

**Report on IDEA, Part B Spending and Related Fiscal  
Rules and their Potential Implications for the State of  
Vermont's Act 173 Implementation**

**By Federal Education Group, PLLC**

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## Introduction

The Vermont-NEA (VT-NEA), Vermont Superintendents Association (VSA), Vermont School Boards Association (VSBA), Vermont Principals' Association (VPA), and Vermont Council of Special Education Administrators (VCSEA) hired Federal Education Group, PLLC to:

- Review materials about the State of Vermont's implementation of IDEA, Part B's spending and related fiscal rules,<sup>1</sup> and
- Develop a written report with initial impressions about:
  - The extent to which the materials are consistent with federal requirements,
  - The extent to which the materials reflect available federal flexibilities, and
  - Areas where IDEA, Part B spending rules might affect implementation of Vermont's Act 173.

In general we observed:

- The State's definition of, and approach to, special education is narrower than IDEA's in ways that potentially conflict with federal law.
- Federal law permits school districts and other local educational agencies to spend IDEA, Part B funds on a broader range of activities than is reflected in the State's materials.
- Act 173's new census-based funding system permits districts to spend state funds on students who are not yet identified for special education. Such spending could not be used to meet IDEA, Part B's maintenance of effort (MOE) or maintenance of state financial support (MFS) requirements, so the State proposes to limit Act 173's spending options. There are, however, ways to calculate MOE and MFS without limiting state spending options.
- Federal law offers opportunities to reduce administrative burdens associated with State monitoring and oversight.

Based on these observations we recommend:

- Amending the State's definition of "special education," as reflected in the State of Vermont Special Education Rules (adopted June 1, 2013), to be consistent with IDEA.

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<sup>1</sup> Specifically, the organizations provided a presentation on IDEA, Part B Fiscal Issues prepared by Vermont's Agency of Education (AOE) ([https://education.vermont.gov/sites/aoe/files/documents/IDEA\\_Fiscal\\_PartII\\_2.4.19.pdf](https://education.vermont.gov/sites/aoe/files/documents/IDEA_Fiscal_PartII_2.4.19.pdf)), Proposed State Rules for Special Education Finance and Census-Based Funding (<https://education.vermont.gov/sites/aoe/files/documents/edu-state%20board-item%20M-Special%20Education%20Finance%20and%20Census-based%20Funding%20Rule%201300%20Draft-4-17-19.pdf>), and a set of frequently asked questions prepared by AOE about fiscal monitoring under a census-based funding model.

- Aligning State policies on the allowable uses of IDEA, Part B funds to federal definitions to help districts take advantage of Part B’s full range of spending options.
- Permitting districts to spend state funds on the full range of activities contemplated by Act 173, but also developing mechanisms to distinguish between MOE- and MFS-eligible versus ineligible spending. For example, districts might be able to code MOE-eligible spending differently from MOE-ineligible spending in their accounting systems, and the State might be able to apportion state appropriations based on student counts or other reasonable measures.<sup>2</sup>
- Exploring strategies for reducing administrative burdens associated with monitoring and oversight.

Each of these recommendations is discussed in more detail below.

## **1. Amending the State’s Definition of “Special Education” Would Help to Ensure Students with Disabilities Receive Appropriate Services in the Least Restrictive Environment**

Students with disabilities are entitled to special education and related services so they can receive a free appropriate public education.<sup>3</sup>

Federal law defines special education services as “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.”<sup>4</sup>

Specially designed instruction “means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction — (i) to address the unique needs of the child that result from the child’s disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.”<sup>5</sup>

In other words, special education refers to the process of adjusting what and/or how a student with a disability is taught so the student can access the general curriculum.

For example, a student with dyslexia might need additional supports to access the school’s reading curriculum. Depending on the student’s needs, those supports could include (among many others): training the student’s classroom teacher on how to modify instruction for the student, providing the student with adapted materials in class, providing the student with appropriate accommodations, or more intensive interventions delivered outside of the general classroom. Any of those supports would

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<sup>2</sup> For example, if students with disabilities make up 20 percent of the students counted under the census-based grant formula, the State might count 20 percent of the census-based grant towards MFS.

<sup>3</sup> 34 CFR § 300.101.

<sup>4</sup> 34 CFR § 300.39.

<sup>5</sup> 34 CFR § 300.39(b)(3).

be a special education service under federal law, even those delivered in class by the classroom teacher.<sup>6</sup> As the U.S. Department of Education's (ED) Office of Special Education Programs (OSEP) has made clear:

The fact that some [special education] services may also be considered "best teaching practices" or "part of the district's regular education program" does not preclude those services from meeting the definition of "special education" . . . and being included in the child's IEP. The [local educational agency] must provide a child with a disability specially designed instruction that addresses the unique needs of the child that result from the child's disability, and ensures access by the child to the general curriculum, even if that type of instruction is being provided to other children, with or without disabilities, in the child's classroom, grade, or building.<sup>7</sup>

The State, however, takes a narrower view of special education. State Rules define special education as "specially designed instruction *that cannot be provided within the school's standard instructional conditions or provided through the school's educational support system*, at no cost to the parent, to meet the unique needs of an eligible child with a disability."<sup>8</sup> (Emphasis added.) The italicized language does not come from federal law and is more restrictive than the IDEA definition of special education. It also appears to contradict OSEP's guidance quoted above.

Depending on how the State's definition of special education is applied, it could raise federal compliance issues such as:

- **Eligibility decisions.**
  - Federal law defines a child with a disability as a child "evaluated . . . as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services."<sup>9</sup>
  - The State's narrow definition of special education might limit who is identified as a child with a disability. For example, a student with an IDEA-eligible condition that requires

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<sup>6</sup> See, for example, U.S. Department of Education, *Non-Regulatory Guidance on Using ARRA Funds Provided Through Part B of the Individuals with Disabilities Education Act (IDEA) to Drive School Reform and Improvement*, (2009), pp. 2-4, available at <https://www2.ed.gov/policy/gen/leg/recovery/guidance/idea-b-reform.pdf>. Please note ED developed this guidance to help districts spend the additional IDEA, Part B funds appropriated through the American Recovery and Reinvestment Act, but it applies to regular IDEA, Part B funds as well. The guidance will be referred to as *2009 IDEA Reform Guidance* from now on.

