



THE SECRETARY OF EDUCATION  
WASHINGTON, DC 20202

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In the matter of

**GEORGIA DEPARTMENT OF  
EDUCATION,**

Respondent.

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**Docket No. 12-35-R**  
Recovery of Funds Proceeding

**PETITION FOR STAY AND INTERLOCUTORY REVIEW DENIED**

Counsel for the Georgia Department of Education (GDE) has filed a petition for interlocutory review and stay of proceedings in the above-captioned case. Based on the following analysis, the petition is denied.

The underlying case arises from a program determination letter (PDL) issued to GDE by the U.S. Department of Education (ED) on May 8, 2012.<sup>1</sup> In the PDL, ED held GDE liable for \$5,668,335 in funds fraudulently awarded to subgrantees that did not qualify for funding.<sup>2</sup> The liability figure now stands at \$2,072,888 as a result of extensive negotiations between ED and GDE, during which the parties stipulated that the statute of limitations barred a majority of the originally ordered recovery.<sup>3</sup> The issue before the Administrative Law Judge (ALJ) is whether an equitable offset should be applied to the remaining liability.<sup>4</sup>

GDE requested an evidentiary hearing in Atlanta, GA, which ED opposed and which the ALJ denied.<sup>5</sup> GDE has since filed the instant petition for stay and interlocutory review. GDE asks me to overturn the ALJ's denial of the hearing request and "provid[e] for the evidentiary hearing."<sup>6</sup>

A party may request interlocutory review by the Secretary of a decision by an ALJ.<sup>7</sup> The requesting party must demonstrate both that the "ruling involves a controlling question of

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<sup>1</sup> Petition for Stay and Interlocutory Review (Petition), p. 2.

<sup>2</sup> *Id.*; Assistant Secretary's Response to GDE's Petition for Stay and Interlocutory Review (ED Response), p. 2. GDE manipulated the outcome of a local subgrant competition for the award of funds under the 21st Century Community Learning Centers program.

<sup>3</sup> ED Response, p. 2-3.

<sup>4</sup> *Id.*, p. 3.

<sup>5</sup> *Id.*

<sup>6</sup> Petition, p. 1.

<sup>7</sup> 34 C.F.R. § 81.20.

substantive or procedural law” and “immediate resolution of the question will materially advance the final disposition of the proceeding or subsequent review will be an inadequate remedy.”<sup>8</sup>

In this case, GDE asserts that “[t]he issue to be determined by an interlocutory review is whether the denial of GDE’s request for an evidentiary hearing significantly harms GDE’s ability to present facts which would entitle it to equitable offset.”<sup>9</sup> GDE argues that a controlling question of law is, essentially, any question in which the answer will materially affect the outcome of the proceedings.<sup>10</sup> GDE further argues that the decision of whether to have an evidentiary hearing will materially affect this case because the question of whether to apply an equitable offset “is a fact-intensive decision” and ED disagrees with GDE about numerous underlying facts.<sup>11</sup> Therefore, GDE argues that it requires an opportunity to provide both in-person testimony and cross-examination to make its case.<sup>12</sup>

Both ED and the ALJ oppose GDE’s petition. ED points out that the parties disagree not on the existence of certain facts but on “how to *interpret* the facts.”<sup>13</sup> Both ED and the ALJ point out that the parties have already submitted briefs and documentary evidence, including sworn affidavits. In fact, GDE admits it has “extensively briefed all of the factors to be considered within an equitable offset determination, and GDE has submitted supporting documentation for each assertion it has made.”<sup>14</sup> GDE even filed a supplemental response demonstrating that it already filed ten sworn affidavits in the proceeding before the ALJ.<sup>15</sup> The ALJ points out that he has yet to actually rule on any of the evidence presented.<sup>16</sup> Therefore, in his opposition to the request for interlocutory review, the ALJ argues that I should not reverse a procedural order designed to facilitate the ongoing proceedings which will ultimately yield a complete record and an initial decision.<sup>17</sup>

I agree with ED and the ALJ. Interlocutory review should be used in limited circumstances to decide a controlling question of pure law without the need to delve into the existing record of a case.<sup>18</sup> Granting GDE’s request would essentially amount to a finding that a party requesting an equitable offset cannot prevail without an evidentiary hearing as a matter of law. GDE has not demonstrated any basis to make such a ruling.

At this stage of the proceedings, the adequacy of the record, the appropriateness of evidentiary submissions, and whether to hold an in-person hearing are all matters squarely within the purview of the ALJ. The ALJ based his denial of the hearing request on, among other things, the existence of extensive briefing accompanied by documentary evidence and GDE’s

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<sup>8</sup> *Id.* § 81.20(a).

<sup>9</sup> Petition, p. 5.

<sup>10</sup> *Id.*, p. 6 (citing *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981)).

<sup>11</sup> *Id.*, pp. 6–8.

<sup>12</sup> *Id.*, p. 8.

<sup>13</sup> ED Response, p. 5.

<sup>14</sup> Petition, p. 8.

<sup>15</sup> See generally GDE Supplemental Response to Response of ALJ to Respondent’s Request for Interlocutory Review by the Secretary.

<sup>16</sup> Response of Administrative Law Judge to Respondent’s Request for Interlocutory Review by the Secretary (ALJ Response), p. 2.

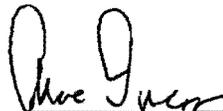
<sup>17</sup> *Id.*

<sup>18</sup> *Simpson v. Carolina Builders Corp.*, 222 Fed. Appx. 924, 925 (11th Cir. 2007).

opportunity to file further evidence. Therefore, the question of whether a hearing is warranted in this case is not a question of pure law, but significantly influenced by the content of the record. GDE has not satisfied the criteria for interlocutory review.

Accordingly, the petition for stay and interlocutory review is denied.

So ordered this 10th day of July 2015.

A handwritten signature in black ink, appearing to read "Arne Duncan", is written above a horizontal line.

Arne Duncan

Washington, D.C.

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