Individuals with Disabilities Education Act (IDEA) Fiscal Monitoring Manual

IDEA Fiscal Monitoring Manual
Kentucky Department of Education

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Introduction

Part B of the Individuals with Disabilities Education Act (IDEA) makes federal funds available to SEAs under sections 611 (Grants to States – School Age) and 619 (Preschool) of the Act. These funds are intended to support the provision of special education and related services to children with disabilities. When a SEA receives its annual IDEA grant award notices (GAN) for sections 611 and 619, it must in turn subgrant the majority of these funds to eligible LEAs (school districts) within the state (see 34 CFR §§300.705 and 300.815)[1]. The section 611 funds are intended to pay the excess cost of providing special education and related services to children with disabilities ages 3 through 21 while the section 619 funds are intended to provide the excess cost of special education and related services to children with disabilities ages 3 through 5. Pursuant to 34 CFR 300.800, the Secretary of Education provides grants under section 619 of the IDEA to assist states in providing special education and related services in accordance with Part B of the IDEA to children with disabilities ages 3 through 5 years; and, at a state's discretion, to 2-year-old children with disabilities who turn 3 during the school year. Like funds provided under section 611, these funds must be used to supplement and not supplant other funds (e.g., Title I funds, or state and local funds, etc.) to cover the excess cost of providing special education and related services to eligible children with disabilities (see 34 CFR §300.202(a)(2) and (3)).

Under 2 CFR §3474.1, the U.S. Department of Education (US ED) adopted 2 CFR Part 200 of Title 2 – Grants and Agreements meaning that US ED is not bound by the Office of Management and Budget's (OMB) funding application and reporting collection formats and data requirements; however, US ED seeks and receives approval from OMB for the formats and data collection requirements it uses with states. Title 2, the Uniform Grant Guidance (UGG) requires that the non-federal entity (i.e., a state or local educational agency) that receives a federal grant award or subaward, is responsible for the efficient and effective administration of the federal award through the application of sound management practices (see 2 CFR §200.400). This entity assumes responsibility for administering federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the federal award. In the case of the IDEA, this includes General Supervision (see 34 CFR §300.149). Under the general supervisory authority of the IDEA, the SEA must monitor LEAs with respect to the administration, use and reporting of funds subgranted under this Act (see 34 CFR §300.202(a)(3)).

Specific responsibilities of the SEA in monitoring the use of IDEA funds by LEAs include ensuring that each LEA:

1. Does not commingle federal funds with other funds in the LEA (see 34 CFR §300.162(b);
2. Practices First In-First Out (FIFO) relative to federal funds (MUNIS);
3. Obligates and liquidates funds solely during the period of availability (see 34 CFR §76.709, and 2 CFR §§200.309 and 200.331;
4. Budgets and expends IDEA funds consistent with Part B of IDEA (see 34 CFR§300.202(a)(1));

[1] Full text of regulations can be found in Appendix D

5. Has a single audit, if it meets the grant award threshold for the previous year, and, if there are findings from a single audit, corrects those findings within six months of the issuance of the audit report (see 2 CFR §§200.501 and 200.502(a) and MUNIS);
6. Provides funds to charter schools that are part of the LEA in the same manner it provides funds to its other schools (see 34 CFR §§76.799, 300.209(b), 300.815 and 300.816) ;
7. Correctly applies the SEA-provided restricted indirect cost rate to contracts/grants (see 34 CFR §76.563 & 2 CFR §200.416);
8. Obtains approval from the SEA prior to using IDEA funds for equipment, construction or alteration of facilities (see 34 CFR §300.718 & 2 CFR 200.439);
9. Meets the excess cost requirements of the IDEA each year prior to releasing funds to the LEA (see 34 CFR §300.202(a)(2));
10. Implements the fiscal requirements for parentally-placed private school children with disabilities (see 34 CFR §§300.133, 300.138, 300.141 and 300.144);
11. Uses not more than 15% of its sub-award for voluntary coordinated early intervening services (see 34 CFR §300.226);
12. Uses 15%, but not more than 15% for allowable purposes when required by a finding of significant disproportionality (see 34 CFR §300.646);
13. Meets the Maintenance of Effort eligibility requirements of the IDEA each year prior to releasing funds to the LEA (see 34 CFR §300.203(a));
14. Meets the Maintenance of Effort compliance requirements of the IDEA from year to year (see 34 CFR §300.203(b));
15. Correctly applies and documents exceptions under 34 CFR §300.204, when applicable;
16. Correctly applies and documents any adjustments under 34 CFR §300.205, when applicable;
17. Properly repays any failure to maintain effort under 34 CFR §300.203(d), when applicable;
18. Submits an annual application for IDEA funds that includes required certifications and assurances that the LEA will meet all program requirements as specified in the IDEA and that it will oversee and administer the funds as required under the IDEA, its implementing regulations and those regulations in EDGAR and the Uniform Grant Guidance (UGG) as they pertain to the use of federal grant funds (see 34 CFR §§300.200, 300.806 and 300.815);
19. Uses procurement mechanisms that conform to 2 CFR §§200.318-300.326 (see 2 CFR §§200.317 and 200.474);
20. Ensures that charges to federal awards for salaries and wages are based on records that accurately reflect the work performed and that records are supported by a system of internal control which provides reasonable assurance that the charges are accurate, allowable, and properly allocated; are incorporated into the official records of the non-federal entity; reasonably reflect the total activity for which the employee is compensated by the non- federal entity, not exceeding 100% of compensated; encompass both federally-assisted and all other activities compensated by the non-federal entity on an integrated basis, but may include the use of subsidiary records as defined in the non-federal entity's written policy; and comply with the established accounting policies and practices of the non-federal entity (see 2 CFR §§200.430 and 200.431);
21. Supports the distribution of the employee's salary or wages among specific activities or cost objectives if the employee works on more than one federal award; a federal award and non-federal award; an indirect cost activity and a direct cost activity; two or more indirect activities which are allocated using different allocation bases; or an unallowable activity and a direct or indirect cost activity (see 2 CFR §§200.430);

22. Ensures that travel paid from special education funds (local, state or federal) is specifically related to, and required for, the provision of special education and related services for children with disabilities identified under the IDEA and is allowable under the IDEA and the UGG (see 34 CFR §300.202(a)(1)).
23. Maintains records for three years from the starting date of the retention period as specified by federal law (for IDEA funds, the retention period begins on the date the liquidation period for the subgrant ends, or any documentation for correction of noncompliance or resolution of audit findings or litigation is no longer required) (see §200.334) and ensures that records are available for review by auditors or others (including SEA or federal department of education staff) (see §200.337);
24. Has a control system to ensure adequate safeguards for all equipment purchased with federal Part B funds or state funds designated for special education (see 2 CFR §200.313)
25. Takes a physical inventory of property purchased with Part B funds, and reconciles the results with property records at least once every two years (see 2 CFR §200.313);
26. Ensures that any equipment, goods, services, materials, etc. purchased by LEAs with Part B funds, or charged to LEA MOE, are used only for Part B purposes (see 34 CFR §300.202(a)(1); and
27. Completes any corrective actions previously imposed within one year of the date the letter informing the LEA of the corrective actions (see Office of Special Education Programs (OSEP) Memo 09-02 in Appendix E.

STATE EDUCATIONAL AGENCY RESPONSIBILITIES

When working with federal Part B funds the state receives under IDEA, KDE refers to the section 611 formula Grants to States for Education of Children with Disabilities ages 3 through 21 as "IDEA Basic." A state that provides a free appropriate public education (FAPE) to children with disabilities aged 3 through 5 may also receive a formula Preschool Grant under section 619 to make available special education and related services for children with disabilities aged 3 through 5. KDE refers to the grant received under section 619 as "IDEA Preschool." A state that does not make FAPE available to all children with disabilities aged 3 through 5 cannot receive funds under this program or attributable to this age range under the IDEA Grants to States program. Use of the terms "Basic" and "Preschool" allow KDE to make a clear distinction between the programs when discussing these funds internally or with LEAs.

Each year, upon receipt of the Grant Award Notices (GAN) for both the Basic and Preschool grants from US ED, staff within KDE, Office of Special Education and Early Learning (OSEEL) review both GANs to determine:

1. If there are any changes in program or fiscal requirements;
2. The total amount awarded to the state (see 34 CFR §§300.703 and 300.807-300.810);
3. The amount of these funds that must be subgranted to the LEAs within the state (see 34 CFR §§300.705 and 300.815);
4. The amount of these funds that may be reserved for state level administration of the program (see 34 CFR §§300.704(a) and 300.813); and
5. The amount the state may set aside for restricted activities as described in the state's annual IDEA application to US ED (see 34 CFR §§300.704(b) and 300.814).

When staff within OSEEL learn the minimum amount of these federal funds that must be awarded to the LEAs within the state, the OSEEL Associate Commissioner determines if additional funds will be awarded to LEAs and how much the state will reserve for administrative and restricted activities. Upon determination of the Basic and Preschool amounts, OSEEL applies the IDEA formula to calculate the amount available for each LEA to provide services to children with disabilities (see 34 CFR §§300.705 and 300.815).

Funds granted to KDE under both the Basic and Preschool programs are available for obligation for 27 months from July 1 through Sept. 30 two years later. This same 27-month period of availability (also called the "*Period of Performance*") is allowed for LEAs. In addition to the 27-month period of availability for obligation, KDE and LEAs have up to 90 days after the end of the obligation period to liquidate any funds properly obligated. This 90-day liquidation period begins on Oct. 1, at the end of the period of availability. Funds not legally obligated or liquidated (expended) within the specified time must be returned to US ED (see 34 CFR §§76.708 and 76.709 and 2 CFR §200.343). Neither the state nor LEAs have authority to retain IDEA funds beyond the end of the liquidation period and KDE has the authority to require the return unexpended funds prior to Dec. 31 in sufficient time to collect and account for the funds and prepare to return them to OSEP when US ED opens the account for the return process at the end of Dec. and/or the beginning of Jan.

Before KDE approves an LEA's application for IDEA funds, it must determine each LEA's eligibility for the funds. This includes determining that the applicant:

1. Is a public school LEA as defined by state statute (see 34 CFR §§300.12, 300.13, 300.28, 300.33, 300.36, and 300.209);
2. Has met IDEA eligibility requirements, including submission of an application to the SEA that meets federal IDEA requirements (see 34 CFR §§300.200-300.213);
3. Meets the excess cost requirement (see 34 CFR §§300.202(a)(2) and 300.16); and
4. Meets the LEA MOE eligibility and compliance standards (see 34 CFR §300.203(a) and (b).

The KDE must review applications from all eligible LEAs. The application must be properly completed and submitted, and document that the LEA has provided all required assurances and certifications. In addition, as previously stated, KDE must also confirm the applicant meets all eligibility requirements. If KDE receives a substantially approvable application from an eligible LEA, upon completion of its review, KDE will approve the application with an effective approval date. The date will be either the date the application was received in substantially approvable form or July 1, whichever is later. Once the application for a LEA is approved, it includes approval for both the LEA's Basic and Preschool subgrants. Funds may not be obligated prior to the date the application was received in substantially approvable form. NOTE: If the application is received after July 1 or is not determined to be substantially approvable until after July 1, funds may not be obligated retroactive to July 1 but only to the date the application was approved or determined to be substantially approvable (see 34 CFR §76.708). Example: An application initially is received on June 29; however, it is determined NOT to be substantially approvable. A revised, substantially approvable application is received on July 23. Funds under this grant award may not be obligated (or expended for obligations made) prior to July 23.

MONITORING RESPONSIBILITIES OF THE SEA

The KDE has monitoring responsibilities with respect to LEAs, both before and after it approves applications for funds under Part B of the IDEA. These responsibilities are generated primarily from two sources.

The requirements of KDE to monitor LEAs come from the state's responsibilities for General Supervision described in the IDEA (see §300.149). Prior to an LEA having an application for IDEA funds approved, KDE must determine the LEA is an eligible recipient of an IDEA subgrant as described in the previous section. Presently KDE recognizes 173 LEAs, or school districts. This includes the 171 traditional, locally operated public school programs plus the Kentucky School for the Blind (KSB) and the Kentucky School for the Deaf (KSD). When an LEA's application under the IDEA is approved, KDE must provide general supervision, including fiscal oversight.

In addition to the fiscal requirements specific to special education and related services in the IDEA, there are fiscal and fiscally related provisions (e.g., procurement, personnel management, etc.) in the Uniform Grant Guidance (UGG) that are relevant to special education and for which KDE has a general supervision responsibility (see the previous two sections for citations and references).

Data Sources for Monitoring Activities

1. MUNIS: State Fiscal Management Software

The MUNIS, KDE's statewide fiscal software system, has unique project numbers that identify all federal funds, according to program, that are controlled by the LEA. This includes separate accounts for the Basic and Preschool funds awarded under the IDEA. These accounts are also specific to the fiscal year of the funds so that IDEA funds awarded one year are tracked separately from IDEA funds awarded in a subsequent or prior year. This allows the LEAs to track all financial transactions specific to the IDEA subgrants and to assign transactions to specific fiscal year allocations. Though not a regulator requirement, KDE encourages LEAs to spend older year funds prior to the obligation or expenditure of newer year funds.

This is often referred to as *"first in first out."* The MUNIS allows flexibility so that the LEAs can easily meet the management and reporting requirements for these funds. In the case of federal funds, MUNIS assigns the funds a unique numeric/alpha identifier when they are issued that is not directly tied to a single state fiscal year. This is because US ED requires accountability for federal funds based on the year issued and because they are available for a 27-month period of obligation which covers more than a single state fiscal year, or SFY. Additionally, multiple federal grants usually are open concurrently during the SFY and could lose their identity if they were identified by SFY. Therefore, while state and local funds continue to be identified by SFY, federal funds must be uniquely identified based on the date of issuance which coincides with the Federal Fiscal Year (FFY). For example, federal funds issued on July 1, 2019 are FFY 2019 federal funds but will be obligated primarily during SFYs 2020 (July 1, 2019-June 30, 2020) and 2021 (July 1, 2020-June 30, 2021) and into 2022 (from July 1, 2021-Sept. 30, 2021) and liquidated until Dec. 31, 2021. These funds are designated as IDEA Basic 337F and IDEA Preschool 343F. IDEA funds issued on July 1, 2020 are IDEA Basic 337G and IDEA Preschool 343G. Their designations have no relationship to state fiscal years.

2. ***Quarterly Summary Finance Reports (Quarterly Reports)***

LEAs must report, at least on a calendar quarterly basis, their expenditures during that period. There are four calendar quarters each year. Because IDEA federal funds are available for obligation for 27 months, plus an additional 90 days to liquidate obligations made as of the end of the 27-month availability period, an LEA may have to report on its expenditures of these funds over a 30-month period. As a result, there may be up to 10 quarterly expenditure reports for each subgrant. Below is a list of the potential calendar quarters where transactions might occur and be reported:

- ***Fiscal Year 1***
  - *Quarter 1: July 1 – Sept. 30*
  - *Quarter 2: Oct. 1 – Dec. 31*
  - *Quarter 3: Jan. 1 – March 31*
  - *Quarter 4: April 1 – June 30*
- ***Fiscal Year 2***
  - *Quarter 5: July 1 – Sept. 30*
  - *Quarter 6: Oct. 1 – Dec. 31*
  - *Quarter 7: Jan. 1 – March 31*
  - *Quarter 8: April 1 – June 30*
- ***Fiscal Year 3***
  - *Quarter 9: July 1 – Sept. 30 (End of Period to Obligate Funds)*
  - *Quarter 10: Oct. 1 – Dec. 31 (Spending/Liquidating Obligated Funds Only – federal requirements allow for 90 days after the period of obligation to obligate these funds. However, KDE requires districts liquidate these funds by Dec. 15 to allow for state accounting before the 90-day period lapses.)*

Quarterly Reports include expenditures during the period, expenditures to date, obligations during the period and the available balance for each object code (activity) from the approved budget.

3. ***Fiscal Desk Reviews/On-Site Fiscal Monitoring***

Each year OSEEL may conduct *Fiscal Desk Reviews* or *On-Site Fiscal Monitoring* of LEAs, as needed. Based on fiscal information available from the independent Single Audit of a LEA, data from the LEA MOE eligibility and LEA MOE compliance forms, Quarterly Reports mentioned above, budgeting or other fiscal documents, OSEEL may determine monitoring is required. Other factors considered in determining if a *Fiscal Desk Review* or *On-Site Fiscal Monitoring* is necessary include information from OSEEL *Fiscal Risk Management*, using the *Risk Management Tool* (RAT).

4. ***Fiscal Desk Review***

This activity is a remote review of information maintained at OSEEL, or requested from the LEA, including:

- A virtual interview with relevant fiscal and special education staff regarding practices and procedures related to fiscal management (usually the finance director (by whatever title)

and the Director of Special Education (DoSE), along with whatever staff they choose to include, and the Superintendent is always invited),
- MUNIS information specific to a LEA's fiscal practices,
- Independent Single Audits for the SFY of interest and previous SFY,
- Quarterly Reports for the federal grant award issued in the SFY of interest and related LEA MOE SFY,
- Annual GMAP applications and award letters for the federal grant award of interest,
- Federal Cash Requests (used by LEAs to draw down IDEA funds, based on expenditures),
- LEA MOE eligibility and compliance for the SFY of interest,
- Model Procurement Standards and Procurement Process,
- LEA Fiscal Policies and Procedures,
- Employee Salary/Benefit Schedules,
- Time/Effort Documentation and Personnel Activity Reports (PAR),
- Physical Inventories (*MUNIS* and LEA),
- Travel Approval/Reimbursement Process, and
- Other fiscal information that may be available.
- The process concludes with an exit conference with the staff included in the initial interview and the Superintendent to inform them of the results, show them documentation supporting conclusions, provide an opportunity for them to comment and offer additional documentation to support conclusions or counter conclusions prior to determinations being provided to KDE OSEEL staff.

A *Fiscal Desk Review* could result in:

- No findings,
- Findings of noncompliance requiring a corrective action plan (CAP) that can be addressed by:
    - Correcting reports with supporting documentation; and/or
    - Updating policies and procedures,
- Requiring repayment of funds (KDE would first repay the federal government, in this situation, from non-federal funds or funds for which accountability to the federal government is not required (see 2 CFR §200.441) and then, as permitted under state law, would recover the repayment from the LEA that incurred the repayment),
- KDE withholding funds pending correction of particular areas of noncompliance, or the
- Determining an LEA ineligible to receive IDEA funds if the noncompliance demonstrated the LEA's ineligibility for its subgrant or the LEA failed to correct the noncompliance within the required timelines, or
- An *On-Site Fiscal Monitoring*.

A *Fiscal Desk Review* may result, as noted immediately above, in findings that require further review leading to *On-Site Fiscal Monitoring*. OSEEL does not typically conduct an *On-Site Fiscal Monitoring* visit unless a *Fiscal Desk Review* finds substantial and significant issues in the LEA's financial practices specific to IDEA that require a more in-depth review of a larger volume of purchase orders, invoices, bills of lading, time sheets, and/or interviews with staff to verify or confirm suspected noncompliance. However, OSEEL may, in some cases, conduct an *On-Site*

Fiscal Monitoring visit as part of a larger visit by KDE or as a result of fiscal concerns that OSEEL considers substantial enough to require immediate action.

An LEA may be required to repay funds as the result of either a *Fiscal Desk Review* or an *On-Site Fiscal Monitoring*. Either type of fiscal monitoring typically results in a CAP. When one or more area(s) of noncompliance are cited by OSEEL, a CAP is issued and the LEA will have one year or less to complete the requirements of the CAP from the date the LEA was notified of the existence of noncompliance (see Appendix E).

LEA Training and Preparation

This comprehensive *IDEA Fiscal Monitoring Manual* was initially shared with LEA fiscal representatives from a small number of districts and feedback requested/received. Feedback incorporated has improved the manual, making it more relevant to Kentucky's LEAs. The manual was approved by KDE and published on its website. Training on its contents began through a PowerPoint presentation in the spring of 2021 and will continue at various statewide meetings for fiscal staff and special education directors and will continue.

The Pilot

In the late fall of 2019, after the review of the *Manual*, five LEAs were solicited to be monitored, using the *Fiscal Desk Review*, during the spring of 2021, on SFY 2019 (school year 2018-2019) records. The pilot included:

1. A copy of the *OSEEL IDEA Fiscal Monitoring Manual*;
2. Preliminary training for KDE monitors, based on interactive discussion, on all topics, selection of examples in each area to be reviewed, identification of noncompliance;
3. Development of forms/formats to be used throughout the process;
4. Navigating and resolving issues with access to the MUNIS system for each LEA monitored;
5. Interviews with staff in the pilot LEAs and soliciting evaluations of the process by the participating LEAs;
6. A meeting with the monitors to identify issues/problems and how they were resolved (short of contacting the LEAs);
7. Identifying needed document submissions and the most efficient and effective methods of obtaining them;
8. Summarizing the results, problems, solutions and recommendations.

Revisions and Changes

Based on the results of the pilot, the manual and monitoring documents have been revised.

Training Going Forward

Beginning in the Spring 2022, training will be provided, based on the *OSEEL IDEA Fiscal Monitoring Manual* on no less than an annual basis, as part of KDE's leadership training offerings.

Summary

All areas of accountability may not be reviewed for each LEA during every fiscal review. Factors determining what will be reviewed include, but are not limited to:

1. Length of time since the previous review;
2. Risk factors for the specific LEA (including the size of the federal and/or state grant awards);
3. Number(s) of state complaints received;
4. Number(s) of due process hearings conducted;
5. Number(s) of monitoring finds in the past two monitoring activities (and whether the findings were corrected in a timely manner and/or recurred, etc.);
6. Whether the LEA has a history of compliance with LEA MOE/excess cost status during the last two reviews; and
7. Whether the LEA has a current determination under 34 CFR §300.608 of "*Meets Requirements.*"

AREAS OF FISCAL/FISCAL-RELATED ACCOUNTABILITY

COMMINGLING

The first step in fiscal accountability is ensuring an LEA has appropriate fiscal management procedures in place to track the IDEA funds and ensure they are not commingled with other funds in the LEA (see 34 CFR §300.162(b)). Kentucky's fiscal management tool, MUNIS, allows LEAs to account for each fiscal transaction that occurs in the LEA from the point of a purchase request to the final payment of all obligations applicable to a specific program or project. Funds are readily attributable to federal, state or other sources. The system can be monitored or spot-checked to determine that an LEA is complying with the requirement not to commingle funds by checking the funds assigned to federal and state grant identifiers against those same categories of funds provided to that LEA.

PERIOD OF AVAILABILITY and FIRST IN FIRST OUT (FIFO) SPENDING OF GRANT FUNDS

The IDEA Basic and Preschool grants are awarded annually to LEAs typically as of July 1, the start of the SFY. These funds are available to the LEA for obligation for a 27-month period. As a result of this long period of availability, these funds cross multiple fiscal years, and create the potential, and even the likelihood, that the LEA will have two or more IDEA subgrants open for the same program at the same time. The KDE encourages LEAs to spend from the older-year grants before they spend from newer-year grants to ensure that older funds are spent within their period of availability, also called the *"period of performance"* in the Uniform Grant Guidance (UGG).

Most LEAs follow this practice and typically spend each year's subgrant within 15-18 months from the date the funds are made available. However, KDE recognizes it is not always possible for an LEA to spend older year funds due to a variety of reasons, including the requirement that the district set aside funds specifically for parentally placed private school children with disabilities. An LEA also may set aside funds for implementing either voluntary or comprehensive coordinated early intervening services (CEIS). If a KDE review finds that an LEA is routinely spending funds from newer subgrants prior to spending down older year subgrants that is not attributable to meeting these other requirements, KDE may elect to contact the district and, if determined necessary by KDE, request the LEA to provide a written plan describing how it will improve this practice.

INDEPENDENT SINGLE AUDITS

In addition to the MUNIS fiscal management tool, LEAs are also required to have independent single audits of their major programs each year. Major programs are determined, pursuant to 2 CFR §200.518, based on the amount of the funds in a particular program for the specific year being audited (*currently, the non-federal entity must expend, in a given fiscal year, a minimum of $750,000 under a single federal grant program for that grant program to be considered a "Type A" program, requiring a single audit, unless risk factors under 2 CFR §200.519 make the program eligible for a single audit*) (see 2 CFR §§200.501-200.502). These audits are conducted by auditors approved by the state and the reports of these audits are submitted to various offices within KDE. When conducted an audit of the IDEA funds, the independent auditors test LEA policies, procedures and practices against the OMB Guidance for Grants and Agreements and are supposed to test them against the

UGG, the Compliance Supplement that includes LEA MOE and Excess Cost specifically related to special education, as well as a variety of general fiscal principles across programs (e.g., procurement, fiscal controls, time and effort, etc.). If there are audit exceptions discovered during this audit, OSEEL will be notified by the Office of Finance and Operations' (OFO) Federal Budget Brant and the LEA will be required to implement correction actions as appropriate. The KDE has six months to resolve findings from independent single audits.

FUNDING TO CHARTER SCHOOLS THAT ARE PART OF THE LEA

The LEA is required to provide IDEA funds to charter schools that are part of the LEA in the same manner that it provides IDEA funds to its other schools. In other words, if the LEA provides mini-grants to its schools to provide special education and related services, its charter schools must receive the same mini-grants in the same manner and same amounts as its other schools. If the LEA uses IDEA funds to pay for the special education staff (including related services providers) in its schools, it must use IDEA funds to pay for the special education staff (including related services providers) in its charter schools. If these staff and providers are funded by using a combination of federal and state funds in its regular schools, the LEA should use a combination of federal and state funds in its charter schools (or otherwise ensure that special education and related services providers are paid for by the LEA). If supplies and materials are paid for using federal funds in an LEA's schools, the LEA should provide supplies and materials with federal funds in its charter schools, and so forth (see 34 CFR §§76.799, 300.209(b), 300.815 and 300.816).

