THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

STATE OF SOUTH CAROLINA,

IDEA Determination

ORDER DENYING REQUEST FOR HEARING

At issue in this case is whether the State of South Carolina (the State) is entitled to a hearing by an Administrative Law Judge (ALJ) or an independent hearing official to adjudicate the State's challenge of a determination by Alexa Posny, Assistant Secretary of the Office of Special Education and Rehabilitative Services (OSERS), to partially deny the State's request for a waiver of certain grant allocation requirements pursuant to the Individuals with Disabilities Education Act (IDEA).

The facts are not in dispute. To be eligible for Federal funding under the IDEA, a State must maintain the level of state funds for special education and related services in any given year as the State allocated in the prior year. When any state reduces funding for such services, OSERS is authorized by IDEA to reduce the amount of Federal funds provided to the state for the same services.[1] States that fail to meet this maintenance of effort (MOE) requirement may request a waiver from the Department, if the State can show that "uncontrollable economic circumstances" justify granting the waiver.

After experiencing reduced tax revenues, the State of South Carolina (the State) reduced funding for numerous programs and services for fiscal years 2008-09, 2009-10, and 2010-11, including special education and related services for children with disabilities. As a result, the State failed to meet its MOE requirement for those fiscal years. Arguing the reduction in tax revenues constituted "uncontrollable circumstances," the State requested a waiver of the statutory injunction against reducing state financial support for special education and related services for children with disabilities. On June 17, 2011, OSERS granted the State a full waiver for fiscal year 2009, but did not grant full waivers for fiscal years 2010 and 2011. For the 2010 fiscal year, OSERS partially denied the State's waiver request, which resulted in a reduction in

[1] 20 U.S.C. § 1412(a)(18)(B).

the State's allocation of Federal funds under IDEA of $36,202,909,[2] which was a smaller reduction in Federal funding than OSERS could have authorized absent the partial waiver.

According to the record in front of me, on September 28, 2011, the State requested that the Department reconsider the matter. In a letter dated December 15, 2011, Deputy Secretary Anthony Miller informed the State that "there is nothing in the IDEA that bars reconsideration of [OSERS'] decision," and that he had assumed responsibility for reviewing the State's request for reconsideration. After reviewing the "State's September 28, 2011, submission and consider[ing] all of the State's information and concerns," the Deputy Secretary affirmed OSERS' decision.

In addition, the State also filed a request for an administrative hearing to challenge OSERS' June 17, 2011, decision to partially deny the State's waiver request. In its brief, the State asserted it was entitled to notice and an opportunity to be heard under the IDEA because the partial denial of the waiver resulted in a "withholding" of $36,202,909 in IDEA funding. OSERS did not file a brief in response until I issued an order in November 2011 requiring that OSERS and the State fully brief their positions regarding the State's right to a hearing.

In its briefs, the State argues that it provided OSERS with sufficient grounds supporting its request for a full waiver of IDEA's statutory maintenance of effort funding requirement,[3] and that OSERS' decision to partially grant the waiver request should be subject to challenge pursuant to 34 C.F.R. § 300.605(a).[4] More precisely, the State argues that OSERS' determination that the State's allocation of IDEA funding should be reduced constitutes a "withholding" of funds from the State; therefore, section 300.605 applies, which provides that a "withholding" of funds is enforceable only if it follows reasonable notice and an opportunity to have a hearing under the procedures set out in sections 300.180 through 300.183.[5] In the State's view, the fact that the statutory maintenance of effort provision at 20 U.S.C. § 1412(a)(18) uses the term "reduction" rather than "withholding" is of no particular significance because those terms are used interchangeably, and nothing unique to IDEA alters the result that OSERS is enforcing a withholding action subject to the due process requirements of 20 U.S.C. § 1234d or 34 C.F.R. § 300.605(a).

Opposing the State's position, OSERS argues that there is no statutory or regulatory right to a hearing to challenge a waiver determination under IDEA. More precisely, OSERS argues that nothing in the language or structure of the IDEA or the General Education Provisions Act

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[2] The State's 2009-10 fiscal year covered the July 1, 2009-June 30, 2010, time period.

[3] The maintenance of effort funding requirement mandates that as a condition of eligibility for receipt of Federal IDEA funds, in any given year, states may not reduce the amount of state funds made available to support special education and related services for children with disabilities below the amount made available in the preceding fiscal year. If a state fails to comply with the maintenance of effort funding requirement, the state may be subject to a reduction in Federal IDEA funds. 20 U.S.C. § 1412(a)(18).

[4] In February 2010 and May 2011, the State of South Carolina requested that OSERS waive the State's maintenance of effort requirement for fiscal years 2009, 2010, and 2011 pursuant to 20 U.S.C. § 1412(a)(18) due to uncontrollable economic circumstances that resulted in a precipitous decline in the State's revenue. For fiscal year 2009-10, the State's financial support for special education and related services was $345,897,722 or $67,402,525 less that the State's required level of financial support; hence, OSERS waived less than half of this shortfall.

[5] As explained more fully, *infra*, the State argues, in the alternative, that it is entitled to a hearing under the General Education Provisions Act pursuant to 20 U.S.C. § 1234d.

