



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

**STATE OF NEW JERSEY AND
NEW JERSEY DEPARTMENT OF EDUCATION**

Docket No. 17-10-O
IDEA Determination

Respondent.

DECISION OF THE SECRETARY

The State of New Jersey and New Jersey Department of Education (collectively “New Jersey”) fund special education and related programs run by state and local educational agencies in the State of New Jersey. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, New Jersey applies for and receives yearly grants of federal funds to supplement state spending on special education.

To become eligible for IDEA grants, among other things, states must meet the statutory “Maintenance of State financial support” (MFS) requirement.¹ Under this provision, a state may not reduce the amount of state funds allocated to special education and related services below the amount of state funds allocated in the preceding fiscal year.² When a state fails to meet the MFS requirement, by reducing state funding below the amount allocated in the preceding fiscal year, the Secretary reduces the federal IDEA grant by the same amount as the state shortfall.³

The Secretary may waive the MFS requirement on a year-by-year basis if the Secretary determines the shortfall was due to “exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State.”⁴

¹ 20 U.S.C. § 1412(a)(18) (prohibiting states from reducing their MFS from one fiscal year to the next, reducing IDEA grants for states that fail to maintain MFS, and allowing for waiver of those consequences in certain circumstances).

² *Id.* § 1412(a)(18)(A) (“The State does 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 educating those children, below the amount of that support for the preceding fiscal year.”).

³ *Id.* § 1412(a)(18)(B) (“The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.”); 34 C.F.R. § 300.163(b).

⁴ 20 U.S.C. § 1412(a)(18)(C) (“The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that--

Authority to evaluate a state's waiver request and prepare a notice of proposed determination is delegated to the Office of Special Education and Rehabilitative Services (OSERS).⁵ Regardless of whether a waiver is granted, in the fiscal year following the year of a shortfall, the funding level to meet the MFS requirement will be the dollar amount that *would have been* required if the state had not underfunded special education.⁶

OSERS published a policy directive in June 2010 describing the process and criteria for granting waivers to the MFS requirement.⁷ The directive mirrors the language of the statute by indicating the Department will only grant a waiver if the state has experienced "exceptional or uncontrollable circumstances."⁸ The decision of whether or not to grant a waiver will be made on a case-by-case basis after a careful process to evaluate the facts and circumstances of each waiver request.⁹ Among other factors, the Department will evaluate whether the state reduced its financial support by no more than the overall percentage of reduced revenues experienced by the state.¹⁰ In other words, the Department will determine whether the state treated its obligation to fund special education equitably with its other funding obligations.¹¹ The Department will also consider its past monitoring of the state to determine whether the state has met its requirement to provide a free appropriate public education to all children with disabilities.¹²

New Jersey requested and received such a waiver for state fiscal year (SFY) 2010.¹³ In that instance, New Jersey requested a waiver of \$25,671,915, a 2.1 percent decrease from the funding level in the preceding fiscal year, SFY 2009. In granting the request, OSERS noted New Jersey's "significant decrease in revenues" between SFY 2009 and SFY 2010.¹⁴ OSERS also "recognize[d] that the reduction in financial support for special education and related services was relatively small compared with cuts to other areas of education."¹⁵ Ultimately, OSERS concluded that "the precipitous and unforeseen decline in the financial resources of the State"

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State."); 34 C.F.R. § 300.163(c)(1). A State may alternatively seek a waiver if it "meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter." 20 U.S.C. § 1412(a)(18)(C)(ii). This provision is not a basis of the decision presently under review; I need not discuss it further.

⁵ See generally Letter dated Apr. 7, 2011, from OSERS to New Jersey Department of Education (SFY 2010 Waiver) and Letter dated Jan. 17, 2017, from OSERS to New Jersey Department of Education (SFY 2011 Proposed Final Determination).

⁶ 20 U.S.C. § 1412(a)(18)(D) ("If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support."); 34 C.F.R. § 300.163(d).

⁷ Process and Criteria Used to Evaluate a Request by States to Waive Maintenance of Effort (MOE) Requirements under Part B of the Individuals with Disabilities Education Act (IDEA), Office of Special Education Programs (OSEP), Office of Special Education and Rehabilitative Services, U.S. Dep't of Educ. (June 2010) (OSEP June 2010 Directive).

⁸ OSEP June 2010 Directive at 1. OSEP is a subordinate unit of OSERS.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 2.

¹³ SFY 2010 Waiver.

¹⁴ *Id.* at 1.

