CENTER FOR LAW AND EDUCATION

www.cleweb.org

reply to:
99 Chauncy Street
Suite 402
Boston, MA 02111
617-451-0855
kboundy@cleweb.org

1875 Connecticut Ave., NW
Suite 510
Washington, D.C. 20009
202-986-3000

August 11, 2009

Andrew Pepin, Acting Assistant Secretary
Office of Special Education and Rehabilitative Services
Patty Guard, Acting Director
Office of Special Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-7100

Dear Mr. Pepin and Ms. Guard:

The Center for Law and Education (CLE) would like to take this opportunity to address an issue of serious concern to families of children with disabilities, in particular those students who are economically disadvantaged and members of racial minorities and English language learners who attend underperforming Title I schools and school-wide programs. As you know the evidence, based on performance indicators, shows that these especially vulnerable students with disabilities remain behind their peers without disabilities at a time when we would expect the gaps in access to highly effective teachers, achievement and graduation with a regular diploma to be closing. Despite widespread evidence of such deficiencies based on performance indicators, the Department of Education has issued by regulation and both informal and formal guidance a position that is contrary to the language of the Individuals with Disabilities Education Act (IDEA). Instead of requiring States to ensure that local education agencies target the new infusion of IDEA funds from the American Recovery and Reinvestment Act to provide for its intended beneficiaries – i.e., students with disabilities who are not meeting their state established performance indicator – including, for example, through ensuring effective interventions from highly qualified teachers who receive appropriate professional development opportunities and sufficient in and out of class supports to meet their students learning needs so they too may attain the standards set for all, the Department's interpretation ostensibly invites SEAs and LEA to circumvent the law and to reduce local maintenance of effort which can have a lasting impact.

CLE takes exception to the U.S. Department of Education's position that effectively negates the separate, affirmative obligation of SEAs under §616(f). The language of this provision is clear - if an SEA determines that an LEA is not meeting the requirements under the IDEA, including the targets in the State's performance plan, then the State must prohibit the LEA from reducing its maintenance of effort.

In the attached memorandum CLE sets forth two separate legal arguments that challenge ED's interpretation as invalid. First, ED's interpretation of how SEAs must make their determinations of whether LEAs are meeting their requirements under §616(a) appears to undermine unlawfully the standard that Congress has expressly established for such determinations in §616(f). In promulgating regulations and providing non-regulatory guidance that advise SEAs that they *must* consider compliance indicators, while they only *may* consider performance indicators in making their determinations about whether LEAs are meeting the requirements of the IDEA, ED has contravened the plain language of §616(f), which expressly requires SEAs to determine whether or not LEAs are meeting the requirements, "including the targets in the State's performance plan." As discussed in the memorandum, ED's interpretation is therefore invalid. In the alternative, CLE argues that ED's construction of §616(f) is flawed because ED does not have the statutory authority to require SEAs to apply the same categorization and enforcement framework as the Secretary (ED).

Thank you for your anticipated consideration of our concerns specifically related to ED's interpretation – in our view a serious misinterpretation with serious and far reaching consequences - of the local maintenance of effort requirement under IDEA. The implications of this decision are significant – for the Appropriations Committees making determinations based on an incorrect assumption that the students with disabilities in need of effective specialized instruction are in fact the beneficiaries of the infusion of IDEA funds through the ARRA – and most notably, for special and regular educators and the students with disabilities they serve throughout the nation who will be deprived of this singular opportunity for improving the quality and effectiveness of teaching, instruction, curriculum, and supportive services – whatever is necessary to enable these students who remain far below their peers without disabilities to have a meaningful opportunity to meet the same performance standards set for all students.

