UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAR -7 2013

Mr. Troy Couillard
Assistant Director of Special Education
Wisconsin Department of Public Instruction
P.O. Box 7841
Madison, Wisconsin 53707-7841

Dear Mr. Couillard:

This is in response to your May 16, 2012 letter to me, requesting responses to several questions regarding using special education personnel to work with students who are not identified as students with disabilities, particularly under Wisconsin's Multi-Level Systems of Support (MLSS), i.e., the State's response to intervention (RTI) system. I apologize for the delayed response. Your questions are posed within the context of permissive use of funds, pursuant to section 613(a)(4) of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR §300.208(a)(1). Before I answer your specific questions, it will be helpful to provide some general information.

In general, IDEA Part B funds must be used only to pay the excess costs of providing special education and related services to children with disabilities, such as costs for special education teachers and administrators; related services providers; materials and supplies for use with children with disabilities; professional development for special education personnel; professional development for general education teachers who teach children with disabilities; and specialized equipment or devices to assist children with disabilities. Regardless of whether the issue involves RTI, IDEA Part B funds may not be used for non-special education instruction in the general education classroom, instructional materials for use with non-disabled children, or for professional development of general education teachers not related to meeting the needs of children with disabilities, subject to the two exceptions discussed here. The two exceptions to these rules are when IDEA Part B funds are: (1) used for coordinated early intervening services (CEIS) under 34 CFR §300.226, or (2) consolidated in a Title I schoolwide school under the Elementary and Secondary Education Act (ESEA) pursuant to 34 CFR §300.206.[1] In addition, under 34 CFR §300.208(a)(1), IDEA Part B (non-CEIS) funds provided to a local educational agency (LEA) may be used for the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a student with a disability in accordance with the student's individualized education program (IEP), even if one or more nondisabled children benefit from these services.

[1] For additional guidance on CEIS, please refer to: http://www2.ed.gov/policy/soeced/guid/idea/ceis_pg2.html For additional guidance on the implementation of RTI using Title I, Title III, and CEIS funds, please refer to: http://www2.ed.gov/programs/titleiparta/rti.pdf

Our responses to your specific questions assume that you are asking about the use of Part B IDEA funds that are not CEIS funds and that are not being used in a Title 1 schoolwide school under the ESEA. (For a discussion of the use of Part B CEIS funds in the context of RTI, please see Letter to Dr. Rick Dale, November 14, 2012). Your questions and OSEP's answers follow.

Question 1: May special education personnel provide formal interventions (tier two or three interventions; longer term beyond "incidental") in the context of MLSS to students within a small group comprised of students with and without disabilities?

OSEP's Response: It is not possible to provide a clear "yes" or "no" response to this question, as it depends on the nature of the duties to be performed by the personnel funded by IDEA Part B (non-CEIS) funds. Pursuant to 34 CFR §300.208(a), special education teachers fully funded by Part B (non-CEIS) funds may perform duties for children without disabilities if they would already be performing these same duties in order to provide special education and related services to children with disabilities. For example, a special education teacher is assigned to provide five hours of reading instruction per week to three students with disabilities consistent with those students' IEPs. The IEPs provide that the students need specialized reading instruction that is at grade level but handled at a slower pace because of auditory processing issues. The school decides that, although they are not children with disabilities, there are two general education children who would benefit from this instruction. The special education teacher must prepare lesson plans for each of these classes regardless of the number of children in the class. She may do so and conduct the class for all five children because she is only providing special education and related services for the three children with disabilities and the two children without disabilities are benefiting from that work. However, if fully funded by Part B IDEA (non-CEIS) funds, this teacher may not grade papers, spend time on parent teacher conferences, or perform any functions for the children without disabilities not otherwise required as part of the provision of special education and related services to children with disabilities. In other words, 34 CFR §300.208(a) does not permit special education teachers fully funded by Part B (non-CEIS) funds to perform duties other than special education and related services.

