



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of
STATE OF CALIFORNIA,

Docket No. 09-05-R
Withholding Proceeding

Respondent.

ORDER ACCEPTING PETITION FOR INTERLOCUTORY REVIEW

This matter comes before me pursuant to 34 C.F.R. section 81.20 providing for an exception to the general rule that a ruling by an administrative law judge (ALJ) may not be appealed to the Secretary until issuance of an Initial Decision. Under 34 C.F.R. section 81.20, a party may file a petition requesting review of an interim ruling of the ALJ if the ruling involves conditions specified in the regulation. Toward that end, the Assistant Secretary of the Office of Elementary and Secondary Education (Assistant Secretary) requests that I grant her Petition for Interlocutory Review of an order denying her motion to dismiss the above-captioned proceeding issued on November 4, 2009, by Chief Administrative Law Judge Allan C. Lewis.

Judge Lewis ruled that the Office of Administrative Law Judges (OALJ) maintained jurisdiction to consider Respondent's challenge to a withholding action initiated by the Assistant Secretary pursuant to Federal grant program funding conditions established by the No Child Left Behind Act (NCLB).¹ The Assistant Secretary disagrees.

According to the Assistant Secretary, OALJ lacks jurisdiction to hear Respondent's challenge. The Assistant Secretary argues both that OALJ has no authority to review her decision to withhold NCLB grant funds from the State of California, and, to the extent that Respondent is entitled to a proceeding on the decision to withhold NCLB grant funds, that proceeding was provided to Respondent by the Assistant Secretary in the form of a show cause proceeding. More directly, in urging that Judge Lewis's order should be subject to interlocutory review, the Assistant Secretary directs my attention to reasons why it would be improvident to allow the proceedings before Judge Lewis to go forward without my ruling on the OALJ's disputed jurisdiction.

¹ The underlying issue in this case involves the State of California's asserted failure to adopt a proper state mathematics assessment for measuring 8th grade academic content as required by NCLB in exchange for Federal grant program funds.

The circumstances upon which a party may obtain interlocutory relief are particularly limited. Pursuant to 34 C.F.R. section 81.20(b), the Assistant Secretary must show that Judge Lewis's ruling: (1) involves a controlling question of substantive or procedural law; and (2) that the immediate resolution of the question will materially advance the final disposition of the proceeding or subsequent review of the judge's decision will be an inadequate remedy.

The Assistant Secretary argues that I should accept her request for interlocutory review because Judge Lewis erroneously ruled that OALJ maintains authority to hear Respondent's challenge, and that the judge's ruling is controlling because the ruling compels the Assistant Secretary to litigate a case before OALJ, notwithstanding that doing so is improper *ab initio*. In addition, the Assistant Secretary notes that Judge Lewis's ruling, if upheld or left undisturbed, would effectively invalidate a practice relied upon in cases involving other states.

Respondent argues that the appropriate legal standard is espoused by the "collateral order doctrine," citing the U.S. Supreme Court case of *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). That doctrine, however, is inapposite. Although it accurately reflects the legal standard for 28 U.S.C.S. § 1292(b) interlocutory appeals, it is not dispositive with respect to 34 C.F.R. section 81.20, which clearly articulates a similar, but manifestly distinct, standard for interlocutory review. To wit, 34 C.F.R. section 81.20(a)(2) can be met if either "the immediate resolution of the question will materially advance the final disposition of the proceeding *or* subsequent review will be an inadequate remedy." (Emphasis added.) The mandatory third prong of the "collateral order doctrine," however, provides that the final order be "effectively unreviewable on appeal from final judgment."² Applying the "collateral order doctrine" to 34 C.F.R. section 81.20 interlocutory orders would effectively eliminate the "or" clause as written in 34 C.F.R. section 81.20(a)(2). I decline to apply such reasoning here.

As an initial matter, I find that Judge Lewis's ruling clearly involves a controlling question because jurisdiction is necessarily a controlling question of law. It is a long-standing fundamental principle of American law that without jurisdiction, a tribunal "cannot proceed at all in any cause," and when jurisdiction "ceases to exist[] the only function remaining . . . is that of announcing the fact and dismissing the cause."³ Consequently, the remaining core questions before me are whether immediate review of Judge Lewis's ruling will materially advance the disposition of the case or, if failing to provide interlocutory relief, whether a subsequent review of the judge's decision will provide an inadequate remedy. Of note, pursuant to 34 C.F.R. section 81.20(d), on December 10, 2009, Judge Lewis wrote a brief statement proffering that interlocutory review of his order is appropriate.

I am convinced that by requiring the Assistant Secretary to litigate Respondent's challenge to the withholding action *before* the Department resolves the OALJ jurisdiction issue, the Department not only risks unnecessary delay in resolving a critical legal question, but also

² See, *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citations omitted)

³ See, *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

risks the use of the limited resources of OALJ when doing so may have been avoidable.⁴ Moreover, in a case in which the judge's jurisdiction is contested, there is a risk that a subsequent review of the judge's decision finding no jurisdiction will provide an inadequate remedy for both parties; for example, the Assistant Secretary would have delayed the efficient enforcement of NCLB grant program requirements, and Respondent may have foreclosed alternative means of adopting a timely and proper state mathematics assessment for measuring 8th grade academic content in compliance with NCLB program requirements.⁵ With these considerations in mind, I find that the Assistant Secretary is entitled to interlocutory review.

Accordingly, the Petition for Interlocutory Review is ACCEPTED, and a STAY of proceedings before Chief Administrative Law Judge Allan C. Lewis shall be imposed until completion of my review of the merits of the petition.

The Assistant Secretary shall file the original and one copy of her brief on or before **January 29, 2010**. Upon receipt of the Assistant Secretary's brief, Respondent shall file by **March 1, 2010**, the original and one copy of its brief. All submissions relating to this proceeding shall be in the form of an original and one copy to the Office of Hearings & Appeals, with simultaneous service of an additional copy upon the opposing party. The parties may submit their respective briefs by means of electronic filing using the Office of Hearings & Appeals Web site.

So ordered this 17th day of December 2009.



Arne Duncan

Washington, D.C.

⁴ See, e.g., *In the matter of Arizona Department of Education*, Dkt. No. 91-45-I, U.S. Dept. of Educ. (Oct. 16, 1991), (amended Nov. 8, 1991) (ALJ certified interim ruling for interlocutory review by noting that there is only a minor delay in the proceedings by seeking interlocutory relief "when compared to a delay of at least 12 to 15 months in the overall process if the reversal by the Secretary comes after an appeal of an initial decision by the administrative law judge").

⁵ *Id.* (ALJ noted that among other things his due process ruling should be subject to interlocutory review "due to the controlling nature of this issue").

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