Yours truly,

Kathleen B. Boundy
Co-Director

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MEMORANDUM

Legal Bases for Challenging Local Maintenance of Effort Reduction under the Individuals with Disabilities Education Act (IDEA), as amended [7-23-09]

Background

One significant outcome of the American Recovery and Reinvestment Act is that local educational agencies (LEAs) will be receiving in a single year a huge increase – in fact about twice as much funding as in the prior fiscal year - for the excess costs of educating students with disabilities who receive special education and related services under the Individuals with Disabilities Education Act (IDEA). One might anticipate that this news would be a source of euphoria for parents of children with disabilities and their educators given the basic facts about special education: the vast majority of students with disabilities participate in regular education classrooms, yet only 7% of 8th grade students with disabilities score at or above proficient on the NAEP; just over half of this population group graduate with a regular education diploma while one in four drop out of school; only one in ten special educators is highly qualified to teach students in core academic subjects; in FY 2008 the U.S. Department of Education found only 12 states to have "met requirements …" of the IDEA. Despite evidence of significant unmet need, this windfall may ironically not reach its intended beneficiaries, i.e., under-performing students with disabilities. This is because SEAs and LEAs are following an interpretation of the IDEA by ED that allows for this outcome which is not supported by the plain language of the statute and principles of statutory construction.

The law contains a provision that for obvious reasons is rarely used. Section 613(a)(2)(C) states that if, for any fiscal year, the allocation that an LEA receives under IDEA exceeds the amount that the LEA received for the previous fiscal year, the LEA may reduce its

maintenance of effort expenditures by up to fifty percent (50%) of that excess. The adverse impact of this action may well be heightened because once an LEA reduces its maintenance of effort under §613(a)(2)(C), the LEA is not required to raise its level of local funding for special education unless it chooses to do so. In its wisdom Congress included in IDEA an explicit condition precedent for any LEA to reduce its local maintenance of effort by up to 50%. The Act states at §616(f) that if a SEA determines that an LEA is not meeting the requirements under the IDEA, including the targets in the State's performance plan, then the State must prohibit the LEA from reducing its maintenance of effort. Indicators of measurable targets that are developed with broad stakeholder involvement are intended to be used by ED to identify states and by states to identify LEAs in need of enhanced monitoring, technical assistance and enforcement. Every 6 years the States must file a State Performance Plan (SPP) that includes rigorous quantifiable measures and targets of quality and effectiveness of the education received by students with disabilities. Each State also must submit an Annual Performance Report (APR) to ED to report in the aggregate progress or slippage by LEAs in meeting the measurable and rigorous state established targets in its respective SPP. Despite the explicit statutory exception at §616(f) of title 20 barring LEAs from using the reduced maintenance of effort provision if they have not met the requirements of the Act, including the performance indicators[1], ED has relatively recently promulgated regulations 34 C.F.R. §300.600(a)(2) and issued commentary and informal and non-regulatory guidance interpreting the regulations to grant SEAs discretion not to consider performance indicators when determining whether LEAs are meeting their requirements.

In light of the language of §613(a)(2)(C) - authorizing an LEA for any fiscal year in which it receives an allocation under IDEA that exceeds the amount it received for the previous fiscal year to reduce its maintenance of effort expenditures by up to fifty percent of that excess - and the explicit exception to reducing maintenance of effort set forth at § 616(f) when the SEA determines that an LEA is not meeting its requirements under the IDEA, including the targets in the State's performance plan, this paper asks: has the U.S. Department of Education exceeded its authority by promulgating a regulation and issuing guidance which grant SEAs the discretion to

[1] Performance indicators include graduation rates, drop-out rates, improved academic achievement measured based on regular and alternative assessments aligned to standards.

not consider performance indicators when determining whether local educational agencies are meeting their requirements?

It will set forth two legal arguments that challenge ED's interpretation as invalid. First, ED's interpretation of how SEAs must make their determinations of whether LEAs are meeting their requirements under §616(a), appears to undermine unlawfully the standard that Congress has expressly established for such determinations in §616(f). According to Chevron analysis, an agency's interpretation is unlawful if it contravenes the plain language of the statute. In promulgating regulations and providing non-regulatory guidance that advise SEAs that they *must* consider compliance indicators, while they only *may* consider performance indicators in making their determinations about whether LEAs are meeting the requirements of the IDEA, ED has contravened the plain language of §616(f) of the Act, which expressly requires SEAs to determine whether LEAs are meeting the requirements, "*including the targets in the State's performance plan.*" (Emphasis added). The discussion below will demonstrate that ED's interpretation is therefore invalid. In the alternative, we argue that ED's construction of § 1416(f) is flawed because ED does not have the statutory authority to require SEAs to apply the same categorization and enforcement framework as the Secretary (ED).

