



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

STATE OF CALIFORNIA,

Docket No. 09-05-R
Withholding Proceeding

Respondent.

DECISION ON INTERLOCUTORY REVIEW

This matter comes before me pursuant to my December 17, 2009 order accepting the request of the Assistant Secretary of the Office of Elementary and Secondary Education (Assistant Secretary) to review an order issued on November 4, 2009 by Chief Administrative Law Judge Allan C. Lewis (ALJ). In his order, the ALJ denied the Assistant Secretary's motion to dismiss the above-captioned proceeding.¹

After noting that pursuant to 34 C.F.R. § 81.20 a party may file a petition requesting that I review an ALJ's interim ruling, I granted the Assistant Secretary's request and ordered the parties to file timely submissions on the core question whether the Office of Administrative Law Judges (OALJ) maintains jurisdiction to hear Respondent's challenge to the Assistant Secretary's decision to withhold \$1 million in Federal funds from the State of California pursuant to the requirements of the Elementary and Secondary Education Act of 1965 (ESEA).² The Assistant Secretary's withholding action is based on section 1111(g)(2) of the ESEA. For reasons that

¹ The course of proceedings in this case includes the following: after providing Respondent with notice and opportunity to participate in a show cause proceeding concerning a proposed withholding action, the Assistant Secretary ruled on January 15, 2009, that Respondent's submission failed to show cause why the Department should not withhold Federal funds from the State of California. In response, the State sought review of the Assistant Secretary's ruling by filing an appeal with the Office of Administrative Law Judges. The Assistant Secretary requested that the ALJ dismiss Respondent's appeal for lack of jurisdiction. The ALJ accepted jurisdiction over Respondent's appeal and denied the Assistant Secretary's request.

² See Pub. L. 89-10, as added Pub. L. 103-382, title I, §101, Oct. 20, 1994, 108 Stat. 3519 (20 U.S.C. 6301 *et seq.*).

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follow, I find that the Assistant Secretary's interpretation of section 1111(g)(2) is in accord with the straightforward text of the statutory provision, and that Congress did not confer jurisdiction upon OALJ to hear Respondent's challenge.

Among the purposes of the ESEA is ensuring that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards. This purpose is accomplished, *inter alia*, by requiring any state desiring to receive ESEA grant funds to submit to me a plan demonstrating that the state has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the state, its local educational agencies, and its schools. If a state fails to meet this requirement or any other designated requirement of the ESEA, I am authorized by Congress to withhold funds from the state until I am satisfied that the state has fulfilled the requirement.³ With regard to Respondent's challenge to the withholding action, the ALJ ruled that OALJ maintains jurisdiction to consider Respondent's challenge.

There is no dispute that Congress delegated to OALJ the statutory authority to provide formal on-the-record hearings with regard to certain programs administered by the Department pursuant to the General Education Provisions Act (GEPA).⁴ To resolve the question of jurisdiction, the ALJ, by relying on principles of statutory interpretation and matters involving "policy considerations," compared the "program-specific remedial provision" of section 1111(g)(2) of the ESEA with the "general remedial provision[]" in section 1234d of GEPA to assess whether section 1111(g)(2) "operate[d] as a standalone provision authorizing the Secretary to enforce the withholding penalty."

Following this analysis, the ALJ concluded that the phrase "the Secretary may withhold," which is found in both section 1234d of GEPA and section 1111(g)(2) of the ESEA, is subject to two different meanings.⁵ The phrase when used in section 1234d means enforcement,⁶ which is accompanied by procedural language setting forth requirements of notice and hearing. This contrasts with, according to the ALJ, the meaning of the same phrase in section 1111(g)(2),

³ See section 1111(g)(2) of the ESEA, which was added by the No Child Left Behind Act of 2001, Pub. L. 107-110, § 5, 115 Stat. 1427 (20 U.S.C. 6311 *et seq.*).

