UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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In the Matter of

State of New Jersey and
New Jersey Department of Education,

Applicant.

Docket No. 17-10-O

IDEA Determination

Appearances: Donna Arons, Esq., Deputy Attorney General, State of New Jersey for the State of New Jersey and the New Jersey Department of Education.

Nana Little, Esq. and Timothy Middleton, Esq., Office of the General Counsel, U.S. Department of Education, for the Office of Special Education and Rehabilitative Services.

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

The Office of Hearings and Appeals has current jurisdiction over the above referenced matter pursuant to 20 U.S.C. § 1416(e)(4)(A) and 34 C.F.R. §§ 300.179 and 300.180.

On September 22, 2011, the State of New Jersey (NJ) requested a waiver of the requirement to maintain State financial support for special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 USC §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) for State fiscal year (SFY) 2011 (July 1, 2010 through June 30, 2011) in the amount of $13,272,335. Following the request for a waiver, The Office of Special Education and Rehabilitation Services (OSERS) acknowledged that NJ provided supplemental data and information that was requested, participated in a series of telephone conversations over time with the U.S. Department of Education (Department), participated in a meeting on August 8, 2012 that included representatives from the New Jersey Department of Education, New Jersey Department of Treasury, Office of Management and Budget, and Department employees, and provided additional written responses dated August 1, 2016 and October 31, 2016. On January

17, 2017, more than five years after NJ filed its request for a waiver, the Department, by its designee OSERS, issued a proposed final determination that NJ was not eligible for a portion of its Section 611 grant under the IDEA in the amount of the requested waiver. The proposed final determination properly provided notice of an opportunity for a hearing and NJ timely filed a request for a hearing dated February 17, 2017.

This matter was assigned to me as the Hearing Official. NJ filed an initial brief, OSERS filed its responding brief, and NJ filed a reply brief. Having been fully briefed, the administrative record is closed, and this matter is ready for decision.

II. Issues

1. Whether New Jersey's request for a waiver of the maintenance of State financial support requirement under Part B of the Individuals with Disabilities Education Act for State Fiscal Year 2011, should be granted?

2. More specifically, has New Jersey established that the granting of its waiver request is equitable due to exceptional or uncontrolled circumstances or an unforeseen decline in the financial resources of the State or has New Jersey shown that the grant of a waiver for State Fiscal Year 2011 will not result in the supplanting of State and local funds expended for special education and related services provided to children with disabilities?

III. Legal Framework/Applicable Laws and Regulations

A. Applicable Statutes

Under the IDEA (20 U.S.C. § 1400 *et seq.*) the Secretary makes grants to the States to assist them in providing special education and related services to children with disabilities (20 U.S.C. § 1411(a)(1)). The States are required to use these grants to supplement, not supplant, the level of Federal, State, and local funds expended for special education and related services for children with disabilities (20 U.S.C. §1412(a)(17)(C)). As a condition to receipt of these grants, the State is required to maintain state financial support. Thus, a State may not reduce the amount of State financial support for special education and related services below the amount of that support for the preceding fiscal year (20 U.S.C. §1412(a)(18)(A)).

If a State reduces its maintenance of State financial support (MFS), the Secretary shall reduce the allocation of funds under section 1411 for any fiscal year following the fiscal year in which the State failed to comply with MFS (20 U.S.C. §1412(a)(18)(B)). The reduction shall be the same amount by which the State failed to meet the requirement of MFS (*Id.*). The Secretary may waive the requirement for MFS, for one year at a time, if the Secretary determines that granting the waiver would be equitable due to exceptional or uncontrollable circumstances, or a precipitous and unforeseen decline in the financial resources of the State, or the State has shown the granting of the waiver will not result in the supplanting of State and local funds expended for special education and related services provided to children with disabilities (20 U.S.C. §1412(a)(18)(C)(i) and (ii)).

If a State fails to meet MFS in any year, whether or not a waiver has been granted, the financial support required of the State in future years 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 (20 U.S.C. §1412(a)(18)(D)).

B. Applicable Regulations

The Department's regulations in relation to MFS closely follow the applicable statutes. A State must not reduce the amount of State financial support for special education and related services below the amount of that support for the preceding fiscal year (34 C.F.R. §300.163(a)). If MFS is not equal to the amount of support for the preceding fiscal year, the Secretary will reduce the amount of allocated funds by the same amount by which the State failed to meet the requirement and may do so in any fiscal year after which the State failed to meet the requirement (34 C.F.R. §300.163(b)). A waiver for exceptional or uncontrollable circumstances may be granted for one fiscal year at a time if the Secretary determines that granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and an unforeseen decline in the financial resources of the State (34 C.F.R. §300.163(c)(1)). Alternatively, the Secretary may grant a waiver if the State continued to provide a free appropriate public education (FAPE) and the waiver would not result in supplanting State and local funds expended for special education and related services (34 C.F.R. §300.163(c)(2)). When a State fails to meet the requirement for MFS, even if granted a waiver, the MFS for subsequent years shall be the amount that would have been required in the absence of the State's failure and not the reduced level (34 C.F.R. §300.163(d)).

