

DEPARTMENT OF EDUCATION**34 CFR Part 300**

RIN 1820-AB51

Assistance to States for the Education of Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing the Assistance to States for the Education of Children with Disabilities program under Part B of the Individuals with Disabilities Education Act (IDEA). This amendment is needed to implement the statutory provision that for any fiscal year in which the appropriation for section 611 of part B of IDEA exceeds \$4.1 billion, a local educational agency (LEA) may treat as local funds up to 20 percent of the amount it receives under that part that exceeds the amount it received during the prior fiscal year. The proposed regulation would ensure effective implementation of this statutory provision by providing clarity about the funds that can be included in this calculation, and would reduce the potential for audit exceptions.

DATES: We must receive your comments on or before August 8, 2000.

ADDRESSES: Address all comments about these proposed regulations to Thomas B. Irvin, Office of Special Education and Rehabilitative Services, U.S. Department of Education, Room 3090, Mary E. Switzer Building, 330 C Street, SW., Washington, DC 20202-2570.

If you prefer to send your comments through the internet, use the following address: Comments@ed.gov.

You must use the term "4.1 billion provision" in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: JoLeta Reynolds (202) 205-5507. If you use a telecommunication device for the deaf (TDD), you may call the TDD number at (202) 205-5465.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotope, or computer diskette) on request to Katie Mimcey, Director of the Alternate Formats Center. Telephone: (202) 205-8113.

SUPPLEMENTARY INFORMATION:**Invitation to Comment**

We invite you to submit comments regarding this proposed regulation.

We also invite you to assist us in complying with the specific

requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from the proposed regulation. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this proposed regulation in Room 3090, Mary E. Switzer Building, 330 C Street SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this proposed regulation. If you want to schedule an appointment for this type of aid, you may call (202) 205-8113 or (202) 260-9895. If you use a TDD, you may call the Federal Information Relay Service at 1-800-877-8339.

Background

The IDEA Amendments of 1997 (Pub. L. 105-17) added a provision related to the permissive treatment of a portion of Part B funds by LEAs for maintenance of effort and non-supplanting purposes in certain fiscal years (see section 613(a)(2)(C) of the Act and § 300.233 of the current regulations). Under that provision, for any fiscal year (FY) for which the appropriation for section 611 of IDEA exceeds \$4.1 billion, an LEA may treat as local funds, for maintenance of effort and non-supplanting purposes, up to 20 percent of the amount it receives that exceeds the amount it received under Part B during the prior year. Under § 300.233 an LEA is able to meet the maintenance of effort requirement of § 300.231 and non-supplant requirement of § 300.230(c) even though it reduces the amount of local or local and State funds that it spends on the Part B program, by an amount equal to the amount of Federal funds that may be treated as local funds. The Federal fiscal year 1999 was the first year that section 611 appropriation exceeded \$4.1 billion.

State and local educational agency officials have told the Department that they believe it is not clear from the provision whether the funds affected are only those that an LEA receives through

statutory subgrants under section 611(g), or whether the provision also applies to other Part B funding sources (i.e., subgrants to LEAs for capacity-building and improvement under section 611(f)(4); other funds the SEA may provide to LEAs under section 611(f); or funds provided under section 619 (Preschool Grants program)). Further, because section 613(a)(2)(C) refers to an amount of funds that an LEA "receives" in one fiscal year compared to the amount it "received" in the prior fiscal year, and because agencies may, at any one point in time, be using funds appropriated in several Federal fiscal years, agency officials are uncertain as to how to determine that an LEA has "received" Federal funds.

Because section 613(a)(2)(C) of IDEA and § 300.233(a)(1) (which tracks the statutory language) may not be sufficiently clear with respect to which precise funds are affected, this could result in the provision being interpreted and applied differently from LEA to LEA. If that situation were to occur, it could result in a significant increase in the number of audit exceptions against LEAs. Thus, it is important to set out in the regulations a clear interpretation of section 613(a)(2)(C) to support its consistent application across LEAs and States, and to reduce the potential for audit exceptions.

