UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of

OREGON DEPARTMENT OF EDUCATION

Applicant.

Docket No. 17-01-O

IDEA Determination

Appearances: Jake Hogue, Esq. for the Oregon Department of Education.

Nana Little, Esq. and Timothy Middleton, Esq. for the U.S. Department of Education.

Before: Chief Administrative Law Judge Rod Dixon

INITIAL DECISION

The Secretary of Education has assigned this appeal for a hearing pursuant to 34 C.F.R. §300.180(a). The Oregon Department of Education ("Oregon") appeals the Department of Education's ("Department") proposed final determination that it would reduce, by $3,313,000, the grant funding that Oregon receives under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412. The grant at issue is authorized in Section 611 of Part B of the IDEA. The procedures for the hearing are found in 34 CFR §300.179 through §300.183. In November 2016, the Department issued a Proposed Determination stating that Oregon had failed to maintain required state financial support by that amount in state fiscal year (SFY) 2011. In January 2017, counsel for Oregon submitted a request for review of the Department's determination.

The IDEA statute and regulations dictate the conditions a state must meet in order to qualify for and maintain its level of an IDEA grant. Included among those conditions is that a state must meet its "Maintenance of State financial support" (MFS) requirements, namely that a state "not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of education those children, below the amount of that support for the preceding fiscal year." 20 U.S.C. §1412(a)(18)(A); 34 CFR § 300.163(a).[1]

[1] This section allows waivers "for exceptional or uncontrollable circumstances." 20 U.S.C. §1412(a)(18)(C); 34 CFR § 300.163(c).

The result of a failure to maintain state financial support is that the Secretary "shall reduce the allocation of funds provided... for any fiscal year following the fiscal year in which the State fails to comply with [the MFS requirement]." 20 U.S.C. §1412(a)(18)(B); *see also* 34 CFR § 300.163(b). The Department contends that, in SFY 2011, Oregon expended $3,313,166 too little in state funding for special education services and so it is proper for the Department to reduce Oregon's IDEA grant by that amount in a future year. Oregon, however, contends that it did provide sufficient funding as calculated using a formula that was acceptable at that time, and even if it did not meet its MFS requirements, the Department cannot reduce Oregon's IDEA funding multiple years later.

Discussion

The facts behind the dispute at issue are as follows. In March 2011, Oregon submitted a waiver request to provide reduced state funding for SFY 2011, claiming "precipitous and unforeseen decline" in revenue. When reviewing the financial documentation provided by Oregon, however, the Department determined that the State would have sufficient funds available. After reporting it had made an additional $13,800,000 available to correct the shortfall, the total amount Oregon appeared to have made available for SFY 2011 was $352,592,583, which would have exceeded the amount required to meet Oregon's MFS requirement. Therefore, based on information and assurances provided by the State, the Department, at that time, determined that Oregon had met the MFS requirement. Ex. R-4.

During the 2011-2012 year, however, Oregon revised its calculation methodology, which was then approved by the Department. Ex. R-9. In the calculations it had been using for SFY 2011 and prior years, Oregon had included both funds that were immediately available for spending and funds subject to a spending limitation. In order for the funds subject to the spending limitation to be used, Oregon would have to make a request to the legislature, which would then consider the request and make a discretionary decision about whether to grant it. Oregon worked with the Department to revise this original calculation methodology (which counted both funds immediately available and funds subject to spending restrictions as "made available") to include only those funds available for spending without any limitations or restrictions. This revised methodology defined "made available" as "the lesser of revenue or spending limitation." The Department approved, and Oregon implemented the new methodology beginning with its application for SFY 2012. Ex. R-9.

