



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

Hanna Skandera
Secretary of Education
New Mexico Public Education Department
Jerry Apodaca Education Building
Santa Fe, New Mexico 87501

JUN - 3 2013

Dear Secretary Skandera:

This letter responds to the State of New Mexico's (State or New Mexico) requests for waivers from the requirement to provide State financial support for special education and related services for State fiscal years (SFY) 2010 (July 1, 2009 through June 30, 2010) and SFY 2011 (July 1, 2010 through June 30, 2011) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1).¹ Specifically, on August 10, 2012 New Mexico sought waivers in the amount of \$15,287,339.55 for SFY 2010 and \$12,900,658.37 for SFY 2011. On September 24, 2012, New Mexico revised its waiver request for SFY 2011 to \$28,187,997.52. We appreciate the time and effort New Mexico took to provide the initial and supplemental data and information.²

¹ The requirement that a State not reduce the amount of State financial support made available for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, is in 20 U.S.C. §1412(a)(18)(A). That requirement is known as "maintenance of State financial support" or, more commonly, "maintenance of effort." For purposes of this letter, references to maintenance of effort or maintenance of fiscal support refer to the requirement in 20 U.S.C. §1412(a)(18)(A).

² The New Mexico Public Education Department (NMPED) first submitted data to the Department on March 7, 2012, which indicated a failure to maintain financial support in SFYs 2010 and 2011. After a series of telephone and email communications between NMPED and Department staff, NMPED submitted requests for waivers for both SFY 2010 and SFY 2011 on August 10, 2012 (supplemented by additional letters on August 17, 2012). The Department submitted additional questions to NMPED on September 11, 2012. NMPED responded on September 24, 2012. The Department contacted NMPED on December 4, 2012 to provide informal notice of a preliminary decision on NMPED's waiver requests. NMPED asked for, and received, 30 days to submit additional information. Prompted by information provided by NMPED in the December 4, 2012 conversation, the Department submitted additional questions to NMPED on December 10, 2012. On December 20, 2012, NMPED asked for a one week extension to January 11, 2013, which was granted. On January 10, 2013, NMPED asked for an additional extension to February 1, 2013, which was granted. On January 29, 2013, NMPED asked for an additional extension to February 14, 2013, which was granted. On February 13, 2013 NMPED asked for a meeting to present its data and information. At the Department's request, NMPED provided the information in writing on February 18, 2013. At the February 22, 2013 meeting, the Department asked for additional information in response to new substantially different data and claims made by NMPED in its February 18, 2013 submission. NMPED provided the additional information on February 28, 2013 and March 2, 2013. During a phone conversation on April 3, 2013, the Department raised additional questions and NMPED responded to those questions by letter on April 11, 2013. In addition to the communications listed above, there have been numerous phone conversations and email communications between NMPED and the Department during this period.

As an initial matter, we note that, through its many submissions, the State submitted different sets of data and claims in support of, and in some cases, inconsistent with, its original waiver requests. While some of the additional information submitted by the State was in response to specific questions from U.S. Department of Education (Department) staff, much of the data and information, and many of the claims, submitted by New Mexico on February 18, 2013, were substantially new. Because the Department must have valid and reliable data on which to base its decisions, in the Department's April 22, 2013 communication with the State, we asked NMPED to provide data "certified by the appropriate official in NMPED, or the appropriate official in the State of New Mexico." NMPED did not certify the data it provided in its May 3, 2013 response to the Department. However, in order to process the State's request in a timely manner, the Department is proceeding, using, in part, the data included in the State's May 3, 2013 response.³

Based on the data and information supplied by NMPED, the Department has determined that it is equitable, due to exceptional or uncontrollable circumstances, to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), permitting New Mexico to reduce the amount of State financial support for special education and related services, or otherwise made available because of the excess costs of educating those children, by \$48,094,194 for SFY 2010. In addition, the Department has determined that it is not equitable due to exceptional or uncontrollable circumstances to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), permitting New Mexico to reduce the amount of State financial support for special education and related services, or otherwise made available because of the excess costs of educating those children, by \$34,120,713 for SFY 2011.

Finally, the Department has determined that New Mexico's required level of State financial support for special education and related services in SFYs 2010 through 2013 is the level made available by the State in SFY 2009, or \$461,998,168.⁴ (The differences between the amount of the waivers requested by New Mexico and the amount of the waiver granted in SFY 2010 and denied in SFY 2011 are a result of decisions the Department made, discussed below, relating to the claims made by New Mexico that affect the calculation of the amount of required State financial support for special education and related services for each of these years.)

Waiver Requests for SFYs 2010 and 2011

A State is eligible for a grant under Part B of the IDEA if the State submits a plan (application) that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets certain conditions. 20 U.S.C. §1412(a) and 34 CFR §300.100. Specifically, 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 otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. New Mexico has provided such

³ Should the Department determine, through audit or any other means, that the data provided by NMPED were inaccurate, we reserve the right to reopen consideration of the issues discussed in this letter, and take appropriate actions.

⁴ This figure assumes that the State maintained financial support in SFY 2009.

assurances in its applications for Part B funds in all relevant years and the Department awarded Part B funds to the State based, in part, on those assurances. This eligibility requirement provides LEAs within the State with an expectation of at least level State funding for special education and related services.