(GEPA) evinces Congressional intent to provide states with a right to a hearing based on a full or partial denial of a waiver of IDEA's maintenance of financial effort requirement.

According to OSERS, IDEA provides states with a right to notice and an opportunity for a hearing only under two circumstances, neither of which is pertinent here. First, the "Secretary shall not make a final determination that a State is not eligible to receive a grant under [IDEA] until after providing the State – (A) with reasonable notice; and (B) with an opportunity for a hearing."[6] Second, if the Secretary determines that Federal funds under IDEA should be withheld as a result of "a substantial failure to comply with any condition of a State educational agency's or local educational agency's eligibility under [IDEA,]" the Secretary may "[w]ithhold, in whole or in part, any further payments to the State," but "[p]rior to withholding any funds under [IDEA], the Secretary shall provide reasonable notice and an opportunity for a hearing to the State educational agency involved."[7]

In OSERS' view, the two circumstances do not apply to this case. Specifically, under the first circumstance, OSERS argues that it determined the State was eligible for IDEA funding, and continued to provide the State with IDEA funding for the fiscal years in question. Under the second circumstance, OSERS contends that it never determined the State substantially failed to comply with any condition of IDEA. Instead, according to OSERS, after the State impermissibly "reduced the amount of State financial support for special education and related services for children with disabilities...below the amount of that support for the preceding fiscal year" for 2009-10,[8] OSERS was required to "reduce the [Federal] allocation of funds under [IDEA]" for the State "by the same amount."[9] Accordingly, because OSERS never made a determination that the State substantially failed to comply with the MOE requirement -- that failure is a fact the State concedes in its waiver request -- OSERS contends that the loss of funding constituted a mandatory "reduction" of funds and not a "withholding" of funds accompanied by a right to a hearing as contemplated by the statute.

In response to OSERS' arguments, the State rejects OSERS' argument that a "reduction" and a "withholding" cannot have the same meaning because the terms are used interchangeably in the statute and its regulations. In addition, the State argues that GEPA requires a hearing, independent of IDEA, prior to enforcing a withholding action. Hence, in the State's view, what matters regarding whether the State has a right to a hearing is not how OSERS denominates its action, but whether the facts show that OSERS has determined not to provide the State with "over $36 million" of its "annual allocation."[10]

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[6] 20 U.S.C. § 1412(d)(2).

[7] 20 U.S.C. § 1416(e)(3). Section 1416(e)(3) also empowers the Secretary to take other enforcement actions including bringing a "[r]ecovery funds" action pursuant to the General Education Provisions Act, 20 U.S.C. § 1234a, or referring the matter to the Department's Office of Inspector General or to the U.S. Department of Justice.

[8] 20 U.S.C. § 1412(a)(18).

[9] 20 U.S.C. § 1412(a)(18)(B).

[10] *See, e.g.*, 34 C.F.R. § 300.607 (referring to "any reduction or withholding").

DISCUSSION

Notwithstanding the numerous arguments raised by the parties, the issue before me is straightforward; namely, I must decide whether the State has a right to a hearing to challenge OSERS' decision to reduce or withhold $36,202,909 of Federal IDEA funding as a result of the State's failure to maintain state financial support for special education and related services in the 2009-10 fiscal year.[11] This is a purely procedural question. I find that the answer is found in IDEA's statutory language, wherein Congress provides that a state that is determined "not eligible to receive a grant under [IDEA]" must be provided "(A) with reasonable notice; and (B) with an opportunity for a hearing"[12] prior to issuance of a final decision.[13] The IDEA makes it clear that states have a statutory right to "reasonable notice" and "an opportunity for a hearing" prior to (1) issuance of the Department's final agency decision rejecting the eligibility of a state for IDEA grant funding or (2) a withholding of IDEA funds.[14]

In this case, applying the statutory language to this matter renders it apparent that no right to a hearing attaches. OSERS determined that the State was eligible for Federal funds, and the State continued to receive IDEA funds for the fiscal years in question. Although the MOE requirement is a condition of eligibility under IDEA, the State does not directly challenge the conclusion that it failed to meet that condition for fiscal year 2009-10. Indeed, the basis of the State's request for waiver of the MOE requirement is the State's acknowledgement that it did not meet the condition.

Moreover, OSERS determined that the State was eligible for IDEA funding by reviewing the State's IDEA grant application to determine whether the State provided assurances for a number of conditions of eligibility including whether the State had in effect policies and procedures that would maintain the State's level of funding. Apparently, these assurances were viewed favorably by OSERS since it deemed the State eligible for funding, and the State's eligibility for IDEA funding was not an issue. Accordingly, the fact that the State, ultimately,

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[11] The State raises numerous other arguments including those concerning the potential impact OSERS' reduction may have on the State's future Federal allocation of IDEA funds. Although the concerns of the State are clear and certain, the arguments are impertinent to the matter at issue. As explained *supra*, Congress appropriates IDEA funds; these appropriations clearly have the most significant impact on future allocations of IDEA funding. Moreover, Congress has mandated that a reduction in state financial support for IDEA services results in a proportionate reduction in Federal funds. This clear and precise remedy leaves no future funding issue to resolve in an administrative hearing.