RELEVANT FACTS AND HISTORY

I. Statutory Language of Section 616 [20 U.S.C. § 1416]

When the Individuals with Disabilities Education Act (IDEA) was reauthorized in 2004, Congress made several amendments to the Act, including the addition of a detailed plan for "Monitoring, technical assistance, and enforcement" in §616. Under subsection (a)(1) the U.S. Department of Education (hereafter ED) must monitor implementation of the key provisions of Part B [§§611-618] of IDEA through oversight of each SEA's exercise of general supervision, as required in §612(a)(11), and through the State performance plans (SPP) described in §616(b); and ED must enforce these provisions under subsection (e) of §616. As stated by §616(a)(2), the primary focus of Federal and State monitoring activities is on improving educational results and

functional outcomes for all children with disabilities, and ensuring that States meet the program requirements, particularly those most closely related to improving educational results for children with disabilities. Toward this end, new subsection (a)(1)(C) of §616 expressly imposes a mandate on ED to "require States to – (i) monitor implementation of this subchapter [§611-§618] by local educational agencies; and (ii) enforce this subchapter in accordance with *paragraph (3) and subsection (e)* of this section." (Emphasis added). "[P]aragraph 3" states as follows:

> The Secretary shall monitor the States, and shall require each State to monitor the local educational agencies located in the State . . . using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in the following performance areas:
> (A) Provision of free appropriate public education in the least restrictive environment.
> (B) State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services…
> (C) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification 20 U.S.C §1416(a)(3).

"Subsection (e) provides" a range of enforcement actions that the *Secretary* can take if he determines that a State continues to "need[] assistance," "need[] intervention," or "need[] substantial intervention." §616(e). If the Secretary does make such a determination, he may: "[a]dvise the State of available sources of technical assistance . . . and require the State to work with appropriate entities," [16(e)(1)(A)] "[d]irect the use of State-level funds," [§616(e)(1)(B)] "impose special conditions on the State's grant,"[§616(e)(1)(C)] "[r]equire the State to prepare a corrective action plan," "[r]equire the State to enter into a compliance agreement," "withhold . . . the State's funds," "[s]eek to recover funds," "withhold . . . any further payments to the State under this subchapter," or "[r]efer the matter for appropriate enforcement action," [§616(e)(2)(B)(i)-(vi)], "[r]ecover funds under …the General Education Provisions Act. . .," "[w]ithhold, in whole or part, any further payment to the State. . . ", "[r]efer the case to the

Office of the Inspector General . . . .", "[r]efer the matter for appropriate enforcement action. . . ."§616(e)(3)(A)-(D).

Subsection (d) refers exclusively to the Secretary's review and determination of State performance and outlines the factors that the Secretary is to consider in making these determinations. §616(d) ("the information provided by the State in the State performance report, information obtained through monitoring visits, and any other public information made available…").

However, through the reauthorization of IDEA in 2004 Congress also added §616(f), an amendment concerning SEA enforcement based exclusively on SEA determinations of LEA performance. This provision reads as follows:

> If a State educational agency determines that a local educational agency is not meeting the requirements of this subchapter, *including the targets in the State's performance plan*, the State educational agency shall prohibit the local educational agency from reducing the local educational agency's maintenance of effort under section 1413(a)(2)(c) of this title for any fiscal year. 20 U.S.C. §1416(f) (emphasis added).