<sup>7</sup> U.S. Department of Education, *Letter to Chambers*, (2012), available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/11-026517r-ma-chambers-definitions-5-4-12.doc>.

<sup>8</sup> *State of Vermont Special Education Rules*, Rule 2360.2.12, (2013), available at <https://education.vermont.gov/sites/aoe/files/documents/edu-series-2360-special-education-rules.pdf>.

<sup>9</sup> 34 CFR § 300.8.

classroom-based behavior supports should not be denied classification as a student with a disability just because those behavior supports can be delivered as part of a school's standard support system.<sup>10</sup>

- **Placement decisions.**
  - Federal law requires that students with disabilities be placed in the least restrictive environment, meaning they should only be removed from the regular educational environment if the nature or severity of the student's disability "is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>11</sup>
  - The State's definition of special education seems to require, or at least incentivize, that services for students with disabilities be separate from, and delivered outside of, regular classroom settings, which may prompt more restrictive placements than is necessary.<sup>12</sup>
  
- **Individualized Education Program (IEP) requirements.**
  - Federal law requires that IEPs address (among other things) how students with disabilities will be involved in the general education curriculum and a description of the special education services the student will receive so they can be involved in the general education curriculum.<sup>13</sup> IEPs must be developed with input from a student's regular education teacher about the supports the student will receive.<sup>14</sup>
  - The State's definition of special education might lead to narrow IEPs that do not capture the full range of special education services a student might need.

In addition, as discussed in more detail below, the State's definition of special education affects how school districts spend IDEA, Part B funds in ways that limit services to students.

We recommend that before the State develops rules specific to Act 173, the State and its stakeholders revisit Vermont's definition of special education, explore its effect on how services are delivered to students with disabilities, and what it might mean for IDEA compliance. There are a variety of technical assistance providers that may be able to support the State in this endeavor.

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<sup>10</sup> See, for example, *Letter to Chambers*. Please note this may be an issue under Section 504 as well. Please see U.S. Department of Education, *Dear Colleague Letter and Resource Guide on Students with ADHD*, (2016), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>.

<sup>11</sup> 34 CFR § 300.114(a)(2).

<sup>12</sup> The State's rules contemplate "co-teaching," but that presumes the need for extra staff to support a student with a disability in the classroom. Certainly, co-teaching may be appropriate in many circumstances, but the State's rules seem to rule out the possibility of special education services delivered by a general classroom teacher.

<sup>13</sup> 34 CFE § 300.320.

<sup>14</sup> 34 CFR § 300.324.

## 2. Aligning State Policies on the Allowable Uses of IDEA, Part B Funds to Federal Definitions Would Help Districts Take Advantage of Part B's Full Range of Spending Options

Because the State takes a narrow view of what constitutes a special education service, it also takes a narrow view of how school districts may spend IDEA, Part B funds. In particular, the State proposes to set rules for what constitutes an “allowable special education expenditure” that can be supported with IDEA, Part B funds, certain state funds, and local special education funds.<sup>15</sup> Consistent with what appears to be existing State policy, these rules would require districts to show each activity supported with IDEA, Part B funds (as well as the covered state and local funds) is “excess,” which the State defines as an activity that would not exist but for a student’s special education needs, is exclusive to special education, and is tied to a student’s individualized education plan.<sup>16</sup>

This approach is not consistent with federal law and limits local IDEA, Part B spending and program delivery options.

Specifically, federal law does not require districts to show individual activities are “excess” in order to be supported with IDEA, Part B funds. While IDEA, Part B has an “excess cost” requirement, compliance with that requirement is determined by looking at a district’s *total* spending, not spending on any individual cost.

This is important because, as discussed in Section 1 above, special education services are intended to help students access the general curriculum so they might be (and often should be) integrated into general education settings. For example, a student with a reading disability might receive adapted instructional materials in the regular classroom or a student with emotional disturbance might receive positive behavior supports in the regular classroom. Isolating the precise “excess” cost of any particular service might be difficult in those instances, so Congress and ED established an excess cost test that looks at spending as a whole, not the cost of particular services (see more below). This helps to ensure IDEA, Part B funds do not pay for the entire cost of educating a student, while still permitting districts to integrate special education supports into the regular education environment as appropriate. As a result, federal law permits, and ED encourages, districts to spend IDEA, Part B funds on a wider range of activities than would be allowed under the State’s proposed rules.

In addition, use of the term “special education expenditure” in the proposed rule could cause confusion because the term “special education” does not include related services, which IDEA, Part B can support.

Therefore, aligning the State’s allowable cost policies to federal rules, particularly excess cost rules, will give districts more spending options.

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<sup>15</sup> *Proposed State Rules for Special Education Finance and Census-Based Funding*, Rule 1305.

<sup>16</sup> *Proposed State Rules for Special Education Finance and Census-Based Funding*, Rule 1305.1, which seems consistent with existing State policy as described on slide 14 here [https://education.vermont.gov/sites/aoe/files/documents/IDEA\\_Fiscal\\_PartII%202.4.19.pdf](https://education.vermont.gov/sites/aoe/files/documents/IDEA_Fiscal_PartII%202.4.19.pdf).

## A. IDEA, Part B Funds in General

IDEA, Part B includes two grant programs that help school districts provide a free appropriate public education<sup>17</sup> to students with disabilities:

1. The *Grants to States for Education of Children with Disabilities* program (authorized under Section 611 of IDEA) to support students with disabilities ages 3 to 21, and
2. The *Preschool Grants for Children with Disabilities* program (authorized under Section 619 of IDEA) to support students with disabilities ages 3 to 5.

School districts can use these grants to pay for the excess cost of providing special education and related services to eligible students with disabilities.