RESTRICTED INDIRECT COST RATE (RICRs)

Any grant that contains a supplement/not supplant provision (which includes the IDEA), requires the application of a RICR rather than an indirect cost rate. The use of indirect cost applies to circumstances when direct costs cannot be related directly to cost centers. It typically includes costs for services such as janitorial services, heating, air conditioning, administrative services and so forth. Restricted rates must be obtained from KDE and, when contractual indirect services are provided, are generally applied only to the first $25,000 of a contract (see 34 CFR §76.563 and 2 CFR §200.416). Questions about the use of restricted rates should be directed to the KDE indirect cost group in the KDE Division of District Support. (See: Cost Allocation Guide for State and Local Governments, US ED, Sept. 2019, p.42, Section VII: Common Indirect Cost Issues, F: Subawards.)

PRIOR APPROVAL (Equipment, Construction or Alteration of Facilities, Personnel)

Federal Part B funds cannot be used for equipment, construction or alteration of facilities without prior approval by KDE. The KDE must review the *Quarterly Reports* to ensure the LEA is spending IDEA funds as approved. While the LEA is not required, nor expected, to expend funds exactly as budgeted, if the LEA needs to make significant changes in the planned expenditures, it must submit a budget revision. Significant changes include adding new activities, needing to purchase additional equipment (items of individual line-item cost of $5,000 and having a useful life of more than one year) not previously approved in the GMAP, increasing personnel resulting in a 10% or more increase of the total amount budgeted for personnel or establishing new job position classifications not previously approved and funded in the LEA. The SEA must approve revisions to the budget before the revisions are implemented (see 34 CFR §300.718).

EXCESS COST

While MOE considers the amount of local, or state and local, funds the LEA budgets or expends to provide special education and related services to children with disabilities, the Excess Cost requirement determines an average annual per student expenditure of state and local funds the LEA spent providing general education to all students in the LEA, including children with disabilities (see 34 CFR §§300.202(a)(2), 300.16 and 34 CFR 300 Appendix A).

Pursuant to 34 CFR 300.202(a)(2), IDEA funds may only be used to pay the excess cost of providing special education and related services to children with disabilities. Excess cost is described in Appendix A of 34 CFR 300 as, *"…those costs for the education of an elementary school or secondary school student with a disability that are in excess of the average annual per student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate."* Appendix A further provides that LEAs must spend the average annual per student expenditure on the education of elementary school and secondary school students with a disabilities *before* funds under the IDEA can be used to pay for the excess cost of providing special education and related services; however, OSEP has determined that, from a practical perspective, IDEA funds may be spent concurrently with general education funds so long as LEAs can demonstrate, at the end of a school year, that the excess cost requirement is met.

This means KDE must ensure that each LEA in the state applying for a subgrant under the IDEA annually calculates the average annual per student expenditure, separately for elementary and secondary students, and expends the average annual per student expenditure for each child with a disability just as it does for each child without a disability in order to maintain eligibility for its IDEA subgrant award.

To meet these requirements, KDE must have in place a process as outlined in Appendix A that requires LEAs to calculate the elementary school and secondary school average annual per student expenditure and a process in place for the LEA to demonstrate it did, in fact, expend this amount for children with disabilities, in aggregate.

While LEAs do not have to sequentially expend the average per pupil expenditure prior to beginning to expend federal grant funds, KDE requires each LEA to document its calculations for the average annual per student expenditure at both the elementary and secondary levels each year prior to approving its application for IDEA. For example, before KDE will approve an LEA's application for IDEA funds for the 2019-2020 school year, the LEA must provide information pursuant to the requirements described in Appendix A documenting the elementary and secondary average annual per student expenditures, in aggregate, for both levels, for the 2017-2018 school year. This is because the fiscal information to calculate the average annual per student expenditure for the 2018-2019 school year will not be available at the time the 2019-2020 application is being reviewed.

A future version of the ***Fiscal Monitoring Manual*** will include more information specific to how Excess Cost is monitored with the state including more forms and review process.

PARENTALLY PLACED PRIVATE SCHOOL CHILDREN WITH DISABILITIES

The Kentucky Constitution establishes the right of parents to choose the formal education for their child; therefore, parents may choose to have their child educated in a private school setting. Private (Non-Public) schools must adhere to Kentucky laws regarding school attendance, minimum instructional hours, subjects taught, and records kept. Private schools that enroll children in preschool through the 12th grade may seek certification from KDE, but are not required to be certified and parents may elect to send their children to private schools that are certified or not certified, or to home school their children and, provided they properly notify their home school district, in writing, at the beginning of each school year, will be considered a private school.

Each LEA must spend the following on providing special education and related services (including direct services) to parentally placed private school children with disabilities:

1. For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under section 611 as the number of private school children with disabilities aged 3 through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3 through 21.
2. For children aged 3 through 5, an amount that is the same proportion of the LEA's total subgrant under section 619 as the number of parentally placed private school children with disabilities aged 3 through 5 who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3 through 5.

Children aged 3 through 5 are considered to be parentally placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets KDE's definition of an elementary school (see 34 CFR §300.133(a)(2)(ii)) and therefore, must also be counted and served with a proportionate share of IDEA Preschool funds as calculated in paragraph 2 above.

If an LEA has not expended, for equitable services, all of the funds by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally placed private school children with disabilities during a carry-over period of one additional year.

In calculating the proportionate amount of federal funds to be provided for parentally placed private school children with disabilities, the LEA, after timely and meaningful consultation with representatives of private schools (see 34 CFR §300.134) must conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the LEA, including all children ages, 3-21, both served and unserved.

Each LEA must, after timely and meaningful consultation with representatives of parentally placed private school children with disabilities, determine the number of parentally placed private school children with disabilities attending private schools located in the LEA, and ensure that the count is conducted on any date between Oct. 1 and Dec. 1, inclusive, of each year. This count must be used to

determine the amount that the LEA must spend on providing special education and related services to parentally placed private school children with disabilities in the next subsequent state fiscal year.

State and local funds may **supplement** and **in no case supplant** the proportionate amount of federal funds required to be expended for parentally placed private school children with disabilities under Part B of the IDEA (see 34 CFR §300.133(d)).

The services provided to parentally placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary and secondary school teachers who are providing equitable services to parentally placed private school children with disabilities do not have to meet the special education teacher qualification requirements in 34 CFR §300.156(c).

Parentally placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

Each parentally placed private school child with a disability who has been designated to receive services under 34 CFR §300.132 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in 34 CFR §§300.134 and 300.137, it will make available to parentally placed private school children with disabilities. **NOTE**: The timely and meaningful consultation described in the referenced section is *NOT* the same as the "intent to participate" meeting that is held among the federal programs and that meeting, unless significantly modified, does not fulfill the intent, content or purpose of the private school consultation called for in these regulations.

The services plan must, to the extent appropriate:

1. Meet the requirements of 34 CFR §300.320, or for a child ages 3 through 5, meet the requirements of 34 CFR §300.323(b) with respect to the services provided; and
2. Be developed, reviewed and revised consistent with 34 CFR §§300.321 – 300.324.

The provision of services pursuant to this section and 34 CFR §§300.139 – 300.143 must be provided:

1. By employees of a public agency; or
2. Through contract by the public agency with an individual, association, agency, organization, or another agency.

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, must be secular, neutral, and nonideological.
An LEA may not use funds provided under sections 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school. The LEA must use funds provided under Part B of the Act to meet the special education and related services needs of parentally placed private school children with disabilities, but not for meeting:

1. The needs of a private school; or
2. The general needs of the students enrolled in the private school.

COORDINATED EARLY INTERVENING SERVICES (see 34 CFR §300.226)

Voluntary

If an LEA is not found to have significant disproportionality, it may use not more than 15 percent of the amount it receives under Part B of the IDEA for any fiscal year, **LESS** any amount reduced by the LEA pursuant to 34 CFR §300.205, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement CEIS, which may include interagency financing structures, 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 under this section, an LEA may carry out activities that include:

1. Professional development (which may be provided by entities other than LEAs) 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.

Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the IDEA or to delay appropriate evaluation of a child suspected of having a disability.

Each LEA that develops and maintains CEIS under this section must annually report to KDE on:

1. The number of children served under this section who received early intervening services; and
2. The number of children served under this section who received early intervening services and subsequently receive special education and related services under Part B of the Act during the preceding two-year period.

Funds made available to carry out this section may be used to carry out CEIS aligned with activities funded by, and carried out under the ESSA if those funds are used to supplement, and not supplant, funds made available under the ESSA for the activities and services assisted under the CEIS.

Be aware that an LEA that wishes to use Part B funds to implement voluntary CEIS and also to take advantage of the reduction in LEA MOE under 34 CFR §300.205 must consider the interaction created by these two options pursuant to 34 CFR §§300.226(a) and 300.646(d).

Required – Comprehensive CEIS

Unless an LEA serves *only* children with disabilities, KDE must require any LEA identified with significant disproportionality, pursuant to 34 CFR §300.647, with respect to the identification of children as children with disabilities (including the identification of children as children with

disabilities in accordance with a particular impairment described in section 602(3) of the IDEA), the placement in particular educational settings of these children, and the incidence, duration and type of disciplinary removals from placement, including suspensions and expulsions, to reserve 15 percent of its Part B subaward (sections 619 and 611 combined) to provide comprehensive coordinated early intervening services (CCEIS) to address factors contributing to the significant disproportionality.

KDE has elected to use a multi-year flexibility in determining significant disproportionality. This means that the LEA must be significantly disproportionate for 3 consecutive years before KDE identifies (notifies) the LEA that it is significantly disproportionate. OSEP guidance states that the multi-year flexibility must be applied separately to each of the 98 risk ratios calculated and the state cannot use different cell sizes or n-sizes, by race or ethnicity within the same category of analysis. If an LEA initially demonstrates significant disproportionality but makes reasonable progress (on measures developed by the state for "reasonable progress" with the advice of stakeholders, include State Advisory Panels), based on whether the progress realized by the LEA in lowering the risk ratio(s) represents a meaningful benefit to children in the LEA, rather than statistical noise or chance, the LEA may never officially be identified as having significant disproportionality. This, however, would require that KDE notify the LEA when it is initially recognized as having significant disproportionality on any of the 98 risk ratios calculated and that is currently not the state's practice; therefore, LEAs do not have the opportunity to determine if there is a concern until it has existed for three consecutive years.

Once notified that it is significantly disproportionate, the LEA must reserve 15 percent of its IDEA funds (calculated on a combination of both section 611 and 619 funds but it can be expended from section 611 only, if the LEA chooses) by August 1 of the year immediately following the official notification that it is significantly disproportionate (from the grant award it receives on July 1 of that year, funds received on July of the immediate prior year, or from the grant that was received on July 1 two years prior that will expire for obligation the immediate coming Sept 30, depending on the plans of the LEA to address the significant disproportionality and how quickly it intends to begin expending those funds).

In implementing CCEIS, an LEA:

1. May carry out activities that include professional development and educational and behavioral evaluations, services, and supports.
2. Must identify and address the factors contributing to the significant disproportionality, which may include, among other identified factors, a lack of access to scientifically-based instruction; economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings; inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality.
3. Must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice, or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups).

An LEA may use funds reserved for CCEIS to serve children from age 3 through grade 12, particularly, but not exclusively, children in those groups that were significantly overidentified as described above, including:

1. Children 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
2. Children with disabilities.

An LEA may not limit the provision of CCEIS under this paragraph to children with disabilities.

Nothing in this section authorizes an LEA to develop or implement policies, practices, or procedures that result in actions that violate the requirements of this part, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

An LEA that is required to use funds to implement CCEIS as a result of significant disproportionality is prohibited from reducing its level of LEA MOE due to an increase in its federal allocation pursuant to 34 CFR §300.205.

LOCAL EDUCATIONAL AGENCY (LEA) MAINTENANCE OF FISCAL EFFORT (MOE)

The IDEA funds awarded to LEAs are intended to supplement, not supplant state and local funds spent by the LEA to provide special education and related services to children with disabilities (see 34 CFR §300.202(a)(3)). Under IDEA's LEA MOE requirements (34 CFR §300.203), an LEA must demonstrate annually that it meets both the compliance (34 CFR §300.203(b)) and eligibility (34 CFR §300.203(a)) standards of the LEA MOE regulation. Both compliance and eligibility use four separate methods to calculate the amount of local, and combined state and local, funds the LEA budgets and expends to determine if LEA MOE compliance and eligibility standards are met.

The KDE monitors the status of an LEA in meeting one or more of the four tests through a tool developed by a US ED, OSEP-funded national technical assistance (TA) center, the Center for IDEA Fiscal Reporting (CIFR). This tool, the ***LEA MOE Calculator***, is a multi-tabbed Excel Workbook calculator that documents expenditures and funding sources for special education costs of the LEA and is used to document both LEA MOE eligibility and compliance. The difference between MOE eligibility and MOE compliance is that eligibility documents the amount of local, or state and local, funds the LEA budgets to support the LEA's special education program, while compliance documents the actual amount of local, or state and local, funds the LEA expended in providing special education and related services to children with disabilities.

LEA MOE Compliance (34 CFR §300.203(b))

All LEAs in Kentucky use MUNIS to document financial transactions as they occur. MUNIS uses standardized codes to identify, program, project, location, fund source, expenditure activity, and other information specific to each transaction within every LEA. For LEA MOE compliance, KDE utilizes the financial data captured in MUNIS to document expenditures of state and local funds specific to the operation of the LEA's special education program. An important issue with MUNIS that impacts an LEA's ability to take advantage of the four calculations of MOE is the source of funding for the general fund within MUNIS. First, the general fund in MUNIS is the LEA's primary account used to support the majority the LEA's activities, including the provision of general education programs. Second, the general fund is supported by both local and state sources. This means that for many activities for which

the general fund is used, MUNIS cannot differentiate whether the specific funds for any given activity are local or state funds. As a result, KDE worked with CIFR to develop a method for allocating expenditures from the general fund that support special education and related services as either state funds or local funds.

To allocate general fund expenditures for special education programs as either state or local funds, OSEEL determined that LEAs:

1. Spend state funds to provide special education and related services before spending local funds;
2. Can identify the total amount of state funds it received to provide special education and related services to children with disabilities in any given year *(These state funds are known as the Support Education Excellence in Kentucky (SEEK) Exceptional Child Add-on and LEAs are provided with information from KDE on the total amount of funds this add-on provides each year.)*;
3. Can identify the total amount of expenditures from the general fund that supported the special education program in any given year *(By assigning a special education program code [200-240] to each transaction related to special education, this information can be easily retrieved in a report from MUNIS)*.

If an LEA received more state funds (SEEK Exceptional Child Add-on Funds) in #2 than it spent providing special education and related services as identified in #2, this means that the LEA did not spend any local funds to provide special education and related services and that the amount reported in #3 is all funds. However, if the LEA spent more funds in #3, then the amount received from state funds to provide special education and related services reported in #2, then the total spent from local funds is calculated by subtracting the amount of state funds in #2 from the total of all general fund dollars spent in #3.

Once an LEA allocates its expenditures providing special education and related services between local and state funds, then the four LEA MOE calculations can be applied to determine if compliance based on these expenditures has been met. To meet MOE compliance, an LEA is required to meet only one of the four tests in any year.

The four calculations for LEA MOE compliance are as follows:

1. Local funds only in total are equal to, or exceed, the amount of local funds total expended in the immediate prior year if the LEA met MOE in that year by the same method, or, if the LEA did not meet MOE in that year by the same method, in the most recent prior year the LEA met compliance using only local funds total.
2. State and local funds combined, in total, are equal to, or exceed, the amount of state and local funds combined, in total, expended in the immediate prior year if the LEA met MOE in that year by the same method, or, if the LEA did not meet MOE in that year by the same method, in the most recent prior year the LEA met compliance using state and local funds combined, in total.
3. Local funds only per child are equal to, or exceed, the amount of local funds only per child expended in the immediate prior year if the LEA met MOE in that year by the same method or, if the LEA did not meet MOE in that year by the same method, in the most recent prior year the LEA met compliance using local funds only per child. *(The per child amount is calculated by dividing the total in #1 above by the IDEA Child Count for ages 3 through 21 from that school year.)*

4. State and local funds combined, per child, are equal to, or exceed, the amount of state and local funds combined per child expended in the immediate prior year if the LEA met MOE in that year by the same method or, if the LEA did not meet MOE in that year by the same method, in the most recent prior year the LEA met compliance using state and local funds combined, per child. *(The per child amount is calculated by dividing the total in #2 above by the IDEA Child Count for ages 3 through 21 described in #3.)*

It is important to note the following:

1. ALL expenditures related to the provision of special education from ALL sources (including portions of state grants provided by the Kentucky Educational Collaborative for State Agency Children (KECSAC), the Kentucky Education Reform Act (1990) (KERA) for preschool and subsequently, from Flex Focus Funds (for preschool)), local, and federal) must be properly coded and assigned to special education within MUNIS (see 34 CFR §300.203(a));
2. "Meeting" one of the four tests means that the amount expended in the current year is equal to or greater than the amount expended by that same method the last time the LEA met MOE by that method – which may or may not have been the previous year (see 34 CFR §300.203(c));
3. LEAs are free to use the ***LEA MOE Calculator*** to determine progress in meeting MOE throughout the year (e.g., quarterly) rather than waiting until after the close of the year to find out if the LEA met effort - after expenditures are entered - it is self-calculating and will update as new figures are entered.
4. If an LEA maintains fiscal effort, expenditures of federal IDEA funds are, by definition, supplementing and not supplanting state/local funds for the education of children with disabilities (34 CFR §300.202(a)(3)); and
5. If an LEA receives an adjustment to its LEA MOE threshold under 34 CFR §300.205, the LEA **MUST** expend the of that adjustment, from non-federal funds, on activities approvable under the ESEA *in the same year the adjustment becomes available* (see 34 CFR §300.205(b) and Appendix B).

To meet the LEA MOE compliance requirement, an LEA must meet at least one of the four tests above (see 34 CFR §300.203(a)(1) and (b)(2)) or the LEA may provide information on the ***LEA MOE Calculator*** for allowable exceptions as described in IDEA (see Appendix A). In some years, the LEA may be eligible for an LEA MOE adjustment (see Appendix B) which could reduce the total amount of expenditures required to meet any of the four tests. An LEA MOE adjustment may occur in years when the LEA has an increase in its IDEA section 611 allocation and has met the eligibility criteria for this adjustment.

If an LEA fails to meet LEA MOE compliance by any of the four calculations after exhausting all allowable exceptions and any allowable adjustment, KDE is required to pay to the US ED, from non-federal funds, or federal funds for which accountability to the federal government is not required (e.g., non-dedicated impact aid or Medicaid reimbursement), an amount equal to the total by which the LEA failed to meet compliance using the calculation that was closest to meeting the requirement or an amount equal to the LEA's combined section 611 and section 619 federal IDEA allocations, whichever is less (see 34 CFR §300.203(d) and GEPA sec.453(a)(1)-(2)). To recoup payments of this type made to US ED, KDE will work with the LEA to determine where it might reduce state funds provided to the LEA in an amount equal to the payment KDE made to the US ED due to the LEA's failure to meet LEA MOE compliance. To meet MOE compliance in subsequent years, the LEA must

meet the same requirements for each of the four tests as described above, unless the LEA identifies allowable exceptions or has an LEA MOE adjustment that can be applied (see Appendices A and B). In other words, absent allowable exceptions or an adjustment, following a failure to maintain effort, the LEA must meet the level of expenditures it was required to maintain prior to the failure and not the lowered amount after its failure.

LEA MOE Eligibility (34 CFR §300.203(a))

As noted above, LEA MOE eligibility is similar to LEA MOE compliance. The difference is that eligibility is based on budgeting an amount that is equal to, or exceeds, the amount the LEA expended in the most recent year for which it has verified data and in which it met LEA MOE by the same method(s). Typically, the year in which the LEA is preparing the budget is not closed and the LEA cannot compare its budget for the upcoming year to the current year. Instead, the current year becomes an intervening year, and while the LEA can consider exceptions that it knows it has in the current year, the comparison year becomes the year before the current year – the most recent year for which verified (usually audited) data are available, assuming LEA MOE is met in that year for one or more of the four methods. Because LEAs are notified in advance of a school year of the amount of SEEK Exceptional Child Add-on Funds it will receive for the budget year, the LEA can subtract that amount from the total state and local funds it budgets for the year reviewed to determine the amount of funds that will be budgeted from state or local sources as described in the LEA MOE compliance section above. When calculating the per pupil amount for the budget year, the LEA typically uses the current year's just-submitted IDEA Child Count unless it has good reason to believe there will be a significant difference in the Count during the coming budget year.

When an LEA budgets an amount sufficient to meet any one of the four eligibility calculations, for the most recent year for which it has verified data and in which it met LEA MOE, it passes the LEA MOE eligibility standard for the application for IDEA funds. If the LEA fails to budget funds sufficient to meet the LEA MOE eligibility standard for any of the four calculations, it may provide additional information in the ***LEA MOE Calculator*** for anticipated exceptions and/or an adjustment. If the LEA continues to fail to meet any of the LEA MOE calculations after taking all allowed exceptions and/or an adjustment, or after revising its budget, the LEA is not eligible for its IDEA Basic or Preschool funds. The KDE advises any LEA applying for IDEA funds that fails to meet the LEA MOE eligibility standard to increase its budget of state and local funds to provide special education and related services to that it will be eligible to receive these funds.

SCHOOLWIDE PROGRAMS UNDER TITLE I (See 34 CFR §300.206)

An LEA may use federal funds received under Part B of the IDEA for any fiscal year to carry out a schoolwide program under Title I, except that the amount used in any schoolwide program may not exceed:

1. The amount received by the LEA under Part B (the sum of sections 619 and 611 (IDEA Preschool and IDEA Basic)) divided by
2. The number of children with disabilities in the jurisdiction of the LEA (the total child count, public and private, preschool and school-age, served and unserved); and multiplied by
3. The number of children with disabilities participating in the schoolwide program.

The funds described that may be used for this program must be considered as federal Part B funds for the purposes of calculations required by 34 CFR §300.202(a)(2) (Excess Cost) and (a)(3) (supplement/not supplant) but may be used without regard to the requirements of 34 CFR §300.202(a)(1) (used only for the purposes of Part B of the IDEA).

Except as provided in the paragraph immediately above, all other requirements of Part B of the IDEA must be met by an LEA using Part B funds for a schoolwide program under Title I, including ensuring that children with disabilities in schoolwide program schools:

1. Receive services in accordance with a properly developed Individualized Education Program (IEP); and
2. Are afforded all of the rights and services guaranteed to children with disabilities under IDEA.

PROCUREMENT (see 2 CFR §§200.317-200.326)

LEAs in Kentucky have several procurement options, including: Model Procurement Procedures (MPP), Bid Process Procedures (BPP), Kentucky Regional Cooperative Bid Lists, KDE Bid Lists, developing their own Board-adopted procedures, or a combination of more than one of these. Whatever choice(s) the LEA makes, it must use the documented procurement procedures it selects which reflect applicable state and local laws and regulations, provided that the procurements it implements, conform to applicable federal law and the standards identified in this section. As indicated below, documentation must clearly reflect the procedures used by the LEA and the LEA must retain documentation that makes clear what method(s) of procurement it used for each of its procurements of goods and services.

LEAs, as subrecipients (subgrantees) of the SEA, must follow 2 CFR §§200.318 through 200.326 when using federal funds to procure goods and services for special education and related services.

The LEA must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

The LEA must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of contracts. No employee officer, or agent may participate in the selection, award, or administration of a contract supported by a federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, the LEA may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the LEA.

The LEA's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the federal government, the LEA is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

The LEA is encouraged to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

The LEA is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

The non-federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also 2 CFR §200.213, Suspension and Debarment.

The LEA **must maintain records** sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

The LEA may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to an LEA is the sum of:

1. The actual cost of materials; and
2. Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the LEA awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

The LEA alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the LEA of any contractual responsibilities under its contracts. The SEA will not substitute its judgment for that of the LEA unless the matter is primarily an SEA concern. Violations of law will be referred to the local, state, or federal authority having proper jurisdiction.

Competition

All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

1. Placing unreasonable requirements on firms in order for them to qualify to do business;
2. Requiring unnecessary experience and excessive bonding;
3. Noncompetitive pricing practices between firms or between affiliated companies;
4. Noncompetitive contracts to consultants that are on retainer contracts;
5. Organizational conflicts of interest;
6. Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
7. Any arbitrary action in the procurement process.

The LEA must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

The LEA must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

1. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and
2. Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

The LEA must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the LEA must not preclude potential bidders from qualifying during the solicitation period.

Methods of Procurement to be Followed

The LEA must use one of the following methods of procurement.

Procurement by micro-purchasing. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see 2 CFR §200.67 Micro-purchase[2]). To the extent practicable, the LEA must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-federal entity considers the price to be reasonable.

Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction if the conditions immediately below apply.

In order for sealed bidding to be feasible, the following conditions should be present:

1. A complete, adequate, and realistic specification or purchase description is available;
2. Two or more responsible bidders are willing and able to compete effectively for the business; and
3. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

If sealed bids are used, the following requirements apply:

1. Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local and tribal governments, the invitation for bids must be publicly advertised;
2. The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
3. All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;
4. A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
5. Any or all bids may be rejected if there is a sound documented reason.

[2] *Micro-purchase threshold* means $10,000, except it means— (1) For acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), $2,000; (2) For acquisitions of services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards, $2,500….

Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply.

1. Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
2. Proposals must be solicited from an adequate number of qualified sources;
3. The LEA must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
4. Contracts must be awarded to the responsible firm whose proposal is the most advantageous to the program, with price and other factors considered; and
5. The LEA may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

1. The item is available only from a single source;
2. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
3. The SEA expressly authorizes noncompetitive proposals in response to a written request from the LEA; or
4. After solicitation of a number of sources, competition is determined inadequate.

Contracting with Small and Minority Businesses, Women's Business Enterprises and Labor Surplus Area Firms

The LEA must take all necessary affirmative steps to assure that small and minority businesses, women's business enterprises, and labor surplus area firms are used when possible. Affirmative steps must include:

1. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
2. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
3. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
4. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

5. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
6. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

An SEA or LEA and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

Contract Cost and Price

The LEA must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the LEA must make independent estimates before receiving bids or proposals.

The LEA must negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

Costs or prices based on estimated costs for contracts under the federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the LEA under Subpart E—Cost Principles of Part 2 of the CFR. The LEA may reference its own cost principles that comply with the federal cost principles.

The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

SEA Review

The LEA must make available, upon request of the SEA, technical specifications on proposed procurements where the SEA believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the LEA desires to have the review accomplished after a solicitation has been developed, the SEA may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

The LEA must make available upon request, for the SEA pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

1. The LEA's procurement procedures or operation fails to comply with the procurement standards in this part;
2. The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
3. The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;
4. The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
5. A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

The LEA is exempt from the pre-procurement review described above if the SEA determines its procurement systems comply with the standards of this part.

1. The LEA may request that its procurement system be reviewed by the SEA to determine whether its system meets the standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;
2. The LEA may self-certify its procurement system. Such self-certification must not limit the SEA's right to survey the system. Under a self-certification procedure, the SEA may rely on written assurances from the LEA that it is complying with these standards. The LEA must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

Bonding Requirements

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the SEA may accept the bonding policy and requirements of the LEA provided that the SEA has made a determination that the federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

1. A bid guarantee from each bidder equivalent to 5% of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
2. A performance bond on the part of the contractor for 100% of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
3. A payment bond on the part of the contractor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for the contract.

Contract Provisions

The LEA's contracts must contain the application provisions described in Appendix II to Part 200—Contract Provisions for non-federal Entity Contracts Under Federal Awards.

End of Procurement

COMPENSATION – PERSONNEL SERVICES (see 2 CFR §200.430)

Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the federal award, including but not necessarily limited to wages and salaries. **Compensation for personal services also includes fringe benefits (see 2 CFR §200.431).** Cost of compensation for individual employees:

1. Is reasonable for the services rendered and conforms to the established written policy of the LEA consistently applied to both federal and non-federal activities;
2. Follows an appointment made in accordance with an LEA's rules or written policies and meets the requirements of federal statute, where applicable; and
3. Is determined and supported as provided in Standards for Documentation of Personal Expenses below, when applicable.

Compensation for employees engaged in work on federal awards will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities in the LEA. In cases where the kinds of employees required for federal awards are not found in the other activities of the LEA, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in other LEAs.

An LEA must follow its written policies and practices concerning the permissible extent of professional services that can be provided outside the LEA for non-LEA compensation. Where such written policies do not exist or do not adequately define the permissible extent of consulting or other non-LEA activities undertaken for extra outside pay, the Federal Government may require that the effort of professional staff working on federal awards be allocated between: (1) LEA activities, and (2) non-LEA professional activities. If the federal awarding agency considers the extent of non-LEA professional effort excessive or inconsistent with the conflicts-of-interest terms and conditions of the federal award, appropriate arrangements governing compensation will be negotiated on a case-by-case basis.

Costs which are unallowable under 2 CFR §§200.400 – 200.475 (Cost Principles) must not be allowable under this section solely on the basis that they constitute personnel compensation.

Special considerations in determining allowability of compensation will be given to any change in an LEA's compensation policy resulting in a substantial increase in its employees' level of compensation (particularly when the change was concurrent with an increase in the ratio of federal awards to other activities) or any change in the treatment of allowability of specific types of compensation due to changes in federal policy.

Incentive compensation to employees based on cost reduction, or efficient performance, suggestion awards, safety awards, etc., is allowable to the extent that the overall compensation is determined to be

reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the LEA and the employees before the services were rendered, or pursuant to an established plan followed by the LEA so consistently as to imply, in effect, an agreement to make such payment.

For records which meet the standards required, the LEA will not be required to provide additional support or documentation for the work performed, other than that referenced in this section.

In accordance with Department of Labor regulations implementing the Fair Labor Standards Act (FLSA) (29 CFR part 516), charges for the salaries and wages of nonexempt employees, in addition to the supporting documentation described in this section, must also be supported by records indicating the total number of hours worked each day.

Salaries and wages of employees used in meeting cost sharing or matching requirements on federal awards must be supported in the same manner as salaries and wages claimed for reimbursement from federal awards.

Substitute Systems

For LEAs, substitute processes or systems for allocating salaries and wages to federal awards may be used in place of or in addition to the records described in this section if approved by the SEA for indirect cost. Such systems may include, but are not limited to, random moment sampling, "rolling" time studies, case counts, or other quantifiable measure of work performed.

Substitute systems which use sampling methods (primarily for Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards, including:

1. The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided below;
2. The entire time period involved must be covered by the sample; and
3. The results must be statistically valid and applied to the period being sampled.

Allocating charges for the sampled employees' supervisors, clerical and support staffs, based on the results of the sampled employees, will be acceptable.

Less than full compliance with the statistical sampling standards noted below may be accepted by the SEA for indirect costs if it concludes that the amounts to be allocated to federal awards will be minimal, or if it concludes that the system proposed by the non-federal entity will result in lower costs to federal awards than a system which complies with the standards.

SEAs are encouraged to approve alternative proposals based on outcomes and milestones for program performance where these are clearly documented. Where approved by the federal cognizant agency for indirect costs, these plans are acceptable as an alternative to the requirements above.

For federal awards of similar purpose activity or instances of approved blended funding, an LEA may submit performance plans that incorporate funds from multiple federal awards and account for their combined use based on performance-oriented metrics, provided that such plans are approved in

advance by all involved federal awarding agencies. In these instances, the LEA must submit a request for waiver of the requirements based on documentation that describes the method of charging costs, relates the charging of costs to the specific activity that is applicable to all fund sources, and is based on quantifiable measures of the activity in relation to time charged.

For an LEA where the records do not meet the standards described in this section, the Federal Government may require personnel activity reports (PARs), including prescribed certifications, or equivalent documentation that support the records as required in this section.

RECORDS MAINTENANCE (see 2 CFR §§200.334 and 200.337)

Records must be maintained for 3 years from the starting date of the retention period as specified by federal law. Financial records, supporting documents, statistical records, and all other LEA records pertinent to a federal award must be retained for a period of 3 years from the date of submission of the final expenditure report or, for federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the SEA. The SEA must not impose any other record retention requirements upon LEAs. The only exceptions are the following:

1. If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.
2. When the LEA is notified in writing by the federal awarding agency, cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or SEA to extend the retention period.
3. Records for real property and equipment acquired with federal funds must be retained for 3 years after final disposition.

Because there is no final expenditure report for IDEA funds and it is not “renewed” annually but is available for obligation for 27 months with another 90 days for liquidation, the effective date of the beginning of the retention period for records relating to each grant award begins after the end of the 90-day liquidation period – at the close of the grant award. Thus, a subgrant received by an LEA on July 1, 2019, will “close” on Dec. 30, 2021. Records pertaining to that subgrant, including salaries/benefits paid, personnel records for those who were paid, purchase orders/invoices/checks paid/contracts and other procurement documentation, and student records such as IEPs, evaluation records, Individual Student Plans (ISPs) for parentally placed private school children with disabilities (school-age and preschool), service logs, mileage records, equipment purchase approvals, required CCEIS records, and any other records related to the subgrant must be retained for 3 years from December 30, 2021, or until December 30, 2024. Records pertaining to that grant award can then be destroyed, with parent permission (notification and an offer for the parents to take possession of the student records), beginning on December 31, 2024, unless there is an open audit finding, open litigation involving due process, or a state complaint involving any of the records, in which case, those particular records may not be destroyed until the actions involving them are completed. A simple way to think of this is to simply ad 6 years to the year of the grant award and begin destruction on Jan. 1 of that year. For the July 1, 2019 subgrant, destruction can effectively begin on Jan. 1, 2025, notwithstanding the rules for destruction of student records found at 34 CFR §300.624, as summarized above.

The federal awarding agency, Inspectors General, the Comptroller General of the United States, and the SEA, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the LEA which are pertinent to the federal award, in order to make audits, examinations, excerpts, transcripts, and conduct monitoring reviews. The right also includes timely and reasonable access to the LEA's personnel for the purpose of interview and discussion related to such documents.

EQUIPMENT PURCHASED WITH FEDERAL FUNDS or STATE FUNDS INCLUDED IN LEA MOE (see 2 CFR §200.313 and 34 CFR §300.202(a))

Subject to the obligations and conditions set forth in this section, title to equipment acquired under a federal award will vest upon acquisition in the LEA. Unless a statute specifically authorizes the federal agency to vest title in the LEA without further obligation to the Federal Government, and the federal agency elects to do so, the title must be a conditional title. Title must vest in the LEA subject to the following conditions:

1. Use the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the purposes of the project.
2. Not encumber the property without approval of the SEA.
3. Use and dispose of the property in accordance with the following requirements.

Equipment must be used by the LEA in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the federal award, and the LEA must not encumber the property without prior approval of the SEA. When no longer needed for the original program or project, the equipment may be used in other activities supported by the federal awarding agency, in the following order of priority:

1. Activities under a federal award from the federal awarding agency which funded the original program or project, then
2. Activities under federal awards from other federal awarding agencies. This includes consolidated equipment for information technology systems.

During the time that equipment is used on the project or program for which it was acquired, the LEA must also make equipment available for use on other projects or programs currently or previously supported by the federal government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects supported by the federal awarding agency that financed the equipment (e.g., the Department of Education in the case of IDEA) and second preference must be given to programs or projects under federal awards from other federal awarding agencies (e.g., Child Nutrition from the U.S. Department of Agriculture). Use for non-federally funded programs or projects is also permissible (i.e., third preference if necessary). User fees should be considered if appropriate.

Notwithstanding the encouragement in 2 CFR §200.307 Program Income, to earn program income, the non-federal entity must not use equipment acquired with the federal award to provide services for a fee that is less than private companies charge for equivalent services unless specifically authorized by federal statute for as long as the Federal Government retains an interest in the equipment.

When acquiring replacement equipment, the LEA may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

Management Requirements

Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part under a federal award, until disposition takes place will, as a minimum, meet the following requirements:

1. Property records must be maintained that include a description of the property, a serial number or other identification number, the source of funding for the property (including the Federal Acquisition Identification Number (FAIN)), who holds title, the acquisition date, and cost of the property, percentage of federal participation in the project costs for the federal award under which the property was acquired, the location, use, and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.
2. A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.
3. A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated.
4. Adequate maintenance procedures must be developed to keep the property in good condition.
5. If the non-federal entity is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

Disposition

When original or replacement equipment acquired under a federal award is no longer needed for the original project or program or for other activities currently or previously supported by a federal awarding agency, except as otherwise provided in federal statutes, regulations, or federal awarding agency disposition instructions, the LEA must request disposition instructions from the federal awarding agency if required by the terms and conditions of the federal award. Disposition of the equipment will be made as follows, in accordance with federal awarding agency disposition instructions.

1. Items of equipment with a current per unit fair market value of $5,000 or less may be retained, sold or otherwise disposed of with no further obligation to the federal awarding agency.
2. Except as provided in 2 CFR 2. Except as provided in 2 CFR 200.312, federally owned and exempt property, paragraph (b), or if the federal awarding agency fails to provide requested disposition instructions within 120 days, items of equipment with a current per-unit fair-market value in excess of $5,000 may be retained by the LEA or sold. The federal awarding agency is entitled to an amount calculated by multiplying the current market value or proceeds from sale by the federal awarding agency's percentage of participation in the cost of the original purchase. If the equipment is sold, the federal awarding agency may permit the LEA to deduct and retain from the federal share $500 or 10% of the proceeds, whichever is less, for its selling and handling expenses.
3. The LEA may transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the LEA must be entitled to compensation for its attributable percentage of the current fair market value of the property.

4. In cases where a LEA fails to take appropriate disposition actions, the federal awarding agency may direct the LEA to take disposition actions.

CORRECTION OF NONCOMPLIANCE

Under the Office of Special Education Programs (OSEP) Mem 09-02 (see Appendix E), any identified noncompliance must be corrected within one calendar year of identification. Identification is considered to be the date of the letter from the SEA (KDE) to the LEA (the school district monitored) informing the LEA of the noncompliance.

REPORTING – E*MAPS*

The ED*Facts* Metadata and Process System (E*MAPS*) is a web-based tool used to provide SEAs with an easy method of reporting and maintaining data to: (1) meet federal reporting requirements, and (2) provide information on state policies, plans, and metadata in order to aid in the analysis of data collected. A wide variety of special education data is collected in ED*Facts* through E*MAPS* such as child count and special education environment data, discipline data, etc. This section focuses only on the data related to special education fiscal data.

The survey has been developed under Section 618, Part B of IDEA. This information is entered by the IDEA Part B Data Managers. The survey provides the following information for every LEA or educational service agency (ESA) that receives an IDEA section 611 or section 619 subgrant:

- LEA/ESA Allocations – includes the IDEA 611 allocation amounts for each LEA/ESA in the state for the reference federal fiscal year (FFY) and the previous FFY and the IDEA 619 allocation amounts for the reference FFY.
- LEA MOE Reduction – includes the determination under for each LEA/ESA; how much the LEA/ESA reduced of local and/or state funds taken under section 613(a)(2)(C) for the reference school year; whether LEAs/ESAs met the LEA MOE compliance standard; and whether funds were returned to US ED for failure to meet the LEA MOE compliance standard.
- Provision of Coordinated Early Intervening Services (CEIS) – includes whether each LEA/ESA was required to reserve funds for CEIS due to significant disproportionality during the reference school year and whether each LEA/ESA voluntarily reserved funds for CEIS. For each LEA/ESA that reserved funds for CEIS (required or voluntary), the dollar amount that was reserved during the reference school year should be included. Additionally, for each LEA/ESA that reserved funds for required CEIS due to significant disproportionality, the reason for which the LEA/ESA was identified for significant disproportionality, the reason for which the LEA/ESA was identified for significant disproportionality, the reason for which the LEA/ESA was identified for significant disproportionality should be reported.
- Number of Children Receiving CEIS – includes the number of children who received CEIS during the reference school year and the number of children who received CEIS at any time during the reference school year and the two preceding school years and received special education and related services during the reference school year.

This survey shall be provided for 50 states plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Bureau of Indian Education, outlying areas and freely associated states (American Samoa, Guam, Marshall Islands, Micronesia, Northern Marianas, and Palau).

The LEA MOE Reduction and CEIS process opens April 1 and closes May 1 at 11:59 p.m. ET.

Data files can be uploaded and reports can be accessed until the May 1 due date. After the due date, the report can be reviewed but revisions CANNOT be uploaded until the reopen period.

There will be a reopen period between July 29 and Aug. 28. The data will be frozen on Aug. 28 to be used by OSEP for monitoring purposes, in the Annual Report to Congress, public reporting of the IDEA section 618 data, and ad hoc requests.

NOTE! Do not submit preliminary or placeholder data just to meet the submission deadline. These data are submitted to meet the annual data reporting requirements under IDEA section 618. The data will be evaluated for timeliness, completeness, and accuracy.

The complete manual can be accessed at: https://www2.ed.gov/about/inits/ed/edfacts/emaps- idea-part-b-moe-reduction-ceis-user-guide.pdf.

APPENDIX A

EXCEPTIONS TO MAINTENANCE OF EFFORT

34 CFR §300.204

§300.204 Exception to maintenance of effort.

Notwithstanding the restriction in §300.203(b), 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.

As required by the regulation, departures must be "voluntary," meaning that reductions in force (RIF's) or other efforts to downsize do not qualify for this exception. Resignations qualify as long as they are not forced by RIF's or downsizing. "Just cause" is a "term of art" in human resources and generally refers to disciplinary removals and qualify for this exception.

In calculating this exception, both salary and benefits (retirement and health benefits) should be included. If the position of the departing staff member is filled, only the difference between the departing staff member and the newly-hired staff member (salary and benefits for both positions) can be deducted from the subsequent year's required level of LEA MOE. If there is a staff turnover during a school year, it could result in a reduction of LEA MOE during that year. Information that must be maintained (and submitted only upon request), includes documentation of the:

- Departing staff member's annual salary and benefits (e.g., contract, final pay stub, electronic accounting records, etc.);
- Departing staff member's voluntary departure status (e.g., letter of resignation, retirement paperwork, notice of dismissal for just cause, etc.);
- Replacement staff member's annual salary and benefits (e.g., contract, electronic accounting records, on-boarding documents, etc.); and
- Impact on the current or subsequent year's LEA MOE (i.e., if the replacement staff member's salary and benefits are lower than the departing staff member's salary and benefits, the LEA's MOE can be reduced by the difference. If this occurs during the year, the amount must be prorated based on the number of months affected; if it occurs at the end of a year, the annual total for the subsequent year can be reduced by the total difference).

If multiple staff members are involved, documentation must be maintained for each staff member involved and the amounts cumulated. If staff members are not replaced, note that the LEA remains responsible for ensuring the provision of a free appropriate public education (FAPE) to all children with disabilities within its jurisdiction and documentation should be maintained related to the reason why departing staff members do not need to be replaced.

(b) A decrease in the enrollment of children with disabilities.

Enrollment in Kentucky means the official child count of children with disabilities that the LEA submits annually to the SEA. You must first subtract the prior year's child count from the current year's child count to determine the difference. The difference must be negative to apply the exception. You determine the percentage difference by dividing the change in child count by the prior year's child count. You then multiply that percentage by the local only total expenditures and the combined state and local expenditures to determine the allowed reduction for each method. Note that the results are not the new LEA MOE levels. They are the amounts by which the LEA will REDUCE the existing MOE levels for local only total expenditures and the combined state and local expenditures. So you must subtract these amounts from those totals to determine the LEA MOE expenditures for the year in which the child count (enrollment) was lower.

There is another way to accomplish the same calculation using a per-child calculation. Using this method, you also subtract the prior year's child count from the current year's child count to determine the difference and, again, the difference must be negative to apply the exception. But now we are going to calculate a per-child amount. Divide the local only total by the prior year's child count which results in a per-child amount. Then multiply the per-child amount by the number of children decreased. You will see that it is the same amount you calculated above by which you can reduce the local only total amount. Subtract this amount from the local only total amount to obtain the new LEA MOE amount for this method. Divide the state and local combined total by the prior year's child count to obtain a per-child amount. Multiply the per-child amount by the number children decreased to obtain the total amount you can reduce the state and local combined total. Subtract this number from the state and local combined total to obtain the new LEA MOE amount for this method.

For both local only per capita and state and local combined per capita, you simply divide those amounts for the year in which the enrollment (child count) decreases by the decreased child count to obtain the per capita expenditure.

(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.

KDE is required to determine the definition of "exceptionally costly program," inform its LEAs and ensure that its LEAs meet the parameters within that definition to accept a reduction in LEA MOE for this exception. Under 34 CFR §300.202(b), LEAs calculate the annual average per pupil expenditure for the education of all students, including children with disabilities. Under 34 CFR §300.203, LEAs are required to maintain their state and local monetary effort for the provision of education to students that require special education and related services under the IDEA. The LEAs receive an IDEA subgrant to defray a portion of the excess costs of providing special education and related services to children with disabilities under the IDEA to supplement those state and local funds.

Any program of services, pursuant to a child's IEP, whether provided outside the LEA's jurisdiction and funded by the LEA, or provided within the LEA's jurisdiction, that exceeds the total, in any given fiscal year, of the Average Per Pupil Expenditure (APPE) + the per capita LEA MOE + the average per child IDEA expenditure will be considered by KDE to be an exceptionally costly program for that child. Information to be maintained must include:

- Excess cost documentation, including APPE;
- LEA MOE documentation (state and local total);
- Child count documentation;
- IEP for the child to whom the exceptionally costly program of services was provided for the year in which the exception is being requested;
- Documentation that the exceptionally costly services were provided (e.g., services logs certified by the service providers and supervisors, documentation of certification of the service providers where applicable (OTs, PTs, SLPs, Psychologists, MDs, RNs, LSWs, etc.));
- Documentation of the average per child IDEA expenditure; and
- Documentation of the total cost of the child's program for the year.*

* *If the child is placed outside the LEA's jurisdiction under contract or tuition, a contract documenting the services included in the IEP along with an invoice and evidence of payment (e.g., cancelled check, EFT, etc.) suffices for this documentation.*

(d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

KDE is required to define both "long-term" and "equipment" as they apply to this exception. Under 34 CFR §300.14, Equipment means - (a) Machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house the machinery, utilities, or equipment; and (b) All other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

Within and beyond this definition, KDE defines equipment as any single line item purchased that costs $5000 or more and has a useful life of one year or more. Thus, paperbacks would not be equipment; laptops would be considered equipment. Neither would fall under this exception, however, as they are unlikely to be considered long-term purchases.

A long-term purchase is one that includes payments over more than one state fiscal year. Thus, if you entered into a contract in SFY 2021 and conclude the contract in SFY 2022 for the purchase of three special education-only buses, you could reduce your LEA MOE by the amount expended against that contract in SFY 2022. There is no reduction in SFY 2021 because the contract is still in effect and is carrying over into SFY 2022. There is no exception for a single-year contractual purchase for equipment.

Note also that if you intend to use Federal subgrant funds for the purposes of constructing school facilities for special education, you must obtain prior approval from KDE.

IDEA Fiscal Monitoring Manual
Kentucky Department of Education

APPENDIX B

ADJUSTMENT TO LOCAL FISCAL EFFORTS IN CERTAIN FISCAL YEARS

34 CFR §300.205

In any fiscal year for which the subgrant received by an LEA under section 611 for ages 3-21 (excluding section 619 for ages 3-5) exceeds the amount the LEA received for the previous year, the LEA may reduce the level of LEA MOE expenditures by not more than 50 percent of the amount of that increase.
That said, there are a LOT of conditions that apply to this potential benefit, so please read this section carefully before deciding to take this adjustment.

1. The LEA cannot take this adjustment if:
   - The determination from KDE in the year for which the LEA wants to take the adjustment is NOT "Meets Requirements;"
   - KDE has determined that the LEA is unable to establish and maintain programs of FAPE that meet the requirements for an LEA IDEA subgrant;
   - KDE has taken action against the LEA under the monitoring and enforcement section of the regulations for IDEA; or
   - The LEA has been determined to have significant disproportionality for the year the adjustment will be taken (including if this is one of the three years during which KDE is making a final determination for CCEIS purposes).
2. If the LEA exercises the authority to take the adjustment, the LEA must use an amount of local and state funds equal to the reduction to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is using funds under the ESEA for those activities. If the LEA is using funds under the ESEA for those activities, these additional funds must be used to supplement the existing funds and not to supplant them.
3. If the LEA also wants to use funds for comprehensive early intervening services (CEIS) under 34 CFR §300.226, the LEA must subtract the amount it wants to use for MOE reduction from the amount it wants to use for CEIS and the total amount of the two together, cannot exceed the lesser of the 15% maximum for CEIS and the 50% maximum for MOE reduction.

Considering all these issues, including the interaction between MOE reduction and voluntary use of funds for CEIS, if the LEA still wants to take the MOE reduction, do not confuse federal funds and state/local funds. The LEA must use the increase in **federal funds** to determine the **amount** by which it can reduce its **state and local expenditures** for the education of children with disabilities. And don't forget that those funds must then be spent on other activities that would be approvable under the ESEA.

A simple example: If the LEA received $1,000 in FFY 2021 and receives $2,000 in FFY 2022, it can (assuming all other conditions are met and it does not choose to use any funds for CEIS), reduce its LEA MOE by 50% of the increase of $1000, or $500. That $500 must then be expended for activities that are approvable under the ESEA.

APPENDIX C

APPENDIX A TO THE 2006 IDEA REGULATIONS

Appendix A to Part 300—Excess Costs Calculation

Except as otherwise provided, amounts provided to an LEA under Part B of the Act may be used only to pay the excess costs of providing special education and related services to children with disabilities. Excess costs are those costs for the education of an elementary school or secondary school student with a disability that are in excess of the average annual per student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate. An LEA must spend at least the average annual per student expenditure on the education of an elementary school or secondary school child with a disability before funds under Part B of the Act are used to pay the excess costs of providing special education and related services.

Section 602(8) of the Act and 34 CFR §300.16 require the LEA to compute the minimum average amount separately for children with disabilities in its elementary schools and for children with disabilities in its secondary schools. LEAs may not compute the minimum average amount it must spend on the education of children with disabilities based on a combination of the enrollments in its elementary schools and secondary schools.

The following example shows how to compute the minimum average amount an LEA must spend for the education of each of its elementary school children with disabilities under section 602(3) of the Act before it may use funds under Part B of the Act.

a. First the LEA must determine the total amount of its expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt services are excluded.

   Example: The following is an example of a computation for children with disabilities enrolled in an LEA's elementary schools. In this example, the LEA had an average elementary school enrollment for the preceding school year of 800 (including 100 children with disabilities). The LEA spent the following amounts last year for elementary school students (including its elementary school children with disabilities):

(1)	From State and local tax funds	$ 6,500,000
(2)	From Federal funds	600,000
	Total Expenditures	**$ 7,100,000**

Of this total, $60,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures.