C. Applicable Policy

The Department has issued two policy statements on maintenance of state financial support under the IDEA. Those are a December 2, 2009 memorandum and a June 2010 directive from the Office of Special Educations Programs (OSEP).

The December 2, 2009 memorandum was issued in response to increased requests for clarification of the fiscal requirements within the IDEA and following the passage of the American Recovery and Reinvestment Act of 2009 (ARRA), which required State and local education agencies to examine the fiscal requirement within IDEA that now required increasing detail and specificity. This memorandum primarily addresses the requirements of 34 C.F.R. § 300.163.

The June 2010 directive was prepared as a response to questions about the process and criteria the Department uses to evaluate a request by a state to waive maintenance of effort (MOE) requirements under Part B of the IDEA. OSEP based this process on the statutory language and directed that the Department will grant a waiver only when a state demonstrates it has experienced "exceptional or uncontrollable circumstances." In cases where a waiver is granted, the statute requires that the state continue to ensure that a FAPE is made available to all children with disabilities residing in that state and the amount of financial support required of the state is future years is the same amount that would have been required in the absence of the waiver. This June 2010 directive continues the Department's prior guidance, as stated in the preamble to the regulations issued in 2006, that decisions to grant or deny a waiver will be made on a case-by-case basis, following a careful process that takes into consideration specific facts and circumstances of each waiver request that is considered.

When considering a waiver request, the Department will ensure that any reduction in the level of state support for special education and related services is not greater than the percentage reduction in revenues experienced by the state and that the state is treating special education equitably when compared to other programs within the state. The directive includes examples of factors that the Department will consider. Lastly, the directive indicates the Department will review the prior monitoring it has done of the state, and after granting a waiver, may undertake additional monitoring of the state's implementation of assistance to the state to assess whether a FAPE is being made available to all children with disabilities residing in the state.

IV. Arguments and Analysis

A. New Jersey's Initial Brief

NJ primarily argues that its September 22, 2011 request for a waiver should be granted because the State experienced exceptional or uncontrollable circumstances and, despite reduced revenues, NJ treated special education equitably when compared to other programs. NJ contends the exceptional or uncontrollable circumstances stem from the 2008 national economic downturn, referred to as the Great Recession.[1] NJ asserts this economic downturn caused a multi-year financial crisis that deepened over the years and required a multi-year federal and state level response. In NJ, state revenues remained below the SFY 2008 level for three (3) years and NJ did not recover 2008 revenue levels until SFY 2015.

Prior to NJ's 2011 request for a waiver, on September 29, 2010, NJ applied for a waiver for SFY 2010. In that waiver request, NJ identified a state budget deficit of nearly 2 billion dollars, stemming from the Great Recession and requested a waiver of $25,671,915, noting that was a 2.1 percent decrease in funding as compared to SFY 2009 – the last year NJ met the MFS requirement. In granting that request for a waiver, the Secretary noted the State's dire financial circumstances and noted that the State's cuts to special education services were relatively small compared to other areas of education.

In its argument, NJ asserts that the request for waiver for SFY 2011 was $13,272,335, only a 1.1 percent decrease in funding as compared to SFY 2009. While NJ disclosed that state revenue in SFY 2011 was higher than 2010, it was still 200 million dollars below 2009 and 3.9 billion below 2008. Noting the improvement in revenues, NJ contended it reduced the gap toward meeting the MFS requirement, but given the required budget process, NJ still could not reach SFY 2009 levels without a waiver. Furthermore, NJ notified the Secretary that it had taken steps to protect special education expenditures by cutting special education and related services less

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[1] The "Great Recession" is a term used in the January 2011 report of the Financial Crisis Inquiry Commission that was created to "examine the causes of the current financial and economic crisis in the United States" and outlined missed warning signs that occurred early in 2007, causing a crash in 2008. The Commission was established as part of the Fraud Enforcement and Recovery Act, (Pub. L. 111-21, May 2009). *See, The Financial Crisis Inquiry Report,* January 2011, https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf, Preface, p. *xi* and 52 (last visited on June 15, 2020). Consistent with Department regulations, I take administrative notice of this report.

than other necessary expenditures during the budget process for SFY 2011.

NJ carefully outlined the budget process explaining why it was necessary to request a waiver for SFY 2011, while noting the State's constitution required a balanced budget. NJ explained it is not allowed to deficit spend and appropriations must not exceed revenues. Therefore, NJ must determine its budget based on projections of revenue, expenditures, and fund balances. NJ explained that given the nature of the budget cycle, revenue projections are inexact until the final quarter of the fiscal year, when final tax payments are due around April 15th. NJ further explained once revenues are more clearly approximated after April 15th of any given year, supplemental appropriations may be enacted at the end of the fiscal year if there are unbudgeted obligations to be met by June 30th and, at the end of the fiscal year, NJ is still responsible for any accrued liabilities attributed to the fiscal year just completed. Lastly, NJ explained that by March 15th, following the end of the SFY, the State Treasury Department issues a Comprehensive Annual Financial Report (CAFR), detailing the financial position of the state and the operating results of the state for the FY that ended the previous June 30th.