In light of the statutory structure for distribution of Federal funds to LEAs, we believe that the most reasonable interpretation is to apply that provision only to subgrants to LEAs under section 611(g) of the Act (§ 300.712 of the regulations) from funds appropriated for one Federal fiscal year compared to funds appropriated for the prior Federal fiscal year. This interpretation (as reflected in the proposed regulation) would ensure that an LEA could treat as local funds up to 20 percent of the increase in the amount it is entitled to receive as a subgrant under § 300.712 for any fiscal year for which the Federal appropriation to carry out section 611 of the IDEA exceeds \$4,100,000,000. Excluded from the Federal funds that can be treated as local funds will be subgrants to LEAs for capacity-building and improvement under section 611(f)(4) (§ 300.622); other funds the SEA may provide to LEAs under section 611(f) (§ 300.602); and funds provided under section 619 (Preschool Grants program) (34 CFR Part 301).

First, if IDEA funds that States have the authority to provide to LEAs on a discretionary basis, such as subgrants to LEAs for capacity building and improvement under section 611(f)(4) (§ 300.622) and other funds the SEA may provide to LEAs under section

611(f) (§ 300.602), are included in this calculation, it would result in some LEAs receiving a proportionately greater benefit from this provision than other LEAs based on receipt of funds that may be earmarked for a specific, time-limited purpose. This would lead to inequitable results of the § 300.233 exception across LEAs in a State. In addition, including section 619 formula grant funds (34 CFR Part 301) in the calculation does not appear to be justified as the 'trigger' appropriation is the amount appropriated under section 611.

The proposed regulation also would provide that if funds are being withheld from an LEA or have been reallocated to other LEAs, those funds would not be included in this calculation, as they would not be available to the LEA for the provision of special education and related services to children with disabilities.

Below are examples showing how this proposed regulation would apply under several situations:

- *Example 1:* An LEA receives \$100,000 in Federal LEA Subgrant funds under section 611(g) of the Act in one fiscal year (FY-1), and \$120,000 in section 611(g) funds in the following fiscal year (FY-2). The LEA may treat as local funds up to 20 percent of the \$20,000 in section 611(g) funds it receives in FY-2 (*i.e.*, up to \$4,000), since this is the amount that exceeds the amount it received in the prior year.

- *Example 2:* An LEA, in one fiscal year (FY-1), receives \$100,000 in section 611(g) funds, and \$20,000 in LEA discretionary funds under section 611(f) of the Act; and in the following fiscal year (FY-2), the LEA receives \$120,000 in section 611(g) funds, but does not receive any funds under section 611(f). The LEA may treat as local funds up to 20 percent of the \$20,000 in section 611(g) funds it receives in FY-2 (*i.e.*, up to \$4,000), since this is the amount of section 611(g) funds that exceeds the amount it received in FY-1.

- *Example 3:* An LEA had all of its section 611(g) funds (\$100,000) withheld in one fiscal year (FY-1); but in the next fiscal year (FY-2), the LEA received a total of \$220,000 in section 611(g) funds (*i.e.*, \$100,000 for FY-1, plus \$120,000 for FY-2). Because the LEA would have been entitled to \$100,000 in FY-1, the LEA may treat as local funds up to 20 percent of the \$20,000 in FY-2 that exceeded its FY-1 allotment, or up to \$4,000.

- *Example 4:* An LEA received \$100,000 under section 611(g) in one fiscal year (FY-1), and would have received \$120,000 in section 611(g) funds for the next fiscal year (FY-2); but

the LEA has all of its section 611(g) funds withheld in FY-2. The LEA would have no section 611(g) funds that could be treated as local funds in FY-2.

