



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

JAN 15 2009

Matthew J. DeTemple
Chief Counsel
Ohio Department of Education
25 South Front Street, Mail Stop 707
Columbus, OH 43215-4183

Dear Mr. DeTemple:

This is in response to your October 31, 2008 letter. In your letter, you request, pursuant to 34 CFR §81.33, guidance on the question of whether funds under Part B of the Individuals with Disabilities Education Act (IDEA) that are set aside by the State under 34 CFR §300.704 can be used, in conjunction with other State and Federal funds, to provide technical assistance to schools and local educational agencies (LEAs) identified for corrective action or improvement under NCLB, due to their failure to meet adequate yearly progress (AYP). You further ask for confirmation concerning whether these funds can be used without regard to the prohibition on commingling IDEA Part B funds with State funds or the State-level supplanting requirement, in accordance with 34 CFR §300.704(d).

As provided for at 34 CFR §81.33(b)(3), your agency can rely on this letter as a basis for its future conduct on the questions addressed in this letter. Under section 607(e) of the IDEA, we also must inform you that our response is provided as informal guidance and is not legally binding on your agency. This guidance applies only to the factual circumstances specifically described in your letter of October 31, 2008, and only addresses the use of IDEA, Part B funds that are reserved by the State pursuant to 34 CFR §300.704(b).

Except as specifically noted to the contrary¹, the purpose of grants under IDEA, Part B is to assist States "to provide special education and related services to children with disabilities." 20 U.S.C. §1411(a)(1); 34 CFR §300.700(a). You question whether 34 CFR §300.704(b)(4)(xi) permits your State to use IDEA Part B funds to support the activities of 'State support teams' to assist schools and LEAs identified for corrective action or improvement based on the performance of children with disabilities on state assessments. A State educational agency (SEA), under 34 CFR §300.704(b)(4)(xi), can use a portion² of the funds available under 34 CFR §300.704(b)(1) to provide technical assistance to schools and LEAs, and direct services,

¹ For example, some Part B funds may be used to provide "early intervening services" to students "who have not yet been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment." 20 U.S.C. §1413(f); 34 CFR §300.226.

² Section 300.704(b)(3) requires that an SEA use "some portion" of its State 'set-aside' funds for certain specific activities. It does not specify how much a State must spend on these activities. An SEA, however, could not spend all of its 'set-aside' funds (the maximum amount of a State's 'set-aside' funds is specified in 34 CFR §300.704(b)(1)) on activities authorized, but not required, under 34 CFR §300.704(b)(4).

including supplemental educational services as defined in section 1116(e) of the Elementary and Secondary Education Act (ESEA), to children with disabilities, in schools or LEAs identified for improvement under section 1116 of the ESEA on the sole basis of the assessment results of the disaggregated subgroup of children with disabilities. The technical assistance and direct services may include providing professional development to special and regular education teachers, who teach children with disabilities, based on scientifically based research to improve educational instruction, in order to improve academic achievement to meet or exceed the objectives established by the State under section 1111(b)(2)(G) of the ESEA. Your State, under 34 CFR §300.704(b)(4)(xi), could use a portion of the funds available to it under 34 CFR §300.704(b)(1) to support the activities of the State support teams that you described in the October 31, 2008 letter, in those schools and LEAs that are identified for improvement under section 1116 of the ESEA “on the **sole basis** of the assessment results of the disaggregated subgroup of children with disabilities.” (Emphasis added.)

Please note that the authority in 34 CFR §300.704(b)(4)(xi) is limited to those schools and LEAs that are identified for improvement under section 1116 of the ESEA “on the **sole basis** of the assessment results of the disaggregated subgroup of children with disabilities.” (Emphasis added). This authority does not authorize the use of IDEA, Part B funds for any of the activities mentioned in your letter in schools or LEAs that were not identified for improvement under 1116 of the ESEA solely because of the assessment results of the disaggregated subgroup of children with disabilities, even though they may have been identified as in need of improvement on the basis of the disaggregated assessments results of children with disabilities and for other reasons, such as the assessment results of another disaggregated subgroup. This authority also would not authorize the use of Part B funds to carry out the activities mentioned in your letter throughout an LEA if the LEA itself was not identified as in need of improvement based solely on the assessment results of the disaggregated subgroup of children with disabilities, but some of the schools within the LEA were. If some schools within an LEA are identified as in need of improvement based solely on the assessment results of the disaggregated subgroup of children with disabilities, but the LEA itself is not, 34 CFR §300.704(b)(4)(xi) only permits the State to use Part B funds to provide “technical assistance . . . in order to improve academic achievement to meet or exceed the objectives established by the State under section 1111(b)(2)(G) of the ESEA” in the specific schools that were identified as in need of improvement solely because of the assessment results of the disaggregated subgroup of children with disabilities.

Several other provisions of 34 CFR §300.704(b)(4) also may be relevant to your inquiry. Section 300.704(b)(4)(i), authorizes an SEA to use a portion of the funds available under 34 CFR §300.704(b)(1) for “support and direct services, including technical assistance, personnel preparation, and professional development and training.” Section 300.704(b)(4)(viii) permits an SEA to use some of the funds available under 34 CFR §300.704(b)(1) “to support capacity building activities and improve the delivery of services by LEAs to improve results for children with disabilities.” While these authorities are limited by the general purpose of the Part B grants to activities related to providing special education and related services to children with disabilities, allocating some of the funds available under 34 CFR §300.704(b)(1) in a proportional manner would be permissible, along with other Federal and State funds, to the costs of technical assistance and capacity building activities, such as the State support teams that you describe in your letter, for schools and LEAs that are in improvement under the ESEA, but not

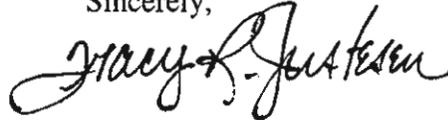
based solely on the assessment results of the disaggregated subgroup of children with disabilities. Therefore, IDEA Part B funds reserved by the State could be used for these State support teams consistent with the proportion of the activity that related to improving the provision of special education and related services to children with disabilities. The most reasonable way of accomplishing this goal would be to match the percentage of the total cost of the State support teams activity supported with IDEA Part B funds to the percentage of the student population being served that consisted of students with disabilities. For example, if school building leadership team activities are being supported and 10% of the children in the school building are children with disabilities, then 10% of the cost of the building leadership activities could be funded using funds available under 34 CFR §300.704(b)(1). Alternatively, of course, the State could apportion costs of the State support teams personnel to the IDEA, Part B funds based on the specific amount of time that the personnel spend on improving the provision of special education and related services.

You are correct that funds reserved by a State under 34 CFR §300.704(b)(1) can be used without regard to the prohibitions on commingling or State-level supplanting, as described in 34 CFR §300.704(d).

It is unclear why you raised the issue of consolidating funds in a schoolwide program, as provided for in 34 CFR §200.29. As noted previously, this response only addresses the use of IDEA, Part B funds that are reserved by the State pursuant to 34 CFR §300.704(b). Note though, that the use of IDEA, Part B funds in a schoolwide program under section 1114 of the ESEA must comply with the requirements of 34 CFR §300.206.

I hope this information is helpful to you. If you have further questions, please contact Dr. Deborah Morrow at 202-245-7456.

Sincerely,

A handwritten signature in black ink that reads "Tracy R. Justesen". The signature is written in a cursive style with a large, stylized initial "T".

Tracy R. Justesen

cc: Dr. Kathe Shelby