## B. Federal Excess Cost Requirements

The “excess cost” of providing special education and related services to eligible students is the cost above and beyond what a district spends, on average, to educate students generally.<sup>18</sup> In other words, school districts spend a certain amount of money to provide services to all students. Students with disabilities need extra supports that generate additional costs for districts. IDEA is meant to help defray these additional costs, not the entire cost of educating a student with a disability.<sup>19</sup>

Determining a district’s excess cost is not done by looking at individual expenses to determine if they are “general costs” or “excess costs.”<sup>20</sup> Instead, it is determined by looking at a district’s *aggregate* spending.<sup>21</sup> Districts must determine how much, on average, they spent per student<sup>22</sup> in the last school year, after deducting:

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<sup>17</sup> A free appropriate public education (FAPE) means special education and related services that: (1) are provided without charge and under public supervision, (2) meet standards set by the State, (3) include an appropriate preschool, elementary school, or secondary school education, and (4) conform to students’ individualized education plans. 34 CFR § 300.17.

<sup>18</sup> 2 CFR § 300.16.

<sup>19</sup> The excess cost requirement does not prevent a district from using IDEA, Part B funds to pay for the entire cost of educating a child with a disability aged 3-5 or 18-21 if the district does not use state and/or local funds to provide services to non-disabled students in those age ranges.<sup>19</sup> In other words, if the district does not normally serve students in those age ranges, but serves a student with disabilities solely because of the district’s responsibilities under IDEA, Part B, the district may use IDEA, Part B funds to pay for the entire cost of educating a student in that age range.

<sup>20</sup> This is true for other IDEA, Part B fiscal tests too. For example, Part B is governed by a supplement not supplant provision, but compliance is not evaluated by looking at any particular cost. Instead, a district that satisfies its maintenance of effort obligations satisfies supplement not supplant as well. U.S. Department of Education, *Non-Regulatory Guidance on Funds for Part B of the Individuals with Disabilities Education Act Made Available Under The American Recovery and Reinvestment Act of 2009*, (2009), Q&A C-6 and footnote 1, <http://www2.ed.gov/policy/gen/leg/recovery/guidance/idea-b.pdf> and U. S. Department of Education, *Letter to James Kennedy*, (2008), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2008-4/kennedy103108funds4q2008.pdf>.

<sup>21</sup> 2 CFR § 300.16, 2 CFR § 300.202(b)(2).



- Capital outlay and debt services,
- Costs paid with IDEA, Part B, Title I, Part A, and Title III, Part A funds,
- Costs paid with state and local funds for programs under Title I, Part A, Title III, Part A, and
- Costs paid with state and local funds for children with disabilities.<sup>23</sup>

The resulting amount represents the minimum a district must spend in the next school year with non-IDEA funds (that is, state, local and/or other federal funds).

For example, if a district with 100 elementary school students spent, on average, \$7,362 per elementary student in 2017-2018, it must spend at least \$736,200 in non-IDEA funds in 2018-2019.<sup>24</sup> There is no need to link a district's allowable use of IDEA funds to any particular "excess cost."

(Please note districts do not have to prove they spent the minimum amount *before* spending IDEA, Part B funds. Instead, districts must show they spent the minimum amount by the end of the year.<sup>25</sup> For instance, in the example above, the district can begin spending IDEA, Part B funds at the start of the 2018-2019 school year as long as the State approves the district's application for funds. By the end of that year, the district must show it also spent at least \$736,200 in non-IDEA funds.)

### **C. The State of Vermont's Approach to Excess Cost and its Effect on IDEA Spending**

The State's *Proposed State Rules for Special Education Finance and Census-Based Funding* say:

To qualify as an excess cost, the following three criteria must be met:

- (a) In the absence of special education needs, this cost would not exist;
- (b) This cost is not generated by students without disabilities; and
- (c) The special education, related service and/or supplementary aids and services to which this cost is attributable is documented in the student's IEP.

Similar language is included in state technical assistance documents.<sup>26</sup>

These three criteria do not come from federal law or guidance. To the best of our knowledge, they were developed (incorrectly) by one state and then widely referenced by others. Many states, however, have moved away from using those three criteria. We recommend the State of Vermont consider doing so as well for three reasons.

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<sup>22</sup> Districts must separately calculate the per-student amount for elementary school students and the per-student amount for secondary school students.

<sup>23</sup> 34 CFR § 300.16.

<sup>24</sup> 2 CFR Part 300, Appendix A.

<sup>25</sup> U.S. Department of Education, PowerPoint Presentation on Excess Cost, (2012), available at <https://osep.grads360.org/#communities/pdc/documents/4882>, at slide 6.

<sup>26</sup> Such as here [https://education.vermont.gov/sites/aoe/files/documents/IDEA\\_Fiscal\\_PartII%202.4.19.pdf](https://education.vermont.gov/sites/aoe/files/documents/IDEA_Fiscal_PartII%202.4.19.pdf) and here <https://education.vermont.gov/sites/aoe/files/documents/Special%20Education%20Allowable%20Costs%20DRAFT.pdf>.

First, the three criteria do not satisfy IDEA, Part B requirements for excess cost compliance.

For example, OSEP determined a state failed to comply with excess cost rules even though it applied the same three criteria as Vermont uses to IDEA, Part B spending.<sup>27</sup> In response, the state developed new procedures and a technical assistance manual that make clear the excess cost rule “looks at an LEA’s program broadly rather than at individual costs.”<sup>28</sup>

Second, the three criteria restrict IDEA, Part B spending options more than federal law requires.

As ED guidance makes clear, “IDEA, Part B funds can be used for a wide variety of strategies to improve student outcomes.”<sup>29</sup> In some cases, a district might choose to use Part B funds “to exclusively support the unique special education and related student services needs of students with disabilities.”<sup>30</sup> In other cases, a district might choose to coordinate Part B with other funding sources “to improve outcomes for all students, including students with disabilities.”<sup>31</sup>

For example, a district could use a combination of IDEA, Part B and Title II, Part A to train all of its teachers on effective strategies for supporting struggling readers. IDEA, Part B could pay the share of costs related to special education teachers and Title II, Part A could pay the rest. Additional examples of allowable activities IDEA, Part B can support are described in the next section and in the Appendix.