By clearly articulating that the standard refers to funds that an LEA is eligible to receive from a particular Federal appropriation, the proposed regulation would provide for consistent application from year to year across LEAs. It also would provide necessary clarity to budget officials and auditors, and ensure that each LEA receives a comparable benefit from this statutory provision.

It is important to note that § 303.233(b) of the existing regulation (which tracks the statutory language under section 613(a)(2)(C)(ii)) provides that "If an SEA determines that an LEA is not meeting the requirements of this part, the SEA may prohibit the LEA from treating funds received under Part B of the Act as local funds under paragraph (a)(1) of this section for any fiscal year, but only if it is authorized to do so by the State constitution or a State statute."

Federal fiscal year 1999 was the first year that the section 611 appropriation exceeded \$4.1 billion. However, since awards for fiscal year 1999 have already been made, these proposed regulations would be effective only for fiscal year 2000 and later appropriations. Thus, under the proposed regulation, FY 1999 would be the "previous fiscal year" for purposes of determining the amount of an LEA's FY 2000 grant under § 300.712 that it may treat as local funds. The amount of increase from FY 1999 to FY 2000 for purposes of this calculation would be based on the amount of funds the LEA was eligible to receive under § 300.712 in each of those years, rather than the amount it received during a particular year, or some other amount. Funds that were withheld from the LEA could not be considered.

Executive Order 12866

1. Potential Cost and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

We have also determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The potential costs and benefits of this proposed regulation are discussed elsewhere in this document under the Supplementary Information section.

2. Clarity of the Regulations

Executive Order 12866 and the President's Memorandum of June 1, 1998 on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

We invite comments on how to make this proposed regulation easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulation clearly stated?
- Does the proposed regulation contain technical terms or other wording that interferes with its clarity?
- Does the format of the proposed regulation (use of headings, paragraphing, *etc.*) aid or reduce its clarity?

- Could the description of the proposed regulation in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulation easier to understand? If so, how?

- What else could we do to make the proposed regulation easier to understand?

Send any comments that concern how the Department could make this proposed regulation easier to understand to the person listed in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have significant economic impact on a substantial number of small entities. The small entities affected would be small LEAs. The regulations would benefit the small entities affected by clarifying the statutory requirements and reducing the possibility of audit exceptions. By ensuring consistency, the regulations would promote more effective and efficient program administration.

Paperwork Reduction Act of 1995

This proposed regulation does not contain any information collection requirements.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34

CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Assessment of Educational Impact

The Secretary particularly requests comments on whether this proposed regulation would require transmission of information that any other agency or authority of the United States gathers or makes available.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites:

<http://ocfo.ed.gov/fedreg.htm>
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To use the PDF you must have Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-800-293-6498; or in the

Washington, D.C., area at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at:

<http://www.access.gpo.gov/nara/index.html>
(Catalog of Federal Domestic Assistance Number: 84.027 Assistance to States for the Education of Children with Disabilities)

List of Subjects in 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: February 29, 2000.

Richard W. Riley,

Secretary of Education.

For the reasons described in the preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES PROGRAM

1. The authority citation for part 300 continues to read as follows:

Authority: 20 U.S.C. 1411-1420, unless otherwise noted.

2. Section 300.233 is amended by revising paragraph (a)(1), and by adding a new paragraph (a)(3), to read as follows:

§ 300.233 Treatment of Federal funds in certain fiscal years.

(a)(1) Subject to paragraphs (a)(2), (a)(3), and (b) of this section, for any fiscal year for which amounts appropriated to carry out section 611 of the Act exceed \$4,100,000,000, an LEA may treat as local funds up to 20 percent of the amount of funds it is eligible to receive under § 300.712 from that appropriation that exceeds the amount from funds appropriated for the previous fiscal year that the LEA was eligible to receive under § 300.712.

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(3) For purposes of this section, an LEA is not eligible to receive funds that have been withheld under § 300.197 or 300.587 or have been reallocated to other LEAs in the State under § 300.714.

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