II. Informal Non-regulatory Guidance Prior and Subsequent to the December 2008 Regulations and Accompanying Comments

Prior Informal Guidance from OSEP/OSERS

In a document issued in March 2007 *prior to* the promulgation of the regulations effective December 31, 2008, and entitled "Determinations of the Status of Local Programs by State Agencies under Parts B and C of the Individuals with Disabilities Education Act (IDEA)," March 2007, OSEP referred to an earlier FAQ document of 10/19/2006 in which it provided guidance to SEAs on how they to make determinations of the status of local programs. (http://www.rrfcnetwork.org/images/stories/FRC/spp_mat/determinations%20faqs.doc). In this document OSEP describes the requirements applicable to the States as follows:

- States are required to enforce the IDEA by making "determinations annually under IDEA section 616(e) on the performance of each LEA under Part B…
- States must use the same four categories in IDEA section 616(d) as OSEP in making determinations of the status of LEAs…These categories are:
    - Meets Requirements;
    - Needs Assistance;
    - Needs Intervention; and
    - Needs Substantial Intervention.
- States *MUST consider*
    - Performance on compliance indicators;
    - Whether data submitted by LEAs…are valid, reliable, and timely;
    - Uncorrected noncompliance from other sources; and
    - Any audit findings.
- In addition, States *could also consider:*
    - Performance on performance indicators; and
    - Other information" (emphasis added)

Under the heading "Issues and Challenges for the State" OSEP identified a number of issues in question format for consideration by States preparing to make the legally mandated annual determinations of the status of local programs. Of particular relevance: How will the State take into consideration data that are more recent than the last report to the public? How will the State take into consideration improvement even when programs do not meet the State target? How many compliance and results indicators should our State include to achieve a comprehensive process for making determinations? Should our State include student or system results indicators as well as the required compliance indicators? *What is the message the State sends to the public if the criteria for making determinations relies solely on program's performance on procedural compliance indicators?* Id., 3-4. (Emphasis added).

December 1, 2008 Regulatory Language, Comments and Non-regulatory Guidance

In what was described as an attempt by ED to clarify the monitoring and enforcement requirements that §616(a)(1)(C) places upon SEAs, ED promulgated regulations, effective December 31, 2008, requiring SEAs to: (1) "[m]ake determinations annually about the performance of each LEA using the categories in §300.603(b)(1)," *see* categories used by the Secretary in §616(d); (2) "[e]nforce this part, consistent with §300.604, using appropriate

enforcement mechanisms," *see* mechanisms used by the Secretary in 20 U.S.C. 616(e); and (3) "report annually on the performance of the State and each LEA under this part."[2] 34 C.F.R. 300.600 (a). In response to a comment to this proposed regulation in the NPRM (73 Fed. Register 27690, May 13, 2008), ED offered guidance on what factors the SEAs should consider when categorizing the LEAs. ED stated that "[w]e have advised States that, at a minimum, a State's annual determination process *must include consideration* of the following: an *LEA's performance on all SPP compliance indicators* . . . whether an LEA submitted valid and reliable data for each indicator, LEA-specific audit findings, and any uncorrected noncompliance from any source. Additionally, *we have advised States to consider results on indicators, such as an LEA's graduation and dropout rates* . . ." 73 Federal Reg. 73006 at 73021 (Dec. 1, 2008) (emphasis added).

ED subsequently issued "*IDEA Part B Supplemental Regulations Issued December 1, 2008 and Effective December 31, 2008: Non Regulatory Guidance*," dated April 2009, through the Office of Special Education Programs, Office of Special Education and Rehabilitative Services. Therein, OSEP explains that §300.600(a) "has been amended to require States to: (1) monitor implementation of Part B of the Act; (2) make determinations annually about the performance of each LEA using categories in section 300.603(b)(1); (3) enforce Part B of the Act in accordance with the statutory enforcement mechanisms that are appropriate for States to apply to LEAs; and (4) annually report on the performance of the State and of each LEA under Part B of the Act." OSEP identifies "implementation considerations" to include the following:

- "States have some discretion in developing a process for making annual determinations on the performance of LEAs.
- However, States' annual determination processes *must include consideration* of:

[2] In the same December 1, 2008 regulations, effective December 31, 2008, ED also promulgated regulations requiring SEAs to ensure that any identified noncompliance by an LEA is corrected is soon as possible, and in no case later than one year after the State's identification of the noncompliance, 34 C.F.R. 300.600(e), to make an annual public report on the performance of each LEA located in the State on the targets in the State's performance plan no later than 120 days following a State's submission of annual performance report to the Secretary, 34 C.F.R. 300.602 (b)(1)(i)(A), to make publicly available, through the SEA's website and distribution to the media and to public agencies, the State's performance plan and annual performance reports, 34 C.F.R. 300.602(b)(1)(i)(B), and to provide public notice of any proposed or occurring enforcement action taken by the Secretary pursuant to §300.604, *see* 20 U.S.C. §1416(e). However, these regulations do not affect the question at hand.

