



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

JUL 6 2010

THE ASSISTANT SECRETARY

Honorable Steven L. Paine
State Superintendent of Schools
West Virginia Department of Education
1900 Kanawha Boulevard, East, Building 6
Charleston, West Virginia 25305-0330

Dear Dr. Paine:

This is in response to your March 26, 2010 letter, supplemented by information provided in a May 27, 2010 memorandum from Pat Homberg and Sandra McQuain of the West Virginia Department of Education's Office of Special Education Programs, in which you request a waiver for State financial support for special education for State Fiscal Year (SFY) 2010 (July 1, 2009 – June 30, 2010) for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. § 1412(a)(18) and 34 CFR § 300.163. We appreciate the time you and your staff took to discuss this matter with U.S. Department of Education (Department) staff over the telephone and in providing 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. 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. 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 children with disabilities, as required in 20 U.S.C. § 1412(a)(1) and 34 CFR § 300.101.

As discussed in your letter, West Virginia sought to reduce State support for special education and related services by \$143,864 for SFY 2010. However, in its May 27, 2010 memorandum, the State revised the amount, and requested a total waiver for SFY 2010 of \$491,580, which represents a 2 percent decrease in State financial support for special education and related services from SFY 2009 to SFY 2010. From the information your agency provided, we are aware that the State faces a difficult financial situation and has experienced a significant decrease in revenues of 7 percent from SFY 2009 to SFY 2010. The State cut its appropriations across agencies, with an average cut in appropriations from SFY 2009 to SFY 2010 of 5.8 percent.

In reviewing your request, I considered all of the information provided by the State in its submissions – including that the percentage cuts to special education are less than the average cuts across agencies and less than the percentage reduction in revenues – and 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 proposed waiver, I considered

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-2500

www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds are available to assist the State and local educational agencies (LEAs) in meeting their obligation to make FAPE available to all children with disabilities in SFY 2010. Accordingly, I have determined that it is equitable to grant a waiver under 20 U.S.C. § 1412(a)(18)(C)(i) and 34 C.F.R. § 300.163(c)(1) due to exceptional or uncontrollable circumstances – the precipitous and unforeseen decline in the financial resources of the State -- permitting West Virginia to reduce its amount of State financial support provided for special education and related services for SFY 2010 by \$491,580.

We remind the State that if it fails to maintain 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). Further, as provided by 20 U.S.C. §1412(a)(18)(D) and 34 CFR § 300.163(d), the amount of financial support required of the State in future years is the same amount that would have been required in the absence of this waiver.

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 C.F.R. §§ 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 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 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 children with disabilities, even though the State has been granted the waiver described above. In addition, in light of the West Virginia Special Education Advisory Panel’s duties under 20 U.S.C. § 1412(A)(21)(D), particularly its duty under 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.

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

Sincerely,



Alexa Posny, Ph.D.

cc: West Virginia Special Education Advisory Panel