UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF	Docket No. 09-05-R
State of California,	Withholding Proceeding
Applicant.	

ORDER RE ASSISTANT SECRETARY'S MOTION TO DISMISS THE APPLICATION

Appearances: David A. DeSchryver, Esq. Brustein & Manasevit, Washington, D.C. for State of California

Judith G. Becker, Esq. and Kay Rigling, Esq. of the Office of the General Counsel, United States Department of Education, Washington, D.C., for the Assistant Secretary for Elementary and Secondary Education.

Before: Allan C. Lewis, Chief Administrative Law Judge

This action is presently before the Office of Administrative Law Judges (OALJ) for a determination whether this tribunal has jurisdiction over the underlying matter. At issue is an action by the California Department of Education (CAL) to challenge a determination by the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) to withhold $1 million in administrative funds from a grant made for fiscal year 2008 under the No Child Left Behind program, Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended. The Assistant Secretary filed a motion to dismiss this matter for lack of jurisdiction, asserting that the Assistant Secretary's action was not undertaken pursuant to Section 455 of the General Education Provisions Act, as amended (20 U.S.C. § 1234d) (2006). Rather, the action was undertaken pursuant to Section 1111(g)(2) of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. § 6311(g)(2) (2006)). As such, the Assistant Secretary argues that the OALJ has no authority to review the withholding action as its jurisdiction does not include a withholding action under Section 1111(g)(2). For the reasons stated below, it is concluded that this tribunal has jurisdiction over this matter pursuant to Section 455 of the General Education Provisions Act, as amended (20 U.S.C. § 1234d (2006)). Accordingly, the Assistant Secretary's motion to dismiss is denied.

Statement

In 1994, Congress enacted the Improving America's Schools Act of 1994 as a major aspect of Federal financial support to states for their elementary and secondary school systems. The grant program required states to create and implement a plan that conformed to certain statutory standards and imposed annual assessments of reading and mathematics at three grade levels. Each plan was subject to a peer review process, including recommendations regarding the proposed plan. Ultimately however, final authority for determining whether a state's plan met the statutory requirements rested with the Secretary.

In the No Child Left Behind Act of 2001 (NCLB Act), Congress built upon the 1994 reauthorization and expanded to seven the number of components that a state was required to develop as part of its statewide standards and assessment system. As with the 1994 reauthorization, each state was required to develop a plan to meet the specific requirements of the legislation in order to receive grant funds. The NCLB Act continued the peer-review process to assist the Secretary in the review of the state plans and required the Secretary to approve a state plan within 120 days of its submission unless the Secretary determined that the plan did not meet the requirements of the legislation. 20 U.S.C. § 6311.

Under the NCLB program, the peer review process began in 2004 and peer reviews were held at least semi-annually from 2005 to 2007. By July of each year, the Assistant Secretary assigned each state an approval status based upon an assessment of its progress toward complying with the requirements of the NCLB Act.

As of June 30, 2006, the Assistant Secretary had developed three status categories for the state plans: full approval, approval pending, and non-approved. Any state assigned a non-approved status would be subject to the withholding of a portion of its Title I, Part A state administrative funds. States assigned to the approval pending category were notified that special conditions would be imposed on their grants. In certain instances, a state with an approval pending status would also be subject to the withholding of a portion of its administrative funds. Dear Chief State School Officer Letter, June 30, 2006.

With regard to CAL, the Assistant Secretary and the peers reviewed the performance level descriptors within the State's standards and assessment system in November 2007 and found one significant problem. The State's 8th-grade General Mathematics assessment was deemed inadequate because it measured 6th- and 7th-grade academic content, rather than 8th-grade content. As a result, CAL was assigned the status of approval pending and was informed on February 6, 2008, that it must enter into a compliance agreement with the Assistant Secretary to maintain its eligibility to receive funding under the NCLB program. In the Assistant Secretary's view, a compliance agreement would provide leverage for bringing CAL into full compliance with the applicable requirements of NCLB Act within three years.

In April 2008, the California State Board of Education addressed the problem with the 8th-grade math assessment by approving a new timeline for the development of a revised General Mathematics California Standards Test that would satisfy the requirements of the NCLB Act. The proposed solution became controversial by early July of that year and ultimately lead to litigation in a lower California court.

At the same time that the controversy over the revised standards test was simmering, the Assistant Secretary informed CAL that the Department was concerned that it was "not acting expeditiously to come into compliance" with the statutory requirements of the NCLB Act. The Assistant Secretary reiterated its offer of assistance and stressed the importance of entering into a compliance agreement. Further, the Assistant Secretary indicated that a public hearing would be necessary before any compliance agreement could be executed and that, if a hearing was not scheduled before August 1, 2008, then the Assistant Secretary would initiate an action to withhold administrative funds from its 2008 grant under the NCLB program.