Because of the timing of its application in SFY 2013, the Department required Oregon to provide documentation proving it had satisfied the MFS requirement for SFY 2012, which required comparing SFY 2012 with SFY 2011. In verifying that information, the Department used the corrected methodology to recalculate the funds made available in SFY 2010 and SFY 2011. Although the Department granted Oregon the full amount of its IDEA funds for SFY 2014, it also determined that a portion of the $13,800,000 that Oregon had reported that it had added to the funds made available for SFY 2011 in order to satisfy the MFS requirement was subject to spending restrictions. Ex. R-7. Using the new methodology and counting only those funds immediately available for spending without any restrictions, the amount made available for SFY 2011 fell to $347,417,332, which revealed a $3,313,166 shortfall from the $350,955,886 made available for SFY 2010. Ex. R-7.

Based on the shortfall resulting from application of the new methodology to SFY 2010 and SFY 2011, the Department found that Oregon had failed to meet the MFS requirement in SFY 2011, and notified Oregon of the finding. Ex. R-7.

In December 2014, Oregon requested a waiver of the MFS for SFY 2011 on the grounds that the alleged shortfall was the result of a good faith misunderstanding of the correct interpretation of "made available." Ex. R-10. In November 2016, the Department denied the waiver and issued a Proposed Determination that stated that Oregon is not eligible for $3,313,000 of its Section 611 IDEA grant. Ex. R-11. Oregon subsequently appealed.

Although there was some disagreement at the briefing stage, by the time of the hearing, both parties agreed that the Department's action is governed by IDEA regulations, and that, therefore, there is no statute of limitations issue. Second, the parties also agree that an error made in good faith is not covered by the MFS waiver provision.

Whether the Department has the authority to clarify the meaning of "made available" for the purposes of the IDEA MFS provision is not contested by Oregon. Rather, Oregon's primary argument is that the calculations it initially used for SFY 2011 were acceptable, that those calculations indicated that Oregon had "made available" sufficient funding to meet its MFS requirement in SFY 2011, and that the clarification of the appropriate definition of "made available" as reflected in the newer methodology is a new distinct standard, which the Department cannot retroactively apply to calculate the funds made available in SFY 2010 and 2011.

The Department counters that its clarification of the meaning of "made available" is not an application of a new standard, but rather a correction of Oregon's previous misinterpretation. Therefore, it argues that whether the Department can retroactively apply a new standard is not at issue here.

Additionally, Oregon also contends that, assuming the State failed to meet its MFS requirements for SFY 2011, the Department is not authorized to reduce funding so many years after the alleged shortfall occurred. Oregon argues both that there is no express provision in the IDEA regulations allowing them to do so and that the phrase "preceding fiscal year" in the statute and regulation (20 U.S.C. § 1412(a)(18); 34 C.F.R. § 300.163(a)) in fact prevents the Department from doing so.

The Department argues that if it finds a shortfall in any previous year's funding support, it is statutorily mandated to reduce funding in a future year, even if that is not the year immediately following the year that the State failed to meet its MFS requirement.

Summary of Decision

The Department's finding is affirmed. There was a reduction in Oregon's financial support between SFY 2010 and SFY 2011, and Oregon is not eligible for $3,313,000 of its IDEA Part B Section 611 grant.

Analysis

1. Did Oregon reduce its funding support in SFY 2011 below its MFS requirements?

As noted above, Oregon's primary argument that it did not reduce its funding is that the Department retroactively applied a new standard, which Oregon argues is impermissible to do. The statute is silent on retroactively applying methodology to recalculate relevant funding in prior years.

Oregon relies heavily on the United States Court of Appeals for the Ninth Circuit case, *Montgomery Ward v. F.T.C.*, as authority for its claim that the Department is not authorized to retroactively apply the revised methodology. 691 F.2d 1322 (9th Cir. 1982). In *Montgomery Ward*, the Federal Trade Commission (F.T.C.) found the company in violation of a regulation called the "presale rule" which requires businesses to provide potential customers with ready access to written warranty information prior to the sale of merchandise priced at over fifteen dollars, and imposed a cease and desist order on the company. *Id.*

In that case, the F.T.C. had issued two interpretation clarifications that caused the noncompliance findings. The Court ruled that one interpretation was at odds with the plain meaning of the regulation, and that, therefore, it must be achieved through rulemaking, as it was an amendment as opposed to an interpretation. In the case at hand, Oregon does not argue that the Department's interpretation is at odds with the plain meaning of the regulation. Rather, Oregon relies on the Court's response to the FTC's other interpretation. The Court also held that the F.T.C. Commissioner's decision to interpret "ready access" as requiring the placement of at least one set of binders on each sales floor was within its adjudicatory interpretation power, but that the interpretation could only apply prospectively, rendering the retroactive cease and desist order invalid.

