United States Court of Appeals for the Fourth Circuit

State Superintendent of Education Mitchell Zais and the S.C. Department of Education, Petitioners	)	
v.	)	Motion for Stay of Withholding IDEA Funds
Secretary of Education Arne Duncan, Respondent	)	

Motion for a Stay of the Withholding of IDEA Funds

Pursuant to Rule 18(a)(2) of the Federal Rules of Appellate Procedure, State Superintendent of Education Mitchell Zais and the South Carolina Department of Education (SCDE), hereinafter referred to as "Petitioners," petition the court for a stay of the order by the Secretary of Education Arne Duncan, hereinafter referred to as "Secretary," of the reduction of South Carolina's Individuals with Disabilities Education Act (IDEA) Part B allocation in the amount of $36,202,909 pending the review of South Carolina's appeal regarding such matter. (Attach. 1).

In accordance with Local Rule, 27(a), counsel for Petitioners notified counsel for the Secretary, of intent to file this motion and requested the Secretary's

consent, which was denied. The Secretary's counsel has informed Petitioners' counsel of her intent to file an objection to this motion.

I. FACTS

The IDEA requires states to maintain state fiscal effort. The IDEA and its implementing regulations provide 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 support for the preceding fiscal year." 20 U.S.C. § 1412(a)(18)(A); 34 C.F.R. § 300.163(a). Thus, regardless of any decline in state revenue or budget deficits that a state may face, the state must appropriate, at a minimum, at least the same amount of funds for special education and related services for students with disabilities as the state appropriated the previous year. The penalty for not meeting maintenance of effort (MOE) is the reduction of federal IDEA funds "for any fiscal year following the fiscal year in which the State fails to comply with the [MOE requirement]." 34 C.F.R. § 300.163(b). The Secretary has the authority to grant a waiver of the MOE requirement if the "Secretary determines that—(1) 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); 34 C.F.R. § 300.163(c)(1).

The SCDE failed to meet MOE for the following fiscal years: 2008–2009 and 2009–10. The U.S. Department of Education (ED) waived the state's MOE requirement for the 2008–09 year and granted a partial waiver for the 2009–10 year. The partial denial of the 2009–10 request resulted in the Secretary initiating the $36,202,909 reduction in South Carolina's IDEA allocation. This reduction will be from South Carolina's federal fiscal year (FFY) 2012 allocation, which begins October 1, 2012.

Like many states, South Carolina experienced unprecedented fiscal decline between the years 2007–08 and 2009–10. Considering South Carolina's three primary sources of education revenue, state revenue collected in 2009–10 was $1,229,125,946 *less* than in 2007–08. The 2007–08 fiscal year is significant because it is the last fiscal year in which South Carolina met its MOE requirement under the IDEA; therefore, 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.[1] (Attach. 2; Attach. 3).

South Carolina experienced a precipitous and unforeseen decline in revenue in 2008–09, which coincided with the nationwide financial crisis. South Carolina first failed to meet MOE in the 2008–09 fiscal year, just as the country was starting

[1] South Carolina subsequently met the MOE requirement for the 2010–11 FY by the South Carolina General Assembly allowing a transfer of funds to school districts in an amount that satisfied the MOE requirement for that fiscal year.

its financial decline. The decline continued and compounded in 2009–10. As a result, South Carolina sought a waiver of the MOE requirement for those fiscal years based on the provisions of 20 U.S.C. § 1412(a)(18)(C) and 34 C.F.R. § 300.163(c)(1) (2006).

By letter dated June 17, 2011, the ED granted a waiver for 2008–09. It also granted a partial waiver for the 2009–10 year, denying the amount of $36,202,909. (Attach. 4).

II. PROCEDURAL BACKGROUND

Simultaneous with the filing of this motion, South Carolina is filing a *Petition for a Review* of Secretary Duncan's Order dated May 22, 2012, which denies South Carolina the right to appeal the determination of Assistant Secretary Alexa Posny's decision to not grant South Carolina a full waiver of the MOE requirements under the IDEA for the 2009–10 state fiscal year, and by that decision, issue a reduction of South Carolina's 2012–13 IDEA funding by $36,202,909. The ED denied, in part, the SCDE's request for a waiver of the MOE under the IDEA for state fiscal year 2009–2010, on June 17, 2011. (Attach. 4). On July 1, 2011, the ED informed the SCDE that it would "work with your State to determine when the State's [South Carolina] allocation will be reduced." (Attach. 5). The ED failed to provide the SCDE notice of its right to a hearing. Despite

this lack of notification of its rights, the SCDE filed an appeal of the ED's decision on August 1, 2011. (Attach. 6).