⁴ GEPA establishes the jurisdiction of OALJ as well as setting forth procedures that must accompany OALJ jurisdiction, including granting the administrative law judge the power to issue subpoenas, require the production of documents, require answers to interrogatories, and order parties to have depositions taken. 20 U.S.C. § 1234. Congress originally enacted GEPA, Pub. L. 91-230, 84 Stat. 164 (1970), primarily "to bring the general provisions of prior law together into a single title." *Bell v. New Jersey*, 461 U.S. 773, 784 (1983) (citing H. R. Conf. Rep. No. 91-937, at 97 (1970)); *see also*, Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

⁵ Respondent indicates that it supports what it asserts as the ALJ's conclusion that the term "withholding" must be given the "same careful meaning in each statute, while carrying out the mandate of both." To the contrary, the ALJ contrasted the meanings of the terms based on his conclusion that the term referred to enforcement in the GEPA provision and remedy in the ESEA provision. Respondent's quoted language, in fact, comes from a section of the ALJ's decision that merely summarizes Respondent's position, which the ALJ did not adopt.

⁶ 20 U.S.C. § 1234d

which means to remedy and establishes the Department's power to withhold funds.⁷ In the ALJ's view, these contrasting meanings of identical text show that section 1111(g)(2) specifies a remedy, but does not contain an enforcement provision.⁸ To fill this void, the ALJ concludes that the appropriate enforcement provision is found in GEPA. According to the ALJ, GEPA provides the mechanism of enforcement for the withholding remedy identified in section 1111(g)(2) and, thereby, also confers jurisdiction on OALJ to hear any challenges to the withholding action. In the ALJ's view, taken together -- the remedy provision of section 1111(g)(2) and the enforcement provision of GEPA -- the Assistant Secretary is authorized to withhold funds from Respondent pursuant to section 1111(g)(2), but must do so by providing Respondent with notice of the withholding action and an opportunity to challenge that action before OALJ pursuant to the procedures established by section 1234d.

Taking a decidedly different view, the Assistant Secretary argues that OALJ lacks jurisdiction to hear Respondent's challenge. The Assistant Secretary argues both that OALJ has no authority to review her decision to withhold Federal funds from the State of California, and, to the extent that Respondent is entitled to challenge her decision to withhold Federal funds, the informal proceeding provided to Respondent by the Assistant Secretary in the form of a show cause proceeding provides sufficient notice and opportunity to challenge the Assistant Secretary's decision.

More directly, the Assistant Secretary argues that the ALJ erroneously ruled that OALJ maintains jurisdiction to hear Respondent's challenge because section 1111(g)(2) does not provide a party subject to a withholding action under its terms with a right to a hearing on the record as is authorized by GEPA. In support of her position, the Assistant Secretary notes that when Congress intends to mandate that challenges to remedial actions taken by the Department come within the scope of OALJ's jurisdiction and GEPA's hearing procedures, it does so explicitly and nothing in section 1111(g)(2) unambiguously refers to OALJ or GEPA. I agree.

The ESEA must not be interpreted as imposing the obligatory jurisdiction of OALJ to state challenges of withholding actions taken by the Assistant Secretary pursuant to section 1111(g)(2). It runs counter to basic principles of statutory construction to say that Congress's apparent silence in section 1111(g)(2) as to statutory due process requires the inference that Congress implicitly intended to confer jurisdiction on OALJ, which is a tribunal of limited

⁷ The ALJ's analysis seems to rest on an implied rejection of the Assistant Secretary's position that Congress's silence as to what procedures should accompany a withholding action pursuant to section 1111(g)(2) is intended to provide the Department with the flexibility and discretion to determine the appropriate procedures.

