UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of	**Docket No. 13-41-O**
NEW MEXICO PUBLIC EDUCATION DEPARTMENT,[1]	IDEA Determination
Applicant.	

Appearances: Leigh M. Manasevit, Esq., and Tiffany Winters, Esq., Brustein & Manasevit PLLC, Washington, D.C., for New Mexico Public Education Department.

Timothy Middleton, Esq., and Nana Little, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Special Education and Rehabilitative Services.

Before: Judge Richard F. O'Hair

INITIAL DECISION

This matter is before me as a Hearing Official designated by the Secretary of Education pursuant to 34 C.F.R. § 300.180. The issue addressed in this proceeding is whether, under the Individuals with Disabilities Education Act (IDEA), a State can exercise flexibility to reduce expenditures under 20 USC § 1413(j), 34 C.F.R. § 300.230, in a given fiscal year, and thus reduce, in a subsequent fiscal year, the State's required level of financial support made available through appropriations under 20 U.S.C. § 1412(a)(18), 34 C.F.R. § 300.163? I answer this question in the negative by finding that the New Mexico Public Education Department (NMPED) cannot reduce its State fiscal year (SFY) 2011 required level of IDEA appropriations following its exercise of flexibility in SFY 2010.

[1] This appeal was previously docketed as "State of New Mexico."

For the purposes of this proceeding, the relevant sections of the IDEA, found at 20 U.S.C. §§ 1412-1413, which address mandatory levels of State education agency (SEA) funding allocations, waiver provisions, and provision for the exercise of flexibility, are set out below:

> § 1412(a)(17)(C) Prohibition Against Supplantation and Conditions for Waiver by Secretary.
> Except as provided in section 1413 of this title (State agency flexibility), funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds ... expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, ... the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.
>
> § 1412(a)(18)(A) In General
> The State does 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 cost of educating those children, below the amount of that support for the preceding fiscal year.
>
> § 1412(a)(18)(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....
>
> § 1412(a)(18)(D) Subsequent Years
> If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.
>
> § 1413(j)(1). State Agency Flexibility
> For any fiscal year for which the allotment received by a State under section 1411 of this title exceeds the amount the State received for the previous fiscal year ... the State educational agency, notwithstanding paragraphs (17 and (18) of section 1412(a) of this title and section 1412(b) of this title, may reduce the level of expenditures from State sources for the education of children with disabilities by not more than 50 percent of the amount of such excess.

The IDEA Part B formula grants are given to States for the purpose of supporting special education and related services. In order to be eligible to receive these federal grants, the State has a maintenance of State financial support (MFS) requirement which is also referred to as a maintenance of effort (MOE) requirement. 20 U.S.C. § 1412(a)(18) and 34 C.F.R. § 300.163. To determine whether an SEA has met its MFS requirement in a given fiscal year, one examines the highest amount of financial support that a State made available, or appropriated, for special education and related services in any previous fiscal year. The highest amount the State has made available is the State's MFS base. Thereafter, the amount of funds the State must make available for special education must equal or exceed this MFS base. If at any time a State exceeds its MFS base, this higher amount becomes its new MFS base. Accordingly, a State's MFS base can never decrease; it can only increase. 20 U.S.C. § 1412(a)(18)(D). If a State fails to meet its MFS base in any fiscal year, the State's Part B grant in the following year will be reduced by the amount by which the State failed to meet its MFS base in the preceding year.

This MFS requirement exists to ensure that States do not reduce their State appropriations for special education and related services in any year in which they receive the IDEA grants. To hold otherwise might encourage States to arbitrarily reduce their State appropriations by the amount of federal grants they received. This reduction could place a burden on the local education agencies (LEA), potentially deprive them of needed funds, and jeopardize their obligation to provide a free and appropriate public education to children with disabilities.

