

# CENTER FOR LAW AND EDUCATION

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RE: Comments to Docket ID ED-2012-OSERS-0020  
Assistance to States for the Education of Children with Disabilities  
Notice of Proposed Rulemaking (NPRM), U.S. Department of Education

The Center for Law and Education (CLE) submits the following comments in response to the Notice of Proposed Rulemaking (September 18, 2013) of the Office of Special Education and Rehabilitative Services, U.S. Department of Education, to amend regulations implementing the *local maintenance of effort* mandate under the Individuals with Disabilities Education Act (IDEA). CLE is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation.

Through this NPRM, ED specifically indicates that it seeks “to clarify existing policy and make other changes” regarding: (1) the *compliance* standard; (2) the *eligibility* standard; (3) the *level of effort required* of a local education agency (LEA) *in the year after it fails to maintain effort under the IDEA*; and the *consequence for a failure to maintain local effort.*” 78 Fed. Reg. 57324 (emphases added). ED requests comments regarding whether the proposed amendments to the regulations promulgated under IDEA will improve understanding of and compliance with current statutory provisions governing local maintenance of effort (MOE).

To the extent that IDEA’s current LEA MOE requirements, including the specifically authorized statutory exceptions and adjustments, may warrant updating and revision, such revision must occur through amendments enacted by Congress, most likely through reauthorization of the Act. In the interim these proposed amendments to the regulations will help clarify several aspects of LEA MOE. CLE is generally supportive of these proposed amendments with specific recommendations that appear below. Moreover, given ED’s finding that at least 40 percent of States have policies and procedures inconsistent with how States should determine eligibility or compliance in relation to the LEA MOE requirements, the proposed amendments appear judicious. Maintaining the integrity of the LEA MOE requirement, as intended by Congress, is critical to ensuring that the nation’s 6 million school-age IDEA-eligible students receive a meaningful, appropriate public education.

Section 613(a)(2)(A) of IDEA requires an LEA as a condition of eligibility for federal assistance under Part B to submit a plan that provides assurances to the State educational agency that Part B funds provided to an LEA “(iii) shall not 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.” (Emphasis added) Only an LEA that can demonstrate that its reduction of local expenditures is attributed to one of the listed authorized local reductions set forth in subparagraph (B), or to an increase in its allocation under §611, as described in subparagraph (C) of §613(a)(2) [the ‘50% rule’], can lawfully reduce its local MOE “below the level of those expenditures for the *preceding fiscal year*” (emphasis added). In such instance, 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.

Below are CLE’s comments in response to the NPRM with specific recommendations for improving the proposed amendments and ensuring compliance with current law.

### **§300.203 Maintenance of effort**

#### **(a) Compliance standard.**

At subsection (a)(2) the NPRM proposes to improve understanding and implementation of the local MOE by explicitly setting forth the manner in which the SEA shall determine whether an LEA has, in fact, complied with its annual local MOE requirement.

We support ED’s clarification of the annual local maintenance of effort mandate which, after reiterating the statutory standard at subsection (a)(1) of §300.203, expressly sets forth at subsection (2)(i)-(iii) how each LEA shall demonstrate that it has met its local MOE compliance standard.

We support the proposed addition of the language at NPRM 300.203(a)(2)(ii) through which ED is helping to mitigate misunderstanding of the local MOE mandate that has contributed to non-compliance with the mandate that bars LEAs from “[r]educ[ing] the level of expenditures for the education of children with disabilities made by the LEA *from local funds*, either in total or per capita, below the level of those expenditures for the *most recent fiscal year for which the LEA met the MOE* compliance standard based on local funds only, ***even if the LEA also met the MOE compliance standard based on State and local funds***, except as provided in §§ 300.204 and 300.205; or...” (emphasis added). The clarification that local-only compliance must be keyed to the most recent year in which MOE compliance was also based on local funds only is essential to avoid undermining the core concept of MOE in those cases where MOE has in intervening years been dependent on counting State funds but the State funds have now been reduced.

We also understand the intent of the clarifying language added at subsection (iii) specifically referencing the “preceding fiscal year” if the LEA has not previously met the MOE compliance standard based on local funds only, except as provided in §§ 300.204 and 300.205. However, we are concerned about the possibility, in the case of an LEA that has never met MOE

compliance based on LEA funds alone and in which LEA funds have declined over time, that a drop in State funds that previously had been counted on to maintain MOE would allow a switch to local-only compliance using the reduced local level of the previous year, which, combined with the drop in State funds, would cause a sharp reduction in overall funds to serve children in the LEA.

**RECOMMENDATION:**

- We recommend that the Department adopt strong provisions to ensure that the potential described above under paragraph (a)(2)(iii) for significant reductions in total State and local funds does not occur.

**(b) Eligibility standard.**

As set out in the NPRM, each LEA applicant for Part B funds must be able to show evidence that it has budgeted at least the same amount for the education of children with disabilities (total or per capita) from either local or a combined local and state funds that the LEA spent from the same source for the most recent prior year for which information is available. Under the existing regulations, the SEA will find an LEA *eligible* to receive an award of Part B funds for the current fiscal year based on its complying with the MOE requirement [34 C.F.R. §300.203(b)(1)] if the LEA meets **any one of four tests of local special education fiscal effort**. Each test compares special education *expenditures* in the most recent fiscal year for which information is available to amounts *budgeted* for special education in the current year from the same source or combined sources.

