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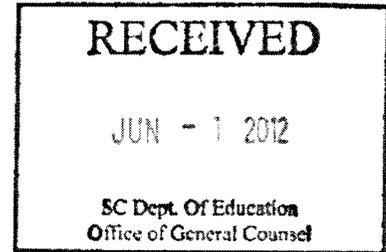
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**Attachment 1:**

Order dated May 22, 2012, issued by Arne Duncan, Secretary, U.S. Department of Education denying South Carolina Department of Education's Request for Hearing



THE SECRETARY OF EDUCATION  
WASHINGTON, DC 20202



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In the Matter of

STATE OF SOUTH CAROLINA,

IDEA Determination

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**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.<sup>1</sup> 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

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<sup>1</sup> 20 U.S.C. § 1412(a)(18)(B).

the State's allocation of Federal funds under IDEA of \$36,202,909,<sup>2</sup> 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,<sup>3</sup> and that OSERS' decision to partially grant the waiver request should be subject to challenge pursuant to 34 C.F.R. § 300.605(a).<sup>4</sup> 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.<sup>5</sup> 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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<sup>2</sup> The State's 2009-10 fiscal year covered the July 1, 2009-June 30, 2010, time period.

<sup>3</sup> 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).

<sup>4</sup> 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 than the State's required level of financial support; hence, OSERS waived less than half of this shortfall.

<sup>5</sup> 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."<sup>6</sup> 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."<sup>7</sup>

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,<sup>8</sup> OSERS was required to "reduce the [Federal] allocation of funds under [IDEA]" for the State "by the same amount."<sup>9</sup> 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."<sup>10</sup>

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<sup>6</sup> 20 U.S.C. § 1412(d)(2).

<sup>7</sup> 20 U.S.C. § 1416(e)(3). Section 1416(e)(3) also empowers the Secretary to take other enforcement actions including bringing a "[r]ecoverly 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.

<sup>8</sup> 20 U.S.C. § 1412(a)(18).

<sup>9</sup> 20 U.S.C. § 1412(a)(18)(B).

<sup>10</sup> 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.<sup>11</sup> 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"<sup>12</sup> prior to issuance of a final decision.<sup>13</sup> 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.<sup>14</sup>

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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<sup>11</sup> 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.

<sup>12</sup> 20 U.S.C. § 1412(d)(2).

<sup>13</sup> 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.

<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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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<sup>15</sup> 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.

<sup>16</sup> 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).

<sup>17</sup> 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))

<sup>18</sup> § 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.

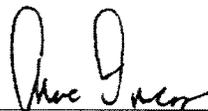
Even the issuance of this decision illustrates the Department's effort to provide the State with an opportunity to be heard. Although OSERS did not initially submit a brief in response to the State's filing with the Office of Hearings and Appeals, I issued an order requiring OSERS to explain its position 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.<sup>19</sup>

#### ORDER

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

So ordered this 22<sup>nd</sup> day of May 2012.



Arne Duncan

Washington, D.C.

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<sup>19</sup> 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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**Attachment 2:**

Letter dated May 9, 2011, to Alexa Posny, Assistant Secretary, Office of Special Education and Rehabilitative Services, U.S. Department of Education from South Carolina State Superintendent of Education Mitchell (Mick) Zais



STATE OF SOUTH CAROLINA  
DEPARTMENT OF EDUCATION

Mick Zais  
Superintendent

1429 Senate Street  
Columbia, South Carolina 29201

May 9, 2011

Alexa Posny, Ph.D., Assistant Secretary  
Office of Special Education and Rehabilitative Services  
U. S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, DC 20202

Dear Dr. Posny:

Members of my staff met with Joan Bardee and William Carroll from your office earlier this week. The purpose of that meeting was to determine the need and the extent of the need for South Carolina to request additional waivers of state-level maintenance of effort.

The South Carolina Department of Education previously requested a waiver of state-level maintenance of effort for state Fiscal Year 2010 (2009-2010). Please accept this letter as a request from South Carolina for a waiver of state-level maintenance of effort as permitted under 34 C.F.R. §300.163(c), *Waivers for exceptional or uncontrollable circumstances*, for two additional years: Fiscal Years 2009 (2008-2009) and 2011 (2010-11).

We have worked closely with the General Assembly to ensure that the state will meet its future maintenance of effort requirements. At our request, the General Assembly is including a safeguard in the State's 2011-2012 budget, which is currently under debate, that will ensure that the required funding levels are met. We anticipate that this provision will be included in the final state Appropriation Act.

Under separate cover, we will send supporting documentation and additional information that was requested by Ms. Bardee and Mr. Carroll during the May 4, 2011, meeting.

Thank you for your assistance in this matter.

Sincerely,

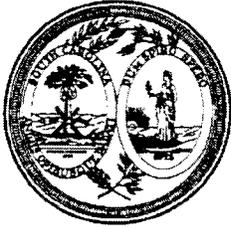
A handwritten signature in cursive script that reads "Mick Zais".

Mick Zais, Ph.D.  
State Superintendent of Education

MZ/sk

**Attachment 3:**

Letter dated May 24, 2011, to Alexa Posny, Assistant Secretary, Office of Special Education and Rehabilitative Services, U.S. Department of Education from South Carolina State Superintendent of Education Mitchell (Mick) Zais



## STATE OF SOUTH CAROLINA DEPARTMENT OF EDUCATION

Mick Zais  
Superintendent

1429 Senate Street  
Columbia, South Carolina 29201

May 24, 2011

Alexa Posny, Ph.D., Assistant Secretary  
Office of Special Education and Rehabilitative Services  
U. S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, DC 20202

Dear Dr. Posny:

I am writing to provide you with the additional information that was promised in our May 9, 2011, letter to you regarding the South Carolina Department of Education's (SCDE) Individuals with Disabilities Education Act (IDEA) maintenance of effort (MOE) waiver request. SCDE staff met with Joan Bardee and William Carroll of the United States Education Department (USED) to discuss South Carolina's efforts to seek a waiver and to discuss the computation of maintenance of effort and South Carolina's budgetary process and history. A question was raised during the May 4, 2011, meeting regarding the revenue surplus that appears on the spread sheet for fiscal year 2009–10 and the projected surplus for the current state fiscal year (2010–11). (Attachment A) This memorandum will explain the budgetary circumstances that created those surpluses and the limitations on the State of South Carolina on applying the surplus to the current (2010–11) fiscal year.

The table in Attachment A was derived from a meeting between Joan Bardee, William Carroll, and staff at the SCDE. This table illustrates the revenues, appropriations, and state fiscal support for IDEA MOE from the base fiscal year 2007–08 to the current fiscal year 2010–11. At that meeting the parties agreed to look at three revenue sources for IDEA MOE purposes: General Fund, Education Improvement Act, and Lottery.<sup>1</sup>

### Background

Like many states, South Carolina experienced unprecedented fiscal decline between the years 2007–08 and 2009–10. Considering three sources of revenue, General Fund, Lottery, and the Education Improvement Act, the State collected \$1,229,125,946 *less* in revenue in 2009–10

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<sup>1</sup> Note that some of the figures that are presented in this letter include other sources of revenue, but for MOE purposes it was agreed at the May 4, 2011, meeting to use these three revenue sources because they are used to fund education.

than it did in 2007–08. Revenue collections are forecasted to improve slightly in the current fiscal year, 2010–11, but the amount anticipated to be collected is still \$1,177,470,254 *less* than 2007–08. The significance of the 2007–08 fiscal year is that it is the last fiscal year in which South Carolina met its MOE requirements under the IDEA; therefore, IDEA MOE 2007–08 is the base year to which comparison for MOE is made. South Carolina submitted a waiver request to the USED for the fiscal years 2008–09, 2009–10, and 2010–11.

South Carolina seeks a waiver of the MOE requirement for those fiscal years based on the provisions of 34 CFR 300.163(c)(1) that “granting a waiver would be equitable due to exceptional or uncontrollable circumstance such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State.” There is no question that South Carolina experienced precipitous and unforeseen decline in revenue in 2008–09, which coincided with the unprecedented drop in housing values, high rates of foreclosures, and the stock market crash. Both the United States Congress and President Obama recognized this crisis when they passed the *American Recovery and Reinvestment Act of 2009* (ARRA), in the early months of President Obama’s administration. Note that the first fiscal year that South Carolina did not meet MOE was in the 2008–09 year, just as the country was starting its fiscal decline. The decline continued and compounded in 2009–10, and the state of South Carolina applied for and received ARRA funds for Title I and the IDEA. South Carolina also applied for and received *State Fiscal Stabilization Funds* (SFSF). Consistent with the intent articulated in the ARRA to save jobs, the South Carolina General Assembly wanted to push SFSF funds out to school districts and allocated those funds through the state’s Education Finance Act (EFA) formula. In 2009–10, those funds restored approximately \$185 million in state dollars to school districts that would have been lost otherwise. SFSF helped “fill the gap” for that year. In 2010–11, that amount was \$174,430,646.

#### South Carolina’s Budgetary Process

The South Carolina General Assembly meets annually. Its session begins the second Tuesday in January and concludes the first Thursday in June. Our state operates a July 1 through June 30 fiscal year and the state’s budget for the following fiscal year is typically debated and adopted by May or June. As stipulated in the South Carolina Constitution, the state must have a balanced budget. (Article X, Section 7 provides “(a) The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue.”) To ensure a balanced budget there are safeguards built into the budgeting process. One of which is the required General Reserve Fund. Article III, Section 36, of the South Carolina Constitution provides for this fund:

SECTION 36. General Reserve Fund.

(A) The General Assembly shall provide for a General Reserve Fund of three percent of the general fund revenue of the latest completed fiscal year. Funds may be withdrawn from the reserve only for the purpose of covering operating deficits of state government. The General Assembly must provide for the orderly restoration of funds withdrawn from the reserve from future revenues and out of funds accumulating in excess of annual operating expenditures.

South Carolina relies on the Board of Economic Advisors (BEA) in determining the amount of revenue that the state may appropriate. This BEA is established by statute and its duties include forecasting state revenues for the next fiscal year. S.C. Code Section 11-9-880 (2011). The General Assembly uses the BEA's forecasted revenues when developing the state's budget. Consistent with statutory and Constitutional requirements, the General Assembly cannot exceed the BEA's estimate when appropriating revenues.

2009–10 Fiscal Year

The Appropriations Act budgeted revenues for 2009–10 were originally \$5,552,002,165; however, actual General Fund revenues were \$5,241,895,775. Because of anticipated shortfalls and revisions of the revenue projections by the BEA, the State Budget and Control Board issued two mid-year budget cuts (4.04 percent in September 2009, and 5 percent in December 2009) and applied \$127,847,888 from the state's Capital Reserve Fund against the projected state shortfall. (See *Budgetary Highlights* document, Attachment B, p. 2) The budget cuts and use of the Capital Reserve Fund created a \$566,527,922 "savings" to the state. (Attachment B, p. 2) The state then had to expend \$185,420,932 to cover expenses required by statute or proviso, some of which was to liquidate a \$98,216,617 operating deficit from the previous fiscal year. After these payments were made, there was a net "surplus" of \$71,000,600. (Attachment B, p. 2) Note, however, that this surplus was not due to an increase in revenue but was a result of across the board budget cuts and use of the Capital Reserve Fund.

Due to the budgeting cycle, however, this "surplus" was realized after the 2010–11 budget was adopted by the General Assembly. That figure was not finalized until after the close of the books for the 2009–10 fiscal year, which occurred after the end of the legislative session. The "surplus," therefore, could not have been distributed in a manner that would have met the IDEA MOE requirements for 2009–10 because the fiscal year had already closed.

2010–11 Fiscal Year

The USED may ask why the General Assembly did not apply that \$71,000,600 “surplus” to the 2010–11 IDEA MOE requirements. Again, because of the appropriations cycle, the fact that there was money remaining was discovered after the General Assembly adopted the budget for the 2010–11 fiscal year and ended the session for the year. The Comptroller General certified the books after the close of the fiscal year, which is June 30 but the Appropriations Act was ratified on June 3, 2010, and enacted on August 10, 2010. Had the General Assembly wanted to allocate those funds for the 2010–11 fiscal year IDEA MOE, the earliest date that this could have been done would have been in January 2011 when the General Assembly returned to session.

Even though the Rex administration asked the USED for the 2009–10 waiver, it had not informed the General Assembly of the pending 2010–11 MOE issue. As indicated in previous correspondence, I was elected to the position of State Superintendent of Education on November 2, 2010, and took office January 12, 2011. I became aware of this situation within several weeks of taking office and immediately began to address the issue. SCDE staff prepared a response to an outstanding letter from the USED and began to review the MOE calculation used to prepare the requests. This resulted in revising the method of calculating MOE. Because of revisions in calculations for MOE, the extent of the MOE deficit for the 2010–11 fiscal year was not known until March 2011. Once that amount was determined, we immediately notified the USED of the deficit and that the SCDE would request a waiver. At the same time my administration worked with the General Assembly to ensure that a proviso would be added to the 2011–12 budget that would ensure that IDEA MOE was met. That proviso is in both the House and Senate versions of the budget; therefore, IDEA MOE will be met next year. (Attachment D, pp. 1–2)

These actions, however, did not affect the current fiscal year’s budget. Timing is important. Recall that the BEA provides the revenue estimates to the General Assembly prior to the budget year so that the General Assembly can adequately budget for future years. The state had just gone through a series of reductions in revenue estimates. (See, Attachment C, pp. 1–8) On April 14, 2010, the BEA reduced its General Fund revenue estimate for fiscal year 2010–11 by \$59,967,911 to \$5,561,842,570.<sup>2</sup> (Attachment C-1) The General Assembly budgeted for the 2010–11 year based on these figures. However, in November 2010, five months after the budget was ratified, the BEA began projecting that revenue would increase for the 2010–11 fiscal year. (Attachment C, p. 3)

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<sup>2</sup> Note that the USED/SCDE FY 2011 figure of \$5,308,017,413 that is used in Attachment A is the February 9, 2011, BEA estimate less \$545,880,212 for the Tax Relief Trust Fund. The figure of \$5,561,842,212 is the April 12, 2010, BEA estimate containing the Tax Relief Trust Fund amount of \$545,880,212. Thus a comparable figure would be \$5,015,962,353.

South Carolina's economy began improving the final three months of the 2009–10 fiscal year. That improvement postdated the BEA's estimate that the 2010–11 fiscal budget was based upon. That improvement continued throughout the 2010–11 fiscal year. Attachment E illustrates the projected surplus for the current fiscal year. At the risk of redundancy, this improvement and resulting surplus was realized outside of the budget cycle. Because of this, the General Assembly, which is currently debating next year's budget, is applying these "surpluses" to the 2011–12 fiscal year to cover other obligations, such as to provide additional education funding and repay part of South Carolina's debt to the federal government for the Unemployment Trust Fund, which is a \$900 million debt. Until the budget process is completed, however, I cannot provide you with the exact manner in which these funds will be appropriated.

Consider the fiscal policies of the federal government in the last two years and the impact on South Carolina. South Carolina accepted and applied for stimulus funds over the objection of the Governor. One argument against accepting those funds was that to do so would create a funding cliff that states could not recover from. The opposite position was that state economies would improve, thereby closing the cliff. South Carolina's economy has improved; however, not nearly to the 2007–08 levels. While the gap is far from being closed, South Carolina has made up some of the difference. The General Assembly funded EFA without stimulus funds for the 2011–12 budget. There are no stimulus funds in that budget, yet the General Assembly has managed to budget additional dollars for education to make up for the loss of those stimulus funds. In addition, the General Assembly has included a provision to ensure that the IDEA MOE will be covered and that South Carolina will meet MOE in 2011–12. (Attachment A) South Carolina should not be penalized for having an upturn in economy. To do so would be contrary to all that was intended by the passage of ARRA.

There is no question that South Carolina has experienced a precipitous decline in revenue. There is no question that it is within the discretion of the USED to grant this waiver. However, due to the upturn in our economy, which came too late to budget—in practical terms—for both the 2009–10 and 2010–11 fiscal years, South Carolina's children risk losing tens of millions in federal dollars. We ask that you consider the entire landscape when reviewing our waiver request and not penalize South Carolina because of the recent improvement in our economy.

#### Percentage Change from Year to Year

The table in Attachment A illustrates the percentage of change in revenues and appropriations from year to year. Since the comparison for MOE purposes is the 2007–08 year, the comparison for percentage decrease in funding should also be to that year. From that chart, you can see that in the first year where South Carolina did not meet MOE 2008–09, revenue dropped 12.73 percent; total appropriations were reduced 13.69 percent; but State fiscal support

for IDEA was reduced by 4.87 percent. In 2009–10 figures showed revenue decreasing by 16.84 percent; total appropriations were reduced 20.20 percent; but State fiscal support for IDEA was reduced by 16.31 percent, when compared to the base year. In both of those years, IDEA funding was reduced by a lesser percentage than the total appropriations when compared to the base year, and less than the revenue change. There was a slight variation in 2010–11. In this year, the comparison to revenue in 2007–08 shows a 16.04 percent decrease; appropriations a 20.27 percent decrease; and IDEA a 18.37 percent decrease. Note that while the decrease to IDEA is still less than the decrease in appropriations in general, it is greater than the overall decrease in revenue. The preceding discussion regarding the recent upturn in South Carolina's revenue provides an explanation as to why this change was unanticipated, however welcome.

Free Appropriate Public Education

South Carolina assures that a free appropriate public education (FAPE) was available to all eligible students with disabilities during the applicable period of time addressed in this waiver request and is currently available to all eligible children with disabilities throughout the state. Pursuant to the state's responsibility for general supervision, South Carolina is committed to ensuring that all public educational programs for students with disabilities meet the federal and state requirements for the provisions of a FAPE and the effective implementation of the procedural safeguards afforded to students with disabilities. The state also assures that it has policies and procedures in effect to ensure that it complies with the monitoring and enforcement requirements of the IDEA.

I trust that the USED will give our request careful consideration and consider the many factors that led to South Carolina not meeting MOE. Be assured that at both the state and local levels we are committed to serving children with disabilities and we have not allowed this financial crisis to impact the services provided to the children served through IDEA. While it is now apparent that the state has not provided the level of financial commitment that was necessary to meet our required efforts, it is also true that children continued to receive FAPE through the hard work of schools statewide. We ask that you consider this and the financial circumstances that our state faced when considering this request.

Sincerely,



Mick Zais, PhD  
State Superintendent of Education

Attachments: A–E (26 pages)

**Attachment 4:**

Letter dated June 17, 2011, to South Carolina State Superintendent of Education Mitchell (Mick) Zais from Alexa Posny, Assistant Secretary, Office of Special Education and Rehabilitative Services, U.S. Department of Education



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

JUN 17 2011

Honorable Mitchell M. Zais  
South Carolina State Department of Education  
1429 Senate St., Room 1006  
Columbia, South Carolina 29201-3799

Dear Dr. Zais:

This is in response to former State Superintendent Jim Rex's February 24, 2010 letter and your May 9, 2011 letter (supplemented by additional information provided by your staff and staff from the Office of State Budget on June 17, 2010, July 7, 2010, July 12, 2010, September 24, 2010, February 24, 2011, March 11, 2011, and May 18, 2011, and your letter on May 24, 2011), in which the State of South Carolina requests waivers of the requirements related to the maintenance of State financial support for special education and related services for fiscal years (FYs) 2009, 2010, and 2011 for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18) and 34 CFR §300.163.<sup>1</sup> We appreciate the time and effort your staff took to provide the supplemental information and to meet with my staff on May 4, 2011 in South Carolina at the offices of the State Department of Education to review the data provided by the State. During the course of that meeting, my staff discussed with your staff the consequences under the IDEA (discussed below) of a State's failure to maintain fiscal effort and the U.S. Department of Education's (Department) concern that the State take steps to ensure that it would maintain effort this fiscal year (2011). Subsequent to the visit, the State had an opportunity to provide any additional information that it chose to submit, and it did so on May 18, 2011 and May 24, 2011.<sup>2</sup> Since that time, on several occasions, Department officials have spoken with State officials about this matter.

