

# **FY 2010-2011 Biennial State Operating Budget: Am. Sub. HB 1**

## **EDUCATIONAL SERVICE CENTER FUNDING**

**Issue:** 9.65% Reduction of ESC Funding in 200-550 Foundation Funding

**Position:** Provide Fiscal Stability to ESCs and the school districts they serve by restoring ESC funding to pre-cut, base funding levels of \$52 million per year (FY 2008 as appropriated).

**Rationale:** ESCs play a significant role in Ohio's System of Public Education. Last year, Ohio's ESCs employed over 13,100 full- and part-time individuals – 90 percent of whom are in the buildings and districts every day providing services to students, teachers and other district personnel.

In the 2007-2008 school year, Ohio's ESCs provided direct services to 270,823 students or 15.5% of Ohio's student population - many of whom are at-risk students. Other ESC programs and services also indirectly impact over 1.6 million students. ESCs play an important role in teacher professional development as well. In the same year, ESCs hosted 10,475 different professional development activities attended by 242,853 total attendees. ***For every \$1 invested by the state, ESCs provide \$26 in programs and services in partnership with traditional public school districts, community schools, parochial schools and other community based organizations – this is a tremendous return on investment.***

ESCs have been flat funded since FY 1999. During this same time period, ESCs lost facility and maintenance support provided by Boards of County Commissioners. In FY 2008, ESCs were cut 9.65% in the first round of state budget reductions in both FY 2008 and FY 2009. House Bill 1 as introduced proposed an additional 10 percent cut. The House-passed version restores the funds cut under the governor's proposal but retains the 9.65% mid-budget cut made in FY 2008.

**Proposal:** OESCA supports funding ESCs at the \$52 million appropriated in each year of the FY 2006-2007 biennium (and the original appropriation for FY 2008-2009). OESCA believes there is both a rational and legitimate way to accomplish this proposal.

Returning ESC funding to the \$52 million base level appropriation could be accomplished by utilizing a combination of the GRF funds diverted for performance reviews and several new program earmarks in the House-passed version of the budget, and/or the use of federal stimulus money from the *State Fiscal Stabilization Fund*.

***These federal funds are to be utilized to restore State aid to elementary, secondary, and higher education. More specifically, states are to assure that in each of Fiscal Years 2009, 2010 and 2011, that they maintain State support for elementary, secondary, and public postsecondary education at least at Fiscal Year 2006 levels. The FY 2006 funding level for ESCs was \$52 million.***

Further, Governors must use 81.8 percent of the allocation to support elementary, secondary, and higher education with first priority to school districts under the State's primary elementary and secondary education funding formula to the greater of Fiscal Year 2008 or Fiscal Year 2009 in each of Fiscal Years 2010, 2011, and 2012. The ESC appropriated level for both 2008 and 2009 was \$52 million per year prior to the budget reductions at the end of FY 2008.

Ohio's local, city and exempted village school districts did not take a direct cut to the per pupil subsidy during budget reductions in FY 2008 or FY 2009. However, ESCs did. ESCs are defined as Local

Education Agencies (LEAs) or school districts under both state and federal laws, and thus, are the only districts to experience a reduction in their per pupil subsidy amount funded through the foundation funding line item.

Because Educational Service Agencies (ESCs) are defined as Local Education Agencies (LEAs) in the Elementary and Secondary Education Act (ESEA), the Higher Education Act (HEA) and the Perkins Act and because Educational Service Agencies are defined in state law as school districts, Educational Service Agencies (ESCs) would be eligible to receive direct funding support under the federal stimulus package.

Utilizing these funds to restore ESC funding to the pre-cut level would be consistent with the intent of the federal stimulus package and the corresponding guidelines from the U.S. Department of Education.



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May 13, 2009

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Dear Mr. Burford:

You have asked us to comment on the obligations of the State of Ohio, through the Ohio Department of Education, to restore funding for Educational Service Centers ("ESCs") lost as a result of budget reductions for the FY 08 and FY 09 biennium. As we understand it, beginning with H.B. 119, the State reduced funding for ESCs by approximately \$5 million for FY 08 for a total loss of approximately \$10 million over the biennium. Currently, the state budget proposal under consideration would further reduce state funding for ESCs.<sup>1</sup>

ESCs, formerly known as county boards of education, are creatures of statute authorized to provide a wide range of supervisory, special education and other services to local school districts pursuant to R.C. § 3317.11 and related statutes. ESCs are funded by the receipt of formula-based state funds for both local school district pupils served as well as city and exempted village pupils served by the ESC pursuant to "city-county" agreements with the respective school districts. One of the primary service areas for ESCs in Ohio is the delivery of special education and related services to pupils with disabilities.

Though not specifically referred to as "ESCs", the concept of support agencies for the delivery of special education services to pupils attending public school districts is well recognized in federal law. The term "Educational Service Agency" ("ESA") appears to encompass in federal law the agencies that we refer to as ESCs in Ohio. ESAs are defined as:

The term "educational service agency"

(A) means a regional public multiservice agency –

(i) authorized by State law to develop, manage, and *provide services or programs to local educational agencies*; and

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<sup>1</sup> See Am. Sub. H.B. 1, § 265.50.10, which would reduce state funding of ESCs over the biennium by 10%.

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(ii) 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*; 20 USCS § 1401

(Emphasis added.)

The term Local Education Agency (“LEA”) is used in federal statutes and regulations to refer to what we in Ohio would describe as a local, exempted village or city school district. However, LEA is broadly defined to include ESAs within that definition, at least for purposes of delivering special education services. Section 1401 also defines LEAs as follows:

(19) Local educational agency.

