UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
THE ASSISTANT SECRETARY

JUL 19 2007

[redacted]

This is in response to your July 2, 2007 email to Dr. Al Jones in the Office of Special Education Programs (OSEP) regarding questions about the Michigan Department of Education's (MDE's) proposed State Special Education Rules. We have included your questions (and our responses) in the order in which you raised them.

Q-1. Regarding Short term Objectives.
Isn't it true that one difference between IDEA 97 and IDEA 2004 is that States are no longer "required" to have "short-term objectives for students taking the standardized assessments"...and isn't it also true that again this is the "minimum" required and that States "can still exceed this minimum" and "can still include short-term objectives for students taking standardized assessments?" Isn't it true that States will not be found out of compliance or risk loss of Federal funds "if they require short-term objectives for all students with disabilities?"

Response.
The IDEA Amendments of 2004 specifically removed a provision from prior law (IDEA-97) that required each child's IEP to include "a statement of measurable annual goals including benchmarks or short term objectives." (Emphasis added.) However, the 2004 Amendments also added a new provision that, "for children with disabilities who take alternate assessments aligned to alternate achievement standards," the IEP [individualized education program] must include "a description of benchmarks or short-term objectives." 20 U.S.C. 1414(d)(1)(A)(i)(I)(cc) and 34 CFR 300.320(a)(2)(ii).

In response to specific comments on the June 21, 2005 NPRM that opposed the removal of benchmarks and short-term objectives, the Department's Analysis of Comments and Changes in the Preamble to the Part B final regulations includes the following discussion:

> Benchmarks and short-term objectives were specifically removed from section 614(d)(1)(A)(i)(II) of the Act. However, because benchmarks and short-term objectives were originally intended to assist parents in monitoring their child's progress toward meeting the child's annual goals, we believe a State could, if it chose to do so, determine the extent to which short-term objectives and benchmarks would be used. However, consistent with §300.199(a)(2) and sections 608(a)(2) and 614(d)(1)(A)(ii)(I) of the Act, a State that chooses to require benchmarks or short-term objectives in IEPs in that State would have to identify in writing to the LEAs located in the State and to the Secretary that such rule, regulation, or policy is a State-imposed requirement, which is not required by Part B of the Act or the Federal regulations. 71 Fed. Reg. at 46663 (August 14, 2006)

In accordance with the preceding discussion, if a State meets the conditions in that discussion regarding benchmarks or short-term objectives and is otherwise in compliance with Part B of the Act and regulations, the State should not risk loss of Federal funds.

Q-2. Regarding "Severe Discrepancy."
Isn't it true that one difference between IDEA 97 and IDEA 2004 is that States are no longer "required" to use "severe discrepancy as a tool to identify a student with a Specific Learning Disability"...and isn't it also true that again this is the "minimum" required and that States "can still exceed this minimum" and "can still use severe discrepancy as a tool to identify a student with a Specific Learning Disability?"

Response:
Section 614(b)(6) of the Act provides that, when determining whether a child has a specific learning disability, (SLD) a local educational agency (LEA) "(A)...shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathmatical calculation, or mathematical reasoning" and "(B)...may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in (paragraphs (b)(2) and (3) of section 614)." (Emphasis added).

The statutory provision is reflected in §300.307(a) of the final Part B regulations, as follows:

> §300.307 Specific learning disabilities.
>
> (a) General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8(c)(10). In addition, the criteria adopted by the State--
>
> (1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in §300.8(c)(10);
>
> (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and
>
> (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in §300.8(c)(10). (Emphasis added.)

In response to specific comments on the June 21, 2005 Notice of Proposed Rulemaking (NPRM) regarding the use of discrepancy models, the Department's Analysis of Comments and Changes in the Preamble to the Part B final regulations includes the following discussion:

> With respect to permitting LEAs to use discrepancy models...States are responsible for developing criteria to determine whether a child is a child with a disability, as defined in §300.8 and section 602(3) of the Act, including whether a particular child meets the criteria for having an SLD. Under section 614(b)(6) of the Act, States are free to prohibit

the use of a discrepancy model. States, including States that did not use a discrepancy model prior to the Act, are not required to develop criteria that permit the use of a discrepancy model. 71 Fed. Reg. at 46646 (August 14, 2006)

In accordance with the preceding requirements in the Act and regulations and the discussion from the Analysis of Comments and Changes, a State is prohibited from requiring LEAs to use a discrepancy model. However, a State could permit (but is not required to permit) LEAs to use other alternative research-based procedures as a part of the process for determining the existence of a specific learning disability, which might include determining whether there is a discrepancy between a child's aptitude and achievement.