(1)	Total Expenditures	$ 7,100,000
(2)	Less capital outlay and debt	−60,000
	Total expenditures for elementary school students less capital outlay and debt	**$ 7,040,000**

b. Next, the LEA must subtract from the total expenditure amounts spent for**:**

(1) IDEA, Part B allocation,
(2) ESEA, Title I, Part A allocation,
(3) ESEA, Title III, Parts A and B allocation,
(4) State and local funds for children with disabilities, and
(5) State or local funds for programs under ESEA, Title I, Part A, and Title III, Parts A and B.

These are funds that the LEA actually spent, not funds received last year but carried over for the current school year.

Example: The LEA spent the following amounts for elementary school students last year:

(1)	From funds under IDEA, Part B allocation	$ 200,000
(2)	From funds under ESEA, Title I, Part A allocation	250,000
(3)	From funds under ESEA, Title III, Parts A and B allocation	50,000
(4)	From State funds and local funds for children with disabilities	500,000
(5)	From State and local funds for programs under ESEA, Title I, Part A, and Title III, Parts A and B	150,000
	Total	**$ 1,150,000**
(1)	Total expenditures less capital outlay and debt	7,040,000
(2)	Other deductions	−1,150,000
	Total	**$ 5,890,000**

c. Except as otherwise provided, the LEA next must determine the average annual per student expenditure for its elementary schools dividing the average number of students enrolled in the elementary schools of the agency during the preceding year (including its children with disabilities) into the amount computed under the above paragraph. The amount obtained through this computation is the minimum amount the LEA must spend (on the average) for the education of each of its elementary school children with disabilities. Funds under Part B of the Act may be used only for costs over and above this minimum.

(1)	Amount from Step b.	$5,890,000
(2)	Average number of students enrolled	800
(3)	$5,890,000/800 Average annual per student expenditure	$ 7,362

d. Except as otherwise provided, to determine the total minimum amount of funds the LEA must spend for the education of its elementary school children with disabilities in the LEA (not including capital outlay and debt service), the LEA must multiply the number of elementary school children with disabilities in the LEA times the average annual per student expenditure obtained in paragraph c above. Funds under Part B of the Act can only be used for excess costs over and above this minimum.

(1)	Number of children with disabilities in the LEA's elementary schools	100
(2)	Average annual per student expenditure	$ 7,362
(3)	$7,362 × 100	
	Total minimum amount of funds the LEA must spend for the education of children with disabilities enrolled in the LEA's elementary schools before using Part B funds	$ 736,200

APPENDIX D

FULL TEXT OF REGULATIONS RELATED TO THIS DOCUMENT

General Education Provisions Act (GEPA)

453(a)(1): A recipient determined to have made an unallowable expenditure, or to have otherwise failed to discharge its responsibility to account properly for funds, shall be required to return funds in an amount that is proportionate to the extent of the harm its violation cause to an identifiable Federal interest associated with the program under which the recipient received the award. Such amount shall be reduced in whole or in part by an amount that is proportionate to the extent the mitigating circumstances caused the violation. **(2)** For the purpose of paragraph (1) an identifiable Federal interest includes, but is not limited to, serving only eligible beneficiaries; providing only authorized services or benefits; complying with expenditure requirements and conditions (such as set-aside, excess cost, maintenance of effort, comparability supplement-not-supplant, and matching requirements); preserving the integrity of planning, application, recordkeeping, and reporting requirements; and maintaining accountability for the use of funds.

Education Department General Administrative Regulations (EDGAR) *(Title 34 C.F.R.)*

§76.563 Restricted indirect cost rate—programs covered.

Sections 76.564 through 76.569 apply to agencies of State and local governments that are grantees under programs with a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, and to their subgrantees under these programs.

§76.708 When certain subgrantees may begin to obligate funds.

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see §76.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates: (1) The date that the State may begin to obligate funds under §76.703; or (2) The date that the applicant submits its application to the State in substantially approvable form.
(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.
(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles in 2 CFR part 200, subpart E-Cost Principles.

§76.709 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.
(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

§76.799 Do the requirements in this subpart apply to LEAs?

(a) Each LEA that is responsible for funding a charter school under a covered program must comply with the requirements in this subpart on the same basis as SEAs are required to comply with the requirements in this subpart.
(b) In applying the requirements in this subpart (except for §§76.785, 76.786, and 76.787) to LEAs, references to SEA (or State), charter school LEA, and LEA must be read as references to LEA, charter school, and public school, respectively.

§200.67 Micro-purchase.

Micro-purchase means a purchase of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchase procedures comprise a subset of a non-Federal entity's small purchase procedures. The non-Federal entity uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burden and cost. The micro-purchase threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions). It is $3,000 except as otherwise discussed in Subpart 2.1 of that regulation, but this threshold is periodically adjusted for inflation.

§200.309 Period of performance.

A non-Federal entity may charge to the Federal award only allowable costs incurred during the period of performance (except as described in §200.461 Publication and printing costs) and any costs incurred before the Federal awarding agency or pass-through entity made the Federal award that were authorized by the Federal awarding agency or pass-through entity.

§200.313 Equipment.

See also §200.439 Equipment and other capital expenditures. See also 34 CFR §300.214 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a Federal award will vest upon acquisition in the non-Federal entity. Unless a statute specifically authorizes the Federal agency to vest title in the non-Federal entity without further obligation to the Federal Government, and the Federal agency elects to do so, the title must be a conditional title. Title must vest in the non-Federal entity subject to the following conditions: (1) Use the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the purposes of the project. (2) Not encumber the property without approval of the Federal awarding agency or pass-through entity. (3) Use and dispose of the property in accordance with paragraphs (b), (c) and (e) of this section.

(b) A state must use, manage and dispose of equipment acquired under a Federal award by the state in accordance with state laws and procedures. Other non-Federal entities must follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority: (i) Activities under a Federal award from the Federal awarding agency which funded the original program or project, then (ii) Activities under Federal awards from other Federal awarding agencies. This includes consolidated equipment for information technology systems. (2) During the time that equipment is used on the project or program for which it was acquired, the non-Federal entity must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects

supported by Federal awarding agency that financed the equipment and second preference must be given to programs or projects under Federal awards from other Federal awarding agencies. Use for non-federally-funded programs or projects is also permissible. User fees should be considered if appropriate. (3) Notwithstanding the encouragement in §200.307 Program income to earn program income, the non-Federal entity must not use equipment acquired with the Federal award to provide services for a fee that is less than private companies charge for equivalent services unless specifically authorized by Federal statute for as long as the Federal Government retains an interest in the equipment. (4) When acquiring replacement equipment, the non-Federal entity may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part under a Federal award, until disposition takes place will, as a minimum, meet the following requirements: (1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of funding for the property (including the FAIN), who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the project costs for the Federal award under which the property was acquired, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property. (2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years. (3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated. (4) Adequate maintenance procedures must be developed to keep the property in good condition. (5) If the non-Federal entity is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a Federal award is no longer needed for the original project or program or for other activities currently or previously supported by a Federal awarding agency, except as otherwise provided in Federal statutes, regulations, or Federal awarding agency disposition instructions, the non-Federal entity must request disposition instructions from the Federal awarding agency if required by the terms and conditions of the Federal award. Disposition of the equipment will be made as follows, in accordance with Federal awarding agency disposition instructions: (1) Items of equipment with a current per unit fair market value of $5,000 or less may be retained, sold or otherwise disposed of with no further obligation to the Federal awarding agency. (2) Except as provided in §200.312 Federally-owned and exempt property, paragraph (b), or if the Federal awarding agency fails to provide requested disposition instructions within 120 days, items of equipment with a current per-unit fair-market value in excess of $5,000 may be retained by the non-Federal entity or sold. The Federal awarding agency is entitled to an amount calculated by multiplying the current market value or proceeds from sale by the Federal awarding agency's percentage of participation in the cost of the original purchase. If the equipment is sold, the Federal awarding agency may permit the non-Federal entity to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for its selling and handling expenses. (3) The non-Federal entity may transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the non-Federal entity must be entitled to compensation for its attributable percentage of the current fair market value of the property. (4) In cases where a non-Federal entity fails to take appropriate disposition actions, the Federal awarding agency may direct the non-Federal entity to take disposition actions.

Procurement:

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§200.318 General procurement standards through 200.326 Contract provisions.

§200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this part.
(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
(c) (1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity. (2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.
(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also §200.213 Suspension and debarment.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j) (1) The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of: (i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to: (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; (3) Noncompetitive pricing practices between firms or between affiliated companies; (4) Noncompetitive contracts to consultants that are on retainer contracts; (5) Organizational conflicts of interest; (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and (7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations: (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and (2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

§200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply. (1) In order for sealed bidding to be feasible, the following conditions should be present: (i) A complete, adequate, and realistic specification or purchase description is available; (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price. (2) If sealed bids are used, the following requirements apply: (i) Bids must be solicited from an

adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised; (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond; (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly; (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and (v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply: (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical; (2) Proposals must be solicited from an adequate number of qualified sources; (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients; (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and (5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: (1) The item is available only from a single source; (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or (4) After solicitation of a number of sources, competition is determined inadequate.

§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include: (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists; (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources; (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum

participation by small and minority businesses, and women's business enterprises; (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises; (5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and (6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

§200.322 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§200.323 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§200.324 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been

developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when: (1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part; (2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; (3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product; (4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or (5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part. (1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis; (2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§200.325 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

End Procurement

§200.331 Requirements for pass-through entities.

All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes: (1) Federal Award Identification. (i) Subrecipient name (which must match the name associated with its unique entity identifier); (ii) Subrecipient's unique entity identifier; (iii) Federal Award Identification Number (FAIN); (iv) Federal Award Date (see §200.39 Federal award date) of award to the recipient by the Federal agency; (v) Subaward Period of Performance Start and End Date; (vi) Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient; (vii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current obligation; (viii) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity; (ix) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA); (x) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity; (xi) CFDA Number and Name; the pass-through entity must identify the dollar amount made available under each Federal award and the CFDA number at time of disbursement; (xii) Identification of whether the award is R&D; and (xiii) Indirect cost rate for the Federal award (including if the de minimis rate is charged per §200.414 Indirect (F&A) costs). **(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;** (3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports; (4) An approved Federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government or, if no such rate exists, either a rate negotiated between the pass-through entity and the subrecipient (in compliance with this part), or a de minimis indirect cost rate as defined in §200.414 Indirect (F&A) costs, paragraph (f); (5) A requirement that the subrecipient permit the pass-through entity and auditors to have access to the subrecipient's records and financial statements as necessary for the pass-through entity to meet the requirements of this part; and (6) Appropriate terms and conditions concerning closeout of the subaward.

(b) Evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as: (1) The subrecipient's prior experience with the same or similar subawards; (2) The results of previous audits including whether or not the subrecipient receives a Single Audit in accordance with Subpart F—Audit Requirements of this part, and the extent to which the same or

similar subaward has been audited as a major program; (3) Whether the subrecipient has new personnel or new or substantially changed systems; and (4) The extent and results of Federal awarding agency monitoring (e.g., if the subrecipient also receives Federal awards directly from a Federal awarding agency).

(c) Consider imposing specific subaward conditions upon a subrecipient if appropriate as described in §200.207 Specific conditions.

(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include: (1) Reviewing financial and performance reports required by the pass-through entity. (2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and other means. (3) Issuing a management decision for audit findings pertaining to the Federal award provided to the subrecipient from the pass-through entity as required by §200.521 Management decision.

(e) Depending upon the pass-through entity's assessment of risk posed by the subrecipient (as described in paragraph (b) of this section), the following monitoring tools may be useful for the pass-through entity to ensure proper accountability and compliance with program requirements and achievement of performance goals: (1) Providing subrecipients with training and technical assistance on program-related matters; and (2) Performing on-site reviews of the subrecipient's program operations; (3) Arranging for agreed-upon-procedures engagements as described in §200.425 Audit services.

(f) Verify that every subrecipient is audited as required by Subpart F—Audit Requirements of this part when it is expected that the subrecipient's Federal awards expended during the respective fiscal year equaled or exceeded the threshold set forth in §200.501 Audit requirements.

(g) Consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity's own records.

(h) Consider taking enforcement action against noncompliant subrecipients as described in §200.338 Remedies for noncompliance of this part and in program regulations.

§200.334 Retention requirements for records.

Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a subrecipient. Federal awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities. The only exceptions are the following:

(a) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

(b) When the non-Federal entity is notified in writing by the Federal awarding agency, cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or pass-through entity to extend the retention period.

(c) Records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.
(d) When records are transferred to or maintained by the Federal awarding agency or pass-through entity, the 3-year retention requirement is not applicable to the non-Federal entity.
(e) Records for program income transactions after the period of performance. In some cases recipients must report program income after the period of performance. Where there is such a requirement, the retention period for the records pertaining to the earning of the program income starts from the end of the non-Federal entity's fiscal year in which the program income is earned.
(e) Indirect cost rate proposals and cost allocations plans. This paragraph applies to the following types of documents and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates). (1) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the pass-through entity) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission. (2) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the pass-through entity) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

§200.337 Access to records.

(a) Records of non-Federal entities. The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.
(b) Only under extraordinary and rare circumstances would such access include review of the true name of victims of a crime. Routine monitoring cannot be considered extraordinary and rare circumstances that would necessitate access to this information. When access to the true name of victims of a crime is necessary, appropriate steps to protect this sensitive information must be taken by both the non-Federal entity and the Federal awarding agency. Any such access, other than under a court order or subpoena pursuant to a bona fide confidential investigation, must be approved by the head of the Federal awarding agency or delegate.
(c) Expiration of right of access. The rights of access in this section are not limited to the required retention period but last as long as the records are retained. Federal awarding agencies and pass-through entities must not impose any other access requirements upon non-Federal entities.

§200.344 Closeout.

The Federal awarding agency or pass-through entity will close-out the Federal award when it determines that all applicable administrative actions and all required work of the Federal award have been completed by the non-Federal entity. This section specifies the actions the non-Federal entity and Federal awarding agency or pass-through entity must take to complete this process at the end of the period of performance.

(a) The non-Federal entity must submit, no later than 90 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. The Federal awarding agency or pass-through entity may approve extensions when requested by the non-Federal entity.
(b) Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all obligations incurred under the Federal award not later than 90 calendar days after the end date of the period of performance as specified in the terms and conditions of the Federal award.
(c) The Federal awarding agency or pass-through entity must make prompt payments to the non-Federal entity for allowable reimbursable costs under the Federal award being closed out.
(d) The non-Federal entity must promptly refund any balances of unobligated cash that the Federal awarding agency or pass-through entity paid in advance or paid and that are not authorized to be retained by the non-Federal entity for use in other projects. See OMB Circular A-129 and see §200.345 Collection of amounts due, for requirements regarding unreturned amounts that become delinquent debts.
(e) Consistent with the terms and conditions of the Federal award, the Federal awarding agency or pass-through entity must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.
(f) The non-Federal entity must account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§200.310 Insurance coverage through 200.316 Property trust relationship and 200.329 Reporting on real property.
(g) The Federal awarding agency or pass-through entity should complete all closeout actions for Federal awards no later than one year after receipt and acceptance of all required final reports.

§200.400 Policy guide.

The application of these cost principles is based on the fundamental premises that:

(a) The non-Federal entity is responsible for the efficient and effective administration of the Federal award through the application of sound management practices.
(b) The non-Federal entity assumes responsibility for administering Federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the Federal award.
(c) The non-Federal entity, in recognition of its own unique combination of staff, facilities, and experience, has the primary responsibility for employing whatever form of sound organization and management techniques may be necessary in order to assure proper and efficient administration of the Federal award.
(d) The application of these cost principles should require no significant changes in the internal accounting policies and practices of the non-Federal entity. However, the accounting practices of the non-Federal entity must be consistent with these cost principles and support the accumulation of costs as required by the principles, and must provide for adequate documentation to support costs charged to the Federal award.
(e) In reviewing, negotiating and approving cost allocation plans or indirect cost proposals, the cognizant agency for indirect costs should generally assure that the non-Federal entity is applying these cost accounting principles on a consistent basis during their review and negotiation of indirect cost proposals. Where wide variations exist in the treatment of a given cost item by the non-Federal entity, the reasonableness and equity of such treatments should be fully considered. See §200.56 Indirect (facilities & administrative (F&A)) costs.

(f) For non-Federal entities that educate and engage students in research, the dual role of students as both trainees and employees (including pre- and post-doctoral staff) contributing to the completion of Federal awards for research must be recognized in the application of these principles.
(g) The non-Federal entity may not earn or keep any profit resulting from Federal financial assistance, unless explicitly authorized by the terms and conditions of the Federal award. *See also §200.307 Program income.*

§200.416 Cost allocation plans and indirect cost proposals.

(a) For states, local governments and Indian tribes, certain services, such as motor pools, computer centers, purchasing, accounting, etc., are provided to operating agencies on a centralized basis. Since Federal awards are performed within the individual operating agencies, there needs to be a process whereby these central service costs can be identified and assigned to benefitted activities on a reasonable and consistent basis. The central service cost allocation plan provides that process.
(b) Individual operating agencies (governmental department or agency), normally charge Federal awards for indirect costs through an indirect cost rate. A separate indirect cost rate(s) proposal for each operating agency is usually necessary to claim indirect costs under Federal awards. Indirect costs include: (1) The indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (2) The costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.
(c) The requirements for development and submission of cost allocation plans (for central service costs and public assistance programs) and indirect cost rate proposals are contained in appendices IV, V and VI to this part.

§200.430 Compensation—personal services.

(a) *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the Federal award, including but not necessarily limited to wages and salaries. Compensation for personal services may also include fringe benefits which are addressed in §200.431 Compensation—fringe benefits. Costs of compensation are allowable to the extent that they satisfy the specific requirements of this part, and that the total compensation for individual employees: (1) Is reasonable for the services rendered and conforms to the established written policy of the non-Federal entity consistently applied to both Federal and non-Federal activities; (2) Follows an appointment made in accordance with a non-Federal entity's laws and/or rules or written policies and meets the requirements of Federal statute, where applicable; and (3) Is determined and supported as provided in paragraph (i) of this section, Standards for Documentation of Personnel Expenses, when applicable.
(b) *Reasonableness.* Compensation for employees engaged in work on Federal awards will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the non-Federal entity. In cases where the kinds of employees required for Federal awards are not found in the other activities of the non-Federal entity, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the non-Federal entity competes for the kind of employees involved.
(c) *Professional activities outside the non-Federal entity.* Unless an arrangement is specifically authorized by a Federal awarding agency, a non-Federal entity must follow its written non-

Federal entity-wide policies and practices concerning the permissible extent of professional services that can be provided outside the non-Federal entity for non-organizational compensation. Where such non-Federal entity-wide written policies do not exist or do not adequately define the permissible extent of consulting or other non-organizational activities undertaken for extra outside pay, the Federal Government may require that the effort of professional staff working on Federal awards be allocated between: (1) Non-Federal entity activities, and (2) Non-organizational professional activities. If the Federal awarding agency considers the extent of non-organizational professional effort excessive or inconsistent with the conflicts-of-interest terms and conditions of the Federal award, appropriate arrangements governing compensation will be negotiated on a case-by-case basis.

(d) *Unallowable costs.* (1) Costs which are unallowable under other sections of these principles must not be allowable under this section solely on the basis that they constitute personnel compensation. (2) The allowable compensation for certain employees is subject to a ceiling in accordance with statute. For the amount of the ceiling for cost-reimbursement contracts, the covered compensation subject to the ceiling, the covered employees, and other relevant provisions, see 10 U.S.C. 2324(e)(1)(P), and 41 U.S.C. 1127 and 4304(a)(16). For other types of Federal awards, other statutory ceilings may apply.

(e) *Special considerations.* Special considerations in determining allowability of compensation will be given to any change in a non-Federal entity's compensation policy resulting in a substantial increase in its employees' level of compensation (particularly when the change was concurrent with an increase in the ratio of Federal awards to other activities) or any change in the treatment of allowability of specific types of compensation due to changes in Federal policy.

(f) *Incentive compensation.* Incentive compensation to employees based on cost reduction, or efficient performance, suggestion awards, safety awards, etc., is allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the non-Federal entity and the employees before the services were rendered, or pursuant to an established plan followed by the non-Federal entity so consistently as to imply, in effect, an agreement to make such payment.

(g) *Nonprofit organizations.* For compensation to members of nonprofit organizations, trustees, directors, associates, officers, or the immediate families thereof, determination must be made that such compensation is reasonable for the actual personal services rendered rather than a distribution of earnings in excess of costs. This may include director's and executive committee member's fees, incentive awards, allowances for off-site pay, incentive pay, location allowances, hardship pay, and cost-of-living differentials.

(h) *Institutions of higher education (IHEs).* (1) Certain conditions require special consideration and possible limitations in determining allowable personnel compensation costs under Federal awards. Among such conditions are the following: (i) Allowable activities. Charges to Federal awards may include reasonable amounts for activities contributing and directly related to work under an agreement, such as delivering special lectures about specific aspects of the ongoing activity, writing reports and articles, developing and maintaining protocols (human, animals, etc.), managing substances/chemicals, managing and securing project-specific data, coordinating research subjects, participating in appropriate seminars, consulting with colleagues and graduate students, and attending meetings and conferences. (ii) Incidental activities. Incidental activities for which supplemental compensation is allowable under written institutional policy (at a rate not to exceed institutional base salary) need not be included in the records described in paragraph (i) of this section to directly charge payments of incidental activities, such activities must either be specifically provided for in the Federal award budget or receive prior written approval by the

Federal awarding agency. (2) *Salary basis.* Charges for work performed on Federal awards by faculty members during the academic year are allowable at the IBS rate. Except as noted in paragraph (h)(1)(ii) of this section, in no event will charges to Federal awards, irrespective of the basis of computation, exceed the proportionate share of the IBS for that period. This principle applies to all members of faculty at an institution. IBS is defined as the annual compensation paid by an IHE for an individual's appointment, whether that individual's time is spent on research, instruction, administration, or other activities. IBS excludes any income that an individual earns outside of duties performed for the IHE. Unless there is prior approval by the Federal awarding agency, charges of a faculty member's salary to a Federal award must not exceed the proportionate share of the IBS for the period during which the faculty member worked on the award. (3) *Intra-Institution of Higher Education (IHE) consulting.* Intra-IHE consulting by faculty is assumed to be undertaken as an IHE obligation requiring no compensation in addition to IBS. However, in unusual cases where consultation is across departmental lines or involves a separate or remote operation, and the work performed by the faculty member is in addition to his or her regular responsibilities, any charges for such work representing additional compensation above IBS are allowable provided that such consulting arrangements are specifically provided for in the Federal award or approved in writing by the Federal awarding agency. (4) Extra Service Pay normally represents overload compensation, subject to institutional compensation policies for services above and beyond IBS. Where extra service pay is a result of Intra-IHE consulting, it is subject to the same requirements of paragraph (b) above. It is allowable if all of the following conditions are met: (i) The non-Federal entity establishes consistent written policies which apply uniformly to all faculty members, not just those working on Federal awards. (ii) The non-Federal entity establishes a consistent written definition of work covered by IBS which is specific enough to determine conclusively when work beyond that level has occurred. This may be described in appointment letters or other documentations. (iii) The supplementation amount paid is commensurate with the IBS rate of pay and the amount of additional work performed. See paragraph (h)(2) of this section. (iv) The salaries, as supplemented, fall within the salary structure and pay ranges established by and documented in writing or otherwise applicable to the non-Federal entity. (v) The total salaries charged to Federal awards including extra service pay are subject to the Standards of Documentation as described in paragraph (i) of this section. (5) *Periods outside the academic year.* (i) Except as specified for teaching activity in paragraph (h)(5)(ii) of this section, charges for work performed by faculty members on Federal awards during periods not included in the base salary period will be at a rate not in excess of the IBS. (ii) Charges for teaching activities performed by faculty members on Federal awards during periods not included in IBS period will be based on the normal written policy of the IHE governing compensation to faculty members for teaching assignments during such periods. (6) *Part-time faculty.* Charges for work performed on Federal awards by faculty members having only part-time appointments will be determined at a rate not in excess of that regularly paid for part-time assignments. (7) *Sabbatical leave costs.* Rules for sabbatical leave are as follow: (i) Costs of leaves of absence by employees for performance of graduate work or sabbatical study, travel, or research are allowable provided the IHE has a uniform written policy on sabbatical leave for persons engaged in instruction and persons engaged in research. Such costs will be allocated on an equitable basis among all related activities of the IHE. (ii) Where sabbatical leave is included in fringe benefits for which a cost is determined for assessment as a direct charge, the aggregate amount of such assessments applicable to all work of the institution during the base period must be reasonable in relation to the IHE's actual experience under its sabbatical leave policy. (8) *Salary rates for non-faculty members.* Non-faculty full-time professional personnel may also earn

"extra service pay" in accordance with the non-Federal entity's written policy and consistent with paragraph (h)(1)(i) of this section. (i) *Standards for Documentation of Personnel Expenses* (1) Charges to Federal awards for salaries and wages must be based on records that accurately reflect the work performed. These records must: (i) Be supported by a system of internal control which provides reasonable assurance that the charges are accurate, allowable, and properly allocated; (ii) Be incorporated into the official records of the non-Federal entity; (iii) Reasonably reflect the total activity for which the employee is compensated by the non-Federal entity, not exceeding 100% of compensated activities (for IHE, this per the IHE's definition of IBS); (iv) Encompass both federally assisted and all other activities compensated by the non-Federal entity on an integrated basis, but may include the use of subsidiary records as defined in the non-Federal entity's written policy; (v) Comply with the established accounting policies and practices of the non-Federal entity (See paragraph (h)(1)(ii) above for treatment of incidental work for IHEs.); and (vi) [Reserved] (vii) Support the distribution of the employee's salary or wages among specific activities or cost objectives if the employee works on more than one Federal award; a Federal award and non-Federal award; an indirect cost activity and a direct cost activity; two or more indirect activities which are allocated using different allocation bases; or an unallowable activity and a direct or indirect cost activity. (viii) Budget estimates (i.e., estimates determined before the services are performed) alone do not qualify as support for charges to Federal awards, but may be used for interim accounting purposes, provided that: (A) The system for establishing the estimates produces reasonable approximations of the activity actually performed; (B) Significant changes in the corresponding work activity (as defined by the non-Federal entity's written policies) are identified and entered into the records in a timely manner. Short term (such as one or two months) fluctuation between workload categories need not be considered as long as the distribution of salaries and wages is reasonable over the longer term; and (C) The non-Federal entity's system of internal controls includes processes to review after-the-fact interim charges made to a Federal awards based on budget estimates. All necessary adjustment must be made such that the final amount charged to the Federal award is accurate, allowable, and properly allocated. (ix) Because practices vary as to the activity constituting a full workload (for IHEs, IBS), records may reflect categories of activities expressed as a percentage distribution of total activities. (x) It is recognized that teaching, research, service, and administration are often inextricably intermingled in an academic setting. When recording salaries and wages charged to Federal awards for IHEs, a precise assessment of factors that contribute to costs is therefore not always feasible, nor is it expected. (2) For records which meet the standards required in paragraph (i)(1) of this section, the non-Federal entity will not be required to provide additional support or documentation for the work performed, other than that referenced in paragraph (i)(3) of this section. (3) In accordance with Department of Labor regulations implementing the Fair Labor Standards Act (FLSA) (29 CFR part 516), charges for the salaries and wages of nonexempt employees, in addition to the supporting documentation described in this section, must also be supported by records indicating the total number of hours worked each day. (4) Salaries and wages of employees used in meeting cost sharing or matching requirements on Federal awards must be supported in the same manner as salaries and wages claimed for reimbursement from Federal awards. (5) For states, local governments and Indian tribes, substitute processes or systems for allocating salaries and wages to Federal awards may be used in place of or in addition to the records described in paragraph (1) if approved by the cognizant agency for indirect cost. Such systems may include, but are not limited to, random moment sampling, "rolling" time studies, case counts, or other quantifiable measures of work performed. (i) Substitute systems which use sampling methods (primarily for Temporary Assistance for Needy Families (TANF),

the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards including: (A) The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in paragraph (i)(5)(iii) of this section; (B) The entire time period involved must be covered by the sample; and (C) The results must be statistically valid and applied to the period being sampled. (ii) Allocating charges for the sampled employees' supervisors, clerical and support staffs, based on the results of the sampled employees, will be acceptable. (iii) Less than full compliance with the statistical sampling standards noted in subsection (5)(i) may be accepted by the cognizant agency for indirect costs if it concludes that the amounts to be allocated to Federal awards will be minimal, or if it concludes that the system proposed by the non-Federal entity will result in lower costs to Federal awards than a system which complies with the standards. (6) Cognizant agencies for indirect costs are encouraged to approve alternative proposals based on outcomes and milestones for program performance where these are clearly documented. Where approved by the Federal cognizant agency for indirect costs, these plans are acceptable as an alternative to the requirements of paragraph (i)(1) of this section. (7) For Federal awards of similar purpose activity or instances of approved blended funding, a non-Federal entity may submit performance plans that incorporate funds from multiple Federal awards and account for their combined use based on performance-oriented metrics, provided that such plans are approved in advance by all involved Federal awarding agencies. In these instances, the non-Federal entity must submit a request for waiver of the requirements based on documentation that describes the method of charging costs, relates the charging of costs to the specific activity that is applicable to all fund sources, and is based on quantifiable measures of the activity in relation to time charged. (8) For a non-Federal entity where the records do not meet the standards described in this section, the Federal Government may require personnel activity reports, including prescribed certifications, or equivalent documentation that support the records as required in this section.