¹⁵ *Id.*

justified granting New Jersey’s waiver request.¹⁶ OSERS specifically notified New Jersey that the waiver would not reduce its \$1,204,956,000 funding minimum for the following year, SFY 2011, and the state “should not anticipate, or rely on, a waiver” in SFY 2011.¹⁷ OSERS went on to advise New Jersey that “since the advent of the State’s economic downturn, the State has had an opportunity to examine its sources and amounts of revenues and to plan accordingly, consistent with its obligations under the IDEA.”¹⁸

On September 22, 2011, New Jersey again requested a waiver of the MFS requirement, this time for SFY 2011. New Jersey asserted that “[t]he effects of a structural budget deficit, the national recession and a significant loss in revenue continued into SFY 2011 and have left the state with difficult choices.”¹⁹ New Jersey asserted that its state revenue levels dropped below its SFY 2008 level for 3 years.²⁰ In its waiver request, New Jersey indicated it underfunded special education by \$13,272,335, a 1.1 percent decrease in funding compared to SFY 2009, the last fiscal year in which New Jersey met its MFS requirement.²¹ Citing the \$13,272,335 figure for underfunding special education, New Jersey’s waiver request constitutes an admission that it failed to meet the MFS requirement in SFY 2011.

New Jersey appears to contend, in part, that its budget process, including its state constitutional requirement to maintain a balanced budget, provided a justification for why its revenue shortfall necessitated a reduction of special education funding.²² Because New Jersey is not permitted to “deficit spend,” the state budget is based on projections of revenue, expenditures, and fund balances, which are inexact until final tax payments are made around April 15 of each year, after which supplemental appropriations may be enacted.²³ Nevertheless, New Jersey asserted that its “percentage change from SFY 2009 to SFY 2011 in the state’s appropriations for special education and related services was -1.1 percent vs. an -11.7 percent reduction in total appropriations other than special education.”²⁴ New Jersey asserted that this relative rate of underfunding showed its commitment to providing a free appropriate public education to students with disabilities.²⁵

However, on January 17, 2017, OSERS issued a proposed final determination denying New Jersey’s request for a waiver for SFY 2011.²⁶ In the SFY 2011 Proposed Final Determination, OSERS found that the New Jersey State General Fund—a fund containing surplus revenues rolled over from one year to the next—contained a balance of \$873 million at the end of SFY 2011.²⁷ This actual balance exceeded the state’s projected balance of \$403

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Letter dated Sept. 22, 2011, from New Jersey Department of Education to U.S. Secretary of Education (SFY 2011 Waiver Request).

²⁰ *Id.* at 2.

²¹ *Id.* at 1.

²² New Jersey Hearing Brief, Ex. A5 (Certification of David Ridolfino, Acting Director, Office of Management and Budget, State of New Jersey) at 5–10.

²³ *Id.*

²⁴ SFY 2011 Waiver Request at 2.

²⁵ *Id.*

²⁶ SFY 2011 Proposed Final Determination.

²⁷ *Id.* at 3.

million.²⁸ Both the actual and projected amounts were far in excess of the amount necessary to cover the \$13,272,335 shortfall in special education funding.²⁹ Because New Jersey could have funded the shortfall with the balance in the State General Fund, OSERS found that New Jersey did not experience an exceptional or uncontrollable circumstance in SFY 2011 that would justify granting a waiver of the MFS requirement.³⁰

New Jersey requested a hearing on the Department's SFY 2011 Proposed Final Determination. In her Initial Decision dated October 9, 2020, the Hearing Official concluded that New Jersey's waiver request should be granted.³¹ The Hearing Official first found that OSERS's process used to evaluate New Jersey's SFY 2011 waiver request was different than the process used to evaluate New Jersey's SFY 2010 waiver request. According to the Hearing Official, OSERS required New Jersey to demonstrate in its SFY 2011 waiver request (but not its SFY 2010 waiver request) that the exceptional or uncontrollable circumstance justifying the waiver request occurred in the fiscal year for which the waiver was sought.³² The Hearing Official found no support for this requirement and rejected it.

The Hearing Official then evaluated the facts of the case to determine, *de novo*, whether New Jersey qualified for a waiver in SFY 2011. The Hearing Official found the economic crisis that started in 2008 "qualified as an exceptional or uncontroll[able] circumstance resulting in a precipitous and unforeseen decline in [New Jersey's] financial resources extending through at least [New Jersey's] SFY 2011."³³ Furthermore, the Hearing Official recognized that the balance in the State General Fund was sufficient that "[New Jersey] could have adjusted its special education and related services appropriation" near the end of SFY 2011, but "because the 2011 school year was near the end or over, an additional appropriation would have provided no benefit to the disabled children of [New Jersey]."³⁴ The Hearing Official took a different view than OSERS and found that New Jersey qualified for a waiver.³⁵

OSERS has filed comments and recommendations on the Initial Decision asking me to reverse it on the grounds that it is clearly erroneous. New Jersey has filed comments and recommendations in favor of the Hearing Official's Initial Decision. With the case fully briefed, I turn to my legal analysis. This case presents three issues that I must resolve:

- 1) What is the Hearing Official's standard of review in IDEA eligibility hearings?
- 2) Was there consistency in OSERS's process for evaluating New Jersey's waiver requests in SFY 2010 and SFY 2011?