On October 28, 2008, a lower California court issued a temporary restraining order enjoining the California State Board of Education from implementing its July 9, 2008 decision to adopt its solution to the problem with the 8th-grade math assessment requirement.[1] As a result of this court order, CAL halted any action towards developing this new mathematics standards test. The State also advised the Assistant Secretary of the injunction.

Shortly thereafter on November 21, 2008, the Assistant Secretary issued a notice to CAL that the Assistant Secretary intended to withhold $1 million from the State's fiscal year 2008 administrative funds pursuant to Section 1111(g)(2) of ESEA [20 U.S.C. 6311(g)(2)]. The withholding was predicated on CAL's failure to implement a standards and assessment system that satisfied the statutory and regulatory requirements imposed by the NCLB Act for the school year 2005-06; its failure to enter into a compliance agreement; and the unlikelihood that CAL would make significant progress in the near future toward compliance with the assessment requirement. The notice also informed CAL that it had the opportunity, within 20 business days of receipt of the notice, to show cause why the Assistant Secretary should not withhold the $1 million in administrative funds and that, if CAL cannot show cause, the Assistant Secretary would withhold $1 million from its NCLB grant. The notice further indicated that the effect of such withholding would be the reversion of $1 million to the local educational agencies in California.

On December 18, 2008, CAL submitted a response to the show cause letter that, inter alia, argued why the withholding of funds was unwarranted and requested the Assistant Secretary to provide a due process hearing under Section 455(b) of the General Education Provisions Act [20 U.S.C. §1234d(b)] prior to the final determination of the proposed withholding. CAL also noted that the Assistant Secretary's letter of November

[1] This temporary restraining order was made permanent on December 19, 2008.

21, 2008, failed to notify the State of its opportunity for a hearing under Section 455(b) of the General Education Provisions Act.

On January 15, 2009, the Assistant Secretary informed CAL that its show cause submission had been reviewed and that the Department had determined that the State had failed to demonstrate why the Department should not withhold the $1 million in administrative funds. The Assistant Secretary added that this action was being carried out pursuant to Section 1111(g)(2) of the Elementary and Secondary Education Act and that Section 455(b) of the General Education Provisions Act was inapplicable. Therefore, CAL was not entitled to a hearing. Lastly, according to the guidance provided by the Assistant Secretary, this withholding of $1 million in administrative funds from CAL would effect a reversion of the monies to CAL's local educational agencies. Hence, the total allocation of grant funds to the State of California was not affected by the withholding action.

On January 12, 2009, three days prior to the Assistant Secretary's ruling on the show cause matter, CAL filed a request for a hearing on the proposed withholding of $1 million in administrative funds with the OALJ.

Discussion

The issue currently before this tribunal is whether the OALJ is vested with jurisdiction to review the Assistant Secretary's decision to pursue a $1 million withholding penalty against CAL. The Assistant Secretary argues that the action is authorized under Section 1111(g)(2) of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, Section 101 (20 U.S.C. § 6311(g)(2) (2006) (hereinafter Section 6311(g)(2)) which provides no hearing rights to the State. As such, the OALJ has no jurisdiction. CAL contends that Section 6311(g)(2) must be read in concert with Sections 454 and 455 of the General Education Provisions Act, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Section 3501(a) (20 U.S.C. §§ 1234c and 1234d) (2006) (hereinafter Section 1234c and Section 1234d). Therefore, the enforcement of the penalty provided in Section 6311(g)(2) must be pursued under Section 1234d and the OALJ has jurisdiction to conduct a hearing.[2] Hence, the question before the tribunal is whether the language in Section 6311(g)(2) operates as a standalone provision authorizing the Secretary to enforce the withholding penalty. To resolve this issue, an analysis of the above provisions, the general remedial provisions, and a few

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[2] The Assistant Secretary urges the tribunal to interpret Section 1234d narrowly on its face on the theory that, absent ambiguous language, jurisdictional statutes are strictly construed. This canon of statutory construction is not particularly helpful here because the issue is which one of two possible statutory provisions authorizes the action taken by the Assistant Secretary. In this regard, both sections are potentially jurisdictional in nature and a narrow reading of the language of one provision over the other provision is not appropriate in this context.

program-specific remedial provisions is necessary. Ultimately, the decision is based on this analysis and supported by policy considerations.