Oregon's argument is that the Department's clarification with respect to the meaning of "made available" is analogous to the F.T.C.'s clarification with respect to the meaning of "ready access." As previously noted, before December 2011, in calculating funds "made available" for special education, Oregon had included both funds that were immediately available for spending as well as funds subject to a spending limitation. In order for the funds subject to the spending limitation to be spent, the State's Department of Education would have to make a request to the legislature, which would then consider the request and make a discretionary decision about whether to grant it. In 2011, as explained above, Oregon revised its methodology in order to become in compliance with the Departments interpretation of the regulation. The new methodology only included those funds not subject to spending limitations in the total number of funds made available.

The Ninth Circuit Court of Appeals's finding in *Montgomery Ward* only applies here if the Department's clarification of the definition of "made available" created a new standard that would not have been reasonably foreseeable to Oregon.

According to Oregon, the new methodology does represent a new standard. Oregon argues that the State had never been given a specific definition of "made available," and so it was left to determine the definition for itself. Oregon argues that its inclusion of funds subject to spending limitations was a reasonable interpretation of "made available," and although the new methodology as clarified by the Department is also entirely reasonable, it does mark a change in standard.

The Department, however, argues that by requiring that Oregon change its calculation method, it was not changing the standard but rather communicating to Oregon what the standard has always been and asking it to comply. Department explained that had Oregon asked whether its calculation methodology was permissible at any time previous to the December 2011 clarification, the Department would have corrected the problem immediately. According to the Department, Oregon's interpretation goes against the plain meaning of the words "made available," and was, therefore, an error as opposed to an alternative and reasonable interpretation.

If Oregon's original methodology was based on an erroneous interpretation of the regulation, then the current calculation methodology, while new to Oregon, was always the appropriate and accurate method of calculating financial support. It follows that the moneys subject to a spending limitation were not part of the financial support provided, and so there was a reduction in financial support in SFY 2011.

The Department's "plain meaning" argument about the regulation is a strong one. The Department asserts: "Made available means made available. It doesn't mean funds that might be made available if certain conditions are met and if the legislature decides to make it available, it means made available for spending."

Although Oregon contends its reading of "made available" to include those funds to be later requested from the legislature is reasonable, if there are further restrictions and the final decision is left to the discretion of the legislature, then those funds are not truly made available. Because those funds were not truly made available, the moneys subject to spending limitations are not financial support and a reduction did occur.

Oregon also makes a second argument for its claim that there was not a reduction in funding support in SFY 2011. Namely, Oregon argues that at the time, Oregon made a good faith assurance that it had maintained the required funding support, a point not contested by the Department, and that because those assurances were made in good faith and in keeping with Oregon's interpretation of "made available" at that time, there was no error in calculating the funding support as it did, and, therefore, no reduction. The Department, however, argues that the question is not whether Oregon's reported numbers and assurances were in good faith, but whether the funds appropriated, when computed using the new, accurate methodology, reflect any reduction.

The language of the statute and regulation supports the Department's reading. They require investigation into the amount of funding made available and do not mention a state's assurances or good faith reporting as relevant to deciding whether a state maintained its financial support.

2. Upon finding a reduction, can the Department then reduce IDEA funds for Oregon in a future fiscal year?

Oregon notes that the maintenance of state financial support provision reads that the amount of state financial support made available may not be reduced "below the amount of that support for the preceding fiscal year," (20 U.S.C. § 1412(a)(18)(A); 34 C.F.R. 300.163(a)) and argues that the use of the word "preceding" authorizes the Department to look only at the year immediately preceding the year in which it intends to reduce federal support. Oregon further contends that this retroactive application is prohibited, because "where Congress has intended for agencies to have the authority to go back and retroactively review or... assess penalties on states for conduct in prior years... they've done so expressly."