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 3–4.

³¹ Initial Decision at 15.

³² *Id.* at 11 ("[t]his history shows two different standards were applied by the Secretary when evaluating [New Jersey's] SFYs 2010 and 2011 requests for a waiver.").

³³ *Id.* at 14.

³⁴ *Id.*

³⁵ *Id.* at 15.

3) How does the statutory waiver provision apply to New Jersey’s SFY 2011 waiver request?

Hearing Official’s Standard of Review in IDEA Eligibility Hearings

The threshold question in this case is what standard of review a Hearing Official must use when evaluating OSERS’s proposed final determination to deny a state eligibility for an IDEA grant. A state is entitled to a hearing because the regulations prohibit the Secretary from making “a final determination that a State is not eligible to receive a grant under Part B of the Act” until providing the state with “reasonable notice” and an “opportunity for a hearing.”³⁶ Denial of a waiver is an eligibility determination that triggers the right to notice and an opportunity for a hearing.³⁷ As such, there is no agency decision under review in an IDEA eligibility hearing, only a notice from the agency that “[s]tates the basis on which the Secretary proposes to make a final determination that the State is not eligible.”³⁸

The regulations provide an extensive list of the Hearing Official’s authority to conduct a hearing, but they do not assign a specific standard of review for the Hearing Official to use when considering the proposed final determination.³⁹ Rather, the regulations give the Hearing Official authority to issue “an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA [state education agency] under § 300.179 including any amendments to or further clarifications of the issues, under § 300.181(c)(7).”⁴⁰ Although the parties may subsequently submit comments and recommendations, the Initial Decision automatically becomes the final decision of the Secretary if the Secretary does not affirmatively inform the parties that further review will be undertaken.⁴¹ In such a circumstance, the regulations assign the “clearly erroneous” standard of review to the Secretary and impose a 30-day deadline to conclude the review.⁴² I issued a procedural order on November 27, 2020, informing the Hearing Official and the parties that I would undertake a review of the Initial Decision.

³⁶ 34 C.F.R. § 300.179(a)(1) (“The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.”).

³⁷ *South Carolina Dep’t of Educ. v. Duncan*, 714 F.3d 249, 252 (4th Cir. 2013) (OSERS’s denial of the State of South Carolina’s waiver request was “a determination that South Carolina was ‘not eligible to receive a grant’ . . . and that therefore the Secretary was required to provide the State with notice and an opportunity for a hearing *before* he made a final determination with respect to the waiver request.”).

³⁸ 34 C.F.R. § 300.179(b)(1) (requiring that the written notice provided by the Secretary, among other things, “States the basis on which the Secretary proposes to make a final determination that the State is not eligible.”).

³⁹ *Id.* § 300.180 (requiring the Secretary to assign a hearing official or hearing panel if a state requests a hearing).

⁴⁰ *Id.* § 300.182(a) (“The Hearing Official or Hearing Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.179 including any amendments to or further clarifications of the issues, under § 300.181(c)(7).”).

⁴¹ *Id.* § 300.182(g) (“The initial decision of the Hearing Official or Hearing Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments and recommendations, the Secretary informs the Hearing Official or Hearing Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.”).

⁴² *Id.* § 300.182(h) (“The Secretary rejects or modifies the initial decision of the Hearing Official or Hearing Panel if the Secretary finds that it is clearly erroneous.”).

The “clearly erroneous” standard of review, also called “clear error,” is derived in law from appellate courts’ review of findings of fact made by trial courts.⁴³ The Supreme Court has held that a court applying this standard of review will disturb the fact finding only “when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”⁴⁴ Thus, a tribunal applying this standard of review would not “reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”⁴⁵

OSERS argues that the Hearing Official used the wrong standard of review.⁴⁶ Before the Hearing Official, OSERS asserted that the Hearing Official’s standard of review should be whether OSERS abused its discretion when it denied New Jersey’s waiver request.⁴⁷ The Hearing Official characterized OSERS’s position as requiring “the standard upon which a reviewing Federal court applies to a final agency action or final decision of [the] Secretary.”⁴⁸ The Hearing Official held that standard of review is incorrect for a Hearing Official making an Initial Decision in an IDEA eligibility hearing.⁴⁹ The Hearing Official then issued an Initial Decision, using the discretionary authority of the Secretary, which included both fact finding and a legal determination on the issue of whether to grant New Jersey’s waiver request. OSERS urges me to find that a Hearing Official should defer to “agency expertise” during an IDEA eligibility hearing, only ruling contrary to the agency’s “broad discretion” if there is a showing that the agency abused that discretion.⁵⁰ I disagree.