Despite these assurances, on December 4, 2012, NMPED asserted in a telephone conversation with Department staff that New Mexico may reduce the amount of State financial support for special education and related services under certain circumstances, including when children with disabilities move from one level of service to another, or otherwise need less costly services. This assertion is unsupported by the statute. Accordingly, when weighing the equities of New Mexico's waiver request submitted under 20 U.S.C. §1412(a)(18)(C)(i), the Department may not, and did not, take into consideration these assertions made by NMPED. Rather, another provision in the IDEA allows the Department to grant a waiver of the requirement to maintain State financial support if a State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education (FAPE), notwithstanding the State's failure to maintain fiscal effort. 20 U.S.C. §1412(a)(18)(C)(ii). This other waiver provision, *not sought* by New Mexico, provides fiscal relief to States that wish to reduce the amount of State financial support made available for special education and related services and also provide a FAPE to all eligible children with disabilities in the State.

Regardless of whether a State is granted a waiver, a State has a continuing obligation to ensure that a FAPE is made available to all eligible children with disabilities, as required under 20 U.S.C. §1412(a)(1) and 34 CFR §300.101. Thus, while we are permitted to waive the requirement in 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a) 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.

SFY 2010

In reviewing the August 10, 2012, request for a waiver, as part of our review of "equitability," we considered all of the information provided by the State in all of its submissions. Based on that data and information, we have determined that New Mexico experienced a precipitous and unforeseen decline in its financial resources in SFY 2010. General Fund recurring revenues decreased 9.79 percent in SFY 2010 when compared to SFY 2009. Total State recurring appropriations were higher than recurring revenues in SFY 2010, necessitating a sizable transfer of funds out of the State's General Reserve Fund. The State finished SFY 2010 with \$278 million in that Fund, representing 5.2 percent of recurring appropriations in that year. Although a \$278 million balance at the end of the year in New Mexico's General Reserve Fund is substantial, as late as January 2010, the State was projecting a 2.5 percent ending balance in its rainy day fund, and the volatility of revenue projections during a year when State revenues were declining at a precipitous rate made it difficult for New Mexico to predict accurately the amount it would maintain in its rainy day fund at the end of that fiscal year. To be clear, when weighing the equities of a waiver request for a fiscal year, particularly when a State had a surplus or

ending balance that year, the Department does not take a rigid formulaic approach. Rather, we carefully consider all the factors raised by a State and examine each of them as they relate to one another.

Having determined that a State experienced an exceptional or uncontrollable circumstance, we examine whether a State treated special education equitably when compared to other State programs. In the case of New Mexico, we compared appropriations in SFY 2010 to appropriations in SFY 2009, and conclude that it did so. The percentage decrease in State financial support for special education and related services (10.4 percent) was smaller than the average percentage decrease in recurring appropriations across agencies (11.2 percent) in SFY 2010 when compared to the immediate prior year, SFY 2009.

In addition, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act 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.

SFY 2011

In reviewing the August 10, 2012, request for a waiver for SFY 2011, as part of our review of "equitability," we considered all of the information provided by the State in all of its submissions. Based on that data and information, we have determined that New Mexico did not experience an exceptional or uncontrollable circumstance, such as a precipitous and unforeseen decline in its financial resources, in SFY 2011. Indeed, the State's data establish that General Fund recurring revenues *increased* 1.66 percent in SFY 2011 when compared to SFY 2009. (Moreover, General Fund recurring revenues *increased* 12.7 percent in SFY 2011 when compared to SFY 2010.)

In contrast to the fiscal situation in SFY 2010, in SFY 2011 General Fund recurring revenues exceeded recurring appropriations by \$195,153,200. The State's data also demonstrate that, at the end of SFY 2011, the State had accumulated \$500,800,000 in its General Reserve Fund and, therefore, had more than sufficient revenues to maintain fiscal effort at the required level. Because the State's recurring revenues increased from SFY 2009 to SFY 2011 (and increased from SFY 2010 to SFY 2011), and the State accrued substantial funds in SFY 2011 that were available for special education and related services, the Department cannot conclude that the State experienced an "exceptional or uncontrollable" circumstance in SFY 2011. Accordingly, I have determined that it is not equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) permitting New Mexico to reduce State financial support for special education and related services for SFY 2011.

SFYs 2012, 2013, and 2014

While this letter and notice relate only to the State's request for waivers for SFYs 2010 and 2011, the Department notes that the data provided by NMPED indicate that the State failed to maintain State financial support for special education and related services in SFY 2012 by approximately \$26.4 million. The Department is also concerned that the State may not maintain State financial support in SFY 2013, which ends on June 30, 2013. Finally, we note that the

State's application for FFY 2013 Part B IDEA, grant funds does not provide the required assurance related to maintenance of State financial support for special education and related services for the 2013 – 2014 program year (SFY 2014). Given the number of claims and issues raised by NMPED, the Department believes it is reasonable to provide NMPED time to review this letter and consider whether it intends to seek a waiver for SFY 2012, take all steps necessary under New Mexico law to ensure that the State maintains State financial support for special education and related services in SFY 2013, and provide the required assurance in its FFY 2013 Part B grant application prior to July 1, 2013. The Department will be addressing each of these issues with NMPED in the near future.