In that appeal, South Carolina requested that the Secretary determine that South Carolina has a right to a review of the adverse administrative decision made by Assistant Secretary Posny which resulted in a reduction of South Carolina's annual IDEA allocation by approximately 20 percent, thus creating a severe adverse impact on South Carolina's students with disabilities, perhaps in perpetuity. Assistant Secretary Posny's decision to deny South Carolina's request for a full waiver of the MOE requirement, which was subsequently reaffirmed by Deputy Secretary Anthony W. Miller, results in a $36,202,909 reduction in South Carolina's IDEA funding—a reduction that could become permanent if one accepts the ED's interpretation of the impact of the reduction on the funding formula. (Attach. 7). On May 22, 2012, the Secretary ruled that he would not afford South Carolina a hearing on this matter and upheld the decision of both Assistant Secretary Posny and Deputy Secretary Miller. (Attach. 1).

III. MOVING FOR A STAY FIRST BEFORE THE SECRETARY OF EDUCATION AND THE ED WOULD BE IMPRACTICABLE.

In March 2012, while awaiting a ruling by the Secretary with regard to South Carolina's request for a hearing, State Superintendent of Education Zais requested that the ED delay the reduction of funds for an additional year because

the SCDE has not yet been given an opportunity for a hearing. (Attach. 8). Deputy Secretary Anthony Miller denied that request and stated that the reduction would occur on October 1, 2012. (Attach. 9). On April 30, 2012, the SCDE received its federal award documents which show that its IDEA allocation was reduced for the 2012–13 year by $36,202,909. (Attach.10).

Since the SCDE's previous request to delay the penalty was denied, the SCDE believes that any additional request to reconsider that determination by the Secretary will be futile, and therefore, requests that this court issue a stay of the reduction of South Carolina's IDEA funds pending the outcome of the appeal.

IV. REQUEST FOR A STAY

A party seeking equitable relief in the form of a stay must show (1) the party is likely to prevail on the merits of the appeal, (2) that the party will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) granting the stay serves the public interest. *Long v. Robinson,* 432 F.2d 977, 979 (4th Cir. 1970). This court has stated that the most crucial factors in the balance are irreparable harm to the party seeking the stay as well as to the opponent. *Belk v. Charlotte-Mecklenburg Bd. Of Educ.,* 1999 U.S. App. LEXIS 34574, 4 (4th Cir. 1999) (granting stay of district

court injunction) (citing *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 359 (4th Cir. 1991).

A. Irreparable Harm to South Carolina

The harm to South Carolina in not granting the stay is immediate and irreversible. South Carolina is attempting to cover the loss of federal funds by allocating $36,202,909 in state dollars to local educational agencies (LEAs) to make up for the loss of the federal funds. South Carolina's proposed budget includes $36,202,909 in one-time funding to make up for the loss of the federal funds. In covering the loss of federal funding, South Carolina is putting its future funding obligations at risk. Pursuant to the IDEA, states are empowered to determine the formula for establishing the MOE requirements for the state. However, by letter dated June 13, 2012, Deputy Secretary Miller states that South Carolina's infusion of the additional funds will raise South Carolina's MOE requirements in subsequent years but the ED would "work with the State on this issue." (Attach. 11). Deputy Secretary Miller suggests that if South Carolina is successful in appeal or if the law is changed, it could request a waiver of the MOE requirement and that ED would "review all of the equities present at the time of any request." South Carolina cannot take a $36 million risk. Without legislative change or a "waiver," regardless of the outcome of this appeal, once the SCDE allocates the funds for children with disabilities, it must maintain those additional

funds for future years. To put this in perspective, if South Carolina is successful in its appeal, but the determination is made after the funds are allocated to the local school districts, South Carolina will have to maintain this additional funding in perpetuity or risk losing additional federal IDEA funds. A delay in the reduction of funds from the ED avoids this scenario.

Effect on Local School Districts

Under § 1413(a)(2)(A)(iii) of Part B of the IDEA and 34 C.F.R. § 300.203(a) of the IDEA regulations, an LEA cannot reduce the level of state and local funds spent on students with disabilities below the level of those expenditures for the preceding fiscal year, except as provided in 34 C.F.R. §§ 300.204 and 300.205. Reducing the level of expenditures is prohibited on either an aggregate or a per capita basis. If an LEA fails to spend at least the same total amount of local funds, the same total amount of state and local funds together or the same amount of local or combined state and local funds per student, the LEA will not meet the MOE requirement under the IDEA.