The regulatory framework at 34 C.F.R. §§ 300.179 through 300.184 does not provide authority to the agency to render a decision of any kind prior to the Hearing Official issuing the Initial Decision. There is no agency decision to which a Hearing Official could defer even if such deference were legally appropriate, which it is not.⁵¹ Furthermore, the Hearing Official is a designee of the Secretary.⁵² Although the Hearing Official may be “from the Department or elsewhere,” the Hearing Official is part of the agency’s decision-making process, and the Initial Decision is a decision of the agency. It would be illogical for the Hearing Official, in rendering the first agency decision in the process, to defer to the notice of a *proposed decision* created by OSERS.

Furthermore, the “clearly erroneous” standard of review assigned to the Secretary in reviewing the Hearing Official’s Initial Decision describes the weight intended to be given to the Hearing Official’s judgment. By assigning this “clearly erroneous” standard of review, the

⁴³ *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

⁴⁴ *Id.*

⁴⁵ *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

⁴⁶ OSERS Comments at 9.

⁴⁷ Initial Decision at 8.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ OSERS Comments at 9.

⁵¹ *In the Matter of Central Kitsap School Dist. (WA)*, Dkt. No. 11-86-I, U.S. Dep’t of Educ. (Decision of the Secretary) at 6 (holding that, in the ordinary administrative review process, “[n]o entity within the Department is a court owing deference to another entity within the Department.”).

⁵² 34 C.F.R. § 300.180(a) (“If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.”).

regulations prevent the Secretary from reviewing the matter *de novo*. The regulations require deference to the Hearing Official's judgment; they demonstrate an expectation that the Hearing Official's Initial Decision will become the final decision of the Department except where the Secretary has a "definite and firm conviction that a mistake has been committed."⁵³

Although OSERS styles its notice to New Jersey as a "proposed final determination," this notice does not constitute a "decision" nor does the hearing official "review" that notice or give it deference. Under the regulations, the Hearing Official is authorized to issue the first "decision" in the administrative process. Accordingly, the Hearing Official acted correctly by issuing the Initial Decision without deferring to the SFY 2011 Proposed Final Determination.⁵⁴

I next turn to the question of whether the Hearing Official correctly determined that OSERS used an inconsistent process in evaluating New Jersey's SFY 2010 and SFY 2011 waiver requests.

Consistency of OSERS's Process for Evaluating Waiver Requests in SFY 2010 and SFY 2011

The Hearing Official held that OSERS used "two different standards" to evaluate New Jersey's SFY 2010 and 2011 waiver requests.⁵⁵ In granting the SFY 2010 waiver request, the Hearing Official found that OSERS "recognized the 2008 financial crash was the cause of the unforeseen decline in financial resources in SFY 2010."⁵⁶ Then, in denying the SFY 2011 waiver request, the Hearing Official concluded that OSERS contradicted its previous practice when it "required that the exceptional or uncontrollable circumstance must occur in the year for which the waiver is requested."⁵⁷

Neither the SFY 2010 Waiver nor SFY 2011 Proposed Final Determination specifically cite the "2008 financial crash" as the "exceptional or uncontrollable circumstance" that OSERS considered when evaluating New Jersey's waiver requests. Rather, in each letter, OSERS compared the current fiscal year to the previous one to evaluate the state's financial circumstances.

In the SFY 2010 Waiver, OSERS cited New Jersey's \$1.1 billion decrease in revenues from SFY 2009 to SFY 2010.⁵⁸ OSERS noted that New Jersey made a "relatively small" reduction of 2.1 percent for special education allocations compared to an overall appropriations cut of 12.76 percent.⁵⁹ OSERS also stated it:

⁵³ *United States v. U.S. Gypsum Co.*, 333 U.S. at 395.

⁵⁴ I note that the Hearing Official described the legal effect of her decision as reversing OSERS's notice of proposed determination. As discussed above, the notice of proposed determination is not an agency decision that can be affirmed or reversed. Rather, it is the initial decision of the agency on whether to find the state eligible for an IDEA grant.

⁵⁵ Initial Decision at 11.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ SFY 2010 Waiver at 1.