Calculation of State Financial Support

Background

On December 10, 2012, the Department asked NMPED about the methodology the State used to calculate the amount of State financial support made available for special education and related services. Specifically, on that date, the Department noted apparent discrepancies between NMPED's prior submissions regarding the amounts made available through New Mexico's State Equalization Guarantee (SEG) school funding formula and the amounts described in publicly available documents published by NMPED.⁵

In the State's February 18, 2013 response, and subsequently in response to questions by the Department,⁶ NMPED provided information related to the following issues or claims: (1) flexibility in 20 U.S.C. §1413(j); 34 CFR §300.230; (2) "workload reductions"; (3) "retirement swaps"; (4) the State's program for 3- and 4-year-old developmentally disabled students⁷; (5) Training and Experience Index; and (6) treatment of funds made available under the State Fiscal Stabilization Fund program and the Education Jobs program. Finally, NMPED asserts that, in a year following a failure to maintain State financial support, its required level of State financial support for special education and related services drops to the amount made available in the year in which it failed to maintain State financial support. Each of these issues is discussed below.

⁵ Among others, "New Mexico Public School Finance Statistics, 2009-2010 Actual and 2010-2011 Estimated," School Budget and Finance Analysis Bureau, New Mexico Public Education Department. Accessible online at <http://ped.state.New Mexico.us/ped/SchBudg-StatBooks.html>

⁶ Representatives from the New Mexico Legislature contacted the Department and called into question whether the data included in the State's February 18, 2013 communication accurately captured all of the State financial support made available for special education and related services through the SEG. In an exercise of due diligence, the Department sought additional information from NMPED to clarify the issues raised by the members of the legislature.

⁷ State officials have referred to these students as "developmentally disabled" or "developmentally delayed." Due to the discrepancy, we use "developmentally disabled" for consistency.

Exercise of the Flexibility under 20 U.S.C. §1413(j); 34 CFR §300.230

On February 18, 2013, NMPED submitted a letter notifying the Department that NMPED was exercising the flexibility in 20 U.S.C. §1413(j); 34 CFR §300.230 (hereinafter referred to as 34 CFR §300.230) for SFY 2010.⁸ This provision provides that “[f]or any fiscal year for which the allotment received by a State under § 300.703 exceeds the amount the State received for the previous fiscal year and if the State in school year 2003-2004 or any subsequent school year pays or reimburses all LEAs within the State from State revenue 100% of the non-Federal share of the costs of special education and related services, the SEA, notwithstanding §§ 300.162 through 300.163 (related to State-level nonsupplanting⁹ and maintenance of effort), and § 300.175 (related to direct services by the SEA) may reduce the level of expenditures for the education of children with disabilities by not more than 50 percent of such excess.” 34 CFR §300.230(a). However, “the Secretary prohibits the SEA from exercising the authority in [34 CFR §300.230(a)]” if the “Secretary determines that an SEA is unable to establish, maintain, or oversee programs of FAPE that meet the requirements of [Part B], or that the State needs assistance, intervention, or substantial intervention under § 300.603.” 34 CFR §300.230(b).

In accordance with 34 CFR §300.230(b), the Department prohibits NMPED from exercising the authority in 34 CFR §300.230(a) for SFY 2010 because the Department determined in June 2009 and in June 2010 that the State did not meet the requirements of Part B of the IDEA.¹⁰ NMPED’s February 18th submission stated that New Mexico “received ‘meets requirements’ status under 34 CFR § 300.603 for SFY 2010, the year of the reductions.” New Mexico seeks to rely on a determination of “meets requirements” that it received in June 2011, almost a full year after the end of SFY 2010, because the State claims that the June 2011 determination was “for SFY 2010.” This is incorrect. Consistent with the requirement in 34 CFR §300.603(b), the

⁸ In that letter, NMPED noted SFY 2009 budgeted expenditures of \$351,208,152 and claimed \$28,447,658.89 in allowable reductions from 15 separate programs. NMPED claimed that 34 CFR §300.230 therefore allowed a reduction of State-level expenditures to \$322,760,494 in SFY 2010. NMPED then used the calculated amount of the reductions (\$28,447,658.89) – which used budgeted expenditures – and applied it against amounts made available (appropriations) to claim that the required level of effort under 34 CFR §300.230 was actually \$406,749,670. NMPED then provided data indicating that \$422,912,455.51 was made available in SFY 2010, \$414,175,550.27 in SFY 2011, and \$405,826,449.08 in SFY 2012. The flexibility in 34 CFR §300.230 permits an eligible State to reduce actual expenditures -- not budgeted expenditures -- made by the State in the year that the State exercises the flexibility. In the State’s May 3, 2013 letter to the Department, NMPED provided actual expenditures for each of SFYs 2009, 2010, and 2011. Those data indicated that the calculated level of State expenditures on special education and related services decreased by \$34,453,186 from SFY 2009 to SFY 2010.

⁹ The Department is not raising issues with the requirement to supplement and not supplant in this letter; all otherwise relevant references to that requirement are omitted from this letter.

¹⁰ NMPED raised the possibility of exercising the flexibility in 34 CFR §300.230 with Department staff informally in the spring of 2012. Thereafter, the Department advised NMPED informally that it did not meet the criteria in 34 CFR §300.230(a) because it did not receive a “meets requirement” determination in June 2010, and therefore, could not use the flexibility in that provision of the IDEA for SFY 2010. New Mexico also did not receive a “meets requirements” determination in June 2009, immediately preceding its SFY 2010. When making a decision whether to exercise the flexibility in 34 CFR §300.230(a), it is reasonable for a State to rely on a determination that it receives during, or immediately before, the State fiscal year in which it seeks to exercise the flexibility.

