

November 23, 2015

Michael Lovato
Director of Special Education
New Mexico Public Education Department
120 South Federal Place
Santa Fe, New Mexico 87501

Dear Mr. Lovato:

This is in response to the electronic mail (email) communication to me dated August 27, 2014, from Gabriel C. Baca, New Mexico's former special education director, in which he posed several questions seeking written guidance regarding the application of the exception to maintenance of effort (MOE) in 34 CFR §300.204(a). Under that provision, a local educational agency (LEA) may reduce the level of expenditures by the LEA for the education of children with disabilities under Part B of the Individuals with Disabilities Education Act (IDEA) below the level of those expenditures for the preceding fiscal year if the reduction is attributable to "the voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel." His questions and the Office of Special Education Programs' (OSEP) responses are below.

Question 1:

"Is an LEA able to take the deduction pursuant to 34 CFR §300.204(a) if the services were provided in the prior year by a special education and related service provider or contractor, and that contractor leaves his or her position by voluntary departure, retirement, or for cause, and now employees of the LEA are providing the same services?"

Example 1

In 2010-2011 an LEA pays [\$]100,000.00 for the fiscal year to a contractor to provide occupational therapist services. Then that contractor decides to leave the position voluntarily to pursue other personal interests or just decides not to renew the contract. In 2011-2012, instead of contracting for the services the LEA hires an occupational therapist as a full time employee with an annual salary of \$50,000.00.

Example 2

In 2010-2011, an LEA paid a total of \$100,000 for the fiscal year, to a contractor to provide occupational therapist services. In 2011-2012, instead of contracting for the services, the LEA decides to save money on travel and other costs that do not directly relate to a student's services, and in order to improve the quality of the services being provided to students in the LEA, the LEA hires an occupational therapist as a full time employee with an annual salary of \$50,000.00.

In both cases, may the LEA take the \$50,000.00 difference as a qualified reduction in MOE pursuant to §300.204(a)?"

OSEP’s Response:

In Example 1 above, the LEA may take the \$50,000 reduction in MOE because of the voluntary departure of the related service provider. On the other hand, in Example 2, the LEA may not take the reduction in MOE because the related service provider did not depart voluntarily, or for just cause, but rather departed because the LEA decided to terminate the contract with the related service provider as a cost-saving measure.

Question 2:

“Is an LEA able to take the deduction pursuant to [34 CFR §] 300.204(a), if the services provided in the prior year were being provided by a full-time employee who leaves his/her position by voluntary departure, retirement, or for just cause, and then the same services are provided by an independent contractor in the following year at a lower cost?”

OSEP’s Response:

In the situation provided in your question, the employee departed “his/her position by voluntary departure, retirement, or for just cause.” Therefore, based on the information you provided, the LEA may take an MOE reduction based on the difference between the salary paid to the full-time employee and the amount paid to the independent contractor. For example, if the salary paid to the full-time employee was \$100,000 and the amount paid to the independent contractor was \$50,000, the LEA may take a \$50,000 reduction in its MOE obligation.

Question 3:

“Is an LEA able to take the deduction pursuant to [34 CFR §] 300.204(a), if the services provided in the prior year were being provided by a contractor and then a less costly contractor provides the same services the following year?”

Example 3

In 2010-2011 an LEA pays \$50,000.00 for the fiscal year to a contractor to provide occupational therapist services. Then that contractor decides to leave the position voluntarily to pursue other personal interests or just decides not to renew the contract. In 2011-2012 the LEA finds another contractor to cover the services but the expenditures for the new contractor are \$40,000.00.

May the LEA take the \$10,000.00 difference as a qualified reduction in MOE pursuant to 34 CFR §300.204(a)?”

OSEP’s Response:

In Example 3, the contractor “voluntarily” departed the position; therefore, the LEA may take the \$10,000 reduction in MOE. (Your general question immediately preceding Example 3 does not indicate whether the contractor in the prior year voluntarily departed the position. If the contractor in that situation voluntarily departed the position, the LEA may take an MOE reduction.)

Question 4:

On page 2 of the OSEP Letter to Albert V. Gonzales, dated September 7, 2012, each of the examples provided “references a replacement of a ‘departing special education teacher’ but there is no context as to whether the teacher was paid as an employee of the LEA or as a contractor of the LEA. How does OSEP apply the exceptions in 34 CFR §300.204(a) to questions 1-3 above, in light of the guidance in the Letter to Gonzales?” You also ask “[i]n the context of the questions above, what is the definition of ‘personnel’ in [34 CFR §] 300.204(a)?”

OSEP’s Response:

As noted above, the provision in 34 CFR §300.204(a) refers to the voluntary departure, or departure for just cause of special education and related services personnel. Neither Part B of the IDEA, nor its implementing regulations, define special education or related services personnel. An LEA may take the reduction under 34 CFR §300.204(a) for the voluntary departure, or departure for just cause of a special education teacher or related service provider, regardless of whether the special education teacher or related services provider is an employee of the public agency or an independent contractor.

Question 5:

Lastly, you ask for clarification of “just cause” in 34 CFR §300.204(a). Specifically, “How would ‘just cause’ be defined in the case of a breach or material breach of contract of a contractor? And also, “How would ‘just cause’ be defined in the case of an occurrence of a violation of a contract by a contractor?”

OSEP’s Response:

Neither Part B of the IDEA, nor its implementing regulations, define “just cause.” In prior guidance, the Department has stated that departure “for just cause” is usually related to some kind of disciplinary dismissal.¹ “Just cause” is a legal term that must be defined consistent with State law. With respect to an employee of a public agency, a termination for “just cause” would generally occur when an employer makes a factual determination that the employee’s performance or conduct warranted the termination of the employee. With respect to an independent contractor, a termination for “just cause” would generally occur when the contractor fails to meet the terms of the contract.

¹ Please see the 2009 Integrated Fiscal Accountability presentation on LEA MOE on the GRADS website at <https://osep.grads360.org/#communities/pdc/documents/9437>. On April 28, 2015, the Department published final regulations on LEA MOE, which took effect on July 1, 2015. 80 Fed. Reg. 23644 (Apr. 28, 2015). In the final regulations, the eligibility standard precedes the compliance standard in order to provide clarity. Therefore, the eligibility standard is set out in 34 CFR §300.203(a), and the compliance standard is set out in 34 CFR §300.203(b). In addition, in order to clarify that LEAs may meet the eligibility standard and the compliance standard using any of the four methods ((i) local funds only, (ii) the combination of State and local funds, (iii) local funds only on a per capita basis, or (iv) the combination of State and local funds on a per capita basis), the final regulations list the four methods individually in both the eligibility standard in §300.203(a)(1) and the compliance standard in 34 CFR §300.203(b)(2). The ability to use any of the four methods is not a change in the final LEA MOE regulations, as the prior LEA MOE regulation also provided for the use of the four methods.

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 specific facts presented.

If you have any further questions, please do not hesitate to contact Jennifer Finch, of my staff, at 202-245-6610 or by email at Jennifer.Finch@ed.gov.

Sincerely,

/s/

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