§200.431 Compensation—fringe benefits.

(a) Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave (vacation, family-related, sick or military), employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable provided that the benefits are reasonable and are required by law, non-Federal entity-employee agreement, or an established policy of the non-Federal entity.

(b) *Leave.* The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, family-related leave, sick leave, holidays, court leave, military leave, administrative leave, and other similar benefits, are allowable if all of the following criteria are met: (1) They are provided under established written leave policies; (2) The costs are equitably allocated to all related activities, including Federal awards; and, (3) The accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the non-Federal entity or specified grouping of employees. (i) When a non-Federal entity uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment. (ii) The accrual basis may be only used for those types of leave for which a liability as defined by GAAP exists when the leave is

earned. When a non-Federal entity uses the accrual basis of accounting, allowable leave costs are the lesser of the amount accrued or funded.

(c) The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in §200.447 Insurance and indemnification); pension plan costs (see paragraph (i) of this section); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, must be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities, and charged as direct or indirect costs in accordance with the non-Federal entity's accounting practices.

(d) Fringe benefits may be assigned to cost objectives by identifying specific benefits to specific individual employees or by allocating on the basis of entity-wide salaries and wages of the employees receiving the benefits. When the allocation method is used, separate allocations must be made to selective groupings of employees, unless the non-Federal entity demonstrates that costs in relationship to salaries and wages do not differ significantly for different groups of employees.

(e) *Insurance.* See also §200.447 Insurance and indemnification, paragraphs (d)(1) and (2). (1) Provisions for a reserve under a self-insurance program for unemployment compensation or workers' compensation are allowable to the extent that the provisions represent reasonable estimates of the liabilities for such compensation, and the types of coverage, extent of coverage, and rates and premiums would have been allowable had insurance been purchased to cover the risks. However, provisions for self-insured liabilities which do not become payable for more than one year after the provision is made must not exceed the present value of the liability. (2) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibility are allowable only to the extent that the insurance represents additional compensation. The costs of such insurance when the non-Federal entity is named as beneficiary are unallowable. (3) Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (e.g., post-retirement health benefits), are allowable in the year of payment provided that the non-Federal entity follows a consistent costing policy.

(f) *Automobiles.* That portion of automobile costs furnished by the entity that relates to personal use by employees (including transportation to and from work) is unallowable as fringe benefit or indirect (F&A) costs regardless of whether the cost is reported as taxable income to the employees.

(g) *Pension Plan Costs.* Pension plan costs which are incurred in accordance with the established policies of the non-Federal entity are allowable, provided that: (1) Such policies meet the test of reasonableness. (2) The methods of cost allocation are not discriminatory. (3) For entities using accrual-based accounting, the cost assigned to each fiscal year is determined in accordance with GAAP. (4) The costs assigned to a given fiscal year are funded for all plan participants within six months after the end of that year. However, increases to normal and past service pension costs caused by a delay in funding the actuarial liability beyond 30 calendar days after each quarter of the year to which such costs are assignable are unallowable. Non-Federal entity may elect to follow the “Cost Accounting Standard for Composition and Measurement of Pension Costs” (48 CFR 9904.412). (5) Pension plan termination insurance premiums paid pursuant to the Employee Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. 1301-1461) are allowable. Late payment charges on such premiums are unallowable. Excise taxes on accumulated funding

deficiencies and other penalties imposed under ERISA are unallowable. (6) Pension plan costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity. (i) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries. (ii) Pension costs calculated using an actuarial cost-based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency for indirect costs) are allowable in the year funded. The cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the non-Federal entity's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund. (iii) Amounts funded by the non-Federal entity in excess of the actuarially determined amount for a fiscal year may be used as the non-Federal entity's contribution in future periods. (iv) When a non-Federal entity converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion is allowable if amortized over a period of years in accordance with GAAP. (v) The Federal Government must receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(h) *Post-Retirement Health.* Post-retirement health plans (PRHP) refers to costs of health insurance or health services not included in a pension plan covered by paragraph (g) of this section for retirees and their spouses, dependents, and survivors. PRHP costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity. (1) For PRHP financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries. (2) PRHP costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The Federal cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the non-Federal entity's contributions to the PRHP fund. Adjustments may be made by cash refund, reduction in current year's PRHP costs, or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHP fund. (3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the non-Federal entity contribution in a future period. (4) When a non-Federal entity converts to an acceptable actuarial cost method and funds PRHP costs in accordance with this method, the initial unfunded liability attributable to prior years is allowable if amortized over a period of years in accordance with GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency for indirect costs. (5) To be allowable in the current year, the PRHP costs must be paid either to: (i) An insurer or other benefit provider as current year costs or premiums, or (ii) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries. (6) The Federal Government must receive an equitable share of any amounts of previously allowed post-retirement benefit costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund,

withdrawal, or other credit. (i) *Severance Pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by non-Federal entities to workers whose employment is being terminated. Costs of severance pay are allowable only to the extent that in each case, it is required by (a) law, (b) employer-employee agreement, (c) established policy that constitutes, in effect, an implied agreement on the non-Federal entity's part, or (d) circumstances of the particular employment. (2) Costs of severance payments are divided into two categories as follows: (i) Actual normal turnover severance payments must be allocated to all activities; or, where the non-Federal entity provides for a reserve for normal severances, such method will be acceptable if the charge to current operations is reasonable in light of payments actually made for normal severances over a representative past period, and if amounts charged are allocated to all activities of the non-Federal entity. (ii) Measurement of costs of abnormal or mass severance pay by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Federal Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Prior approval by the Federal awarding agency or cognizant agency for indirect cost, as appropriate, is required. (3) Costs incurred in certain severance pay packages which are in an amount in excess of the normal severance pay paid by the non-Federal entity to an employee upon termination of employment and are paid to the employee contingent upon a change in management control over, or ownership of, the non-Federal entity's assets, are unallowable. (4) Severance payments to foreign nationals employed by the non-Federal entity outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the non-Federal entity in the United States, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency. (5) Severance payments to foreign nationals employed by the non-Federal entity outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the non-Federal entity in that country, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(j)(1) *For IHEs only.* Fringe benefits in the form of undergraduate and graduate tuition or remission of tuition for individual employees are allowable, provided such benefits are granted in accordance with established non-Federal entity policies, and are distributed to all non-Federal entity activities on an equitable basis. Tuition benefits for family members other than the employee are unallowable. (2) Fringe benefits in the form of tuition or remission of tuition for individual employees not employed by IHEs are limited to the tax-free amount allowed per section 127 of the Internal Revenue Code as amended. (3) IHEs may offer employees tuition waivers or tuition reductions, provided that the benefit does not discriminate in favor of highly compensated employees. Employees can exercise these benefits at other institutions according to institutional policy. See §200.466 Scholarships and student aid costs, for treatment of tuition remission provided to students.

(k) For IHEs whose costs are paid by state or local governments, fringe benefit programs (such as pension costs and FICA) and any other benefits costs specifically incurred on behalf of, and in direct benefit to, the non-Federal entity, are allowable costs of such non-Federal entities whether or not these costs are recorded in the accounting records of the non-Federal entities, subject to the following: (1) The costs meet the requirements of Basic Considerations in §§200.402 Composition of costs through 200.411 Adjustment of previously negotiated indirect (F&A) cost rates containing unallowable costs of this subpart; (2) The costs are properly supported by approved cost allocation plans in accordance with applicable Federal cost accounting principles; and (3) The costs are not otherwise borne directly or indirectly by the Federal Government.

§200.436 Depreciation.

(a) Depreciation is the method for allocating the cost of fixed assets to periods benefitting from asset use. The non-Federal entity may be compensated for the use of its buildings, capital improvements, equipment, and software projects capitalized in accordance with GAAP, provided that they are used, needed in the non-Federal entity's activities, and properly allocated to Federal awards. Such compensation must be made by computing depreciation.

(b) The allocation for depreciation must be made in accordance with Appendices III through IX.

(c) Depreciation is computed applying the following rules. The computation of depreciation must be based on the acquisition cost of the assets involved. For an asset donated to the non-Federal entity by a third party, its fair market value at the time of the donation must be considered as the acquisition cost. Such assets may be depreciated or claimed as matching but not both. For the purpose of computing depreciation, the acquisition cost will exclude: (1) The cost of land; (2) Any portion of the cost of buildings and equipment borne by or donated by the Federal Government, irrespective of where title was originally vested or where it is presently located; (3) Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity where law or agreement prohibits recovery; and (4) Any asset acquired solely for the performance of a non-Federal award.

(d) When computing depreciation charges, the following must be observed: (1) The period of useful service or useful life established in each case for usable capital assets must take into consideration such factors as type of construction, nature of the equipment, technological developments in the particular area, historical data, and the renewal and replacement policies followed for the individual items or classes of assets involved. (2) The depreciation method used to charge the cost of an asset (or group of assets) to accounting periods must reflect the pattern of consumption of the asset during its useful life. In the absence of clear evidence indicating that the expected consumption of the asset will be significantly greater in the early portions than in the later portions of its useful life, the straight-line method must be presumed to be the appropriate method. Depreciation methods once used may not be changed unless approved in advance by the cognizant agency. The depreciation methods used to calculate the depreciation amounts for indirect (F&A) rate purposes must be the same methods used by the non-Federal entity for its financial statements. (3) The entire building, including the shell and all components, may be treated as a single asset and depreciated over a single useful life. A building may also be divided into multiple components. Each component item may then be depreciated over its estimated useful life. The building components must be grouped into three general components of a building: building shell (including construction and design costs), building services systems (e.g., elevators, HVAC, plumbing system and heating and air-conditioning system) and fixed equipment (e.g., sterilizers, casework, fume hoods, cold rooms and glassware/washers). In exceptional cases, a cognizant agency may authorize a non-Federal entity to use more than these three groupings. When a non-Federal entity elects to depreciate its buildings by its components, the same depreciation methods must be used for indirect (F&A) purposes and financial statements purposes, as described in paragraphs (d)(1) and (2) of this section. (4) No depreciation may be allowed on any assets that have outlived their depreciable lives. (5) Where the depreciation method is introduced to replace the use allowance method, depreciation must be computed as if the asset had been depreciated over its entire life (i.e., from the date the asset was acquired and ready for use to the date of disposal or withdrawal from service). The total amount of use allowance and depreciation for an asset (including imputed depreciation applicable to periods

prior to the conversion from the use allowance method as well as depreciation after the conversion) may not exceed the total acquisition cost of the asset.

(e) Charges for depreciation must be supported by adequate property records, and physical inventories must be taken at least once every two years to ensure that the assets exist and are usable, used, and needed. Statistical sampling techniques may be used in taking these inventories. In addition, adequate depreciation records showing the amount of depreciation taken each period must also be maintained.

§200.439 Equipment and other capital expenditures.

(a) See §§200.13 Capital expenditures, 200.33 Equipment, 200.89 Special purpose equipment, 200.48 General purpose equipment, 200.2 Acquisition cost, and 200.12 Capital assets.

(b) The following rules of allowability must apply to equipment and other capital expenditures: (1) Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except with the prior written approval of the Federal awarding agency or pass-through entity. (2) Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost of $5,000 or more have the prior written approval of the Federal awarding agency or pass-through entity. (3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity. See §200.436 Depreciation, for rules on the allowability of depreciation on buildings, capital improvements, and equipment. See also §200.465 Rental costs of real property and equipment. (4) When approved as a direct charge pursuant to paragraphs (b)(1) through (3) of this section, capital expenditures will be charged in the period in which the expenditure is incurred, or as otherwise determined appropriate and negotiated with the Federal awarding agency. (5) The unamortized portion of any equipment written off as a result of a change in capitalization levels may be recovered by continuing to claim the otherwise allowable depreciation on the equipment, or by amortizing the amount to be written off over a period of years negotiated with the Federal cognizant agency for indirect cost. (6) Cost of equipment disposal. If the non-Federal entity is instructed by the Federal awarding agency to otherwise dispose of or transfer the equipment the costs of such disposal or transfer are allowable. (7) Equipment and other capital expenditures are unallowable as indirect costs. See §200.436 Depreciation.

§200.474 Transportation costs.

Costs incurred for freight, express, cartage, postage, and other transportation services relating either to goods purchased, in process, or delivered, are allowable. When such costs can readily be identified with the items involved, they may be charged directly as transportation costs or added to the cost of such items. Where identification with the materials received cannot readily be made, inbound transportation cost may be charged to the appropriate indirect (F&A) cost accounts if the non-Federal entity follows a consistent, equitable procedure in this respect. Outbound freight, if reimbursable under the terms and conditions of the Federal award, should be treated as a direct cost.

§200.475 Travel Costs.

(a) *General.* Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-Federal entity. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-Federal entity's non-federally-funded activities and in accordance with non-Federal entity's written travel reimbursement policies. Notwithstanding the provisions of §200.444 General costs of government, travel costs of officials covered by that section are allowable with the prior written approval of the Federal awarding agency or pass-through entity when they are specifically related to the Federal award.

(b) *Lodging and subsistence.* Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, must be considered reasonable and otherwise allowable only to the extent such costs do not exceed charges normally allowed by the non-Federal entity in its regular operations as the result of the non-Federal entity's written travel policy. In addition, if these costs are charged directly to the Federal award documentation must justify that: (1) Participation of the individual is necessary to the Federal award; and (2) The costs are reasonable and consistent with non-Federal entity's established travel policy.

(c) (1) Temporary dependent care costs (as dependent is defined in 26 U.S.C. 152) above and beyond regular dependent care that directly results from travel to conferences is allowable provided that: (i) The costs are a direct result of the individual's travel for the Federal award; (ii) The costs are consistent with the non-Federal entity's documented travel policy for all entity travel; and (iii) Are only temporary during the travel period. (2) Travel costs for dependents are unallowable, except for travel of duration of six months or more with prior approval of the Federal awarding agency. See also §200.432 Conferences.

(d) In the absence of an acceptable, written non-Federal entity policy regarding travel costs, the rates and amounts established under 5 U.S.C. 5701-11, ("Travel and Subsistence Expenses; Mileage Allowances"), or by the Administrator of General Services, or by the President (or his or her designee) pursuant to any provisions of such subchapter must apply to travel under Federal awards (48 CFR 31.205-46(a)).

(e) *Commercial air travel.* (1) Airfare costs in excess of the basic least expensive unrestricted accommodations class offered by commercial airlines are unallowable except when such accommodations would: (i) Require circuitous routing; (ii) Require travel during unreasonable hours; (iii) Excessively prolong travel; (iv) Result in additional costs that would offset the transportation savings; or (v) Offer accommodations not reasonably adequate for the traveler's medical needs. The non-Federal entity must justify and document these conditions on a case-by-case basis in order for the use of first-class or business-class airfare to be allowable in such cases. (2) Unless a pattern of avoidance is detected, the Federal Government will generally not question a non-Federal entity's determinations that customary standard airfare or other discount airfare is unavailable for specific trips if the non-Federal entity can demonstrate that such airfare was not available in the specific case.

(f) *Air travel by other than commercial carrier.* Costs of travel by non-Federal entity-owned, -leased, or -chartered aircraft include the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, insurance, and other related costs. The portion of such costs that exceeds the cost of airfare as provided for in paragraph (d) of this section, is unallowable.

§200.501 Audit requirements.

(a) *Audit required*. A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single or program-specific audit conducted for that year in accordance with the provisions of this part.

(b) *Single audit*. A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single audit conducted in accordance with §200.514 Scope of audit except when it elects to have a program-specific audit conducted in accordance with paragraph (c) of this section.

(c) *Program-specific audit election*. When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's statutes, regulations, or the terms and conditions of the Federal award do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted in accordance with §200.507 Program-specific audits. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) *Exemption when Federal awards expended are less than $750,000*. A non-Federal entity that expends less than $750,000 during the non-Federal entity's fiscal year in Federal awards is exempt from Federal audit requirements for that year, except as noted in §200.503 Relation to other audit requirements, but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and Government Accountability Office (GAO).

(e) *Federally Funded Research and Development Centers (FFRDC)*. Management of an auditee that owns or operates a FFRDC may elect to treat the FFRDC as a separate entity for purposes of this part.

(f) *Subrecipients and Contractors*. An auditee may simultaneously be a recipient, a subrecipient, and a contractor. Federal awards expended as a recipient or a subrecipient are subject to audit under this part. The payments received for goods or services provided as a contractor are not Federal awards. Section §200.330 Subrecipient and contractor determinations sets forth the considerations in determining whether payments constitute a Federal award or a payment for goods or services provided as a contractor.

(g) *Compliance responsibility for contractors*. In most cases, the auditee's compliance responsibility for contractors is only to ensure that the procurement, receipt, and payment for goods and services comply with Federal statutes, regulations, and the terms and conditions of Federal awards. Federal award compliance requirements normally do not pass through to contractors. However, the auditee is responsible for ensuring compliance for procurement transactions which are structured such that the contractor is responsible for program compliance or the contractor's records must be reviewed to determine program compliance. Also, when these procurement transactions relate to a major program, the scope of the audit must include determining whether these transactions are in compliance with Federal statutes, regulations, and the terms and conditions of Federal awards.

(h) *For-profit subrecipient*. Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The agreement with the for-profit subrecipient must describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award

audits, monitoring during the agreement, and post-award audits. See also §200.331 Requirements for pass-through entities.

§200.502 Basis for determining Federal awards expended.

(a) *Determining Federal awards expended.* The determination of when a Federal award is expended must be based on when the activity related to the Federal award occurs. Generally, the activity pertains to events that require the non-Federal entity to comply with Federal statutes, regulations, and the terms and conditions of Federal awards, such as: expenditure/expense transactions associated with awards including grants, cost-reimbursement contracts under the FAR, compacts with Indian Tribes, cooperative agreements, and direct appropriations; the disbursement of funds to subrecipients; the use of loan proceeds under loan and loan guarantee programs; the receipt of property; the receipt of surplus property; the receipt or use of program income; the distribution or use of food commodities; the disbursement of amounts entitling the non-Federal entity to an interest subsidy; and the period when insurance is in force.

(b) *Loan and loan guarantees (loans).* Since the Federal Government is at risk for loans until the debt is repaid, the following guidelines must be used to calculate the value of Federal awards expended under loan programs, except as noted in paragraphs (c) and (d) of this section: (1) Value of new loans made or received during the audit period; plus (2) Beginning of the audit period balance of loans from previous years for which the Federal Government imposes continuing compliance requirements; plus (3) Any interest subsidy, cash, or administrative cost allowance received.

(c) *Loan and loan guarantees (loans) at IHEs*. When loans are made to students of an IHE but the IHE does not make the loans, then only the value of loans made during the audit period must be considered Federal awards expended in that audit period. The balance of loans for previous audit periods is not included as Federal awards expended because the lender accounts for the prior balances.

(d) *Prior loan and loan guarantees (loans)*. Loans, the proceeds of which were received and expended in prior years, are not considered Federal awards expended under this part when the Federal statutes, regulations, and the terms and conditions of Federal awards pertaining to such loans impose no continuing compliance requirements other than to repay the loans.

(e) *Endowment funds*. The cumulative balance of Federal awards for endowment funds that are Federally restricted are considered Federal awards expended in each audit period in which the funds are still restricted.

(f) *Free rent*. Free rent received by itself is not considered a Federal award expended under this part. However, free rent received as part of a Federal award to carry out a Federal program must be included in determining Federal awards expended and subject to audit under this part.

(g) *Valuing non-cash assistance*. Federal non-cash assistance, such as free rent, food commodities, donated property, or donated surplus property, must be valued at fair market value at the time of receipt or the assessed value provided by the Federal agency.

(h) *Medicare*. Medicare payments to a non-Federal entity for providing patient care services to Medicare-eligible individuals are not considered Federal awards expended under this part.

(i) *Medicaid*. Medicaid payments to a subrecipient for providing patient care services to Medicaid-eligible individuals are not considered Federal awards expended under this part unless a state requires the funds to be treated as Federal awards expended because reimbursement is on a cost-reimbursement basis.

(j) *Certain loans provided by the National Credit Union Administration*. For purposes of this part, loans made from the National Credit Union Share Insurance Fund and the Central Liquidity Facility that are funded by contributions from insured non-Federal entities are not considered Federal awards expended.

§200.503 Relation to other audit requirements.

(a) An audit conducted in accordance with this part must be in lieu of any financial audit of Federal awards which a non-Federal entity is required to undergo under any other Federal statute or regulation. To the extent that such audit provides a Federal agency with the information it requires to carry out its responsibilities under Federal statute or regulation, a Federal agency must rely upon and use that information.

(b) Notwithstanding subsection (a), a Federal agency, Inspectors General, or GAO may conduct or arrange for additional audits which are necessary to carry out its responsibilities under Federal statute or regulation. The provisions of this part do not authorize any non-Federal entity to constrain, in any manner, such Federal agency from carrying out or arranging for such additional audits, except that the Federal agency must plan such audits to not be duplicative of other audits of Federal awards. Prior to commencing such an audit, the Federal agency or pass-through entity must review the FAC for recent audits submitted by the non-Federal entity, and to the extent such audits meet a Federal agency or pass-through entity's needs, the Federal agency or pass-through entity must rely upon and use such audits. Any additional audits must be planned and performed in such a way as to build upon work performed, including the audit documentation, sampling, and testing already performed, by other auditors.

(c) The provisions of this part do not limit the authority of Federal agencies to conduct, or arrange for the conduct of, audits and evaluations of Federal awards, nor limit the authority of any Federal agency Inspector General or other Federal official. For example, requirements that may be applicable under the FAR or CAS and the terms and conditions of a cost-reimbursement contract may include additional applicable audits to be conducted or arranged for by Federal agencies.

(d) Federal agency to pay for additional audits. A Federal agency that conducts or arranges for additional audits must, consistent with other applicable Federal statutes and regulations, arrange for funding the full cost of such additional audits.

