CENTER FOR LAW AND EDUCATION

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August 17, 2011

Melody Musgrove, Director
Ruth Ryder, Deputy Director
Office of Special Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-7100

Re: Informal Guidance - interpretation of section 613

Dear Dr. Musgrove and Ms. Ryder:

The Center for Law and Education (CLE) requests that the Office of Special Education Program (OSEP) reconsider and rescind its "informal guidance" concerning the local maintenance of effort (MOE) requirement under § 613 of the Individuals with Disabilities Education Improvement Act (IDEA) issued June 16, 2011, in response to a letter of inquiry from Dr. Bill East, Executive Director of the National Association of State Directors of Special Education. CLE believes that OSEP's interpretation of §613, as applied to the factual scenario presented in the letter of inquiry, is inconsistent with the legislative history of P.L. 94-142 and the local MOE statutory provision, and is contrary to basic tenets of statutory construction and contract law. Given the current economic burden on school districts, OSEP's flawed interpretation is especially inopportune; it can be anticipated that LEAs will transgress the statutory prohibition against reducing their local MOE outside of the expressly authorized exceptions (§613(a)(2)(A)(iii)) as a means of lowering their MOE in subsequent fiscal years resulting in further harm to the education of the nation's 5.9 million children with disabilities in need of special education.

As enacted, §613(a)(2) of IDEA expressly provides that LEAs must use Part B funds only to pay for the excess or additional cost of providing specialized instruction and related services to children with disabilities, and that these funds must be used to supplement other Federal, State, and local funding for special education and shall not supplant such funds. In general, funds received under Part B must not be used by LEAs to reduce the level of local expenditures made by the LEA for special education and related services from one year to the following year (i.e., a 100% MOE). A financial principle found in multiple Federal education statutes, MOE, as applied in the context of IDEA, penalizes local recipients of Part B funds if they reduce their non-Federal spending on special education. In adopting this provision of IDEA, however, Congress expressly recognized specific, limited circumstances in which LEAs may legitimately reduce local spending and not be penalized under the local MOE requirement.

In subparagraphs (B) and (C) of §613(a)(2), Congress expressly authorized **two types of exceptions** that exempt LEAs from the local MOE, thereby enabling LEAs to reduce the level of local expenditure for special education from the preceding fiscal year. LEAs that fall within the type of exception authorized by either subparagraph may legitimately reduce local spending and not be penalized under the local MOE requirement.

- Under **subparagraph (B)**, an LEA is able to reduce the level of local expenditures in specific situations that result in legitimate, reduced expenditures at the local level, for example, when senior (more highly paid) special education personnel retire and are replaced with more junior (and lower paid) yet qualified personnel, or when a child with a disability whose educational needs required provision of very costly special education programming moves out of the district, or such student is no longer of eligible school-age for special education, or the termination of costly expenditures for long-term purchases.
- Under **subparagraph (C)**, an LEA is authorized to use up to 50% of any increase in its Part B grant to "reduce the level of expenditure" for special education [§613(a)(2)(C)(I)] provided that LEAs exercising this option use an amount equal to the savings to carry out activities authorized by the ESEA or for early intervening services if the SEA had made a finding against the LEA. In the most recent reauthorization of IDEA, through P.L. 108-446, Congress amended this second type of exception which previously authorized an LEA to "treat as local funds" up to 20% of any annual increase in its IDEA grant (after attaining a set dollar amount that had been reached in 1999).

Neither of these two different types of expressed statutory exceptions to local MOE are at issue in OSEP's informal guidance on §613. Their relevance is only that Congress, consistent with the legislative history of IDEA, adopted the financial principle of MOE and then established two types of exemptions for LEAs to reduce legitimately their local MOE. These limited and different types of exceptions to local MOE were enacted and subsequently reauthorized, most recently in 2004, as part of the continuing amendments to IDEA.

In its reply letter of June 16, 2011, characterized as 'informal guidance,' OSEP responded in essence to the following question:

> When an LEA (i) was *not* authorized to reduce its local MOE because it had not met either of the two types of exceptions statutorily authorized by §613(a)(2)(A)(iii) and described in subparagraphs (B) and (C), and nonetheless, (ii) violated the local MOE requirement by failing to spend the same amount of local special education funds – e.g., in FY 11 as it expended the preceding year (FY 10) – must that LEA, in order to meet its local MOE the subsequent fiscal year (FY 12), make local expenditures for special education based on its local MOE for FY 10, or based on the *reduced* amount it actually expended in FY 11 –i.e., the year when the LEA failed to meet its local MOE in violation of its obligation under IDEA?

OSEP concludes *without analysis* that in FY 12 such an LEA must *only meet the reduced level* of FY 11, the year when it did ***not meet its local MOE*** **in violation of IDEA.** OSEP reaches this conclusion by first suggesting that the statutory provision [§613(a)(2)(iii), (B), (C)] does not address the particular question raised by Dr. East's inquiry then, rather incongruously, purports to rely upon the plain language of the statute for its justification. **We disagree; neither premise is correct and OSEP's conclusion lacks a rational basis.**

