



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

January 17, 2017

The Honorable Michael J. Martirano, Ed.D.
State Superintendent of Schools
West Virginia Department of Education
1900 Kanawha Boulevard East
Building 6, RM 358
Charleston, West Virginia 25305-0330

Dear Superintendent Martirano:

This is in response to your September 2, 2016 letter, in which the State of West Virginia requests waivers of the requirement to maintain State financial support (MFS) for special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412(a)(18) and 34 CFR §300.163, for State fiscal years (SFYs) 2014 and 2015¹, in the amounts of \$583,425 and \$117,167 respectively.

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. The U.S. Department of Education (Department) is permitted to waive this requirement for a State, for one fiscal year at a time, only if the Department determines 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)). 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.

Background:

In the single State audits issued for West Virginia covering SFYs 2014 and 2015, the auditors found that the State was not in compliance with the MFS requirement noted above. In program determination letters issued on November 19, 2015 and December 2, 2016, the Office of Special Education and Rehabilitative Services (OSERS) sustained the auditors' findings, but deferred corrective actions pending further review.

¹ For purposes of this document, a SFY is referenced according to the calendar year in which it ends. However, West Virginia's waiver request refers to either Federal Fiscal Years or Federal Years, both of which are referenced according to the year in which they start. For consistency, we will refer to SFYs according to the calendar year in which they end.

Beginning in Federal fiscal year (FFY) 2013, as part of their annual IDEA Part B applications, States were required to include the total amount of State financial support made available for special education and related services for children with disabilities for the prior two SFYs. States provide this information in Section V of the application. The applications submitted by West Virginia for FFYs 2015 and 2016 enclosed included amounts that confirmed the auditors' findings.

On September 9, 2015, staff from the Office of Special Education Programs (OSEP), a part of OSERS, held a conference call with staff from the West Virginia Department of Education (WVDE) to discuss the apparent MFS shortfalls. During this call, OSEP reviewed the data and discussed the option of submitting waiver requests. On July 19, 2016, OSEP held another call with WVDE staff to inform them that OSERS intended to issue a proposed determination that West Virginia had failed to meet the MFS requirement in SFYs 2014 and 2015. In a follow-up email, OSEP provided the following data:

SFY	Total amount of State financial support	Child Count	Per Child Amount of State financial support	Required amount of State financial support (based on per capita calculation — results in lower required amount)	Apparent Shortfall
2013	\$25,860,225	44,487	\$581		N/A
2014	\$25,211,695	44,375	\$568	\$25,795,120	(\$583,425)
2015	\$25,609,359	44,257	\$579	\$25,726,526	(\$117,167) ²

During the July 19, 2016 call and in the follow-up email, OSEP once again discussed with WVDE the waiver option and criteria, and invited WVDE to provide additional information and/or to submit a waiver request(s). As noted above, on September 2, 2016, WVDE submitted waiver requests for both SFYs 2014 and 2015. Each of the State's waiver requests is discussed below.

SFY 2014 (July 1, 2013-June 30, 2014):

In your September 2, 2016 waiver request, you explain that an August 3, 2012 memorandum from the West Virginia Department of Revenue predicted a pending budget shortfall and indicated that the budget request for WVDE should reflect a 7.5% cut. Your waiver request also explains that “[d]uring the same fiscal year, on January 3, 2014, Governor Earl Ray Tomblin issued an Executive Order to revise the current year (FY2013) [which is SFY 2014] budgets to reflect an additional cut to certain departments, including the Department of Education by a minimum amount of \$3,340,000.”

Based on the data provided to OSEP by WVDE on October 21, 2016, however, actual revenues in SFY 2014 increased from \$4,104,138,000 in SFY 2013 to \$4,106,104,000 in SFY 2014.

² The shortfall is based on a per capita calculation, which leads to a smaller shortfall than that resulting from a calculation based on the total amount of funds made available for special education and related services. States may meet the MFS requirement by making available at least the same amount of funds per capita compared to the last fiscal year in which the State met the MFS requirement.

West Virginia's data also demonstrate that, at the end of SFY 2014, the State had accumulated \$955,890,485 in its Revenue Shortfall Reserve Funds — an increase of \$41,424,814 over the \$914,465,671 of Revenue Shortfall Reserve Funds available at the end of SFY 2013. Thus, West Virginia had sufficient revenues to maintain financial support at the required level in SFY 2014 and avoid the \$583,425 MFS shortfall. Because West Virginia's recurring revenues increased from SFY 2013 to SFY 2014, and West Virginia accrued substantial funds in SFY 2014 that were available to maintain financial support for special education and related services, the Department cannot conclude that West Virginia experienced an "exceptional or uncontrollable" circumstance in SFY 2014. Accordingly, the Department has 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), and that therefore West Virginia was not permitted to reduce State financial support for special education and related services for SFY 2014.

SFY 2015 (July 1, 2014-June 30, 2015):

As in SFY 2014, in SFY 2015 the West Virginia Department of Revenue predicted a budget shortfall and recommended that WVDE cut its budget by 7.5%. Similarly, the Governor again issued an executive order mandating a cut to the WVDE budget by a minimum amount of \$2,453,000.

However, according to the data that WVDE provided to OSEP on October 21, 2016, West Virginia's actual revenues in SFY 2015 increased from \$4,104,138,000 in SFY 2013, the last year West Virginia maintained State financial support, to \$4,203,811,000 in SFY 2015, representing an increase of 2.43 percent. In SFY 2015, West Virginia's Revenue Shortfall Reserve Funds totaled \$869,099,930. Although this amount is less than the amount of West Virginia's reserve funds in SFY 2014, it was still sufficient to cover the \$117,167 MFS shortfall in SFY 2015, and allow West Virginia to maintain financial support for special education and related services at the required level in SFY 2015. Because West Virginia's recurring revenues increased from SFY 2013 to SFY 2015 (and from SFY 2014 to SFY 2015) and West Virginia had substantial reserve funds in SFY 2015 that were available for special education and related services, the Department cannot conclude that West Virginia experienced an "exceptional or uncontrollable" circumstance in SFY 2015. Accordingly, the Department has 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), and that therefore West Virginia was not permitted to reduce State financial support for special education and related services for SFY 2015.

Proposed Determinations

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 grant") "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 the following final determinations: that West Virginia is not eligible for a portion of its section 611 grant under the IDEA in the amount of

\$583,425 because of its failure to maintain State financial support for special education and related services by that amount in SFY 2014; and that West Virginia is not eligible for a portion of its section 611 grant under the IDEA in the amount of \$117,167 because of its failure to maintain State financial support for special education and related services by that amount in SFY 2015. 20 U.S.C. §1412(d)(2). In total, West Virginia failed to meet the MFS requirement in SFY 2014 and SFY 2015 by \$700,592.

Notice and Opportunity for a Hearing

WVDE may request a hearing pursuant to the procedures in 34 CFR §§300.179 through 300.183 in connection with the Department's proposed determinations to deny eligibility to West Virginia for a total of \$700,592 of its IDEA section 611 grant because of its failure to maintain State financial support for special education and related services in SFYs 2014 and 2015. To request a hearing, WVDE 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) not later than 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).

The Department may undertake additional monitoring of West Virginia'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. In addition, in light of the West Virginia IDEA 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,

/s/

Sue Swenson

Deputy Assistant Secretary

Delegated the authority to perform the
functions and duties of the Assistant Secretary

cc: West Virginia IDEA State Advisory Panel

Enclosures