December 2, 2013

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 [insert org name] 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).

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 will improve understanding of and compliance with current statutory provisions governing local maintenance of effort (MOE).

While IDEA’s current LEA MOE requirements, including the allowable exceptions and adjustments, may be in need of review and revision, such a process can only occur within the context of a statutory reauthorization and resulting amendments enacted by Congress. In the interim these amendments will bring needed clarification to several aspects of LEA MOE.

The [insert org name] is generally supportive of these proposed amendments with specific recommendations that appear below. 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 the education of the nation’s 6 million school-age IDEA-eligible students.

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 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 [from local funds] for the *preceding fiscal year*.” Only an LEA that can demonstrate that its reduction of local expenditures is attributed to one of the list of 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 our comments and a few specific recommendations we offer to improve the proposed amendments.

**§300.203 Maintenance of effort.**

1. **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, **e*ven 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] We are similarly supportive 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.

**RECOMMENDATION:**

* We recommend for additional clarity that 300.203(a)(2)(ii) include a cross reference to subsection (a)(2)(1) after “even if the LEA also met the MOE compliance standard based on State and local funds…”.
1. **Eligibility standard.**

As set out in the NPRM and consistent with the statutory requirement at §613(a)(2)(A), 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 proposed revision should emphasize that an LEA meets the MOE test for IDEA eligibility if it meets just one of the four tests that compare (i) total state and local funds combined; (ii) total local funds only (iii); per capita state and local funds combined; (iv) per capita local funds only from either local funds only or the combination of State and local funds.
* We also 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.
1. **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*.

Proposing to include this standard in federal regulation is clear evidence of ED’s reversal of its previously rescinded misinterpretation of law [See letter to Boundy, April 4, 2012].

However, there is no lawful basis for impeding timely implementation and enforcement of the local MOE requirement that was established in 1997 by introducing an effective date of July 1, 2014.

ED’s proposed timeline will not only delay implementation and enforcement of current law and regulations which are not being substantively modified by these regulatory modifications, it will open the door for a windfall to LEAs that are not meeting MOE.

**RECOMMENDATION**

* We strongly recommend that ED remove “*beginning on or after July 1, 2014*” from the proposed amendment.
1. **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), also stated that “Faced with a history of noncompliance with the MOE requirement, however, 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 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 the opportunity to comment on the proposed regulations.

Sincerely,