⁵⁹ *Id.*

considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. § 1416). In addition, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a [Free Appropriate Public Education] available to all children with disabilities in SFY 2010.⁶⁰

Based on this information, OSERS “determined that it is equitable to grant a waiver . . . due to exceptional or uncontrollable circumstances—the precipitous and unforeseen decline in the financial resources of the State.”⁶¹

In the SFY 2011 Proposed Final Determination, OSERS cited New Jersey’s actual and projected revenue decline from SFY 2009 to SFY 2011.⁶² OSERS also cited New Jersey’s belief in May 2011 that it would end SFY 2011 with a balance of \$403 million in its State General Fund, which was “well beyond the amount necessary to cover its MFS shortfall for SFY 2011 of approximately \$13.3 million.”⁶³ In its proposed determination, OSERS indicated it took into account “all the circumstances facing New Jersey in SFY 2011, including the amount and certainty of its anticipated budget surplus and its decrease in total State financial resources” but concluded “New Jersey had sufficient financial resources available to maintain its required level of State financial support for special education and related services for SFY 2011.”⁶⁴

The Hearing Official accurately states that OSERS based its waiver denial in the SFY 2011 Proposed Final Determination on New Jersey’s financial resources.⁶⁵ The Hearing Official then asserts that “OSERS revised its argument before this Tribunal” to assert that the exceptional or uncontrollable circumstance must occur in the year for which the waiver is requested.⁶⁶

The Hearing Official’s conclusion seems to be based on OSERS’s brief submitted during the hearing. In its brief, OSERS characterized New Jersey’s position as claiming “the State . . . experienced an ‘exceptional or uncontrollable’ circumstance in SFY 2011” partially based on “economic trends spanning a period of several other years.”⁶⁷ OSERS asserted that New Jersey’s position “reveals a fundamental misunderstanding” of the MFS requirement, because waiver requests are evaluated one fiscal year at a time.⁶⁸

In evaluating the SFY 2010 Waiver and SFY 2011 Proposed Final Determination, I see no evidence that OSERS used a different process or held New Jersey to an inconsistent standard. In each case, the letter granting or denying the waiver request was based on a comparison of the

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

⁶² SFY 2011 Proposed Final Determination at 3.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Initial Decision at 9.

⁶⁶ *Id.*

⁶⁷ OSERS Hearing Brief at 8.

⁶⁸ *Id.*

current and previous fiscal years' financial resources. The SFY 2010 Waiver does not, as asserted by the Hearing Official, make any finding that the "2008 financial crash was the cause of the unforeseen decline in financial resources in SFY 2010."⁶⁹ Rather, as previously quoted, OSERS cited New Jersey's reported financial circumstances.⁷⁰ These included its overall revenue decline—which resulted in New Jersey de-appropriating funds in legislation adopted in June 2010—and the steps New Jersey took to treat special education funding equitably while coping with its financial decline.⁷¹ Nor does OSERS's SFY 2011 Proposed Final Determination categorically deny the waiver request for SFY 2011 based on an assertion the multi-year national recession did not commence in SFY 2011. As in the SFY 2010 Waiver, OSERS's SFY 2011 Proposed Final Determination discusses New Jersey's financial circumstances in SFY 2011 and previous fiscal years.⁷² OSERS in particular considered New Jersey's projected balance for its State General Fund in SFY 2011 and compared that to its pre-planned underfunding of special education in the same year.⁷³ In each letter, OSERS correctly considered whether an exceptional or uncontrollable circumstance affecting New Jersey's financial resources *in that year* justified a waiver request *for that year*.

A multi-year national economic crisis could precipitate financial shortfalls that would justify granting a waiver in one or more subsequent fiscal years. However, the statute explicitly limits waiving of the MFS requirement "for 1 fiscal year at a time."⁷⁴ Therefore, a state must separately demonstrate in its waiver request for each year that an exceptional or uncontrollable circumstance affected it that year, such as "a precipitous and unforeseen decline in the financial resources of the State."⁷⁵ In the SFY 2010 Waiver and SFY 2011 Proposed Final Determination, OSERS correctly and consistently applied the statutory requirement. OSERS considered whether to waive the MFS requirement "for 1 fiscal year at a time" by considering the financial circumstances of the state, such as projected and actual revenue, fund balances, and proposed and actual appropriations, in the fiscal year for which New Jersey requested each waiver compared to previous fiscal years.⁷⁶ Based on those figures, OSERS considered whether there was a "precipitous and unforeseen decline in the financial resources of the State" in each fiscal year that constituted "exceptional or uncontrollable circumstances."⁷⁷

Considering the totality of the evidence, I find the Hearing Official's conclusion to be clearly erroneous on the question of whether OSERS used an inconsistent process or different standards to evaluate each waiver request. Therefore, I modify the Initial Decision to find that OSERS correctly and consistently applied the appropriate statutory authority and Department policy in preparing the letters.