NJ argues the options available during the budgeting process were few. Because the process is predicated on the State officials' best estimates of potential revenues and expenditures, the analysis of NJ's actions and its request for a waiver must recognize that NJ was required to make certain decisions in real-time. Furthermore, NJ argued the decision on its request for waiver must also be made based on the real-time circumstances, without the benefit of the final analysis available in the CAFR. Given that the decision on the waiver was not made for more than five years after SFY 2011 ended, NJ argued the retrospective analysis by the Department in its proposed final determination fails to apply the proper standard of review for NJ's waiver request.

NJ argues it acted responsibly in the 2011 budget process. Recognizing its revenues for SFY 2011 were still significantly less than its revenues in SFYs 2008 and 2009, NJ still increased its financial support for special education by over 17 percent. While not being able to completely close the gap in MFS during that budget process and SFY, upon receipt of the CAFR, after the close of SFY 2011, NJ recognized some of its actual revenues were higher than the real-time projections that had been made for SFY 2011. Considering the finalized budget information for SFY 2011, NJ appropriated 1.3 billion dollars for special education and related services in SFY 2012. This appropriation was nearly 115 million dollars over the 2009 MFS. NJ argues that this increased appropriation reflects NJ's commitment to special education and related services noting, that with this additional appropriation, NJ exceeded its 2009 MFS amount by 9.5 percent. NJ argues it took this action to reaffirm its commitment to special education and related services despite that action set a higher amount that NJ will be obligated to meet in future years to maintain its state financial support.

Lastly, NJ argues that it treated special education and related services equitably because the appropriations for this expenditure remained constant at 4.3 percent of overall State revenues despite the fluctuations in State revenues following the financial collapse that occurred in 2008 and the protracted recovery years through at least 2011.

B. OSERS's Responsive Brief

OSERS argues its decision to deny NJ's second consecutive waiver of the MFS was not an abuse of discretion because NJ did not experience an exceptional or uncontrollable circumstance in that year that would justify granting a waiver. OSERS explained that in the 1997 reauthorization of the IDEA, Congress added the MFS requirement whereby states must not reduce their own state appropriations for special education and related services from year to year, so as to provide stability to local education agencies to facilitate providing a FAPE.

OSERS asserts the MFS requirement is straightforward and requires identification of the highest amount of financial support that a state has made available in any previous fiscal year. This identification determines the MFS base. Thereafter, the state must meet or exceed the MFS base and when a state exceeds its MFS base, the higher amount becomes the new MFS base. The statutory consequence of failure to meet the MFS requirement is a reduction of the state's IDEA Part B grant in a future year in an amount equal to the amount by which the state failed to meet the MFS base. The Secretary does not have to impose the statutory consequence of failure to meet the MFS requirement if the Secretary grants a waiver. The standard upon making that determination is whether granting the waiver is equitable due to exceptional or uncontrollable circumstances.

OSERS identified the June 2010 directive as the most applicable policy and process to be followed when evaluating a request for a waiver. OSERS contends that the policy considers several factors in making that determination, but no set of factors is exhaustive. Instead, the determination is made on a case-by-case, year-by-year basis, considering all relevant information to a state's waiver request for a fiscal year. OSERS asserts the Department has broad discretion under the "MFS waiver provision." OSERS contents the most significant factor, is the one set forth in the statute that requires that a state must have experienced an exceptional or uncontrollable circumstance such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the state.

OSERS argues the evaluation of a waiver request is a two-prong test. First the state must have experienced an exceptional or uncontrollable circumstance. If it has, then the analysis proceeds to the second prong to consider if the state treated special education equitably in the year for which the waiver was requested.

In its brief, OSERS concludes the January 2017 denial of NJ's request for a waiver for SFY 2011 was proper because NJ did not experience an exceptional or uncontrollable circumstance such as a precipitous and unforeseen decline in its financial resources for that year. In support of that conclusion, OSERS reiterates that NJ's financial resources increased from SFY 2010 to SFY 2011. OSERS also points out that upon issuance of the CAFR, in March 2012, the projections used in the budget process preceding and during SFY 2011 were shown to be inaccurate. The CAFR showed that NJ actually ended SFY 2011 with 873 million dollars in the State General Fund, and it should have appropriated the approximate 13 million dollars that would have been necessary to meet the requirements of MFS for SFY 2011.

OSERS contends that NJ's arguments are unpersuasive and the CAFR clearly shows NJ could have met its MFS had it appropriated the required amount of financial resources in that last quarter of SFY 2011. OSERS discounts NJ's claim of progress when it reduced its gap in appropriations for SFY 2011 from SFY 2010, and notes NJ was the recipient of a wavier for more than $25.6 million in SFY 2010, then did not appropriate financial resources when able to do so in SFY 2011. Finally, OSERS contends NJ rationalized its decision with a litany of excuses for not meeting the MFS requirement in SFY 2011. OSERS asserted the denial was proper because NJ was not entitled to the waiver when it shortchanged special education by $13 million immediately following a year when it was granted a waiver of more than $25.6 million.

