



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

February 8, 2018

The Honorable Mike Morath  
Commissioner  
Texas Education Agency  
1701 North Congress Avenue  
Austin, TX 78701

Dear Commissioner Morath:

We are writing in response to the Texas Education Agency's (TEA's) requests regarding the following requirements: (1) the maintenance of effort (MOE) requirements under both section 8521 of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act, for ESEA programs, and 20 U.S.C. 1413(a)(2)(A) (34 CFR § 300.203) of the Individuals with Disabilities Education Act, Part B (IDEA-B); (2) section 1127(a) of the ESEA, to enable local educational agencies (LEAs) to exceed the 15 percent carryover limitation applicable to Title I, Part A for fiscal year 2016 (school year (SY) 2016-17) funds; (3) section 421(b) of the General Education Provisions Act (GEPA), also known as the Tydings Amendment, to extend the period of availability of funds for Federal programs for fiscal year 2016 (SY 2016-17) to September 30, 2019; and (4) 34 CFR § 76.703, to extend the liquidation period for fiscal year 2015 (SY 2015-16) funds.

We have addressed each part of your request below with respect to programs under the ESEA and IDEA. If you have requests related to other programs administered by the U.S. Department of Education (the Department), please contact the appropriate office at the Department.

### **Waiver of MOE Requirements under Section 8521 of the ESEA**

Under section 8521(a) of the ESEA, MOE determinations are based on a comparison of expenditure data from the preceding fiscal year compared to the second preceding fiscal year. For MOE purposes, under 34 CFR § 299.5(c) "preceding fiscal year" is defined as the Federal fiscal year, or the 12-month fiscal period most commonly used in a State for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available." Under these requirements, expenditures in SY 2017-18 (fiscal year 2017 funds) will not affect MOE determinations until SY 2019-20 (fiscal year 2019 funds), when such expenditures will constitute the "preceding fiscal year" for MOE determinations, and SY 2020-21, when such expenditures will be the "second preceding fiscal year." Thus, given the delay in when the current year's expenditures are taken into account for ESEA MOE determinations, it is premature to consider a waiver of section 8521 of the ESEA because no LEA has yet failed to maintain effort due to Hurricane Harvey.

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*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

Under section 8521(b)(2) of the ESEA, an LEA that does not maintain effort based on MOE determinations in SY 2019-20 (i.e., based on expenditures during the July 1, 2017, to June 30, 2018, period) would not be penalized with a reduction in Federal fiscal year 2019 (SY 2019-20) ESEA funds unless the LEA also failed to maintain effort in one or more of the five fiscal years preceding July 1, 2017. If an LEA faces a reduction in fiscal year 2019 ESEA funds, TEA may request an MOE waiver under section 8521(c)(1), which gives the Department the authority to waive the MOE requirements in the case of a natural disaster or another exceptional or uncontrollable circumstance. After June 30, 2018, once TEA has identified any LEAs that failed to maintain effort due to Hurricane Harvey and that are facing a loss of fiscal year 2019 ESEA funds due to having also failed to maintain effort at least once in the five years prior to SY 2017-18, all TEA will need to do to request MOE waivers for these LEAs is to list the affected LEAs on the Department's MOE waiver request form and indicate in the form that the MOE failure was due to the hurricane.

Finally, we note that, under 34 CFR § 299.5(d)(2)(i), a State educational agency (SEA) excludes from an ESEA MOE determination supplemental expenditures of State and local funds made as a result of a Presidentially declared disaster. Therefore, if an LEA's expenditures increase significantly in SY 2017-18 due to increased spending in response to Hurricane Harvey, TEA will exclude these expenditures from MOE calculations, which will decrease the possibility that a one-time increase in SY 2017-18 expenditures will cause an LEA to fail to maintain effort in SY 2018-19 (affecting allocations for the 2020-21 school year) when expenditures from SY 2018-19 are compared to SY 2017-18 expenditures.

#### **Waiver of MOE Requirements under 20 U.S.C. 1413(a)(2)(A) (34 CFR § 300.203) of IDEA-B**

IDEA includes both a State level MOE requirement (maintenance of State financial support or MFS, under 20 U.S.C 1412(a)(18)) and a local level, or LEA MOE requirement, under 20 U.S.C. 1413(a)(2)(A). Although IDEA provides the Secretary waiver authority for the MFS requirement under 20 U.S.C 1412(a)(18), it does not provide general waiver authority nor specific waiver authority for LEA MOE. Therefore, the Department does not have the authority to waive the LEA MOE requirements under 20 U.S.C. 1413(a)(2)(A). However, if LEAs experience a decline in child count due to the disruption of the hurricane, there is flexibility for this to be considered by using a per capita LEA MOE calculation and /or taking an exception for a decrease in enrollment of children with disabilities under 20 U.S.C. 1413(a)(2)(B)(ii). The Office of Special Education Programs (OSEP) is happy to further discuss these options with you at your convenience.

#### **Waiver of the 15 Percent Carryover Limitation for Title I, Part A**

Under section 1127(b)(1) of the ESEA, an SEA may, once every 3 years, waive the 15 percent carryover limitation if the agency determines that the request of an LEA is reasonable and necessary. If TEA has already waived the limitation once in the last three years for an LEA, TEA has authority under the Education Flexibility Partnership Act (Ed-Flex), which is available through SY 2017-18, and may use this authority to waive the carryover limitation for fiscal year 2016 Title I, Part A funds. Therefore, TEA does not require a waiver from the Department in order for its LEAs to carry over more than 15 percent of fiscal year 2016 Title I, Part A funds.

