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

JAN 3 0 2013

Carol Hokenson, Manager
Education Funding and Data
Division of Program Finance
Minnesota Department of Education
1500 Highway 36 West
Roseville, Minnesota 55113-4266

Dear Ms. Hokenson:

This is in response to your October 27, 2011 letter to the Office of Special Education Programs (OSEP) in the Office of Special Education and Rehabilitative Services, U.S. Department of Education (Department). I apologize for the delay in responding. In your letter, you requested that OSEP provide clarification of provisions in Part B of the Individuals with Disabilities Education Act (IDEA) related to coordinated early intervening services (CEIS) and the maintenance of effort (MOE) by local educational agencies (LEAs). Your questions and OSEP's responses are below.

CEIS

In your letter, you describe the "Alternative Delivery of Specialized Instructional Services" (ADSIS) program as a State program defined in Minnesota Statute § 125A.50 "to provide prevention services as an alternative to special education and other compensatory programs. A district with an approved program may provide instruction and services in a regular education classroom, or an area learning center, to eligible pupils. Pupils eligible to participate in the program are pupils who need additional academic or behavioral support to succeed in the general education environment and who may eventually qualify for special education instruction or related services … if the intervention services authorized by this section were unavailable." You further indicated that students with disabilities are also served in this program.

For fiscal year (FY) 2012, a district previously approved in FY 2006 to provide the ADSIS program is proposing to reinstitute the program and fund it from a combination of State special education aid, local district funds, and funds made available under the IDEA for CEIS (CEIS funds). The district plans to use the CEIS funds for the fringe benefits of ADSIS staff providing positive behavioral interventions and supports (PBIS) and to cover the non-reimbursable costs (not funded by the State special education formula) of their ADSIS program such as equipment, supplies, materials and costs for data tracking.

Question 1: Can a district use CEIS funds to cover a portion of the cost of its ADSIS program if the program meets the requirements of CEIS such as targeted at risk population, general education based intervention, K-3 emphasis, allowable K-12, etc.? If so, can a State program like ADSIS, or a portion thereof, with its State specific

requirements, also constitute a CEIS program? Then does the district prorate the costs only for those students eligible for CEIS, excluding students with individualized education programs (IEPs) and non-targeted/typical students?

Answer: Under 34 CFR §300.226, an LEA may not use more than 15 percent of the amount the LEA receives under Part B of the IDEA for any fiscal year … in combination with other amounts (which may include amounts other than education funds), to develop and implement CEIS for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. In implementing CEIS, an LEA may carry out activities that include: (1) professional development for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and (2) providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction. In addition, under 34 CFR §300.226(e), funds made available to carry out CEIS may be used to carry out CEIS aligned with activities funded by, and carried out under the Elementary and Secondary Education Act (ESEA), if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under 34 CFR §300.226.

As you can see, CEIS do not constitute a "program," but rather are services and activities designed to assist children who need additional academic and behavioral support to succeed in a general education environment, but are not currently identified as children with disabilities. Therefore, CEIS funds could be used for a program such as ADSIS, but could not be used to provide ADSIS services to children with disabilities or nondisabled students who do not need additional academic and behavioral support to succeed in a general education environment (what you refer to as "non-targeted/typical students").

Our response to your questions about the use of CEIS funds assumes that the LEA is not using these funds in a Title I schoolwide school under the ESEA pursuant to 34 CFR §300.206. An LEA may use CEIS funds for the fringe benefits of ADSIS staff providing positive behavioral intervention and supports (hereinafter referred to as "teacher") to students who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment. See Office of Management and Budget (OMB) Circular A-87, Attachment B, 8. (Compensation for personal services), codified at 2 CFR Part 225, Appendix B, 8. The LEA may wish to consider split funding the teacher using IDEA Part B special education funds, general education funds, and CEIS funds if the teacher is providing services to students with disabilities, students who are not currently identified as needing

special education or related services but who need additional academic and behavioral support to succeed in a general education environment, and nondisabled students who do not need additional support. This funding mechanism offers full flexibility for a particular teacher to work with diverse groups of students, regardless of disability or intervention status. If a teacher is supported by funds from several sources, an LEA must document separately, consistent with OMB Circular A-87, the amount of time the teacher spends providing services to students with disabilities, services to students who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment, and services to nondisabled students who do not need additional support, to ensure that IDEA Part B funds are properly expended.[1]