Third, the three criteria could limit services to struggling students both with and without disabilities.

For example, the criteria incentivize districts to spend Part B funds on discrete services required by a student’s individualized education plan instead of more comprehensive approaches to improving outcomes for students with disabilities. The criteria also incentivize districts to limit supports for struggling students not identified for special education by implying a district could not spend IDEA, Part B funds on an intervention for a student with disabilities if a nondisabled student received the same intervention. This is not required by federal law and runs counter to ED guidance.<sup>32</sup>

Importantly, we note the *State’s Proposed State Rules for Special Education Finance and Census-Based Funding* apply the same three criteria to state and local special education funds and may have the same effects on state and local spending. This would appear to run counter to the goals of Act 173, which was designed to broaden supports for students with disabilities and other struggling students.

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<sup>27</sup> A copy of OSEP’s monitoring report is available at <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/fy12-osep-fm-letter.pdf>.

<sup>28</sup> <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/excess-cost-calculation-guide.pdf> and <https://dpi.wi.gov/sped/educators/fiscal/excess-cost>.

<sup>29</sup> *2009 IDEA Reform Guidance*, p. 4.

<sup>30</sup> *2009 IDEA Reform Guidance*, p. 2.

<sup>31</sup> *2009 IDEA Reform Guidance*, p. 2.

<sup>32</sup> OSEP recognizes students with and without disabilities often benefit from the same intervention and encourages alignment to the extent possible. *2009 IDEA Reform Guidance*. OSEP even permits non-disabled students to participate in an IDEA, Part B funded intervention when it does not increase the cost for the Part B program. U.S. Department of Education, *Letter to Couillard*, (2013), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2013-1/couillard03072013useoffunds1q2013.doc>.

#### D. Examples of IDEA, Part B Spending Options from ED Guidance

ED guidance permits, and even encourages, districts to spend IDEA, Part B funds on a much wider range of costs than State policy allows. ED's guidance specifically says "IDEA Part B funds can be used for a wide variety of strategies to improve student outcomes," and gives examples of whole school initiatives "that address the needs of students with and without disabilities."<sup>33</sup> ED recognizes that many of these strategies would be part of larger initiatives that benefit all students; therefore, ED suggests a variety of ways districts could apportion costs among several funding sources consistent with federal cost principles and other spending rules.<sup>34</sup>

But, as ED's guidance makes clear, as long as students with disabilities benefit from an IDEA, Part B cost and IDEA, Part B pays its fair share, the fact that IDEA, Part B spending is coordinated with other funding sources, helps to improve general education settings so they better serve students with disabilities, or has a school-wide benefit, is *not* a barrier to using IDEA, Part B funds.

ED's guidance provides the following examples of comprehensive strategies to support students with disabilities that can be paid for with IDEA, Part B:

- Increasing teacher effectiveness and addressing inequities in the distribution of effective teachers, such as dual certification, induction and mentoring, using technology for instruction, and assistive technology,
- Adopting college and career-ready standards and high-quality assessments, such as universal design for learning, response to intervention, literacy, math, and behavior interventions, social and emotional supports, and transition services, and
- Establishing data systems and using data for improvement, such as student progress monitoring, web-based IEPs, and data systems.<sup>35</sup>

A detailed list of activities IDEA, Part B funds can pay for to implement these strategies is available in the Appendix.

#### E. Federal Definitions of "Special Education" and "Related Services"

The State's *Proposed State Rules for Special Education Finance and Census-Based Funding* set a single standard of "allowable special education expenditures" for IDEA, Part B funds, certain state funds, and local special education funds.<sup>36</sup> The state's definition of "special education" does not include support services students with disabilities might need to benefit from special education, which are considered

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<sup>33</sup> 2009 IDEA Reform Guidance, p. 2.

<sup>34</sup> For example, U.S. Department of Education, *Letter to Hokenson*, (2013), available at <https://www2.ed.gov/policy/speced/guid/idea/letters/2013-1/hokenson01302013leamoe1q2013.pdf>; U.S. Department of Education, *Letter to DeTemple*, (2009), available at <https://www2.ed.gov/policy/speced/guid/idea/letters/2009-1/detemple011509stateactivities112009.pdf>; 2009 IDEA Reform Guidance.

<sup>35</sup> 2009 IDEA Reform Guidance, pp. 6-37.

<sup>36</sup> Rule 1305.

“related services” under federal law.<sup>37</sup> IDEA, Part B can support related services, and while it seems clear the proposed rules intend to permit such spending (the term is mentioned in the rules, although not defined), it might avoid confusion if the proposed rules used a term like “allowable special education and related service expenditures” or “allowable expenditures for the education of students with disabilities.”

### **3. Policies and Procedures Should Ensure Maintenance of Effort and Maintenance of State Financial Support Calculations Properly Reflect Spending for the Education of Students with Disabilities While Preserving Act 173’s Flexibilities to the Extent Possible**

The State of Vermont and its districts must comply with federal rules that require them to spend a consistent amount of state and local money on the education of children with disabilities from year-to-year. These rules – known as maintenance of effort (MOE) at the local level and maintenance of state financial support (MFS) at the state level – are one way the federal government ensures IDEA, Part B provides additional funding for special education.

Because Act 173’s census block grant permits spending on struggling students who have not been identified with a disability, the State and districts will need ways to determine how much of the census block grant to include in MOE and MFS calculations. The State proposes to do this by (mostly) limiting the census block grant to special education services,<sup>38</sup> but it is possible to design more flexible policies and procedures that comply with IDEA, Part B requirements while preserving Act 173’s spending flexibilities as discussed below.

As the State considers its options, it may be helpful to consult with other states that have adopted census-based funding formulas including Alabama, California, Idaho, Illinois, Massachusetts, Montana, New Jersey, and South Dakota.<sup>39</sup> It may also be helpful to look at states, like Connecticut, with funding models that integrate special education into larger funding formulas in ways that affect MOE and MFS.<sup>40</sup> We have not reviewed any of these states’ MOE or MFS procedures, but they may have insights to share. In addition, it may be helpful to consult with the Center for IDEA Fiscal Reporting (CIFR), a U.S. Department of Education-funded technical assistance center that helps states with MOE and MFS issues.<sup>41</sup>

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<sup>37</sup> 34 CFR § 300.34

<sup>38</sup> Rule 1305.3.1 would allow spending on “structures or programs for students with disabilities requiring additional supports” only “if an LEA is able to meet its ongoing services requirements under IDEA, Part B.”