An LEA or school may wish to consider split funding teachers from special education funds, general education funds, and CEIS funds. This funding mechanism offers full flexibility for a particular teacher to work with diverse groups of students, regardless of disability or intervention status. If a teacher is providing special education, general education, and RTI interventions and is supported by funds from several sources, an LEA must document separately, consistent with OMB Circular A-87, the amount of time the teacher spends providing services to students with disabilities, services to students who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment, and services to nondisabled students who do not need additional support, to ensure that IDEA Part B funds are properly expended. See OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments (05/10/2004), Attachment B, 8.h., relocated to 2 CFR Part 225, Appendix B, 8.h.

Question 2: May special education personnel provide formal interventions (tier two or three interventions; longer term beyond "incidental") in the context of MLSS to students within a small group comprised of solely of students without disabilities?

OSEP Response: No. Except when the funds are being used in a Title I schoolwide program, a special education teacher paid solely with IDEA Part B (non-CEIS) funds may not provide interventions to a small group comprised only of students without disabilities.

Question 3: May special education personnel within the context of co-teaching/team teaching and inclusion have equal responsibility for the instruction of students not identified as students with disabilities? Equal responsibility would be defined as whole group instruction, lesson plan development, and grading.

OSEP Response: OSEP encourages States and LEAs to use a variety of service delivery models to meet their responsibilities to educate children with disabilities in the least restrictive environment, provided all requirements of Part B are met. As discussed above, 34 CFR §300.208(a)(1) permits LEAs to use IDEA Part B (non-CEIS) funds for the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a student with a disability in accordance with the student's IEP, even if one or more nondisabled children benefit from these services. Therefore, for example, IDEA Part B (non-CEIS) funds could be used for lesson plan development if the same lesson plans will be used for children with disabilities and general education children. In other situations, determinations as to whether the expenditure of IDEA Part B (non-CEIS) funds is allowable would have to be made on a case by case basis. However, this provision does not permit the special education teacher to perform functions that go beyond the provision of special education and related services. Therefore, based on your description of the duties, the special education teacher could not grade papers for students without disabilities.

As noted above, LEAs may want to consider funding a teacher from a variety of sources in order to provide maximum flexibility in the classroom. If a teacher is providing special education, general education, and RTI interventions and is supported by funds from several sources, an LEA must document separately, consistent with OMB Circular A-87, the amount of time the teacher spends providing services to students with disabilities, services to students who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment, and services to nondisabled students who do not need additional support, to ensure that IDEA Part B funds are properly expended.

Question 4: May special education personnel be permanent members of collaborative MLSS teams that determine whether to refer a student to special education based on data collected from interventions?

OSEP Response: We assume your question is whether special education personnel fully funded by IDEA Part B (non-CEIS) funds may be a permanent member of such a team. Pursuant to 34 CFR §300.111, the State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated. Under the circumstances you describe, in order to ensure that the child find provisions are met under 34 CFR §300.111, a State may allow special

education personnel to be permanent members of collaborative MLSS teams that determine whether to refer a student for an evaluation to determine whether the students is a student with a disability based on data collected from interventions.

Question 5: May special education personnel be permanent members of collaborative MLSS teams that plan instructional interventions for students not identified as students with disabilities?

OSEP Response: In the context you raise of a collaborative team that is working with struggling learners, special education personnel may share their expertise in addressing the needs of children with disabilities with other personnel, as this may be considered professional development for general education teachers to assist them in identifying, locating, and evaluating children with disabilities in accordance with the child find responsibilities in 34 CFR §300.111. However, except for services that are a part of a schoolwide program as authorized under 34 CFR §300.206, personnel paid with IDEA Part B (non-CEIS) funds may not perform duties solely designed to help meet a child's needs in the general education classroom for a student who is not currently identified as needing special education or related services, but needs additional academic and behavioral support to succeed in a general education environment. Personnel paid with Part B CEIS funds may perform duties, including planning instructional interventions, for students who are not currently identified as needing special education and related services, but who need additional academic and behavioral supports to succeed in a general education environment.

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.

If you have additional questions, please do not hesitate to contact Jennifer Wolfsheimer, at 202-245-6090 or by email at Jennifer.Wolfsheimer@ed.gov.

Sincerely,

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

cc: State Director of Special Education