While the Secretary would prefer that the recipients of grant funds adhere to the program rules, this is, unfortunately, not always the situation. Congress recognized this reality and has provided the Secretary with several tools to deal with a recipient that is not in compliance with the requirements of a program. These tools provide the Secretary with the flexibility to address a wide range of problems from minor infractions to malfeasance or fraud. While ordinary problems may be resolved by the Secretary through consultation, technical assistance or similar means, more egregious violations require more aggressive measures.

Congress enacted Section 1234c as a means by which the Secretary may address the out-of-the ordinary problems. Specifically, Section 1234c provides the Secretary with three distinct tools—a withholding of funds provision, a cease and desist order, and a compliance agreement with the recipient.[3] With three exceptions not pertinent herein,[4] these remedies may be applied by the Secretary to "any recipient of funds under any applicable program" . . . [in which the recipient] "is failing to comply substantially with any requirement of law applicable to such [program]." Section 1234c. Thus, with this language, Congress designated a threshold standard to invoke these remedies, i.e. substantial noncompliance, and made these remedies applicable to all programs of the Department, including the NCLB program at issue in this matter.

In order to implement the remedies in Section 1234c, Congress enacted enforcement provisions tailored to each of the four remedies. Each enforcement provision is applicable to all programs of the Department (excluding the three exceptions as noted above) and includes an authorization for the Secretary to enforce the particular remedy. With the exception of the compliance agreement remedy, each enforcement provision requires the Secretary to provide, one, notice to the recipient of the proposed action and, two, a hearing before the OALJ before the remedy can be implemented.[5]

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[3] In a companion provision, Congress also provided the Secretary with a fourth tool, Section 1234a, by which the Secretary may recover funds misspent by the program recipient.

[4] Of the programs administered by the Secretary, the three areas not subject to these remedial tools are the programs authorized by the Higher Education Act of 1965 [20 U.S.C. § 1001 et seq.] and assistance programs under the Act of September 20, 1950 (Public Law 874, 81st Congress) [20 U.S.C. § 235 et seq.] and the Act of September 23, 1950 (Public Law 815, 81st Congress) [20 U.S.C. § 631 et seq.]. Section 1234i (2).

[5] The remaining tool, the compliance agreement, does not require the Secretary to provide the grantee with notice and a hearing since, as Congress recognized, this approach reflects modifications to the grant agreement that have been assented to by the grantee. Section 1234f.

For example, Section 1234d enforces the withholding remedy and provides—

> (a) Discretionary authority over further payments under applicable program
> In accordance with section 1234c of this title, the Secretary may withhold from a recipient . . . 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;
> . . .
> (3) an opportunity for a hearing . . . .
> (c) Hearing
> The hearing shall be held before the Office [of Administrative Law Judges] and shall be conducted in accordance with the rules prescribed pursuant to subsections (f) and (g) of section 1234 of this title.

Despite the application of the withholding, cease and desist, and recovery of funds remedies to all programs, Congress, on occasion, has enacted a remedial provision within a program statute that applies to limited aspects of that program. The underlying need for such a remedial provision of limited scope varies. Perhaps the substantial noncompliance standard of the general remedies may not be an appropriate standard to activate the remedy or one or more of the general remedies are not appropriate for this aspect of the program.

The instant case involves just such a remedial provision. The Assistant Secretary pursued a withholding penalty under Section 6311(g)(2) which provides for a penalty in the event that a recipient of funds under the NCLB program fails to maintain a plan that meets the requirements of Section 6311(a)--

> (g) Penalties
> . . .
> (2) Failure to meet requirements enacted in 2001
> If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.

Relying on the above language, the Assistant Secretary's argument is straight-forward. The Assistant Secretary asserts that the plain meaning of the language "the Secretary may withhold" funds in Section 6311(g)(2) grants the legal authority to the Secretary to withhold funds from a recipient of a grant under the NCLB program in the event that the recipient's plan does not satisfy one or more of the requirements under Section 6311(a). Since the Assistant Secretary acted pursuant to this authority, the Assistant Secretary may withhold $1 million from CAL without notice and a hearing even though the Assistant Secretary could have taken the same action under the general

withholding provision of Section 1234c(a)(1) and Section 1234d that require notice and a hearing.[6]

In the Assistant Secretary's view, CAL is not entitled to notice and a hearing under Section 6311(g)(2) because the statute does not provide explicitly for this. Moreover, CAL is not entitled to notice and a hearing under the general withholding enforcement provision, Section 1234d, because Section 6311(g)(2) is a standalone provision and operates independently of Section 1234d.