Department's annual determination in June 2011 of "meets requirements" was "based on the information provided by the State in the State's annual performance report, *information obtained through monitoring visits, and any other public information made available...*" (emphasis added). In other words, when the Department made its June 2011 determination, it did not consider only data in the State's annual performance report that covered the 2009 – 2010 school year.¹¹ Rather, the Department considered monitoring and other information about New Mexico available to the Department through the date of its June 2011 determination, well after the end of SFY 2010. Accordingly, the State may not rely on a determination made almost one year after the end of its State fiscal year in order to exercise the flexibility in 34 CFR §300.230.

In addition, NMPED has not established that it "pays or reimburses all LEAs within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services."¹² Based on information from Don Moya, Chief Financial Officer, Albuquerque Public Schools (APS), we understand that at least some LEAs within New Mexico commingle State and local education funds and do not, or cannot, separately account for which funding stream supports the non-Federal share of special education and related services. Presumably, because LEAs do not track separately State and local dollars for special education and related services, NMPED sought to establish that it pays or reimburses 100 percent of the non-Federal share of special education and related services, by demonstrating that the amount of State funds made available for special education and related services to each LEA through the State funding formula, the SEG, is greater than the amount of reported LEA expenditures on the education of children with disabilities (MOE Expenditures). To put it more simply, NMPED's position is that if it makes available \$10 to an LEA for special education and related services and the LEA reports spending \$10 or less on the non-Federal share of the costs of special education and related services, then the State has established that it pays for or reimburses that LEA 100 percent of the non-Federal share of the costs of special education and related services.¹³

To support its claim, on February 28, 2013, NMPED submitted email communications between six LEAs (selected by NMPED) and NMPED, in which the LEAs were asked to verify data provided to them by NMPED. These data included "MOE Expenditures" for SFY 2010 and the SEG special education allocation for that year for each LEA. In each instance, the SEG special education allocation to the LEA (State financial support for special education and related services) was greater than the MOE Expenditures reported by the LEA. All six LEAs verified

¹¹ Indeed, New Mexico's annual performance report includes data from more than one school year.

¹² On April 10, 2012, in a telephone call between NMPED and the Department, NMPED indicated that local funds were used to support special education and related services in the State, but that they were for special education and related services beyond those required to be provided. NMPED subsequently withdrew that statement. In addition, in a February 26, 2013 telephone conversation between representatives from the New Mexico Legislature and the Department, the representatives indicated that local funds were used to support special education and related services in the State. In a telephone call from (APS) on February 22, 2013, the Chief Financial Officer, Don Moya informed the Department that local funds are used for special education and related services in APS. While the Department does not rely on these statements, they prompted questions and concerns about whether New Mexico may appropriately exercise flexibility under 34 CFR §300.230.

¹³ We also note that NMPED reported that it was "impossible to accurately determine the amount spent annually [by LEAs]." This calls into question all of the State's LEA MOE Expenditure calculations.

the information provided to them by the NMPED. However, the communication from APS submitted by NMPED included a note that “the disability allocation will always exceed the MOE expenditures because a significant group of ancillary providers, social workers, are included in the allocations, but they are not included in the allowable expenditures for MOE. In addition, the MOE expenditures exclude benefits.” Thus, APS reported, in effect, that the LEA MOE Expenditures do not include all of the funds expended by APS for the education of children with disabilities.

Publicly available documents published by NMPED¹⁴ support and explain the information provided in APS’ note. Those documents indicate that NMPED calculates LEA MOE compliance under the IDEA by only counting expenditures with specific job classification codes and object codes in the NMPED’s Operating and Budget Management System (OBMS). The document indicates that NMPED permits LEAs to include in their MOE Expenditures funds expended for only job classification codes 51100 (Salaries Expense), 51200 (Overtime Expense), and 51300 (Additional compensation). The job code for “Guidance Counselor/Social Worker” is not listed among the job codes included in calculation of LEA MOE.¹⁵ NMPED also does not include expenditures under object codes related to Educational Retirement, FICA Payments, Medicare Payments, Health and Medical Premiums, Life, Dental, Vision, or Worker’s Compensation, among others.

On April 11, 2013, in response to questions raised by the Department, NMPED addressed this issue and confirmed that it does not include the cost of benefits when calculating LEA MOE Expenditures, but permits LEAs that have the capability to include these figures if approved by NMPED. NMPED further explained that “[i]n SFY 2010, the state provided approximately \$385 million for special education in formula funding while districts spent about \$305 million. The difference includes sufficient funding to cover the cost of benefits on a statewide basis.”¹⁶ NMPED also noted in its April 11, 2013 letter that “the [OBMS] does not segregate benefits, either mandatory or voluntary, by employee type including teachers, related service providers and instructional assistants in the accounting system.”

The Department was not satisfied with NMPED’s explanation, and in its April 22, 2013 letter to NMPED, stated that “benefits for special education and related services providers represent a considerable source of financial support for special education and related services, and must be included in the state’s calculation of LEA expenditures.” Accordingly, that letter asked NMPED

¹⁴ “New Mexico’s Integrated Special Education Accountability System – A Comprehensive Monitoring Approach to Improving Outcomes for Students with Disabilities,” November 2011. Available online at <http://www.ped.state.New Mexico.us/SEB/technical/ISEASpercent20Novemberpercent202011.pdf>

¹⁵ In a telephone conversation on April 8, 2013, representatives from NMPED also indicated that social workers are not included in the State’s LEA MOE calculations, and explained in its April 11, 2013 letter that, “since social workers provide services for a number of different students and programs school-wide and district-wide are not specifically or solely assigned to special education students, it is not possible at the state level to track the individual assignments of each social worker.”