(e) Request for a program to be audited as a major program. A Federal awarding agency may request that an auditee have a particular Federal program audited as a major program in lieu of the Federal awarding agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 calendar days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such a request by informing the Federal awarding agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in §200.518 Major program determination and, if not, the estimated incremental cost. The Federal awarding agency must then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal awarding agency request, and the Federal awarding agency agrees to pay the full incremental costs, then the auditee must have the program audited as a major program. A pass-through entity may use the provisions of this paragraph for a subrecipient.

§200.518 Major program determination.

(a) *General.* The auditor must use a risk-based approach to determine which Federal programs are major programs. This risk-based approach must include consideration of: current and prior audit experience, oversight by Federal agencies and pass-through entities, and the inherent risk of the Federal program. The process in paragraphs (b) through (h) of this section must be followed.

(b) *Step one.* (1) The auditor must identify the larger Federal programs, which must be labeled Type A programs. Type A programs are defined as Federal programs with Federal awards expended during the audit period exceeding the levels outlined in the table in this paragraph (b)(1):

Total Federal awards expended	Type A/B threshold
Equal to or exceed $750,000 but less than or equal to $25 million	$750,000.
Exceed $25 million but less than or equal to $100 million	Total Federal awards expended times .03.
Exceed $100 million but less than or equal to $1 billion	$3 million.
Exceed $1 billion but less than or equal to $10 billion	Total Federal awards expended times .003.
Exceed $10 billion but less than or equal to $20 billion	$30 million.
Exceed $20 billion	Total Federal awards expended times .0015.

(2) Federal programs not labeled Type A under paragraph (b)(1) of this section must be labeled Type B programs. (3) The inclusion of large loan and loan guarantees (loans) must not result in the exclusion of other programs as Type A programs. When a Federal program providing loans exceeds four times the largest non-loan program it is considered a large loan program, and the auditor must consider this Federal program as a Type A program and exclude its values in determining other Type A programs. This recalculation of the Type A program is performed after removing the total of all large loan programs. For the purposes of this paragraph a program is only considered to be a Federal program providing loans if the value of Federal awards expended for loans within the program comprises fifty percent or more of the total Federal awards expended for the program. A cluster of programs is treated as one program and the value of Federal awards expended under a loan program is determined as described in §200.502. (4) For biennial audits permitted under §200.504, the determination of Type A and Type B programs must be based upon the Federal awards expended during the two-year period.

(c) *Step two.* (1) The auditor must identify Type A programs which are low-risk. In making this determination, the auditor must consider whether the requirements in §200.519(c), the results of audit follow-up, or any changes in personnel or systems affecting the program indicate significantly increased risk and preclude the program from being low risk. For a Type A program to be considered low-risk, it must have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, the program must have not had: (i) Internal control deficiencies which were identified as material weaknesses in the auditor's report on internal control for major programs as required under §200.515(c); (ii) A modified opinion on the program in the auditor's

report on major programs as required under §200.515(c); or (iii) Known or likely questioned costs that exceed five percent of the total Federal awards expended for the program. (2) Notwithstanding paragraph (c)(1) of this section, OMB may approve a Federal awarding agency's request that a Type A program may not be considered low risk for a certain recipient. For example, it may be necessary for a large Type A program to be audited as a major program each year at a particular recipient to allow the Federal awarding agency to comply with 31 U.S.C. 3515. The Federal awarding agency must notify the recipient and, if known, the auditor of OMB's approval at least 180 calendar days prior to the end of the fiscal year to be audited.

(d) *Step three.* (1) The auditor must identify Type B programs which are high-risk using professional judgment and the criteria in §200.519. However, the auditor is not required to identify more high-risk Type B programs than at least one fourth the number of low-risk Type A programs identified as low-risk under Step 2 (paragraph (c) of this section). Except for known material weakness in internal control or compliance problems as discussed in §200.519(b)(1) and (2) and (c)(1), a single criterion in risk would seldom cause a Type B program to be considered high-risk. When identifying which Type B programs to risk assess, the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time. (2) The auditor is not expected to perform risk assessments on relatively small Federal programs. Therefore, the auditor is only required to perform risk assessments on Type B programs that exceed twenty-five percent (0.25) of the Type A threshold determined in Step 1 (paragraph (b) of this section).

(e) *Step four.* At a minimum, the auditor must audit all of the following as major programs: (1) All Type A programs not identified as low risk under step two (paragraph (c)(1) of this section). (2) All Type B programs identified as high-risk under step three (paragraph (d) of this section). (3) Such additional programs as may be necessary to comply with the percentage of coverage rule discussed in paragraph (f) of this section. This may require the auditor to audit more programs as major programs than the number of Type A programs.

(f) *Percentage of coverage rule.* If the auditee meets the criteria in §200.520, the auditor need only audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 20 percent (0.20) of total Federal awards expended. Otherwise, the auditor must audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 40 percent (0.40) of total Federal awards expended.

(g) *Documentation of risk.* The auditor must include in the audit documentation the risk analysis process used in determining major programs.

(h) *Auditor's judgment.* When the major program determination was performed and documented in accordance with this Subpart, the auditor's judgment in applying the risk-based approach to determine major programs must be presumed correct. Challenges by Federal agencies and pass-through entities must only be for clearly improper use of the requirements in this part. However, Federal agencies and pass-through entities may provide auditors guidance about the risk of a particular Federal program and the auditor must consider this guidance in determining major programs in audits not yet completed.

§200.519 Criteria for Federal program risk.

(a) *General.* The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring that could be material to the Federal program. The auditor must

consider criteria, such as described in paragraphs (b), (c), and (d) of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a particular Federal program with auditee management and the Federal agency or pass-through entity.

(b) *Current and prior audit experience.* (1) Weaknesses in internal control over Federal programs would indicate higher risk. Consideration should be given to the control environment over Federal programs and such factors as the expectation of management's adherence to Federal statutes, regulations, and the terms and conditions of Federal awards and the competence and experience of personnel who administer the Federal programs. (i) A Federal program administered under multiple internal control structures may have higher risk. When assessing risk in a large single audit, the auditor must consider whether weaknesses are isolated in a single operating unit (e.g., one college campus) or pervasive throughout the entity. (ii) When significant parts of a Federal program are passed through to subrecipients, a weak system for monitoring subrecipients would indicate higher risk. (2) Prior audit findings would indicate higher risk, particularly when the situations identified in the audit findings could have a significant impact on a Federal program or have not been corrected. (3) Federal programs not recently audited as major programs may be of higher risk than Federal programs recently audited as major programs without audit findings.

(c) *Oversight exercised by Federal agencies and pass-through entities.* (1) Oversight exercised by Federal agencies or pass-through entities could be used to assess risk. For example, recent monitoring or other reviews performed by an oversight entity that disclosed no significant problems would indicate lower risk, whereas monitoring that disclosed significant problems would indicate higher risk. (2) Federal agencies, with the concurrence of OMB, may identify Federal programs that are higher risk. OMB will provide this identification in the compliance supplement.

(d) *Inherent risk of the Federal program.* (1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third-party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have high risk for noncompliance with requirements of §200.430, but otherwise be at low risk. (2) The phase of a Federal program in its life cycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, statutes, regulations, or the terms and conditions of Federal awards may increase risk. (3) The phase of a Federal program in its life cycle at the auditee may indicate risk. For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to start-up or closeout of program activities and staff. (4) Type B programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

§300.12 Educational service agency.

Educational service agency means—

(a) A regional public multiservice agency—(1) Authorized by State law to develop, manage, and provide services or programs to LEAs; (2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State;
(b) Includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and
(c) Includes entities that meet the definition of intermediate educational unit in section 602(23) of the Act as in effect prior to June 4, 1997.

§300.13 Elementary school.

Elementary school means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

§300.14 Equipment.

Equipment means—

(a) Machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house the machinery, utilities, or equipment; and
(b) All other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

§300.16 Excess costs.

Excess costs means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate, and that must be computed after deducting—

(a) Amounts received—(1) Under Part B of the Act; (2) Under Part A of title I of the ESEA; and (3) Under Part A of title III of the ESEA and;
(b) Any State or local funds expended for programs that would qualify for assistance under any of the parts described in paragraph (a) of this section, but excluding any amounts for capital outlay or debt service. (See appendix A to part 300 for an example of how excess costs must be calculated.)

§300.28 Local educational agency.

(a) *General*. Local educational agency or LEA means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school

districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) *Educational service agencies and other public institutions or agencies*. The term includes—(1) An educational service agency, as defined in §300.12; and (2) Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public nonprofit charter school that is established as an LEA under State law.

(c) *BIA funded schools*. The term includes an elementary school or secondary school funded by the Bureau of Indian Affairs, and not subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the Act with the smallest student population.

§300.33 Public agency.

Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

§300.36 Secondary school.

Secondary school means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

§300.149 SEA responsibility for general supervision.

(a) The SEA is responsible for ensuring— (1) That the requirements of this part are carried out; and (2) That each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency (but not including elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior)— (i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and (ii) Meets the educational standards of the SEA (including the requirements of this part). (3) In carrying out this part with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 *et seq.*) are met.

(b) The State must have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements in §§300.600 – 300.602 and §§300.606 – 300.608.

(c) Part B of the Act does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(d) Notwithstanding paragraph (a) of this section, the Governor (or another individual pursuant to State law) may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

§300.132 Provision of services for parentally-placed private school children with disabilities—basic requirement.

(a) *General.* To the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, provision is made for the participation of those children in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with §300.137, unless the Secretary has arranged for services to those children under the by-pass provisions in §§300.190 through 300.198.

(b) *Services plan for parentally placed private school children with disabilities.* In accordance with paragraph (a) of this section and §§300.137 through 300.139, a services plan must be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services under this part.

(c) *Record keeping.* Each LEA must maintain in its records, and provide to the SEA, the following information related to parentally placed private school children covered under §§300.130 through 300.144: (1) The number of children evaluated; (2) The number of children determined to be children with disabilities; and (3) The number of children served.

§300.133 Expenditures.

(a) *Formula.* To meet the requirement of §300.132(a), each LEA must spend the following on providing special education and related services (including direct services) to parentally-placed private school children with disabilities: (1) For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(f) of the Act as the number of private school children with disabilities aged 3 through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3 through 21. (2)(i) For children aged three through five, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of parentally-placed private school children with disabilities aged three through five who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three through five. (ii) As described in paragraph (a)(2)(i) of this section, children aged three through five are considered to be parentally placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets the definition of elementary school in §300.13. (3) If an LEA has not expended for equitable services all of the funds described in paragraphs (a)(1) and (a)(2) of this section by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally-placed private school children with disabilities during a carry-over period of one additional year.

(b) *Calculating proportionate amount.* In calculating the proportionate amount of Federal funds to be provided for parentally placed private school children with disabilities, the LEA, after timely and meaningful consultation with representatives of private schools under §300.134, must conduct a thorough and complete child find process to determine the number of parentally-placed children

with disabilities attending private schools located in the LEA. (See appendix B for an example of how proportionate share is calculated).

(c) *Annual count of the number of parentally placed private school children with disabilities.* (1) Each LEA must—(i) After timely and meaningful consultation with representatives of parentally-placed private school children with disabilities (consistent with §300.134), determine the number of parentally-placed private school children with disabilities attending private schools located in the LEA; and (ii) Ensure that the count is conducted on any date between October 1 and December 1, inclusive, of each year. (2) The count must be used to determine the amount that the LEA must spend on providing special education and related services to parentally placed private school children with disabilities in the next subsequent fiscal year.

(d) *Supplement, not supplant.* State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally placed private school children with disabilities under this part.

§300.134 Consultation.

To ensure timely and meaningful consultation, an LEA, or, if appropriate, an SEA, must consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children regarding the following:

(a) Child find. The child find process, including—(1) How parentally-placed private school children suspected of having a disability can participate equitably; and (2) How parents, teachers, and private school officials will be informed of the process.

(b) *Proportionate share of funds.* The determination of the proportionate share of Federal funds available to serve parentally placed private school children with disabilities under §300.133(b), including the determination of how the proportionate share of those funds was calculated.

(c) *Consultation process.* The consultation process among the LEA, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally placed children with disabilities identified through the child find process can meaningfully participate in special education and related services.

(d) *Provision of special education and related services.* How, where, and by whom special education and related services will be provided for parentally-placed private school children with disabilities, including a discussion of—(1) The types of services, including direct services and alternate service delivery mechanisms; and (2) How special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children; and (3) How and when those decisions will be made;

(e) *Written explanation by LEA regarding services.* How, if the LEA disagrees with the views of the private school officials on the provision of services or the types of services (whether provided directly or through a contract), the LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.

§300.137 Equitable services determined.

(a) *No individual right to special education and related services.* No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(b) *Decisions.* (1) Decisions about the services that will be provided to parentally placed private school children with disabilities under §§300.130 through 300.144 must be made in accordance with paragraph (c) of this section and §300.134(d). (2) The LEA must make the final decisions with respect to the services to be provided to eligible parentally placed private school children with disabilities.

(c) *Services plan for each child served under §§300.130 through 300.144.* If a child with a disability is enrolled in a religious or other private school by the child's parents and will receive special education or related services from an LEA, the LEA must—(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with §300.138(b); and (2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls.

§300.138 Equitable services provided.

(a) *General.* (1) The services provided to parentally placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to parentally placed private school children with disabilities do not have to meet the special education teacher qualification requirements in §300.156(c). (2) Parentally placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

(b) *Services provided in accordance with a services plan.* (1) Each parentally placed private school child with a disability who has been designated to receive services under §300.132 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in §§300.134 and 300.137, it will make available to parentally-placed private school children with disabilities. (2) The services plan must, to the extent appropriate—(i) Meet the requirements of §300.320, or for a child ages three through five, meet the requirements of §300.323(b) with respect to the services provided; and (ii) Be developed, reviewed, and revised consistent with §§300.321 through 300.324.

(c) *Provision of equitable services.* (1) The provision of services pursuant to this section and §§300.139 through 300.143 must be provided: (i) By employees of a public agency; or (ii) Through contract by the public agency with an individual, association, agency, organization, or other entity. (2) Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, must be secular, neutral, and nonideological.

§300.139 Location of services and transportation.

(a) *Services on private school premises.* Services to parentally placed private school children with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with law.

(b) *Transportation*—(1) *General.* (i) If necessary for the child to benefit from or participate in the services provided under this part, a parentally placed private school child with a disability must be provided transportation—(A) From the child's school or the child's home to a site other than the private school; and (B) From the service site to the private school, or to the child's home, depending on the timing of the services. (ii) LEAs are not required to provide transportation from the child's home to the private school. (2) *Cost of transportation.* The cost of the transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the LEA has met the requirement of §300.133.

§300.140 Due process complaints and State complaints.

(a) *Due process not applicable, except for child find.* (1) Except as provided in paragraph (b) of this section, the procedures in §§300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§300.132 through 300.139, including the provision of services indicated on the child's services plan.
(b) *Child find complaints—to be filed with the LEA in which the private school is located.* (1) The procedures in §§300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in §300.131, including the requirements in §§300.300 through 300.311. (2) Any due process complaint regarding the child find requirements (as described in paragraph (b)(1) of this section) must be filed with the LEA in which the private school is located and a copy must be forwarded to the SEA.
(c) *State complaints.* (1) Any complaint that an SEA or LEA has failed to meet the requirements in §§300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the procedures described in §§300.151 through 300.153. (2) A complaint filed by a private school official under §300.136(a) must be filed with the SEA in accordance with the procedures in §300.136(b).

§300.141 Requirement that funds not benefit a private school.

(a) An LEA may not use funds provided under section 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school.
(b) The LEA must use funds provided under Part B of the Act to meet the special education and related services needs of parentally-placed private school children with disabilities, but not for meeting—(1) The needs of a private school; or (2) The general needs of the students enrolled in the private school.

§300.142 Use of personnel.

(a) *Use of public school personnel.* An LEA may use funds available under sections 611 and 619 of the Act to make public school personnel available in other than public facilities—(1) To the extent necessary to provide services under §§300.130 through 300.144 for parentally-placed private school children with disabilities; and (2) If those services are not normally provided by the private school.
(b) *Use of private school personnel.* An LEA may use funds available under sections 611 and 619 of the Act to pay for the services of an employee of a private school to provide services under §§300.130 through 300.144 if—(1) The employee performs the services outside of his or her regular hours of duty; and (2) The employee performs the services under public supervision and control.

§300.143 Separate classes prohibited.

An LEA may not use funds available under section 611 or 619 of the Act for classes that are organized separately on the basis of school enrollment or religion of the children if—

(a) The classes are at the same site; and
(b) The classes include children enrolled in public schools and children enrolled in private schools.

§300.144 Property, equipment, and supplies.

(a) A public agency must control and administer the funds used to provide special education and related services under §§300.137 through 300.139, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in the Act.
(b) The public agency may place equipment and supplies in a private school for the period of time needed for the Part B program.
(c) The public agency must ensure that the equipment and supplies placed in a private school—(1) Are used only for Part B purposes; and (2) Can be removed from the private school without remodeling the private school facility.
(d) The public agency must remove equipment and supplies from a private school if—(1) The equipment and supplies are no longer needed for Part B purposes; or (2) Removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes.
(e) No funds under Part B of the Act may be used for repairs, minor remodeling, or construction of private school facilities.

§300.156 Personnel qualifications….

(c) *Qualifications for special education teachers.* (1) The qualifications described in paragraph (a) of this section must ensure that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school—(i) Has obtained full State certification as a special education teacher (including certification obtained through an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in 34 CFR 200.56(a)(2)(ii) as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the teacher must meet the certification or licensing requirements, if any, set forth in the State's public charter school law; (ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) Holds at least a bachelor's degree. (2) A teacher will be considered to meet the standard in paragraph (c)(1)(i) of this section if that teacher is participating in an alternate route to special education certification program under which—(i) The teacher—(A) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching; (B) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program; (C) Assumes functions as a teacher only for a specified period of time not to exceed three years; and (D) Demonstrates satisfactory progress toward full certification as prescribed by the State; and (ii)

The State ensures, through its certification and licensure process, that the provisions in paragraph (c)(2)(i) of this section are met.

§300.162 Supplementation of State, local, and other Federal funds.

(a) *Expenditures*. Funds paid to a State under this part must be expended in accordance with all the provisions of this part.

(b) *Prohibition against commingling*. (1) Funds paid to a State under this part must not be commingled with State funds. (2) The requirement in paragraph (b)(1) of this section is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of funds paid to a State under this part. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

(c) *State-level nonsupplanting*. (1) Except as provided in §300.203, funds paid to a State under Part B of the Act must be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of the SEA or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act, and in no case to supplant those Federal, State, and local funds. (2) If the State provides clear and convincing evidence that all children with disabilities have available to them FAPE, the Secretary may waive, in whole or in part, the requirements of paragraph (c)(1) of this section if the Secretary concurs with the evidence provided by the State under §300.164.

§300.200 Condition of assistance.

An LEA is eligible for assistance under Part B of the Act for a fiscal year if the agency submits a plan that provides assurances to the SEA that the LEA meets each of the conditions in §§300.201 through 300.213.

§300.201 Consistency with State policies.

The LEA, in providing for the education of children with disabilities within its jurisdiction, must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under §§300.101 through 300.163, and §§300.165 through 300.174.

§300.202 Use of amounts.

(a) *General.* Amounts provided to the LEA under Part B of the Act—(1) Must be expended in accordance with the applicable provisions of this part; (2) Must be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with paragraph (b) of this section; and (3) Must be used to supplement State, local, and other Federal funds and not to supplant those funds.

(b) *Excess cost requirement*—(1) General. (i) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (b)(1)(ii) of this section. (ii) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the ages 3, 4, 5, 18, 19, 20, or 21, if no local or State funds are available for nondisabled children of these ages. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services for these children. (2)(i) An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities

before funds under Part B of the Act are used. (ii) The amount described in paragraph (b)(2)(i) of this section is determined in accordance with the definition of excess costs in §300.16. That amount may not include capital outlay or debt service. (3) If two or more LEAs jointly establish eligibility in accordance with §300.223, the minimum average amount is the average of the combined minimum average amounts determined in accordance with the definition of excess costs in §300.16 in those agencies for elementary or secondary school students, as the case may be.

§300.203 Maintenance of effort.

(a) *Eligibility standard*. (1) For purposes of establishing the LEA's eligibility for an award for a fiscal year, the SEA must determine that the LEA budgets, for the education of children with disabilities, at least the same amount, from at least one of the following sources, as the LEA spent for that purpose from the same source for the most recent fiscal year for which information is available: (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. (2) When determining the amount of funds that the LEA must budget to meet the requirement in paragraph (a)(1) of this section, the LEA may take into consideration, to the extent the information is available, the exceptions and adjustment provided in §§300.204 and 300.205 that the LEA: (i) Took in the intervening year or years between the most recent fiscal year for which information is available and the fiscal year for which the LEA is budgeting; and (ii) Reasonably expects to take in the fiscal year for which the LEA is budgeting. (3) Expenditures made from funds provided by the Federal government for which the SEA is required to account to the Federal government or for which the LEA is required to account to the Federal government directly or through the SEA may not be considered in determining whether an LEA meets the standard in paragraph (a)(1) of this section.

(b) *Compliance standard.* (1) Except as provided in §§300.204 and 300.205, funds provided to an LEA under Part B of the Act must not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year. (2) An LEA meets this standard if it does not reduce the level of expenditures for the education of children with disabilities made by the LEA from at least one of the following sources below the level of those expenditures from the same source for the preceding fiscal year, except as provided in §§300.204 and 300.205: (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. (3) Expenditures made from funds provided by the Federal government for which the SEA is required to account to the Federal government or for which the LEA is required to account to the Federal government directly or through the SEA may not be considered in determining whether an LEA meets the standard in paragraphs (b)(1) and (2) of this section.

(c) *Subsequent years.* (1) If, in the fiscal year beginning on July 1, 2013 or July 1, 2014, an LEA fails to meet the requirements of §300.203 in effect at that time, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required in the absence of that failure, not the LEA's reduced level of expenditures. (2) If, in any fiscal year beginning on or after July 1, 2015, an LEA fails to meet the requirement of paragraph (b)(2)(i) or (iii) of this section and the LEA is relying on local funds only, or local funds only on a per capita basis, to meet the requirements of paragraph (a) or (b) of this section, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the

failure is the amount that would have been required under paragraph (b)(2)(i) or (iii) in the absence of that failure, not the LEA's reduced level of expenditures. (3) If, in any fiscal year beginning on or after July 1, 2015, an LEA fails to meet the requirement of paragraph (b)(2)(ii) or (iv) of this section and the LEA is relying on the combination of State and local funds, or the combination of State and local funds on a per capita basis, to meet the requirements of paragraph (a) or (b) of this section, the level of expenditures required of the LEA for the fiscal year subsequent to the year of the failure is the amount that would have been required under paragraph (b)(2)(ii) or (iv) in the absence of that failure, not the LEA's reduced level of expenditures.

(d) *Consequence of failure to maintain effort.* If an LEA fails to maintain its level of expenditures for the education of children with disabilities in accordance with paragraph (b) of this section, the SEA is liable in a recovery action under section 452 of the General Education Provisions Act (20 U.S.C. 1234a) to return to the Department, using non-Federal funds, an amount equal to the amount by which the LEA failed to maintain its level of expenditures in accordance with paragraph (b) of this section in that fiscal year, or the amount of the LEA's Part B subgrant in that fiscal year, whichever is lower. (Approved by the Office of Management and Budget under control number 1820-0600)

§300.204 Exception to maintenance of effort.

Notwithstanding the restriction in §300.203(b), 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). [NOTE: Exception (e) does NOT apply to Kentucky.]

§300.205 Adjustment to local fiscal efforts in certain fiscal years.

(a) *Amounts in excess*. Notwithstanding §300.202(a)(2) and (b) and §300.203(b), and except as provided in paragraph (d) of this section and §300.230(e)(2), for any fiscal year for which the allocation received by an LEA under §300.705 exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures otherwise required by §300.203(b) by not more than 50 percent of the amount of that excess.
(b) *Use of amounts to carry out activities under ESEA*. If an LEA exercises the authority under paragraph (a) of this section, the LEA must use an amount of local funds equal to the reduction in expenditures under paragraph (a) of this section to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is using funds under the ESEA for those activities.

(c) *State prohibition.* Notwithstanding paragraph (a) of this section, if an SEA determines that an LEA is unable to establish and maintain programs of FAPE that meet the requirements of section 613(a) of the Act and this part or the SEA has taken action against the LEA under section 616 of the Act and subpart F of these regulations, the SEA must prohibit the LEA from reducing the level of expenditures under paragraph (a) of this section for that fiscal year.
(d) Special rule. The amount of funds expended by an LEA for early intervening services under §300.226 shall count toward the maximum amount of expenditures that the LEA may reduce under paragraph (a) of this section.

§300.206 Schoolwide programs under title I of the ESEA.

(a) *General.* Notwithstanding the provisions of §§300.202 and 300.203 or any other provision of Part B of the Act, an LEA may use funds received under Part B of the Act for any fiscal year to carry out a schoolwide program under section 1114 of the ESEA, except that the amount used in any schoolwide program may not exceed—(1)(i) The amount received by the LEA under Part B of the Act for that fiscal year; divided by (ii) The number of children with disabilities in the jurisdiction of the LEA; and multiplied by (2) The number of children with disabilities participating in the schoolwide program.
(b) *Funding conditions*. The funds described in paragraph (a) of this section are subject to the following conditions: (1) The funds must be considered as Federal Part B funds for purposes of the calculations required by §300.202(a)(2) and (a)(3). (2) The funds may be used without regard to the requirements of §300.202(a)(1).
(c) *Meeting other Part B requirements*. Except as provided in paragraph (b) of this section, all other requirements of Part B of the Act must be met by an LEA using Part B funds in accordance with paragraph (a) of this section, including ensuring that children with disabilities in schoolwide program schools—(1) Receive services in accordance with a properly developed IEP; and (2) Are afforded all of the rights and services guaranteed to children with disabilities under the Act.