Q-3. Regarding ESY Services for the Severely Cognitively and Severely Multiply Impaired "Programs."

In your 7-2-07 email, you stated that, in your telephone conversation with Dr. Jones, you asked if OSEP staff, or other units in the Education Department had informed MDE that the State would lose funds if it doesn't remove the 50 additional days for R 340.1738 & R 340.1748 regarding the Severely Cognitively and Severely Multiply Impaired Programs. And you added the following: "These Programs R 340.1738 & R 340.1748 "don't say that students outside of these Programs can't have ESY [extended school year]...these Programs only determine that students who "need" to be in these Programs need more school days. The ESY determination is made when the student is placed into Programs R 340.1738 & R 340.1748. Students who are identified as "Severely Multiply Impaired R 340.1714" or "Cognitively Impaired R 340.1705" aren't given ESY or the additional 50 days included in R 340.1738 & R 340.1748 "unless the IEPT determines they need ESY." So the 50 days are not tied to the eligibility or identification of the student. The 50 days are attached to Programs that are determined to need more school days, which "in effect exceeds the minimum guidelines of IDEA 2004."

Response:

With respect to your question on the funding status of Michigan's grant under Part B of the IDEA, this letter reiterates Dr. Jones' previous statement to you that neither OSEP nor other units in the Education Department have informed MDE that the State would lose its funding based on the additional 50 days included in R 340.1738 & R 340.1748.

The following is the provision on ESY services from §300.106 of the final regulations:

§300.106 Extended school year services.

(a) General. (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE [free appropriate public education], consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not--

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that--

(1) Are provided to a child with a disability--

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA [State educational agency].

In response to specific comments on the June 21, 2005 NPRM regarding ESY services, the Department's Analysis of Comments and Changes in the Preamble to the Part B final regulations includes the following discussion:

> The requirement to provide ESY services to children with disabilities who require such services in order to receive FAPE reflects a longstanding interpretation of the Act by the courts and the Department. The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE under section 612(a)(1) of the Act. Some children with disabilities may not receive FAPE unless they receive necessary services during times when other children, both disabled and nondisabled, normally would not be served. We believe it is important to retain the provisions in §300.106 because it is necessary that public agencies understand their obligation to ensure that children with disabilities who require ESY services in order to receive FAPE have the necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process. 71 Fed. Reg. at 46582 (August 14, 2006)

In accordance with the preceding requirements and discussion regarding ESY services, and subject to the following, the requirements in R 340.1738 & R 340.1748 of MDE's proposed regulations would not be in conflict with Part B of the IDEA if: (1) the need for placement of each child with a disability in the R 340.1738 or R 340.1748 program has been individually determined by the child's IEP Team, and (2) the IEP of each individual child specifies the kind and amount of services the child is to receive, including ESY services beyond the normal school year of the public agency. In addition, MDE 's regulations would need to provide that ESY services will be made available to any other child with a disability in the State who needs those services, as determined by the child's IEP team and in accordance with the child's IEP.

Q-4. Regarding Exceeding Minimum Requirements.

There is much concern on our State Board of Education that neither Michigan nor any State can "exceed" the minimum guidelines set forth in IDEA 2004. Can your office clearly state that any State can "exceed the minimum"...but all States "must meet the minimum."

Response: Generally, a State can exceed Federal requirements as long as what the State requires (1) is not inconsistent with other requirements in the IDEA, and (2) consistent with §300.199(a)(2) and sections 608(a)(2) and 614(d)(1)(A)(ii)(I) of the Act, the State identifies in writing to the LEAs located in the State and to the Secretary that such rule, regulation, or policy is a State-imposed requirement that is not required by Part B of the Act or regulations. All States

receiving funds under Part B of the IDEA must meet the requirements of Part B of the IDEA and its regulations.

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

We hope our responses to your questions are helpful to you. If you have other comments or questions, please feel free to contact Laura Duos in the Office of Policy and Planning at (202) 245-6772 or at Laura.Duos@ed.gov.

Sincerely,

John H. Hager

cc: Jaquelyn Thompson, Director, Michigan Office of Special Education and Early Intervention Services