<sup>39</sup> See Education Commission of the States, K-12 Special Education Funding: Census-Based System chart, available at <https://c0arw235.caspio.com/dp/b7f9300033fb309547a448eb8de1>.

<sup>40</sup> It is our understanding Connecticut includes special education as part of its main funding formula, so the State attributes a certain percentage of its main funding formula to MFS based on estimates of special education spending.

<sup>41</sup> See <https://cifr.wested.org>.

## A. Local Maintenance of Effort Overview

Districts must meet two MOE requirements for IDEA every year:

1. **Eligibility Standard.** At the beginning of the grant year, a district must budget to spend at least as much local, or state and local, money on the education of children with disabilities as it spent in the most recent year for which final expenditure information is available.<sup>42</sup> This is a front-end test, run before the district receives IDEA, Part B funds, to establish eligibility for IDEA, Part B. Failure to comply with the eligibility standard means a district is not eligible for an IDEA, Part B grant that year.
2. **Compliance Standard.** At the end of the year, a district must demonstrate it actually spent at least as much local, or state and local, money on the education of children with disabilities as it spent in the year before.<sup>43</sup> This is a back-end test, run after the district receives IDEA, Part B funds. Failure to comply with the compliance standard will result in repayment.

MOE calculations can be complicated (and are beyond the scope of this report), but both the eligibility and compliance standards measure how much a district spends “for the education of children with disabilities.” Neither the IDEA law nor its regulations clearly defines this term, but it generally includes:

- The costs of providing special education to students with disabilities,
- The costs of providing related services to students with disabilities, and
- Other costs attributable to students with disabilities (such as mental health and behavioral supports pursuant to IEPs, school-based Special Olympics programs, and the like).

It is our understanding Act 173 permits districts flexibility to spend census block grant funds on costs that are not directly attributable to students with disabilities. Such spending could not be part of the MOE calculation, so districts would need some way to differentiate MOE-eligible spending from other kinds of spending.

## B. The State of Vermont’s Proposed Approach to MOE

The State’s *Proposed State Rules for Special Education Finance and Census-Based Funding* appear to address the issue of differentiating special education spending by:

- Establishing a uniform definition of “allowable special education expenditure” for IDEA, Part B, state funds, and local funds, and by
- (Mostly) limiting census block grant spending to costs that meet the uniform definition.<sup>44</sup>

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<sup>42</sup> 34 CFR § 300.203(a).

<sup>43</sup> 34 CFR § 300.203(b).

<sup>44</sup> Rule 1305 and 1305.3.1. We note the proposed rules would allow districts to use census based funds for struggling students without disabilities if they are able to meet their “ongoing service requirements under IDEA,

This is a restrictive approach to MOE for two reasons.

First, the State’s definition of “allowable special education expenditures” does not include the full range of costs that can count towards MOE (please see Section 2 above).

Second, it limits Vermont census block grant spending. Whether that is consistent with Act 173 is an issue of state law beyond the scope of this report, but that limitation is not necessary for federal compliance purposes. Districts could, for example, differentiate MOE-eligible spending from other spending through coding in their financial management systems.<sup>45</sup> That might be challenging if an initiative benefits students with and without disabilities, but it should be feasible with strong enough policies and financial controls.

### **C. Maintenance of State Financial Support**

MFS prohibits a state from reducing “the amount of state financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.”<sup>46</sup>

MFS looks at all of the money the state makes available for special education and related services, even if the money is not actually spent.<sup>47</sup>

This includes money made available to the state educational agency (SEA), including state funding for “special education staff, the cost of monitoring and carrying out other State administrative duties related to special education, and the cost of any direct services provided by the SEA, as well as any State funds provided to public agencies (including LEAs) in the State for the purpose of providing special education and related services.”<sup>48</sup>

It also includes the financial support of other state agencies that provide or pay for special education and related services. For example, it would include money made available for job coaching services through a State Vocational Rehabilitation Agency and mental health services through a State Department of Health, if those services are included in a student’s individualized education plan.<sup>49</sup>

Because Act 173’s census block grant includes and permits spending on non-disabled students, the State will need a way to determine which part of that grant represents support for special education and

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Part B and Vermont law.” If this rule stands, it might be helpful to clarify how the State will determine whether a district meets that standard or not.

<sup>45</sup> For example, some states have dedicated expenditures codes for special education that include separate codes for non-MOE eligible expenditures that benefit non-disabled students (like coordinated early intervening services). Consider this example from Missouri <https://dese.mo.gov/sites/default/files/se-fi-nda-sped-expencodecheatsht.pdf>.

<sup>46</sup> 34 CFR § 300.163.

<sup>47</sup> U.S. Department of Education, *OSEP Memo 10-5*, (2009) available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2009-4/directors120209finsupport4q2009.pdf>, p. 2.

<sup>48</sup> *OSEP Memo 10-5*, (2009) available, p. 2.

<sup>49</sup> *OSEP Memo 10-5*, (2009) available at, p. 2.

related services for children with disabilities. There are a variety of ways of doing so that do not limit local spending options.<sup>50</sup>

For example, the State could consider end-of-year expenditure data which, as described above, can be tracked in ways that differentiate special education versus other kinds of spending. If, for instance, districts spend on average 80 percent of their census-based funding on special education and related expenses, the State could attribute 80 percent of the census-based block grant to MFS.

Or, the State could estimate the special education portion of the census block grant funding through another reasonable measure. If, for instance, students with disabilities make up 20 percent of the students counted under the census block grant, the State could attribute 20 percent of the grant to MFS.