¹⁶ The Department notes that this amount included \$34,021,045 in State Fiscal Stabilization Funds and that the State is not permitted to treat these funds as State funds for this purpose, as discussed more fully below.

to devise a methodology for calculating the amount expended by LEAs for benefits, provide a narrative description of that methodology, and provide a set of certified data reflecting the new methodology.

NMPED's May 3, 2013 response did not certify the data it provided, and NMPED objected to the inclusion of benefits, even if based on a reasonable estimate, explaining that the State's accounting system does not disaggregate benefits by type of teacher, "making it impossible to accurately determine the amount spent annually." Nevertheless, to comply with the Department's request, NMPED proposed an estimate of 18.2 percent for benefits (for SFY 2010). NMPED developed this estimate by first determining the proportion of total statewide expenditures for salaries. NMPED then applied that percentage (66.7 percent for SFY 2010) to the calculated LEA MOE Expenditures. This reduced number was then multiplied by 18.2 percent (for SFY 2010) in order to calculate the amount expended on mandatory benefits by LEAs for special education and related services.¹⁷ For the reasons outlined in footnote 17, the Department does not believe that the methodology proposed by NMPED is reasonable, and in fact, underestimates the amount of funds that LEAs expend for special education and related services. Nevertheless, using the State's own methodology to estimate the cost of benefits, the data establish that the State does not pay 100 percent of the costs of special education and related services in two (Roswell and Las Cruces) of the six LEAs selected by NMPED as examples.¹⁸

For all of the reasons discussed above, NMPED has not established that New Mexico "pays or reimburses all LEAs within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services." Therefore, as indicated above, pursuant to

¹⁷ NMPED declined to approximate expenditures on all benefits, arguing that estimating "voluntary benefits (e.g. medical, dental or vision insurance, employee assistance or prepaid legal services) is not practical because of the differences among individual employees." The Department has serious concerns about this methodology and believes that it underestimates the amount actually expended by LEAs on benefits for special education and related services providers. Publicly available documents indicate that NMPED calculates LEA MOE compliance under the IDEA by using specific job classification codes and object codes related to compensation. See footnote 14. Specifically, NMPED's current LEA MOE calculations only include salaries, overtime, or additional compensation. Therefore, 100 percent of the calculated LEA MOE Expenditures are "salaries," not the 66.7 percent that NMPED proposes to use.

Additionally, according to publicly available documents published in the NMPED School Finance & Analysis Bureau's Stat Book for 2009-2010, State wide expenditures on benefits in that year totaled approximately 31.4 percent of State wide expenditures on compensation. Therefore, 18.2 percent likely underestimates the actual amounts expended on benefits. Across all funds in SFY 2010, expenditures for salaries totaled approximately \$1,896.1 million and expenditures for benefits totaled approximately \$595.3 million, for an average benefit ratio of 31.4 percent. According to NMPED, LEAs expended \$278.6 million on salaries for special education and related services providers in 2009-2010. Assuming only 28 percent for benefits (below the average), that totals \$356.6 million in the cost of special education and related services. However, in that year, New Mexico only made available \$351.6 million through the SEG.

¹⁸ Even when including only an 18.2 percent estimated amount for benefits, the State provided Las Cruces with \$28,738,426 for special education through the SEG, but Las Cruces would have accumulated \$29,915,883 in LEA MOE Expenditures. When including only an 18.2 percent estimated amount for benefits, the State provided Roswell with \$9,538,135 for special education through the SEG, but Roswell would have accumulated \$9,856,144 in LEA MOE Expenditures.

34 CFR §300.230(b), the Department prohibits New Mexico from exercising the authority in 34 CFR §300.230(a) for SFY 2010.

Workload Reduction

In its February 18, 2013 letter, NMPED “adjusted the data previously submitted to OSEP on June 20, 2012 to adjust for the changes in level of services.” Specifically, the State sought to amend its amount of State financial support for special education and related services in SFYs 2010, 2011, and 2012 on the basis of changes in the FTE/Membership counts for Ancillary service providers, A/B Level students with disabilities, C Level students with disabilities, D Level students with disabilities, and 3- and 4-year-old Developmentally Disabled students. In other words, NMPED sought to reduce its required level of State financial support by claims that as children with disabilities moved from one category to the next, they needed less costly services. However, as noted above, the IDEA does not permit States to make adjustments or otherwise calculate their compliance with 20 U.S.C. §1412(a)(18)(A) on the basis of these claims. See the discussion above of the waiver provision in 20 U.S.C. §1412(a)(18)(C)(ii). Further, we note that the service levels of children with disabilities necessitated an *increased* cost through the SEG in SFYs 2010 and 2011. However, these increased costs were offset by reductions in ancillary service providers. Therefore, NMPED is seeking to adjust its required levels of State financial support based largely on reductions in personnel, and not based on the required service levels of students.¹⁹ In any event, New Mexico may not take “workload reduction” into consideration when calculating the amount of State financial support made available for special education and related services.

Retirement Swap

NMPED’s February 18, 2013 letter to the Department also proposed to adjust previously submitted data in order to account for a “retirement swap” in the State in SFYs 2010, 2011, and 2012. Specifically, beginning in SFY 2010, the State decreased the required employer contributions for retirement accounts, *e.g.*, from an LEA, and correspondingly increased the required employee contributions for retirement accounts for employees earning more than \$20,000 per year. The State sought to add the reduced amount of required employer contributions to the amount of its State financial support for special education and related services in SFYs 2010, 2011, and 2012. In other words, the State sought to make it appear as if the amount of State financial support for special education and related services had decreased less dramatically by taking credit for the share of retirement contributions now borne by certain employees.