The Department counters this argument by explaining that, because the regulation is about maintaining funding support, the Department must look to "the highest amount of financial support that the State has made available for special education and related services in any previous fiscal year." The Department asserts that although the regulation uses the word "preceding," the effect of the rule is to have the state consistently spend as much or more as the year in which it provided the highest level of financial support, and the Department's action is, therefore, consistent with the practical effect of the regulation.[2] The Department argues that if it uncovers an inaccuracy in a previous year's calculation, it is then mandated by the regulation to reduce funding in a future year.

The language of the statute states that "the Secretary shall reduce the allocation of funds under... this title for any fiscal year following the fiscal year in which the state fails to comply with the requirement [to maintain the required level of financial support] by the same amount by which the State fails to meet the requirement." 20 U.S.C. § 1412(a)(18)(B); *see also* 34 CFR § 300.163(b).

Therefore, if the Department finds a reduction of funding on the part of a state, it is then required to reduce funds in a following year by the same amount. The question in this case is whether it has to do so in the fiscal year immediately following the year in which the state failed to maintain funding support, or whether the Department can do so in any following year.

The dictionary definitions of "following" in Merriam Webster are "being next in order or time" and "listed or shown next." Merriam-Webster Online Dictionary, 2018, http://merriam-webster.com (July 10, 2018). In a vacuum, this appears to imply that the reduced funding is only appropriate during the year directly following the year in which a state failed to maintain funding support. Read that way, even if the recalculation was appropriate and the funds appropriated by

---

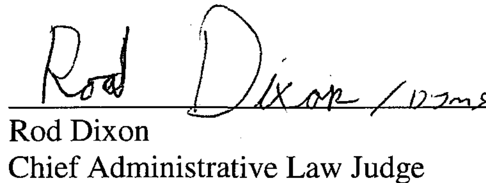
[2] In its brief, Oregon asserts that the Department's action is appropriately governed by 20 U.S.C. § 1416, as opposed to § 1412. It is not clear whether it maintains that argument. However, this assertion rests primarily on the argument that an action reducing funds because of a shortfall in a year other than the one immediately preceding the year in which the action is taken is outside the scope of § 1412. As explained above, that is not the case. Therefore, § 1412 is the appropriate provision for the Department's action.

Oregon in 2011 were insufficient, then the Department would not be authorized to implement a reduction numerous years later.

However, "following" also means "after," and the choice to write "following" instead of "directly following" implies that reducing funding during any year coming after the year in which a state failed to maintain financial support would be appropriate. Also, the fact that the regulation says "any following fiscal year" instead of "the" following fiscal year lends support to the Department's view that reduced funding is appropriate multiple years later. On balance, the law indicates that the Department is required to reduce IDEA funding, even if not done in the fiscal year immediately following the fiscal year when a state failed to satisfy the MFS requirement. The Department properly reduced Oregon's IDEA grant funding by $3,313,000.

ORDER

The Department's determination is **AFFIRMED**. There was a reduction in Oregon's financial support between SFY 2010 and SFY 2011, and Oregon is not eligible for $3,313,000 of its IDEA Part B Section 611 grant.



Rod Dixon
Chief Administrative Law Judge

Dated: July 12, 2018

<u>SERVICE</u>

This order has been sent via US Postal certified mail and email, with confirmation delivery receipt, to:

Jake Hogue, Esq.
Oregon Department of Justice
Government Services Section
1162 Court Street NE
Salem, OR 97301-4096
(emailed to: jake.j.hogue@doj.state.or.us)

And to:

Nana Little, Esq.
Timothy Middleton, Esq.
Assistant General Counsel
U.S. Department of Education
Office of the General Counsel
400 Maryland Avenue, S.W.
Room LBJ-6E304
Washington, DC 20202-2110
(emailed to: nana.little@ed.gov and to tim.middleton@ed.gov)