A State is eligible for a grant under Part B of the IDEA if the State submits a plan (application) that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets certain conditions. 20 U.S.C. §1412(a) and 34 CFR §300.100. One of these conditions is that a 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 financial support for the preceding fiscal year. 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a). South Carolina has provided such assurances in its applications for Part B funds in all relevant years and the Department awarded Part B funds to the State based in part on those assurances.

<sup>1</sup> The State first requested a waiver for FY 2009, which the State later clarified was FY 2010 (July 1, 2009 – June 30, 2010), by letter dated February 26, 2010. However, the Department did not receive the letter until April 22, 2010. The State submitted a request for waivers for FYs 2009 and 2011 on May 9, 2011.

<sup>2</sup> Attached is a table that summarizes the data provided by the State at the meeting on May 4<sup>th</sup>. The May 18<sup>th</sup> and May 24<sup>th</sup> submissions by the State were consistent with information provided by the State on May 4<sup>th</sup>, although the May 24<sup>th</sup> submission included more recent revenue projections which were updated in the attached table.

While we are permitted to waive the requirements related to the maintenance of financial support for a State, for one fiscal year at a time, if we determine that granting a waiver would be equitable due to exceptional or uncontrollable circumstances (such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1)), we do so carefully and reluctantly, given the importance we place on maintaining State financial support for our most vulnerable students. Moreover, regardless of whether a State receives a waiver under this authority, the State has a continuing obligation to ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities, as required in 20 U.S.C. §1412(a)(1) and 34 CFR §300.101.

Each of the State's waiver requests is discussed below:

Fiscal Year 2009 (July 1, 2008 – June 30, 2009)

In a May 9, 2011 letter, the State requested a waiver of State-level maintenance of effort for FY 2009. From the information your agency provided, we are aware that the State faced a very difficult financial situation in that year and experienced a significant decrease in revenues - total State revenues dropped by 12.73 percent from FY 2008 to FY 2009. Based on information provided by your agency, South Carolina reduced State financial support for special education and related services by \$20,312,122 in FY 2009 from FY 2008 levels, as calculated on a per capita basis. This represents a 4.87 percent decrease in State financial support for special education and related services from FY 2008 to FY 2009. The State cut its total State appropriations by 13.69 percent in the same time period. While it is regrettable that these cuts were made to special education funding, we recognize that the reduction in State financial support for special education and related services was relatively small compared with cuts to other State appropriations.

In reviewing your request, as part of our examination of "equitability," we considered all of the information provided by the State in all of its submissions--including that the percent reduction in State financial support for special education and related services was less than the average percent reduction in appropriations across agencies and less than the percent reduction in revenues. We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, while it is not a factor in determining whether a State experienced an exceptional or uncontrollable circumstance, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a FAPE available to all children with disabilities in FY 2009.

Based on all of the information discussed above, I have determined that it is equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for FY 2009 by \$20,312,122.

Fiscal Year 2010 (July 1, 2009 – June 30, 2010)

South Carolina's February 26, 2010 letter based its request for a waiver for FY 2010 on "a severe and precipitous decline in State revenue which is outside the control of the South Carolina Department of Education (SCDE) and the state legislature." In FY 2010, the financial support for special education and related services required of the State was the amount that would have been required in the absence of a failure to maintain effort in FY 2009 and not the reduced level of the State's financial support permitted by the waiver granted for FY 2009, adjusted to account for any changes due to the State's per capita calculation (i.e., \$413,300,247). 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d). The State's financial support for special education and related services in FY 2010 was \$345,897,722, or \$67,402,525 less than its required level of effort. Accordingly, we consider the State's request for a waiver for FY 2010 to be a request for a waiver for \$67,402,525.

Based on the information provided by your agency, it is evident that the State continued to face difficult financial circumstances in FY 2010 - total State revenues dropped by 4.71 percent between FY 2009 and FY 2010. Additionally, revenues were 16.84 percent lower than in FY 2008, the year that South Carolina last met the maintenance of effort requirement. Based on these data, we believe that the State experienced an exceptional circumstance in FY 2010, i.e., a precipitous and unforeseen decline in the financial resources of the State. In addition, data provided to the Department demonstrate that the State had revenues in excess of its appropriations by \$59,816,035 in FY 2010. Of this amount, \$26,835,463 consisted of revenues in excess of appropriations in the General Fund. In your May 24, 2011 letter, you provided satisfactory evidence that the \$26,835,463 in the General Fund could not have been made available for special education and related services in FY 2010. However, the revenues in the State's Lottery and Education Improvement Act funds were \$32,980,572 in excess of appropriations made from those same funds in FY 2010. Although the State ended the year with \$32,980,572 more in revenues than appropriations, this amount was substantially less than \$67,402,525 -- the amount by which the State failed to maintain effort in FY 2010. Given that the excess revenues were less than the \$67,402,525 maintenance of effort shortfall and that the revenue forecasts in FY 2010 had been erratic, the surplus in FY 2010 is not inconsistent with our determination that the State experienced an exceptional or uncontrollable circumstance in FY 2010. To be clear, when weighing the equities of a waiver request for a fiscal year, particularly when the State had a surplus that year, the Department does not take a rigid formulaic approach. Rather, for FY 2010, the Department very carefully considered whether it was reasonable under all the circumstances facing the State in FY 2010 to maintain fiscal effort for special education and related services. We were persuaded by the fact that the surplus was small compared to the State's overall budget and to the State's maintenance of effort shortfall and that it was not clear to the State towards the end of FY 2010 how much of the surplus would actually be realized. Nevertheless, although the Department finds that the State experienced an exceptional or uncontrollable circumstance in FY 2010, the Department expected the State to treat special education equitably compared to overall State appropriations.

As part of our examination of "equitability," in order to determine whether to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) for FY 2010, the Department examined a variety of factors. The reduction in State financial support for special education and related services in FY 2010 of \$67,402,525 represents a 12.02 percent cut from its State financial

support for special education and related services in FY 2009 and a 16.31 percent cut from its required level of effort. The reduction in State financial support for special education and related services (12.02 percent) in FY 2010 from the FY 2009 level was a larger percentage cut than the reduction in total State appropriations (7.55 percent) from FY 2009 to FY 2010. The State seeks to compare the percentage reductions in special education and other appropriations to the amounts appropriated in FY 2008 (the "MOE base year"), and stated (in your May 24, 2011 letter) that "since the comparison for MOE purposes is the 2007-2008 year, the comparison for percentage decrease in funding should also be to that year." The Department believes that comparing revenue reductions to the MOE base year (as well as the immediate prior fiscal year) is appropriate because the level of revenues in the MOE base year supported the level of State financial support for special education and related services. However, when considering waiver requests, the Department examines the treatment of special education and related services each fiscal year compared to the prior fiscal year because that is the best method to protect the Federal interest in ensuring the equitable treatment of State funding for special education and related services every year. Therefore, in evaluating whether the State's appropriations decisions treated special education proportionately relative to total State appropriations, comparisons are made to the prior year rather than to the year in which the State last met the MOE requirement.

In reviewing your request, we considered all of the information provided by the State in all of its submissions--including the totality of the State's circumstances in FY 2010: (1) revenues decreased when compared to the prior year, and decreased substantially when compared to FY 2008 (the year in which the State last met its required level of effort); (2) the State had a surplus of \$32,980,572 in FY 2010, which was not sufficient to maintain the required level of State financial support for special education and related services; and (3) the percent reduction in State financial support for special education and related services (12.02) was higher than the average percent reduction in appropriations across agencies (7.55) and higher than the percent decrease in revenues (4.71). We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, while it is not a factor in determining whether a State experienced an exceptional or uncontrollable circumstance, when evaluating the equity of the requested waiver, we considered the fact that the Part B IDEA ARRA funds were available to assist the State and LEAs in meeting their obligation to make a FAPE available to all children with disabilities in FY 2010.

Accordingly, based on all of the information discussed above, the Department finds that the State did not treat special education and related services in an equitable manner when compared to State agencies as a whole. Therefore, I have determined it would not be equitable to grant a waiver under 20 U.S.C. §1412 (a)(18)(C)(i) and 34 CFR §300.163(c)(1) that would permit the State to reduce State financial support for special education and related services by \$67,402,525 for FY 2010. However, I have determined that it is equitable to grant a partial waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for FY 2010 by \$31,199,616, representing a 7.55 percent decrease from the amount required to be made available, adjusted to account for changes due to the State's per capita calculation. This level brings the percentage decrease in State financial

support for special education and related services in line with the percentage decrease in appropriations for the State as a whole.

The State's submissions to the Department in support of its waiver request establish that it has failed to maintain financial support for special education and related services for FY 2010 by \$36,202,909 – the difference between the amount of financial support required to have been made available under this partial waiver (\$382,100,631) and the level made available by the State in FY 2010 (\$345,897,722). Thus, the State has a \$36,202,909 shortfall in the amount of State financial support for FY 2010.

Fiscal Year 2011 (July 1, 2010 – June 30, 2011)

In its May 9, 2011 letter, the State requested a waiver of State-level maintenance of effort for FY 2011. As noted above, the financial support required of the State in FY 2011 is the amount that would have been required in the absence of a failure to maintain effort in prior years and not the reduced level of the State's financial support provided by the State, or permitted by the waiver granted for FY 2009 and the partial waiver granted for FY 2010, adjusted to account for any changes due to the State's per capita calculation (i.e., \$410,232,370). The State's financial support for special education and related services in FY 2011 was \$334,889,301, which is \$75,343,070 less than the amount the State is required to provide in FY 2011.

South Carolina's total State revenues increased by 2.58 percent from FY 2010 to FY 2011. However, total State revenues in FY 2011 are still 14.70 percent lower than FY 2008, the year that South Carolina last met the maintenance of effort requirement. Even though the State's revenues increased by 2.58 percent between FY 2010 and FY 2011, the State provided 2.46 percent less in financial support for special education and related services in FY 2011 than in FY 2010 and 18.37 percent less than its required level of effort. The 2.46 percent reduction in financial support for special education and related services from the FY 2010 level is a larger percentage cut than the reduction in total State appropriations, which were cut by 0.65 percent from FY 2010 to FY 2011.

Moreover, the State's revenue projections indicate that the State expects to have sufficient funds available to maintain its required level of State financial support for special education and related services in FY 2011. Current revenue projections provided to the Department by the State demonstrate that the State anticipates \$6,225,067,605 in total State revenues for FY 2011.<sup>3</sup> These revenues exceed total appropriations by \$255,232,057 in FY 2011, an amount that is substantially higher than the amount by which the State failed to maintain financial support for special education and related services in FY 2011. We understand that revenue projections for FY 2011 have increased since the FY 2011 appropriations legislation was passed by the State legislature. We also carefully considered the State's position, discussed on May 4<sup>th</sup> and confirmed in your May 24, 2011 letter, that it did not increase its financial support for special education and related services once it passed its original budget for FY 2011 because it was not aware of its maintenance of effort shortfall until March 2011, and the surplus in FY 2011 was realized "outside of the budget cycle." While the Department is cognizant of the State's usual budget process, a shortfall in a State's required fiscal effort for special education and related

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<sup>3</sup> This figure is derived from the Board of Economic Advisors' May 12, 2011 estimate of \$5,958,897,625 in General Fund revenue, less the Tax Relief Trust Fund, in order to obtain a comparable figure to the one provided by the State in Attachment A of its May 24<sup>th</sup>, 2011 submission to the Department.

services may not be treated as an ordinary circumstance. In contrast to the information the State provided for FY 2010 with respect to its use of General Fund revenues, the State did not provide similar information for FY 2011. Rather, your May 24, 2011 letter merely stated that the General Assembly is debating the use of these funds and “until the budget process is completed...I cannot provide you with the exact manner in which these funds will be appropriated.”

The State has accumulated a surplus well beyond the size of its maintenance of effort shortfall and can rely on the existence of sufficient funds being available for special education and related services. Under these circumstances, the State must maintain financial support for special education and related services even if doing so requires the State to act outside of its normal legislative budget cycle. In short, the State has offered no fiscal or practical reason why the State did not - and could not *now* - make available an additional \$75,343,070 for special education and related services to meet its requirement under the IDEA to maintain fiscal effort in FY 2011. The State's fiscal situation at the end of FY 2011 is in stark contrast to the State's fiscal situation at the end of FY 2010. In FY 2011 the existence of a substantial surplus is certain, and the Department must consider it when weighing whether the State experienced an exceptional or uncontrollable circumstance. (The Department notes that, even if the State had not accumulated a substantial surplus in FY 2011, the State did not treat special education and related services equitably when compared to overall State appropriations. Accordingly, even if the State had not accumulated a substantial surplus, the Department would not have granted a waiver to the State permitting the State to cut special education and related services by 2.46 percent. Rather, based on the decrease in revenues when compared to the MOE base year and an examination of the proportionality of cuts to special education and related services compared to other appropriations, the Department would have granted a partial waiver to South Carolina of \$2,646,332, leaving a shortfall of \$72,696,737 for special education and related services for FY 2011.)

Therefore, while the State has not reached the level of revenue it had in 2008, because the State has a substantial surplus in FY 2011, accompanied by an increase in revenues from the prior year, the Department finds that the State has not experienced an “exceptional or uncontrollable” circumstance that prevents it from meeting its required level of State financial support in FY 2011. Accordingly, we have determined it would not be equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) that would permit the State to reduce financial support for special education and related services by \$75,343,070 for FY 2011.

#### Summary

When a State fails to maintain State financial support at the level required by law, the IDEA directs that the “Secretary shall reduce the allocation of funds under section 611 of the IDEA for any fiscal year following the fiscal year for which the State fails to comply with the requirement” to maintain effort “by the same amount by which the State fails to meet the requirement.” 20 U.S.C. §1412(a)(18)(B) and 34 CFR §300.163(b). Accordingly, unless the State provides confirmation in writing to the Department that it has made available an additional \$75,343,070 in State financial support for special education and related services for FY 2011, the Department will reduce the State's section 611 allocation by \$75,343,070, in addition to the \$36,202,909 by which the State failed to maintain effort in FY 2010, for a total of \$111,545,979. Because of the Department's concern over this matter, several Department officials reached out to State officials

during the week of June 6<sup>th</sup> to alert the State to the Department's decision and to encourage the State to take action to restore funding for special education and related services for FY 2011, and offered the Department's technical assistance to the State to resolve this matter. We remain available to assist the State.

In addition, under 20 U.S.C. §1411(d)(3)(B)(i), (ii), and (iii), some of the State's minimum and maximum allocations for a fiscal year are based on the amount the State received for the preceding fiscal year. The reduced allocation that South Carolina will receive will be used as the amount the State received for the preceding fiscal year when the Department calculates the State's future grants.

Further, as discussed above, as provided in 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d), the amount of State financial support required of the State in FY 2012 is the same amount that would have been required in the absence of a waiver or a failure to maintain fiscal effort. We also want to make clear to the State that, when making decisions about its level of State support for special education and related services in FY 2012, the State should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services. Indeed, since the advent of the State's economic downturn, the State has had an opportunity to examine its sources and amounts of revenues and to plan accordingly, consistent with its obligations under the IDEA.

As you know, the State must ensure that LEAs do not count Part B IDEA ARRA funds as "State" or "local" funds for the purpose of determining whether an LEA has met its supplement not supplant and maintenance of effort requirements in 34 CFR §§300.202(a)(3) and 300.203. Further, if it is discovered, through means such as monitoring or auditing, that an LEA has not met these requirements, the Department will seek to recover funds from the State educational agency (SEA), in an amount equal to the amount by which the LEA did not meet the requirements. The amount recovered must be paid from non-Federal funds.

The Department will be undertaking additional monitoring of South Carolina's implementation of Part B of the IDEA to assess whether a FAPE is still being made available to all children with disabilities. In addition, in light of the South Carolina Advisory Council on the Education of Students with Disabilities' duties under 20 U.S.C. §1412(a)(21)(D), particularly its duty under 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter.

To ensure that the public is fully informed regarding the granting of these waivers, OSEP requires the SEA to prominently post on its Web site the State's February 24, 2010 and May 9, 2011 letters to the Department and this letter. In addition, OSEP is requiring the State to report to your OSEP State Contact on August 1, 2011, and December 1, 2011, responses to the following:

1. What action is the State taking, or did the State take, to ensure that children with disabilities are receiving a FAPE during the current school year (2010-2011), including monitoring and reviewing complaints filed or hearings requested? and
2. How will the State communicate with stakeholders regarding the waiver request and the State's actions to ensure that all eligible children with disabilities are receiving a FAPE?

Page 8 – Honorable Dr. Mitchell M. Zais

We appreciate your commitment to serving children with disabilities and look forward to our continued collaboration on their behalf.

Sincerely,

A handwritten signature in black ink that reads "Alexa Posny". The signature is written in a cursive style with a large, looping initial "A".

Alexa Posny, Ph.D.

Attachment

cc: South Carolina Advisory Council on the Education of Students with Disabilities

South Carolina IDEA MOE Waiver Request Data

	2007-2008 SFY 2008	2008-2009 SFY 2009	% change prior year	2009-2010 SFY 2010	% change prior year	2010-2011 SFY 2011	% change prior year	% change FY 2008
<b>REVENUES</b>								
General Fund	\$ 6,392,894,438	\$ 5,544,172,770	-12.73%	\$ 5,241,895,775	-4.71%	\$ 5,414,017,513	2.58%	-14.70%
Lottery	\$ 2,694,412,217	\$ 2,629,989,955		\$ 2,754,581,138		\$ 2,569,000,000		
Education Improvement Act	\$ 635,702,264	\$ 563,077,910		\$ 551,393,000		\$ 566,050,193		
<b>TOTAL REVENUES</b>	\$ 7,297,577,859	\$ 6,568,234,735	-12.73%	\$ 6,008,411,913	-4.71%	\$ 6,275,067,637	2.58%	-14.70%
<b>APPROPRIATIONS</b>								
General Fund	\$ 6,797,675,103	\$ 5,487,362,921	-18.66%	\$ 5,215,000,212	-4.71%	\$ 5,191,045,141		
Lottery	\$ 374,138,374	\$ 273,760,576	-26.83%	\$ 262,027,686		\$ 257,716,346		
Education Improvement Act	\$ 659,375,090	\$ 535,191,538	-18.38%	\$ 531,207,880		\$ 522,213,197		
<b>TOTAL APPROPRIATIONS</b>	\$ 7,529,678,474	\$ 6,498,215,015	-13.69%	\$ 6,008,595,878	-7.55%	\$ 5,909,315,534	-0.65%	-20.72%
<b>STATE FINANCIAL SUPPORT (per capita calculation)</b>								
IDEA MOE BASE FY 08	\$ 424,311,879	\$ 416,803,807	-1.80%	\$ 413,890,247		\$ 410,232,370		
FY IDEA EFFORT	\$ 424,311,879	\$ 396,493,685	-4.87%	\$ 445,807,722	12.02%	\$ 443,989,301	-0.41%	-2.46%
<b>MOE DEFICIT</b>	\$ -	\$ (20,312,122)		\$ (67,402,525)		\$ (75,343,079)		Total Shortfall \$ (16,057,717)
<b>WAIVED MOE SHORTFALL</b>	\$ -	\$ (20,312,122)		\$ (67,402,525)		\$ (75,343,079)		Total Waived \$ (14,111,738)
<b>PENALTY</b>	\$ -	\$ -		\$ -		\$ -		Total Penalty \$ (111,593,979)

**Attachment 5:**

Letter dated July 1, 2011, to South Carolina State Superintendent of Education Mitchell (Mick) Zais from Melody Musgrove, Director, Office of Special Education Program, U.S. Department of Education



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

JUL - 1 2011

Honorable Mitchell M. Zais  
South Carolina State Department of Education  
1429 Senate Street, Room 1006  
Columbia, South Carolina 29201-3799

Dear Dr. Zais:

We have approved your State's application for Federal Fiscal Year (FFY) 2011 funds under Part B of the Individuals with Disabilities Education Act (IDEA Part B). Our approval is based on review of the application submitted by the South Carolina Department of Education (SCDE) to the U.S. Department of Education, Office of Special Education Programs (OSEP), on May 10, 2011 and June 16, 2011, including assurances provided in Section II and incorporated by reference to this letter as noted in Enclosure A.

