



# Oregon Department of Education

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December 9, 2014

The Honorable Arne Duncan  
Secretary, United States Department of Education  
400 Maryland, Ave., SW  
Washington DC, 20202

Dear Secretary Duncan:

The State of Oregon respectfully requests you grant a waiver of the requirement that Oregon maintain state financial support for special education and related services under 34 CFR 300.163(c). It would be appropriate to grant this waiver due to "exceptional or uncontrollable circumstances," as well as changes to the definition of "made available" as determined by Oregon. We have been working with Matthew Schmeer, and some of his colleagues within the Office of Special Education Programs (OSEP), over the past several months to discuss the issue, determine the status, and review budgets from the 2009-2010 through 2012-13 fiscal years. We have held several phone conferences with Mr. Schmeer and we appreciate the support we have received from him, and his willingness to discuss and clarify the issue.

Specifically, the issue centers around the definition of "made available" utilized to calculate Maintenance of State Financial Support (MSFS) over the past four years. The Office of Special Education Programs has not definitively defined the term "made available" through any guidance letters or policies; it has been left up to states to define this term. In 2009-2010 and 2010-2011, Oregon defined "made available" when calculating MSFS as **available revenue**, and this was the definition used in previous years as well. Oregon passed maintenance of state support in 2009-2010 through 2010-2011. In 2010-2011 (March 8, 2011) Oregon requested of OSEP a waiver from the level of state support due to the budgetary crisis and financial issues facing our state. The waiver was not approved, so the Oregon Department of Education (ODE) requested additional monetary support from the Oregon Legislature to meet our state level of financial support. The Legislature appropriated \$13.8 million to meet our state responsibility. As noted above, Oregon defined "made available" as **available revenue** (old definition) and, with this addition of funds, Oregon met MSFS.

As a part of ongoing fiscal and budgetary reviews during the 2011-2012 year, a committee of staff at ODE reviewed OSEP guidance regarding MSFS, as well as the definition of "made available" as applied to the calculation of state support. This committee comprised the Assistant Superintendent of Finance and Administration, the Assistant Superintendent of Analysis and Reporting, the Director of School Finance, the Director of Operations in our special

education office, and several fiscal analysts in special education. After careful analysis and discussion, the committee determined a more refined and appropriate definition of “made available” is the **lesser of revenue or spending limitation** (new definition). This new definition was then applied in 2011-2012 and 2012-2013 when calculating MSFS for Oregon. The new definition was also applied to 2010-11 to determine if MSFS was met in 2011-2012. Using this new definition, applied initially in 2011-2012, Oregon passed maintenance of state support through 2012-2013.

Oregon’s current situation related to MSFS came to light last year after completing our IDEA Part B Application. A difference was noted by OSEP in budget figures from 2010-2011, due to our request of additional funds from the Legislature. This led OSEP to discuss with us the difference in figures and to request documentation of state support. Over several phone conferences we provided OSEP with budget and fiscal information about state support using both the old and new definitions. Matthew Schmeer and colleagues all agreed to our new definition and understood the new definition was determined sometime during 2011-2012. We have been requested by OSEP to use this definition (**lesser of revenue OR spending limitation**) going forward. As part of our discussions, OSEP was provided with spreadsheets using both definitions from 2009-2010 through 2012-2013.

Using the old definition of “available revenue” Oregon met MSFS from 2009-2010 through 2012-2013. However, using the new definition of “lesser of revenue OR spending limitation,” Oregon fails MSFS in 2010-2011 but meets requirements in 2009-2010, 2011-2012, and 2012-2013. Oregon’s failure of state support in 2010-2011 is based on retroactively applying a new definition that was not developed or utilized until 2011-2012. Had ODE known, in 2010-2011, that we would review and re-define the term “made available,” we would have requested an additional \$3.3 million from the Legislature to meet MSFS and not jeopardize federal IDEA funds. It is clear to us that, not only would we have requested the additional \$3.3 million, we have no reason to believe the Legislature would not have given it to ODE as evidenced by its provision of an additional \$13.8 million to satisfy MSFS in 2010-11 using the old definition of “made available.”

OSEP is now requiring Oregon to utilize our new definition of “made available” and retroactively apply the definition back to 2009-2010. With this requirement, Oregon fails MSFS in 2010-2011, resulting in a penalty of \$3.313 million. These dollars would be withheld from a future IDEA Part B state allocation. This action appears to be inappropriate and excessive for the following reasons:

- Oregon has made a good faith effort to implement this federal requirement. We believe we have met the intent and integrity of federal requirements by utilizing the old definition of “made available” in 2009-2010 and 2010-2011, and then applying our new definition, as determined by committee going forward, in 2011-2012 and 2012-2013. Oregon had no idea of determining a new definition in 2010-2011, so we should not be unfairly penalized for improving the quality of our work on behalf of students with disabilities and their families. More importantly, these students and their families should not be penalized.

- OSEP has acknowledged during phone calls there is no clear definition or guidance available to states on how to interpret "made available." We believe we all need to work to improve our understanding and implementation of federal requirements without risk of penalty when guidance is lacking or unclear.

Therefore, our request is OSEP not require Oregon to retroactively apply our new definition of "made available" to 2009-2010 and 2010-2011 calculations of MSFS.

The State of Oregon appreciates your consideration of this Maintenance of State Financial Support waiver request and asks you exercise your authority under 34 CFR 300.163(c) and waive the requirement. The specific amount sought is \$3,313,166. We are committed to meeting the needs of all students in Oregon, and we believe you share the same goal as well.

Sincerely,



Rob Saxton  
Deputy Superintendent  
Oregon Department of Education



Susan MacGlashan  
Assistant Superintendent  
Office of Finance and Administration



Sarah Drinkwater  
Assistant Superintendent  
Office of Learning/Student Services

Enclosures

Cc: Mr. Michael Yudin, Acting Assistant Secretary (OSEP)  
Ms. Melody Musgrove, Director (OSEP)  
Mr. Matthew Schneer, Education Program Specialist (OSEP)