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Special Education

Administrative Advisory SPED 2016-2: Requirements related to Maintenance of Effort

To: Superintendents, Special Education Administrators, Directors of Charter Schools, Business Directors, and Other Interested Parties

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This advisory replaces and supersedes Administrative Advisory SPED 2008-1 (now withdrawn). Administrative Advisory SPED 2015-1 informs school districts and charter schools (both referred to as districts in this advisory) about the **new** requirements in the Individuals with Disabilities Education Act (IDEA) regulations¹ related to maintaining annual fiscal effort in the expenditure of state and local funds for special education services to eligible students. These requirements are known as "maintenance of effort" ("MOE"). New requirements and subsequently new procedures at the Department of Elementary and Secondary Education (ESE) will be in place for the school year 2015-2016. MOE requires that each year school districts expend combined local and state funds or just local funds for special education services at least at the same level (computed on either a per capita basis or an aggregate basis) that the district spent during the previous year, unless the district has an allowable reason for reducing its expenditures. The purpose of the MOE requirement is to ensure that federal special education funds are used to supplement and not supplant local or state funds.²

This advisory addresses the following five topics:

- The general requirements related to MOE and district documentation of compliance, including the four methods that can be used to demonstrate compliance and expected changes to Massachusetts practice.
- How increases in federal special education entitlement funding can be used to comply with MOE spending requirements.
- The impact on MOE of using federal special education funds for instructional support services.
- The impact on MOE of an ESE finding against a district of "significant disproportionality."
- The impact on MOE of ESE findings against a district of noncompliance.

A. The general requirements of MOE and district documentation of compliance and expected changes to Massachusetts practice

To be eligible for federal financial assistance for special education, each year a school district is required to spend at least the same total or per capita³ amount either in **local funds** or through a **combination of state and local funds**⁴ as the school district spent for special education purposes in the prior year⁵, unless an allowable exception allows spending to be reduced in the second year⁶ or the district is able to reduce its expenditures because of increased federal funds as described in Section B of this advisory. The regulations specify four alternative methods that a district may use to demonstrate MOE for special education⁷:

- Spending the same total amount from one year to the next using local funds only.
- Spending the same total amount from one year to the next using the combination of state and local funds.
- Spending the same per capita amount using local funds.
- Spending the same per capita amount using the combination of state and local funds.

DESE audits the spending of combined state and local funds through the End of the Year Financial Report (EOY)⁸. DESE uses information from Schedule 1 of the EOY, including tuition for out-of-district placements to identify spending from combined state and local sources (methods 2 & 4 above). However, the EOY report does not separate state and local fund sources. Districts are strongly encouraged to maintain records related to use of **local funds**⁹ in order to be able to use the full flexibility of the law when needed (e.g. establishing MOU for methods 1 and 3 above).¹⁰ This advisory primarily discusses MOE in the context of the combination of state and local funds, either in the aggregate or per/capita because that is the information available to DESE in the EOY reports.

School districts should be aware that ultimately, school district compliance with the MOE requirement is predicated on actual spending of state and local funds. Therefore, the MOE obligation is not static from year to year, but may increase if state and local expenditures for special education are increasing, it may decrease if certain high cost expenditures are no longer necessary, and may vary up or down if a per capita method is chosen and student numbers increase or decrease.

DESE audits compliance of the MOE requirement in two ways. First, new regulations require that districts meet an "eligibility standard" before a district can receive federal special education entitlement funds.¹¹ ESE is required to review district budgets for the upcoming fiscal year to ensure that the district plans to spend at least the same total or per capita amount from a **combination of state and local funds** as the school district spent for special education services from the same sources for the most recent fiscal year for which information is available. ESE plans to use Schedule 19 of the EOY for this purpose.

Secondly, ESE is required to audit the district's compliance with MOE, the "compliance standard," by comparing a school district's two most recent EOY reports to determine if the district has spent at least the same total or per capita amount from a **combination of state and local funds** as the school district spent for special education purposes in the prior year¹². When the reports show that a district did not spend at least the same amount of state and local funds in the second year (total or per capita), ESE will notify the district of the discrepancy and require the district to produce documentation either:

- Correcting the financial records used by DESE (if they were in error), or
- Showing that it **did** meet MOE, **using local funds only, either in total or per capita, or**
- Demonstrating that the reduction in spending was justified because of an exception to the MOE requirement, or
- Completing a corrective action plan that could include returning funds.

