UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

NOV 10, 2004

Richard A. Cohen
Executive Director
Disabilities Rights Center, Inc.
18 Low Avenue
Concord, New Hampshire 03301

Dear Mr. Cohen:

This is in response to your letter to Stephanie Smith Lee, Director, Office of Special Education Programs (OSEP) regarding New Hampshire's use of funds under the Individuals with Disabilities Education Act (IDEA) for funding Statewide assessments. You indicate in your letter that New Hampshire is proposing to use $299,999 of IDEA discretionary funds and $441,167 of "sliver grant" funds to pay for the Statewide assessments for grades 3,6, and 10. You are requesting that OSEP review the State's proposed diversion of these funds and determine whether such diversion is permissible under the IDEA.

The two categories of IDEA funds that you indicate the State wants to use for the assessment have different restrictions and purposes. "Sliver grant" funding (pursuant to 20 USC 1411(f)(4) of the IDEA) in the years it is available must be distributed to local educational agencies (LEAs). These funds may be used for a variety of purposes including direct services; addressing needs or carrying out improvement strategies identified in the State's Improvement Plan under Part D of the IDEA; adopting promising practices, materials or technology; establishing or implementing interagency agreements between LEAs and other agencies concerning services to children with disabilities; and cooperative problem solving between parents and school personnel. These funds are not available to be used by the State for a State-level activity. In addition, "sliver grant" funds are subject to State and local level supplement, and not supplant requirements under the IDEA.

IDEA State set-aside funds ("discretionary" funds available under 20 USC 1411(f)(1)-(3)) are available to be used by the State for a variety of purposes, including support and direct services, and activities at the State and local levels to meet performance goals established by the State under section 612(a)(16) of the IDEA and to support implementation of the State Improvement Plan under Part D of the IDEA. These funds are not subject to supplement, and not supplant requirements. These funds could be used to pay for expenses related to the assessment of children with disabilities.

Further, if the State uses IDEA funds to pay for an activity that it previously had paid for with State funds, it would have to be able to demonstrate that at least the same amount of

additional State funds was spent on some other activity for the special education of children with disabilities. Under the IDEA maintenance of effort requirement, the State must not reduce 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. The State must be able to demonstrate that it meets this standard on either a total or per capita basis.

Through the No Child Left Behind Act, New Hampshire receives funds, which are estimated at 4 million for the 2005 fiscal year, for the purpose of developing State assessments. Earlier this year, the Office of Elementary and Secondary Education sent a letter to the Commissioner about the use of these funds. That letter may be found at the following website address: http://www.ed.gov/policy/elsec/guid/stateletters/uofnh.html

We are asking that the New Hampshire Department of Education submit documentation regarding how funds for LEA capacity building and improvement were spent. I hope you find this response helpful. If you would like further assistance, please contact Marie Mayor at (202) 245-7433 or Dr. JoLeta Reynolds at (202) 245-7459 (press 3).

Sincerely,

for

Stephanie Smith Lee
Director
Office of Special Education Programs

cc: Nicholas Donahue, Commissioner of Education
Virginia Irwin, Interim Director, Bureau of Special Education