When an LEA fails to meet MOE, the SEA is required to reimburse the ED an amount equal to the amount that the LEA fell short in maintaining the required level of spending. As a result, the SEA collects non-federal funds in the amount equal to the shortage in spending from the LEA and returns the money to the ED.

If the state's Part B IDEA funding is decreased by $36,202,909 during FFY 2012, the inevitable result will be a reduction in the quality and amount of services to students with disabilities. The very students who the IDEA was enacted to protect and ensure that they receive a free appropriate public education (FAPE) and access to the special education and related services necessary to receive a FAPE will be negatively impacted. To prevent a reduction in the level of special education and related services provided to students with disabilities and ensure the continued provision of a FAPE for these students, the state will be required to replace the reduced federal funds with increased state funding. The LEAs will use the additional state funding to replace the lost federal funds and as a result, increase the level of state spending to meet the needs of its students with disabilities.

Based upon the existing requirement to maintain at least the same level of spending from state and local funds, the provision of additional state funds during FFY 2012 will lead to an increase in LEAs' local MOE that they must meet for FFY 2013. If, however, the state is successful in getting the $36,202,909 million reduction in its IDEA funds decreased, overturned, or limited to one fiscal year, LEAs will be forced to maintain the increased level of spending from state and/or funds for every year from this point forward to avoid a local MOE deficit and repayment of funds. Consequently, the state's attempt to avoid any loss of special

education and related services for students with disabilities has the potential for raising the local MOE for LEAs to a level that cannot be sustained in subsequent years and inadvertently result in a further loss of already limited IDEA funds.

With regard to the impact of the reduction in the level of state-level expenditures, the ED, Office of Special Education Programs (OSEP) previously said LEAs that inappropriately cut their special education spending would suffer at most a one-time consequence and then the level of required support would drop in subsequent years to the reduced level. (Letter from Melody Musgrove, Dir. OSEP, to Dr. Bill East, Exec. Dir. Nat'l Assoc. State Dir. Special Educ.(June 16, 2011) (*Letter to East*)). (Attach 12). The OSEP recently reversed this stance, however, and on April 4, 2012, withdrew *Letter to East*. In its April 4, 2012, correspondence, the OSERS and the OSEP explicitly stated that if an LEA reduces the level of expenditures for local and state funds for students with disabilities for the preceding fiscal year, the necessary level of support in subsequent years will not reduce to the lower level of spending. (Letter from Dr. Alexa Posny, Asst. Sec'y, OSERS and Melody Musgrove, Dir. OSEP, to Kathleen Boundy, Ctr. For Law & Educ. (April 4, 2012)). (Attach. 13). The required level of MOE will remain at the higher level of spending.

As a result of the April 4, 2012, change in policy, if the state provides an additional $36,202,909 to LEAs to make up for the reduction in Part B IDEA

funds, the funding will increase LEAs' aggregate and per capita level of spending and therefore, raise the local MOE for each LEA. If the state is later successful in getting its Part B IDEA funds reinstated, LEAs will be penalized if unable to maintain the increased level of spending that will result from the additional funds that the state will make available to fill the gap in funding.

B. The Issuance of a Stay of the Reduction of Funds is Harmless to the ED

The IDEA and its regulations state that the reduction of funds shall be taken in "any" fiscal year following the failure to meet MOE. 34 C.F.R. § 300.163(b). The ED acknowledged that it was not bound by statute to immediately reduce South Carolina's allocation by its actions in 2011–12 when it chose not to reduce South Carolina's allocation by $36,202,909 in that fiscal year. By delaying the reduction, the ED conceded that it has the *authority* under the statute and regulation to delay the penalty. Thus, it should be logical that the ED delay the penalty until the matter is fully resolved in court. As a result of the ED's failure to provide the SCDE with a right to a hearing, the SCDE is in the same position now as it was in July 2011 when the ED determined that it should delay the reduction. There is no harm to the ED in continuing the delay until a final determination can be made with regard to whether South Carolina's IDEA funds will be reduced.