The statute provides for a potential exception to this mandatory IDEA formula grant requirement up a State's failure to meet its MFS base. It gives the Secretary of Education the discretion to grant a State's request for a waiver of its MFS requirement if the Secretary 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). The statute further provides that for any year in which the State has received a waiver of its MFS base funding level requirement, the funding level required for future years will be the amount of its original MFS, and not the reduced level approved pursuant to the waiver the Secretary granted. 20 U.S.C. § 1412(a)(18)(D).

The 2004 IDEA reauthorization introduced a new financial provision for the SEAs which is labeled SEA flexibility. 20 U.S.C. § 1413(j). This section basically provides that, if a State meets certain requirements (not relevant in this proceeding), for any fiscal year in which the amount of IDEA grants a State receives exceeds the amount the State received for the previous fiscal year, the State may exercise flexibility and thereby reduce the level of expenditures from State sources for the education of children with disabilities by no more than 50 percent of the amount of the excess.[2]

[2] If a State exercises flexibility under § 1413(j), it may roll over the excess IDEA funds it does not expend during that year and make them available for appropriations in subsequent fiscal years until they are fully expended.

The IDEA legislation also contains a commonly employed limitation to ensure that the federal grants are used to the greatest benefit to the special education programs. It mandates that these grant funds will be used to supplement the level of Federal, State, and local funds expended for special education, and in no case will they supplant such Federal, State, and local funds. 20 U.S.C. § 1412(a)(17)(C).

PROCEDURAL HISTORY

NMPED met its MFS requirement for SFY 2009 by making available for special education an amount equal to or greater than its previously established MFS base. However, it failed to satisfy this MFS requirement for SFYs 2010 and 2011. As a consequence, in August 2010 NMPED submitted separate requests to the Secretary, through the Office of Special Education and Rehabilitative Services (OSERS), for waivers for both SFY 2010 and SFY 2011 MFS requirements. NMPED explained it was requesting waivers due to exceptional circumstances, such as an unforeseen decline in the financial resources of the State of New Mexico, pursuant to 20 U.S.C. § 1412(a)(18)(D). On February 18, 2013, before the Secretary had acted upon the waiver requests, NMPED submitted a letter notifying OSERS that it was exercising SEA flexibility for SFY 2010 to reduce the level of expenditures from State sources for special education, under 20 U.S.C. § 1413(j).[3] In a May 2013 letter to OSERS, NMPED explained that by exercising flexibility for SFY 2010, it established a new MFS base – the amount of State funds it expended in 2010. NMPED asserted that this reduced 2010 MFS base was carried forward to the next year and became the new SFY 2011 base. NMPED said its special education expenditures for SFY 2011 were equal to or greater than this new MFS base and, therefore, it met the MFS requirement for SFY 2011. Accordingly, it concluded it did not need a waiver from the Secretary for that year. On June 3, 2013, OSERS responded that the exercise of flexibility does not reduce a State's MFS base, and that NMPED's SFY 2011 MFS base remains the same as it was for SFYs 2009 and 2010. It is this difference of statutory interpretation that is before me.

DISCUSSION

Unfortunately the statute and regulations do not address what, if anything, happens to the MFS base in the year following a State's exercise of flexibility under § 1413(j). NMPED argues that in the absence of clarity in the statute, an examination of the legislative history of the IDEA gives us guidance and supports its position that the exercise of flexibility creates a new MFS base: the level of expenditures for the year in which it exercised flexibility.

The subject of statutory interpretation is hardly novel and there are countless cases addressing this frequently encountered conundrum. The cardinal rule is that when the statute's

[3] NMPED explained that its IDEA Part B grant for SFY 2009 was $86,618,033, and for SFY 2010 it was $181,763,853, an amount which exceeded the previous year's amount by $95,118,820. NMPED says this increase allowed it to reduce its level of expenditures from State sources by not more than 50 percent of the excess, which would be $47,559,410. NMPED, however, elected to reduce its SFY 2010 level of expenditures by only $28,447,658.

language is clear, and a plain reading does not produce an absurd result, the court must enforce the statute according to its terms. *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). Courts, however, are advised to engage in reviewing "congressional intent or legislative history only when the language of the statute is not clear." *In re: Comshare, Incorporated Securities Litigation,* 183 F.3rd 542, 549 (6th Cir. 1999).