The language of the applicable statutory provision cannot be more clear. Section 613 of IDEA states that as a **condition of qualifying for Federal funds**, an LEA providing for the education of children with disabilities within its jurisdiction, must meet the fiscal requirements including principles of supplement not supplant and maintenance of effort (MOE) which, in general, require that local spending on special education not be reduced from one year to the next (i.e., a 100% MOE). §613(a)(2)(A)(iii). A brief review of the legislative history of P.L. 94-142 indicates that one key reason for the law being enacted as a civil rights law under the Fourteenth Amendment and a grant-in-aid statute under the Spending Clause was

the inability of States and local school districts to provide sufficient financial resources to meet their constitutional duty to educate children with disabilities. S. Rep. No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975**]** U.S.C.C. A.N. 1425, 1431; 121 Cong. Rec. 23702 (1975)(remarks of Rep. Madden). The Senate observed that passage of P.L. 94-142 would "greatly change the Federal role in the education of …children [with disabilities]…"121 Cong. Rec. 19498 (remarks of Sen. Dole); that "a strong supportive Federal role was necessary if States were to meet their responsibility to …children [with disabilities]." 121 Cong. Rec. 19482 (remarks of Sen. Randolph). From the House debate also emerged what would become the prevailing view that Federal funds were to be used for the excess costs of educating students with disabilities and "in no way would Federal funds be used to supplant State and local funds unless every …child [with a disability] in the State is receiving a free appropriate public education." 121 Cong. Rec. 23704 (1975)(statement of Rep. Brademas). There were also repeated references to the importance of States and localities continuing to share the fiscal burden by upholding their traditional responsibility for educating children with disabilities. See, e.g., 121 Cong. Rec. 23705, 25535 (1975).

Despite Congress having spoken as evidenced by (1) its adoption of the financial principle of MOE, (2) its having expressly established two different types of exemptions for LEAs to reduce legitimately their local MOE, and (3) the reauthorization of the Act in its entirety with subparagraph (C) of §613(a)(2) amended most recently in 2004, OSEP has chosen to ignore the statute – indeed, the plain language of §613(a)(2)(A)(iii). OSEP's suggestion that its interpretation is based on the plain language of the statute is wrong on its face, and even if it were given any credence, is without merit based on rules of statutory interpretation because such a reading suggests an absurd result – one that undermines the statutory provision establishing two types of expressly recognized exceptions and **results in the "unjust enrichment" of an LEA that violates the local MOE requirement.**

OSEP's interpretation flips the analysis on its head when it states that §613(a)(2) does not address the circumstance raised by the letter of inquiry from Dr. East, suggesting that the factual scenario raised in the letter of inquiry is somehow outside the bounds of review for determining local MOE. To the contrary, the statutory provision, supported by the legislative history of P.L. 94-142, establishes Congress's position that **as a condition of eligibility to receive Federal funds under Part B**, LEAs cannot use Part B funds to supplement or supplant non-Federal funds and must ensure that their local MOE from the preceding fiscal year is *not* reduced unless the LEA meets one of the two types of exceptions set forth in subparagraphs (B) and (C). **Because the LEA described in the letter of inquiry from Dr. East did *not* come within either of the two statutorily authorized exemptions to MOE, that LEA was *not* eligible to reduce its local MOE.**

The language of §613(a)(2)(A)(iii) is clear. No Part B funds provided to an LEA "(iii) shall be used, except as provided in subparagraphs (B) and (C) to reduce the level of expenditures for the education of children with disabilities made by the local educational agency from local funds below the level of those expenditures for the preceding fiscal year." Here the rule of *expressius unius* undoubtedly applies –the expression of one thing [here the two types of exceptions to local MOE set forth in subparagraphs (B) and (C)] suggests the exclusion of others. There is no other possible reading of the language of this statutory provision. Only an LEA that can demonstrate its reduction of local expenditures is attributed to one of the list of examples in subparagraph (B) or to an increase in its allocation under §611 as described in subparagraph (C) of §613(a)(2), can lawfully reduce its MOE "below the level of those expenditures for the preceding fiscal year." Based on this explicit language, the local MOE for such an LEA that has *lawfully* reduced its local MOE would then be reset as the basis for the next fiscal year.

OSEP only needed to review the statutory language of §613(a)(2)(A)(iii) to respond to the letter of inquiry submitted by Dr. East. There is no tricky or difficult question here. The LEA at issue failed to meet its local MOE in violation of IDEA; it was not authorized to reduce its local MOE level of non-Federal expenditures that were not attributable to one of the two types of statutory exceptions authorized by §613(a)(2)(A)(iii) and described in subparagraphs (B) and (C). The answer to the question raised in Dr. East's letter of inquiry – whether the level of local non-Federal expenditures that the offending LEA must meet the following year (FY 12) ought to be determined based on the amount from the previous year (FY 10), or reset to reflect the lower amount actually spent the previous year (FY 11) [i.e., when the offending LEA violated IDEA's mandate] – could not be more simple. **The LEA, having violated its mandated condition of eligibility for receipt of Part B funds by unlawfully reducing its MOE, should be in jeopardy of losing its eligibility, and not being unjustly enriched through its violation.** Whether or not enforcement action is taken against the LEA, as long as the LEA unlawfully reduced its local MOE – i.e., it reduced its level of MOE without coming within the exceptions authorized by subparagraphs (B) or (C) - principles of law and equity dictate that the LEA be required to meet the level of local MOE established from the year previous to its unlawful act.

We respectfully urge OSEP to rescind its June 16, 2011 informal guidance concerning local MOE. The implications of this flawed interpretation will be detrimental not only to students with disabilities receiving high quality education but to LEAs that will be rightfully challenged through costly litigation.

Yours truly,

Kathleen B. Boundy
Co-Director