C. Applicant's Reply Brief

In reply to OSERS' brief, NJ contends the denial of NJ's waiver request was an abuse of discretion because OSERS did not give adequate consideration to the facts that establish NJ did experience exceptional or uncontrollable circumstances. The waiver request stemmed from the calamitous financial crisis that began in 2008. While not disputing the historic nature of the recession, nor the exceptional decline in the State's financial resources, the waiver was denied because NJ ended SFY 2011 with a positive balance in its undesignated general fund. NJ asserts this position reflects a basic misunderstanding of the State's budgeting process, ignores unique features of the economic crisis, and disregards NJ's commitment to serving special education needs for disabled children in its State.

NJ further explains why OSERS argument and analysis reflects a basic misunderstanding of NJ's budgeting process and the role of the State's undesignated General Fund Balance because it repeatedly mischaracterizes the General Fund Balance as a "surplus" and by suggesting NJ simply "chose" not to appropriate sufficient funds to meet the MFS for SFY 2011. In so doing, OSERS ignores the mechanics of the NJ's actual budgeting process and relies on developments that had not materialized at the time the SFY 2011 budget was enacted. NJ contends that OSERS compounds this error when its analysis and argument faults NJ state officials for not budgeting a portion of those funds to meet the MFS for SFY 2011. In using this rationale for the denial, OSERS analysis and argument fails to recognize that often the audited undesignated general fund balance will differ from the budgeted undesignated general fund balance, as was the case in SFY 2010, when OSERS granted NJ a waiver.

In failing to recognize that NJ had demonstrated it experienced an exceptional or uncontrollable circumstance, OSERS erred in its argument and analysis by ignoring the unique features of this nearly unprecedented economic crisis that created unforeseen financial consequences that extended over succeeding years. In limiting its analysis only to a comparison of the State's financial circumstances in SFY 2010 and 2011, instead of comparing SFYs 2008 through 2011, OSERS's analysis fails because it applies an illogically narrow interpretation of its waiver authority and the myopic perspective fails to recognize that exceptional or uncontrollable circumstances are by their nature unpredictable and unique events that do not necessarily resolve within a single fiscal year. NJ argues this error in argument and analysis prevents OSERS from recognizing that NJ appropriately budgeted for SFY 2011 based on projected revenue certifications that were consistent with state budgeting practices in real time. Lastly, NJ argues OSERS erred in failing to consider the totality of the circumstances, including the State's substantial increase in special education expenditures in SFY 2012, which is further evidence that NJ always maintained and continues to maintain its commitment to serving special education students.

D. Analysis

Consistent with the regulation at 34 C.F.R. § 300.182(a), this decision is an initial decision of the agency and addresses the points in the January 17, 2017 proposed determination denying NJ's request for a waiver of the requirement to maintain state financial support for SFY 2011 as well as the change in argument when the issue was briefed. Having carefully considered the arguments presented in written briefs by the parties, and consistent with the regulations at 34 C.F.R. § 300.181(l), this decision interprets the applicable statutes and applies the law to the facts as established in the briefings submitted and as indicated in this decision.

In its responsive brief, OSERS contends the standard of review at this administrative proceeding is whether the proposed determination denying NJ's request for a waiver is an abuse of discretion. That contention conflicts with the applicable statute and Department regulations. It also conflicts with general concepts of the Administrative Procedure Act (*See,* 5 U.S.C. §§ 554, 556, and 557). The standard of review, as argued by OSERS, is the standard upon which a reviewing Federal court applies to a final agency action or a final decision of Secretary. That argument is misplaced at this level of administrative review because the decision by this Tribunal is an initial decision unless and until the Secretary determines whether to review or modify.

NJ has carefully and comprehensively set out the financial crisis that occurred in 2008 in the United States, the immediate and long-term residual effects of that financial crisis, the multiyear impact upon its State budget, and the real-time budget process in NJ. NJ convincingly established that the financial crisis that started in late 2008, is properly designated as an exceptional or uncontrollable circumstance that resulted in a precipitous and unforeseen decline in NJs financial resources in SFY 2009 and for several years following SFY 2009. NJ explained that it, like other states, benefited from stimulus spending at the Federal level in SFY 2009 but in September 2010, found itself needing to request a waiver from the requirement to maintain State Financial support for SFY 2010.

In granting the 2010 waiver request, on April 7, 2011, OSERS, on behalf of the Secretary, determined that NJ acted equitably toward special education and related services when it decreased financial support by only 2.1 percent for SFY 2010 when compared to SFY 2009, its base year. OSERS recognized that NJ experienced a significant decrease in revenues of 1.1 billion dollars, which was a 3.8 percent decrease from SFY 2009 to SFY 2010 and that NJ cut its overall (average) appropriations across agencies by 12.76 percent. In conclusion, OSERS recognized that the cut in appropriations to special education and related services was relatively small compared to cuts to other areas.