Please note that as part of your application for FFY 2011, your State has made an assurance, pursuant to 34 CFR §80.11(e), that it will comply with all applicable Federal statutes and regulations in effect during the FFY 2011 grant period. Any changes made by the State, after OSEP approval, to information that is a part of a State's application, must meet the public participation requirements in 34 CFR §300.165.

Enclosed are the State's FFY 2011 grant awards for funds currently available under the Department of Defense and Full-Year Continuing Appropriations Act, 2011 -- P.L. 112-10 for the IDEA Part B Section 611 (Grants to States) and Section 619 (Preschool Grants) programs. These funds are available for obligation by States from July 1, 2011 through September 30, 2013 in accordance with 34 CFR §76.709.

The amount in your award for Section 619 represents the full amount of funds to which you are entitled. However, the amount shown in your award for the Section 611 program is only part of the total funds that will be awarded to you for FFY 2011. Of the \$11,482,200,578 appropriated for Section 611 in FFY 2011, \$2,889,817,578 is available for awards on July 1, 2011, and \$8,592,383,000 will be available for awards on October 1, 2011. Under the Section 611 formula, in a year in which the amount available for allocation to States decreases from the prior year, but is greater than the 1999 level, any amount available for allocation to States above the 1999 level is allocated based on the relative increases in funding that the States received between 1999 and the prior year.

The State failed to meet the requirement in Section 612(a)(18)(A) to maintain State financial support for special education and related services for FFY 2010 by \$36,202,909. The Department is required by Section 612(a)(18)(B) to reduce, in any fiscal year, the Grants to States awards of States that failed to meet this requirement by the amount the

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State failed to maintain effort. We will be working with your State to determine when the State's allocation will be reduced in order to provide the State with an opportunity to plan for the reduction and to mitigate the risk that students with disabilities will be adversely affected.

For FFY 2011, the appropriation for the Preschool Grants program is \$373,350,802. Under the Section 619 formula in a year in which the amount available for allocation to States decreases from the prior year, but is greater than the 1997 level, any amount available for allocation to States above the 1997 level is allocated based on the relative increases in funding that the States received between 1997 and the prior year.

Enclosure B provides a short description of how Section 611 funds were allocated and how those funds can be used. In addition, Table I in Enclosure B shows funding levels for distribution of Section 611 funds and the parameters for within-State allocations.

Enclosure C provides a short description of how Section 619 funds were allocated and how those funds can be used. In addition, Table II in Enclosure C shows State-by-State funding levels for distribution of Section 619 funds.

Section 611(e)(1)(C) of the IDEA provides that “[p]rior to expenditure of funds under this paragraph [section 611(e)(1) concerning funds for State administration], the State shall certify to the Secretary that the arrangements to establish responsibility for services pursuant to section 612(a)(12)(A) are current.” We read this provision to mean that if a State does not have interagency agreements or other arrangements in place to establish responsibility for the provision of services, the State may not expend funds available to the State under section 611(e)(1) [State administration funds] until the State has these agreements or arrangements in place.

Under section 608(a)(2) of the IDEA, each State that receives funds under IDEA Part B is required to inform in writing local educational agencies located in the State of any State-imposed rule, regulation, or policy that is not required by IDEA or Federal regulations. A State may use the same list of State-imposed rules, regulations, and policies that it was required to submit to the Department in Section IV of its IDEA Part B application for this purpose.

The enclosed grant awards of FFY 2011 funds are made with the continued understanding that this Office may, from time to time, require clarification of information within your application, if necessary. These inquiries may be necessary to allow us to appropriately carry out our administrative responsibilities related to IDEA Part B.

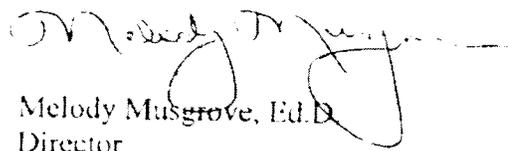
As a reminder, within 30 days of July 1, 2011, all prime recipients of IDEA (Part B or Part C) funds must report subaward information as required by the Federal Financial

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Accountability and Transparency Act of 2006 (FFATA), as amended in 2008. FFATA guidance is found at <http://www2.ed.gov/policy/gen/leg/recovery/rms-web-conferences.html>. Please contact your State's Recovery Act Facilitator if you have further questions.

We appreciate your ongoing commitment to the provision of quality educational services to children with disabilities.

Sincerely,



Melody Musgrove, Ed.D.  
Director  
Office of Special Education Programs

Enclosures

- Enclosure A
- Enclosure B
- Enclosure C

cc: State Director of Special Education

**Attachment 6:**

Appeal dated August 1, 2011, to Jenny McClendon, Docket Clerk, Office of Hearings and Appeals, U.S. Department of Education from Shelly Bezanson Kelly, General Counsel, South Carolina Department of Education



STATE OF SOUTH CAROLINA  
DEPARTMENT OF EDUCATION

Mick Zais  
Superintendent

1429 Senate Street  
Columbia, South Carolina 29201

August 1, 2011

Ms. Jenny McClendon, Docket Clerk  
Office of Hearings and Appeals  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202-4611

Re: In the Matter of South Carolina Department of Education Appeal of Denial of  
Waiver Request/Reduction in Funds

Dear Ms. McClendon:

Enclosed, please find the original and 1 copy of both our Appeal of Denial of Waiver  
Request/Reduction in Funds and Record of Appeal in the above-referenced matter.

A copy of our Brief and Record of Appeal are being served to USDE Secretary Arne  
Duncan via FedEx.

Thank you for your consideration of our Appeal.

Very truly yours,

A handwritten signature in black ink, appearing to read "Shelly Bezarson Kelly", written over a horizontal line.

Shelly Bezarson Kelly  
General Counsel

SBK/npr  
Enclosures

cc: The Honorable Arnie Duncan

United States Department of Education  
Office of Administrative Law Judges

IN THE MATTER OF )  
)  
) ) Appeal of Denial of Waiver Request/  
) Reduction in Funds  
South Carolina )  
)

The South Carolina Department of Education (SCDE) requests that the Office of Administrative Law Judges (OALJ) review the determination by Assistant Secretary Alexa Posny, Office of Special Education and Rehabilitative Services, that the State of South Carolina should not be granted a waiver of the requirement to meet the maintenance of fiscal effort (MOE) for the 2009–10 school year, pursuant to 20 USC § 1412(a)(18) and 34 CFR § 300.163, and the determination by the United States Department of Education (ED) to permanently reduce South Carolina’s allocation under the Individuals with Disabilities Education Act (IDEA) by \$36,202,909 annually.

**ISSUES ON APPEAL**

1. The ED failed to provide the SCDE with notice and opportunity for a hearing regarding the loss of \$36,202,909 in IDEA funding.
2. Assistant Secretary Posny erred in failing to grant the SCDE a complete waiver of the MOE requirement for the 2009–10 fiscal year.
3. The ED erred in not considering South Carolina’s level of services provided to students with disabilities.
4. The ED erred in its interpretation of 34 CFR § 300.163(d) by finding that South Carolina’s IDEA allocation would be forever reduced by \$36,202,909.

## FACTS

Like many states, South Carolina experienced unprecedented fiscal decline between the years 2007–08 and 2009–10. Considering three sources of revenue, General Fund, Lottery, and the Education Improvement Act (EIA), the state collected \$1,229,125,946 *less* in revenue in 2009–10 than in 2007–08. The significance of the 2007–08 fiscal year is that it is the last fiscal year in which South Carolina met its MOE requirement under the IDEA; therefore, IDEA MOE 2007–08 is the base year to which comparison for MOE is made. South Carolina submitted a waiver request to the ED for the fiscal years 2008–09, 2009–10, and 2010–11.<sup>1</sup> (R 1-2)

South Carolina sought a waiver of the MOE requirement for those fiscal years based on the provisions of 20 USC § 1412(a)(18) and 34 CFR § 300.163(c)(1) (2006) that “granting a waiver would be equitable due to exceptional or uncontrollable circumstance such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State.” The IDEA provides at 20 USC § 1412(a)(18)(c) as follows:

(18) Maintenance of State financial support

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that--

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a *precipitous and unforeseen decline in the financial resources of the State*; (Emphasis added).

South Carolina experienced a precipitous and unforeseen decline in revenue in 2008–09, which coincided with the unprecedented drop in housing values, high rates of foreclosures, and

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<sup>1</sup>The SCDE requested a waiver of MOE for state fiscal year 2009–10 on February 26, 2010. (R 1) On May 9, 2011, an additional request was made to waive the MOE requirement for state fiscal years 2008–09 and 2010–11. (R 2)

the stock market crash. The first fiscal year that South Carolina did not meet MOE was in the 2008–09 year, just as the country was starting its fiscal decline. The decline continued and compounded in 2009–10, and the state of South Carolina applied for and received American Recovery and Reinvestment Act funds for Title I and the IDEA, as well as State Fiscal Stabilization Funds.

By letter dated June 17, 2011, the ED granted a waiver for 2008–09 and denied the waiver request for 2010–11. (R 35-43). It also granted a partial waiver for the 2009–10 year—denying the amount of \$36,202,909. This appeal only involves the partial approval of the waiver for the 2009–10 fiscal year.

After receiving notification of the denial for the 2010–11 year on June 17, 2011, state Superintendent Mitchell M. Zais, PhD, worked with the South Carolina General Assembly to seek permission to transfer \$75,343,070 in funding to school districts earmarked for special education. Since the end of the state’s fiscal year was quickly approaching, the parties involved worked to ensure that surplus funds which were discovered late in the fiscal year could be used for this purpose. (R 44-45). South Carolina was able to transfer these funds and notified the ED that the transfer occurred. (R 46). The ED sent a letter acknowledging that South Carolina met the MOE requirements for 2010–11. (R 50)

#### South Carolina’s Budgetary Process

The South Carolina General Assembly meets annually. Its session begins the second Tuesday in January and concludes the first Thursday in June. South Carolina operates a July 1 through June 30 fiscal year, and the state’s budget for the following fiscal year is typically debated and adopted by May or June. As stipulated in the South Carolina Constitution, the state

must have a balanced budget. (S.C. Const. of 1895, art. X, § 7 (2009) provides “(a) The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue.”). To ensure a balanced budget safeguards are built into the budgetary process.

South Carolina relies on the Board of Economic Advisors (BEA) in determining the amount of revenue that the state may appropriate. This BEA is established by statute and its duties include forecasting state revenues for the next fiscal year. S.C. Code Ann. § 11-9-880 (2011). The General Assembly uses the BEA’s forecasted revenues when developing the state’s budget. Consistent with statutory and Constitutional requirements, the General Assembly cannot exceed the BEA’s estimate when appropriating revenues.

#### 2009–10 Budget Year

The 2009–10 final budget figures improved upon that which was projected by the BEA. (R 13 & 22). This improvement was considered by the ED in rejecting South Carolina’s request in the amount of \$36,202,909. An overview of the 2009–10 budget year is important to demonstrate the state of South Carolina’s economy and the uncertainty that the SCDE was faced with during that time. The Appropriations Act budgeted revenues for 2009–10 were originally \$5,552,002,165; however, actual General Fund revenues were \$5,241,895,775—over \$310,000,000 less than what was budgeted. (R 13). Because of anticipated shortfalls and revisions of the revenue projections by the BEA, the state Budget and Control Board issued two mid-year budget cuts (4.04 percent in September 2009 and 5 percent in December 2009) and applied \$127,847,888 from the state’s Capital Reserve Fund against the projected state shortfall. (R 13). The budget cuts and use of the Capital Reserve Fund created a \$566,527,922 “savings”

to the state. (R 13). The state then had to expend \$185,420,932 to cover expenses required by statute or proviso, some of which was to liquidate a \$98,216,617 operating deficit from the previous fiscal year. After these payments were made, there was a net budget (not revenue) surplus of \$71,000,600. (R 13). Note, however, that this budget surplus was not due to an increase in revenue, but was a result of across the board budget cuts and use of the Capital Reserve Fund to avoid violating the state Constitution.

### ARGUMENT

**1. The ED failed to provide the SCDE with notice and opportunity for a hearing regarding the loss of \$36,202,909 in IDEA funding.**

The SCDE received notification that its waiver request was partially denied on June 17, 2011, and on July 1, 2011, the SCDE received a letter from Melody Musgrove, EdD, Director, Office of Special Education Programs, approving the state's application for the federal fiscal year 2011. (R 35-43 & 47-49). In the July 1, 2011, letter, Dr. Musgrove informed South Carolina that:

The State failed to meet the requirements in Section 612(a)(18)(A) to maintain State financial support for special education and related services for FFY 2010 by \$36,202,909. The Department is required by Section 612(a)(18)(B) to reduce, in any fiscal year, the Grants to States awards of States that failed to meet this requirement by the amount the State Failed to maintain effort." (R 47-48).

Neither letter provided the SCDE with notification of rights to appeal the determination. From its review of the IDEA and the General Education Provisions Act (GEPA), the SCDE expected notification from the ED of its right to appeal this determination. On July 13, 2011, within thirty days from the June 17, 2011, letter, the SCDE's General Counsel, Shelly Bezanson Kelly, sent an e-mail to Joan Bardee, Esquire, of the ED Office of General Counsel, inquiring about appeal rights. (R 51-53). Ms. Bardee responded on July 20, 2011, that nothing bars the SCDE from asking for a reconsideration but that since the ED is not "withholding" money from the SCDE,

the ED does not have to provide the SCDE with notice and an opportunity for a hearing because “the action to reduce the amount of the State’s allocation is not a withholding.” (R 51-53). Ms. Kelly followed with a direct question as to what appeal rights applied, to which Ms. Bardee wrote “the IDEA does not include a provision for appealing decisions under Section 612(a)(18)(C).” (R 51-53). While the ED, through its attorney, maintains that the SCDE does not have a hearing right because the determination with regard to the waiver was not what they consider a “withholding, the comments to the regulations imply that the intent was to provide hearing rights to states. The comments to the IDEA regulation address the hearing rights: “When the Secretary proposes to deny a State’s eligibility to receive a grant under Part B of the Act, withhold funds, or take other enforcement action, it is important to all parties that the process through which those issues will be decided is clearly described, so that time, money, and effort are not spent resolving procedural questions instead of the underlying issues. For these reasons, we believe it is important to retain §§ 300.179 through 300.183 in the regulations.” Federal Register, Vol. 71, No. 156, August 14, 2006, p. 46622. (Emphasis added). It is hard to imagine how reducing a state’s allocation by \$36,202,909 could not be considered a withholding or an enforcement action.

While the SCDE was informed by Ms. Bardee that no appeal right exist; the SCDE asserts that in the absence of a right to appeal under the IDEA, which the SCDE believes exists, GEPA is controlling and hereby files this appeal under both the provisions of 34 CFR § 300.179 or in the alternative 20 USC § 1234d. The SCDE believes that the ED is in noncompliance with the notice provisions of 20 USC § 1234d because its letter dated July 1, 2011, stating that \$36,202,909 would be withheld from future payments, did not provide the notice provisions required by 20 USC § 1234. (R 47-49). The SCDE, nevertheless, wishes to reserve its appeal

rights and hereby files this petition, absent the receipt of the notice required by law. However, by filing this appeal, the SCDE does not waive its notice rights that are afforded to it under federal law.

Assuming *arguendo* that the IDEA does not provide appeal rights to a state when funds are being reduced, the SCDE believes the Office of Administrative Law Judges (OALJ) decision in *The Matter of State of California*, Docket No. 09-05-R (R 54-65), is controlling in establishing a right to appeal the denial of South Carolina's request for a waiver of the MOE requirements and subsequent reduction in funding in the amount of \$36,202,909. In that decision, the OALJ reviewed a decision by the Secretary to withhold funds under the Elementary and Secondary Education Act (ESEA). In that case the Assistant Secretary argued that the OALJ had no authority to review the withholding action in that case "as its jurisdiction does not include a withholding action under Section 1111(g)(2)." The OALJ held that while jurisdiction was not specifically conferred in that particular statute, the general law 20 USC § 1234d applied. In that ruling, the OALJ stated "Although it is difficult to conceive that Congress would permit the Secretary to act without notice and a hearing under Section 6311(g)(2), it is even more so in matters involving tens of millions of dollars." Here, the Secretary is attempting to withhold over \$36 million from South Carolina without giving South Carolina notice of an opportunity to be heard.

As such, we submit that the OALJ has jurisdiction to hearing this Petition for Review and we submit such, even though South Carolina has not received notice of its rights.

**2. Assistant Secretary Posny erred in failing to grant the SCDE a complete waiver of the MOE for the 2009–10 Fiscal Year.**

The SCDE appreciates the speed at which the ED addressed its 2010–11 waiver request. The SCDE made the request on May 9, 2011, and on June 17, 2011, received a definitive answer.

Even though the answer came only two weeks prior to the end of the fiscal year, it gave the SCDE time to approach the General Assembly and request special permission to use funds that were not specifically appropriated for MOE to be transferred to meet this obligation. That permission was granted and funds were allocated to the school districts in time to meet the 2010–11 MOE requirements. The timing of the ED’s response gave the SCDE time to address the situation.

Juxtaposed, the SCDE submitted the 2009–10 waiver request on February 26, 2010. Had the ED acted upon that request in the same manner as it did the 2010–11 request, the SCDE would have had time to notify the General Assembly of the need for additional funds. While there is no way to ascertain whether funding would have been found because the financial environment was not as promising in April 2010 as it was in May 2011 (when the 2010-2011 request was made), an expedited response would have given South Carolina the opportunity to address the shortfall. The failure of the ED to have procedures in place to adequately address the MOE waiver request detrimentally impacted South Carolina’s ability to rectify the funding situation.

During the process, the ED and the SCDE staff met, spoke via conference call, and corresponded via e-mail at least twenty-five (25) times. At no point during these meetings was there any indication that the ED would not grant the waiver.

A review of the decisions with regard to other waiver requests demonstrates that in no other case did the ED delay in making the final determination as it did in South Carolina’s. In reviewing denials, the ED issued a letter after one to three months of consideration—except to South Carolina where the determination took sixteen months. (R 66-67). Because of the promptness in addressing those denials, those states had time to plan. Compare that to the

sixteen months that the ED took to reject South Carolina's request. There was no mechanism to correct the MOE deficiency because of this delay.