A new element in the district's demonstration (documentation) of compliance with the MOE requirement using one of the four methods is the requirement that the district use expenditure information from **the most recent fiscal year in which the district met MOE using the same method**. So, for example, if the district wishes to demonstrate that it met MOE using only local funds, (in total, in 2016-17, it may have to go back several years to find the last time that it met MOE using local funds, in total, in order to have an appropriate comparison year.

Therefore, districts must maintain records showing its spending and whether it makes MOE in each of the four methods every year in order to use the full flexibility of the law.¹³ Districts must be sure to document all applicable exceptions that allow the district to reduce its state and local spending in certain circumstances. ESE may request such records at any time (see Section E of this advisory). In addition to the exceptions found in the new regulations, under specific circumstances, districts are permitted to use a percentage of the increase in the federal special education entitlement grant in calculating the required MOE. This is discussed below in Section B of this advisory.

B. How to use increases in federal special education funds to meet the MOE requirement

IDEA-2004 allows districts to treat 50% of the increases in federal special education entitlement funds "Fund Code 240 grant"¹⁴ they receive from one year to the next as if these federal funds are state and local funds for the purpose of meeting the MOE requirement.¹⁵ Therefore, districts can reduce the amount of state and local funds they must use to support special education services, while still providing the full range of needed services and fulfilling their obligations for MOE.

For any fiscal year in which the district's Fund Code 240 grant exceeds the amount of the district's grant in the previous year, the district may reduce its state and local funds for special education by up to 50% of the amount of that excess (the "offset").¹⁶ Beginning with school year 2015-2016, **if the offset amount is not used in the year it is available, it will not accumulate nor be available to be used in any subsequent year.**

The district may use the offset and still meet its MOE obligation under federal law while spending less in state and local funds or local funds only. This offset is allowed because Congress originally intended that a greater percentage overall of the costs of special education would be covered by federal funds, and it determined to give states and localities recognition for the fiscal effort that has been made in the absence of federal funds at the originally planned level.

Each district should maintain expenditure records from year to year consistent with the examples provided in the Federal Register¹⁷ order to determine whether it may reduce state and local spending in the succeeding fiscal year by using the accumulated offset. These records should be maintained for auditing purposes.

C. Using federal special education funds for instructional support services

Under federal special education law, a school district may use up to 15% of its Fund Code 240 grant to pay for instructional support activities in the general education program, i.e., for all students.¹⁸ Each year, if the district uses federal special education funds for instructional support, then the amount of offset to the MOE described in Section B of this advisory must be reduced accordingly for that year.¹⁹

Each district should maintain complete and accurate records of its spending practices and budgets for future years in order to determine whether this special rule applies. Also, ESE will maintain a record of a school district's use of instructional support funds as documented on the "Notice of Intent to Use Federal Special Education Entitlement Funds" form.²⁰

D. The impact of a finding against the district of "significant disproportionality"

IDEA-2004 requires ESE to determine whether there is "significant disproportionality" based on race and ethnicity within the state or school districts with respect to finding students eligible for special education, identifying students in specific disability categories, making overly restrictive special education placements, or suspending or expelling students with disabilities.²¹ If DESE makes a finding of significant disproportionality against a district, the district is *required* to reserve 15% of its federal Fund Code 240 grant to provide instructional support activities to students in the groups that were significantly over-identified, as well as to other students in the district.²² This requirement will result in a similarly revised offset calculation as described in Section C of this advisory.

ESE will review school district data annually to determine whether there is significant racial or ethnic disproportionality. If ESE finds significant disproportionality based on the data, the district will receive a written notice from ESE of the requirement to reserve the full 15% of the federal special education grant for instructional support activities.²³ Upon receipt of the notice, the district must complete the application for Coordinated Instructional Support Services within the 240 grant application. Such districts must make offsets in their local records and in their MOE calculation based on an increase in their federal entitlement grant as described in Section C of this advisory, above.

E. The impact of findings of noncompliance

As part of its' annual accountability program ESE reviews compliance findings made through monitoring or conducting general oversight and may identify a school district as having pervasive noncompliance with federal special education requirements that requires intervention or substantial intervention to correct the non-compliance.²⁴ When such a determination is made, in accordance with IDEA-2004 requirements, the district may not reduce its MOE (i.e., the district may *not* reduce spending from state or local funds for any of the reasons described above) in that fiscal year or in any subsequent years in which the district continues to be out of compliance and in need of substantial intervention by ESE.²⁵

Also, ESE will audit school districts' special education spending to ensure that districts meet the MOE requirement in providing services for students with disabilities each year. Any findings of noncompliance with MOE may result in action by DESE to recover or withhold federal special education funds, as appropriate.