- An LEA's performance on all State Performance Plan (SPP) compliance indicators;
- Whether an LEA submitted valid and reliable data for each indicator;
- LEA specific audit findings; and
- Any uncorrected noncompliance from any source.

- States are also *advised to consider performance on results indicators*, such as an LEA's graduation and dropout rates, or the participation rate of students with disabilities in State assessments when making annual determinations. . .." Id., 6 (*emphasis added*).

In yet another example of non-regulatory guidance issued in June 2009, in response to the question **"**What factors must a State consider in making LEA determinations?" OSEP responded: **"**When making an annual determination on the performance of each LEA under Part B of the IDEA, consistent with sections 616(a) and (e) of the IDEA, a *State must consider* the following factors: (1) performance on compliance indicators; (2) valid and reliable data; (3) correction of identified noncompliance; and (4) other data available to the State about the LEA's compliance with the IDEA, including relevant audit findings. In addition, *States may consider results on performance indicators* and other information. States must utilize the four categories in section 616(d) of the IDEA." (Emphasis added). "Questions and Answers on Monitoring, Technical Assistance, and Enforcement," p. 11, Question 9, Revised June 2009 is found at the following Web site: **http://spp-apr-calendar.rrfcnetwork.org/explorer/view/id/417/?1#category1**

This document is described as representing the ED's "current thinking" on this topic. However, ED acknowledges that "[t]he responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements…and are not legally binding." Id., 2.

III. Section 613(a)(2)(C) and April 13th (revised) Guidance from ED

Subsequent to the announcement that as part of the economic stimulus plan schools would receive a large increase in IDEA funding in the coming year, questions arose as to

whether local school districts would be able to reduce their annual local maintenance of effort using the provision found in §613. Section 613 states that:

> Notwithstanding clauses (ii) and (iii) of subparagraph (A), for any fiscal year for which the allocation received by a local educational agency under section 1411(f) of this title exceeds the amount the local educational agency received for the previous fiscal year, the local educational agency may reduce the level of expenditures otherwise required by subparagraph (A)(iii) by not more than 50 percent of the amount of such excess. 20 U.S.C. §1413(a)(2)(C)(i).

As a result of the stimulus funding plan many LEAs *will* receive an allocation that significantly "exceeds the amount the local education agency received for the previous fiscal year." However, §616(f) would prohibit such LEAs from lowering their maintenance of effort if they are "not meeting the requirements of this subchapter, including the targets in the State's performance plan." In attempt to clarify when this §616(f) bar would apply, ED issued another document – this one designated as "Guidance" - advising States to determine whether an LEA is not "meeting the requirements of this subchapter" based upon the annual categorization that ED now requires under 34 C.F.R. §300.600 (a)(2). The Guidance expressly states that "an SEA must prohibit an LEA from taking advantage of the MOE reduction under IDEA section 613(a)(2)(C) if the LEA's determination is Needs Assistance, Needs Intervention, or Needs Substantial Intervention." "Guidance: Funds for Part B of the Individuals with Disabilities Education Act Made Available Under The American Recovery and Reinvestment Act of 2009," U.S. Department of Education, Office of Special Education and Rehabilitation Services, 16-17, D-7 (Revised April 13, 2009) *available at:* https://www.ade.az.gov/.../ARRA%20Guidance%20doc%20idea-b%20doc%20revised%20April%2013%202009.doc.