### **Merits of the Waiver Request**

The Secretary has the discretion to grant South Carolina's request for a waiver for the 2009–10 fiscal year. Regulation 34 CFR § 300.163(c)(1) grants the Secretary authority to grant a waiver of the requirement to maintain fiscal effort if the Secretary determines that "granting a waiver would be equitable due to the exceptional or uncontrollable circumstance such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State." The regulation provides, however, that in subsequent years the fiscal support must meet the level of the year that the state last met fiscal effort. South Carolina last met MOE in the 2007–2008 Fiscal Year<sup>2</sup>. When reviewing South Carolina's request, Dr. Posny used the 2008–2009 FY for comparison instead of the base funding year of 2007–2008 fiscal year. We believe that Dr. Posny erred by using that year for comparison. Regulation 34 CFR § 300.163 requires that the state use the last year in which the state met MOE as the base for establishing the level of effort required. Since that year is used as the comparison year for establishing the MOE, it should also be the year that is used for fiscal comparisons when determining whether the waiver is "equitable" under 34 CFR § 300.163. South Carolina provided clear evidence that when compared to the 2007–2008 fiscal year, expenditures for students with disabilities were not disproportionately reduced as compared to state expenditures in general. The chart that was attached to Dr. Posny's letter clearly shows that the percentage change in funding levels for IDEA MOE from 2007–2008 to 2009–10 was -16.31%, as compared to -20.20% in total appropriations and -16.31% in revenue overall. (R 43). However, when compared to the previous year, the numbers reflect a greater impact on IDEA MOE. This comparison to the

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<sup>2</sup> The ED granted a waiver of MOE for the 2008–09 year.

previous year was an abuse of discretion by the Secretary and does not accurately reflect the true state of funding for South Carolina. By the Secretary's ruling, South Carolina is being punished for attempting to hold IDEA MOE as harmless as possible in the 2008–09 Fiscal Year. In that year, IDEA MOE only saw a -4.87% decrease while appropriations in general saw a -13.69% decrease.

The ED erred in considering the perceived "surplus" in the state's budget at the close of the 2009–10 fiscal year. South Carolina's decision is unique when compared to other denials in that the ED's decision came after the end of the fiscal year, yet the ED used the "surplus" against South Carolina. As explained in the May 24, 2011, letter, the surplus was not known by the state until the close of the books in August 2010—after the close of the fiscal year. All revenue forecasts that year were bleak. The state started the year with an Appropriations Act budgeted revenues of \$5,552,002,165, but the actual revenues were over \$300 million less at \$5,241,895,775. (R 13). The state's Budget and Control Board initiated two statewide budget cuts and applied Capital Reserve Funds against the projected revenue shortfall, in essence closing the gap by \$566,527,922. By the close of the fiscal year, the state did have a net budgetary surplus of \$71,000,600. Dr. Posny considered this "surplus" when rejecting \$36,202,909 of South Carolina's request. This budget surplus was partially created by borrowing against the Capital Reserve fund and budget cuts. It was not a surplus in revenue. Revenue was down—by \$300 million. It is a budgetary surplus—not a revenue surplus.

When rejecting South Carolina's request by \$36,202,909, the ED overemphasized what it saw as revenue increases in the EIA and Lottery accounts. South Carolina recognized an increase in both Lottery and EIA from that which was *appropriated* for 2009–10. EIA funding is derived from a one penny sales tax. By 2009–10 the annual EIA revenues decreased by over

\$800 million *per year*, in just two years. The final 2009–10 EIA revenue figures were approximately \$10,000,000 less than the previous year. The ED erred in considering and emphasizing the remaining EIA balances in rejecting South Carolina's. As late as April 14, 2010, the BEA estimated that the EIA revenues would be \$521,090,107. (R 22).<sup>3</sup> Based on the BEA estimate, the SCDE could not have asked for EIA funds to apply towards IDEA MOE. The Lottery account also closed with an increase in revenue during the 2009–10. When comparing the Lottery funds depicted on the South Carolina—Financial Data chart, 2009–10 seems to be the outlier.<sup>4</sup> (R 43). These revenues greatly dropped in 2010–11. These increased Lottery funds were not anticipated and were not appropriated as such.

Neither the IDEA or its regulations mention surpluses with regard to granting waivers of MOE. Based on the ED's logic in emphasizing budget or unanticipated revenue surpluses, a state would have to run a deficit to be able to qualify for a waiver. South Carolina is prohibited from appropriating a budget based on a projected deficit. The South Carolina General Assembly, as explained earlier, must appropriate funds based on revenue projections that it receives from the BEA. To penalize South Carolina after the fact for having an unanticipated budget surplus, which at the time of the final ruling by the ED could not be used towards MOE since it was outside of the fiscal year, is an abuse of discretion. Additionally, the ED is basically stating that 100 percent of all budget surpluses must be allocated towards IDEA MOE. This logic ignores the other spending needs of the state.

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<sup>3</sup> The 2009-10 EIA appropriation was \$531,507,880. (R 43).

<sup>4</sup> In 2007–2008 Lottery revenues were \$269,841,217; 2008–09 they were \$262,989,055; and in 2010-2011 were estimated at \$256,000,000. (R 43). By this comparison the 2009–10 figures were unusual.

**3. The ED erred in not considering South Carolina's level of services provided to students with disabilities**

Despite the shortfall in the state's appropriated funding for special education and related services for federal fiscal year (FFY) 2009<sup>5</sup> the ED determined that, under the IDEA § 616(d)(2)(A)(i), South Carolina met the requirements of Part B of the IDEA. As indicated in the ED's June 20, 2011, letter to Dr. Zais, this determination was based on the totality of the state's data and information, including the state's FFY 2009 Annual Performance Report (APR) and revised State Performance Plan (SPP), other state-reported data, and other publicly available information.

Specific factors affecting the determination made by the Office of Special Education Programs (OSEP) that South Carolina meets requirements under IDEA section 616(d) include that: (1) South Carolina provided valid and reliable FFY 2009 data reflecting the measurement for each indicator; (2) South Carolina reported high levels of compliance or correction for Indicators 9, 10, 11, 12, 16, 17, and 20; and (3) South Carolina reported under Indicator 15 both a high level of compliance in timely correcting FFY 2008 findings of noncompliance and that it verified the correction of FFY 2008 findings of noncompliance consistent with the guidance in OSEP Memorandum 09-02, dated October 17, 2008. We commend South Carolina for its performance in these areas.

(R 68-90).

More specifically, the state met the established 0 percent target for Indicator 9, with no school district identified with disproportionate representation of racial and ethnic groups in special education and related services that was the result of inappropriate identification, and continued to meet the 100 percent compliance requirements for the timelines for the investigation of complaints for Indicators 16 and conducting due process hearings for Indicator 17. The state also maintained its FFY 2008 compliance level at 100 percent for the reporting of accurate and reliable data for Indicator 20.

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<sup>5</sup> Note this reference is to the federal fiscal year which includes the state 2009-10 fiscal year.

For Indicators 10, 11, and 12, the state evidenced substantial compliance. The percent of school districts with disproportionate representation of racial and ethnic groups in specific disability categories that was the result of inappropriate identification was 4.5 percent (four out of eighty-six school districts). The percent of children who were evaluated within 60 days of receiving parental consent for initial evaluation increased from the FFY 2008 rate of 96 percent to 99.16 percent. Additionally, the percent of children referred by Part C prior to age 3, who were found eligible for Part B and had an individualized education program (IEP) developed and implemented by their third birthdays, was 96.7 percent, which was an increased level of compliance from the 93 percent reported for FFY 2008.

In addition to these gains, the state improved its performance relative to its general supervision system under Indicator 15 with a compliance rating that rose from 77 to 92 percent. The state exceeded its targets relative to the increase in the percent of children with IEPs served inside the regular class 80 percent or more of the day and the decrease in the percent of children with IEPs served in separate schools, residential facilities, or homebound/hospital placements. With technical assistance and guidance from the SCDE, the state, through efforts by its LEAs, also met a number of other targets for FFY 2009.

The ED should consider its determination under the IDEA § 616(d)(2)(A)(i), that South Carolina met the requirements of Part B of the IDEA for the 2009–10 SFY, in determining whether to grant a waiver.

- 4. The ED erred in its interpretation of IDEA Regulation 34 CFR § 300.163(b) by finding that South Carolina's IDEA allocation would be forever reduced by \$36,202,909.**

IDEA Regulation 34 CFR § 300.163(b) states, "*Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under Section 611 of the Act for any fiscal

year following the fiscal year in which the state fails to comply with the requirement of paragraph (a) of this section by the same amount by which the state fails to meet the requirement.”<sup>6</sup> The SCDE maintains that this provision requires that the allocation be reduced once, not annually, in perpetuity. The plain reading of the statute states that the reduction be taken for “any fiscal year,” not all fiscal years. If Congress intended for this impact to be lasting, it would have clearly stated the reduction would be permanent. In fact, the ED appears to have different interpretations of the impact of this language. In her letter to the SCDE notifying the SCDE of the reduction, Dr. Musgrove states:

The State failed to meet the requirements in § 612(a)(18)(A) to maintain State financial support for special education and related services for FFY 2010 by \$36,202,909. The Department is required by Section 612(a)(18)(B) to reduce, in any fiscal year, the Grants to States awards of States that failed to meet this requirement by the amount the State failed to maintain effort. *We will be working with your State to determine when the State’s allocation will be reduced in order to provide the State with an opportunity to plan for the reduction* and to mitigate the risk that students with disabilities will be adversely affected.

(R 48, Emphasis added).

South Carolina was informed that the reduction will occur in all future fiscal years. This interpretation is contrary to the statement made in Musgrove’s letter and to the plain reading of the statute. Dr. Musgrove’s offer to work to determine when the allocation will be reduced is an admission by the ED that this reduction is not continuous. The inference is that perhaps the ED could spread the reduction over more than one fiscal year. If not, the inquiry becomes what is the benefit of the offer? The state does not receive these funds in a lump sum manner but is allocated those funds to be drawn down when spent. If the statute and regulation required lasting

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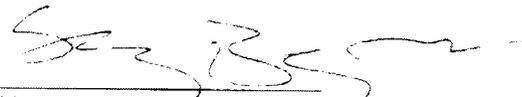
<sup>6</sup> The statutory language is “The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.” 20 USC § 612(a)(18)(B).

reductions, the ED would simply have informed the SCDE that the allocation would be reduced. No other interpretation is plausible regarding the ED's offer to mitigate.

### CONCLUSION

The SCDE respectfully requests that the OALJ grant a review of this petition under the provisions of 34 CFR 300.179, or in the alternative GEPA, 20 USC § 1234d, and reverse Assistant Secretary Posny's decision to grant South Carolina only a partial waiver for the 2009–10 state fiscal year and the determination that South Carolina's annual allocation will be reduced by \$36,202,909. The SCDE also seeks a declaration that a reduction, if ordered, be taken in one fiscal year only.

Submitted by:



Shelly Bezanson Kelly, USDC #10125  
Barbara Drayton, USDC # 7066

Attorneys for the SC Department of Education

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August 1, 2011  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Brief and Record on Appeal was served upon the following via FedEx Priority Overnight Service:

Office of Hearings and Appeals (2 copies)  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202-4611

The Honorable Arne Duncan (1 copy)  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

This is the 1<sup>st</sup> day of August, 2011.



---

Noelle Redd  
Administrative Assistant  
South Carolina Department of Education  
Office of General Counsel  
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Ph: 803-734-8783  
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**Attachment 7:**

Letter dated December 15, 2011, to South Carolina State Superintendent of Education Mitchell (Mick) Zais from Anthony W. Miller, Deputy Secretary, U.S. Department of Education



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

December 15, 2011

Honorable Mitchell M. Zais  
Superintendent  
State Department of Education  
1006 Rutledge Building  
1429 Senate Street  
Columbia, South Carolina 29201

Dear Superintendent Zais:

This is in response to the September 28, 2011, letter from Shelly Bezanson Kelly, General Counsel for the South Carolina State Department of Education. In that letter, and accompanying submission, the State of South Carolina seeks reconsideration of the June 17, 2011, decision by Alexa Posny, Assistant Secretary for Special Education and Rehabilitative Services (OSERS),<sup>1</sup> to grant a partial waiver to South Carolina related to the maintenance of State financial support ("maintenance of effort" or "MOE") for State fiscal year (FY) 2010 for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18) and 34 CFR §300.163.

Assistant Secretary Posny made the determination in the June 17, 2011, letter pursuant to a delegation of authority to her by the Secretary of the U.S. Department of Education. As such, the Department considered the June 17, 2011, letter to be the final agency action on this matter. However, there is nothing in the IDEA that bars reconsideration of that decision. As such, I assumed responsibility for handling this matter and carefully reviewed the State's September 28, 2011, submission and considered all of the State's information and concerns. Based on this review I am affirming the earlier decision. I am incorporating by reference the June 17, 2011, and August 9, 2011, letters to the State (attached) and am clarifying that this letter, with all attachments, is the final agency action on this matter.

Because the State raised some questions about the timing of the decision to grant the State a partial waiver for State FY 2010, I am addressing those questions in this letter. The State first requested a waiver for "FY 2009" by letter dated February 26, 2010. (However, the Department did not receive that letter until April 22, 2010.) The State's FY 2009 is July 1, 2008-June 30, 2009. Thereafter, the State clarified that the request for a waiver was for the time period covering July 1, 2009-June 30, 2010, which is the State's State FY 2010. The request for a waiver for State FY 2010 did not contain sufficient information to support its request.<sup>2</sup> Therefore, the Department actively worked with the State to collect the necessary data and information, including sending two Department staff to the State on May 4, 2011, to provide

<sup>1</sup> Assistant Secretary Posny has recused herself from further participation in this matter. I am handling this matter in her place.

<sup>2</sup> Attached is Assistant Secretary Posny's February 3, 2011, letter to you that expressed her concern about the State's delay in providing information to support its request for a waiver.

technical assistance and help the State assemble the appropriate information. The State submitted final data and information to OSERS related to its request for a waiver for State FY 2010 on May 24, 2011.

The State based its request for a waiver for State FY 2010 on "a severe and precipitous decline in State revenue which is outside the control of the South Carolina Department of Education (SCDE) and the state legislature." In a letter dated June 17, 2011, OSERS determined that it was equitable to grant a partial waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for State FY 2010 by \$31,199,616. In other words, the June 17<sup>th</sup> letter concurred with the State's characterization of its financial situation in State FY 2010 and Assistant Secretary Posny concluded that the State had a precipitous and unforeseen decline in its financial resources that year.

Assistant Secretary Posny granted a partial waiver for State FY 2010, rather than the full waiver requested by the State, because in that year the State did not treat special education equitably compared to other State programs. OSERS examined the State's data to determine if the State reduced the percentage of State financial support for special education and related services more or less than it reduced other State programs when compared to the prior fiscal year, State FY 2009. The data indicated that the State reduced State financial support for special education and related services by 12.02 percent but reduced appropriations for all State programs by only 7.55 percent. Accordingly, Assistant Secretary Posny granted a partial waiver to the State permitting the State to only reduce State financial support for special education and related services by 7.55 percent.

The IDEA provides discretion to the Department in determining what is "equitable" when granting a waiver. When exercising this discretion, we considered the purposes of the IDEA in general and in particular the purposes of the provision requiring States to maintain fiscal effort. OSERS concluded that, when determining whether the State experienced an exceptional or uncontrollable circumstance, such as the precipitous and unforeseen decline in the financial resources of the State, it should use the MOE base year (as well as the immediate prior fiscal year) as a basis for comparison because the level of revenues in the MOE base year supported the level of State financial support for special education and related services in that year. (OSERS considers other factors as well, such as the existence of a surplus, but those factors are not relevant to South Carolina for State FY 2010.)

Once OSERS determined that South Carolina experienced such an event in State FY 2010, OSERS then examined the percentage of the reduction in appropriations for special education and related services compared to the percentage of the reduction in appropriations for other State programs in order to determine whether the State treated special education equitably ("proportionality test"). The State's September 28<sup>th</sup> letter suggests that, in examining whether the State treated special education equitably, OSERS should exercise its discretion to compare appropriations made in State FY 2010 to State FY 2008 (rather than to State FY 2009). In other words, the State prefers that OSERS compare appropriations made in State FY 2010 with those made in State FY 2008 (the last year in which the State maintained effort (also known as the

“MOE base year”) rather than compare them to State FY 2009, the immediate prior fiscal year. OSERS compared these percentages to the reductions made in the immediate prior fiscal year, because this is the best method to protect the Federal interest in ensuring equitable treatment of State funding for special education and related services every year. The IDEA provides that, as a condition of eligibility for a grant each year, the State must ensure that a free appropriate public education (FAPE) is available to every eligible child with a disability who resides in the State during that year. The fact that the State reduced State financial support for special education and related services by a smaller percentage in State FY 2009 than it reduced appropriations for other State programs in that year did not provide any protection to the children with disabilities (or to local educational agency budgets) in State FY 2010.

Furthermore, using the MOE base year as the comparison point for proportionality tests would allow a State that protects special education funding in one year to dramatically reduce funding in subsequent years (with cuts at a much higher percentage than the percentage of reductions in overall appropriations) until the reductions in special education funding “catch up” to the overall percentage of reductions in appropriations. Allowing a State to reduce funds made available for special education and related services while increasing State overall appropriations (or reducing State overall appropriations by a lower percentage) would be inconsistent with the purposes of the IDEA, particularly “to ensure that all children with disabilities have available to them a [FAPE], [and] . . . to assist . . . localities, [and] educational service agencies . . . to provide for the education of all children with disabilities.” 20 U.S.C. § 1400(d).

The State also raised in its September 28<sup>th</sup> letter the role that its surplus (or excess revenues) in FY 2010 played in the June 17<sup>th</sup> decision. I am clarifying for the State that the existence of this surplus played no role in the decision to grant a partial waiver to the State, rather than the full amount as requested by the State. As noted in the June 17<sup>th</sup> letter:

Given that the excess revenues were less than the \$67,402,525 maintenance of effort shortfall and that the revenue forecasts in FY 2010 had been erratic, the surplus in FY 2010 is not inconsistent with our determination that the State experienced an exceptional or uncontrollable circumstance in FY 2010. To be clear, when weighing the equities of a waiver request for a fiscal year, particularly when the State had a surplus that year, the Department does not take a rigid formulaic approach. Rather, for FY 2010, the Department very carefully considered whether it was reasonable under all the circumstances facing the State in FY 2010 to maintain fiscal effort for special education and related services. We were persuaded by the fact that the surplus was small compared to the State’s overall budget and to the State’s maintenance of effort shortfall and that it was not clear to the State towards the end of FY 2010 how much of the surplus would actually be realized.

Therefore, although OSERS carefully examined all of the information concerning the State’s revenues and surplus in State FY 2010, OSERS ultimately decided that the amount of the surplus in the State that year was too small, and that it was not clear to the State towards the end of State FY 2010 how much of the surplus would actually be realized. Thus, as noted above, the surplus ultimately was not a factor in the decision.

In making the decision to grant a partial waiver for State FY 2010, OSERS considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). The State raised the issue of its determination of “meets requirements” for Federal Fiscal Year (FFY) 2009, which covers roughly the same period as State FY 2010. That determination was based on a specific set of factors (see enclosed document *How the Department Made Determinations under Section 616(d) of the Individuals with Disabilities Education Act in 2011: Part B*).<sup>3</sup> Although OSERS has the discretion to do so, it did not include a State’s compliance with the requirement to maintain fiscal effort in the determinations made in 2011 for FFY 2009, so that the State’s noncompliance with 20 U.S.C. § 1412(a)(18)(A) did not affect its determination in 2011.

Accordingly, based on all of the information discussed above and included in the June 17, 2011, letter, I am reaffirming the earlier decision that the State did not treat special education and related services in an equitable manner when compared to State agencies as a whole in State FY 2010. In conclusion, it would not be equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) that would permit the State to reduce State financial support for special education and related services by \$67,402,525 for State FY 2010. However, it is equitable to grant a partial waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for State FY 2010 by \$31,199,616, representing a 7.55 percent decrease from the amount required to be made available, adjusted to account for changes due to the State’s per capita calculation. This level brings the percentage decrease in State financial support for special education and related services in line with the percentage decrease in appropriations for the State as a whole.

The State’s submissions in support of its waiver request establish that it has failed to maintain financial support for special education and related services for State FY 2010 by \$36,202,909--the difference between the amount of financial support required to have been made available under this partial waiver (\$382,100,631) and the level made available by the State in State FY 2010 (\$345,897,722). Thus, the State has a \$36,202,909 shortfall in the amount of State financial support for State FY 2010.