⁸ The ALJ draws categorical classifications between withholding remedial provisions that contain "threshold standard[s]" and withholding enforcement provisions that contain "notice and hearing" requirements; in doing so, he concludes that a withholding provision must fit within one of the classifications unless it contains language regarding both. This line of reasoning reaches far beyond categorical classifications because the rationale would read a notice and hearing requirement into any withholding provision that did not explicitly provide for notice and hearing, including contexts that contained neither a mandatory requirement of due process, nor a property or liberty interest protected by statute. Clearly, where there is no indication of a deprivation of a property or liberty interest, Congress could intend that a withholding action not require formal notice and hearing. Here, Respondent concedes that it is not in full compliance with the ESEA, and the ALJ acknowledged the "total allocation of grant funds to the State of California was not affected by the withholding action."

jurisdiction. The better view is that Congress means what it says when it confers jurisdiction on OALJ explicitly, and, therefore, Congress's inaction cannot mean the same.

The Assistant Secretary's interpretation of section 1111(g)(2) is in accord with the straightforward text of the statutory provision. The phrase "the Secretary may withhold" is unambiguous; it authorizes me to withhold funds for state administration of the ESEA when I am unsatisfied that the state has fulfilled the pertinent requirements of the ESEA. There is no reference to GEPA in section 1111(g)(2), nor need there be. Moreover, I find further support for the Assistant Secretary's position illustrated by two conditions: (1) that withholding actions in some programs administered by the Department include specific references to GEPA or OALJ in their remedial statutory provisions and, thereby, confer jurisdiction on OALJ, and (2) that the Department's long-standing practice of establishing informal proceedings for programs that do not contain explicit references to GEPA or OALJ -- or any other tribunal established by Congress -- is a sound practice that is sufficiently protective of the respective interests involved. In such instances, the Department retains the flexibility to designate what body or official shall have jurisdiction to adjudicate certain disputes and exercises the discretion to identify the appropriate informal or formal procedures available to parties based on the interests at stake. Here, the Assistant Secretary has adopted a show cause proceeding subject to my review.

I am persuaded that Congress's silence as to who should have jurisdiction to review a challenge under a section 1111(g)(2) withholding action and Congress's silence as to what procedures are due constitutes Congress's occasional preference to allow the Department the flexibility and discretion to designate the tribunal and identify the appropriate procedures. My conclusion is consistent with common principles of statutory construction. Section 1111(g)(2) of the ESEA specifically instructs that: "the Secretary may withhold funds for State administration [of ESEA grants] until the Secretary determines that the State has fulfilled [the pertinent] requirements" of the grant program whereas, in contrast, some withholding provisions in the ESEA directly confer jurisdiction on OALJ by explicitly referencing section 1234d.⁹ In this regard, a common principle of statutory construction bears striking pertinence in this case; namely, that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."¹⁰

As I noted in my Order Accepting Petition for Interlocutory Review, it is a long-standing fundamental principle of American law that without jurisdiction, a tribunal "cannot proceed at all in any cause;" when jurisdiction "ceases to exist[] the only function remaining...is that of announcing the fact and dismissing the cause."¹¹ Accordingly, I find that the language of section 1111(g)(2) is clear, and that it does not confer jurisdiction on OALJ to hear Respondent's

⁹ See, e.g., 20 U.S.C. § 6362(e)(3) (this section of the ESEA authorizes me to withhold reading program grant funds from state education agencies that lack substantial compliance with grant program requirements, but confers jurisdiction over challenges to the withholding action on OALJ and mandates by reference notice and a hearing).

¹⁰ *Russello v. United States*, 464 U. S. 16, 23 (1983); see also, *Lindh v. Murphy*, 521 U. S. 320 (1997).

¹¹ See *Ex parte McCardle*, 74 U.S. 7 Wall 506 (1868).

challenge to the Assistant Secretary's withholding action. The ALJ should have dismissed Respondent's appeal due to lack of jurisdiction.

To be sure, certain challenged withholding actions not only must be brought before OALJ, but the procedures used to adjudicate the challenged action are specifically identified in section 1234d of GEPA. Nonetheless, there can be only two ways OALJ maintains jurisdiction to hear a challenge to a withholding action in an applicable Department program.¹² First, Congress may expressly mandate OALJ jurisdiction by clear statutory reference to GEPA or OALJ; second, I may exercise my discretion to designate OALJ jurisdiction.¹³ Clearly, neither choice has been made in this case.