**RECOMMENDATIONS:**

- We recommend that the revision at §300.203(b)(1) make explicit reference to the authorized exceptions for reducing MOE found at §§300.204 and 300.205 in order to prevent LEAs from being found ineligible because they lack sufficient local or combined state and local, funds and have either failed to identify in their budget calculations authorized reductions under §300.204 or have not been permitted to include any authorized reduction in their proposed budgets. (This issue is especially relevant as national demographics indicate a decline in the eligible population of children with disabilities.)
- We also recommend that ED consider setting out the proposed regulations concerning local MOE in the order of the process: LEA Assurances, Eligibility, Compliance and Audited Standards.

**(c) Subsequent years.**

The proposed amendment under the heading *Subsequent years* states that if for any fiscal year, an LEA violates the MOE compliance standard [§613(a)(2)(A)(iii)], the level of expenditures required of the LEA for any fiscal year *beginning on or after July 1, 2014*, is the amount that would have been required in the absence of that failure *and not the LEA's reduced level of expenditures*.

Integrating this standard in federal regulation is clear evidence of ED's having rejected its previous misinterpretation of current law in Letter to East, June 16, 2011, which ED rescinded shortly thereafter [see *letter to Boundy*, April 4, 2012]. This is consistent with ED's stating in the NPRM that "the position expressed in the April 4, 2012 letter correctly interprets the statutory obligation of LEAs to maintain effort." Fed. Reg. 78:181 (Sept. 18, 2013) p. 57328. In that letter, ED expressly acknowledged its erroneous interpretation: "[W]e have determined that the level of effort that an LEA must meet in the year after it fails to maintain effort is the level of effort that it should have met in the prior year, and not the LEA's actual expenditures. We are, therefore, withdrawing the letter to Dr. East." [*letter to Boundy*, April 4, 2012]

It is noteworthy that ED's position is predicated upon the current statutory requirements that ED has chosen to clarify through the NPRM. As ED explained in the NPRM, "allowing an LEA to reduce spending on the education of children with disabilities by failing to comply with a statutory requirement is inconsistent with the purpose of the local MOE requirement, which is to support a continuation of at least a certain level of local expenditures for the education of children with disabilities. Permitting an LEA to lower its required level of effort based on a past year's failure to comply with the requirement conflicts in a fundamental way with that purpose and provides a financial incentive for LEAs not to maintain their fiscal efforts. We do not believe that the statute contemplates that an LEA should be permitted a future financial benefit from a current failure to comply with the LEA MOE requirement." Fed. Reg. 78:181 (Sept. 18, 2013) p. 57328.

There is no lawful basis for impeding timely implementation and enforcement of the local MOE requirement that was established under the IDEA in 1997 by introducing a misleading reference to an effective date "on or after July 1, 2014" in the context of when these clarifying modifications to the existing regulations, NOT new requirements would apply.

ED's proposed timeline will not only delay implementation and enforcement of current law, which is not being substantively modified by these regulatory modifications, it will open the door for a windfall to LEAs that are not meeting MOE. Moreover, reliance on this proposed timeline will make LEAs as well as their respective SEAs vulnerable to legal action. For US ED to suggest that SEAs do not have an overriding responsibility is irresponsible; SEAs that fail to ensure that the LEAs are in compliance with this longstanding local MOE now, not after July 1, 2014, will be vulnerable to legal action.

Under § 612(a)(11)(A)(i), the SEA is responsible for ensuring that LEAs receiving assistance under IDEA comply with all applicable requirements, and for ensuring implementation and

enforcement of the local MOE mandate. If an LEA fails to meet its MOE obligation, the SEA is required to pay USED an amount equal to the short-fall in required local fiscal special education effort. An SEA may not use IDEA funds, nor reduce a current year IDEA subgrant as a means of resolving a prior year's MOE violation by an LEA.

Moreover, Congress writes legislation with the presumption that applicable recipients will comply with the requirements of that legislation – including the presumption that, in requiring funding to be maintained at the previous year's level, the previous year's funding was in turn maintained, as required by law, at the level of the year before that. The statutory mandate here has been in effect for nearly 20 years, so it would be especially disturbing in this context to say that the statutory provision, as correctly understood, is not applicable to the current year.

#### **RECOMMENDATION**

- We strongly recommend that ED remove “*beginning on or after July 1, 2014*” from the proposed amendment.

#### **(d) Consequence of failure to maintain effort.**

This section clarifies that an SEA (as the grantee) is liable in a recovery action to return to US ED an amount equal to the amount by which the LEA failed to maintain its level of expenditures. However, in previous policy interpretation (*See OSEP letter to Baglin (2006)*), ED addressed the SEA's enhanced oversight responsibility, stating that: “Faced with a history of noncompliance with the MOE requirement. . .the SEA would need to carefully determine whether the LEA will meet the MOE requirement in the coming year, or whether the SEA should begin an administrative withholding action consistent with §613(c) and (d) because it is not convinced that the LEA will meet the MOE requirement for the new year.”

#### **RECOMMENDATION**

- We recommend that ED expand this section to include language that reflects the additional guidance provided in the OSEP letter to Baglin, July 26, 2006. In particular, through this regulation ED should underscore the importance of SEA monitoring and oversight for ensuring implementation and compliance with the local MOE requirement.

Thank you for your consideration; we appreciate the opportunity to comment on the proposed regulations.

Yours truly,



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Co-Directors