In a meeting on February 22, 2013, NMPED clarified that the increased employee contributions did not change the overall amount of State funds made available to support special education and related services, but simply the amounts that LEAs were required to expend in support of

¹⁹ In SFY 2010, the State calculated a reduced cost (“workload reduction”) of \$5,882,400.15 due to a reduction in the number of ancillary service providers. In that same year, the service level changes of students accounted for an increased cost of \$959,350.82. In SFY 2011, the State calculated a reduced cost (“workload reduction”) of \$9,388,077.93 due to a reduction in the number of ancillary service providers. In that same year, the service level changes of students accounted for an increased cost of \$3,413,711.53.

retirement costs. Because shifting the burden of retirement benefits onto LEA employees did not change the overall amount of funds made available by the State in SFYs 2010, 2011, or 2012, and would result in inaccurate calculations of State financial support, the State cannot include the “retirement swap” in its calculations for purposes of demonstrating compliance with 20 U.S.C. §1412(a)(18)(A).

3 and 4 Year Olds

In a telephone call with NMPED on April 8, 2013 and in a letter dated April 11, 2013, NMPED indicated that students in the State’s 3- and 4-year-old developmentally disabled program are served through the State’s IDEA Part B program and “are eligible for funding only if they meet eligibility requirements for special education services.” NMPED’s May 3, 2013 letter to the Department also stated that, “while these students do receive the services they are eligible for, they receive a core academic program as well. Base units in the funding formula provide the cost of general education teachers, other staff and materials that are focused on the non-special education portion of the program.” Therefore, NMPED sought to exclude a part of the cost of this program in its calculation of State financial support for special education and related services.

However, the sole purpose of the program for 3- and 4-year-old developmentally disabled students is to provide special education services and/or meet the requirements of those students’ individualized education programs. The State does not provide a “core academic program” to any 3- or 4-year-old child who is not enrolled in this program and receiving special education services. Moreover, the program is operated through the State’s IDEA Part B program. Accordingly, the “base units” associated with students enrolled in the State’s 3- and 4-year-old developmentally disabled programs must be included in the State’s calculation of State financial support for special education and related services. The Department included the full amount of State financial support for special education and related services for 3-and 4-year olds in its recalculation of New Mexico’s amount of State financial support for special education and related services.²⁰

Training and Experience Index

With respect to the “Training and Experience Index” in the SEG, NMPED explained in a phone conversation on April 8, 2013, and by letter on April 11, 2013, that it did not include these multipliers in its calculation of the amount of State financial support for special education and related services because they were based on a wide array of teacher credentials and qualifications, not limited to those for special education teachers. As such, because the “Training and Experience Index” in any given year could increase based on the credentials and experience of regular education personnel, none of the additional generated funding would be used to support special education and related services. The Department accepts the State’s explanation and has not used the “Training and Experience Index” in its recalculation of the amount of State financial support for special education and related services.

²⁰ As a practical matter, the inclusion of these amounts increased the amount of New Mexico’s shortfall in SFY 2010 and decreased the amount of the State’s shortfall in SFY 2011.

State Fiscal Stabilization Funds and Education Jobs Program Funds

In response to questions raised by the Department, NMPED notified the Department in its February 18, 2013 submission that the State treated \$34,021,044.28 of State Fiscal Stabilization Funds (SFSF) as State funds for the purposes of meeting the requirement in 20 U.S.C. §1412(a)(18)(A) to maintain State financial support in SFY 2010. NMPED also reported that it treated \$3,836,795.83 in SFSF funds and \$10,337,554.53 in Education Jobs Program (Ed Jobs) funds for that same purpose in SFY 2011. In that submission, the State indicated that it “followed the guidance on ARRA funding for IDEA Part B, revised July 1, 2009, provided by OSERS at C-7 (‘To what extent may a state or LEA use Stabilization funds to meet the MOE requirements of the IDEA, Part B program?’) as well as the ‘Part B MOE Guidance for States on the Education Jobs Fund Program’ dated May 2011.” However, the data supplied by NMPED indicate that the State does not meet the criteria in those guidances to treat those funds as non-Federal funds, and therefore, the Department has not included these amounts as State funds in its recalculation of the amount of State financial support for special education and related services.²¹

Section 14012(d) of the American Recovery and Reinvestment Act of 2009 (ARRA) provides that “[u]pon prior approval from the Secretary,” a State may treat SFSF funds that are used for elementary, secondary, or postsecondary education as non-Federal funds for the purpose of any requirement to maintain fiscal effort under any other program that the Department administers. Section 14012(d) is also applicable to the Ed Jobs program. The criteria for prior approval to treat SFSF and Ed Jobs funds as State funds for the purpose of maintaining effort in Part B of the IDEA are found in section H of the Office of Special Education and Rehabilitative Services guidance entitled “Funds for Part B of the [IDEA], Made Available under [ARRA] (P.L. 111-5)”, revised July 2009, and in “Part B IDEA MOE Guidance for States on the Education Jobs Fund Program”, May 2011.²²

²¹ Even if New Mexico disagrees with our determination regarding whether the State had “prior approval” under Section 14012(d) of ARRA to treat SFSF and Ed Jobs funds as State funds for the purposes of the maintenance of financial support requirement in SFY 2010, because we have determined that it would be equitable to grant a waiver for that year, this determination has no effect on the outcome for New Mexico with respect to SFY 2010.