While in the first quarter of SFY 2011, NJ, like the United States in general, realized it had not recovered from the economic downturn following the 2008 financial crash. NJ, unlike the Federal government, was constitutionally prohibited from deficit spending. While the Federal government could and did spend trillions of taxpayer dollars to stabilize the U.S. economy, NJ had to work within a balanced State budget. Although NJ's financial resources for SFY 2011 were improved as compared to SFY 2010, they were not restored to the levels prior to the 2008 financial crash and NJ's SFY 2009 budget. Consequently, NJ found itself needing to request a waiver from the requirement to maintain state financial support for SFY 2011.

On September 22, 2011, NJ requested a waiver of the requirement to maintain state financial support for SFY 2011. Working within the confines of a constitutionally required balanced budget, NJ requested that the Secretary waive $13,272.335 of its obligation to maintain State Financial Support for SFY 2011, which was 1.1 percent below the base year appropriation for SFY 2009. As determined in real time during the budget process, NJ reported that total appropriations in the State budget were reduced by 11.7 percent due to the continuing effects of the Great Recession following the financial market crash in 2008.

OSERS did not make a proposed determination on NJ's September 22, 2011 request for a waiver until January 17, 2017, more than five years after NJ's request. Given the passage of time, which was significantly longer than the approximately seven months that it took to act on NJ's request for a waiver for SFY 2010, additional information was available. While considering the additional available evidence, OSERS was able to use information in NJ's CAFR, which was the comprehensive final accounting for SFY 2011. Having finally completed its review of NJ's request, OSERS found it was not equitable to grant the waiver request for SFY 2011.

The January 17, 2017 proposed determination reasoned the granting of the waiver was not equitable because the additional information that became available established that NJ ended its SFY 2011 better than it had projected during the real time budget process. Because the real time budget projections were proven inexact and because NJ actually ended its FY with a State General Fund balance of nearly twice the amount it projected, OSERS reasoned, NJ should have been able to easily cover its MFS shortfall for SFY 2011. Consequently, the proposed determination concluded that NJ had sufficient financial resources to maintain its required level of state financial support based on its projections during the budget process and confirmed by its actual financial resources at the close of the budget year.

OSERS revised its argument before this Tribunal, asserting that NJ did not experience an exceptional or uncontrollable circumstance in SFY 2011 that would justify granting the waiver request and, therefore, no analysis of whether NJ treated special education and related services equitably was necessary. Furthermore, OSERS contends NJ's analysis showing it treated special education and related services equitably was irrelevant because NJ did not experience an exceptional or uncontrollable circumstance in that year.

OSERS reliance on the argument that NJ did not experience an exceptional or uncontrollable circumstance ***in that year*** (emphasis added) requires careful analysis. Consistent with the authorizing statute, the Secretary makes grants to States to assist them in providing special education and related services to children with disabilities (*See,* 20 U.S.C. § 1400 *et seq.*). The States are required to use these grants to supplement, not supplant, the level of Federal, Sates, and local funds extended for special education and related services (20 U.S.C. § 1412(a)(17(C)). OSERS correctly argues that as a condition of receipt of these grants, a State may not reduce the amount of State financial support for special education and related services below the amount of that support for the preceding fiscal year (20 U.S.C. § 1412(a)(18)(A)).

OSERS is correct in its assertion that the Secretary shall reduce the allocation of funds under section 1411 for any fiscal year following the fiscal year in which the state failed to comply with MFS (20 U.S.C. § 1412(a)(18)(B)). OSERS is also correct that the Secretary may waive the requirement for MFS for one year at a time if the Secretary determines that granting the waiver would be equitable due to exceptional or uncontrollable circumstances or a precipitous and unforeseen decline in the financial resources of the State (20 U.S.C. § 1412(a)(18)(C)(i)).[2] As indicated earlier in this decision, the Department's regulations mirror these statutory provisions.

In support of its arguments, NJ relied on policy guidance issued by the Department in January 2010.[3] OSERS asserts NJ's reliance on that January 2010 guidance is misplaced and instead cites the December 2, 2009 memorandum and the June 2010 directive, as identified herein, as the appropriate Department policy (Exhibits ED-1 and ED-2, OES Document 10, pgs. 2-4 and 6-7). I accept OSERS's contention as to the applicable policy and will evaluate the parties' arguments considering those policies, and primarily the June 2010 directive, which directly address the process and criteria the Department shall use in evaluating requests for waivers.

The June 2010 directive, *Process and Criteria Used to Evaluate a Request by States to Waive Maintenance of Effort (MOE) Requirements under Part B of the Individual with Disabilities Education Act (IDEA)*, was issued in response to increased questions received about the process and criteria used to evaluate request for waiver of MOE.[4] The directive identified factors the Department would consider in reviewing waiver requests. The first factor is whether the state experienced exceptional or uncontrollable circumstances such as a nature disaster or a precipitous and unforeseen decline in the financial resources of the state. This factor, like the statute and the regulations, does not require that the exceptional or uncontrollable circumstance or precipitous and unforeseen decline in the financial resources of the state occur in the year for which a waiver is requested.