NMPED argues that because the language of § 1413(j) is silent as to the consequences of exercising flexibility as it relates to the MFS for the following year, we can determine the legislative intent by examining a November 17, 2004, Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) conference report. That report, it explains, addresses the financial consequences of the exercise of flexibility by a local education agency (LEA) as well as an SEA.

> The Conferees intend that in any fiscal year in which the local educational agency or State educational agency reduces expenditures pursuant to section 613(a)(2)(C) or section 613(j), the reduced level of effort shall be considered the new base for purposes of determining the required level of fiscal effort for the succeeding year.

H.R. Rep. No. 108-779, at 196-197 (2004) (Conf. Rep.)

NMPED points out that from an examination of this conference report it is clear that it was the intent of Congress that when either an LEA or an SEA exercises flexibility to reduce its expenditures for special education in a given year, the reduced level of fiscal effort for succeeding years would be that reduced amount. It contends that this exercise of flexibility is an authorized means of calculating a State's MFS. In further support of its position, NMPED references the regulations addressing an LEA's exercise of flexibility which are found at 34 C.F.R § 300.205. NMPED says the language therein permitting LEA's to exercise flexibility when they receive an excess allocation of funds almost duplicates the language of 34 C.F.R §§ 300.230 which addresses the criteria for exercising SEA flexibility. Further, NMPED says that when the LEA exercises this authority and reduces its level of expenditures for that year this results in a permanent reduction of its level of expenditures for subsequent years. This authority to reduce an LEA's level of expenditures for succeeding years is found, not in the regulations, but in guidance issued by the Department on April 2009, wherein it states:

> If an LEA chooses to utilize the flexibility available under IDEA section 613(a)(2)(C) to reduce the level of local, or State and local, expenditures otherwise required in the current fiscal year, in subsequent fiscal years the LEA would be required to maintain effort at the reduced level...

Guidance, Funds for Part B of the [IDEA] Made Available Under the American Recovery and Reinvestment Act of 2009, Question D-9, Revised September 9, 2010, at 17.

NMPED explains that the authority for permitting the LEAs to carry forward to the next fiscal year a reduced expenditure level following the exercise of flexibility should, by analogy, apply similarly to the SEA exercise of flexibility. It argues that, in light of the legislative history from the conference report, and the similarity of the language found in the respective flexibility sections of the regulations for LEAs and SEAs, it is logical to conclude that congress intended for both entities be treated similarly: following the exercise of flexibility, they both carry forward to the following year a reduced level of mandatory expenditures.

I am unpersuaded by NMPED's arguments and must agree with OSERS that the relevant statute is sufficiently clear, unambiguous, and does not produce an absurd result on the issue of whether a State's required level of maintenance of state financial support for a succeeding year can ever be changed by the exercise of flexibility. This conclusion obviates the need to examine any legislative history for interpreting these statutory provisions.

The statute contains a clear, firm mandate that, if a State desires to be eligible to receive IDEA funds, it must maintain at least the same level of State financial support for special education as it did for the previous fiscal year. Recognizing that States may not always be able to comply with this obligation, the statute provides the States with three options for when they are unable to allocate sufficient funds to satisfy its MFS base. One, it can do nothing and simply not fully fund the special education programs for that year. Two, it can request a waiver from the Secretary. Three, if it received excess federal grant funds in that year, it may be able to exercise flexibility. In the first scenario, if the State does nothing, the statute provides that its IDEA grant funds for the following year will be reduced by the amount of the deficit, and specifically states the MFS support for future years will be the amount it should have funded in the absence of its failure. § 1412(a)(18)(D). In the second scenario, if a State requests and receives a waiver from the Secretary, the statute specifically instructs that this does not reduce the amount of State financial support for the succeeding year. § 1412(a)(18)(D). Unfortunately there is no matching language of this nature in the section of the statute addressing the utilization of flexibility. Perhaps Congress believed it was unnecessary to comment because it believed §§ 1412(a)(18)(A) and (D) adequately instructed that the maintenance of financial support level would never be lowered. § 1412(a)(18) says that, even in a year in which a waiver is granted, the level of maintenance of financial support shall be the amount that would have been required in the absence of the failure, and not the reduced amount. If Congress had desired to allow for a reduced MFS level for any State which exercised flexibility, § 1412(a)(18) would have been the logical site to include it, but it did not.

