



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW JUDGES

400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4615

TELEPHONE (202) 245-8300

FACSIMILE (202) 245-6931

Application of

Docket No. 16-58-R

**West Virginia Department of Education and
the Arts, Division of Rehabilitation Services,**

Recovery of Funds Proceeding

Applicant.

DECISION AND ORDER OF DISMISSAL

The Application for Review relating to preliminary departmental decisions dated September 28, 2016 and September 29, 2016, issued by Sue Swenson, Acting Assistant Secretary of the Office of Special Education and Rehabilitative Services (OSERS), U.S. Department of Education (Department) was received in this Office on December 9, 2016. The further handling of this proceeding was assigned to me for review in accordance with applicable law. The application places in issue initial requests for recovery of funds in the amount of \$2,436,736 (ACN: 031459498) and \$268,497 (ACN: 031348757), respectively.

The notices of disallowance decision were reviewed and found to establish a prima facie cases for the recovery of funds, including an analysis reflecting the value of the program services actually obtained in a determination of harm to the Federal interest. 20 U.S.C. § 1234a(a)(2).

The Application for Review has also been examined. The Application for Review was not timely filed within the period allowed by 20 U.S.C. § 1234a(b)(1) and 34 C.F.R. §81.37(b). However, simultaneously with the filing of the Application for Review, the Applicant provided a statement in support of the reasons for the late filing and has requested that the Application for Review be accepted despite the late filing. Consistent with 34 C.F.R. §81.11, this request was deemed to be a motion for an extension of time and the Department was allowed an opportunity to respond to said Motion. On January 11, 2017, the Department filed a response opposing the applicant's Motion for an Extension of Time to File the Appeal.

An electronic file has been established for this proceeding. Electronic filing is available through the OFFICE OF HEARINGS & APPEALS (OHA) Electronic Filing System. The Electronic Filing System (OES) is available on the OHA webpage at <http://oha.ed.gov/efilewelcome.html>.

Instructions for E-filing are located in our *Electronic Filing User Guide* available on the OHA webpage at <http://oha.ed.gov/docs/efilingguide.pdf>. Representatives for the parties have consented to voluntary use of OES.

The critical issue here is whether the untimely filing of the Application for Review deprives the Office of the Administrative Law Judge of jurisdiction.

The facts are simple here. The Acting Assistant Secretary for OSERS issued two program determination letters (PDLs) on September 28 and 29, 2016 requesting return of funds in the amount of \$2,436,736 and \$268,497, respectively. These preliminary determinations clearly and correctly notified the West Virginia Department of Education and the Arts, Division of Rehabilitation Services (Applicant) that an appeal must be filed within 60 calendar days of the date of receipt. The Applicant acknowledges these PDLs were received at the Office of the Director on October 3, 2016. The Application for Review is dated December 8, 2016 and was received by the Office of Hearings and Appeals on December 9, 2016. The last date to file a timely appeal with the Office of Hearings and Appeals was December 2, 2016.

The law is also simple. Although historically such appeals were allowed to be filed beyond the period of appeal for good cause shown, that exception was eliminated by Congress with the establishment of the Office of the Administrative Law Judge (OALJ) and the amendment of the General Education Provision Act. *See, Application of the Commonwealth of Puerto Rico Department of Education*, 69 Ed. Law Rep. 1307 (ED.O.H.A.) (Docket No. 89-2-R, September 1, 1989). The Administrative Law Judge (ALJ) therein found the requirement for filing an Application for Review must be treated as an absolute requirement and without a timely Application for Review, the OALJ does not have jurisdiction. Furthermore, the ALJ therein found equity and fairness considerations are not factors that may be considered when reviewing an untimely Application for Review, as an ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid, 34 C.F.R. §81.5(b).

The precedent established by *Application of the Commonwealth of Puerto Rico Department of Education* has been consistently followed by this Tribunal. *See, In re Maine Department of Education*, Docket No. 90-74-R (November 27, 1990, ALJ Decision), *In re Oglala Lakota College*, Docket No. 90-58-R, ALJ Decision), *Application of Virgin Islands Department of Education*, Docket No. 00-60-R (May 11, 2001, ALJ Decision), and *in the Matter of State of New Jersey*, Docket No. 16-67-R (December 30, 2013, ALJ Decision).

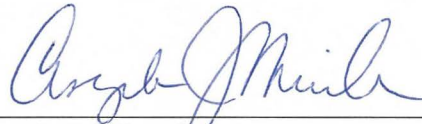
The Department, herein correctly argues that neither the ALJ nor the Assistant Secretary have the authority to waive the requirement for timely filing of applications for review since Congress has not provided for any exception to this requirement.

The Applicant has submitted exhibits with the Application for Review that suggest the Department may be considering rescinding the PDLs but this is not addressed by the Department in the filing in opposition to the Motion for Extension of Time. Unless and until the Department does rescind one or both of these PDL's they stand as preliminary determinations that have not been timely appealed. Consequently, all other directives regarding source of repayment, method of repayment, and timing of repayment and interest contained in the PDLs remain enforceable by

the Department.

CONCLUSION

Based upon the submissions of the parties, the record, and for reasons stated herein, the appeal of the preliminary department decisions by the West Virginia Department of Education and the Arts, Division of Rehabilitation Services was not filed within the prescribed period and the Application for Review is **HEREBY DISMISSED**. Accordingly, the monetary determinations and request for recovery of funds in the amount of \$2,436,736 (ACN: 031459498) and \$268,497 (ACN: 031348757) are sustained and the Applicant is to return these funds in the manner prescribed in the program determination letters.

A handwritten signature in blue ink, appearing to read "Angela J. Miranda", is written over a horizontal line.

Angela J. Miranda
Administrative Law Judge

Dated: February 1, 2017

SERVICE

A copy of the attached document was sent to the following:

Katherine A. Campbell
Assistant Attorney General
812 Quarrier Street, 2nd Floor
Charleston, WV 25301
U.S. Mail Certified Return Receipt: 7011 0470 0003 7885 7183

Marcus Hedrick, Esq.
Office of the General Counsel
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-21410
U.S. Mail Certified Return Receipt: 7011 0470 0003 7885 7190

Courtesy Copy by hand delivery to:

Phil Rosenfelt
Acting Secretary of Education
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202