The State’s September 28<sup>th</sup> request for reconsideration asked that the Department reconsider the decision “to permanently reduce South Carolina’s allocation” under the IDEA. To be clear, the State’s section 611 allocation will be reduced pursuant to 20 U.S.C. §1412(a)(18)(B) and 34 CFR §300.163(b) for only one year -- FFY 2012. However, under 20 U.S.C. §1411(d)(3)(B) and (4), which provides how the Department must distribute funds to the States, that reduction will

<sup>3</sup> In 2011, the Department did not consider a State’s data on “performance” indicators when making determinations, except to include whether the State’s data on those indicators was valid and reliable. Therefore, the State was considered to “meet requirements” even though its performance on many of the performance indicators was low. For example, the State’s reported data for the percentage of youth with individualized education programs (IEPs) who graduated from high school with a regular diploma went down to 42.9%; its percentage of districts with a disability subgroup (with the minimum “n” size) that met the State’s Adequate Yearly Progress targets for the disability subgroup was 3.49%, and the proficiency rate for children with IEPs against grade-level, modified, and alternate academic achievement standards ranged from 52.3% to 58.5%.

have an impact on how subsequent awards are computed and OSERS informed the State of that consequence so that the State can take steps to plan for this eventuality.<sup>4</sup> OSERS does not have the discretion to allocate funds under section 611 beyond the terms of the formula contained in that section of the IDEA.

Summary

When a State fails to maintain State financial support at the level required by law, the IDEA directs that the "Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year for which the State fails to comply with the requirement" to maintain effort "by the same amount by which the State fails to meet the requirement." 20 U.S.C. §1412(a)(18)(B) and 34 CFR §300.163(b). Accordingly, OSERS will reduce the State's Federal FY 2012 section 611 allocation by \$36,202,909--the amount by which the State failed to maintain effort in State FY 2010.

In light of the South Carolina Advisory Council on the Education of Students with Disabilities' duties under 20 U.S.C. §1412(a)(21)(D), particularly its duty under 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter.

To ensure that the public is fully informed regarding the granting of these waivers, OSERS requires the SEA to post this letter prominently on its Web site.

We appreciate your commitment to serving children with disabilities and look forward to our continued collaboration on their behalf.

Sincerely,

/s/

Anthony W. Miller

Enclosures:

- (1) Letter from Alexa Posny to Mitchell Zais, February 3, 2011
- (2) Letter from Alexa Posny to Mitchell Zais, June 17, 2011
- (3) Letter from Alexa Posny to Mitchell Zais, August 9, 2011
- (4) *How the Department Made Determinations under Section 616(d) of the Individuals with Disabilities Education Act in 2011; Part B*

cc: South Carolina Advisory Council on the Education of Students with Disabilities

<sup>4</sup> Under 20 U.S.C. §1411(d)(3)(B)(i), (ii), and (iii) (if there is an increase in the amount of section 611 funds) or 20 U.S.C. §1411(d)(4) (if there is a decrease in the amount of section 611 funds), the State's allocation for a fiscal year is based in part on the amount the State "received" for the "preceding fiscal year." The reduced allocation that South Carolina will receive in FFY 2012 will be used as the amount the State "received" "for the preceding fiscal year" when OSERS calculates the State's grant in FFY 2013. OSERS cannot determine at this time the exact dollar impact on the State's section 611 allocation because there are other factors in the formula that will affect the impact --for example, the amount of IDEA funding appropriated by Congress, and changes in the State's population and poverty census.



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

FEB 03 2011

THE ASSISTANT SECRETARY

Honorable Mick Zais  
State Superintendent  
South Carolina Department of Education  
1006 Rutledge Building  
1429 Senate Street  
Columbia, South Carolina 29201

Dear Superintendent Zais:

In a letter dated February 26, 2010 that the Office of Special Education Programs (OSEP) first received by facsimile transmission on April 22, 2010, South Carolina requested a waiver of the requirement in Part B of the Individuals with Disabilities Education Act (Part B) that States "not reduce 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." 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a). The State requested the waiver for fiscal year 2009, which the State later clarified was State fiscal year (SFY) 2010 (July 1, 2009-June 30, 2010). The Secretary is permitted to waive these requirements for a State, for one fiscal year at a time, if he determines that "granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State." 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR § 300.163(c)(1).

On October 15, 2010, OSEP sent the State a request for additional information that the Department needs in order to make a decision on the State's request for a waiver (copy attached). The State has not responded to this request. It is important that the State respond with all of the information requested in that memorandum as soon as possible so that the Department may make a decision on the State's request.

Part B provides that the "Secretary shall reduce the allocation of funds under Section 611 for any fiscal year following the fiscal year in which the State fails to comply with the requirement" to maintain State financial support "by the same amount by which the State fails to meet the requirement." 20 USC §1412(a)(18)(B) and 34 CFR §300.163(b). Accordingly, absent a waiver for the full amount by which the State failed to maintain financial support in SFY 2010, the State's Part B section 611 grant award will be reduced.

If you, or a member of your staff, have any questions regarding this letter or OSEP's October 15, 2010 memorandum, please contact Larry Ringer, OSEP's contact for South Carolina, at (202) 245-7496. Thank you for your cooperation.

Sincerely,

Alexa Posny, Ph.D.

Attachment

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-2500  
www.ed.gov

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

TO: Mariene Mens  
State Director of Special Education  
South Carolina Department of Education

FROM: Larry Ringer *[Signature]*  
Associate Director  
Division of Monitoring and State Improvement Planning  
Office of Special Education Programs  
United States Department of Education

Subject: The State's Request for a Waiver under 34 CFR §300.163(e)

Date: October 15, 2010

Mariene,

The purpose of this memo is to request additional information from the South Carolina Department of Education in support of the State's request for a waiver under 34 CFR §300.163(b) of the requirements for maintenance of State financial support for special education and related services. So that the Department may proceed in our consideration of the State's request for a waiver for State fiscal year 2009-2010, please provide the following additional information:

**A. Updated Fiscal Information**

1. **Financial Support for Special Education and Related Services:** On September 24, 2010, Les Byles, Director, Office of State Budget in South Carolina, sent to Binny Yun in the US Department of Education updated figures for the State's maintenance of financial support for Part B of IDEA. These updated figures report that in 2008-2009 the State made available \$405,286,674.18 for special education and related services and in 2009-2010 the State made available \$344,512,347.62 in support for special education and related services. This shortfall amounts to \$60,374,426.56 in total support. We are confirming that this amount represents the State's final request for a waiver for 2009-2010.

2. **Possible Inconsistencies in Other Data**

**Revenues:** In order to determine whether the State has experienced "exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State," the Department must have clear data on the drop in the State's revenues that formed the basis of the request for a waiver. We understand that the collection of revenues continued throughout the 2009-2010 fiscal

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year. The Department received conflicting numbers from the State on its revenues, as noted in the chart below, and, as a result, the Department is unable to determine the extent of the State's decrease in revenues. Please provide final revenue figures, including the source of the revenues for 2008-2009. In addition, please provide revenue figures, using the same sources as 2008-2009, for 2009-2010. The State may provide revenue figures for 2009-2010 as they were known in the State as of June 2010.

**Appropriations:** If the Department determines that the State has experienced "exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State," the Department must assess whether a waiver would be equitable. In order to do so, the Department needs final appropriation figures for all State agencies for 2008-2009 and 2009-2010.

We compared the appropriations data provided by your office on July 12, 2010 to other information provided by South Carolina to the Department and noted some possible inconsistencies. We understand that different offices within the State may have used different definitions or data sources when supplying information to the Department and we want to ensure that we understand the information provided by the State. The chart below notes some examples of discrepancies.

Please provide an explanation for these discrepancies. In addition, please provide us with final, updated appropriations data for 2008-2009 and 2009-2010, using the same agency categories that you used in your July 12, 2010 submission.

	07/2010 <sup>1</sup>	7/12/2010 <sup>2</sup>	7/26/2010 <sup>3</sup>	9/23/2010 <sup>4</sup>
08/09 Total Appropriations		\$5,732,545,013	\$5,754,765,833	\$5,492,177,168
09/10 Total Appropriations		\$5,261,440,174		\$6,008,595,378
08/09 Capital		\$15,745,501		\$12,347,148
08/09 USC-Budget		\$2,557,839		\$2,812,613
08/09 Welfare		\$21,345,010		\$17,838,919
Dept of Transportation appropriations 08-09		\$182,185	\$1,783,147	
Revenue 08-09	\$5,228,328,939		\$5,629,257,890	
Revenue 09-10	\$5,064,662,259			

#### B. Calculating State Maintenance of Financial Support

We note that the State has the flexibility to calculate State level maintenance of financial support using total support or per-capita level of support. Based on child count figures provided by the

<sup>1</sup> This information was provided as an attachment to a letter dated 5/17/2010 from Jim Rex, State Superintendent of Education.

<sup>2</sup> This information was provided as an attachment in e-mail from Marlene Metz dated July 12, 2010.

<sup>3</sup> This information was provided by the State in an excel spreadsheet dated July 26, 2010 in connection with its request for a waiver under the Higher Education Act.

<sup>4</sup> This information was provided as an attachment by an e-mail by Les Bales, Director, Office of State Budget to South Carolina, dated September 24, 2010, in connection with the State's request for a waiver under the Higher Education Act.

State, and based on the figures noted above, the Department has calculated the State's required level of support for 2009-2010 on a per-capita basis. The State's Child Count in 2008 was 101,896. Based on a level of support provided by the State during that same year (\$405,285,678.18), the State provided a per-capita level of support of \$3977.45. Based on that figure, and the State's Child Count in 2009 of 101,039, we have calculated that the State's per-capita level of support for 2009 was  $101,039 \times \$3977.45$ , or \$401,877,570.55. This represents a shortfall of \$5,965,322.93 in the level of financial support for 2009-2010.

Please clarify whether the State is calculating its maintenance of financial support on a total or per-capita basis and indicate the final total amount for which the State seeks a waiver for 2009-2010.

### C. Updated Annual Performance Report Data

1. In its February 2010 Federal Fiscal Year (FFY) 2008 Annual Performance Report (APR) under section 616 of the Individuals with Disabilities Education Act (IDEA), the State reported data for Indicator 1A showing that zero percent of the State's districts with a disability subgroup that met the State's minimum "n" size met the State's subsequent yearly progress (AYP) targets for the disability subgroup. Please inform us whether the State has more recent data (i.e., FFY 2009 data) on the percentage of the State's districts with a disability subgroup that met the State's minimum "n" size that met the State's AYP targets for the disability subgroup. If so, please provide us with the more recent data.
2. In its February 2010 FFY 2008 APR, the State reported data for Indicator 1A showing that in the 2007 - 2008 school year 29.4% of the State's districts had a significant discrepancy in the rate of suspensions and expulsions of greater than 10 days in a school year for children with individualized education programs (IEPs). Please inform us as to whether the State has more recent data (i.e., data for the school year 2008-2009) on the percent of the State's districts that had a significant discrepancy in the rate of suspensions and expulsions of greater than 10 days in a school year for children with IEPs. If so, please provide us with the more recent data.
3. In its February 2010 FFY 2008 APR, the State reported data for Indicator 15 showing that 27% (161 of 236) findings of non-compliance identified in FFY 2007 were corrected in a timely manner. Please inform us as to whether the State has more recent data (i.e., FFY 2009 data) for Indicator 15 on the number and percent of findings identified during FFY 2008 that were timely corrected. If so, please provide us with the more recent data.

I look forward to your response to these questions and requests for further information. Please let Perry or me know if you have any questions.

Thank you,

Larry Ringer



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

JUN 17 2011

Honorable Mitchell M. Zais  
South Carolina State Department of Education  
1429 Senate St., Room 1006  
Columbia, South Carolina 29201-3799

Dear Dr. Zais:

This is in response to former State Superintendent Jim Rex's February 24, 2010 letter and your May 9, 2011 letter (supplemented by additional information provided by your staff and staff from the Office of State Budget on June 17, 2010, July 7, 2010, July 12, 2010, September 24, 2010, February 24, 2011, March 11, 2011, and May 18, 2011, and your letter on May 24, 2011), in which the State of South Carolina requests waivers of the requirements related to the maintenance of State financial support for special education and related services for fiscal years (FYs) 2009, 2010, and 2011 for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18) and 34 CFR §300.163.<sup>1</sup> We appreciate the time and effort your staff took to provide the supplemental information and to meet with my staff on May 4, 2011 in South Carolina at the offices of the State Department of Education to review the data provided by the State. During the course of that meeting, my staff discussed with your staff the consequences under the IDEA (discussed below) of a State's failure to maintain fiscal effort and the U.S. Department of Education's (Department) concern that the State take steps to ensure that it would maintain effort this fiscal year (2011). Subsequent to the visit, the State had an opportunity to provide any additional information that it chose to submit, and it did so on May 18, 2011 and May 24, 2011.<sup>2</sup> Since that time, on several occasions, Department officials have spoken with State officials about this matter.

A State is eligible for a grant under Part B of the IDEA if the State submits a plan (application) that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets certain conditions. 20 U.S.C. §1412(a) and 34 CFR §300.100. One of these conditions is that a 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 financial support for the preceding fiscal year. 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a). South Carolina has provided such assurances in its applications for Part B funds in all relevant years and the Department awarded Part B funds to the State based in part on those assurances.

<sup>1</sup> The State first requested a waiver for FY 2009, which the State later clarified was FY 2010 (July 1, 2009 – June 30, 2010), by letter dated February 26, 2010. However, the Department did not receive the letter until April 22, 2010. The State submitted a request for waivers for FYs 2009 and 2011 on May 9, 2011.

<sup>2</sup> Attached is a table that summarizes the data provided by the State at the meeting on May 4<sup>th</sup>. The May 18<sup>th</sup> and May 24<sup>th</sup> submissions by the State were consistent with information provided by the State on May 4<sup>th</sup>, although the May 24<sup>th</sup> submission included more recent revenue projections which were updated in the attached table.

400 MARZLAND AVE., S.W. WASHINGTON, D.C. 20202-2500

While we are permitted to waive the requirements related to the maintenance of financial support for a State, for one fiscal year at a time, if we determine that granting a waiver would be equitable due to exceptional or uncontrollable circumstances (such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1)), we do so carefully and reluctantly, given the importance we place on maintaining State financial support for our most vulnerable students. Moreover, regardless of whether a State receives a waiver under this authority, the State has a continuing obligation to ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities, as required in 20 U.S.C. §1412(a)(1) and 34 CFR §300.101.

Each of the State's waiver requests is discussed below.

Fiscal Year 2009 (July 1, 2008 – June 30, 2009)

In a May 9, 2011 letter, the State requested a waiver of State-level maintenance of effort for FY 2009. From the information your agency provided, we are aware that the State faced a very difficult financial situation in that year and experienced a significant decrease in revenues – total State revenues dropped by 12.73 percent from FY 2008 to FY 2009. Based on information provided by your agency, South Carolina reduced State financial support for special education and related services by \$20,312,122 in FY 2009 from FY 2008 levels, as calculated on a per capita basis. This represents a 4.87 percent decrease in State financial support for special education and related services from FY 2008 to FY 2009. The State cut its total State appropriations by 13.69 percent in the same time period. While it is regrettable that these cuts were made to special education funding, we recognize that the reduction in State financial support for special education and related services was relatively small compared with cuts to other State appropriations.

In reviewing your request, as part of our examination of "equitability," we considered all of the information provided by the State in all of its submissions—including that the percent reduction in State financial support for special education and related services was less than the average percent reduction in appropriations across agencies and less than the percent reduction in revenues. We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, while it is not a factor in determining whether a State experienced an exceptional or uncontrollable circumstance, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a FAPE available to all children with disabilities in FY 2009.

Based on all of the information discussed above, I have determined that it is equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for FY 2009 by \$20,312,122.

Fiscal Year 2010 (July 1, 2009 – June 30, 2010)

South Carolina's February 26, 2010 letter based its request for a waiver for FY 2010 on "a severe and precipitous decline in State revenue which is outside the control of the South Carolina Department of Education (SCDE) and the state legislature." In FY 2010, the financial support for special education and related services required of the State was the amount that would have been required in the absence of a failure to maintain effort in FY 2009 and not the reduced level of the State's financial support permitted by the waiver granted for FY 2009, adjusted to account for any changes due to the State's per capita calculation (i.e., \$413,300,247). 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d). The State's financial support for special education and related services in FY 2010 was \$345,897,722, or \$67,402,525 less than its required level of effort. Accordingly, we consider the State's request for a waiver for FY 2010 to be a request for a waiver for \$67,402,525.

Based on the information provided by your agency, it is evident that the State continued to face difficult financial circumstances in FY 2010 - total State revenues dropped by 4.71 percent between FY 2009 and FY 2010. Additionally, revenues were 16.84 percent lower than in FY 2008, the year that South Carolina last met the maintenance of effort requirement. Based on these data, we believe that the State experienced an exceptional circumstance in FY 2010, i.e., a precipitous and unforeseen decline in the financial resources of the State. In addition, data provided to the Department demonstrate that the State had revenues in excess of its appropriations by \$59,816,035 in FY 2010. Of this amount, \$26,835,463 consisted of revenues in excess of appropriations in the General Fund. In your May 24, 2011 letter, you provided satisfactory evidence that the \$26,835,463 in the General Fund could not have been made available for special education and related services in FY 2010. However, the revenues in the State's Lottery and Education Improvement Act funds were \$32,980,572 in excess of appropriations made from those same funds in FY 2010. Although the State ended the year with \$32,980,572 more in revenues than appropriations, this amount was substantially less than \$67,402,525 -- the amount by which the State failed to maintain effort in FY 2010. Given that the excess revenues were less than the \$67,402,525 maintenance of effort shortfall and that the revenue forecasts in FY 2010 had been erratic, the surplus in FY 2010 is not inconsistent with our determination that the State experienced an exceptional or uncontrollable circumstance in FY 2010. To be clear, when weighing the equities of a waiver request for a fiscal year, particularly when the State had a surplus that year, the Department does not take a rigid formulaic approach. Rather, for FY 2010, the Department very carefully considered whether it was reasonable under all the circumstances facing the State in FY 2010 to maintain fiscal effort for special education and related services. We were persuaded by the fact that the surplus was small compared to the State's overall budget and to the State's maintenance of effort shortfall and that it was not clear to the State towards the end of FY 2010 how much of the surplus would actually be realized. Nevertheless, although the Department finds that the State experienced an exceptional or uncontrollable circumstance in FY 2010, the Department expected the State to treat special education equitably compared to overall State appropriations.

As part of our examination of "equitability," in order to determine whether to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) for FY 2010, the Department examined a variety of factors. The reduction in State financial support for special education and related services in FY 2010 of \$67,402,525 represents a 12.02 percent cut from its State financial

support for special education and related services in FY 2009 and a 16.31 percent cut from its required level of effort. The reduction in State financial support for special education and related services (12.02 percent) in FY 2010 from the FY 2009 level was a larger percentage cut than the reduction in total State appropriations (7.55 percent) from FY 2009 to FY 2010. The State seeks to compare the percentage reductions in special education and other appropriations to the amounts appropriated in FY 2008 (the "MOE base year"), and stated (in your May 24, 2011 letter) that "since the comparison for MOE purposes is the 2007-2008 year, the comparison for percentage decrease in funding should also be to that year." The Department believes that comparing revenue reductions to the MOE base year (as well as the immediate prior fiscal year) is appropriate because the level of revenues in the MOE base year supported the level of State financial support for special education and related services. However, when considering waiver requests, the Department examines the treatment of special education and related services each fiscal year compared to the prior fiscal year because that is the best method to protect the Federal interest in ensuring the equitable treatment of State funding for special education and related services every year. Therefore, in evaluating whether the State's appropriations decisions treated special education proportionately relative to total State appropriations, comparisons are made to the prior year rather than to the year in which the State last met the MOE requirement.