A provision which would permit the reduction of the MFS for the fiscal year in which flexibility was employed would be contrary to the overall justification for the IDEA, and that is, that in return for receipt of Part B grants to be used for special education, States agree not to reduce the level of appropriations for special education below that of the previous year. Any such reduction would certainly be detrimental to the efforts of the LEAs. To hold otherwise would inevitably penalize the LEAs, while at the same time, provide an overall financial reward to the States because they would be able to reduce their obligatory appropriations for special

education. As pointed out above, the stated intent of the IDEA is to provide additional funds for special education, not ease the State's responsibility.

NMPED also fails when it attempts to create an analogy between the ramification of an LEA's exercise of flexibility and that of the SEA. NMPED argues that since LEAs have the authority to reduce their MOE, SEAs should be able to do this as well, because the conditions under which either may be able to exercise flexibility are nearly identical. I see a definite distinction between the two entities. Neither the statute nor the regulations provide for a reduction of the MFS level following the exercise of flexibility. It is only by means of Departmental guidance that permits the LEAs to reduce their MOE; there is no parallel guidance which gives the same discretion to the SEAs. This is understandable because the LEAs have no independent authority to generate program funds, but are totally dependent upon the allocations provided by the SEAs. The SEAs, on the other hand, have significantly more discretion as to whether to allocate funds to fully fund the special education programs. Congress' and the Department's failure to permit SEAs to reduce their MFS following the use of flexibility further ensures the LEAs receive a constant, and hopefully increased, level of funding from year to year.

One additional feature which convinces me NMPED's position is untenable is that, as set out in the first line of the statute, the use of flexibility in § 1413(j) is an exception to the 'supplement not supplant' limitation. This is important because there is no similar, explicit exception for the use of flexibility found in the language of §§ 1412(a)(18)(A) and (D) which prohibit States from reducing the amount of State financial support below the amount of that support for the preceding year. The statute explicitly dictates that this amount is not reduced for a succeeding year, even when the State is granted a waiver of this requirement due to exceptional circumstances.

Notwithstanding the language in the IDEIA conference report that SEAs and LEAs would be treated identically with respect to the reduced level of fiscal effort following the exercise of flexibility, if Congress desired for this to apply to States, it had the opportunity to do so. Its absence from the statute convinces me Congress decided against it in the final hour. The plain text of the statute is clear that a State may not disregard its MFS requirement for a fiscal year following its exercise of flexibility the previous year.

CONCLUSION

When § 1412(a)(17)(C) (which provides that funds paid to the State must supplement, not supplant, State expenditures), § 1412(a)(18)(A) (which provides that States will not reduce financial support made available for special education), and § 1413(j) (which provides for a reduction of expenditures through flexibility) are read together it is clear that neither of the first two provisions prohibit a State from reducing its expenditures for special education by exercising flexibility, and that § 1412(a)(17) provides an exception to the supplement not supplant requirement. However, there is no similar exception to the MFS requirement found in § 1412(a)(18), and I do not believe one can be created by the arguments presented by NMPED. On the basis of the foregoing, I conclude that under the Individuals with Disabilities Education

Act, when a State exercises flexibility to reduce its expenditures in a given year under 20 U.S.C. § 1413(j), this does not reduce the State's required level of financial support made available through appropriations for special education under 20 U.S.C. § 1412(a)(18) for the following fiscal year. Flexibility permits a reduction in actual expenditures, but not in budgeted amounts.

Richard F. O'Hair

Judge Richard F. O'Hair

Dated: May 8, 2014

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested, to the following:

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