

51 IDELR 136

108 LRP 65836

**Letter to Plagata-Neubauer
Office of Special Education Programs**

N/A

April 8, 2008

Related Index Numbers

205.015 Excess Costs

205.030 In General

Judge / Administrative Officer

William W. Knudsen, Acting Director

Case Summary

While districts can include both IDEA and general education services in their list of expenditures for students with disabilities, they must maintain separate accountings for elementary and secondary school expenditures. OSEP informed a special education attorney that calculations of average per-student expenditures based on a combined reporting would be "inaccurate and potentially misleading." Because Part B funds are intended to supplement state and local funds, they can be used only for the "excess costs" of special education and related services. A district determines its excess costs by calculating the minimum average amount spent on students with disabilities in elementary and secondary schools. The attorney here noted that some districts may maintain a combined file for elementary and secondary school expenditures rather than tracking those expenditures separately. However, OSEP rejected the notion that districts could calculate the minimum average amount for each group of students by multiplying the combined amount by the percentage of students with disabilities in elementary school. OSEP noted that services provided to secondary school students are often far more expensive than those provided to younger students. "For example, school programs at the secondary level typically include things such as vocational education programs, athletic programs, music programs including marching bands, etc. that do not apply to

elementary schools," Acting Director William W. Knudsen wrote. Because the costs of elementary and secondary school programs were not comparable, OSEP explained, they must be calculated separately.

Full Text

Appearances:

Dear Ms. Plagata-Neubauer

This letter is in response to your October 30, 2007 letter to the Office of Special Education Programs (OSEP) in which you request clarification on several fiscal questions relating to Part B of the Individuals with Disabilities Education Act (IDEA). Your questions, with OSEP's responses, are listed below.

Excerpt from your letter:

Question Topic No. 1 -- Excess Cost Requirement

Regulation § 300.202(b)(2)(i) states that an LEA [local educational agency] "meets the excess cost requirement if it has spent at least a minimum average amount *for the education of its children with disabilities* before funds under Part B of the Act are used" (emphasis added). Regulation § 300.16 refers to Appendix A "for an example of how excess costs *must be calculated*" (emphasis added). As the first step in the calculation, Appendix A, paragraph "a." states that "the LEA must determine the total amount of its expenditures for elementary school students from all sources -- local, State, and Federal including Part B -- in the preceding school year." (See 71 Fed. Reg. 46813, third column.)

Question 1a: In unexpected circumstances like a major natural disaster, LEAs may incur certain extraordinary expenditures that are not directly related to the education of its students. Does the reference to "total amount of its expenditures for elementary school students" mean that an LEA includes the total amount of expenditures for the education of its elementary school students or, literally, the total amount of all expenditures attributable to its elementary school students?

Our Response: 34 CFR § 300.16 and Appendix A describe how average expenditures per elementary school or secondary school student are calculated and refer to "total expenditures" less expenditures for capital outlay and debt service. Consequently, some expenditures are excluded from this calculation. However, the determination of expenditures that can be excluded is based on the language of 34 CFR § 300.16 and Appendix A, rather than whether they are "educational" expenditures.

Excerpt from your letter:

Question 1b: If the excess cost calculation refers to the total amount of expenditures for the education of its students (elementary or secondary, respectively), in as much as States have discretion in deciding what constitutes education based on their State law, is there any guidance as to how States are to exercise that discretion for the purpose of the excess cost calculation? For example, can a State include instructional-related expenditures and transportation expenditures, but exclude expenditures related to school food programs in the excess cost calculation?

Our Response: The reference in 34 CFR § 300.16 and Appendix A is to total expenditures of the LEA for elementary school students and total expenditures for secondary school students, not total expenditures for the education of elementary school students and total expenditures for the education of secondary school students. The only possible deductions are those specified in 34 CFR § 300.16 and Appendix A.

Excerpt from your letter:

Questions on determining excess cost compliance:

Appendix A states that "Section 602(8) of the Act and § 300.16 require the LEA to compute the minimum average amount separately for children with disabilities in its elementary schools and for children with disabilities in its secondary schools. LEAs may not compute the minimum average amount an LEA must spend for the education of children with

disabilities based on a combination of the enrollments in its elementary and secondary schools." 71 Fed. Reg 46813 (Aug.14, 2006).

Question 1c: When determining whether an LEA has met the excess cost requirement, an LEA may not necessarily maintain and track expenditure data separately for elementary school students and secondary school students. Can an LEA apply the enrollment numbers of students and children with disabilities in its elementary schools to the relevant combined expenditure data on a proportional basis to determine how much non-IDEA Part B funds it has spent for the education of children with disabilities in its elementary schools?

Our Response: 34 CFR § 300.16 requires that the minimum average amount be computed separately for children with disabilities in elementary schools and secondary schools. There are distinct and separate costs associated with these levels that would make the computation you describe inaccurate and potentially misleading. For example, school programs at the secondary level typically include such things as vocational education programs, athletic programs, music programs including marching bands, etc. that do not apply to elementary schools. The costs of the separate programs are generally not comparable and therefore, the costs must be computed separately.

Excerpt from your letter:

Question 1d: When determining if an LEA has spent the required minimum average amounts for the education of children with disabilities, can an allocable portion of regular education costs (such as regular education teacher salaries for classes where children with disabilities are mainstreamed, or regular education transportation costs for children with disabilities who use such transportation) be applied, if they can reasonably be attributed to the education of children with disabilities?