(A) In general. The term "local educational agency" 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 schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such 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 –

(i) an *educational service agency*; and

(ii) any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(Emphasis added.)

These provisions serve, in general, to equate the term LEA (local educational agency) with the term ESA (Educational Service Agency). As noted by the United States Department of Education in 2007, “Under section 602.19 of the IDEA and 34 CFR § 300.28, the term LEA includes an educational service agency. Educational service agency is defined at 34 CFR § 300.12 as a regional public multi-service agency authorized by State law to develop, manage and provide services or programs to LEAs; and recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools within the State. \*\*\* ...ESAs carry out different responsibilities

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depending on State law.”<sup>2</sup> The foregoing is significant because it demonstrates that ESCs, which are in fact ESAs as defined by federal law and regulations, are integral parts of the special education delivery system in Ohio. Accordingly, funding changes that impact ESCs also affect the educational programs delivered to public school pupils.

Federal law also limits the ability of states to reduce the funding provided pupils with disabilities, except in specifically defined circumstances. This concept, generally referred to as “maintenance of effort” requirement, is codified as part of the regulations governing assistance to states for the education of children with disabilities. “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. 34 CFR 300.203 Subsequent provisions clarify that the maintenance of effort requirement is measured based on the total or per capita expenditures from either local funds only or a combination of state and local funds on the education of pupils with disabilities.

The reduction in ESC funds for the 2008-2009 biennium had the effect of reducing the aggregate funding for pupils with disabilities. Thus, the reductions may have been directly prohibited by § 300.203. However, even if reductions in ESC funding by itself did not trigger a violation of the maintenance of effort requirement, the combined effect of ESC funding reductions and the commensurate shifting of additional costs to those school districts served by ESCs resulted in a lessening of the aggregate amount of local and state funds available to fund the programs for pupils with disabilities served by ESCs.<sup>3</sup> Thus, however measured, the funding cuts served to reduce “...the level of expenditures for the education of children with disabilities...” in those LEAs served by ESCs.

The issue before us today is not, however, the validity of spending reductions two years ago, but the validity of spending reductions contemplated at the present time combined with the impact of funds made available by the American Recovery and Reinvestment Act (“ARRA”). One of the stated purposes of the Act is to avoid both staff and programmatic reductions in public schools. The ARRA created the State Fiscal Stabilization Fund (“SFSF”) and appropriated \$53.6 billion to be administered by the department of education. Of those funds, 81.8 percent were dedicated to the states for the support of elementary, secondary and post-secondary education. The Act further provides, with respect to the funds dedicated to the

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<sup>2</sup> March 23, 2007 letter from John H. Hager, Office of the Department of Education’s General Council to Dr. Brian L. Talbott.

<sup>3</sup> Please note that we have not analyzed the specific amounts of funding flowing to any pupil as a result of the budget reductions for ESCs. Our conclusions in this regard are based on the fact that we are aware that the cost of some special education services was shifted to local and contracted school districts by ESCs as a direct result of the budget reduction, resulting in a lower aggregate amount of funds available for the education of pupils with disabilities.

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support of public education,

(a) Education Fund.

(1) In general.-- For each fiscal year, the Governor shall use 81.8 percent of the State's allocation under section 14001(d) for the support of elementary, secondary, and postsecondary education and, as applicable, early childhood education programs and services.

(2) Restoring state support for education.--

(A) In general.--The Governor shall **first use the funds described in paragraph (1)--**

(i) to provide the amount of funds, **through the State's primary elementary and secondary funding formulae**, that is needed--

**(I) to restore**, in each of fiscal years 2009, 2010, and 2011, **the level of State support provided through such formulae** to the greater of the fiscal year 2008 or fiscal year 2009 level; ..."111 P.L. 5, 14002.

(Emphasis added.)

The SFSF does not distribute funds to the states automatically and application for the funds, in this case, by the governor of each state, is necessary to secure access to the funds. The process for such application is defined in Section 14005 of the Act. Funding applications include certain assurances, the most important of which for our purposes, includes assurance that "The State will, in each of fiscal years 2009, 2010, and 2011, maintain State support for elementary and secondary education at least at the level of such support in fiscal year 2006. 111 P.L. 5, 14005. We recognize that the funding provided by the SFSF is not exclusively directed to programs for pupils with disabilities. However, the augmentation of funding for such programs is clearly within the contemplated uses of SFSF funds. H.R.1 Section 14003(a).

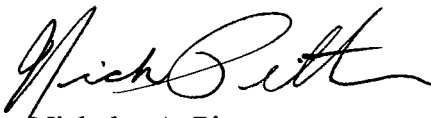
The level of funding for special education was reduced in FY 08 as a result of the ESC funding reduction. It would appear that the appropriate benchmark for measuring the assurances required in connection with the SFSF is not the amount of funding actually received in FY 08, but the amount of funding that *should have been received* in FY 08, at least with respect to the funding of programs for pupils with disabilities. Further, since SFSF funding is now available, there would seem to be no rationale for not using the opportunity to make up the shortfall in ESC funding in connection with the current year. Whether that shortfall is made up with SFSF funds or with state budget appropriations is an issue beyond the scope of this letter. We would note,

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however, to the extent that the State continues its failure to satisfy the maintenance of effort requirement, it is arguably in violation of both federal regulations as well as assurances otherwise provided to the U. S. Department of Education in connection with IDEA funding.

We trust the above will be of assistance. Please do not hesitate to call if you have any additional questions.

Very truly yours,



Nicholas A. Pittner

cc: Kimball H. Carey