Finally, I turn to the question of whether the Hearing Official's decision to grant the waiver was clearly erroneous.

⁶⁹ Initial Decision at 11.

⁷⁰ SFY 2010 Waiver at 2.

⁷¹ *Id.* at 1; SFY 2010 Waiver Request at 1.

⁷² SFY 2011 Proposed Final Determination at 3.

⁷³ *Id.*

⁷⁴ 20 U.S.C. § 1412(a)(18)(C).

⁷⁵ *Id.* § 1412(a)(18)(C)(i); 34 C.F.R. § 300.163(c)(1).

⁷⁶ *See generally* SFY 2010 Waiver and SFY 2011 Proposed Final Determination.

⁷⁷ 20 U.S.C. § 1412(a)(18)(C)(i); 34 C.F.R. § 300.163(c)(1).

Application of the Statutory Waiver Provision to New Jersey’s SFY 2011 Waiver Request

As I previously stated, the Hearing Official correctly issued an Initial Decision without deferring to the Proposed Final Determination. The question before me now is whether the Hearing Official made any clear error in her Initial Decision.

The Supreme Court has considered the application of the clear error standard of review in several recent cases. In *Monasky v. Taglieri*, the court considered whether lower courts erred in granting an Italian father’s petition to repatriate his child to Italy after the American mother fled with the child to the United States.⁷⁸ The court recited the analysis for determining a standard of review:

Absent a treaty or statutory prescription, the appropriate level of deference to a trial court’s . . . determination depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact. Generally, questions of law are reviewed *de novo* and questions of fact, for clear error, while the appropriate standard of appellate review for a mixed question “depends . . . on whether answering it entails primarily legal or factual work.”⁷⁹

This language from *Monasky* indicates that the Hearing Official’s decision is a ruling on a question of fact, or a mixed question that depends primarily on factual work, to justify the clear error standard established in the regulations.

The Supreme Court has described the limitations placed on a reviewing tribunal applying a clear error standard of review. In *Cooper v. Harris*, the court considered a District Court ruling on whether the establishment of voting districts constituted illegal race-based gerrymandering.⁸⁰ The court held:

We of course retain full power to correct a court’s errors of law, at either stage of the analysis. But the court’s findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. Under that standard, we may not reverse just because we “would have decided the [matter] differently.” A finding that is “plausible” in light of the full record—even if another is equally or more so—must govern.⁸¹

This language from *Cooper* establishes the high bar a party must reach to demonstrate a clear error made by a lower tribunal on a question of fact. Thus, the regulation requires the Secretary to give deference to the Hearing Official unless the Hearing Official committed a clear error.

⁷⁸ *Monasky v. Taglieri*, 140 S. Ct. 719, 724 (2020).

⁷⁹ *Id.* at 730 (quoting *U.S. Bank Nat’l Assoc. v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018)).

⁸⁰ *Cooper v. Harris*, 137 S. Ct. 1455, 1464–65 (2017).

⁸¹ *Id.* (citations omitted).

However, where a tribunal relies on facts that “cannot, as a matter of law, support” a judgment, the tribunal commits a clear error.⁸² In *Easley v. Cromartie*, the Supreme Court considered a District Court’s ruling that “race *rather than* politics *predominantly* explains District 12’s 1997 boundaries.”⁸³ The Supreme Court found the lower decision erroneous because its factual analysis focused on party registration, not voting behavior, and other evidence showed significant disparity between party registration and party preference among white voters.⁸⁴ Although the District Court undertook a factual analysis, “the data do not help answer the question posed.”⁸⁵ Even though “the record contain[ed] a modicum of evidence offering support for the District Court’s conclusion,” the “evidence taken together, however” was insufficient to avoid finding that the District Court made a clear error.⁸⁶

I find that the Hearing Official’s decision to grant a waiver must be reversed because the Hearing Official made a clear error. The Hearing Official did not analyze the factual grounds for New Jersey’s SFY 2011 waiver request in the context of the statutory language. Specifically, the Hearing Official did not determine whether the asserted decline in financial resources was “unforeseen.” Such an analysis is a necessary part of making an initial decision on a state’s IDEA eligibility.

