

1303(c)(1) to determine the actual size of the FY 2002 MEP grant awards.

**FY 2003 MEP Awards.** Section 1303 is far less clear about how the Department is to determine the size of FY 2003 MEP allocations for all States (including Puerto Rico). Because the amount available for FY 2003 awards is no greater than the amount that was available for FY 2002 MEP awards, section 1303(a)(2)(A)(i)(I) provides that, except as is required by section 1303(b) to allocate funds to Puerto Rico, each State other than Puerto Rico is generally entitled to receive the amount of MEP funds that the State received for FY 2002.

At the same time, section 1303(b) fails to establish a clear and consistent method to calculate Puerto Rico's allocation for FY 2003. Section 1303(b)(1) and (b)(2) seems to establish an entitlement for Puerto Rico based on multiplying an FTE count described in section 1303(a)(1)(A) and an adjusted State per-pupil expenditure (SPPE) amount determined by sections (b)(1)–(3). However, the law is unclear as to whether the FTE data and/or the SPPE data in question should be frozen at the FY 2002 level or adjusted annually. In addition, it is unclear as to whether any of these options make sense in light of the fact that NCLB changed the funding formula for all other States starting in FY 2003, specifically to move toward use of more accurate and less burdensome actual counts of migrant children and away from the outdated FTE counts. [Note: The FTE counts are outdated because they are calculated using adjustment factors that are based on State data collected in 1994.]

Regardless of how Puerto Rico's entitlement is calculated, it is also unclear how to apply the ratable reduction in section 1303(c)(2) consistently across all States and Puerto Rico when, as in FY 2003, the appropriation falls short of the entitlements for all States and Puerto Rico. Section 1303(a)(2) provides that, in general, the entitlement for all States but Puerto Rico is their actual FY 2002 award amounts, which already went through a ratable reduction in FY 2002. However, under section 1303(b), Puerto Rico's FY 2003 entitlement is not tied to its actual FY 2002 award amount and, thus, never went through an initial ratable reduction in FY 2002. The process of calculating Puerto Rico's FY 2003 entitlement amount, therefore, is inconsistent with the process for calculating the entitlements for all the other States. If the ratable reduction in section 1303(c) is then applied to all States and Puerto Rico in the same manner, the amount Puerto Rico would

be entitled to receive for FY 2003 would be the amount it would have been entitled to receive in FY 2002 had there been *no* ratable reduction, *increased* by a 2.5 percent reduction in the gap between its SPPE and the lowest SPPE of any of the 50 States. This would mean that the FY 2003 allocations for all States but Puerto Rico would be affected by two ratable reductions from the amount of FY 2002 MEP funds to which they otherwise would have been entitled—one for FY 2002 and another for FY 2003—while Puerto Rico's FY 2003 allocation would be affected by a ratable reduction only for FY 2003. However, interpreting the statute this way would result in a substantial increase in the amount of FY 2003 MEP funds that Puerto Rico would receive, at the expense of the other States.

These kinds of anomalies, however, are not necessary. In particular, one also can interpret sections 1303(b)(1) and 1303(a)(2) to mean that, for FY 2003 and subsequent years, the amount of MEP funds for which Puerto Rico and every other State may apply is to be based on the same State migrant FTE counts—and hence the same ratable-reduction factor—that the Department applied when it calculated the FY 2002 MEP awards. Such an interpretation of the MEP statutory formula seems to make the most sense programmatically, and to comport best with what we believe is Congress' intent.

There is no legislative history to suggest that Congress intended that the Department adopt an interpretation of the MEP formula under which Puerto Rico would receive a substantial increase of MEP funds from FY 2002 to FY 2003—an increase that, because the MEP is funded for FY 2003 at a level that would not permit the maximum formula-based allocations to States, would have the effect of reducing every other State's award proportionately. Rather, Congress appears to have intended that Puerto Rico instead benefit from the gradual narrowing of the per-pupil expenditure gap, as provided in section 1303(b)(2). Narrowing of this gap would result in increases in the size of Puerto Rico's MEP allocation commensurate with increases in appropriations for the MEP.

We, therefore, interpret sections 1303(b)(1), which requires using “the number of children counted under subsection (a)(1)(A),” to mean that the FY 2003 MEP award to Puerto Rico, like the FY 2003 award to all other States, will be based on the FTE number of migratory children counted for purposes of the FY 2002 award under section 1303(a)(1). This reading of section 1303(b)(1) is consistent with section

1303(a)(2), which, by providing that each State's base amount of MEP funds in FY 2003 and subsequent years is the amount that the State received for FY 2002, in effect incorporates into the base amount for FY 2003 the FTE number of that State's migratory children used for the FY 2002 allocation under section 1303(a)(1). Any adjustment in FY 2003 MEP funds for Puerto Rico would be due solely to the increase in the minimum per-pupil expenditure adjustment factor authorized in section 1303(b)(2) and (b)(3). However, paragraph (b)(3) specifically provides that this increase will not occur if it decreases any State's MEP award below the amount it received during the previous fiscal year. Therefore, because the amount available for FY 2003 MEP awards is the same as the amount available for FY 2002 MEP awards, the Department will continue to apply for FY 2003 the minimum per-pupil expenditure adjustment factor for Puerto Rico of 77.5 percent that paragraph (b)(2) required to be used for FY 2002.

In short, based on the above interpretations, and because the overall amount of MEP funds available for award to States in FY 2003 is equal to the amount awarded for FY 2002, the Department will make available to all States, including Puerto Rico, FY 2003 MEP awards that are identical in size to what was awarded to them in FY 2002.

#### Waiver of Proposed Rulemaking

Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed regulations. However, under 5 U.S.C. 553(b)(A) the Secretary is not required to offer the public an opportunity to comment on an interpretative rule. These rules advise the public of our interpretation of sections 1303(a) and (b) of ESEA, as amended. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required. For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(2).

#### Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document is intended to provide early notification of our specific plans and actions for this program.