For its part, CAL focuses on the same language "the Secretary may withhold" funds as does the Assistant Secretary. This phrase appears in Section 6311(g)(2) and the general withholding provisions of Section 1234c and Section 1234d as well as other program provisions. As such, CAL asserts that it must be construed in a uniform manner. As argued by CAL, it is exactly because Congress did not explicitly exempt Section 6311(g)(2) from the general remedies' broad jurisdiction that the two statutes act upon the same withholding subject matter and must be read harmoniously, giving the term "withhold" the same careful meaning in each statute, while also carrying out the mandate of both. Therefore, the notice and hearing aspects of the general withholding provision are applicable to Section 6311(g)(2). CAL Br. at 6.

The lynchpin of the Assistant Secretary's argument is that the language in Section 6311(g)(2), "the Secretary may withhold" funds, may only be construed as an authorization to the Secretary to take a withholding action. This is not correct. This phrase may also be construed as the designation of withholding as a remedy.[7]

Section 1234c(a) and Section 1234d(a) illustrate that Congress employs the language, "the Secretary may withhold" funds in two different capacities. One, it is used as a means to designate withholding as a remedy. Two, it is also used as a means to enforce the remedy by authorizing Secretarial action to withhold funds. The ambiguity in the interpretation of this language in Section 1234c(a) and Section 1234d(a) is clarified by the insertion of the phrase "as authorized by Section 1234d" in Section 1234c(a)(1). This enables the reader to recognize that Section 1234c(a)(1) is a remedy provision and

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[6] For purposes here, it is assumed that the Assistant Secretary is acting pursuant to authority delegated by the Secretary.

[7] In its brief, the Assistant Secretary cites *Connecticut v. Spellings,* 453 F. Supp. 2d (D. Conn. 2006) and *Association of Cmty. Orgs. For Reform Now v. New York City Dept. of Education*, 269 F. Supp. 2d 338 (S.D. N.Y. 2003). At oral argument, the Assistant Secretary acknowledged that Section 6311(g)(2) was only mentioned in the context of background information in these opinions and that the cases did not address the issue in this matter. Hence, further discussion of these cases is not warranted.

that Section 1234d is the enforcement provision. Thus, these sections state--

> Section 1234c. Remedies for existing violations.
> (a) Whenever the Secretary has reason to believe than any recipient of Funds . . . is failing to comply substantially with any requirement of law . . . the Secretary may—
> (1) withhold further payments under that program, *as authorized by section 1234d of this title*;
>
> [and]
>
> Section 1234d. Withholding.
> (a) . . . the Secretary may withhold from a recipient . . . further payments (including payments for administrative costs) . . . under an applicable program. (Emphasis added.)

Given that the language "the Secretary may withhold" payments or funds is subject to two different interpretations, the question arises as how to ascertain the appropriate meaning employed by Congress in a given provision. The answer lies in the elements associated with the language. In the remedy context, there is a threshold standard that activates the remedy. As discussed above, Section 1234c(a) has a threshold standard of substantial noncompliance with any requirement of law. Similarly, in the context of a program statute for example, Section 6362(e)(3) has a threshold standard of insignificant progress in meeting the purposes of this subpart.[8]

In contrast, the enforcement provision for a remedy has procedural language that includes notice and a hearing requirement. Section 1234d. Thus, whether a provision is a remedy or an enforcement provision may be determined by the presence of either a threshold standard or notice and a hearing requirement.

With respect to withholding provisions, Congress adopted two approaches when including this language. The remedy and the enforcement aspects are either combined into one provision or divided into separate provisions. Section 2343(a)(3) is a program

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[8] Section 6362(e)(3) provides—

> (e) Review
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> . . .
>
> (3) Consequences of insufficient progress
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> After submission of the progress report described in paragraph (1), if the Secretary determines that the State educational agency is not making significant progress in meeting the purposes of this subpart, the Secretary may withhold from the State educational agency, in whole or in part, further payments under this section in accordance with section 1234d of this title or take such other action authorized by law as the Secretary determines necessary, including providing technical assistance upon request of the State educational agency.

provision and an example of a single provision in which the threshold standard, the remedy, the authorization, and the notice and a hearing requirement are combined—

> (3) Subsequent action
> (A) In general
> The Secretary may, after notice and opportunity for a hearing, withhold from an eligible agency all, or a portion, of the eligible agency's allotment under paragraphs (2) and (3) of section 2322(a) of this title if the eligible agency—
> (i) fails to implement an improvement plan as described in paragraph (1);