§300.207 Personnel development.

The LEA must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of §300.156 (related to personnel qualifications) and section 2102(b) of the ESEA.

§300.208 Permissive use of funds.

(a) *Uses. Notwithstanding §§300.202, 300.203(b), and 300.162(b), funds provided to an LEA under Part B of the Act may be used for the following activities:* (1) *Services and aids that also benefit nondisabled children*. For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services. (2) *Early intervening services*. To develop and implement coordinated, early intervening educational services in accordance with §300.226. (3) *High cost special education and related services.* To establish and implement cost or risk sharing funds, consortia, or cooperatives for the LEA itself, or for LEAs working in a consortium of which the LEA is a part, to pay for high cost special education and related services.
(b) *Administrative case management*. An LEA may use funds received under Part B of the Act to purchase appropriate technology for recordkeeping, data collection, and related case management activities of teachers and related services personnel providing services described in the IEP of

children with disabilities, that is needed for the implementation of those case management activities

§300.209 Treatment of charter schools and their students.

(a) Rights of children with disabilities. Children with disabilities who attend public charter schools and their parents retain all rights under this part.

(b) *Charter schools that are public schools of the LEA.* (1) In carrying out Part B of the Act and these regulations with respect to charter schools that are public schools of the LEA, the LEA must—(i) Serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the LEA has a policy or practice of providing such services on the site to its other public schools; and (ii) Provide funds under Part B of the Act to those charter schools—(A) On the same basis as the LEA provides funds to the LEA's other public schools, including proportional distribution based on relative enrollment of children with disabilities; and (B) At the same time as the LEA distributes other Federal funds to the LEA's other public schools, consistent with the State's charter school law. (2) If the public charter school is a school of an LEA that receives funding under §300.705 and includes other public schools—(i) The LEA is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity; and (ii) The LEA must meet the requirements of paragraph (b)(1) of this section.

(c) *Public charter schools that are LEAs*. If the public charter school is an LEA, consistent with §300.28, that receives funding under §300.705, that charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

(d) *Public charter schools that are not an LEA or a school that is part of an LEA.* (1) If the public charter school is not an LEA receiving funding under §300.705, or a school that is part of an LEA receiving funding under §300.705, the SEA is responsible for ensuring that the requirements of this part are met. (2) Paragraph (d)(1) of this section does not preclude a State from assigning initial responsibility for ensuring the requirements of this part are met to another entity. However, the SEA must maintain the ultimate responsibility for ensuring compliance with this part, consistent with §300.149.

§300.210 Purchase of instructional materials.

(a) *General*. Not later than December 3, 2006, an LEA that chooses to coordinate with the National Instructional Materials Access Center (NIMAC), when purchasing print instructional materials, must acquire those instructional materials in the same manner, and subject to the same conditions as an SEA under §300.172.

(b) *Rights of LEA*. (1) Nothing in this section shall be construed to require an LEA to coordinate with the NIMAC. (2) If an LEA chooses not to coordinate with the NIMAC, the LEA must provide an assurance to the SEA that the LEA will provide instructional materials to blind persons or other persons with print disabilities in a timely manner. (3) Nothing in this section relieves an LEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats but are not included under the definition of blind or other persons with print disabilities in §300.172(e)(1)(i) or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.

§300.211 Information for SEA.

The LEA must provide the SEA with information necessary to enable the SEA to carry out its duties under Part B of the Act, including, with respect to §§300.157 and 300.160, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

§300.212 Public information.

The LEA must make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the Act.

§300.213 Records regarding migratory children with disabilities.

The LEA must cooperate in the Secretary's efforts under section 1308 of the ESEA to ensure the linkage of records pertaining to migratory children with disabilities for the purpose of electronically exchanging, among the States, health and educational information regarding those children.

§300.226 Early intervening services.

(a) *General.* An LEA may not use more than 15 percent of the amount the LEA receives under Part B of the Act for any fiscal year, less any amount reduced by the LEA pursuant to §300.205, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, 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. (See appendix D for examples of how §300.205(d), regarding local maintenance of effort, and §300.226(a) affect one another.)

(b) *Activities.* In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include—(1) Professional development (which may be provided by entities other than LEAs) 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.

(c) *Construction.* Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability.

(d) *Reporting.* Each LEA that develops and maintains coordinated, early intervening services under this section must annually report to the SEA on—(1) The number of children served under this section who received early intervening services; and (2) The number of children served under this section who received early intervening services and subsequently receive special education and related services under Part B of the Act during the preceding two year period.

(e) *Coordination with ESEA.* Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section.

§300.320 Definition of individualized education program.

(a) *General.* As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300.324, and that must include—(1) A statement of the child's present levels of academic achievement and functional performance, including—(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; (2)(i) A statement of measurable annual goals, including academic and functional goals designed to— (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability; (ii) For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, a description of benchmarks or short-term objectives; (3) A description of—(i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided; (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—(i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section; (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section; (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—(A) The child cannot participate in the regular assessment; and (B) The particular alternate assessment selected is appropriate for the child; and (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

(b) *Transition services.* Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

(c) *Transfer of rights at age of majority.* Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under §300.520.

(d) *Construction.* Nothing in this section shall be construed to require—(1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or (2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

§300.321 IEP Team.

(a) *General.* The public agency must ensure that the IEP Team for each child with a disability includes—(1) The parents of the child; (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; (4) A representative of the public agency who—(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) Is knowledgeable about the general education curriculum; and (iii) Is knowledgeable about the availability of resources of the public agency. (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section; (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) Whenever appropriate, the child with a disability.

(b) *Transition services participants.* (1) In accordance with paragraph (a)(7) of this section, the public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under §300.320(b). (2) If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered. (3) To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(c) *Determination of knowledge and special expertise.* The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.

(d) *Designating a public agency representative.* A public agency may designate a public agency member of the IEP Team to also serve as the agency representative, if the criteria in paragraph (a)(4) of this section are satisfied.

(e) *IEP Team attendance.* (1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (2) A member of the IEP Team described in paragraph (e)(1) of this section may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—(i) The parent, in writing, and the public agency consent to the excusal; and (ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(f) *Initial IEP Team meeting for child under Part C.* In the case of a child who was previously served

under Part C of the Act, an invitation to the initial IEP Team meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.

§300.322 Parent participation.

(a) *Public agency responsibility—general.* Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place.

(b) *Information provided to parents.* (1) The notice required under paragraph (a)(1) of this section must—(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and (ii) Inform the parents of the provisions in §300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and §300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act). (2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must—(i) Indicate—(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with §300.320(b); and (B) That the agency will invite the student; and (ii) Identify any other agency that will be invited to send a representative.

(c) *Other methods to ensure parent participation.* If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with §300.328 (related to alternative means of meeting participation).

(d) *Conducting an IEP Team meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—(1) Detailed records of telephone calls made or attempted and the results of those calls; (2) Copies of correspondence sent to the parents and any responses received; and (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) *Use of interpreters or other action, as appropriate.* The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) *Parent copy of child's IEP.* The public agency must give the parent a copy of the child's IEP at no cost to the parent.

§300.323 When IEPs must be in effect.

(a) *General.* At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in §300.320.

(b) *IEP or IFSP for children aged three through five.* (1) In the case of a child with a disability aged three through five (or, at the discretion of the SEA, a two-year-old child with a disability who will turn age three during the school year), the IEP Team must consider an IFSP that contains the

IFSP content (including the natural environments statement) described in section 636(d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs under this section who are at least three years of age), and that is developed in accordance with the IEP procedures under this part. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is—(i) Consistent with State policy; and (ii) Agreed to by the agency and the child's parents. (2) In implementing the requirements of paragraph (b)(1) of this section, the public agency must—(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; and (ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(c) *Initial IEPs; provision of services.* Each public agency must ensure that—(1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

(d) *Accessibility of child's IEP to teachers and others.* Each public agency must ensure that—(1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of—(i) His or her specific responsibilities related to implementing the child's IEP; and (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

(e) *IEPs for children who transfer public agencies in the same State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—(1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

(f) *IEPs for children who transfer from another State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency—(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

(g) *Transmittal of records.* To facilitate the transition for a child described in paragraphs (e) and (f) of this section—(1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

§300.324 Development, review, and revision of IEP.

(a) *Development of IEP*—(1) *General.* In developing each child's IEP, the IEP Team must consider—(i) The strengths of the child; (ii) The concerns of the parents for enhancing the education of their child; (iii) The results of the initial or most recent evaluation of the child; and (iv) The academic, developmental, and functional needs of the child. (2) *Consideration of special factors.* The IEP Team must—(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior; (ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP; (iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child; (iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and (v) Consider whether the child needs assistive technology devices and services. (3) *Requirement with respect to regular education teacher.* A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—(i) Appropriate positive behavioral interventions and supports and other strategies for the child; and (ii) Supplementary aids and services, program modifications, and support for school personnel consistent with §300.320(a)(4). (4) *Agreement.* (i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. (ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes. (5) *Consolidation of IEP Team meetings.* To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child. (6) *Amendments.* Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

(b) *Review and revision of IEPs*—(1) *General.* Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address—(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under §300.303; (C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters. (2) *Consideration of special factors.* In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section. (3) *Requirement with respect to regular education teacher.* A regular education teacher of the child, as a member of the IEP Team, must, consistent with paragraph (a)(3) of this section, participate in the review and revision of the IEP of the child.

(c) *Failure to meet transition objectives*—(1) *Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with §300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP. (2) *Construction.* Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

(c) *Children with disabilities in adult prisons*—(1) *Requirements that do not apply.* The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons: (i) The requirements contained in section 612(a)(16) of the Act and §300.320(a)(6) (relating to participation of children with disabilities in general assessments). (ii) The requirements in §300.320(b) (relating to transition planning and transition services) do not apply with respect to the children whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release. (2) *Modifications of IEP or placement.* (i) Subject to paragraph (d)(2)(ii) of this section, the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. (ii) The requirements of §§300.320 (relating to IEPs), and 300.114 (relating to LRE), do not apply with respect to the modifications described in paragraph (d)(2)(i) of this section.

§300.600 State monitoring and enforcement.

(a) The State must—(1) Monitor the implementation of this part; (2) Make determinations annually about the performance of each LEA using the categories in §300.603(b)(1); (3) Enforce this part, consistent with §300.604, using appropriate enforcement mechanisms, which must include, if applicable, the enforcement mechanisms identified in §300.604(a)(1) (technical assistance), (a)(3) (conditions on funding of an LEA), (b)(2)(i) (a corrective action plan or improvement plan), (b)(2)(v) (withholding funds, in whole or in part, by the SEA), and (c)(2) (withholding funds, in whole or in part, by the SEA); and (4) Report annually on the performance of the State and of each LEA under this part, as provided in §300.602(b)(1)(i)(A) and (b)(2).

(b) The primary focus of the State's monitoring activities must be on—(1) Improving educational results and functional outcomes for all children with disabilities; and (2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established by the Secretary for the State performance plans.

(d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas: (1) Provision of FAPE in the least restrictive environment. (2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in §300.43 and in

20 U.S.C. 1437(a)(9). (3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

(e) In exercising its monitoring responsibilities under paragraph (d) of this section, the State must ensure that when it identifies noncompliance with the requirements of this part by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance.

§300.608 State enforcement.

(a) If an SEA determines that an LEA is not meeting the requirements of Part B of the Act, including the targets in the State's performance plan, the SEA must prohibit the LEA from reducing the LEA's maintenance of effort under §300.203 for any fiscal year.

(b) Nothing in this subpart shall be construed to restrict a State from utilizing any other authority available to it to monitor and enforce the requirements of Part B of the Act.

§300.624 Destruction of information.

(a) The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

§300.646 Disproportionality.

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to—(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act; (2) The placement in particular educational settings of these children; and (3) The incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions.

(b) *Methodology.* The State must apply the methods in §300.647 to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State under paragraph (a) of this section.

(c) *Review and revision of policies, practices, and procedures.* In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities or the placement in particular educational settings, including disciplinary removals of such children, in accordance with paragraphs (a) and (b) of this section, the State or the Secretary of the Interior must—(1) Provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in identification or placement in particular education settings, including disciplinary removals, to ensure that the policies, practices, and procedures comply with the requirements of the Act. (2) Require the LEA to publicly report on the revision of policies, practices, and procedures described under paragraph (c)(1) of this section consistent with the requirements of the Family Educational Rights and Privacy Act, its implementing

regulations in 34 CFR part 99, and Section 618(b)(1) of the Act.

(d) *Comprehensive coordinated early intervening services.* Except as provided in paragraph (e) of this section, the State or the Secretary of the Interior shall require any LEA identified under paragraphs (a) and (b) of this section to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to address factors contributing to the significant disproportionality. (1) In implementing comprehensive coordinated early intervening services an LEA—(i) May carry out activities that include professional development and educational and behavioral evaluations, services, and supports. (ii) Must identify and address the factors contributing to the significant disproportionality, which may include, among other identified factors, a lack of access to scientifically based instruction; economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings; inappropriate use of disciplinary removals; lack of access to appropriate diagnostic screenings; differences in academic achievement levels; and policies, practices, or procedures that contribute to the significant disproportionality. (iii) Must address a policy, practice, or procedure it identifies as contributing to the significant disproportionality, including a policy, practice or procedure that results in a failure to identify, or the inappropriate identification of, a racial or ethnic group (or groups). (2) An LEA may use funds reserved for comprehensive coordinated early intervening services to serve children from age 3 through grade 12, particularly, but not exclusively, children in those groups that were significantly overidentified under paragraph (a) or (b) of this section, including—(i) Children 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 (ii) Children with disabilities. (3) An LEA may not limit the provision of comprehensive coordinated early intervening services under this paragraph to children with disabilities.

(e) *Exception to comprehensive coordinated early intervening services.* The State or the Secretary of the Interior shall not require any LEA that serves only children with disabilities identified under paragraphs (a) and (b) of this section to reserve funds to provide comprehensive coordinated early intervening services.

(f) *Rule of construction.* Nothing in this section authorizes a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate the requirements of this part, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.

§300.647 Determining significant disproportionality.

(a) *Definitions.* (1) *Alternate risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk of that outcome for children in all other racial or ethnic groups in the State. (2) *Comparison group* consists of the children in all other racial or ethnic groups within an LEA or within the State, when reviewing a particular racial or ethnic group within an LEA for significant disproportionality. (3) *Minimum cell size* is the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups. (4) *Minimum n-size* is the minimum number of children enrolled in an LEA with respect to identification, and the minimum number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups. (5) *Risk* is the likelihood of a particular outcome

(identification, placement, or disciplinary removal) for a specified racial or ethnic group (or groups), calculated by dividing the number of children from a specified racial or ethnic group (or groups) experiencing that outcome by the total number of children from that racial or ethnic group or groups enrolled in the LEA. (6) *Risk ratio* is a calculation performed by dividing the risk of a particular outcome for children in one racial or ethnic group within an LEA by the risk for children in all other racial and ethnic groups within the LEA. (7) *Risk ratio threshold* is a threshold, determined by the State, over which disproportionality based on race or ethnicity is significant under §300.646(a) and (b).

(b) *Significant disproportionality determinations.* In determining whether significant disproportionality exists in a State or LEA under §300.646(a) and (b)—(1)(i) The State must set a: (A) Reasonable risk ratio threshold; (B) Reasonable minimum cell size; (C) Reasonable minimum n-size; and (D) Standard for measuring reasonable progress if a State uses the flexibility described in paragraph (d)(2) of this section. (ii) The State may, but is not required to, set the standards set forth in paragraph (b)(1)(i) of this section at different levels for each of the categories described in paragraphs (b)(3) and (4) of this section. (iii) The standards set forth in paragraph (b)(1)(i) of this section: (A) Must be based on advice from stakeholders, including State Advisory Panels, as provided under section 612(a)(21)(D)(iii) of the Act; and (B) Are subject to monitoring and enforcement for reasonableness by the Secretary consistent with section 616 of the Act. (iv) When monitoring for reasonableness under paragraph (b)(1)(iii)(B) of this section, the Department finds that the following are presumptively reasonable: (A) A minimum cell size under paragraph (b)(1)(i)(B) of this section no greater than 10; and (B) A minimum n-size under paragraph (b)(1)(i)(C) of this section no greater than 30. (2) The State must apply the risk ratio threshold or thresholds determined in paragraph (b)(1) of this section to risk ratios or alternate risk ratios, as appropriate, in each category described in paragraphs (b)(3) and (4) of this section and the following racial and ethnic groups: (i) Hispanic/Latino of any race; and, for individuals who are non-Hispanic/Latino only; (ii) American Indian or Alaska Native; (iii) Asian; (iv) Black or African American; (v) Native Hawaiian or Other Pacific Islander; (vi) White; and (vii) Two or more races. (3) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section with respect to: (i) The identification of children ages 3 through 21 as children with disabilities; and (ii) The identification of children ages 3 through 21 as children with the following impairments: (A) Intellectual disabilities; (B) Specific learning disabilities; (C) Emotional disturbance; (D) Speech or language impairments; (E) Other health impairments; and (F) Autism. (4) Except as provided in paragraphs (b)(5) and (c) of this section, the State must calculate the risk ratio for each LEA, for each racial and ethnic group in paragraph (b)(2) of this section with respect to the following placements into particular educational settings, including disciplinary removals: (i) For children with disabilities ages 6 through 21, inside a regular class less than 40 percent of the day; (ii) For children with disabilities ages 6 through 21, inside separate schools and residential facilities, not including homebound or hospital settings, correctional facilities, or private schools; (iii) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of 10 days or fewer; (iv) For children with disabilities ages 3 through 21, out-of-school suspensions and expulsions of more than 10 days; (v) For children with disabilities ages 3 through 21, in-school suspensions of 10 days or fewer; (vi) For children with disabilities ages 3 through 21, in-school suspensions of more than 10 days; and (vii) For children with disabilities ages 3 through 21, disciplinary removals in total, including in-school and out-of-school suspensions, expulsions, removals by school personnel to an interim alternative education setting, and removals by a hearing officer. (5) The State must calculate an

alternate risk ratio with respect to the categories described in paragraphs (b)(3) and (4) of this section if the comparison group in the LEA does not meet the minimum cell size or the minimum n-size. (6) Except as provided in paragraph (d) of this section, the State must identify as having significant disproportionality based on race or ethnicity under §300.646(a) and (b) any LEA that has a risk ratio or alternate risk ratio for any racial or ethnic group in any of the categories described in paragraphs (b)(3) and (4) of this section that exceeds the risk ratio threshold set by the State for that category. (7) The State must report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, and standards for measuring reasonable progress selected under paragraphs (b)(1)(i)(A) through (D) of this section, and the rationales for each, to the Department at a time and in a manner determined by the Secretary. Rationales for minimum cell sizes and minimum n-sizes not presumptively reasonable under paragraph (b)(1)(iv) of this section must include a detailed explanation of why the numbers chosen are reasonable and how they ensure that the State is appropriately analyzing and identifying LEAs with significant disparities, based on race and ethnicity, in the identification, placement, or discipline of children with disabilities.

(c) *Exception.* A State is not required to calculate a risk ratio or alternate risk ratio, as outlined in paragraphs (b)(3), (4), and (5) of this section, to determine significant disproportionality if: (1) The particular racial or ethnic group being analyzed does not meet the minimum cell size or minimum n-size; or (2) In calculating the alternate risk ratio under paragraph (b)(5) of this section, the comparison group in the State does not meet the minimum cell size or minimum n-size.

(d) *Flexibility.* A State is not required to identify an LEA as having significant disproportionality based on race or ethnicity under §300.646(a) and (b) until—(1) The LEA has exceeded a risk ratio threshold set by the State for a racial or ethnic group in a category described in paragraph (b)(3) or (4) of this section for up to three prior consecutive years preceding the identification; and (2) The LEA has exceeded the risk ratio threshold and has failed to demonstrate reasonable progress, as determined by the State, in lowering the risk ratio or alternate risk ratio for the group and category in each of the two prior consecutive years.

§300.703 Allocations to States.

(a) General. After reserving funds for technical assistance under §300.702, and for payments to the outlying areas, the freely associated States, and the Secretary of the Interior under §300.701 (a) and (b) for a fiscal year, the Secretary allocates the remaining amount among the States in accordance with paragraphs (b), (c), and (d) of this section.

(b) *Special rule for use of fiscal year 1999 amount.* If a State received any funds under section 611 of the Act for fiscal year 1999 on the basis of children aged three through five, but does not make FAPE available to all children with disabilities aged three through five in the State in any subsequent fiscal year, the Secretary computes the State's amount for fiscal year 1999, solely for the purpose of calculating the State's allocation in that subsequent year under paragraph (c) or (d) of this section, by subtracting the amount allocated to the State for fiscal year 1999 on the basis of those children.

(c) *Increase in funds.* If the amount available for allocations to States under paragraph (a) of this section for a fiscal year is equal to or greater than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows: (1) *Allocation of increase*—(i) General. Except as provided in paragraph (c)(2) of this section, the Secretary allocates for the fiscal year—(A) To each State the amount the State received under this section for fiscal year 1999; (B) Eighty-five (85) percent of any remaining funds to States on the

basis of the States' relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE under Part B of the Act; and (C) Fifteen (15) percent of those remaining funds to States on the basis of the States' relative populations of children described in paragraph (c)(1)(i)(B) of this section who are living in poverty. (ii) Data. For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary. (2) *Limitations*. Notwithstanding paragraph (c)(1) of this section, allocations under this section are subject to the following: (i) Preceding year allocation. No State's allocation may be less than its allocation under section 611 of the Act for the preceding fiscal year. (ii) Minimum. No State's allocation may be less than the greatest of—(A) The sum of—(1) The amount the State received under section 611 of the Act for fiscal year 1999; and (2) One third of one percent of the amount by which the amount appropriated under section 611(i) of the Act for the fiscal year exceeds the amount appropriated for section 611 of the Act for fiscal year 1999; (B) The sum of—(1) The amount the State received under section 611 of the Act for the preceding fiscal year; and (2) That amount multiplied by the percentage by which the increase in the funds appropriated for section 611 of the Act from the preceding fiscal year exceeds 1.5 percent; or (C) The sum of—(1) The amount the State received under section 611 of the Act for the preceding fiscal year; and (2) That amount multiplied by 90 percent of the percentage increase in the amount appropriated for section 611 of the Act from the preceding fiscal year.
(iii) Maximum. Notwithstanding paragraph (c)(2)(ii) of this section, no State's allocation under paragraph (a) of this section may exceed the sum of—(A) The amount the State received under section 611 of the Act for the preceding fiscal year; and (B) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated under section 611 of the Act from the preceding fiscal year. (3) *Ratable reduction*. If the amount available for allocations to States under paragraph (c) of this section is insufficient to pay those allocations in full, those allocations are ratably reduced, subject to paragraph (c)(2)(i) of this section.

(d) *Decrease in funds*. If the amount available for allocations to States under paragraph (a) of this section for a fiscal year is less than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:
(1) *Amounts greater than fiscal year 1999 allocations*. If the amount available for allocations under paragraph (a) of this section is greater than the amount allocated to the States for fiscal year 1999, each State is allocated the sum of—(i) 1999 amount. The amount the State received under section 611 of the Act for fiscal year 1999; and (ii) Remaining funds. An amount that bears the same relation to any remaining funds as the increase the State received under section 611 of the Act for the preceding fiscal year over fiscal year 1999 bears to the total of all such increases for all States. (2) *Amounts equal to or less than fiscal year 1999 allocations*—(i) General. If the amount available for allocations under paragraph (a) of this section is equal to or less than the amount allocated to the States for fiscal year 1999, each State is allocated the amount it received for fiscal year 1999. (ii) Ratable reduction. If the amount available for allocations under paragraph (d) of this section is insufficient to make the allocations described in paragraph (d)(2)(i) of this section, those allocations are ratably reduced.

§300.704 State-level activities.

(a) *State administration*. (1) For the purpose of administering Part B of the Act, including paragraph (c) of this section, section 619 of the Act, and the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children

with disabilities—(i) Each State may reserve for each fiscal year not more than the maximum amount the State was eligible to reserve for State administration under section 611 of the Act for fiscal year 2004 or $800,000 (adjusted in accordance with paragraph (a)(2) of this section), whichever is greater; and (ii) Each outlying area may reserve for each fiscal year not more than five percent of the amount the outlying area receives under §300.701(a) for the fiscal year or $35,000, whichever is greater. (2) For each fiscal year, beginning with fiscal year 2005, the Secretary cumulatively adjusts—(i) The maximum amount the State was eligible to reserve for State administration under section 611 of the Act for fiscal year 2004; and (ii) $800,000, by the rate of inflation as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor. (3) Prior to expenditure of funds under paragraph (a) of this section, the State must certify to the Secretary that the arrangements to establish responsibility for services pursuant to section 612(a)(12)(A) of the Act are current. (4) Funds reserved under paragraph (a)(1) of this section may be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that Part.