Other factors identified in the June 2010 directive indicate the Department will look at revenues, appropriations, the state's level of financial support for special education and related services, and the state's appropriations for other agencies by category in the year for which the waiver is sought and the prior year. The directive indicates the Department may evaluate the state's compliance and performance record in implementing Part B of IDEA, specifically noting the nature and length of any past noncompliance. The Department's directive specifically reserved the right to look at all measures of these factors from prior years. The last factor the Department considered was other sources of revenues used by the state for special education and

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[2] Although a state seeking a waiver is required to file a request for a waiver for each year a waiver is sought, this provision does not preclude the Secretary from granting waivers over consecutive years. This provision does not preclude the Secretary from granting waivers over consecutive years when an exceptional or uncontrollable circumstance results in a precipitous and unforeseen decline in state financial resources that extends over consecutive years, provided the State makes a request for each year for which a waiver is requested.

[3] Guidance on the Maintenance-of-Effort Requirements in the State Fiscal Stabilization Fund Program, https://www2.ed.gov/policy/gen/leg/recovery/statutory/moe-guidance.pdf (last visited on October 1, 2020).

[4] At the time of issuance of the guidance, the Department received requests from four states for waiver of the MOE for the 2009-2010 school year. Two requests were granted and two remained under review. NJ's request for a waiver for SFY 2010 was not filed with the Secretary until September 29, 2010.

related services including funds provided through Part B or IDEA and the ARRA (Pub. L. 111-5, February 17, 2009).

OSERS brief provided no legal support for the argument that the exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the state must occur in the year for which the waiver was requested. OSERS failed to explain why the Department' January 17, 2017 proposed determination found NJ did not treat special education and related services equitably based on information that was not available at the time the budget was operational and was confirmed only after the end of SFY 2011, a process that was different than it used in review and granting of NJ's request for a waiver for SFY 2010. More importantly though, OSERS failed to explain why in 2017, the Department required that the exceptional or uncontrollable circumstance must occur in the year for which the waiver is requested when that was not indicated in the June 2010 directive or required when waivers for 2010 were evaluated and granted.

The directive cited by OSERS confirms that as of June 1, 2010, the Department received waiver requests for the 2009-2010 school year from four states and two of the requests were approved. This same directive references the $12.5 billion federal investment in special education as distributed under the ARRA of 2009, also known as the Stimulus Bill, enacted in February 2009 to redress the economic condition of the United States following the financial crash in 2008 and the following years, eventually identified as the Great Recession. The June 2010 directive does not specifically identify the exceptional or uncontrollable circumstance cited by the two states whose wavier requests were approved prior to June 1, 2010, but NJ also requested a waiver for the 2009-2010 school year. NJ provides sufficient information and evidence in this matter to determine what standard the Department applied in its evaluation of NJ's SFY 2010 request for a waiver.

Although the financial crash occurred in 2008, NJ explained they were able to meet the MFS for SFY 2009 because of the infusion of financial assistance available by the ARRA and by tapping into the State's Undesignated Fund Balance, otherwise known as the Rainy Day Fund. NJ's economic recovery following the 2008 financial crash was like many other states and the recovery extended several years. On September 29, 2010, when NJ was facing a nearly two-billion-dollar State budget deficit, NJ de-appropriated funds for special education and related services and requested a waiver of $25,671,915 dollars. Although ARRA funds were still available to assist State and local education agencies, albeit at lower levels than in SFY 2009, the Secretary recognized the 2008 financial crash was the cause of the unforeseen decline in financial resources in SFY 2010. The Secretary, via an authorized designee, then determined it was equitable to grant NJ a waiver for SFY 2010 in the amount requested (Exhibit A-2, OES Document 9, pp. 3-5). This history shows two different standards were applied by the Secretary when evaluating NJ's SFYs 2010 and 2011 requests for a waiver.

When the Secretary granted NJ's SFY 2010 waiver request, the Secretary accepted NJ's explanation that a waiver was necessary because of the SFY 2010 revenue shortfalls stemming from the 2008 financial crash qualified as an exceptional or uncontrollable circumstances and that NJ treated special education equitably compared to all other State programs. OSERS' argument, as presented in the brief submitted herein, fails to explain why NJ must now establish that it experienced an exceptional or uncontrollable circumstance in SFY 2011, the SFY for which it is requesting a waiver. OSERS' argument is rejected because OSERS provides no legal or rational basis for the application of two different standards applied by the Secretary in granting NJ's SFY 2010 waiver request and in denying NJ's SFY 2011 request for a waiver.

NJ has established, and OSERS acknowledges, that crafting a state budget in real time is difficult, and complicated by the State constitutional requirement to work within a balanced budget that does not allow for deficit spending, as is customary at the Federal level. OSERS characterized NJ's brief as an "unpersuasive litany of excuses for not meeting the MFS requirement." OSERS contends that NJ admitted it was "theoretically possible to appropriate $13 Million at the end of SFY 2011" but it was not practical to do so. OSERS claims that NJ then tried to justify its failure to maintain state financial support in SFY 2011 by appropriating more funds in SFY 2012. Although OSERS acknowledges the increased SFY 2012 appropriation forever increased NJ's MFS base, OSERS argued the MFS provision does not give a state a choice to reduce funding in one year in exchange for increasing funding in the following year.