In accordance with the ED's (OSERS) Guidance on these categories, SEAs have determined that they *must* consider compliance indicators to determine whether their LEAs "meet[] the requirements" under §616(f), but they simply *may* consider performance indicators. *See* "How the Indiana State Department of Education Made Local Determinations under Individuals with Disabilities in Education Improvement Act (IDEA 2004)," Indiana Department of Education, May 7, 2009, *available at*: www.doe.in.gov/exceptional.monitoring. Based on this new standard, some states temporarily changed their standards in order to exclude performance indicators, which they otherwise typically included in making their determinations of LEA

status, so that indicators that would have reflected unfavorably on the LEAs would not be taken into account. *See* "Missouri Changes District Ratings in Light of ARRA IDEA Funds," *available* http://ideamoneywatch.com/states/mo/?p=19.[3]

DISCUSSION & ANALYSIS

The Department's construction of §616 of the IDEA is fundamentally flawed according to the plain language of the statute. In Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984), the Supreme Court of the United States created a two-step process for the review of an agency's construction of a statute. Id., at 842-43. First, the court must consider whether Congress has spoken on the issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. If the statute does not clearly speak to the issue, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id., at 843. The court does not have to reach this second question in this case, though, because the statute makes clear that Congress did not intend, as ED claims in its Guidance and informal Non-regulatory Guidance, to allow the SEAs to make determinations without considering whether the LEAs are meeting the State's targets for its performance indicators.

There are, arguably, two possible readings of the statute, but neither would allow for the SEAs to determine whether LEAs are "meeting the requirements" of the IDEA without considering whether the LEAs are meeting the targets for both the compliance and performance indicators in the State's performance plan.

I. The Department's Construction of §616 Is Flawed Because the Plain Language of the Statute Requires SEAs To Use a Stricter Determination Standard Than ED

Under the doctrines of *expressio unius* and non-derogation the Congress plainly required SEAs to use a stricter determination standard than that which Congress requires of the Secretary. According to the principle of *expressio unius exclusio alterius*, the inclusion of one thing from an associated group excludes those that are left unmentioned. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 73 (2002). Subsections (d) and (e) of §616 make up such an associated

[3] Other SEAs have manipulated variables such as cell size to similarly avoid the application of §616(f). *See* "Illinois State DOE Changes District Ratings," *available at* http://ideamoneywatch.com/states/il/?p=24.

group because (d) describes the categories that are the basis for enforcement in (e). The ED has therefore interpreted §616 (a)(C)(ii), which requires SEAs to "enforce this subchapter in accordance with paragraph (3) and subsection (e) of this section," to mean that the monitoring and enforcement efforts of the SEAs must mirror those that Congress prescribed for the Secretary in §616(d) and (e), including the standards by which the Secretary categorizes the SEAs. *See* 34 C.F.R. §300.600(a); "Questions and Answers on Monitoring, Technical Assistance, and Enforcement," Office of Special Education and Rehabilitative Services, U.S. Department of Education, 11, Question C-9 (June 2009) (emphasis added), *available at:* http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C4%2C. However, §616 (a)(C)(ii) only mentions "paragraph (3) and subsection (e)"; subsection (d) is conspicuously absent. Under the doctrine of *expressio unius*, such an absence must be meaningful.

The language of the statute establishes that (d) is absent in order to distinguish the standards to be used by the Secretary (ED) from those to be used by the SEAs in making their determinations. On the one hand, the absence of (d) implies that the ED lacks the authority to require SEAs to apply the same categorization and enforcement mechanisms as the Secretary. *See infra* at II. But, even assuming, *arguendo,* that (e) somehow allows for the SEAs to use the same *categories* as the Secretary when analyzing LEA performance because these categories appear in (e), the absence of (d) establishes that the *standards* that the SEAs use for that determination must be distinct from those used by the Secretary. Subsection (d) states that the Secretary shall make his determinations "[b]ased on the information provided by the State in the State performance report, information obtained through monitoring visits, and any other public information made available." §616(d)(2)(A). From this broad instruction, the Secretary has chosen to make his determinations based on the State's (1) "substantial compliance on all compliance indicators," (2) provision of "valid and reliable data" on all indicators, and (3) demonstration of timely correction of noncompliance. "Department's Review and §616 Determination Criteria," 1 (Sept. 14, 2006) *available at:* http://spp-apr-calendar.rrfcnetwork.org/explorer/view/id/417/?1#category1. However, there is no mention of these standards or the Secretary's basis of determination in subsection (e). Thus, as Congress did not state in §616(a)(1)(C) that SEAs must monitor and enforce the IDEA in accordance with (d), there is no basis for ED's claim that the SEAs should use the same standards that Congress has allowed the Secretary to apply under that subsection.