Although I accepted the Assistant Secretary's Petition for Interlocutory Review to take up the question of jurisdiction, I invoke my plenary authority to resolve this matter expeditiously by reviewing the Assistant Secretary's show cause decision on the basis of the submissions before her.¹⁴ At issue is the appropriateness of the Assistant Secretary's proposed withholding action.

In ruling that Respondent did not satisfactorily show cause why withholding Federal funds from the State of California was unwarranted, I find that the Assistant Secretary erred when setting the amount withheld at \$1 million. In her show cause decision, the Assistant Secretary noted two reasons why she determined it was appropriate to withhold \$1 million from the State: (1) that since the 2005-06 school year the State has not been in compliance with Federal statutory 8th grade math assessment requirements, and (2) that the State has not made meaningful progress developing an action plan and timeline to come into compliance. To be sure, the State neither is in compliance with Federal requirements, nor contends that it is. As such, the Assistant Secretary's reasons are incontrovertible. Even so, I find the reasons insufficient to impose a \$1 million penalty on the State in light of the State's un rebutted mitigating circumstances.

Respondent argues that the proposed withholding would diminish the State's capacity to close the achievement gaps that exist within the State among the State's 961 Title I school districts, which serve more than 2.6 million of the State's students.¹⁵ In addition, Respondent argues that it has made good faith efforts with compliance with the ESEA by bringing all of the

¹² I find the connection between the mandatory jurisdiction of OALJ and the power to enforce a withholding action far less compelling than the ALJ for the reasons identified in this decision as well as because the long-standing authority of the Department to impose withholding actions pursuant to the ESEA predates the existence of OALJ. *See Bell v. New Jersey*, 461 U. S. 773 (1983).

¹³ Respondent appears to acknowledge this result by arguing that the absence of a specific reference to GEPA in section 1111(g)(2) does not preclude me from designating the jurisdiction of OALJ in this case. I agree. Congress's silence in section 1111(g)(2) provides me with the discretion to determine who may hear Respondent's challenge and what procedures shall apply. In exercising my discretion, however, I decline to designate the jurisdiction of OALJ.

¹⁴ *See* 20 U.S.C. § 1221e-3.

¹⁵ Title I of the ESEA, among other things, provides Federal funds for schools that have high concentrations of students from families that live in poverty to help improve learning opportunities for students at risk of failing to meet state academic achievement standards. *See*, Title I, Part A of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001.

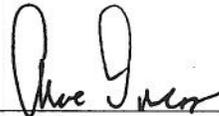
February 2006 findings of noncompliance into compliance except the State's 8th grade math assessment at issue here. Respondent also argues that withholding \$1 million in Federal funds from the State would harm the State in light of the weakened economy and the precipitous and unforeseen decline in the State's financial resources.¹⁶

In light of the aforementioned, I am persuaded that Respondent's mitigating circumstances sufficiently identify why withholding \$1 million in Federal funds is excessive and unwarranted. Notwithstanding Respondent's clear obligation to comply with the conditions and requirements of the ESEA, the amount of the Assistant Secretary's proposed withholding exceeds what is warranted to steer the State into compliance in light of the State's efforts to comply with the ESEA and in light of the extraordinary circumstances of the State's current economy.

ORDER

Accordingly, I REVERSE the order of Chief Administrative Law Judge Allan C. Lewis denying the Assistant Secretary's motion to dismiss the above-captioned proceeding. It is FURTHER ORDERED that the Assistant Secretary's January 15, 2009, show cause decision is HEREBY MODIFIED to require withholding, under section 1111(g)(2) of the ESEA, \$50,000 from the State of California's fiscal year 2008 Title I, Part A allocation for administrative activities.

So ordered this 12th day of November 2010.



Arne Duncan

Washington, D.C.

¹⁶ Respondent argues that the State's budget deficit is "not simply a foreseeable cyclical downturn, but an exceptional and uncontrollable circumstance warranting unique consideration."

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