Our Response: Yes.

Excerpt from your letter:

Question 1e: The excess cost requirement appears to compare expenditures on the education of

children with disabilities for one school year against a minimum average amount (calculated separately for elementary school level and secondary school level) that is based on the preceding school year. However, for the current grant award year, final LEA expenditure data is often not yet available for the preceding school year. It is generally available for the second fiscal year preceding the current grant award year. Can an LEA use expenditure data from the second fiscal year preceding the current grant award year to determine its minimum average amounts for the current grant award year (i.e., for federal FY 2007 IDEA Part B funds, 2007-08 school year expenditures compared to a calculation based on 2005-06 data), or must an LEA only compare expenditure data for one school year measured against an excess cost threshold amount calculated from the preceding school year?

Our Response: Under 34 CFR § 300.16, excess costs means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary school or secondary school student. Therefore, it would NOT be appropriate to compare a current year with information two years prior to the current year.

Excerpt from your letter:

Question Topic No. 2 -- LEA Maintenance of Effort Requirement

Under the State-level requirement, the State must not reduce the amount of State financial support "for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year." See IDEA section 645(a)(18); 34 CFR § 300.163(a). The focus is on special education and related services, or the excess costs of educating children with disabilities that arise from those children's disability-related needs.

The local-level maintenance of effort requirement, however, focuses on "the education of children with disabilities." See IDEA section 613(a)(2)(A)(iii); 34 CFR §§ 300.203(a) and (b). The

wording of this phrase could encompass not only special education and related services, or excess costs of educating children with disabilities, but also the basic cost of providing children with disabilities a public education.

Question 2: Is there a difference in the type of expenditures that must be considered before the State-level maintenance of financial support requirement at 34 CFR § 300.163(a) and the type that must be considered for the local-level maintenance of effort (MOE) requirement found at 34 CFR §§ 300.202-300.205?

Our Response: 34 CFR § 300.163(a) does not focus solely on expenditures, while 34 CFR §§ 300.202-300.205 do. The focus of 34 CFR § 300.163(a) is on the amount of State financial support for special education and related services, which would include expenditures for special education and related services made by the State as well as State funding provided to local educational agencies (LEAs) for special education and related services. Under 34 CFR § 300.203, the focus is expenditures made by the LEAs from local, or State and local, funds for the education of children with disabilities. Note that 34 CFR § 300.163(a) addresses the level of State "support" rather than "expenditures," and looks at State financial support for special education and related services rather than expenditures for the education of children with disabilities.

Excerpt from your letter:

Question Topic No. 3 -- LEA Allowable Costs

In the Department's publication of comments and discussion on the Part B regulations, one commentor stated that LEAs should be permitted to use a reasonable amount of their Part B funds to meet the Act's requirements relating to student assessment, outcomes, complaints, and compliance monitoring, mediation and due process hearings. ED's response was, "With one exception [mediation], nothing in the Act or these regulations would prevent an LEA from using its Part B allotment for the activities noted by the commentor, so long as the expenditures meet the

other applicable requirements under the Act and regulations." 71 Fed. Reg 46624 (Aug. 14, 2006). Those activities (student assessment, outcomes, complaints, and compliance monitoring, and due process hearings) are not listed under the permissive uses of funds at § 300.208.

Question 3a: Is it the Department's interpretation that these activities are allowable pursuant to § 300.202(a) because those types of activities are "in accordance with the applicable provisions of [Part 300]"?

Our Response: The activities listed in 34 CFR § 300.208(a) are in addition to any other allowable use of Part B funds under 34 CFR § 300.202(a)(1), which provides that Part B funds "... must be expended in accordance with the applicable provisions of this part." Most of the allowable expenditures typically made under Part B are not related to the purposes allowed under 34 CFR § 300.208(a) but instead, are related to the provision of direct services to children with disabilities or in support of those children. Section 300.208(a) provides a clarification to how funds may be used that might otherwise not be apparent.

Excerpt from your letter:

Question 3b: If those activities are allowable pursuant to § 300.202(a), then can IDEA Part B funds be used to pay for a reasonable amount of program costs specifically tied to an LEA meeting Part B requirements (for example, data collection and reporting to the SEA for State Performance Plan submissions), provided such use does not violate other requirements of IDEA Part B, including excess cost, maintenance of effort, supplement, nonsupplant?

Our Response: Yes.

Excerpt from your letter:

Question Topic No. 4 -- Payment of RTI-related Costs

The new regulations permit LEAs to use a process based on the child's response to scientific, research-based intervention (RTI) as a means for determining whether a child has a specific learning

disability. This RTI process could be one of multiple methods used in evaluating a child who is suspected of having a disability.

Question 4: Could an LEA use Part B funds that are not set-aside for early intervening services to pay for some or all of the cost of implementing RTI as part of a child find process?

Our Response: We will respond to your question regarding RTI at a future date.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope this provides you the information you need. If you have further questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456.

Statutes Cited

- 20 USC 1413(a)(2)(A)(iii)
- 20 USC 1401(8)

Regulations Cited

- 34 CFR 300.202(b)(2)(i)
- 34 CFR 300.16
- 34 CFR 300.163(a)
- 34 CFR 300.203(a)
- 34 CFR 300.203(b)
- 34 CFR 300.208(a)
- 34 CFR 300.202(a)(1)
- 34 CFR 300.203
- 34 CFR 300.202(a)