In reviewing your request, we considered all of the information provided by the State in all of its submissions--including the totality of the State's circumstances in FY 2010: (1) revenues decreased when compared to the prior year, and decreased substantially when compared to FY 2008 (the year in which the State last met its required level of effort); (2) the State had a surplus of \$32,980,572 in FY 2010, which was not sufficient to maintain the required level of State financial support for special education and related services; and (3) the percent reduction in State financial support for special education and related services (12.02) was higher than the average percent reduction in appropriations across agencies (7.55) and higher than the percent decrease in revenues (4.71). We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, while it is not a factor in determining whether a State experienced an exceptional or uncontrollable circumstance, when evaluating the equity of the requested waiver, we considered the fact that the Part B IDEA ARRA funds were available to assist the State and LEAs in meeting their obligation to make a FAPE available to all children with disabilities in FY 2010.

Accordingly, based on all of the information discussed above, the Department finds that the State did not treat special education and related services in an equitable manner when compared to State agencies as a whole. Therefore, I have determined it would not be equitable to grant a waiver under 20 U.S.C. §1412 (a)(18)(C)(i) and 34 CFR §300.163(c)(1) that would permit the State to reduce State financial support for special education and related services by \$67,402,535 for FY 2010. However, I have determined that it is equitable to grant a partial waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for FY 2010 by \$31,199,516, representing a 7.55 percent decrease from the amount required to be made available, adjusted to account for changes due to the State's per capita calculation. This level brings the percentage decrease in State financial

support for special education and related services in line with the percentage decrease in appropriations for the State as a whole.

The State's submissions to the Department in support of its waiver request establish that it has failed to maintain financial support for special education and related services for FY 2010 by \$36,202,909 – the difference between the amount of financial support required to have been made available under this partial waiver (\$382,100,631) and the level made available by the State in FY 2010 (\$345,897,722). Thus, the State has a \$36,202,909 shortfall in the amount of State financial support for FY 2010.

Fiscal Year 2011 (July 1, 2010 – June 30, 2011)

In its May 9, 2011 letter, the State requested a waiver of State-level maintenance of effort for FY 2011. As noted above, the financial support required of the State in FY 2011 is the amount that would have been required in the absence of a failure to maintain effort in prior years and not the reduced level of the State's financial support provided by the State, or permitted by the waiver granted for FY 2009 and the partial waiver granted for FY 2010, adjusted to account for any changes due to the State's per capita calculation (i.e., \$410,232,370). The State's financial support for special education and related services in FY 2011 was \$334,889,301, which is \$75,343,070 less than the amount the State is required to provide in FY 2011.

South Carolina's total State revenues increased by 2.58 percent from FY 2010 to FY 2011. However, total State revenues in FY 2011 are still 14.70 percent lower than FY 2008, the year that South Carolina last met the maintenance of effort requirement. Even though the State's revenues increased by 2.58 percent between FY 2010 and FY 2011, the State provided 2.46 percent less in financial support for special education and related services in FY 2011 than in FY 2010 and 18.37 percent less than its required level of effort. The 2.46 percent reduction in financial support for special education and related services from the FY 2010 level is a larger percentage cut than the reduction in total State appropriations, which were cut by 0.65 percent from FY 2010 to FY 2011.

Moreover, the State's revenue projections indicate that the State expects to have sufficient funds available to maintain its required level of State financial support for special education and related services in FY 2011. Current revenue projections provided to the Department by the State demonstrate that the State anticipates \$6,225,067,605 in total State revenues for FY 2011.<sup>3</sup> These revenues exceed total appropriations by \$255,232,057 in FY 2011, an amount that is substantially higher than the amount by which the State failed to maintain financial support for special education and related services in FY 2011. We understand that revenue projections for FY 2011 have increased since the FY 2011 appropriations legislation was passed by the State legislature. We also carefully considered the State's position, discussed on May 4<sup>th</sup> and confirmed in your May 24, 2011 letter, that it did not increase its financial support for special education and related services once it passed its original budget for FY 2011 because it was not aware of its maintenance of effort shortfall until March 2011, and the surplus in FY 2011 was realized "outside of the budget cycle." While the Department is cognizant of the State's usual budget process, a shortfall in a State's required fiscal effort for special education and related

<sup>3</sup> This figure is derived from the Board of Economic Advisors' May 12, 2011 estimate of \$5,958,897,625 in General Fund revenue, less the Tax Relief Trust Fund, in order to obtain a comparable figure to the one provided by the State in Attachment A of its May 24<sup>th</sup>, 2011 submission to the Department.

services may not be treated as an ordinary circumstance. In contrast to the information the State provided for FY 2010 with respect to its use of General Fund revenues, the State did not provide similar information for FY 2011. Rather, your May 24, 2011 letter merely stated that the General Assembly is debating the use of these funds and “until the budget process is completed...I cannot provide you with the exact manner in which these funds will be appropriated.”

The State has accumulated a surplus well beyond the size of its maintenance of effort shortfall and can rely on the existence of sufficient funds being available for special education and related services. Under these circumstances, the State must maintain financial support for special education and related services even if doing so requires the State to act outside of its normal legislative budget cycle. In short, the State has offered no fiscal or practical reason why the State did not – and could not now – make available an additional \$75,343,070 for special education and related services to meet its requirement under the IDEA to maintain fiscal effort in FY 2011. The State’s fiscal situation at the end of FY 2011 is in stark contrast to the State’s fiscal situation at the end of FY 2010. In FY 2011 the existence of a substantial surplus is certain, and the Department must consider it when weighing whether the State experienced an exceptional or uncontrollable circumstance. (The Department notes that, even if the State had not accumulated a substantial surplus in FY 2011, the State did not treat special education and related services equitably when compared to overall State appropriations. Accordingly, even if the State had not accumulated a substantial surplus, the Department would not have granted a waiver to the State permitting the State to cut special education and related services by 2.46 percent. Rather, based on the decrease in revenues when compared to the MOE base year and an examination of the proportionality of cuts to special education and related services compared to other appropriations, the Department would have granted a partial waiver to South Carolina of \$2,646,332, leaving a shortfall of \$72,696,737 for special education and related services for FY 2011.)

Therefore, while the State has not reached the level of revenue it had in 2008, because the State has a substantial surplus in FY 2011, accompanied by an increase in revenues from the prior year, the Department finds that the State has not experienced an “exceptional or uncontrollable” circumstance that prevents it from meeting its required level of State financial support in FY 2011. Accordingly, we have determined it would not be equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(e)(1) that would permit the State to reduce financial support for special education and related services by \$75,343,070 for FY 2011.

#### Summary

When a State fails to maintain State financial support at the level required by law, the IDEA directs that the “Secretary shall reduce the allocation of funds under section 611 of the IDEA for any fiscal year following the fiscal year for which the State fails to comply with the requirement” to maintain effort “by the same amount by which the State fails to meet the requirement.” 20 U.S.C. §1412(a)(18)(B) and 34 CFR §300.163(b). Accordingly, unless the State provides confirmation in writing to the Department that it has made available an additional \$75,343,070 in State financial support for special education and related services for FY 2011, the Department will reduce the State’s section 611 allocation by \$75,343,070, in addition to the \$36,202,909 by which the State failed to maintain effort in FY 2010, for a total of \$111,545,979. Because of the Department’s concern over this matter, several Department officials reached out to State officials

during the week of June 5<sup>th</sup> to alert the State to the Department's decision and to encourage the State to take action to restore funding for special education and related services for FY 2011, and offered the Department's technical assistance to the State to resolve this matter. We remain available to assist the State.

In addition, under 20 U.S.C. §1411(d)(3)(B)(i), (ii), and (iii), some of the State's minimum and maximum allocations for a fiscal year are based on the amount the State received for the preceding fiscal year. The reduced allocation that South Carolina will receive will be used as the amount the State received for the preceding fiscal year when the Department calculates the State's future grants.

Further, as discussed above, as provided in 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d), the amount of State financial support required of the State in FY 2012 is the same amount that would have been required in the absence of a waiver or a failure to maintain fiscal effort. We also want to make clear to the State that, when making decisions about its level of State support for special education and related services in FY 2012, the State should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services. Indeed, since the advent of the State's economic downturn, the State has had an opportunity to examine its sources and amounts of revenues and to plan accordingly, consistent with its obligations under the IDEA.

As you know, the State must ensure that LEAs do not count Part B IDEA ARRA funds as "State" or "local" funds for the purpose of determining whether an LEA has met its supplement/nm supplant and maintenance of effort requirements in 34 CFR §§300.202(a)(3) and 300.203. Further, if it is discovered, through means such as monitoring or auditing, that an LEA has not met these requirements, the Department will seek to recover funds from the State educational agency (SEA), in an amount equal to the amount by which the LEA did not meet the requirements. The amount recovered must be paid from non-Federal funds.

The Department will be undertaking additional monitoring of South Carolina's implementation of Part B of the IDEA to assess whether a FAPE is still being made available to all children with disabilities. In addition, in light of the South Carolina Advisory Council on the Education of Students with Disabilities' duties under 20 U.S.C. §1412(a)(21)(D), particularly its duty under 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter.

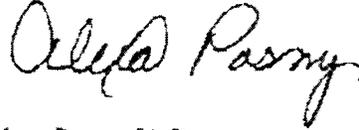
To ensure that the public is fully informed regarding the granting of these waivers, OSEP requires the SEA to prominently post on its Web site the State's February 24, 2010 and May 9, 2011 letters to the Department and this letter. In addition, OSEP is requiring the State to report to your OSEP State Contact on August 1, 2011, and December 1, 2011, responses to the following:

1. What action is the State taking, or did the State take, to ensure that children with disabilities are receiving a FAPE during the current school year (2010-2011), including monitoring and reviewing complaints filed or hearings requested? and
2. How will the State communicate with stakeholders regarding the waiver request and the State's actions to ensure that all eligible children with disabilities are receiving a FAPE?

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We appreciate your commitment to serving children with disabilities and look forward to our continued collaboration on their behalf.

Sincerely,

A handwritten signature in black ink that reads "Alexa Posny". The signature is written in a cursive, flowing style.

Alexa Posny, Ph.D.

Attachment

cc: South Carolina Advisory Council on the Education of Students with Disabilities

South Carolina IDEA MOE Waiver Request Data

	2007-2008 SFY 2008	2008-2009 SFY 2009	2009-2010 SFY 2010	2010-2011 SFY 2011	% change prior year	% change FY 2000	% change FY 2000
<b>REVENUES</b>							
General Fund	\$ 6,392,394,370	\$ 5,944,172,270	\$ 5,211,095,775	\$ 5,412,017,413			
Utility	\$ 269,041,217	\$ 263,979,655	\$ 275,158,130	\$ 256,000,000			
Education Improvement Act	\$ 635,302,264	\$ 563,072,910	\$ 551,358,000	\$ 556,459,197			
<b>TOTAL REVENUES</b>	\$ 7,297,537,850	\$ 6,369,234,735	\$ 6,008,411,933	\$ 6,725,067,405	-4.71%	-16.84%	2.58%
<b>APPROPRIATIONS</b>							
General Fund	\$ 6,597,678,103	\$ 5,602,262,921	\$ 5,215,000,912	\$ 5,191,005,143			
Library	\$ 272,120,271	\$ 271,760,506	\$ 262,027,696	\$ 255,715,300			
Education Improvement Act	\$ 559,875,000	\$ 545,191,520	\$ 511,507,000	\$ 522,234,107			
<b>TOTAL APPROPRIATIONS</b>	\$ 7,529,673,374	\$ 6,499,215,015	\$ 6,008,595,078	\$ 5,969,035,549	-7.53%	-20.20%	-0.65%
<b>STATE FINANCIAL SUPPORT (per capita calculation)</b>							
IDEA MOE BASE FY2008	\$ 424,311,879	\$ 416,005,007	\$ 413,308,247	\$ 410,232,370			
FY IDEA E/UNIT	\$ 424,311,879	\$ 396,493,605	\$ 385,897,722	\$ 374,889,403			
<b>MOE DEFICIT</b>	\$	\$ (20,313,222)	\$ (67,982,525)	\$ (25,347,070)	-32.03%	-16.31%	-2.46%
<b>WAIVER/UNAPPORTIONED/</b>	\$	\$ (20,313,222)	\$	\$			Total Shortfall: \$ (163,057,272)
<b>PENALTY</b>	\$	\$	\$ (31,199,616)	\$ (35,343,020)			Total RMAwd: \$ (51,511,700)
			\$ (36,202,999)	\$			Total Penalty: \$ (111,545,979)



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

AUG - 9 2011

Honorable Mitchell M. Zais  
Superintendent of Education  
South Carolina State Department of Education  
1429 Senate St., Room 1006  
Columbia, South Carolina 29201-3799

Dear Superintendent Zais:

The purpose of this letter is to inform you that the U.S. Department of Education (Department) will reduce your State's Part B Section 611 (Grants to States) award under the Individuals with Disabilities Education Act (IDEA) in Federal Fiscal Year (FFY) 2012 due to your State's failure to maintain State financial support for special education and related services in State Fiscal Year (SFY) 2010.

This letter follows up on the Department's June 17, 2011, and July 5, 2011, letters related to the maintenance of State financial support for special education and related services for the IDEA under 20 U.S.C. §1412(a)(1)(B) and 34 CFR §300.163. As indicated in those letters, the IDEA provides in 20 U.S.C. §1412(e)(1)(B) that, when a State fails to maintain State financial support at the level required by law, the Department "shall reduce the allocation of funds under Section 611 for any fiscal year following the fiscal year in which the State fails to comply with the requirement" to maintain effort "by the same amount by which the State fails to meet the requirement." Accordingly, the Department must reduce your State's Section 611 grant in the amount of \$36,202,909 because of the State's failure to maintain fiscal effort in SFY 2010 by that same amount.

As you know, the State is required to make available a free appropriate public education (FAPE) to all children with disabilities residing in the State regardless of the amount of the State's Section 611 allocation. 20 U.S.C. §1412(a)(1). Accordingly, in order to provide the State, and its local educational agencies (LEAs), additional time to take whatever steps are necessary to plan for the reduction and to ensure that a FAPE is available to all children with disabilities residing in the State, the reduction in South Carolina's IDEA Part B Section 611 (Grants to States) award will occur in FFY 2012.<sup>1</sup> Specifically, the Department will reduce the Section 611 funds distributed to the State on October 1, 2012, by \$36,202,909.

<sup>1</sup> Although the Department is exercising its discretion under the Act to delay the imposition of the reduction in South Carolina's Section 611 award, States should not rely on similar delays in future years, as these decisions are made on a case-by-case basis. If a State has not maintained effort, the State should anticipate a reduction in its Section 611 allocation by that amount in the year immediately following the failure to maintain effort, and must take action to ensure that FAPE will be made available to all eligible children with disabilities.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

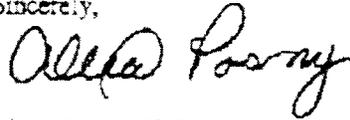
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In addition, under 20 U.S.C. §1411(d)(3)(B)(i), (ii), and (iii) (if there is an increase in the amount of Section 611 funds) or 20 U.S.C. §1411(d)(4) (if there is a decrease in the amount of Section 611 funds), the State's allocation for a fiscal year is based in part on the amount the State received for the preceding fiscal year. The reduced allocation that South Carolina will receive in FFY 2012 will stand as the amount the State received for the preceding fiscal year when the Department calculates the State's FFY 2013 grant.

In light of the South Carolina Advisory Council on the Education of Students with Disabilities' duties under 20 U.S.C. §1412(a)(21)(D), particularly its duty under 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter. In addition, the State must post this letter on the State educational agency's Web site and distribute a copy of this letter to each LEA no later than October 1, 2011, so that LEAs have notice of the Department's action.

We look forward to our continued collaboration to ensure that children with disabilities receive the special education and related services they need to reach their full potential.

Sincerely,



Alexa Posny, Ph.D.

cc: South Carolina Advisory Council on the  
Education of Students with Disabilities

## How the Department Made Determinations under Section 616(d) of the Individuals with Disabilities Education Act in 2011: Part B

In making our determination for each State under section 616(d) of the Individuals with Disabilities Education Act (IDEA), we considered the totality of the information we have available about a State. This includes the State's FFY 2009 Annual Performance Report (APR)/State Performance Plan (SPP) submission; information from monitoring visits, including verification reviews; and other public information, such as the State's performance under any existing special conditions on its FFY 2010 grant or a compliance agreement, longstanding unresolved audit findings, and other State compliance data under the IDEA.

### FFY 2009 APR/SPP Submissions and Other Information

In reviewing a State's FFY 2009 APR/SPP submission, we considered both the submission of valid and reliable data and the level of compliance, including correction of noncompliance, as described below. We also reviewed other information (described below) that reflects the State's compliance with IDEA requirements.

With respect to data, for Indicators 1 through 5, and 7 through 19, we examined whether the State provided valid and reliable FFY 2009 data (i.e., the State provided all the required data, the data were for the correct year and were consistent with the required measurement and/or the approved SPP, and whether we had information demonstrating that the data were not correct or the State indicated that the data were not valid and reliable).

With respect to compliance, we examined Indicators 9, 10, 11, 12, 15, 16, 17, and 20. For each indicator, we looked for evidence that the State demonstrated substantial compliance either through reporting FFY 2009 data that reflected a very high level of compliance (generally 95% or better) or, for Indicators 9, 10, 11, and 12, if the State's FFY 2009 compliance data were 25% or below (for Indicators 9 and 10) or at or above 75% (for Indicators 11 and 12), whether it had fully corrected FFY 2008 findings of noncompliance. Indicator 15 evaluates the "timely" correction of FFY 2008 findings, so for this indicator we specifically examined both whether the State reported a high level of compliance (generally 95% or better) in timely correcting FFY 2008 findings of noncompliance, and whether the State verified the correction of FFY 2008 findings of noncompliance consistent with OSEP Memorandum 09-02, dated October 17, 2008 (OSEP Memo 09-02). We did not consider Indicators 16 and 17 if the State reported less than 100% compliance, but fewer than 10 complaints or 10 fully adjudicated hearings, in recognition of the inequities in basing decisions on small numbers.

Generally, and absent any other issues (see below), we considered a State to "meet requirements" if the State: (1) Provided valid and reliable FFY 2009 data consistent with, or substantially the same as, the measurement for each indicator and/or the approved SPP; (2) Demonstrated substantial compliance for Indicators 9, 10, 11, 12, 16, 17, and 20; and (3) Reported under Indicator 15 both a high level of compliance (generally 95% or better) in timely correcting FFY 2008 findings of noncompliance, and that it verified correction of FFY 2008 findings of noncompliance consistent with the guidance in OSEP Memo 09-02. We determined that a State demonstrated substantial compliance if it provided data showing a very high level of compliance (generally at or above 95%) for these indicators, or if it had fully corrected previously identified findings of noncompliance for Indicators 9 and 10 (if the State's FFY 2009 compliance data for these indicators were 25% or below), and for Indicators 11 and 12 (if the State's FFY 2009 compliance data for these indicators were at or above 75%). As indicated in OSEP Memo 09-02, beginning with the Department's

determinations in 2010, for Indicators 9, 10, 11 and 12, we considered a State to have demonstrated correction of previously identified noncompliance for any findings identified in FFY 2007 and 2008 if the State verified correction of those findings consistent with OSEP Memo 09-02. In addition, we did not consider a State to be in substantial compliance for a compliance indicator based on correction if its reported FFY 2009 data were low (generally below 75%, or, for Indicators 9 and 10, above 25%), consistent with OSEP Memo 09-02. If a State did not meet these standards for substantial compliance for only one compliance indicator (including Indicators 15 and 20) and there were no other factors (see below), we considered the State to "meet requirements" if the compliance level for that indicator was high (generally at or above 90%, or, for Indicators 9 and 10, at or below 10%). In no case, however, did we place a State in "meets requirements" if it failed to provide valid and reliable FFY 2009 data (as defined above) for Indicators 1 through 5 and 7 through 19. We also considered whether the State, when it reported under Indicator 4A, (1) Made clear that, if it identified any districts as having significant discrepancies in the discipline of children with disabilities, it reviewed and, if appropriate revised (or required the LEA to revise) its policies, procedures, and practices related to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, as required by 34 CFR §300.170(b); and (2) If the State identified any noncompliance in policies, procedures or practices in these areas as a result of this review, it corrected the noncompliance.