The ED's reading also fails to give effect to Congress's *inclusion* of clear and distinct State standards in §616(b)(2)(C) and §616(f). Under the presumption of meaningful variation, different statutory wording suggests different statutory meaning. *See* Lawrence v. Florida, 549 U.S. 327, 333-334 (2007). Section 616(b)(2)(C) states: "[t]he State shall use the targets established in the plan and priority areas described in subsection a(3) of this section to analyze the performance of each local educational agency in the State in implementing this chapter," and §616(f) adds that "[i]f a State educational agency determines that a local educational agency is not meeting the requirements of this subchapter, *including the targets in the State's performance plan*, the State educational agency shall prohibit the local educational agency from reducing the local educational agency's maintenance of effort. . ." (emphasis added). While the Secretary is given a wide spectrum of sources to simply "base[]" his decision on, both sections pertaining to the States give the SEAs a distinct, narrow focus to their analysis: "the targets in the State's performance plan." The syntax of §616(f) establishes that, for the SEAs' determinations, the targets are specifically within the category of "requirements" that LEAs must be meeting for the SEA to determine that an LEA is "meeting the requirements of this subchapter." Thus, to give effect to the variation between the standards that Congress provided for the Secretary and those that it provided for the SEAs, the ED cannot claim that the SEAs can use the standards that the Secretary has developed under §616(d)(2)(A) when making their determinations under §616(f).[4]

Finally, the ED's interpretation is flawed under the rule against interpreting provisions in derogation of others. *See* Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 100-01 (1992) ("If a State could supplement federal regulations without undergoing the § 18(b) approval process, then the protections that § 18(c) offers to interstate commerce would easily be undercut"). The purpose of § 616(f) appears to be to prevent LEAs that are not reaching the State standards established in the performance plan from being able to reduce the funding that they are putting towards that goal. This is not so much a sanction, as the Secretary's withholding or redirecting funds under the enforcement provisions in (e) would be, but a protection, maintaining the *status quo* in an already troubled program. It makes sense, then, that Congress

[4] Notably, an earlier version of the bill, passed in the Senate on May 13, 2004, did specifically require both the SEAs and the Secretary to base their determinations on the "benchmarks in the State's compliance plan." 150 Cong.Rec. S5394-01, S5432, §616(c)(1), (e)(2) (May 13, 2004). The fact that this language remained in the final bill in the section concerning the SEAs, but not in that concerning the Secretary, seems to further demonstrate Congress's intent to create a distinction between the standards for each.

would require LEAs to meet a higher standard to avoid having to apply §616(f) than they must to avoid the sanctions under subsection (e). According to the ED's interpretation of State standards under §616(a)(1)(C), though, LEAs could undermine the purpose and effect of this distinction and reduce the funds that they are putting towards the excess costs of special education for students with disabilities, despite not meeting any State performance targets. The ED's interpretation of § 616(a) therefore would allow LEAs to easily "undercut" the protection that Congress intended § 616(f) to create for inadequate programs.

A system in which both State and Federal agencies must use the same categories, but with different standards and meanings attached to those categories, may create confusing inconsistencies, though. For this reason it may be an even clearer and more accurate reading of the statute to say that § 616(f) and the SEA determinations are meant to be entirely distinct, both in standards and process, from those of the Secretary. In which case, the ED exceeded its authority not only in allowing SEAs to apply the Secretary's standards, but also in creating regulations that require SEAs to use the overall categories and enforcement mechanisms that Congress prescribed for the Secretary.

II. In the Alternative, the Department's Construction of § 616 Is Flawed Because the Plain Language of the Statute Does Not Give ED the Authority to Require SEAs to Apply the Same Categorization and Enforcement Framework as the Secretary.