²² Specifically, the following criteria, each of which must be met, are outlined in those guidance documents:

- Criterion 1: The State maintains auditable data to demonstrate that it is complying with the SFSF/Ed Jobs programs’ maintenance of effort requirements. A State may meet this requirement for the SFSF program if the Secretary has granted a waiver of those requirements pursuant to the criterion in section 14012(c) of the ARRA.
- Criterion 2: With respect to the SFSF funds, the State maintains auditable data to demonstrate that it needs Education Stabilization funds to restore support for elementary and secondary education, or that it is using only Government Services Stabilization funds to meet State-level maintenance of effort. With respect to Ed Jobs funds, the State maintains auditable data demonstrating that it needs Ed Jobs funds to restore support for special education and related services.
- Criterion 3: The State maintains auditable data to demonstrate that the percentage of total State revenues available to the State that is used to support education for children with disabilities does not decrease from one year to the next.

The data submitted by NMPED do not establish that the State met criterion 3 – “The State maintains auditable data to demonstrate that the percentage of total State revenues available to the State that is used to support education for children with disabilities does not decrease from one year to the next.”²³ On March 2, 2013, the State submitted information purporting to demonstrate that the proportion of State revenues made available in support of the education for children with disabilities increased from 7.74 percent in SFY 2009 to 8.12 percent in SFY 2010 before dropping to 7.52 percent in SFY 2011. We noted in our April 22, 2013 letter to the State that the revenue data used to make these calculations differed from the data provided on August 17, 2012, February 14, 2013, and February 18, 2013. Further, we noted that it appeared that NMPED included SFSF and Ed Jobs funds themselves as “State” funds for the purpose of calculating its support for special education and related services in order to meet this criterion and that this was not permissible. See “Guidance on the Maintenance-of-Effort Requirements in

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- Criterion 4: The State maintains auditable data to demonstrate that the percentage of total State revenues available to the State that is used to support elementary, secondary, and higher education combined does not decrease from one year to the next.
 - Criterion 5: To provide for proper accounting of SFSF/Ed Jobs funds, the State identifies to each local LEA the amount of SFSF/Ed Jobs funds that it distributes to that LEA that the State is treating as State funds for the purposes of meeting the State-level MOE requirement.

²³ Since the State did not meet criterion 3, it is not necessary to address the manner in which the State did not meet criteria 4 and 5. However, in order to provide a complete response to NMPED, the Department notes the following. With respect to criterion 4, on March 2, 2013, NMPED provided data purporting to show that the proportion of total State revenues used to support elementary, secondary, and higher education increased from 56.47 percent in SFY 2009 to 56.52 percent in SFY 2010 before dropping to 55.12 percent in SFY 2011. However, as the Department noted in its April 22, 2013 communication to NMPED, the revenue data used by NMPED to make these calculations differed both from the data provided in the State’s August 17, 2012, February 14, 2013, and February 18, 2013 communications and the revenue data used to support the State’s claims under criterion 3. Furthermore, if the “Total Revenues” used by the State to calculate the proportion of support for the education of children with disabilities were used to calculate the proportion of support for elementary, secondary, and higher education, that latter proportion would have decreased from SFY 2009 to SFY 2010 and from SFY 2010 to SFY 2011.

We also note that the State’s calculations in regards to criterion 4 used “General Fund Expenditures” rather than amounts appropriated. Had the State calculated the proportion on the basis of appropriated amounts and the “Total Revenues+Reserve Used,” the proportion of support for elementary, secondary, and higher education would have decreased from SFY 2009 to SFY 2010 and from SFY 2010 to SFY 2011. NMPED indicated that it believed that its calculations with respect to criterion 4 were “consistent in all PED submissions listed and agree with data submitted by the New Mexico Legislative Finance Committee on February 14, 2013.” The Department disagrees with this assertion. Because of the discrepancies noted in our April 22, 2013 communication with the State and the fact that, had the State used amounts appropriated in its March 2, 2013 submission, it would not have met criterion 4 in either year, we believe that the State does not meet criterion 4 in SFY 2010 or SFY 2011.

With respect to criterion 5, the State indicated that “in SFY10 and SFY11 when SFSF and Ed Jobs funds were used to fund LEAs, a unit value was created for each funding source; one unit value for general fund, one unit value for the SFSF funds and one unit value for the Ed Job funds so such funds could be differentiated.” To be clear, criterion 5 does not address whether a State separately tracks funds from the SFSF and Ed Jobs programs to LEAs. It specifically addresses whether the State identifies to each LEA the amount that the State is treating as State funds for the purposes of meeting the State-level maintenance of effort requirement. New Mexico has not demonstrated that it informed LEAs of the amount of funding that it distributed to them that it was treating as State funds for the purposes of meeting State-level maintenance of effort. Therefore, we do not believe that New Mexico has established that it met criterion 5 for either year.

the State Fiscal Stabilization Fund Program, January 2010” (p. 2 – “The data used to determine levels of support must include only *State* support for education...Federal funds are not considered part of State support”).

In its May 3, 2013 letter to the Department, NMPED concurred with the Department’s analysis of the State’s data with respect to criterion 3 above but provided additional data to support its claims. The State’s data for the amount of State revenues made available in support of the education for children with disabilities excluded the 3- and 4-year-old base units, included the retirement swap numbers, and included the workload reductions. The State also included “reserves used” in its calculation of “total State revenues available”. The State’s calculation in its May 3 submission purports to indicate that the proportion of total State revenues available to support special education and related services increased from 7.6 percent in SFY 2009 to 7.9 percent in SFY 2010 before decreasing to 7.5 percent in SFY 2011, conceding that the State did not meet this criterion for SFY 2011.²⁴ In any event, the State did not meet criterion 3 for SFY 2010 or SFY 2011.

