



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

THE ASSISTANT SECRETARY

Honorable Joseph B. Morton
Superintendent of Education
Alabama Department of Education
Gordon Persons Building
P.O. Box 302101
Montgomery, Alabama 36130-2101

APR - 7 2011

Dear Dr. Morton:

This is in response to your letters to Ruth E. Ryder, who is now Deputy Director of the Office of Special Education Programs (OSEP) at the United States Department of Education (Department), that were received on September 30, 2010, and November 12, 2010, and additional information provided by Mabrey Whetstone, Ph.D., Director, Special Education Services, Alabama Department of Education, in a letter dated October 15, 2010. We appreciate the time and effort your staff took to provide the supplemental information.

Under 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a), a State must not reduce the amount of State financial support for special education and related services for children with disabilities, or made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. While we are permitted to waive these requirements for a State, for one fiscal year at a time, if we determine that granting a waiver would be equitable due to exceptional or uncontrollable circumstances (such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1)), we do so carefully and reluctantly, given the importance we place on maintaining State financial support for our most vulnerable students. However, regardless of whether a State receives a waiver under this authority, the State has a continuing obligation to ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities, as required in 20 U.S.C. §1412(a)(1) and 34 CFR §300.101.

State Fiscal Year 2009

Your first letter, received on September 30, 2010, requested that the Department waive the requirement that the State maintain State financial support for special education and related services for children with disabilities for the State Fiscal Year (SFY) 2009 (October 1, 2008–September 30, 2009) for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1). However, the State withdrew that request in its October 15, 2010, letter. Thereafter, on November 12, 2010, the State submitted documentation that the State met its required level of State financial support for SFY 2009. Accordingly, the Department is not acting on the State's request for a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) for SFY 2009.

State Fiscal Year 2010

In the materials included with its November 12, 2010, letter, the State requested a waiver in the amount of \$9,204,462 for State financial support for special education and related services for children with disabilities for SFY 2010 (October 1, 2009-September 30, 2010) for the IDEA under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1). This represented a 1.45 percent reduction in State financial support for special education and related services for SFY 2010 when compared to SFY 2009. From the information your agency provided, we are aware that the State experienced a significant decrease in revenues from SFY 2009 to SFY 2010. The State's revenues are collected through two funds--the Education Trust Fund (ETF), which provides funds for education, and the General Fund. From SFY 2009 to SFY 2010, the ETF experienced a drop in revenues of approximately \$462 million, which represented an 8.13 percent decrease. In addition, the General Fund experienced a drop in revenues of approximately \$174 million, which represented a 10.89 percent decrease over the same time period. The State reduced its appropriations across agencies, with an average 9.32 percent reduction in all appropriations from SFY 2009 to SFY 2010, including an 8.41 percent reduction in appropriations in education and an 8.46 percent reduction in elementary and secondary education for that same time period. While it is regrettable that these cuts were made to education funding, we recognize that the reduction in financial support for special education and related services was relatively small compared with cuts to other areas of education.

In reviewing your request, as part of our examination of "equitability," we considered all of the information provided by the State in all of its submissions--including that the percent reduction in State financial support for special education and related services was less than the average percent reduction in appropriations across agencies and less than the percent reduction in revenues. We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a FAPE available to all children with disabilities in SFY 2010.

Based on all of the information discussed above, I have determined that it is equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting Alabama to reduce its amount of State financial support provided for special education and related services for SFY 2010 by \$9,204,462.

We remind the State that if the Department determines through an audit, or other means, that the State failed to maintain State financial support at the level permitted by this waiver, the Department will be required to reduce the allocation of funds to the State under section 611 of the IDEA for any fiscal year following the fiscal year for which the State fails to maintain effort by the same amount by which the State fails to meet the requirement. 20 U.S.C §1412(a)(18)(B) and 34 CFR §300.163(b). In addition, the Department may take action to recover funds as provided for in section 452(a)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. §1234a(a)(1).

Further, as provided in 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d), the amount of State financial support required of the State in SFY 2011 is the same amount that would have been required in the absence of this waiver (i.e., \$634,976,935). We also want to make clear to the State that, when making decisions about its level of State support for special education and related services in SFY 2011, the State should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services. Indeed, since the advent of the State's economic downturn, the State has had an opportunity to examine its sources and amounts of revenues and to plan accordingly, consistent with its obligations under the IDEA.

As you know, the State must ensure that LEAs do not count ARRA Part B funds as "State" or "local" funds for the purpose of determining whether an LEA has met its supplement/not supplant and maintenance of effort requirements at 34 CFR §§300.202(a)(3) and 300.203. Further, if it is discovered, through means such as monitoring or auditing, that an LEA has not met these requirements, the Department will seek to recover funds from the State educational agency (SEA), in an amount equal to the amount by which the LEA did not meet the requirements. The amount recovered must be paid from non-Federal funds.

The Department may undertake additional monitoring of Alabama's implementation of Part B of the IDEA should we believe that to be necessary to assess whether a FAPE is still being made available to all eligible children with disabilities, even though the State has been granted the waiver described above. In addition, in light of the Alabama Special Education Advisory Panel's duties in 20 U.S.C. §1412(a)(21)(D), particularly its duty in 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter.

To ensure that the public is fully informed regarding the granting of this waiver, OSEP requires the SEA to prominently post on its Web site the State's letters to the Department requesting waivers for State financial support for SFY 2010 and this letter. In addition, OSEP is requiring the State to report to your OSEP State Contact on July 1, 2011, and October 1, 2011, responses to the following questions:

1. What action is the State taking, or did the State take, to ensure that all eligible children with disabilities are receiving a FAPE during the current school year (2010-2011), including monitoring and reviewing complaints filed or hearings requested? and
2. How will the State communicate with stakeholders regarding the waiver request and the State's actions to ensure that all eligible children with disabilities are receiving a FAPE?

We appreciate your commitment to serving children with disabilities and look forward to our continued collaboration on their behalf.

Sincerely,



Alexa Posny, Ph.D.

cc: Alabama State Special Education Advisory Panel