Under the doctrine of *expressio unius*, the ED may have exceeded its authority by requiring the SEAs to mirror the Secretary's categorization and enforcement framework. The plain language of § 616(a) does not logically support the ED's claim that "States also have an obligation to make annual determinations about each LEA's performance using the same categories, under section 616(d) of the Act, that the Secretary applies to States." NPRM, 73 Federal Reg. at 27693 (May 13, 2008). Section 616(a)(1)(C)(ii) states that the Secretary "shall" "require the States to . . . enforce this subchapter in accordance with paragraph (3) and subsection (e) of this section." Notably, the "review and determination," in which the *Secretary* is required to categorize the States as "meets the requirements," "needs assistance," "needs intervention," or "needs substantial intervention" occurs in § 616(d). Again, according to the principle of *expressio unius exclusio alterius*, the inclusion of one thing from an associated group excludes those that are left unmentioned, *see* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 73 (2002), and subsections (d) and (e) are an associated group because they describe two steps of

the Secretary's determination process. If Congress had intended the States to apply this whole process, it seems nonsensical to have only mentioned (e).

In a reading that gives proper effect to the absence of any reference to (d) in § 616(a)(1)(C)(ii), Congress cannot have intended to require the SEAs to mirror the Secretary's categorization and enforcement procedures when it mandated that the Secretary require the States to enforce "this subchapter in accordance with . . . subsection (e)." Instead there must be an enforcement action that Congress has required the SEAs take solely under (e). In subsection (e) Congress stated that if the Secretary finds that States are continuously failing to meet requirements, the Secretary may make the States take enforcement actions by "requir[ing] the State to work with appropriate entities," "[r]equir[ing] the State to prepare a corrective action plan," "[r]equir[ing] the State to enter into a compliance agreement," or making the State "sufficiently address[] the areas in which the State needs intervention" by withholding funds. Thus, in a straightforward reading, § 616(a)(1)(C)(ii) simply requires the Secretary to make States take these enforcement actions. Under this interpretation, the statute does not grant the ED the authority to require SEAs to take the same categorization and enforcement actions as the Secretary in its interactions with the LEAs. Therefore, the regulations that the ED has promulgated requiring the SEAs to do so, *see* 34 C.F.R. 300.600, are an invalid extension of ED power. Accordingly, there is then no statutory basis for the ED's guidance allowing the SEAs to use the Secretary's categorization standards to determine whether LEAs are "meeting the requirements of th[e] subchapter" for the purposes of § 616(f), particularly considering that Congress provided clear, distinct standards in § 616(f) itself.[5]

This reading, which distinguishes the State monitoring and enforcement mechanisms from those of the Secretary, also more clearly upholds Congressional intent. Again, this reading gives effect to the rule against reading provisions in derogation of others by preventing LEAs and SEAs from easily undercutting the protective purposes of §616.[6] This reading also seems to align with the discussions of the monitoring and enforcement provisions that appear in the House Conference report for the 2004 reauthorization of the IDEA. The report only mentions the Secretary in its discussion of the enforcement mechanisms in § 616(e), suggesting that they did not intend the States to also have these mechanisms at their disposal. H.R. Conf. Rep. 108-779,

[5] *See* discussion of the rules of meaningful variation above.
[6] *See* discussion of the rule of non-derogation above.

232 (Nov. 17, 2004) ("The *Secretary* is directed to monitor states. . ."; "Conferees strongly encourage the *Secretary* to review . . ."; "Conferees recommend that the *Secretary* diligently investigate. . .") (emphasis added).

Thus, based on both the intent and plain language of Congress, there seems to be no statutory authority for the ED's informal Guidance allowing States to limit their determinations of whether LEAs meet the requirements of the statute to exclude consideration of performance indicators. The language of the statute plainly requires that LEAs consider and meet all of the targets contained in their State's performance plan in order to be able to reduce their maintenance of effort. Therefore, the ED's informal guidance to the contrary is invalid and should not be followed by the States.