

# The Effects of PED's Latest Directive on the Provision of Special Education Ancillary Services

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# What are Ancillary Services?

- o Occupational Therapy
- o Physical Therapy
- o Social work
- o Speech and Language
- o Behavioral Therapy

# NM Special Education Underfunded

- o State found to have underfunded special education by \$110 million from 2010-2012.
- o New Mexico has struggled to meet the federal requirement of maintenance of effort.
- o 2014, a federal judge denied the NMPED request to waive a \$34.1 million fine in missed special education funding in 2011.
- o The state appealed, but currently owes the feds millions.

# Maintenance of Effort

- o In general, Federal funds appropriated under Part B of IDEA may only be utilized to cover the excess costs of providing special education and related services to students with disabilities.

# MOE Continued

- o These Federal funds must supplement/increase the level of other Federal, State and local funds expended for special education and related services and in no case supplant these funds.

# MOE Continued

- o In addition, IDEA includes separate maintenance of effort (MOE) provisions that apply independently at the State and local levels.
- o Both the rules and the consequences of failing to meet the required level of effort by the State or by the LEA are different under IDEA.

# MORE MOE

- o The term “Maintenance of Effort” (“MOE”) generally refers to a requirement placed upon many federally funded grant programs that the State Education Agency (SEA) and Local Education Agencies (LEAs) or school districts, demonstrate that the level of State and local funding remains constant from year to year.

# State MOE Requirement

- o Although States may vary in the manner in which they support special education, for each State to meet its MOE obligation under IDEA, it must continue to provide support for special education at the same level every year.
- o IDEA Part B prohibits a State from reducing State financial *support* for special education and related services below the amount of that *support* made available by the State the preceding fiscal year. 20 U.S.C. §1412(a)(18); 34 C.F.R. §300.163.

# State MOE Requirement

- Furthermore, the statute is clear that the Secretary of Education will reduce the amount of a State's grant by the same amount by which the State fails to meet this requirement for any fiscal year following the fiscal year in which the State fails to comply with this requirement. 20 U.S.C. §1412(a)(18)(B).

# Local MOE Requirement

- o At the local level, IDEA requires that LEAs, as a condition of eligibility for Part B funds, submit a plan that provides assurances to the SEA that the LEA shall not use IDEA monies to reduce the level of expenditures from local funds for educating students with disabilities below the level of those expenditures for the preceding fiscal year. 20 U.S.C. § 1413(a)(2)(A)(iii).
- o An SEA will find the LEA eligible for an award of Part B funds in a fiscal year based on this standard if the LEA *budgets* for the education of students with disabilities at least the same total or per capita amount as the LEA *expended* for that purpose *from the same source(s)* for the most recent prior fiscal year.

# Local MOE

- o The sources considered are local funds only or the combination of local funds and State funds. 34 C.F.R. §300.203(b).
- o The SEA may not consider any expenditure made from federal funds for which the SEA, or the LEA directly or through the SEA, is required to account to the Federal government. 34 C.F.R. §300.203.

# Latest PED Directive

- o Recently, PED Special Education Department directed school districts to decertify the 80 day counts and recalculate the method by which they had calculated FTE (full-time equivalency) for ancillary providers.
- o Districts were instructed to recalculate based on hours that the therapist was providing direct service to students only.
- o Other factors have been included previously in this calculation, including: travel, meeting time, case management, consult, etc.

# Why is this a Problem?

- o Besides the fact that this will create situations in school districts requiring that staff be fired, this has never been the method by which districts calculated ancillary service provider FTE.
- o This is a dramatic change from the previously method.
- o This change requires that districts either lie about the numbers they certified in the 80 day count or fire service providers.

***Neither option seems acceptable.***

# Until Now...

- o Funds for ancillary service providers are part of the SEG.
- o Any reimbursement from PED beyond the salary is utilized for operational costs: books, salaries, heating, cooling, etc.
- o This practice is now challenged by PED as incorrect , but without reference to any regulation, code or statute that indicates supports this change.

# Problem Continued

- o Providing direct service is only part of how ancillary service providers spend their time.
- o They are required to attend IEPs, conduct screenings and evaluations, maintain case files, conduct observations and teacher consults and social workers, in particular, handle student crisis situations.
- o The focus area of this new directive seems to be on Social Worker FTE, but the effects will be seen across service areas if the directives are carried out.

# Non-renewal of Staff?

- o Districts in rural and isolated areas may already have a difficult time finding special education ancillary service providers.
- o If Districts are required to non-renew ancillary staff, there are concerns related to tenure, as well as satisfying MOE with a smaller staff.
- o To date, PED has not addressed either of these concerns, but in the next two months, districts will be required to notify staff members who will not have positions for the 2016-2017 school year.

# Unanswered Questions

- o How does a District calculate FTE for personnel who only provide evaluations for child find students (evals mandated by state regs)?
- o Is the Superintendent authorized to reopen the 80/120 days counts? What will happen if authorization is not given, what action will PED take?
- o Why is this a problem now when districts have been instructed to calculate FTE in STARS in this same manner for many years? What does PED expect to accomplish with this directive besides getting back/saving money?

# Unanswered Questions

## Cont.

- o How will this new directive effect MOE for next year?
- o Will the PED penalize Districts when they fail to meet MOE requirements due to new method of calculating FTE for ancillary services.
- o Will the Feds punish the State for the same reason?

# Concerns

- o Changes in regulation should be subject to public comment.
- o There should be an opportunity for review and impact studies conducted before a change is implemented.
- o No new regulations have been published to reflect the changes that PED is proposing and no public comment has been requested.
- o How should Districts prepare for staffing and budget for next year with so many unanswered questions?

# Next Steps

- o Districts are currently grappling with how to handle these new directives.
- o Many Districts have written letters explaining the effects these directives will have on them.
- o Our firm has been asked to write a letter requesting more specific information from the NMPED Special Education Director Michael Lovato.

# Questions? Contact Us.

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