In fact, the ED agrees in concept that the perpetual nature of the reduction in funds is punitive on states and has requested an amendment to the law in its budget

request. The ED requested that Congress amend the IDEA to make it clear that the reduction of funds is a one-time event. (Attach. 14). In its budget request, the ED requests that Congress clarify the law to ensure that this penalty will not be permanent. However, South Carolina cannot be assured that Congress will make this change in time to affect current year funding. Since that is the intent of the ED, a stay by this court of the reduction of funds, pending the outcome on appeal, to South Carolina is harmless. Assuming *arguendo* that South Carolina is unsuccessful in its appeal, the ED indicated that the reduction "should" only be once. Therefore, there is no harm to the ED in delaying the reduction until the final determination on the merits is reached.

C. Likelihood of Success on the Merits

The SCDE will raise three issues on appeal. First, the SCDE has a right to a hearing and has been denied due process by the ED in its determination that it has no right to appeal the decision to deny a full waiver of the state's MOE and subsequent reductions in funding. Secondly, the decision to deny the full waiver for the 2009–10 fiscal year was an abuse of discretion, arbitrary, and capricious. Finally, the Secretary erred as a matter of law in his interpretation of the IDEA in holding that the reduction of funding will have the effect of reducing South Carolina's IDEA funds in perpetuity.

1. Right to a Hearing

The SCDE has been denied a hearing on the matter which is provided for in the IDEA and GEPA. The ED argues that because section 34 C.F.R. § 300.163 does not contain specific language outlining the right to appeal the discretionary decision regarding the refusal to grant a full waiver of state MOE and subsequent reduction of the funds, no right to appeal exists. The ED argues that the reduction of funds is a non-discretionary act that it must implement in accordance with the language in the statute. This argument ignores the fact that the funds are being reduced because of a *discretionary* act of the Secretary.

There are no policies, regulations, or guidelines that set forth the criteria that the Secretary uses to determine whether the SCDE, or any State Educational Agency (SEA), should be granted a MOE waiver. While the SCDE had an opportunity to meet with ED staff to calculate the *amount* of the deficit, at no time did the SCDE have any input with respect to how the ED would consider the facts surrounding how the deficit occurred. In fact, the ED used a different formula when considering other states' MOE. The SCDE has not had an opportunity to dispute the application of the formula.

The ED failed to give the SCDE notice of a right to a hearing which is required under 34 C.F.R. § 300.179. That section states:

§ 300.179 Notice and hearing before determining that a State is not eligible to receive a grant.
(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State— (i) With reasonable notice; and (ii) With an opportunity for a hearing
(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the SEA by certified mail with return receipt requested.

One of the eligibility requirements is complying with the MOE requirement. The Secretary states that OSERS did not determine that the SCDE was not eligible for its IDEA grant, that the SCDE "conceded" eligibility by requesting the waiver, thus admitting that it did not meet MOE. Thus, using the Secretary's logic, had the SCDE not requested a waiver and the state been deemed ineligible for funding it would have been granted a hearing regarding the non-discretionary withholding of funds. But because the state asked for a waiver of the MOE requirement under a provision outlined in both statute and regulation and through an act of *discretion* the waiver was partially denied—the State does not have a right to a hearing. Under the Secretary's ruling, discretionary acts are not subject to challenge but non-discretionary acts are. This interpretation by the Secretary is contrary to the law.

With regard to the General Education Provisions Act (GEPA), the Secretary argues that the provision of law does not apply because the IDEA is specific in granting hearing rights under two limited circumstances. He finds that because

there is not a specific right to appeal articulated in 34 C.F.R. § 300.163, GEPA does not apply. However, if assuming *arguendo* that 300.179 does not apply in this case, the general law of GEPA would apply since there is no specific language in IDEA negating a right to a hearing.

The GEPA provides South Carolina a right to appeal from a determination related to a discretionary matter. The IDEA statute at 20 U.S.C. § 1234(c) gives the Secretary authority to withhold funds whenever he has "reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds . . . ." 20 U.S.C. § 1234(c). The failure to grant a waiver when the circumstances clearly exist to support a waiver creates a discretionary act as covered under 20 U.S.C. § 1234(d).

20 U.S.C. § 1234(d) provides:

> § 1234(d). Withholding
>
> (a) Discretionary authority over further payments under applicable program. In accordance with section 454 [20 USCS § 1234c], the Secretary may withhold from a recipient, in whole or in part, further payments (including payments for administrative costs) under an applicable program
>
> (b) Notice requirements. Before withholding payments, the Secretary shall notify the recipient, in writing, of--
> (1) the intent to withhold payments;
> (2) the factual and legal basis for the Secretary's belief that the recipient has failed to comply substantially with a requirement of law; and

(3) an opportunity for a hearing to be held on a date at least 30 days after the notification has been sent to the recipient.