Some of OSERS's arguments distract from the issue in this matter. As stated earlier, the issue is whether New Jersey established that the granting of its waiver request is equitable due to exceptional or uncontrolled circumstances and an unforeseen decline in the financial resources of the State, or has New Jersey shown that the grant of a waiver for State Fiscal Year 2011 will not result in the supplanting of state and local funds expended for special education and related services provided to children with disabilities. NJ has established the financial crash of 2008 is properly classified as an exceptional or uncontrollable circumstance. It not only resulted in a precipitous and unforeseen decline in the financial resources of the state, but it resulted in unforeseen decline in financial resources for NJ for many subsequent years. While NJ was able to maintain its MOE in the year immediately following the crash, i.e. 2009, it was able to do so only by reducing its Rainy Day Fund and by receipt of federal funds under the ARRA.

NJ established that the on-going effect of the 2008 financial crash caused NJ to seek a waiver in 2010. The Secretary, through an appropriate designee, approved NJ's 2010 waiver. In 2011, NJ again found it necessary to request a waiver. This time, the Secretary's designee declined to grant the waiver. Initially the designee claimed NJ had not shown it treated special education and related services equitably and, therefore, the request for waiver was denied. Before this Tribunal, OSERS changed its rational for denial, indicating NJ had not established an exceptional or uncontrollable circumstance in the FY for which a waiver was requested. The change in rational failed to explain why NJ's 2010 request for a waiver was granted but NJ's 2011 request for a waiver was denied, when NJ alleged the same exceptional and uncontrollable circumstance that occurred in 2008 was the cause for NJ's revenue shortfall in both 2010 and 2011.

The Secretary's June 2010 directive, upon which OSERS relies, allows the Department to consider a state's financial information and measures from the preceding year and prior years. NJ'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 the end of the school year. When NJ realized its actual revenue for SFY 2011 was better than it had projected throughout the budget process, it did not have to increase its MFS base for SFY 2012, and could have awaited the Department's proposed decision on its waiver. In doing so, NJ confirmed its commitment to special education and related services and its commitment to students with disabilities. Therefore, considering the applicable statue, regulations, and the Secretary's June 2010 directive, NJ has established the request for wavier in SFY 2011 should be granted.

V. Findings of Fact

1. In the 1997 reauthorization of the Individual with Disabilities Education Act (IDEA), Congress added the maintenance of State financial support (MFS) requirement whereby states must not reduce their own state appropriations for special education and related services from year to year. This requirement was added to provide stability to local education agencies to facilitate providing a free appropriate public education (FAPE).

2. With this requirement, a state must identify the highest amount of financial support that a state made available in any previous fiscal year and this identification determines the MFS base. In any subsequent year if a state exceeds it MFS base, the higher amount becomes the State's new MFS base.

3. New Jersey's base, when it last met its MFS requirement, was SFY 2009 in the amount of $1,204,956,000.00.

4. On September 29, 2010, NJ submitted a request for a waiver of the requirement to maintain state financial support for special education and related services in the amount of $25,671,915 for SFY 2010, which was a 2.1 percent decrease in funding as compared to SFY 2009.

5. On April 7, 2011, NJ's request for a waiver was granted because the Secretary, by the authorized designee, determined it was equitable to grant a waiver due to exceptional or uncontrollable circumstances – the precipitous and unforeseen decline in NJ's financial resources originating from the 2008 financial crash.

6. On September 11, 2011, NJ submitted a request for a waiver of the requirement to maintain state financial support for special education and related services in the amount of $13,272,335 for SFY 2011, which was a 1.1 percent decrease in funding as compared to SFY 2009.

7. In the notice of proposed determination, dated January 17, 2017, NJ's request for a waiver for SFY 2011 was denied by the Secretary's designee. The proposed determination based its denial of NJ's SFY 2011 waiver on NJ's budget projection in May 2011 that expected NJ would end its FY with "$403 million in the State General Fund" and could have easily met its MFS anticipated shortfall of approximately $13.3 million, without the need for a waiver. The proposed determination further noted that after the release of NJ's Comprehensive Annual Financial Report in 2012, the actual amount of the State General Fund at the end of SFY 2011, was $873 million. Consequently, the Secretary's designee informed NJ that granting the waiver was not equitable since additional information established NJ ended its SFY 2011 better than it

had projected during the real time budget process.

8. In the brief filed herein, OSERS abandoned the reasoning put forth in the January 17, 2017 notice of proposed determination and argued NJ's request for a waiver of MFS in SFY 2011 was denied because NJ failed to establish that it had experienced an exceptional or uncontrolled circumstance in SFY 2011 that resulted in an unforeseen decline in its financial resources.