In summary, because we do not believe that the State met the criteria to treat SFSF and Ed Jobs funds as State funds for the purposes of meeting the maintenance of financial support requirements of the IDEA, we have determined that the State did not have “prior approval” to treat these funds as State funds for the purposes of the maintenance of financial support requirement. As such, these funds must be excluded from calculations of State financial support for special education and related services in SFY 2010 and SFY 2011.

Required Level of Support in a Subsequent Year

On September 17, 2012, and again on May 3, 2013, NMPED asserted that, in SFY 2011, it was only required to maintain State financial support for special education and related services at the level maintained in SFY 2010, a year in which the State has conceded that it failed to maintain support at the same level maintained in SFY 2009. The Department advised NMPED that the IDEA provides that “[i]f, for any year, a State failed to meet the requirement [to maintain support], including any year for which the State is granted a waiver ... the financial support required of the State in future years ... shall be the amount that would have been required in the absence of that failure and not the reduced level of the State’s support.” 20 U.S.C. §1412(a)(18)(D). Thereafter, on September 24, 2012, NMPED increased its waiver request for SFY 2011 from \$15,287,339.55 to \$28,187,997.92, but noted that it was amending the request because of the Department’s position on this issue and “reserves the right to argue the amount of the reductions to its Section 611 allocation would be the amount of the original request.”

NMPED has offered no explanation or rationale for its position. The Department reiterates that the language in 20 U.S.C. §1412(a)(18)(D) is clear. Accordingly, when providing an assurance in its application that it has policies and procedures in place to ensure compliance with 20 U.S.C.

²⁴ Had the State excluded “reserves used” and the workload reductions and retirement swaps from its calculations, the proportion would have decreased from SFY 2009 to SFY 2010 and from SFY 2010 to SFY 2011. We also note that, had the State excluded “reserves used” from its calculation and used the revised amounts made available outlined above, the proportion would have decreased from SFY 2009 to SFY 2010 and again from SFY 2010 to SFY 2011.

§1412(a)(18)(A), and in ensuring compliance in SFY 2013 and thereafter, the Department expects that New Mexico will maintain State financial support for special education and related services at a level that would have been required in the absence of a failure to maintain financial support or the receipt of a waiver from the Department.

Notice and Opportunity for a Hearing

When a State fails to maintain State financial support for special education and related services at the level required by law, the Department “shall” reduce the allocation of funds to the State under 20 U.S.C. §1411 (“section 611 allocation”) “for any fiscal year following the fiscal year in which the State fails” to maintain State financial support 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).

Accordingly, the Department proposes to make a final determination that New Mexico is not eligible for a portion of its section 611 grant under the IDEA, \$34,120,713, because of its failure to maintain State financial support for special education and related services in SFY 2011. 20 U.S.C. §1412(d)(2).

This notice advises NMPED that it may request a hearing pursuant to the procedures in 34 CFR §§300.179 through 300.183 in connection with the Department’s proposed decision to deny eligibility to New Mexico for \$34,120,713 of its section 611 Part B IDEA grant because of its failure to maintain State financial support for special education and related services by that amount in SFY 2011. To request a hearing, NMPED must submit a letter to Andrew J. Pepin, Office of Special Education and Rehabilitative Services, 400 Maryland Avenue SW, Room 5106, Potomac Center Plaza, Washington, D.C. 20202-2600 (facsimile number 202-245-7638) within 30 calendar days after it receives this notice. The filing date for any written submission by a party under 34 CFR §§300.179 through 300.184 is the date the document is hand-delivered; mailed; or sent by facsimile transmission. 34 CFR §300.183(a)-(b). (In this case, therefore, NMPED must submit a letter requesting a hearing within 30 calendar days from the date that this letter was sent to NMPED by facsimile transmission.)

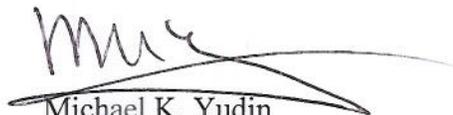
If NMPED does not request a hearing, this decision shall be final and the Department will work with NMPED to determine a date for the reduction in its section 611 Part B grant award. If NMPED requests a hearing, the date for a reduction in the State’s Part B grant will be determined only after a final determination by the Secretary on the State’s waiver request. In any event, the Department does not intend to reduce New Mexico’s Federal fiscal year 2013 IDEA Part B grant award because of its failure to maintain State financial support in SFY 2011.

Conclusion

We remind the State that if the Department determines through an audit, or other means, that the State failed to maintain State financial support in SFY 2010 at the level permitted by this waiver, or in any other fiscal year, the Department will be required to propose the reduction of the allocation of funds to the State under section 611 of the IDEA for any fiscal year following the fiscal year in which the State fails to maintain financial support 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).

We also want to make clear to the State that, when making decisions about its level of State financial support for special education and related services in SFY 2013, New Mexico should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services at the level made available by the State in SFY 2009, or \$461,998,168. The Department may undertake additional monitoring of New Mexico'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 New Mexico Individuals with Disabilities Education Act State 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.

Sincerely,



Michael K. Yudin
Delegated the authority
to perform the functions
and duties of the Assistant
Secretary for Special
Education and
Rehabilitative Services

cc: New Mexico IDEA State Advisory Panel

Sent by facsimile transmission on June 3, 2013