Education Law Center
Standing Up for Public School Children

David G. Sciarra, Esq.
Executive Director

Student Rights Project

Elizabeth Athos, Esq.
Senior Attorney

Ruth Deale Lowenkron, Esq.
Senior Attorney

Lauren S. Michaels, Esq.
Greenberg Traurig
Equal Justice Works Fellow

Jenna L. Statfeld, Esq.
Skadden Fellow

Aimee Roche
Intake Coordinator

September 15, 2011

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

Re: USDOE's June 16, 2011 interpretation of IDEA's Maintenance of Effort provisions

Dear Dr. Musgrove:

As you may know, the Education Law Center (ELC), established in 1973, is a not-for-profit law firm which advocates on behalf of low-income students who are denied access to an appropriate education in New Jersey. ELC concentrates its advocacy on issues related to equitable funding in education and the educational rights of children with disabilities.

ELC urges the United States Department of Education, Office of Special Education Programs (USDOE) to rescind its June 16, 2011 "informal guidance" regarding the Maintenance of Effort (MOE) provisions of the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et seq*. (IDEA). The

guidance is wrong on its face and will be wholly detrimental to the nearly 6 million children with disabilities in our country – our most vulnerable citizens.

Section 613 of IDEA, as well as its implementing regulation, 34 C.F.R. § 300.203, clearly authorize a local educational agency (LEA) to reduce the level of expenditures below the level of those expenditures from the preceding fiscal year only where it meets one of two stated exceptions. Thus, the "plain language of the statute and regulation" requires the precise opposite response to the June 16 2011 inquiry by the National Association of State Directors of Special Education, Inc. (NASDSE) regarding MOE. Neither of IDEA's exceptions applied to the LEA in NASDSE's hypothetical, and therefore the LEA was prohibited from reducing its level of expenditures. If an LEA is allowed to "reset the base amount to reflect the lower amount actually spent the previous year," after reducing its level of expenditures in violation of the statute, then not only would the LEA be unjustly enriched, but there would be no need for the exceptions to the MOE provisions. Such an interpretation would violate the basic precept of statutory construction – *expressio unius est exclusio alterius.* In other words, if a statute specifies one exception to a general rule, other exceptions are clearly excluded. It is thus only the LEAs to which the specific MOE exceptions apply which are permitted to reduce their expenditure level and then rely on that lower, reset level the following year. By reading the MOE provision to treat all LEAs the same – whether reducing expenditures lawfully or not – USDOE's informal guidance is in clear violation of the statute and regulation.

In addition to being wrong on its face, the informal guidance is an improper usurpation by the Executive Branch of the role of the Legislative Branch, as it is only Congress which is authorized to modify the MOE provision it long ago established. Moreover, even if the "informal guidance" were merely considered an interpretation of statute which USDOE was authorized to offer, it violates administrative law precepts which mandate that such rulemaking conform with notice and comment provisions. USDOE's guidance also conflicts with the legislative history of the MOE provision which makes numerous references to State Educational Agencies and LEAs upholding their financial obligation to educate students with disabilities. *See, e.g.,* 121 Cong. Rec. 23705, 25535 (1975).

Especially in this time of severe cutbacks, we cannot afford an unauthorized exception to the MOE provisions, and ELC respectfully requests that USDOE

rescind its June 16, 2011 informal guidance.

Sincerely yours,

Ruth Lowenkron

60 PARK PLACE • SUITE 300 • NEWARK, NEW JERSEY • 07102
PHONE: 973.624.1815 • FAX: 973.624.7339 • TTY: 973.624.4618 • WWW.EDLAWCENTER.ORG