9. Changes in the United States financial markets unfolding in 2007 led to recognizable problems beginning in March 2008 through September 2008, when a singular event, the financial market crash, occurred on September 15, 2008, which marked the beginning of the worst market disruption in postwar American history. This market disruption affected state government budgets into at least SFY 2011, when the States had to determine how the phase out of federal stimulus funds was going to impact their budget processes. NJ asserts it did not financially recover for seven years after this financial disruption, that is SFY 2015.

10. In March 2010, NJ was still facing a fiscal emergency when the then Governor released a proposed budget for SFY 2011. The final State appropriations for SFY 2011 were decreased by 12.8 percent from 2009, but because cuts were tailored to protect special education and related services, special education spending was decreased by only 1.1 percent.

11. By the end of June 2011, with only about one month left in the NJ's SFY 2011, total revenues were certified at approximately $400 million more than anticipated at the start of the fiscal year. While NJ could have adjusted its special education and related services appropriation at that point, because the 2011 school year was near the end or over, an additional appropriation would have provided no benefit to the disabled children of NJ.

12. In December 2010, when the CAFR for SFY 2010 was issued, the State General Fund was $804 million, which was more than projected during the budgeting process. At this point, NJ was developing the budget for SFY 2012. In its SFY 2012 budgeting process, NJ increased the appropriation for special education and related services by 9.5 percent more than its MFS base that was last met in SFY 2009. Consequently, in SFY 2012, NJ established a new MFS base, which it is required to maintain in subsequent years.

13. Applying the standard used by the Secretary's designee in granting NJ's SFY 2010 request for a waiver, NJ established the 2008 financial market crash qualified as an exceptional or uncontrolled circumstance resulting in a precipitous and unforeseen decline in NJ's financial resources extending through at least NJ's SFY 2011.

14. NJ established it treated special education programs equitably by cutting funding for special education and related services less than that of other necessary expenditures and programs in SFY 2011.

VI. Conclusion and Order

The notice of proposed final determination, dated January 17, 2017, wherein the Department, Office of Special Education and Rehabilitative Services (OSERS) proposes that the State of New Jersey and the New Jersey Department of Education is not eligible to receive a grant under the Part B of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* in the amount of $13,272,335.00 because it has failed to maintain State financial support as required under 20 U.S.C. §1412(a)(18) for State Fiscal Year 2011 is **REVERSED**. The State of New Jersey has shown that the requirements of for granting a waiver pursuant to 20 U.S.C. §1412(a)(18)(c)(i), have been met. The State of New Jersey proved its state finances in SFY 2011 were reduced following the 2008 financial crash, which qualifies as an exceptional or uncontrollable circumstance or a precipitous and unforeseen decline in the financial resources of the state, and that the State of New Jersey treated special education and related services equitably when it reduced spending for that program less than other necessary expenditures and program in SFY 2011.

Date: October 9, 2020

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Angela J. Miranda
Administrative Law Judge

NOTICE OF DECISION AND APPEAL RIGHTS-IDEA

This is the initial decision of the Hearing Official pursuant to 34 C.F.R. § 300.182. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 300.182(d), (e), and (g).

Each party has the right to file comments and recommendations on this initial decision. Comments and recommendations are filed with the Hearing Official and must be filed within fifteen (15) days the date the party receives this decision. Each party may file responsive comments and recommendations with the Hearing Official within seven (7) days of the date the party receives the initial comments and recommendations filed by the opposing party. Upon the later of, receipt of initial comments and recommendations or upon the expiration of the date for receipt of responsive comments and recommendations, the Hearing Official forwards the record to the Secretary for review and issuance of a final decision.

The initial decision becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt for written comments and recommendations, the Secretary, in writing, informs the Hearing Official and the parties that the decision is being further reviewed for possible modification.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system.* Otherwise, appeals must be timely filed in OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail**	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12th Street, S.W., 10th Floor Washington, DC 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington DC 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the applicable regulatory requirements for appealing to the Secretary. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

* The parties, registered e-filers, have consented to the use of OES for service of the decision and all filings thereafter, as well as suspension of the regulatory requirements of service by certified mail with return receipt.

** Due to the consequences from the current COVID-19 event, OHA does not have routinely scheduled employee coverage during traditional business hours and is unable to directly accept hand delivery or courier-delivered filings at the OHA's physical location. Hand delivery or courier-delivered filings may be accepted at OHA's office by regularly scheduled internal mail service employees who will then forward receipts to OHA. Delivery by of filings to OHA by means other than OES will be delayed due to modifications to interoffice mail delivery caused by the COVID-19 event.

SERVICE

Service completed by Office of Hearings and Appeals Electronic Filing System (OES) automatic email notice** sent to the email of record for the following registered e-filers:

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** Service and receipt thereof will be the date indicated in the confirmation of receipt email for E-filing consistent with the parties' voluntary consent to use the Office of Hearings and Appeals Electronic Filing System (OES). With the specific consent of the parties, the regulatory requirement of service by certified mail with return receipt is suspended.

Courtesy copy to:

Betsy DeVos
Secretary of Education
By email delivery to: Charles.Yordy@ed.gov