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Alexa Posny, Director
Office of Special Education Programs
U.S. Department of Education
Potomac Center Plaza
550 12th Street, SW
Washington, DC 20202-2641

RE: Request for clarification on reallocation of unexpended high cost funds

Dear Ms. Posny:

I am writing to request clarification on the new IDEA Part B regulation at 34 C.F.R. §300.704(c)(9). This provision deals with the reallocation of Part B funds reserved by a state to address the needs of high need children with disabilities.

IDEA §611(e)(3)(A) allows a state, each fiscal year, to reserve 10 percent of the amount reserved for state-level activities to assist local educational agencies ("LEAs") in addressing the needs of high need children with disabilities. The state can use this 10 percent set-aside to (1) establish and make disbursements from a "high cost fund" to LEAs and to (2) support innovative and effective ways of cost sharing by the state, by an LEA, or among a consortium of LEAs.

If a state decides to establish a high cost fund, the statute requires annual disbursements during the same fiscal year in which the state reserves the 10 percent set-aside. If an SEA does not expend all funds reserved under §611(e)(3)(A) through annual disbursements, those funds remaining in the high cost fund "shall be allocated to local educational agencies for the succeeding fiscal year in the same manner as funds are allocated to local educational agencies under subsection (f) for the succeeding fiscal year." IDEA §611(e)(3)(I).

The new IDEA Part B regulation at 34 C.F.R. §300.704(c)(9) provides the following interpretive language:

> Funds reserved under paragraph (c)(1)(i) of this section from the appropriation for any fiscal year, but not expended pursuant to paragraph (c)(4) of this section before the beginning of their last year of availability for obligation, must be allocated to LEAs in the same manner as other funds from the appropriation for that fiscal year are allocated to LEAs under §300.705 during their final year of availability.

I understand this regulation to mean that remaining funds must be reallocated to LEAs during the succeeding fiscal year, using the §300.705 subgrant formula. In essence, the remaining funds should be treated as a carry-over of unobligated funds and reallocated using the §300.705 subgrant formula. As an example, if a state reserves a 10 percent set-aside from the FY 2007 appropriation and does not expend all of the set-aside before the beginning of FY 2008, then the remaining funds must be reallocated to LEAs in FY 2008 using the §300.705 subgrant formula.

However, it is not entirely clear which FY subgrant formula should be used for the reallocation – the current FY formula (FY 2007) or the succeeding FY formula (FY 2008). Normally, when unobligated balances are carried over, pursuant to GEPA regulations §76.709 and §80.23(a), the federal statutes and regulations *in effect for the carryover period* apply to the carryover funds. 34 C.F.R. §76.710(a) (2005) (emphasis added). This would mean that a state should use the succeeding FY subgrant formula to reallocate the remaining funds (a.k.a., the formula for the carryover period, or FY 2008 in my example).

To clarify the intent of new IDEA regulation §300.704(c)(9), please provide answers to the following questions:

1. Should funds reserved under §300.704(c)(1)(i), but not expended before the beginning of the last year of availability for obligation, be reallocated in the final year of availability? In my example, this would be FY 2008.
2. Do states have any discretion or flexibility that would allow them to reallocate the funds before the beginning of the last year of availability?
    a. In my example, is there any way in which a state could reallocate the funds in FY 2007, if it is clear that no annual disbursements are going to be made in FY 2007?
    b. If it became evident to an SEA that there are no LEAs in the state eligible to receive an annual disbursement from the high cost fund for that FY, can the SEA go ahead and reallocate the funds in that FY instead of waiting until the carryover period?
    c. Would the state plan for the high cost fund have to specifically allow for this early reallocation?
3. Assuming remaining funds are reallocated in the succeeding FY (carryover period), which FY subgrant formula applies to the reallocation of funds?
4. Do states have discretion to apply either the current FY subgrant formula (FY 2007, in my example) or the succeeding FY subgrant formula (FY 2008, in my example)?

As you may imagine this is an important question that arises in the administration of this new provision, and your guidance would be quite helpful. Thank you for your assistance.

Sincerely,

Leigh M. Manasevit