The ESE acknowledges the financial reports that school districts currently submit and strongly encourage school districts to also maintain comprehensive local records of their expenditures and allowable reductions to determine required federal MOE. It is our hope that these records will enable districts to take advantage of the flexibility in the MOE calculation described in Section B of this advisory and will have a positive impact on the use of state and local resources for the provision of special education services.

Thank you for your attention to this advisory and for all the work you do on behalf of students with disabilities.

¹ At 34 CFR 300.203 through 300.208 and Appendix E, in effect 7/1/2015.

² 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). Federal guidance about the changes in the MOE regulations is available at: <http://www.gpo.gov/fdsys/pkg/FR-2015-04-28/pdf/2015-09755.pdf> and <https://osep.grads360.org/#communities/pdc/documents/8628>

³ "Per capita" means the total amount a district spends in local funds or in state and local funds divided by the number of r students with IEPs served by the district.

⁴ This provision is found at 34 CFR § 300.203(b).

⁵ "Prior year" refers to the most recent year in which the district met MOE obligations using the same method.

⁶ Under 34 CFR § 300.204, A district may reduce its level of state and local spending below that of the previous fiscal year if one of the following exceptions applies: (a) the voluntary departure or departure for just cause, of special education or related services personnel; (b) a decrease in the enrollment of children with disabilities in the district; (c) the end of the district's obligation to serve a student in a costly program because the student has moved from the district, or is no longer eligible for special education services; and/or (d) the end of the district's obligation to make "costly expenditures for long-term purchases" such as equipment or facilities;

⁷See 34 CFR §300.203 (a) eligibility standards; 34 CFR 300.203 (b) compliance standard.

⁸Includes the charter school equivalent form commonly called the CSEYOYFR.

⁹Defined as funds coming to the district through the municipality; thus c. 70 funds are considered "local" Funds.

¹⁰A new Appendix E supplementing 34 CFR 300 on the Level of Effort Required to Meet MOE Compliance Standard gives several examples of methods of computing and maintaining financial records related to MOE and is available at: <http://www.gpo.gov/fdsys/pkg/FR-2015-04-28/pdf/2015-09755.pdf>. The OSEP Non-Regulatory guidance also includes tables that explicate the alternative methods for calculating the amount of spending needed to comply with the MOE requirement.

¹¹ 34 CFR §300.203(a) , <http://www.gpo.gov/fdsys/pkg/FR-2015-04-28/pdf/2015-09755.pdf>

¹²34 CFR 300.203(b), <http://www.gpo.gov/fdsys/pkg/FR-2015-04-28/pdf/2015-09755.pdf>

¹³See footnote #10.

¹⁴ The fund code 262 grant (for 3-5 year olds) increases could also potentially be used in this manner. However, there have been no increases in this grant to Massachusetts for well over 10 years now. Minor changes to the 262 grant would have minimal effect and are, therefore, not discussed in this advisory.

¹⁵34 CFR § 300.205

¹⁶34 CFR § 300.205(a). Please note that if the federal funds received by the district do not increase, then the district may not reduce its state and local spending in that year. (is it necessary to state that if a district doesn't receive an increase it cannot offset MOE by the absent increase?)

¹⁷See: <http://www.gpo.gov/fdsys/pkg/FR-2015-04-28/pdf/2015-09755.pdf>

¹⁸In federal special education regulations, these instructional support activities are called "early intervening" activities. In practice they may also be referred to as "pre-referral," "Response to Intervention," or "tiered instruction and intervention programs." Such programs serve students not yet identified as eligible for special education but in need of instructional interventions to prevent inappropriate referrals to special education. Up to 15% of the federal grant can be used for such programs. 34 CFR § 300.226.

¹⁹34 CFR § 300.205(d).

²⁰The Notice of Intent to Provide Coordinated Instructional Support Services is a part of the grant application for Fund Code 240 (section C). The application for FY2016 is at: <http://www.doe.mass.edu/grants/2016/240/>

²¹34 CFR § 300.646.

²²34 CFR § 300.646(b)(2).

²³Where such findings are made, individual letters with detail on the finding and required activity will be sent to the district superintendent or director.

²⁴Please see a description of this type of determination at: <http://www.doe.mass.edu/apa/accountability/?section=2014> in the document titled: 2014 Determination of Need for Special Education Technical Assistance or Intervention

²⁵34 CFR § 200.205(c).

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