#### **4. States Can Use a Variety of Strategies to Monitor Local Compliance with Federal Requirements**

States have two sets of monitoring responsibilities when it comes to IDEA:

- IDEA, Part B requires states to monitor and annually report on local performance through a State performance plan (SPP) and annual performance reports (APRs),<sup>51</sup> and
- Federal regulations that apply to all federal grants, known as the Uniform Grant Guidance, require states to monitor local compliance with federal rules (including program-specific requirements like compliance with IDEA spending rules, and administrative requirements like time and effort, etc.).<sup>52</sup>

States must follow specific rules when conducting the monitoring and performance reporting required by IDEA, but states have more discretion over the Uniform Grant Guidance monitoring, and there are a variety of ways states can minimize burden including:

- Coordinating monitoring of related compliance requirements to reduce duplication,
- Taking advantage of other state oversight processes to support monitoring (such as the application review and approval process, reporting, and the like), and
- Ensuring monitoring policies, procedures and protocols reflect available federal flexibilities.

The discussion below focuses on ways a state might design its Uniform Grant Guidance monitoring to reduce burdens.

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<sup>50</sup> See, for example, CIFR presentation, *Maintenance of State Financial Support (MFS): Challenges, Tools, and Technical Assistance* (2017) available at [https://ideadata.org/sites/default/files/media/documents/2017-09/allslides\\_m1\\_maintenanceofstatefinancial.pdf](https://ideadata.org/sites/default/files/media/documents/2017-09/allslides_m1_maintenanceofstatefinancial.pdf), which generally describes how states approach MFS calculations.

<sup>51</sup> 34 CFR § 300.600.

<sup>52</sup> 2 CFR § 200.331. The Uniform Grant Guidance regulations, including the monitoring regulations, apply when a state subgrants (or “passes through”) funds to another recipient, as states do under IDEA, Part B.

## A. Monitoring Overview<sup>53</sup>

States are required to monitor districts to ensure they:

- Use federal funds for authorized purposes,
- Comply with federal laws, regulations, and the terms and conditions of the award, and
- Achieve performance goals.<sup>54</sup>

Monitoring is a broad term that covers a variety of oversight activities. At a minimum, states must:

- Review financial and performance reports the state requires its districts to submit,
- Ensure districts take timely and appropriate action on any compliance issues detected through audits, on-site reviews, and other means, and
- Issue management decisions for single audit findings.<sup>55</sup>

States must tailor monitoring activities to each district's risk of non-compliance.<sup>56</sup>

Federal law gives states discretion to pick which monitoring activities make the most sense for an individual district given that district's compliance risks. Some ways to monitor include:

- Providing districts with training and technical assistance on program-related matters,
- Performing on-site reviews of a district's program operations, or
- Arranging for "agreed-upon-procedures" engagements (essentially a mini-audit of certain subgrant activities).<sup>57</sup>

In other words, monitoring is not any one single activity, but a combination of oversight activities that should be tailored as needed.

## B. Examples of Ways States can Minimize Monitoring Burdens

We did not review the State's monitoring procedures as part of this project. But, we understand monitoring burdens are a concern for both the State and districts,<sup>58</sup> so below are some strategies other states have used to minimize the administrative burdens associated with monitoring.

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<sup>53</sup> Please note this overview is excerpted from *A Guide to State Educational Agency Oversight Responsibilities under ESSA: The Role of the State in the Local Implementation of ESSA Programs*, a publication we developed for the Council of Chief State School Officers, available at <https://ccsso.org/resource-library/role-state-local-implementation-essa-programs>.

<sup>54</sup> 2 CFR § 200.331(d).

<sup>55</sup> 2 CFR § 200.331(d)(1)-(3).

<sup>56</sup> 2 CFR § 200.331(e).

<sup>57</sup> 2 CFR § 200.331(e).

<sup>58</sup> AOE specifically addressed monitoring in the frequently asked questions about Act 173 provided to us.



First, some states coordinate monitoring of related compliance requirements to the extent possible. For example, federal time and effort rules apply to all ED programs, so compliance with those rules could be reviewed once for all relevant programs.

Second, some states incorporate monitoring into other state oversight processes to minimize the number of issues that have to be looked at through back-end desk reviews or onsite visits. For example, if a state collects information from districts through the IDEA, Part B application, or through other reporting mechanisms, then it may not be necessary to re-review the information during monitoring.

Third, some states carefully vet their monitoring protocols, and related procedures, to ensure they reflect flexibilities available under federal law.

For example, time and effort records seem to be a particular concern for Vermont districts. Federal law offers a variety of options for satisfying time and effort requirements.

i. Time and Effort Background

If a district uses ED grant funds to pay an employee's salaries and wages, the district must maintain records that reflect the work the employee performed.<sup>59</sup> The purpose of these records, often called "time and effort records," is to verify employees worked on the program(s) supporting their compensation. For example, if a district charges an employee's entire salary to IDEA, Part B, the district must have records demonstrating the employee spent all of their time working on the IDEA, Part B program.

Time and effort records must meet the following criteria:

- They must be supported by a system of internal control that provides reasonable assurance employee compensation charges are accurate, allowable, and properly allocated,
- They must be incorporated into the district's official records,
- They must reasonably reflect the total activity for which the employee is compensated,
- They must encompass both grant-related activities and any other activities an employee works on,
- They must comply with the district's established accounting policies and practices, and
- They must support the distribution of the employee's salary or wages among the specific activities or cost objectives the employee works on.<sup>60</sup>

It is the last criterion, supporting the distribution of salaries and wages among various activities/cost objectives, that can often pose a challenge. To understand the challenge, it is first important to understand the concept of a cost objective.

In general, a cost objective is an activity that needs to be tracked separately for funding purposes.

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<sup>59</sup> 2 CFR § 200.430(i).

<sup>60</sup> 2 CFR § 200.431(i)(1)(i)-(vii).

For example, a teacher who spends all of her time either delivering academic interventions to students with disabilities or mentoring other teachers that work with students with disabilities works on one cost objective since IDEA, Part B can support both activities.

On the other hand, a teacher who spends part of her time with students with disabilities and part of her time with other students works on two cost objectives since, in general, IDEA, Part B can only support students with disabilities.