Generally, and absent any other issues (see below), we considered a State to be "in need of intervention" for one of three reasons that are explained further in this paragraph: very low compliance data, failure to provide valid and reliable data for a compliance indicator, or longstanding noncompliance that was the subject of Departmental enforcement for a key IDEA requirement. First, we identified a State as "in need of intervention" if the State's compliance data demonstrated: (1) Very low performance for Indicators 9, 10, 11, 12, 16 or 17 (generally below 50%, or in the case of Indicators 9 and 10, above 50%, regardless of whether it reported correction of previously identified findings of noncompliance; or (2) Very low performance for Indicator 15 (generally below 50%) and the State did not report under Indicator 15 that it verified correction of FFY 2008 findings of noncompliance consistent with the guidance in OSEP Memo 09-02. Second, we identified a State as "in need of intervention" if it did not provide valid and reliable (as defined above) FFY 2009 compliance data for Indicators 9, 10, 11, 12, 15, 16 or 17. We also identified a State as "in need of intervention" if the State has been subject to Departmental enforcement for multiple years for failing to comply with key IDEA requirements, the noncompliance has been long-standing, and the State's data demonstrate continued noncompliance.

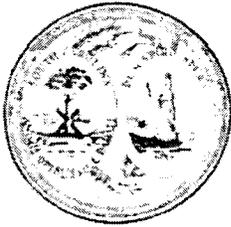
We would identify a State as "in need of substantial intervention" if its substantial failure to comply significantly affected the core requirements of the program, such as the delivery of services to children with disabilities or the State's exercise of general supervision, or if the State informed the Department that it was unwilling to comply with an IDEA requirement. In making this determination, we would consider the impact of any longstanding unresolved issues on the State's current implementation of the program. We would also consider identifying a State "in need of substantial intervention" for failing to submit its APR/SPP.

Absent any other issues (see below), we determined that States that did not "meet requirements" and were not "in need of intervention" or "in need of substantial intervention" were "in need of assistance."

### Monitoring Data and Other Public Information

We also considered other public information available to the Department, including information from monitoring visits, verification reviews, and other public information, such as the State's performance under any existing special conditions on its FFY 2010 grant or a compliance agreement, longstanding unresolved audit findings, and other State compliance data under the IDEA. We did not consider a State to "meet requirements" if the State had unresolved special conditions that were imposed as a result of the State being designated as a "high risk" grantee, outstanding OSEP monitoring findings, including verification visit findings, longstanding audit issues, or a compliance agreement. In determining whether the State should be identified as "in need of assistance," "in need of intervention," or "in need of substantial intervention," we considered the length of time the problem had existed, the magnitude of the problem, and the State's response to the problem, including progress the State had made to correct the problem.

Finally, in making these determinations in 2011, we did not consider whether a State was in compliance with the requirement in section 612(a)(18)(A) to maintain State financial support for special education and related services. This is a key component of a State's eligibility for a grant under Part B of the IDEA. However, because the statute provides a specific remedy when a State is not in compliance with this provision (and the Department is taking action consistent with the statute) and recognizing that this is the first time that a number of States have failed to meet this requirement, the Department decided not to include compliance with this provision in the determinations process this year. The Department is actively considering including a State's compliance with this requirement in the 2012 determinations.



STATE OF SOUTH CAROLINA  
DEPARTMENT OF EDUCATION

Mick Zais  
Superintendent

1429 Senate Street  
Columbia, South Carolina 29201

March 16, 2012

Anthony W. Miller, Deputy Secretary  
United States Department of Education  
400 Maryland Ave., SW  
Washington, DC 20202

RE: Request for a delay in implementing the reduction of Individual with Disabilities Education Act funds for failure to meet the maintenance of effort requirements

Dear Mr. Miller:

South Carolina is moving quickly through its budget process. The Fiscal Year 2012-2013 Appropriations bill was passed by the South Carolina House of Representatives 115-0 this week. From there it will be taken up by the Senate, likely sometime in April. We are quickly approaching the point where it will be very difficult to make changes to address the potential shortfall in federal IDEA funds that our state may recognize in its 2013 allocation based on the failure of South Carolina to meet maintenance of effort for the 2009-2010 state fiscal year. As you know, South Carolina has requested a hearing on this matter and the request for a hearing is pending before the Secretary of Education. It does not appear that we will have a final determination in time for South Carolina to effectively budget for the upcoming fiscal year.

In July 2011, the United States Department of Education (ED) exercised its authority under 34 CFR § 300.163(b) to delay the reduction in funding to the 2013 fiscal year. I am requesting that ED delay this reduction again. Additionally, the SCDE was notified by Office for Special Education and Rehabilitative Services (OSERS), in its reply brief, that the ED has requested as part of its FFY 2013 budget proposal a change "that would require OSERS to ignore for FFY 2012 any reductions necessitated by section 612(a)(18)(B) when determining the amount that a State received for the preceding year."

In light of our pending hearing request, and agreement by ED, at least on a matter of policy, that the impact from failing to meet MOE should be a one-time event, the additional delay seems warranted. In the most basic terms, South Carolina simply needs time to plan if these funds are reduced by over \$36 million. With a hearing request pending before the Secretary, we believe that it is premature for the SCDE to seek those additional funds from some yet to be identified source to help make up for the loss of federal funding.

Deputy Secretary Miller  
March 16, 2012  
Page 2

When I took office in January 2011, I inherited an educational budget that was over \$70 million short in state funding to support IDEA maintenance of effort. I hope you recognize that since that time, we restored over \$70 million in state funding to provide educational services to children with disabilities. We have worked tirelessly to provide the level of financial support required and needed for children and to ensure that in future years those funds remain in place.

Thank you for your consideration of this request to delay the reduction of funds for an additional year. If you have any questions regarding this request please contact Shelly Kelly, General Counsel at 803-734-8218.

Sincerely,

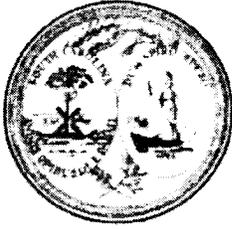
A handwritten signature in black ink that reads "Mick Zais". The signature is written in a cursive style with a horizontal line above the name.

Mick Zais, Ph.D.  
State Superintendent of Education

Cc: Members, South Carolina Federal Delegation  
The Honorable Nikki R. Haley, Governor  
The Honorable Robert W. Harrell, Jr., Speaker, South Carolina House of Representatives  
The Honorable John E. Courson, Senate President Pro Tempore  
The Honorable Hugh K. Leatherman, Sr., Chairman, Senate Finance Committee  
The Honorable W. Brian White, Chairman, House Ways and Means Committee

**Attachment 8:**

Letter dated March 16, 2012, to Anthony W. Miller, Deputy Secretary, U.S. Department of Education to South Carolina State Superintendent of Education Mitchell (Mick) Zais from South Carolina State Superintendent of Education Mitchell (Mick) Zais



STATE OF SOUTH CAROLINA  
DEPARTMENT OF EDUCATION

Mick Zais  
Superintendent

1429 Senate Street  
Columbia, South Carolina 29201

March 16, 2012

Anthony W. Miller, Deputy Secretary  
United States Department of Education  
400 Maryland Ave., SW  
Washington, DC 20202

RE: Request for a delay in implementing the reduction of Individual with Disabilities Education Act funds for failure to meet the maintenance of effort requirements

Dear Mr. Miller:

South Carolina is moving quickly through its budget process. The Fiscal Year 2012-2013 Appropriations bill was passed by the South Carolina House of Representatives 115-0 this week. From there it will be taken up by the Senate, likely sometime in April. We are quickly approaching the point where it will be very difficult to make changes to address the potential shortfall in federal IDEA funds that our state may recognize in its 2013 allocation based on the failure of South Carolina to meet maintenance of effort for the 2009-2010 state fiscal year. As you know, South Carolina has requested a hearing on this matter and the request for a hearing is pending before the Secretary of Education. It does not appear that we will have a final determination in time for South Carolina to effectively budget for the upcoming fiscal year.

In July 2011, the United States Department of Education (ED) exercised its authority under 34 CFR § 300.163(b) to delay the reduction in funding to the 2013 fiscal year. I am requesting that ED delay this reduction again. Additionally, the SCDE was notified by Office for Special Education and Rehabilitative Services (OSERS), in its reply brief, that the ED has requested as part of its FFY 2013 budget proposal a change "that would require OSERS to ignore for FFY 2012 any reductions necessitated by section 612(a)(18)(B) when determining the amount that a State received for the preceding year."

In light of our pending hearing request, and agreement by ED, at least on a matter of policy, that the impact from failing to meet MOE should be a one-time event, the additional delay seems warranted. In the most basic terms, South Carolina simply needs time to plan if these funds are reduced by over \$36 million. With a hearing request pending before the Secretary, we believe that it is premature for the SCDE to seek those additional funds from some yet to be identified source to help make up for the loss of federal funding.

Deputy Secretary Miller  
March 16, 2012  
Page 2

When I took office in January 2011, I inherited an educational budget that was over \$70 million short in state funding to support IDEA maintenance of effort. I hope you recognize that since that time, we restored over \$70 million in state funding to provide educational services to children with disabilities. We have worked tirelessly to provide the level of financial support required and needed for children and to ensure that in future years those funds remain in place.

Thank you for your consideration of this request to delay the reduction of funds for an additional year. If you have any questions regarding this request please contact Shelly Kelly, General Counsel at 803-734-8218.

Sincerely,

A handwritten signature in black ink that reads "Mick Zais". The signature is written in a cursive style with a horizontal line above the name.

Mick Zais, Ph.D.  
State Superintendent of Education

Cc: Members, South Carolina Federal Delegation  
The Honorable Nikki R. Haley, Governor  
The Honorable Robert W. Harrell, Jr., Speaker, South Carolina House of Representatives  
The Honorable John E. Courson, Senate President Pro Tempore  
The Honorable Hugh K. Leatherman, Sr., Chairman, Senate Finance Committee  
The Honorable W. Brian White, Chairman, House Ways and Means Committee

**Attachment 9:**

Letter dated April 5, 2012, to South Carolina South Carolina State Superintendent of Education Mitchell (Mick) Zais from Anthony W. Miller, Deputy Secretary, U.S. Department of Education



## UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

April 5, 2012

Honorable Mick Zais, Ph.D.  
State Superintendent of Education  
South Carolina Department of Education  
1429 Senate Street  
Columbia, South Carolina 29201

Dear Superintendent Zais:

This responds to your March 16, 2012, letter in which you requested that the U.S. Department of Education delay the planned reduction in the State of South Carolina's section 611 allocation under the Individuals with Disabilities Education Act (IDEA). You requested that the reduction be delayed from October 1, 2012, to October 1, 2013, and indicated that the State needs time to plan for this reduction. You also mentioned the pending matter before the Secretary in which South Carolina is seeking a hearing on Assistant Secretary Posny's and my decision to grant a partial, rather than a full, waiver to the State.

We are sensitive to the budget concerns that you raised in your letter and note that the State may not be prepared to take action to address the loss in IDEA dollars until the underlying legal issues are resolved. However, the Office of Special Education and Rehabilitative Services (OSERS) already delayed the reduction from July 1, 2011, to October 1, 2012.<sup>1</sup> In addition, because we cannot anticipate when the Office of the Secretary's deliberations in this matter will conclude,<sup>2</sup> and having already delayed the reduction once, we believe it is in the best interests of students with disabilities for the State to prepare now for a reduction in Federal aid beginning on October 1, 2012. As such, we intend to proceed with the reduction in the State's allotment on October 1, 2012, absent a countervailing decision from the Secretary in the interim.<sup>3</sup>

We will continue to provide technical assistance to the State as it works through this issue.

Sincerely,

A handwritten signature in black ink that reads "Anthony W. Miller".

Anthony W. Miller

<sup>1</sup> In her August 9, 2011, letter to you, Assistant Secretary Alexa Posny delayed the reduction for nearly fourteen months specifically in order to provide the State time to plan.

<sup>2</sup> The Office of the Secretary's review is distinct and separate from OSERS. OSERS and the Office of the Deputy Secretary are not, and cannot be, privy to those deliberations.

<sup>3</sup> If the Secretary were to grant the State's request for a hearing, we would reconsider whether to delay the planned reduction.

**Attachment 10:**

Chart: Fiscal Year Allocations For Preschool Grants—Individuals  
With Disabilities Education Act-Part B, Section 619-Table II

FISCAL YEAR ALLOCATIONS FOR PRESCHOOL GRANTS INDIVIDUALS WITH DISABILITIES EDUCATION ACT - PART B, SECTION 619 - TABLE II						
	Total Award	Maximum State Set-Aside	Maximum Available for Administration	Base Payment for LEAs (1997 Flow-Through)	Allocation to LEAs Based on Population/Poverty Factors	Minimum Flow-Through to LEAs
<b>TOTAL</b>	<b>\$372,645,369</b>	<b>\$97,765,634</b>	<b>\$19,653,087</b>	<b>\$270,938,117</b>	<b>\$4,841,718</b>	<b>\$274,879,835</b>
Alabama	\$5,465,587	\$1,440,925	\$284,189	\$3,981,010	\$63,602	\$4,044,612
Alaska	\$1,237,190	\$324,999	\$64,919	\$868,907	\$15,784	\$912,591
Arizona	\$5,233,837	\$1,361,563	\$272,316	\$3,756,666	\$115,568	\$3,872,254
Arkansas	\$5,261,053	\$1,385,214	\$277,042	\$3,827,091	\$48,748	\$3,875,839
California	\$37,657,903	\$9,792,811	\$1,958,562	\$27,055,716	\$609,376	\$27,665,092
Colorado	\$4,852,632	\$1,273,793	\$254,758	\$3,518,254	\$59,585	\$3,578,839
Connecticut	\$4,810,505	\$1,255,597	\$253,317	\$3,498,346	\$44,572	\$3,543,918
Delaware	\$1,230,716	\$322,841	\$64,568	\$891,852	\$15,922	\$907,774
Florida	\$18,101,968	\$4,733,525	\$960,705	\$13,133,108	\$215,365	\$13,348,473
Georgia	\$9,597,428	\$2,511,031	\$502,208	\$6,995,513	\$149,884	\$7,068,367
Hawaii	\$973,384	\$252,700	\$50,540	\$695,791	\$24,873	\$720,664
Idaho	\$2,144,602	\$564,665	\$112,933	\$1,569,066	\$19,871	\$1,579,937
Illinois	\$17,308,047	\$4,554,056	\$910,811	\$12,582,011	\$171,980	\$12,753,991
Indiana	\$8,727,280	\$2,267,653	\$459,570	\$6,348,542	\$80,865	\$6,429,407
Iowa	\$3,914,752	\$1,030,739	\$208,147	\$2,847,740	\$36,273	\$2,884,013
Kansas	\$4,250,483	\$1,119,138	\$223,827	\$3,097,971	\$38,384	\$3,131,355
Kentucky	\$10,016,825	\$2,637,391	\$527,478	\$7,295,622	\$92,812	\$7,379,434
Louisiana	\$6,348,378	\$1,668,690	\$333,738	\$4,610,280	\$70,409	\$4,680,689
Maine	\$2,464,993	\$649,022	\$129,604	\$1,793,129	\$22,842	\$1,815,971
Maryland	\$6,542,419	\$1,720,634	\$344,106	\$4,753,517	\$68,369	\$4,821,885
Massachusetts	\$9,701,776	\$2,594,440	\$510,898	\$7,057,443	\$93,893	\$7,147,336
Michigan	\$12,310,135	\$3,234,745	\$648,949	\$8,937,000	\$138,390	\$9,075,390
Minnesota	\$7,265,511	\$1,918,246	\$383,049	\$5,299,759	\$67,506	\$5,367,265
Mississippi	\$4,146,779	\$1,090,843	\$218,168	\$3,013,798	\$41,138	\$3,054,936
Missouri	\$5,875,290	\$1,536,706	\$307,341	\$4,245,633	\$92,951	\$4,338,584
Montana	\$1,158,199	\$303,164	\$60,632	\$837,571	\$17,464	\$855,035
Nebraska	\$2,212,223	\$581,888	\$116,377	\$1,507,650	\$22,685	\$1,530,335
Nevada	\$2,185,571	\$574,970	\$114,984	\$1,583,373	\$37,228	\$1,620,601
New Hampshire	\$1,527,855	\$402,278	\$80,456	\$1,111,420	\$14,157	\$1,125,577
New Jersey	\$11,196,879	\$2,998,089	\$587,617	\$8,117,395	\$103,395	\$8,220,790
New Mexico	\$3,126,461	\$823,185	\$164,637	\$2,274,308	\$28,968	\$2,303,276
New York	\$33,100,968	\$8,715,148	\$1,743,028	\$24,078,335	\$307,485	\$24,385,820
North Carolina	\$11,094,802	\$2,921,218	\$584,243	\$8,070,787	\$102,802	\$8,173,589
North Dakota	\$799,830	\$206,407	\$41,281	\$561,294	\$22,129	\$583,423
Ohio	\$12,270,992	\$3,212,425	\$642,485	\$8,875,335	\$183,232	\$9,058,567
Oklahoma	\$3,563,976	\$928,893	\$185,796	\$2,566,608	\$68,385	\$2,634,993
Oregon	\$3,778,956	\$990,213	\$198,042	\$2,735,579	\$53,164	\$2,788,743
Pennsylvania	\$13,869,570	\$3,801,874	\$720,374	\$9,991,311	\$148,385	\$10,087,696
Rhode Island	\$1,639,323	\$431,627	\$86,325	\$1,192,506	\$15,190	\$1,207,696
South Carolina	\$7,003,167	\$1,843,906	\$368,781	\$5,094,371	\$64,890	\$5,159,261
South Dakota	\$1,437,077	\$378,377	\$75,675	\$1,045,385	\$13,315	\$1,058,700
Tennessee	\$6,750,220	\$1,773,609	\$354,721	\$4,900,152	\$75,459	\$4,975,611
Texas	\$22,325,688	\$5,705,688	\$1,159,137	\$16,012,409	\$317,591	\$16,330,000
Utah	\$3,491,122	\$916,696	\$183,371	\$2,533,105	\$41,161	\$2,574,266
Vermont	\$840,327	\$218,765	\$43,753	\$599,107	\$22,395	\$621,502
Virginia	\$8,952,199	\$2,357,079	\$471,415	\$6,512,172	\$82,948	\$6,595,120
Washington	\$3,011,726	\$2,109,456	\$421,891	\$5,828,035	\$74,235	\$5,902,270
West Virginia	\$3,418,114	\$899,633	\$179,826	\$2,485,521	\$31,660	\$2,517,181
Wisconsin	\$9,289,944	\$2,446,006	\$499,201	\$6,757,860	\$86,078	\$6,843,938
Wyoming	\$1,033,251	\$269,282	\$53,852	\$743,880	\$20,129	\$763,989
District of Columbia	\$238,635	\$62,820	\$12,564	\$168,485	\$7,330	\$175,815
Puerto Rico	\$3,086,171	\$799,631	\$159,996	\$2,172,343	\$85,867	\$2,258,240
Dept of the Interior	\$0	\$0	\$0	\$0	\$0	\$0
American Samoa	\$0	\$0	\$0	\$0	\$0	\$0
Guam	\$0	\$0	\$0	\$0	\$0	\$0
Northern Mariana	\$0	\$0	\$0	\$0	\$0	\$0
Virgin Islands	\$0	\$0	\$0	\$0	\$0	\$0
Freely Associated	\$0	\$0	\$0	\$0	\$0	\$0
Other	\$0	\$0	\$0	\$0	\$0	\$0

**Attachment 11:**

Letter dated June 13, 2012, to South Carolina South Carolina State Superintendent of Education Mitchell (Mick) Zais from Anthony W. Miller, Deputy Secretary, U.S. Department of Education



UNITED STATES DEPARTMENT OF EDUCATION

June 13, 2012

THE DEPUTY SECRETARY

RECEIVED

Honorable Wick Zais, Ph.D.  
 State Superintendent of Education  
 South Carolina State Department of Education  
 1429 Senate Street  
 Columbia, South Carolina 29211

THE SECRETARY

Dear Superintendent Zais:

This responds to your May 15, 2012 letter in which you requested clarification of a conversation we had on April 4, 2012, related to the partial denial of the State of South Carolina's request for a waiver under section 612(a)(13)(C)(i) of the Individuals with Disabilities Education Act (IDEA). During that conversation, I informed you that the Office of Special Education Programs (OSEP) would not deny the planned \$36,202,909 reduction in South Carolina's section 611 allocation under the IDEA.<sup>1</sup> As your May 15<sup>th</sup> letter states, during that conversation, we also discussed your request to the State legislature to appropriate an additional \$36,202,909 in State funds for special education and related services for State fiscal year (SFY) 2012 to make up for the reduced Federal allocation. The State was concerned that this increase in State financial support for special education and related services will reset its required level of fiscal effort for such purposes in subsequent years to a higher amount, and that this would be problematic if the State is successful in its request for a hearing on the partial denial of its waiver request for SFY 2010.