### **Waiver of GEPA Section 421(b) (Tydings Amendment)**

With respect to State-administered programs under the ESEA, the Department may waive the Tydings Amendment for ESEA programs. As the period of availability for fiscal year 2016 funds does not end until September 30, 2018, it would be premature to grant a waiver of this provision at this time. In addition, section 8401(a)(1) of the ESEA requires a State to identify the Federal programs affected by the requested waiver and TEA has not yet provided a list of programs in response to the Department's request for this information; rather TEA has referred more generally to "program areas." If TEA decides, as the end of the period of availability for any ESEA program approaches, to request a Tydings waiver, please provide a list the specific programs for which TEA seeks a waiver (e.g., Title I, Part A; Title II, Part A, and Title III, Part A).

Because Hurricane Harvey and its aftermath may have impacted the TEA's ability to obligate its Migrant Student Information Exchange (MSIX) State Date Quality Grant funds (\$220,166.00), the Office of Migrant Education recommends that the TEA consider requesting a Tydings waiver to extend the period of availability of fiscal year 2015 MSIX State Data Quality Grant funds (S144G150090) authorized under Title I, Part C of the ESEA as amended by the No Child Left Behind Act of 2001. This will permit the TEA to implement activities and tasks related to MSIX for one additional fiscal year until September 30, 2018, and liquidate all remaining funds by December 30, 2018.

Please note that IDEA does not permit a waiver of the Tydings Amendment.

### **Waiver to Extend the Liquidation Period**

As an initial matter, the provision for which you are seeking a waiver in order to extend the liquidation period, 34 CFR § 76.703, governs when a State may obligate funds and not the liquidation period. The requirements governing liquidation are in 34 CFR § 200.343(b), which requires a grantee to liquidate all obligation incurred under a federal award within 90 days of the end of the period of availability. At the request of an SEA, however, the Department may extend this deadline without a waiver. In 2011 the Department provided SEAs with the information that an SEA must include in its request. This information is attached.

We appreciate the work you are doing to provide a high quality education for all of Texas's students during this time of recovery from the hurricane. If you have any questions about the responses that pertain to ESEA programs, please have your staff members reach out to their specific program contacts here at the Department. For Title I, Part A, Title II, Part A, and Title III, Part A, please reach out to Erin Shackel or Daniel Behrend of my staff at: [OSS.Texas@ed.gov](mailto:OSS.Texas@ed.gov). With respect to IDEA, please contact Leslie Clithero at [leslie.clithero@ed.gov](mailto:leslie.clithero@ed.gov).

Sincerely,

/s/

Jason Botel  
Principal Deputy Assistant Secretary,  
Delegated the Authority to Perform the  
Functions and Duties of Assistant Secretary of  
Elementary and Secondary Education

/s/

Johnny W. Collett  
Assistant Secretary Office of Special Education  
and Rehabilitative Services

cc: Cory Green, Associate Commissioner, Department of Contracts, Grants, and Financial  
Administration  
Anita Villareal, Title I State Director, Department of Grants Compliance and Oversight  
Kelly Kravitz, Director of Highly Mobile and At Risk Students Special Populations Division  
Tim Regal, Director, Instructional Leadership  
Susie Coultriss, State Director, Bilingual/ESL/Title III/Migrant  
Justin Porter, Acting State Director of Special Education

Enclosure

**EXAMPLE OF “PHASE I” LATE LIQUIDATION REQUEST TO REOPEN A GRANT AWARD THAT HAS BEEN SUSPENDED IN THE G5 GRANTS MANAGEMENT SYSTEM**

Dear

Under §80.23(b) of the Education Department General Administrative Regulations (34 C.F.R. 80.23(b)), the *[insert the name of the State educational agency]* is requesting that Grant Award *[insert grant award number(s) and the name of the program(s)]* be reopened for *[specify number of days or establish a specific end date]* so *[the SEA]* can access the G5 Grants Management System to draw down funds needed to liquidate obligations made between *[beginning date and ending date]*. *[Or provide an alternative reason for the request as applicable; e.g., need to correct an accounting error or to access Title I, Part A funds reserved for the State Academic Achievement Awards program for another year because of the additional year those funds are available for obligation beyond the normal Tydings Amendment period of availability.]*

The information needed to process this request is as follows:

		<i>[Insert name of program, CFDA number, and grant award number)]*</i>
1	Grant Award amount	
2	Current Expenditures (net drawdowns)	
3	Current balance (amount not drawn down)	
4	Percent of grant award amount not drawn down	
5	Requested amount to be drawn down	
6	Revised expenditures (net drawdowns) if request is approved	
7	Revised balance if request is approved	
8	Time period requested to complete draw down (number of days or a specific end date)	

*\* Use more than one column if there are late liquidation request for multiple programs.*

The *[name of SEA]* requests that this grant award be reopened because *[insert a clear explanation of the circumstances for why the SEA has not drawn down all of the funds made available to the State under the grant award in question prior to the December 31, 20XX deadline date for drawing down those funds. In the letter, the SEA must provide backup documentation supporting the situation it described. Where applicable, the explanation must also describe the steps the SEA is taking to ensure the timely drawdown of funds in the future. The explanation may require several paragraphs to describe the need for the late liquidation request in sufficient detail.]*

The [*name of SEA*] attests that the information provided in this request is accurate and that the funds drawn down would only be used to liquidate obligations incurred during the period those funds were available ([*month day, 20XX*] through [*month day, 20XX*]) and support costs that were allowable under applicable laws and regulations in effect during the period of availability.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

/s/

State Federal program director,  
State accounting officer, or  
other high ranking State officer