The Hearing Official accurately stated that the question to be resolved was “whether New Jersey established that the granting of its waiver request is equitable due to exceptional or uncontrol[able] circumstances and an unforeseen decline in the financial resources of the State.”⁸⁷ The Hearing Official also accepted OSERS’s contention that the OSEP June 2010 Directive is the applicable departmental policy explaining the criteria the Department uses in evaluating a waiver request.⁸⁸ Then, without conducting a factual analysis of New Jersey’s SFY 2011 financial resources, the Hearing Official concluded that “the financial crash of 2008 is properly classified as an exceptional or uncontrollable circumstance” which caused a “precipitous and unforeseen decline in the financial resources of [New Jersey]” and “resulted in unforeseen decline in financial resources for [New Jersey] for many subsequent years.”⁸⁹ The Hearing Official found New Jersey’s budgeting decisions to constitute equitable treatment of special education programs by New Jersey.⁹⁰ The Hearing Official also concluded that “[New Jersey’s] explanation of why it was not practical to appropriate additional funds in the final quarter of SFY 2011 is reasonable because the increased appropriation at the end of the budget year would not benefit the students served by the appropriation, which was also at the end of the school year.”⁹¹ The Hearing Official granted New Jersey’s request for a waiver of the MFS requirement.⁹²

⁸² *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

⁸³ *Id.*

⁸⁴ *Id.* at 245–246.

⁸⁵ *Id.* at 246.

⁸⁶ *Id.* at 257.

⁸⁷ Initial Decision at 12.

⁸⁸ *Id.* at 10.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 14.

⁹¹ *Id.* at 12.

⁹² *Id.* at 15.

I find that the Hearing Official did not support her conclusion that New Jersey experienced “an unforeseen decline in the financial resources of the State” in SFY 2011. Undoubtedly New Jersey’s financial resources were less in both SFY 2010 and SFY 2011 than they were in SFY 2009. However, the Hearing Official does not establish how the financial crash of 2008 could result in a decline in New Jersey’s financial resources that was “unforeseen” after the passage of 3 years (in SFY 2011), and the evidence does not support such a conclusion.

While crafting its budget for SFY 2011, New Jersey was aware of the 2008 financial crash and its effect on the state budget in subsequent years. New Jersey had already received a waiver of the MFS requirement for SFY 2010. In its SFY 2010 Waiver Request, New Jersey indicated that it had to “deappropriate” \$52 million of aggregate special education funding in legislation adopted on June 29, 2010. In the SFY 2010 Waiver, the Department concluded that New Jersey experienced an unforeseen decline in financial resources and granted the waiver request, but specifically cautioned New Jersey to not rely on receiving another waiver for the following fiscal year. OSERS instructed New Jersey to take necessary steps to fully fund special education in subsequent years.

Rather than taking such steps, New Jersey again underfunded special education in SFY 2011. New Jersey did not point to the “2008 financial crash” as justification for its underfunding, but cited rampant unemployment “[b]etween December 2006 and December 2010,” among other things.⁹³ New Jersey pointed to the severity of its financial situation, but made no showing that the financial decline was unforeseen and did not explain why it could not entirely “close the gap” to meet its MFS requirement in SFY 2011.

As in *Easley*, there is a modicum of support for the Hearing Official’s conclusion. There is no question that New Jersey’s financial resources in SFY 2011 were less than in SFY 2009. However, the plain language of the statute requires a reduction in financial resources to be “unforeseen” to rise to the level of an “exceptional and uncontrollable circumstance[]” that would justify the discretionary grant of a waiver. New Jersey did not assert in its SFY 2011 waiver request that it experienced a financial decline that was “unforeseen.” Because the Hearing Official did not undertake an analysis of whether the applicable criteria apply to New Jersey’s SFY 2011 waiver request, I will undertake it.

While budgeting for SFY 2011, New Jersey asserts it faced a \$10.7 billion budget deficit “between projected revenues for SFY 2011 and the State’s spending obligations if nothing was changed.”⁹⁴ To cushion the loss of revenue, New Jersey reduced its spending by 4.7 percent from SFY 2010 to SFY 2011.⁹⁵ In SFY 2011, New Jersey cut funding for special education and related services by less than it cut other necessary expenditures—its SFY 2011 appropriation for special education fell short of New Jersey’s MFS base by \$13,272,335, or 1.1 percent below the base.⁹⁶

⁹³ SFY 2011 Waiver Request at 2.

⁹⁴ New Jersey Hearing Brief, Ex. A5 at 15.

⁹⁵ *Id.* at 16.

⁹⁶ *Id.* at 17.

