were also repeated references to the importance of States and localities continuing to share the fiscal burden by upholding their traditional responsibility for educating children with disabilities. See, e.g., 121 Cong. Rec. 23705, 25535 (1975).

Despite Congress having spoken as evidenced by (1) its adoption of the financial principle of MOE, (2) its having expressly established two different types of exemptions for LEAs to reduce legitimately their local MOE, and (3) the reauthorization of the Act in its entirety with subparagraph (C) of §613(a)(2) amended most recently in 2004, OSEP has chosen to ignore the statute – indeed, the plain language of §613(a)(2)(A)(iii). OSEP’s suggestion that its interpretation is based on the plain language of the statute is wrong on its face, and even if it were given any credence, is without merit based on rules of statutory interpretation because such a reading suggests an absurd result – one that undermines the statutory provision establishing two types of expressly recognized exceptions and **results in the “unjust enrichment” of an LEA that violates the local MOE requirement.**

OSEP’s interpretation flips the analysis on its head when it states that §613(a)(2) does not address the circumstance raised by the letter of inquiry from Dr. East, suggesting that the factual scenario raised in the letter of inquiry is somehow outside the bounds of review for determining local MOE. To the contrary, the statutory provision, supported by the legislative history of P.L. 94-142, establishes Congress’s position that **as a condition of eligibility to receive Federal funds under Part B**, LEAs cannot use Part B funds to supplement or supplant non-Federal funds and must ensure that their local MOE from the preceding fiscal year is *not* reduced unless the LEA meets one of the two types of exceptions set forth in subparagraphs (B) and (C). **Because the LEA described in the letter of inquiry from Dr. East did not come within either of the two statutorily authorized exemptions to MOE, that LEA was not eligible to reduce its local MOE.**

The language of §613(a)(2)(A)(iii) is clear. No Part B funds provided to an LEA “(iii) shall be used, except as provided in subparagraphs (B) and (C) to reduce the level of expenditures for the education of children with disabilities made by the local educational agency from local funds below the level of those expenditures for the preceding fiscal year.” Here the rule of *expressius unius* undoubtedly applies –the expression of one thing [here the two types of exceptions to local MOE set forth in subparagraphs (B) and (C)] suggests the exclusion of others. There is no other possible reading of the language of this statutory provision. Only an LEA that can demonstrate its reduction of local expenditures is attributed to one of the list of examples in subparagraph (B) or to an increase in its allocation under §611 as described in subparagraph (C) of §613(a)(2), can lawfully reduce its MOE “below the level of those expenditures for the preceding fiscal year.” Based on this explicit language, the local MOE for such an LEA that has *lawfully* reduced its local MOE would then be reset as the basis for the next fiscal year.

OSEP only needed to review the statutory language of §613(a)(2)(A)(iii) to respond to the letter of inquiry submitted by Dr. East. There is no tricky or difficult question here. The LEA at issue failed to meet its local MOE in violation of IDEA; it was not authorized to reduce its local MOE level of non-Federal expenditures that were not attributable to one of the two types of statutory exceptions authorized by §613(a)(2)(A)(iii) and described in subparagraphs (B) and (C). The answer to the question raised in Dr. East's letter of inquiry – whether the level of local non-Federal expenditures that the offending LEA must meet the following year (FY 12) ought to be determined based on the amount from the previous year (FY 10), or reset to reflect the lower amount actually spent the previous year (FY 11) [i.e., when the offending LEA violated IDEA's mandate] – could not be more simple. **The LEA, having violated its mandated condition of eligibility for receipt of Part B funds by unlawfully reducing its MOE, should be in jeopardy of losing its eligibility, and not being unjustly enriched through its violation.** Whether or not enforcement action is taken against the LEA, as long as the LEA unlawfully reduced its local MOE – i.e., it reduced its level of MOE without coming within the exceptions authorized by subparagraphs (B) or (C) - principles of law and equity dictate that the LEA be required to meet the level of local MOE established from the year previous to its unlawful act.

We respectfully urge OSEP to rescind its June 16, 2011 informal guidance concerning local MOE. The implications of this flawed interpretation will be detrimental not only to students with disabilities receiving high quality education but to LEAs that will be rightfully challenged through costly litigation.

Yours truly,



Kathleen B. Boundy
Co-Director