You have also asked whether an LEA can use CEIS funds to cover the non-reimbursable costs (not funded by the State special education formula) of the ADSIS program, such as the purchase of equipment, supplies, materials, and costs for data tracking. If these costs are related to providing services to students with disabilities, and nondisabled students who do not need additional support, as well as students who are not currently identified as needing special education or related services but who need additional support; the LEA could use an amount of CEIS funds that is the same proportion of the total of those costs as the number of children who participate in the ADSIS program and activities who are not currently identified as needing special education or related services but need additional academic and behavioral support is to the total number of children who participate in the ADSIS program and activities.[2]

Question 2: If use of CEIS funds is allowable, would the district be required to demonstrate that the Federal funds they're requesting to be used for CEIS supplement existing funds they are using for the program (e.g., the program is growing, and they are using the Federal money to pay for some of the growth while continuing to spend the same amount of local funds)?

Answer: Yes. Under 34 CFR §300.202(a)(3), funds provided to LEAs under Part B of the IDEA must be used to supplement State, local, and other Federal funds and not to supplant those funds. The district would be required to demonstrate that the Federal IDEA Part B funds they are requesting to be used for CEIS supplement and do not supplant existing State, local and other Federal funds, including ESEA funds, the district is using for ADSIS. See also, 34 CFR §300.226(e).

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[1] Section 8.d. of Attachment B of OMB Circular A-87 provides principles to be applied in determining the allowability of the costs of fringe benefits and section 8.h. describes the standards regarding time distribution.

[2] Sections 15 and 26 of Appendix B of OMB Circular A-87 provide principles to be applied in determining the allowability of the costs of equipment and materials and supplies. See also, 34 CFR §80.32 for requirements related to equipment.

MOE

You indicate that you have several situations in which a district has reduced its State and/or local special education expenditures as a result of improving efficiencies in the delivery of special education services, and has been in jeopardy of not meeting MOE because of these reductions. In the specific example provided, you ask about an LEA that reduced the cost of providing special education services by consolidating bus routes and sharing bus services between districts. You ask for clarification as to whether these efficiencies can be the basis for an allowable reduction in MOE.

Question: Can improved efficiencies resulting in a reduction in expenditures, with no reduction in special education and related services, which are included in the MOE analysis, be a legitimate justification for not maintaining MOE?

Answer: Neither the statute nor its implementing regulations specifically address the situation you describe, *i.e.,* reducing the cost of providing special education services by either consolidating bus routes or sharing bus services between districts. The only exceptions and adjustments that apply to the LEA MOE requirements in 34 CFR §300.203 are those described in 34 CFR §§300.204 and 300.205. Under 34 CFR §300.204, notwithstanding the restriction in 34 CFR §300.203(a), regarding MOE, an LEA may reduce the level of expenditures by the LEA under Part B of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to any of the following:

> (a) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel.
> (b) A decrease in the enrollment of children with disabilities.
> (c) The termination of the obligation of the agency, consistent with this part, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child—
>> (1) Has left the jurisdiction of the agency;
>> (2) Has reached the age at which the obligation of the agency to provide FAPE to the child has terminated; or
>> (3) No longer needs the program of special education.
> (d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.
> (e) The assumption of cost by the high cost fund operated by the SEA under § 300.704(c).

The LEA may wish to thoroughly examine its expenditures that have been reduced to determine if any of the expenditures may be covered by the circumstances above.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact Melissa Turner at 202-245-6415 or by email at Melissa.Turner@ed.gov.

Sincerely,

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

cc: State Director of Special Education