New Jersey indicated that, on December 1, 2010, the Comprehensive Annual Financial Report (CAFR) was issued for SFY 2010.⁹⁷ The CAFR revealed an ending undesignated fund balance for SFY 2010 of \$804 million, “which was higher than anticipated.”⁹⁸ This information became available well before the June 30, 2011, passage of New Jersey’s supplemental appropriations act for SFY 2011.⁹⁹ OSERS also determined that “New Jersey reported that, as of May 2011, it projected it would end SFY 2011 with a balance of \$403 million in the State General Fund.”¹⁰⁰ Despite the availability of this data, New Jersey did not appropriate any additional state funds to erase the shortfall in special education funding because:

(1) the funds were not a recurring resource that the State could or should use to increase special education spending; (2) the fund balance had been low for a number of years, resulting in negative impacts to the State’s credit rating; and (3) the expenditure of funds in SFY 2011 would impact the amount of funds available at the beginning of SFY 2012, and the State’s SFY 2012 budget assumed a particular starting balance in the General Fund.¹⁰¹

OSERS asserts that New Jersey had “hundreds of millions of dollars” in budget surpluses in SFY 2011 to meet the required level of funding.¹⁰² Despite the ongoing financial crisis, which justified New Jersey’s waiver in SFY 2010, OSERS claims the circumstances in SFY 2011 were materially different and did not justify granting a waiver.¹⁰³ OSERS also asserts that the Hearing Official erred by not analyzing the benefit of appropriating money near the end of SFY 2011 to reimburse school districts.¹⁰⁴ I agree.

New Jersey’s budget process does not afford it any special privilege or exception to the MFS requirement. The MFS requirement is a provision of a federal statute governing IDEA grants. Failure to comply with the MFS requirement renders a state ineligible for a portion of its IDEA grant. New Jersey describes its ordinary budget process as including pre-fiscal year proposed allocations, which are modified by spending the State General Fund, undesignated fund balance, and supplemental appropriations throughout the year. The necessity of projecting revenue may justify New Jersey to initially plan to underfund special education in a given year, but the process conversely places a burden on New Jersey to “close the gap” and fully fund special education with discretionary spending or supplemental appropriations during the course of the fiscal year whenever possible.

Fearing serious revenue shortfalls, New Jersey planned to underfund special education by \$13,272,335 in SFY 2010. By December 2010, New Jersey knew it had \$804 million in its undesignated fund balance leftover from SFY 2010 that could be allocated in SFY 2011. By

⁹⁷ *Id.* at 23. New Jersey indicates that its undesignated fund balance (“the difference between certified anticipated revenues . . . and appropriations”) is not determined until the close of the fiscal year. For that reason, funds available in the undesignated fund balance cannot be applied retroactively to the previous fiscal year. *Id.* at 9.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ SFY 2011 Proposed Final Determination at 3.

¹⁰¹ *Id.*

¹⁰² OSERS Comments at 13.

¹⁰³ *Id.* at 12.

¹⁰⁴ *Id.* at 5.

May 2011, New Jersey projected it would have a balance of \$403 million in its State General Fund at the end of SFY 2011. Contrasting the de-appropriation of funds in June 2010, in June 2011 New Jersey enacted a supplemental appropriations act for SFY 2011. At none of these times did New Jersey choose to allocate the \$13,272,335, or any portion thereof, to meet its MFS requirement, nor does it explain what circumstances justified failing to do so. The Hearing Official justified New Jersey's decision to not make a supplemental allocation because the school year had ended by June 2011. Proximity to the end of the fiscal year or school year does not justify failing to meet the MFS requirement, because the MFS requirement is mandatory, not discretionary. In other words, a state cannot simply choose to ignore the requirement of a federal statute on the ground that it does not believe meeting the requirement will have a sufficiently positive impact.

Instead of an unforeseen decline in financial resources, New Jersey had an increase in financial resources from the beginning to the end of SFY 2011. However, New Jersey failed to use those resources to meet its MFS requirement. I find that New Jersey did not experience a "precipitous and unforeseen decline in the financial resources of the State" in SFY 2011. New Jersey advances no other basis to find that it experienced "exceptional or uncontrollable circumstances" that would support granting a waiver to the MFS requirement. Therefore, I find that New Jersey did not demonstrate exceptional and uncontrollable circumstances that would justify granting a waiver.

The Hearing Official made a clear error in finding that New Jersey met the statutory requirements to justify granting a waiver, and she made a clear error in granting it. I reverse the Hearing Official's Initial Decision on the grant of the waiver.

ORDER

ACCORDINGLY, the October 9, 2020 Initial Decision of the Hearing Official, Administrative Law Judge Angela J. Miranda, is hereby AFFIRMED IN PART, AS MODIFIED, and REVERSED IN PART as described herein. The State of New Jersey has not met the requirements for granting a waiver of the IDEA MFS requirement for SFY 2011. Therefore, the State of New Jersey is ineligible for \$13,272,335 of its IDEA grant in SFY 2011.

So ordered this 23rd day of December 2020.


Betsy DeVos

Washington, DC

Service List

Angela J. Miranda
Administrative Law Judge
Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Donna Arons, Esq.
Deputy Attorney General
State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, NJ 08625-0112

Nana Little, Esq.
Timothy Middleton, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202