I want to clarify what I meant when I said during that conversation that the Department would work with the State on this issue. Under a scenario where the State provides an additional \$36,202,909 in State financial support for special education and related services for SFY 2012 (and its required level of fiscal effort in subsequent years rises to include those dollars), the State may request a waiver under section 612(a)(13)(C)(i) of the IDEA. The Department would carefully consider such a request. Such a request would be especially relevant if (1) the State's partial denial of its waiver request was granted after a hearing<sup>2</sup> and/or (2) future possible Federal legislative amendments would limit the effect of the reduction in the State's section 611 allocation to one year, and not reset its required level of fiscal effort for such purposes in subsequent years to the previous lower amount. While the Department would have to review all of the equities present at the time of any request, we would consider permitting the State to meet the

<sup>1</sup> OSEP will reduce the State's section 611 allocation by \$36,202,909 on October 1, 2012.

<sup>2</sup> At the time of the conference call (April 4, 2012), the Secretary had not yet issued an Order on South Carolina's request for a hearing. The Secretary issued an Order on May 22, 2012, denying the State's request for a hearing.

Page 2 – Honorable Mick Eals, PA D.

requirement to maintain fiscal effort without providing an additional \$56,202,939 in State financial support for special education and related services in a future year.<sup>1</sup>

We acknowledge and fully support your efforts to ensure that there is adequate State financial support for students with disabilities to receive the special education and related services they need to receive a free appropriate public education. If there is additional information or technical assistance that we can provide, please let me know.

Sincerely,



Anthony M. Miller

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<sup>1</sup> The Department may only waive the maintenance of effort requirement for one year at a time.

**Attachment 12:**

Letter dated June 16, 2011, to Dr. Bill East, Executive Director, National Association of State Directors of Special Education, Inc. from Melody Musgrove, Director, Office of Special Education Program, U.S. Department of Education



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

JUN 16 2011

Dr. Bill East, Executive Director  
National Association of State Directors of  
Special Education, Inc.  
1800 Diagonal Road, Suite 320  
Alexandria, Virginia 22314

Dear Dr. East:

I am writing in response to your letter to me dated February 17, 2011, requesting a written response to your question about the local educational agency (LEA) maintenance of effort (MOE) requirement in 34 CFR §300.203(b).

In your letter, you ask about the following scenario:

An LEA fails to meet their maintenance of effort. As a result, the LEA pays the State educational agency (SEA) an amount equal to the shortage. The SEA then returns the money to the U.S. Department of Education.

Question: In determining the base amount that the LEA must spend the following year, do they maintain the base amount from the previous year, or reset the base amount to reflect the lower amount actually spent the previous year?

Under section 613(a)(2)(A)(iii) of the Individuals with Disabilities Education Act (IDEA) and 34 CFR §300.203(a), except as provided in 34 CFR §§300.204 and 300.205, funds provided to an LEA under Part B of the IDEA must not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA below the level of those expenditures for the preceding fiscal year. While the IDEA does not contain a specific provision that addresses the circumstance you raise with respect to LEAs<sup>1</sup>, the Department must rely on the plain language of the statute and regulation with regard to the level of expenditures, which provide that an LEA may not reduce its level of expenditures for the education of children with disabilities "below the level of those expenditures for the preceding fiscal year." See section 613(a)(2)(A)(iii) and 34 CFR §300.203(a). Under this language, the LEA, in the fiscal year immediately following the fiscal year in which it failed to maintain effort, is obligated to expend no less than the amount it expended *in the prior fiscal year* for the education of children with disabilities from either local funds only, or from State and local funds. It is not obligated to expend at least the amount it expended in the last fiscal year for which it met the maintenance of

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<sup>1</sup> With respect to State-level maintenance of financial support, the IDEA specifically addresses what level of support the State must maintain in a year following a year in which the State fails to maintain its required level of support. Section 612(a)(18)(D) provides that the State's level of support remains the level "that would have been required in the absence of" the failure to maintain support.

effort requirement. In other words, each year's LEA maintenance of effort obligation is based on the actual amount expended *in the immediate prior* fiscal year.

As your question assumes, in the event that an LEA fails to maintain its required level of effort, the SEA must pay the Department, from non-Federal funds or funds for which accountability to the Federal Government is not required, the difference between the amount of local, or State and local, funds the LEA should have expended and the amount that it did expend. The SEA may then seek to recoup from the LEA, from non-Federal funds or funds for which accountability to the Federal Government is not required, the amount by which the LEA did not maintain effort. Whether the SEA seeks recovery of those funds from the LEA is a matter of State discretion.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact my office.

Sincerely,

A handwritten signature in black ink, appearing to read "Melody Musgrove", with a long horizontal flourish extending to the right.

Melody Musgrove, Ed.D.  
Director  
Office of Special Education Programs

**Attachment 13:**

Letter dated April 4, 2012, to Kathleen Boundy, Center for Law and Education from Alexa Posny, Assistant Secretary, Office of Special Education and Rehabilitative Services, U.S. Department of Education and Melody Musgrove, Director, Office of Special Education Program, U.S. Department of Education



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Ms. Kathleen Boundy  
Center for Law and Education  
99 Chauncy Street  
Suite 700  
Boston, MA 02111

APR 4 2012

Dear Ms. Boundy:

This letter is in response to your letter of August 17, 2011, regarding the local maintenance of effort requirement in section 613(a)(2)(A)(iii), (B) and (C) of the Individuals with Disabilities Education Act (IDEA) and our response on June 16, 2011, to a question raised by Dr. Bill East, Executive Director of the National Association of State Directors of Special Education. This earlier correspondence concerned the level of effort required of a local educational agency (LEA) in the year after it fails to maintain effort under section 613(a)(2)(A)(iii), (B) and (C) of the IDEA. In our June 16<sup>th</sup> letter to Dr. East, the Department stated that, in the absence of an explicit alternative rule, an LEA would be obligated only to meet a level of effort equal to the amount it expended in the prior year, even if it had not maintained effort in the prior year. After further review, we have determined that the level of effort that an LEA must meet in the year after it fails to maintain effort is the level of effort that it should have met in the prior year, and not the LEA's actual expenditures. We are, therefore, withdrawing the letter to Dr. East.

LEAs, at a minimum, should not reduce their level of financial support for the education of children with disabilities, except as permitted in section 613(a)(2)(B) and (C), so that they can continue to meet their obligations to provide the special education and related services that children with disabilities need to receive a free appropriate public education.

Based on section 607(d) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents the interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented. The Department intends to seek comments from the public on this issue.

Thank you for your views on the letter of June 16, 2011 to Dr. East. We appreciate your thoughtful comments, and your desire to improve the education of children with disabilities.

Sincerely,

Alexa Posny, Ph.D.  
Assistant Secretary  
Office of Special Education and  
Rehabilitative Services

Melody Musgrove, Ed.D.  
Director  
Office of Special Education Programs

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-2600

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*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

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**Attachment 14:**

Department of Education Special Education Fiscal Year 2013 Budget  
Request

Department of Education  
**SPECIAL EDUCATION**  
 Fiscal Year 2013 Budget Request

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## SPECIAL EDUCATION

For carrying out the Individuals with Disabilities Education Act ("IDEA") and the Special Olympics Sport and Empowerment Act of 2004, [\$12,647,066,000] \$12,687,307,000, of which [\$3,115,716,000] \$2,289,108,000 shall become available on July 1, [2012] 2013, and shall remain available through September 30, [2013] 2014, and of which [\$9,283,383,000] \$10,124,103,000 shall become available on October 1, [2012] 2013, and shall remain available through September 30, [2013] 2014, for academic year [2012-2013] 2013-2014:<sup>1</sup> *Provided*, That the amount for section 611(b)(2) of the IDEA shall be equal to the lesser of the amount available for that activity during fiscal year [2011] 2012, increased by the amount of inflation as specified in section 619(d)(2)(B) of the IDEA, or the percent change in the funds appropriated under section 611(i) of the IDEA, but not less than the amount for that activity during fiscal year [2011] 2012:<sup>2</sup> *Provided further*, That the Secretary shall, without regard to section 611(d) of the IDEA, distribute to all other States (as that term is defined in section 611(g)(2)), subject to the third proviso, any amount by which a State's allocation under section 611(d), from funds appropriated under this heading, is reduced under section 612(a)(18)(B), according to the following: 85 percent on the basis of the States' relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of a free appropriate public education under this part, and 15 percent to States on the basis of the States' relative populations of those children who are living in poverty:<sup>3</sup> *Provided further*, That the Secretary may not distribute any funds under the previous proviso to any State whose reduction in allocation from funds appropriated under this heading made funds available for such a distribution:<sup>4</sup> *Provided further*, That the States shall allocate such funds distributed under the second proviso to local educational agencies in accordance with section 611(f):<sup>5</sup> *Provided further*, That the amount by which a State's allocation under section 611(d) of the IDEA is reduced under section 612(a)(18)(B) and the amounts distributed to States under

the previous provisos in fiscal year 2012 or any subsequent year shall not be considered in calculating the awards under section 611(d) for fiscal year 2013 or for any subsequent fiscal years:<sup>6</sup> *Provided further,* That the Secretary may, notwithstanding section 643(e)(1) of the IDEA, reserve up to \$2,710,000 of the amount provided under section 644 for incentive grants to States to carry out section 635(c):<sup>7</sup> *Provided further,* that funds made available for the Special Olympics Sport and Empowerment Act of 2004 may be used to support expenses associated with the Special Olympics National and World Games:<sup>8</sup> *Provided further,* That ~~[\$2,000,000]~~ \$30,000,000 to remain available for obligation through September 30, [2013] 2014, shall be for competitive grants to States, incentive payments, and related activities [aimed at improving the outcomes of children receiving Supplemental Security Income (SSI) and their families, which may include competitive grants to States]as may be necessary to improve the provision and coordination of services and supports for Supplemental Security Income (SSI) child recipients and their families or households in order to achieve improved [health status] outcomes, including both physical and emotional health, [and] education and post-school outcomes, [including completion of] such as completing postsecondary education and job training and obtaining employment, [and to improve services and supports to the families or households of the SSI child recipient, such as education and job training for the parents] that may result in long-term improvements in the SSI child recipient's economic self-sufficiency:<sup>9</sup> *Provided further,* That States may award subgrants for a portion of the funds to other public and private, non-profit entities<sup>10</sup>: *Provided further,* That not to exceed \$15,000,000 of amounts provided in the eighth proviso may be used for performance-based awards for Pay for Success projects:<sup>11</sup> *Provided further,* That, with respect to the previous proviso, any funds obligated for such projects shall remain available for disbursement until expended, notwithstanding 31 U.S.C. 1552(a):<sup>12</sup> *Provided further,* That, with respect to the tenth proviso, any deobligated

funds from such projects shall immediately be available for section 611 of the IDEA.<sup>13</sup>

*(Department of Education Appropriations Act, 2012)*

NOTE

Each language provision that is followed by a footnote reference is explained in the Analysis of Language Provisions and Changes document which follows the appropriation language.

**SPECIAL EDUCATION**

**Analysis of Language Provisions and Changes**

Language Provision	Explanation
<p>F. [ \$12,647,066,000] <u>\$12,687,307,000</u>, of which [ \$3,115,716,000] <u>\$2,289,108,000</u> shall become available on July 1, [2012] <u>2013</u>, and shall remain available through September 30, [2013] <u>2014</u>, and of which [ \$9,283,383,000] <u>\$10,124,103,000</u> shall become available on October 1, [2012] <u>2013</u>, and shall remain available through September 30, [2013] <u>2014</u>, for academic year [2012-2013] <u>2013-2014</u>:</p>	<p>This language provides for funds to be appropriated on a forward-funded basis for a portion of the Grants to States program, and all of the Preschool Grants and Grants for Infants and Families programs. The language also provides that a portion of the Grants to States funds be available in an advance appropriation that becomes available for obligation on October 1 of the fiscal year following the year of the appropriation.</p>
<p><sup>2</sup> <i>Provided</i>, That the amount for section 611(b)(2) of the IDEA shall be equal to the lesser of the amount available for that activity during fiscal year [2011] <u>2012</u>, increased by the amount of inflation as specified in section 619(d)(2)(B) of the IDEA, or the percent change in the funds appropriated under section 611(i) of the IDEA, but not less than the amount for that activity during fiscal year [2011] <u>2012</u>:</p>	<p>This language limits the amount of funds required to be transferred to the Department of the Interior under the Grants to States program to the lesser of an amount equal to the amount transferred to the Department of the Interior in 2012 plus inflation or the percent change in the appropriation for the Grants to States program. This language also clarifies that in the event of a decrease or no change in the appropriation for the Grants to States program, the amount of funds required to be transferred to the Department of the Interior remains level with the amount they received under the fiscal year 2012 appropriation.</p>

**SPECIAL EDUCATION**

**Analysis of Language Provisions and Changes**

Language Provision	Explanation
<p><u><sup>2</sup> Provided further, That the Secretary shall, without regard to section 611(d) of the IDEA, distribute to all other States (as that term is defined in section 611(q)(2)), subject to the third proviso, any amount by which a State's allocation under section 611(d), from funds appropriated under this heading, is reduced under section 612(a)(18)(B), according to the following: 85 percent on the basis of the States' relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of a free appropriate public education under this part, and 15 percent to States on the basis of the States' relative populations of those children who are living in poverty:</u></p>	<p>This language authorizes the Department to reallocate funds that are reduced from a State's award as a result of a failure to meet the maintenance of financial support requirements of section 612 of the IDEA and requires that those funds be distributed to other States on the basis of their relative populations of children in the age ranges for which a State ensures a free appropriate public education and those children living in poverty.</p>
<p><u><sup>2</sup> Provided further, That the Secretary may not distribute any funds under the previous proviso to any State whose reduction in allocation from funds appropriated under this heading made funds available for such a distribution:</u></p>	<p>This language ensures that any State receiving a reduction in their section 611 allocation as a result of not meeting the maintenance of financial support requirements of section 612 of the IDEA does not receive funds redistributed as a result of another State's failure to meet those same requirements.</p>
<p><u><sup>2</sup> Provided further, That the States shall allocate such funds distributed under the second proviso to local educational agencies in accordance with section 611(f):</u></p>	<p>This language requires States to distribute the funds received under the second proviso to local educational agencies without reserving a portion of those funds for State-level activities.</p>

**SPECIAL EDUCATION**

**Analysis of Language Provisions and Changes**

Language Provision	Explanation
<p><u><sup>2</sup> Provided further, That the amount by which a State's allocation under section 611(d) of the IDEA is reduced under section 612(a)(18)(B) and the amounts distributed to States under the previous provisos in fiscal year 2012 or any subsequent year shall not be considered in calculating the awards under section 611(d) for fiscal year 2013 or for any subsequent fiscal years:</u></p>	<p>This language allows the Department to calculate a State's allocation under section 611(d) in future years without regard to reductions in awards made as a result of a failure to meet the maintenance of financial support requirements in section 612. This language mitigates the potential long-term impact of one-time reductions in awards.</p>
<p><u><sup>2</sup> Provided further, That the Secretary may, notwithstanding section 643(e)(1) of the IDEA, reserve up to \$2,710,000 of the amount provided under section 644 for incentive grants to States to carry out section 635(c):</u></p>	<p>This language permits the Secretary to use up to \$2,710,000 of the funds appropriated for Part C of the IDEA for incentive grants for States to serve children 3 years of age until entrance into elementary school.</p>
<p><u><sup>2</sup> Provided further, That funds made available for the Special Olympics Sport and Empowerment Act of 2004 may be used to support expenses associated with the Special Olympics National and World Games:</u></p>	<p>This language authorizes funds made available for the Special Olympics Sports and Empowerment Act of 2004 to be used to support expenses associated with Special Olympics National and World games.</p>

**SPECIAL EDUCATION**

**Analysis of Language Provisions and Changes**

Language Provision	Explanation
<p><u>2: Provided further, That [\$2,000,000] \$30,000,000, to remain available for obligation through September 30, [2013] 2014, shall be for competitive grants to States, incentive payments, and related activities [aimed at improving the outcomes of children receiving Supplemental Security Income (SSI) and their families, which may include competitive grants to States] as may be necessary to improve the provision and coordination of services and supports for Supplemental Security Income (SSI) child recipients and their families or households in order to achieve improved [health status] outcomes, including both physical and emotional health, [and] education and post-school outcomes, [including completion of] such as completing postsecondary education and job training and obtaining employment, [and to improve services and supports to the families or households of the SSI child recipient, such as education and job training for the parents] that may result in long-term improvements in the SSI child recipient's economic self-sufficiency:</u></p>	<p>This language designates \$30,000,000 for competitive grants to States, incentive payments, and related activities to improve the education and employment outcomes of SSI child recipients through the provision and coordination of services and supports for SSI child recipients and their families or households. The language would also make these funds available through September 30, 2014.</p>
<p><u>3: Provided further, That States may award subgrants for a portion of the funds to other public and private, non-profit entities</u></p>	<p>This language allows States to award as subgrants to private and public, non-profit entities a portion of the competitive awards authorized in the eighth proviso.</p>
<p><u>4: Provided further, That not to exceed \$15,000,000 of amounts provided in the eighth proviso may be used for performance-based awards for Pay for Success projects:</u></p>	<p>This language permits the Secretary to use up to \$15,000,000 of the funds provided for the activities directed at Supplemental Security Income children recipients and their families for performance-based awards under the Pay for Success program.</p>

SPECIAL EDUCATION

Analysis of Language Provisions and Changes

Language Provision	Explanation
<p><u><i>Provided further, That, with respect to the previous proviso, any funds obligated for such projects shall remain available for disbursement until expended, notwithstanding 31 U.S.C. 1552(a):</i></u></p>	<p>This language permits funds designated by the Secretary for the Pay for Success projects to remain available until expended.</p>
<p><u><i>Provided further, That, with respect to the tenth proviso, any deobligated funds from such projects shall immediately be available for section 611 of the IDEA.</i></u></p>	<p>This language requires any deobligated funds of the Pay for Success projects to be allocated through the Special Education Grants to States program.</p>