In the divided or bifurcated approach, Congress splits the remedy and the enforcement aspects and uses Section 1234d as the enforcement vehicle. *See, e.g. Section 6777(d)(1); Section 6362(e)(3).* For example, Section 6777(d)(1) is a remedy provision in a program context that uses Section 1234d as the enforcement mechanism--

> (d) Noncompliance
> (1) Use of General Education Provisions Act remedies
> Whenever the Secretary has reason to believe that any recipient of funds under this part is failing to comply substantially with the requirements of this section, the Secretary may—
> (A) Withhold further payments to the recipient under this part;
> . . .
> in the same manner as the Secretary is authorized to take such actions under section[ ] 455 . . .of the General Education Provisions Act.

Turning to the provision in issue, Section 6311(g)(2), the tribunal concludes that it is not a single withholding provision because it lacks the notice and a hearing requirement. Rather, it constitutes the remedy aspect of a bifurcated withholding provision because it has a threshold standard, i.e. failing to meet a requirement, that activates the remedy—

> (g) Penalties
> . . .
> (2) Failure to meet requirements enacted in 2001
> If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph (1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.

A bifurcated withholding provision must also have an enforcement provision. As noted previously, Section 1234d serves as a general enforcement provision for Section 1234c as well as it serves as the enforcement provision for a remedial program statute such as Section 6777(d)(1) or Section 6362(e)(3). Although Section 6311(g)(2) does not specifically designate Section 1234d as the enforcement provision, this is of no consequence. Section 1234d is the enforcement provision for ESEA and its NCLB program including Section 6311(g)(2) since its jurisdiction extends to any "applicable

program." Section 1234i (2). Hence, Section 6311(g)(2) and Section 1234d constitute the two components of this bifurcated withholding provision.

Inasmuch as Section 1234d is the enforcement provision for the remedy designated in Section 6311(g)(2), CAL is entitled to a hearing under that provision regarding the proposed withholding of funds by the Assistant Secretary.

This interpretation of Section 6311(g)(2) and Section 1234d is in accord with a well-established Congressional policy expressed in the Department's program statutes. The program statutes provide that grant recipients are entitled to notice and a hearing before the Secretary may withhold any funds, take cease and desist actions, or recover misspent funds. The Assistant Secretary has not cited any provision to the contrary. Moreover, the Assistant Secretary has not proffered any justification why the recipients under the NCLB program should be treated differently than recipients under other programs of the Department. The tribunal is not aware of any differences in the programs that would warrant such a marked divergence from existing Congressional policy.

This interpretation is further supported by an examination of Section 6311(g)(1), the companion provision of Section 6311(g)(2). Here, the Secretary is required to withhold 25 percent of *all* funds in the event a state fails to meet the deadlines in Section 6311(a) that were enacted in 1994. While a violation subject to Section 6311(g)(2) may lead to penalties amounting to a million dollars or so, tens of millions of dollars are at issue for a violation subject to Section 6311(g)(1). 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. In sum, notice and a hearing are essential aspects of Congressional policy in the Department's programs and are an integral part of an appropriate and fair process for the resolution of any problems under Section 6311(a).[9]

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[9] In an apparent recognition of due process problems under Section 6311(g)(2), the Assistant Secretary created, without legal authorization, a show cause opportunity for the states subject to a withholding proposal to object to the proposed action. Dear Chief State School Officer Letter, June 30, 2006, attachment titled "Additional Information on Requirements for States in *Approval Expected, Approval Pending, and Non-Approval* Status. It was disturbing to learn at oral argument that the Assistant Secretary was comfortable with the show cause opportunity given CAL in which the Assistant Secretary performed two conflicting roles in the process. The Assistant Secretary was the prosecutor of the withholding action as well as the arbiter of the show cause opportunity. By serving in both capacities, this presents, at a minimum, the appearance of a lack of impartiality by the Assistant Secretary. This unfortunate situation can be avoided in the future if the Department utilizes its Office of Hearings and Appeals that is staffed with administrative judges and an administrative law judge that are available for preside over hearings under the program statutes.

Conclusion

For the foregoing reasons, it is concluded that the Office of Administrative Law Judges has jurisdiction in this matter pursuant 20 U.S.C. §§ 1234d and 6311(g)(2). The motion to dismiss for lack of jurisdiction filed by Assistant Secretary is denied.

Allan C. Lewis
Chief Administrative Law Judge

Issued: November 4, 2009
Washington, D.C.

SERVICE

On November 4, 2009, a copy of the attached order was sent by mail and, as a courtesy, by email to the following:

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