If an employee works on one cost objective, time and effort records can be fairly straightforward. Typically, an employee or supervisor signs a certification twice a year verifying the employee spent 100% of their time on the cost objective. Note that certifications are one way to satisfy time and effort requirements, but federal regulations permit other kinds of time and effort records as long as they meet the criteria listed above.

If an employee works on more than one cost objective, time and effort records can get more complicated because they must support the distribution of the employee's salary and wages across multiple funding sources. For example, if a district charges 75% of an employee's salary to IDEA, Part B, the district's records would have to show the Part B program received 75% of the employee's time and effort. This could be done through employee certifications or through other records consistent with the criteria listed earlier in this document.

ii. Minimizing Time and Effort Burdens

Having employees track the time they spend on various cost objectives can be burdensome. To minimize the burden, there are four things to keep in mind.

First, federal law gives districts many options for documenting time and effort. Technically, employee certifications are not required if a district has other records/systems that meet the criteria listed above.<sup>61</sup> That being said, ED has not provided guidance about what such records/systems look like in practice, so states are understandably reluctant to move away from employee certifications.

Second, splitting the cost of an activity across multiple funding sources does not automatically create multiple cost objectives,<sup>62</sup> which means if employee certifications are used to document time and effort, employees might be able to use less burdensome certifications even if their salaries are charged to more than one funding source.

For example, a district hires an instructional coach to provide professional development to teachers who work with students with disabilities. Her salary could be supported entirely with Title II, Part A funds, entirely with IDEA, Part B funds, or with a combination of the two. Because either grant could pay the employee's entire salary, there is no need to distinguish between "Title II" activities vs. "IDEA" activities.

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<sup>61</sup> 2 CFR § 200.430(i)(2).

<sup>62</sup> U.S. Department of Education, *Actions to Ease the Burden of Time-and-Effort Reporting*, (2012), Appendix C, available at <https://www2.ed.gov/policy/fund/guid/gposbul/time-and-effort-reporting.html>. Although this guidance is archived on ED's website, and is based on a prior version of the regulations governing time and effort (which were updated in 2014), ED has advised the guidance is still valid.

This employee works on one cost objective even if the district splits her salary among the two grants. For time and effort purposes, the employee could certify she spent 100% of her time on instructional coaching to support students with disabilities.

(Please note the same would be true if the employee's salary was split between IDEA, Part B and state funds. As long as an employee's work *could* be supported entirely with IDEA, Part B funds, the employee is considered to be working on one cost objective under federal law.)

Third, employees who work on multiple cost objectives according to a fixed schedule might be able to keep less burdensome records with state approval.<sup>63</sup> For example, if an instructional assistant typically works with all students for half of the day and works with students with disabilities for the other half, the district could split her salary based on her fixed schedule.

Fourth, federal law permits states and districts to develop alternate ways of accounting for staff time with ED approval.<sup>64</sup>

Time and effort is only one example of how taking advantage of federal flexibilities can reduce burden for both the State and districts. Other burden reduction opportunities include:

- Ensuring State policies on the allowable uses of federal funds include all available spending options,
- Ensuring State policies permit districts to coordinate funds across multiple funding sources, including, where appropriate blended funding models, and
- Consolidating funds in schoolwide program schools to better support whole school initiatives.

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<sup>63</sup> *Actions to Ease the Burden of Time-and-Effort Reporting.*

<sup>64</sup> 2 CFR § 200.430(i)(5)&(6).

## APPENDIX:

### Chart of Activities Districts Can Support with IDEA, Part B Funds

Based on the U.S. Department of Education’s Non-Regulatory Guidance on Using ARRA Funds Provided Through Part B of the Individuals with Disabilities Education Act (IDEA) to Drive School Reform and Improvement available at <https://www2.ed.gov/policy/gen/leg/recovery/guidance/idea-b-reform.pdf><sup>65</sup>

Strategy to Support SWDs	Cost that Could be Paid for with IDEA, Part B Funds to Implement the Strategy
Access to effective teachers	<ul style="list-style-type: none"> <li>• Hiring effective, dually certified special education teachers,</li> <li>• Paying for teachers to participate in high-quality certification programs that increase teacher effectiveness in improving outcomes for students with disabilities,</li> <li>• Providing site-based, job-embedded professional development for special education teachers that leads to certification in content areas through partnerships with an institution of higher education (IHE) and/or a recognized alternative certification program,</li> <li>• Providing site-based, job-embedded professional development for general education teachers that leads to certification in special education through partnerships with an IHE and/or a recognized alternative certification program,</li> <li>• Induction programs that use evidence-based practices such as creating ongoing support and opportunities for interaction between novice and experienced special education teachers (e.g., classroom observations, advising, group meetings for grade-level teams, and networking within and outside of the school),</li> <li>• Teacher mentoring programs, including the cost of hiring substitute teachers to provide release time for special education teacher mentors, and</li> <li>• Training mentors in adult development and learning, conferencing skills, and relationship and communication skills to work with special education teachers.</li> </ul>
Use of technology	<ul style="list-style-type: none"> <li>• Paying for staff time outside the school day and for substitute teachers for release time during the school day, so special education staff can engage in a technology self-assessment and strategic planning,</li> <li>• Purchasing technology hardware and software consistent with the district’s established technology integration plan to improve achievement for students with disabilities and to increase their access to the curriculum,</li> <li>• Providing professional development and technical assistance to special education staff on the purchase and use of instructional technology, and</li> <li>• Promoting the effective use of technology to improve instruction for students with disabilities by providing professional development and technical assistance and developing teacher mentor programs and communities of practice.</li> </ul>
Assistive technology (AT)	<ul style="list-style-type: none"> <li>• Purchasing AT devices and services for students with disabilities and providing</li> </ul>

<sup>65</sup> Please note ED developed this guidance to help districts spend the additional IDEA, Part B funds appropriated through the American Recovery and Reinvestment Act, but it applies to regular IDEA, Part B funds as well.