[12] 20 U.S.C. § 1412(d)(2).

[13] To be clear, there is an additional right to a hearing provided by IDEA under section 1412. Pursuant to 20 U.S.C. § 1412(f)(3), the Department must provide a hearing to State educational agencies subject to a withholding action involving costs of IDEA services provided by private schools. This provision, however, is impertinent to the matter at hand, and neither party contends otherwise.

[14] 20 U.S.C. § 1412(d).

failed in one of its assurances does not yield a means for the State to obtain a hearing on its waiver request.[15]

The loss of IDEA funding also does not constitute a "withholding" action under the IDEA. Such a withholding action can only occur after OSERS has made a determination that a State has substantially failed to comply with an IDEA eligibility condition. As stated above, OSERS never determined the State substantially failed to comply with the IDEA's MOE requirement -- the State concedes that it did not. Clearly, had OSERS made such a determination and the State disagreed, the State would have been entitled to notice and an opportunity to be heard. It is not entitled to a hearing, however, to challenge a decision to partially deny the State's waiver request.

Finally, the State argues that the General Education Provisions Act (GEPA) is applicable to this matter. In support of its argument, the State cites a decision by an administrative law judge (ALJ) -- *In the Matter of State of California*, No. 09-05-R, U.S. Dep't of Educ. (November 4, 2009). That decision, however, does not involve the IDEA. Moreover, on appeal in that case, I rejected the ALJ's decision regarding the scope of GEPA.[16] I noted that where the statute is silent as to what procedures are due, the Department maintains the flexibility and discretion to identify the appropriate procedures for a hearing. More importantly, there was no dispute in that case that a hearing was required; at issue was who should provide the "hearing" and what procedures should be used, which is a fundamentally different issue from the matter at hand.

The State's argument concerning a right to a hearing under GEPA is similarly unavailing. As a basic matter of statutory construction, courts have widely acknowledged that specific terms of a statute supersede general terms within that statute or within another statute that would otherwise control.[17] There is no general rule of statutory interpretation that would support undoing a narrowly drawn remedial provision in one statute by applying a broader remedy provision in a different statute. Thus, in this case, where IDEA requires a reduction of funds with no specific reference or mention of a right to a hearing under IDEA, IDEA must trump GEPA's general provisions governing withholding of funds actions.[18] Accordingly, GEPA does not provide the State a right to a hearing concerning the Department's decisions issued on June 17, 2011, and December 15, 2011.

Finally, even if IDEA provided the State a right to appeal OSERS' waiver determinations -- which it does not -- the Department provided the State with sufficient procedural due process. First, on June 17, 2011, Assistant Secretary Posny issued a decision supported by detailed

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[15] To the extent that the State viewed Assistant Secretary Posny's June 17, 2011, decision as ostensibly ruling that, by failing to maintain financial support in fiscal year 2009-10, the State had substantially failed to comply with a condition of IDEA eligibility, I am persuaded that this view is unsupported by the explicit findings of both the June 17, 2011, decision and the December 15, 2011, decision upon reconsideration. Those decisions acknowledged the State's continuing eligibility for IDEA funding.

[16] *See, In the Matter of State of California*, No. 09-05-R, U.S. Dep't of Educ. (Decision of the Secretary, November 12, 2010).

[17] *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling." (quoting *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204 (1932))

[18] § 3803 *Law Applicable*, 14D Fed. Prac. & Proc. Juris. § 3803 (3d ed.) (Westlaw database updated April 2012).

reasons why she authorized a partial waiver for the State; that decision demonstrated that OSERS met with State officials to discuss the State's waiver request, and provided the State multiple opportunities to submit documents in support of its request. Moreover, the Department granted the State's request for reconsideration of Assistant Secretary Posny's decision. On December 15, 2011, the Department's Deputy Secretary, Anthony Miller, reconsidered the Assistant Secretary's decision, and issued a final agency decision supported by detailed reasons affirming her decision.

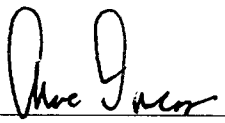
Even the issuance of this decision illustrates the Department's effort to provide the State with an opportunity to be heard. Although OSERS did not initially submit a brief in response to the State's filing with the Office of Hearings and Appeals, I issued an order requiring OSERS to explain its position on whether the State could challenge the waiver decision in a hearing before an impartial tribunal. Upon request of both parties, I also allowed for the submission of supplemental briefs. I have reviewed all of the submissions and given careful consideration to the arguments of the parties. These procedures have been provided to the State to ensure that the State's position that it is entitled to a hearing is fully considered.

As I noted in *In the Matter of State of California*, when there is no basis to proceed at all in an administrative action, and the only function remaining is that of announcing that fact, the matter should be dismissed.[19]

ORDER

Accordingly, it is HEREBY ORDERED that the above-captioned matter is DISMISSED.

So ordered this 22nd day of May 2012.



Arne Duncan

Washington, D.C.

[19] *See In the Matter of State of California*, No. 09-05-R, U.S. Dep't of Educ. (Decision of the Secretary, November 12, 2010).

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