"Withholding" under 20 U.S.C. § 1234(d) is the "[d]iscretionary authority over further payments under applicable program." Thus, GEPA applies when the Secretary uses his discretion in determining whether to withhold funds. This section applies when the Secretary uses his discretion that results in the withholding of funds, in whole or in part. Section 300.163 of the IDEA regulations gives the Secretary the discretion to determine whether to grant a waiver or not, which is a discretionary act over further payments.

2. Secretary Erred in Denying the Full Wavier of the 2009–10 MOE Deficit

On appeal the SCDE will show that the Secretary erred in making his determination with regard to the impact that South Carolina's reduction in funding had on students with disabilities. Among other arguments that will be thoroughly briefed on appeal, the SCDE will show that the Secretary in his review of South Carolina's finances should have used the 2007–08 year as the comparison year when determining the impact on students with disabilities as compared to the general education populations. The ED used the 2008–09 year as comparison which was an abuse of discretion, arbitrary, and capricious.

3. Secretary Erred in his Interpretation of the Funding Formula

Finally, the Secretary erred in determining that the reduction of South Carolina's IDEA allocation will be taken in perpetuity. The SCDE maintains that any reduction should be taken once and the state's allocation be returned to its pre-reduction allocation, the following year.

The IDEA statute at 20 U.S.C. § 1412(a)(18) and regulation 34 C.F.R. § 300.163 set forth a one-time penalty for failure to meet the MOE requirements. The statute states:

> (B) Reduction of funds for failure to maintain support. The Secretary shall reduce the allocation of funds under section 611 [20 USCS § 1411] 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.

Both the statute and the regulations provide that a state's funding will be reduced in "any fiscal year." OSERS already exhibited the intent of Congress when it delayed the reduction of funds for South Carolina, by letter dated July 1, 2011.

> When interpreting a statute, we [courts] "first and foremost strive to implement congressional intent by examining the plain language." *Barbour v. Int'l Union*, 640 F.3d 599, 610 (4th Cir. 2011). "This plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statue as a whole." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "In interpreting the plain language of a statute, we give the terms their 'ordinary, contemporary, common means."

Crespo v. Holder, 631 F.3d 130,133 (4th Cir. 2011) (quoting *North Carolina ex rel. Cooper v. Tenn. Valley Auth.,* 515 F.3d 344, 351 (4th Cir. 2008)). The clear interpretation of "any" and "year" is "one".

D. Granting the Stay Protects the Public Interest

No greater public interest exists than the preservation of services to children with disabilities. The immediate reduction of funds, prior to the appeal being heard by the court, will have an immediate impact on the very children that the OSERS is charged with protecting. While the state has included in its budget funding to make up for the loss of federal funds for 2012–13, the additional state funds will have an immediate impact on state and local MOE requirements. Most LEAs will not be able to maintain this artificially high level of state funding and will face the loss of federal funds in future years or be forced to pay back funds to the ED using already stretched local and state funds in an amount equal to the amount that the LEAs failed to meet local MOE as a condition of receiving their IDEA funds. Alternatively, to sustain the inflated local MOE level, LEAs could divert moneys from gifted and talented programs, technology, the arts, supplementary programs aimed at providing additional support services to prevent students from being retained or later identified as students with disabilities, dropout prevention programs, school-wide positive behavioral interventions and support, and reading programs, just to list a few examples. If the SCDE is

successful in its appeal, the State funds will not have to be sent to the LEAs and thereby their local MOE will not be raised.

In the alternative, to avoid the adverse effect on local MOE, the LEAs could divert state and local funds away from services for students with disabilities. Faced with the reality of trying to maintain a level of fiscal effort that is not realistic or sustainable, LEAs may choose to do this; thus, harming students with disabilities. A delay in the penalty from the ED until the appeal is finalized will avoid this. If the SCDE is successful, the state funds will not be infused into the local budgets to create this funding phenomenon. If the SCDE is unsuccessful, South Carolina will have the daunting task of finding a permanent solution to the funding gap.

V. CONCLUSION

South Carolina respectfully requests that the court grant a stay of the decision to reduce South Carolina's 2012 IDEA allocation in the amount of $36,202,909 until South Carolina's appeal in this matter is heard.

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