	<p>training for teachers and other service providers, administrators, parents, and children,</p> <ul style="list-style-type: none"> <li>• Establishing AT labs or lending libraries with a collection of AT devices and materials for use in AT evaluations and training, and</li> <li>• Providing training on how to conduct a systematic analysis of the child’s specific needs and abilities, the environments in which the child must function, the tasks the child must perform, and the AT devices that may benefit the child.</li> </ul>
<p>Universal Design for Learning</p>	<ul style="list-style-type: none"> <li>• Purchasing assessments that utilize UDL approaches to ensure that assessments of students with unique learning needs are valid measures of their knowledge,</li> <li>• Providing professional development related to UDL approaches and strategies for supporting emergent literacy, reading and math instruction, learners with disabilities in K-12, and the use of new technologies with evidence-based strategies for improved outcomes,</li> <li>• Providing professional development related to the implementation of embedded assessments intended to inform the development of improved teaching and learning strategies,</li> <li>• Purchasing consultant services to plan and implement new learning environments supportive of all learners within inclusive settings,</li> <li>• Providing professional development related to the implementation of appropriate accommodations for children with disabilities on large scale assessments,</li> <li>• Providing professional development related to the acquisition and use of specialized formats to support students with disabilities within the least restrictive environment, and</li> <li>• Acquiring and implementing technologies and specialized formats for students with print disabilities who qualify for National Instructional Materials Accessibility Standard derived textbooks in accordance with the Library of Congress National Library Service guidelines and for other students with disabilities who may not qualify under the four categories supported by the Chafee Amendment to Copyright Law.</li> </ul>
<p>Response to Intervention(RTI)</p>	<ul style="list-style-type: none"> <li>• Providing any special education and related services that is in a child's IEP, regardless of the tier the child is in,</li> <li>• Developing a district strategy for implementing an RTI framework that provides guidance on tiers of instruction and the instructional approaches and programs appropriate for each tier, appropriate use of assessment data, supports needed for implementation, and evaluation of effectiveness of approach,</li> <li>• Purchasing curriculum-based screening and progress monitoring and formative assessment measurement instruments, and curriculum materials for intensive instruction,</li> <li>• Providing professional development for school or district staff to appropriately and effectively use the progress monitoring and formative assessment measurement instruments, and</li> <li>• Providing professional development for school or district staff to appropriately and effectively implement evidence-based instructional and positive behavior practices.</li> </ul>

Literacy Interventions	<ul style="list-style-type: none"> <li>• Purchasing evidence-based reading programs,</li> <li>• Purchasing progress monitoring tools,</li> <li>• Providing professional development for school staff across content areas in the implementation of effective instruction for students with disabilities who are struggling readers, and</li> <li>• Employing and training literacy coaches to provide ongoing training and support to teachers.</li> </ul>
Math Intervention	<ul style="list-style-type: none"> <li>• Purchasing evidence-based math screening instruments and intervention materials,</li> <li>• Purchasing technical assistance and training in implementing math strategies,</li> <li>• Employing staff to provide technical assistance and training in implementing math, and</li> <li>• Supporting dual certification initiatives to ensure teachers can effectively work with students with disabilities who are struggling with math.</li> </ul>
Positive Behavior Intervention and Support	<ul style="list-style-type: none"> <li>• Providing technical assistance and professional development for teachers, service providers, and school staff for training needed to initially implement and maintain a positive behavioral intervention and support system (PBIS),</li> <li>• Providing technical assistance and professional development for teachers, service providers, and school staff for training needed to initially implement and maintain a PBIS program, including the funding for substitutes for staff release time,</li> <li>• Employing and training for behavior coaches who would support the implementation of the PBIS program and train additional staff coaches to sustain the program,</li> <li>• A schoolwide data system that measures school climate in a rigorous way so that progress can be assessed and measured, and</li> <li>• Providing the specific positive behavioral interventions and supports that are included in the IEPs of children with disabilities including the professional development of personnel (both special education and regular education) involved in providing those interventions.</li> </ul>
Social and emotional development	<ul style="list-style-type: none"> <li>• Collaborating with other local early care and education programs to coordinate funds consistent with regulatory requirements, to provide professional development and fund the hiring and training of trainers and coaches to implement a multi-tiered framework for promoting social development and addressing challenging behavior in young children,</li> <li>• Providing technical assistance to build the capacity of their community or district to develop the infrastructure needed to implement a multi-tiered model for promoting social development, including the training of trainers and coaches and the development of model demonstration sites using coordinated funds, and</li> <li>• Hiring coaches to provide classroom and program support.</li> </ul>
Transition services	<ul style="list-style-type: none"> <li>• Hiring transition personnel who possess the knowledge and skills to work with teachers, businesses, employers, community colleges, technical schools, and IHEs to create an effective interagency transition system for students with disabilities that fosters interagency coordination between the school, the community, and</li> </ul>

	<p>the post-school adult service system,</p> <ul style="list-style-type: none"> <li>• Purchasing transition-curriculum and career assessment, exploration, and development tools for students with disabilities,</li> <li>• Providing technical assistance and professional development to enhance the knowledge and skills of special educators regarding transition strategies, including how to effectively use transition-curriculum and career assessment, exploration, and development tools,</li> <li>• Employing staff to provide technical assistance and professional development to enhance the knowledge and skills of special educators regarding transition strategies, including how to effectively use transition-curriculum and career assessment, exploration, and development tools, and</li> <li>• Hiring consultants to integrate data regarding the provision of transition services to students with disabilities into other data collection systems to better support and track student outcomes.</li> </ul>
Data systems	<ul style="list-style-type: none"> <li>• Progress monitoring tools,</li> <li>• Web-based IEPs,</li> <li>• Purchasing hardware and software to enhance current data systems or purchase new data systems,</li> <li>• Hiring consultants to address data challenges, including privacy concerns and cross-departmental technical and legal data transferability issues,</li> <li>• Training personnel on how to use data for improving student outcomes,</li> <li>• Building a local longitudinal data system that is interoperable with any existing statewide longitudinal data system, and</li> <li>• Merging separate special education data systems into existing elementary, secondary, post-secondary, and workforce systems.</li> </ul>