(b) Other State-level activities. (1) States may reserve a portion of their allocations for other State-level activities. The maximum amount that a State may reserve for other State-level activities is as follows: (i) If the amount that the State sets aside for State administration under paragraph (a) of this section is greater than $850,000 and the State opts to finance a high cost fund under paragraph (c) of this section: (A) For fiscal years 2005 and 2006, 10 percent of the State's allocation under §300.703. (B) For fiscal year 2007 and subsequent fiscal years, an amount equal to 10 percent of the State's allocation for fiscal year 2006 under §300.703 adjusted cumulatively for inflation. (ii) If the amount that the State sets aside for State administration under paragraph (a) of this section is greater than $850,000 and the State opts not to finance a high cost fund under paragraph (c) of this section—(A) For fiscal years 2005 and 2006, nine percent of the State's allocation under §300.703. (B) For fiscal year 2007 and subsequent fiscal years, an amount equal to nine percent of the State's allocation for fiscal year 2006 adjusted cumulatively for inflation. (iii) If the amount that the State sets aside for State administration under paragraph (a) of this section is less than or equal to $850,000 and the State opts to finance a high cost fund under paragraph (c) of this section: (A) For fiscal years 2005 and 2006, 10.5 percent of the State's allocation under §300.703. (B) For fiscal year 2007 and subsequent fiscal years, an amount equal to 10.5 percent of the State's allocation for fiscal year 2006 under §300.703 adjusted cumulatively for inflation. (iv) If the amount that the State sets aside for State administration under paragraph (a) of this section is equal to or less than $850,000 and the State opts not to finance a high cost fund under paragraph (c) of this section: (A) For fiscal years 2005 and 2006, nine and one-half percent of the State's allocation under §300.703. (B) For fiscal year 2007 and subsequent fiscal years, an amount equal to nine and one-half percent of the State's allocation for fiscal year 2006 under §300.703 adjusted cumulatively for inflation. (2) The adjustment for inflation is the rate of inflation as measured by the percentage of increase, if any, from the preceding fiscal year in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor. (3) Some portion of the funds reserved under paragraph (b)(1) of this section must be used to carry out the following activities: (i) For monitoring, enforcement, and complaint investigation; and (ii) To establish and implement the mediation process required by section 615(e) of the Act, including providing for the costs of mediators and support personnel; (4) Funds reserved under paragraph (b)(1) of this section also may be used to carry out the following activities: (i) For support and direct services, including technical assistance, personnel preparation, and professional development and training; (ii) To support paperwork reduction

activities, including expanding the use of technology in the IEP process; (iii) To assist LEAs in providing positive behavioral interventions and supports and mental health services for children with disabilities; (iv) To improve the use of technology in the classroom by children with disabilities to enhance learning; (v) To support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities; (vi) Development and implementation of transition programs, including coordination of services with agencies involved in supporting the transition of students with disabilities to postsecondary activities; (vii) To assist LEAs in meeting personnel shortages; (viii) To support capacity building activities and improve the delivery of services by LEAs to improve results for children with disabilities; (ix) Alternative programming for children with disabilities who have been expelled from school, and services for children with disabilities in correctional facilities, children enrolled in State-operated or State-supported schools, and children with disabilities in charter schools; (x) To support the development and provision of appropriate accommodations for children with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities, in accordance with sections 1111(b) and 1201 of the ESEA; and (xi) To provide technical assistance to schools and LEAs, and direct services, including direct student services described in section 1003A(c)(3) of the ESEA, to children with disabilities, in schools or LEAs implementing comprehensive support and improvement activities or targeted support and improvement activities under section 1111(d) of the ESEA on the basis of consistent underperformance of the disaggregated subgroup of children with disabilities, including providing professional development to special and regular education teachers who teach children with disabilities, based on scientifically based research to improve educational instruction, in order to improve academic achievement based on the challenging academic standards described in section 1111(b)(1) of the ESEA.

(c) Local educational agency high cost fund. (1) In general—(i) For the purpose of assisting LEAs (including a charter school that is an LEA or a consortium of LEAs) in addressing the needs of high need children with disabilities, each State has the option to reserve for each fiscal year 10 percent of the amount of funds the State reserves for other State-level activities under paragraph (b)(1) of this section—(A) To finance and make disbursements from the high cost fund to LEAs in accordance with paragraph (c) of this section during the first and succeeding fiscal years of the high cost fund; and (B) To support innovative and effective ways of cost sharing by the State, by an LEA, or among a consortium of LEAs, as determined by the State in coordination with representatives from LEAs, subject to paragraph (c)(2)(ii) of this section. (ii) For purposes of paragraph (c) of this section, local educational agency includes a charter school that is an LEA, or a consortium of LEAs. (2)(i) A State must not use any of the funds the State reserves pursuant to paragraph (c)(1)(i) of this section, which are solely for disbursement to LEAs, for costs associated with establishing, supporting, and otherwise administering the fund. The State may use funds the State reserves under paragraph (a) of this section for those administrative costs. (ii) A State must not use more than 5 percent of the funds the State reserves pursuant to paragraph (c)(1)(i) of this section for each fiscal year to support innovative and effective ways of cost sharing among consortia of LEAs. (3)(i) The SEA must develop, not later than 90 days after the State reserves funds under paragraph (c)(1)(i) of this section, annually review, and amend as necessary, a State plan for the high cost fund. Such State plan must—(A) Establish, in consultation and coordination with representatives from LEAs, a definition of a high need child with a disability that, at a minimum—(1) Addresses the financial impact a high need child with a disability has on the budget of the child's LEA; and (2) Ensures that the cost of the high need child with a disability is

greater than 3 times the average per pupil expenditure (as defined in section 8101 of the ESEA) in that State; (B) Establish eligibility criteria for the participation of an LEA that, at a minimum, take into account the number and percentage of high need children with disabilities served by an LEA; (C) Establish criteria to ensure that placements supported by the fund are consistent with the requirements of §§300.114 through 300.118; (D) Develop a funding mechanism that provides distributions each fiscal year to LEAs that meet the criteria developed by the State under paragraph (c)(3)(i)(B) of this section; (E) Establish an annual schedule by which the SEA must make its distributions from the high cost fund each fiscal year; and (F) If the State elects to reserve funds for supporting innovative and effective ways of cost sharing under paragraph (c)(1)(i)(B) of this section, describe how these funds will be used. (ii) The State must make its final State plan available to the public not less than 30 days before the beginning of the school year, including dissemination of such information on the State Web site. (4)(i) Each SEA must make all annual disbursements from the high cost fund established under paragraph (c)(1)(i) of this section in accordance with the State plan published pursuant to paragraph (c)(3) of this section. (ii) The costs associated with educating a high need child with a disability, as defined under paragraph (c)(3)(i)(A) of this section, are only those costs associated with providing direct special education and related services to the child that are identified in that child's IEP, including the cost of room and board for a residential placement determined necessary, consistent with §300.114, to implement a child's IEP. (iii) The funds in the high cost fund remain under the control of the State until disbursed to an LEA to support a specific child who qualifies under the State plan for the high cost funds or distributed to LEAs, consistent with paragraph (c)(9) of this section. (5) The disbursements under paragraph (c)(4) of this section must not be used to support legal fees, court costs, or other costs associated with a cause of action brought on behalf of a child with a disability to ensure FAPE for such child. (6) Nothing in paragraph (c) of this section—(i) Limits or conditions the right of a child with a disability who is assisted under Part B of the Act to receive FAPE pursuant to section 612(a)(1) of the Act in the least restrictive environment pursuant to section 612(a)(5) of the Act; or (ii) Authorizes an SEA or LEA to establish a limit on what may be spent on the education of a child with a disability. (7) Notwithstanding the provisions of paragraphs (c)(1) through (6) of this section, a State may use funds reserved pursuant to paragraph (c)(1)(i) of this section for implementing a placement neutral cost sharing and reimbursement program of high need, low incidence, catastrophic, or extraordinary aid to LEAs that provides services to high need children based on eligibility criteria for such programs that were created not later than January 1, 2004, and are currently in operation, if such program serves children that meet the requirement of the definition of a high need child with a disability as described in paragraph (c)(3)(i)(A) of this section. (8) Disbursements provided under paragraph (c) of this section must not be used to pay costs that otherwise would be reimbursed as medical assistance for a child with a disability under the State Medicaid program under Title XIX of the Social Security Act. (9) 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.

(d) Inapplicability of certain prohibitions. A State may use funds the State reserves under paragraphs (a) and (b) of this section without regard to—(1) The prohibition on commingling of funds in §300.162(b). (2) The prohibition on supplanting other funds in §300.162(c).

(e) Special rule for increasing funds. A State may use funds the State reserves under paragraph (a)(1) of this section as a result of inflationary increases under paragraph (a)(2) of this section to carry

out activities authorized under paragraph (b)(4)(i), (iii), (vii), or (viii) of this section.

(f) Flexibility in using funds for Part C. Any State eligible to receive a grant under section 619 of the Act may use funds made available under paragraph (a)(1) of this section, §300.705(c), or §300.814(e) to develop and implement a State policy jointly with the lead agency under Part C of the Act and the SEA to provide early intervention services (which must include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act and who previously received services under Part C of the Act until the children enter, or are eligible under State law to enter, kindergarten, or elementary school as appropriate.

§300.705 Subgrants to LEAs.

(a) *Subgrants required*. Each State that receives a grant under section 611 of the Act for any fiscal year must distribute any funds the State does not reserve under §300.704 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act for use in accordance with Part B of the Act. Effective with funds that become available on the July 1, 2009, each State must distribute funds to eligible LEAs, including public charter schools that operate as LEAs, even if the LEA is not serving any children with disabilities.

(b) Allocations to LEAs. For each fiscal year for which funds are allocated to States under §300.703, each State shall allocate funds as follows: (1) Base payments. The State first must award each LEA described in paragraph (a) of this section the amount the LEA would have received under section 611 of the Act for fiscal year 1999, if the State had distributed 75 percent of its grant for that year under section 611(d) of the Act, as that section was then in effect. (2) Base payment adjustments. For any fiscal year after 1999—(i) If a new LEA is created, the State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under §300.703(b), currently provided special education by each of the LEAs; (ii) If one or more LEAs are combined into a single new LEA, the State must combine the base allocations of the merged LEAs; (iii) If, for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages 3 through 21 change, the base allocations of affected LEAs must be redistributed among affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under §300.703(b), currently provided special education by each affected LEA; and (iv) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities. The State must divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009. (3) Allocation of remaining funds. After making allocations under paragraph (b)(1) of this section, as adjusted by paragraph (b)(2) of this section, the State must—(i) Allocate 85 percent of any remaining funds to those LEAs on the basis of the

relative numbers of children enrolled in public and private elementary schools and secondary schools within the LEA's jurisdiction; and (ii) Allocate 15 percent of those remaining funds to those LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(c) *Reallocation of LEA funds.* (1) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under this part that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to §300.704. (2) After an SEA distributes funds under this part to an eligible LEA that is not serving any children with disabilities, as provided in paragraph (a) of this section, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to §300.704.

§300.718 Acquisition of equipment and construction or alteration of facilities.

(a) *General.* If the Secretary determines that a program authorized under Part B of the Act will be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.

(b) *Compliance with certain regulations.* Any construction of new facilities or alteration of existing facilities under paragraph (a) of this section must comply with the requirements of—(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the “Americans with Disabilities Accessibility Standards for Buildings and Facilities”); or (2) Appendix A of subpart 101-19.6 of title 41, Code of Federal Regulations (commonly known as the “Uniform Federal Accessibility Standards”).

§300.800 In general.

The Secretary provides grants under section 619 of the Act to assist States to provide special education and related services in accordance with Part B of the Act—

(a) To children with disabilities aged three through five years; and

(b) At a State's discretion, to two-year-old children with disabilities who will turn three during the school year.

§300.806 Eligibility for financial assistance.

No State or LEA, or other public institution or agency, may receive a grant or enter into a contract or cooperative agreement under subpart 2 or 3 of Part D of the Act that relates exclusively to programs,

projects, and activities pertaining to children aged three through five years, unless the State is eligible to receive a grant under section 619(b) of the Act.

§300.807 Allocations to States.

The Secretary allocates the amount made available to carry out section 619 of the Act for a fiscal year among the States in accordance with §§300.808 through 300.810.

§300.808 Increase in funds.

If the amount available for allocation to States under §300.807 for a fiscal year is equal to or greater than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) Except as provided in §300.809, the Secretary—(1) Allocates to each State the amount the State received under section 619 of the Act for fiscal year 1997; (2) Allocates 85 percent of any remaining funds to States on the basis of the States' relative populations of children aged three through five; and (3) Allocates 15 percent of those remaining funds to States on the basis of the States' relative populations of all children aged three through five who are living in poverty.
(b) For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

§300.809 Limitations.

(a) Notwithstanding §300.808, allocations under that section are subject to the following: (1) No State's allocation may be less than its allocation under section 619 of the Act for the preceding fiscal year. (2) No State's allocation may be less than the greatest of—(i) The sum of—(A) The amount the State received under section 619 of the Act for fiscal year 1997; and (B) One-third of one percent of the amount by which the amount appropriated under section 619(j) of the Act for the fiscal year exceeds the amount appropriated for section 619 of the Act for fiscal year 1997; (ii) The sum of—(A) The amount the State received under section 619 of the Act for the preceding fiscal year; and (B) That amount multiplied by the percentage by which the increase in the funds appropriated under section 619 of the Act from the preceding fiscal year exceeds 1.5 percent; or (iii) The sum of—(A) The amount the State received under section 619 of the Act for the preceding fiscal year; and (B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated under section 619 of the Act from the preceding fiscal year.
(b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under §300.808 may exceed the sum of—(1) The amount the State received under section 619 of the Act for the preceding fiscal year; and (2) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated under section 619 of the Act from the preceding fiscal year.
(c) If the amount available for allocation to States under §300.808 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full, those allocations are ratably reduced, subject to paragraph (a)(1) of this section.

§300.810 Decrease in funds.

If the amount available for allocations to States under §300.807 for a fiscal year is less than the amount allocated to the States under section 619 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) If the amount available for allocations is greater than the amount allocated to the States for fiscal year 1997, each State is allocated the sum of—(1) The amount the State received under section 619 of the Act for fiscal year 1997; and (2) An amount that bears the same relation to any remaining funds as the increase the State received under section 619 of the Act for the preceding fiscal year over fiscal year 1997 bears to the total of all such increases for all States.
(b) If the amount available for allocations is equal to or less than the amount allocated to the States for fiscal year 1997, each State is allocated the amount the State received for fiscal year 1997, ratably reduced, if necessary.

§300.812 Reservation for State activities.

(a) Each State may reserve not more than the amount described in paragraph (b) of this section for administration and other State-level activities in accordance with §§300.813 and 300.814.
(b) For each fiscal year, the Secretary determines and reports to the SEA an amount that is 25 percent of the amount the State received under section 619 of the Act for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—(1) The percentage increase, if any, from the preceding fiscal year in the State's allocation under section 619 of the Act; or (2) The rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

§300.813 State administration.

(a) For the purpose of administering section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities), a State may use not more than 20 percent of the maximum amount the State may reserve under §300.812 for any fiscal year.
(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act.

§300.814 Other State-level activities.

Each State must use any funds the State reserves under §300.812 and does not use for administration under §300.813—(a) For support services (including establishing and implementing the mediation process required by section 615(e) of the Act), which may benefit children with disabilities younger than three or older than five as long as those services also benefit children with disabilities aged three through five;

(a) For direct services for children eligible for services under section 619 of the Act;
(b) For activities at the State and local levels to meet the performance goals established by the State under section 612(a)(15) of the Act;
(c) To supplement other funds used to develop and implement a statewide coordinated services system designed to improve results for children and families, including children with disabilities

(d) and their families, but not more than one percent of the amount received by the State under section 619 of the Act for a fiscal year;
(e) To provide early intervention services (which must include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills) in accordance with Part C of the Act to children with disabilities who are eligible for services under section 619 of the Act and who previously received services under Part C of the Act until such children enter, or are eligible under State law to enter, kindergarten; or
(f) At the State's discretion, to continue service coordination or case management for families who receive services under Part C of the Act, consistent with §300.814(e).

§300.815 Subgrants to LEAs.

Each State that receives a grant under section 619 of the Act for any fiscal year must distribute all of the grant funds the State does not reserve under §300.812 to LEAs (including public charter schools that operate as LEAs) in the State that have established their eligibility under section 613 of the Act. Effective with funds that become available on July 1, 2009, each State must distribute funds to eligible LEAs that are responsible for providing education to children aged three through five years, including public charter schools that operate as LEAs, even if the LEA is not serving any preschool children with disabilities.

§300.816 Allocations to LEAs.

(a) *Base payments.* The State must first award each LEA described in §300.815 the amount that agency would have received under section 619 of the Act for fiscal year 1997 if the State had distributed 75 percent of its grant for that year under section 619(c)(3), as such section was then in effect.
(b) *Base payment adjustments.* For fiscal year 1998 and beyond—(1) If a new LEA is created, the State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages three through five currently provided special education by each of the LEAs; (2) If one or more LEAs are combined into a single new LEA, the State must combine the base allocations of the merged LEAs; (3) If for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages three through five changes, the base allocations of affected LEAs must be redistributed among affected LEAs based on the relative numbers of children with disabilities ages three through five currently provided special education by each affected LEA; and (4) If an LEA received a base payment of zero in its first year of operation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities aged three through five years. The State must divide the base allocation determined under paragraph (a) of this section for the LEAs that would have been responsible for serving children with disabilities aged three through five years now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities aged three through five years currently provided special education by each of the LEAs. This requirement takes effect with funds that become available on July 1, 2009.
(c) *Allocation of remaining funds.* After making allocations under paragraph (a) of this section, the State must—(1) Allocate 85 percent of any remaining funds to those LEAs on the basis of the relative numbers of children enrolled in public and private elementary schools and secondary

schools within the LEA's jurisdiction; and (2) Allocate 15 percent of those remaining funds to those LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(d) *Use of best data.* For the purpose of making grants under this section, States must apply on a uniform basis across all LEAs the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.

§300.817 Reallocation of LEA funds.

(a) If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities aged three through five years residing in the area served by the LEA with State and local funds, the SEA may reallocate any portion of the funds under section 619 of the Act that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to §300.812.

(b) After an SEA distributes section 619 funds to an eligible LEA that is not serving any children with disabilities aged three through five years, as provided in §300.815, the SEA must determine, within a reasonable period of time prior to the end of the carryover period in 34 CFR 76.709, whether the LEA has obligated the funds. The SEA may reallocate any of those funds not obligated by the LEA to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities aged three through five years residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent the State has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to §300.812.

§300.818 Part C of the Act inapplicable.

Part C of the Act does not apply to any child with a disability receiving FAPE, in accordance with Part B of the Act, with funds received under section 619 of the Act.

APPENDIX E

OSEP MEMO 09-02
TIMELY CORRECTION OF NONCOMPLIANCE

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

October 17, 2008

Contact Person	
Name:	Ruth Ryder
Telephone:	(202) 245-7513

OSEP 09-02

TO: Chief State School Officers
Lead Agency Directors

FROM: William W. Knudsen
Acting Director
Office of Special Education Programs

SUBJECT: Reporting on Correction of Noncompliance in the Annual Performance Report Required under Sections 616 and 642 of the Individuals with Disabilities Education Act.

Introduction

Pursuant to sections 616(d) and 642 of the Individuals with Disabilities Education Act (IDEA), the Department reviews each State's Annual Performance Report (APR) and, based on data provided in the State's APR, information obtained through monitoring visits, including verification visits, and any other public information, determines if the State: Meets Requirements, Needs Assistance, Needs Intervention, or Needs Substantial Intervention. In making determinations in 2007 and 2008, the Office of Special Education Programs (OSEP) considered, among other factors, whether a State demonstrated substantial compliance on all compliance indicators either through reporting a very high level of performance (generally 95% or better) or correction of noncompliance.[3]

The purpose of this memorandum is twofold. First, the memorandum reiterates the steps a State must take in order to report that the previously identified noncompliance has been corrected. Second, the memorandum describes how we will factor evidence of correction into our analysis of whether the State has demonstrated substantial compliance for purposes of determinations under sections 616 and 642 of the IDEA (beginning with the Department's 2010 determinations based on a review of the

[3] For Indicators B-15 and C-9, which measure timely correction of noncompliance, the only way for States to demonstrate substantial compliance is by demonstrating timely correction.

FFY 2008 APRs). This memorandum also addresses concerns identified in our review of States' FFY 2005 and FFY 2006 APRs about identification and correction of noncompliance and low performance in compliance areas.

Issue 1 – Demonstrating Correction

As noted in OSEP's prior monitoring reports and verification visit letters, in order to demonstrate that previously identified noncompliance has been corrected, a State must:

(1) Account for all instances of noncompliance, including noncompliance identified: (a) through the State's on-site monitoring system or other monitoring procedures such as self-assessment; (b) through the review of data collected by the State, including compliance data collected through a State data system; and (c) by the Department;

(2) Identify where (in what local educational agencies (LEAs) or early intervention services (EIS) programs) noncompliance occurred, the percentage level of noncompliance in each of those sites, and the root cause(s) of the noncompliance;[4]

(3) If needed, change, or require each LEA or EIS program to change, policies, procedures and/or practices that contributed to or resulted in noncompliance; and

(4) Determine, in each LEA or EIS program with identified noncompliance, that the LEA or EIS program is correctly implementing the specific regulatory requirement(s). This must be based on the State's review of updated data such as data from subsequent on-site monitoring or data collected through a State data system.

If an LEA or EIS program did not correct identified noncompliance in a timely manner (within one year from identification), the State must report on whether the noncompliance was subsequently corrected. Further, if an LEA or EIS program is not yet correctly implementing the statutory/regulatory requirement(s), the State must explain what the State has done to identify the cause(s) of continuing noncompliance, and what the State is doing about the continued lack of compliance including, as appropriate, enforcement actions taken against any LEA or EIS program that continues to show noncompliance.

Regardless of the specific level of noncompliance, if a State finds noncompliance in an LEA or EIS program, the State must notify the LEA or EIS program in writing of the noncompliance, and of the requirement that the noncompliance be corrected as soon as possible, but in no case more than one year from identification (i.e., the date on which the State provided written notification to the LEA or EIS program of the noncompliance). In determining the steps that the LEA or EIS program must take to correct the noncompliance and to document such correction, the State may consider a variety of factors, including whether the noncompliance: (1) was extensive or found in only a small percentage of files; (2) resulted in the denial of a basic right under the IDEA (e.g., an extended delay in an initial evaluation with a corresponding delay in the child's receipt of a free appropriate public education or early intervention services, or a failure to provide services in accordance with the individualized education program or individualized family service plan); and (3) represents an isolated incident in the LEA or EIS program, or reflects a long-standing failure to meet the IDEA requirements. Thus,

[4] Please note that while we are not requesting that States provide, in the APR, lists of specific LEAs or EIS programs found out of compliance, we may review documentation of correction that the State required of the LEA or EIS program when we conduct a verification visit or other monitoring activity in a State.

while a State may determine the specific nature of the required corrective action, the State must ensure that any noncompliance is corrected as soon as possible, but in no case more than one year from identification.

For any noncompliance concerning a child-specific requirement that is not subject to a specific timeline requirement (State Performance Plan (SPP)/APR Indicators B-9, B-10, B-13, C-8A and C-8B), in addition to the steps above, the State also must ensure that the LEA or EIS program has corrected each individual case of noncompliance, unless the child is no longer within the jurisdiction of the LEA or EIS program. Similarly, for any noncompliance concerning a child-specific timeline requirement (SPP/APR Indicators B-11, B-12, C-1, C-7, and C-8C), in addition to the steps enumerated above, the State must ensure that the LEA or EIS program has completed the required action (e.g., the evaluation or initiation of services), though late, unless the child is no longer within the jurisdiction of the LEA or EIS program. In ensuring that each individual case of noncompliance has been corrected, the State does not need to review each child's record in the LEAs or EIS programs where the noncompliance occurred, but rather may review a reasonable sample of the previously noncompliant files to verify that the noncompliance was corrected.

Issue 2 – Factoring Correction into Evaluation of Substantial Compliance

For purposes of the Department's IDEA section 616 determinations issued since June 2007, we considered a State to be in substantial compliance relative to a compliance indicator if the State's data indicate a very high level of compliance (generally 95% or above), or if the State nonetheless demonstrated correction of identified noncompliance related to that indicator. In the interest of fairness to all States, we will evaluate whether a State demonstrated correction of identified noncompliance related to an indicator when we make our 2009 determinations based on the FFY 2007 APRs, and will use the same approach we used in 2007 and 2008. However, some States are reporting very low levels of compliance year after year, while also reporting that they have corrected previously identified noncompliance. This concerns us because it indicates that systemic correction of noncompliance did not occur. Thus, in the interest of improving LEA and EIS program performance and ultimately improving results for infants, toddlers, children and youth with disabilities, beginning with our 2010 determinations:

(1) We will no longer consider a State to be in substantial compliance relative to a compliance indicator based on evidence of correction of the previous year's noncompliance if the State's current year data for that indicator reflect a very low level of compliance (generally 75% or below); and

(2) We will credit a State with correction relative to a child-specific compliance indicator only if the State confirms that it has addressed each instance of noncompliance identified in the data for an indicator that was reported in the previous year's APR, as well as any noncompliance identified by the Department more than one year previously. The State must specifically report for each compliance indicator whether it has corrected all of the noncompliance identified in its data for that indicator in the prior year's APR as well as that identified by the Department more than one year previously.

For example --

- Reporting correction of noncompliance identified in on-site monitoring findings alone will not be sufficient to demonstrate correction if the data reported in a State's prior year's APR showing noncompliance were collected through the

State's data system, and the monitoring findings do not include all of the instances of noncompliance identified through the prior year's data.

- In order to report correction of noncompliance identified in data based on a statewide sample, the State would need to track the noncompliance identified in the sample data reported in its prior year's APR back to the specific LEAs or EIS programs with noncompliance and report correction for those LEAs or EIS programs.

In other words, a State's demonstration of correction needs to be as broad in scope as the noncompliance identified in the prior year's data.

We hope that you find the information in this memorandum helpful in collecting and reporting data for your future SPP/APR submissions. OSEP is committed to supporting your efforts to improve results for infants, toddlers, children and youth with disabilities and looks forward to working with your State over the next year. If you have any questions, would like to discuss this further, or would like to request technical assistance, please do not hesitate to call your OSEP State Contact.

cc: Part B State Directors

Part C Coordinators