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

MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

Docket No. 21-08-O

IDEA Determination

Applicant

ORDER

Summary of this Order

Upon consideration of the Massachusetts Department of Elementary and Secondary Education's (Applicant or DESE's) Motion to Dismiss (Motion), the Office of Special Education and Rehabilitation Services' (OSERS') opposition (Opp.), and DESE's reply, DESE's motion is denied. OSERS is not time-barred in determining DESE's eligibility for Section 611, Part B grants for State fiscal years (SFYs) 2010 and 2011, for the reasons discussed below.

The stay of the Order Governing Proceeding that was entered by Order issued on March 17, 2021, will remain in place, as requested by the parties, pending resolution of either party's anticipated request for interlocutory review of this Order to the Secretary of Education (the Secretary).

Procedural History

On February 26, 2021, DESE filed a Request for a Hearing. DESE challenges the United States Department of Education's (the Department's) proposed final determination denying eligibility to Massachusetts in the total amount of $114,023,641, under its Individuals with Disabilities Education Act (IDEA) Section 611, Part B grants. The Department's filings show it reached this determination based on Massachusetts's failure to maintain State financial support (MFS) for special education and related services in SFYs 2010 and 2011, as required by 20 U.S.C. § 1412(a)(18)(A) and 34 C.F.R. § 300.163(a).

DESE also challenges the Department's denial of waivers it requested under 20 U.S.C. § 1412(a)(18)(C) and 34 C.F.R. § 300.163(c) regarding its failures to satisfy MFS requirements for special education and related services in SFYs 2010 and 2011.[1]

By Order Governing Proceeding issued by the Office of Hearings and Appeals (OHA) on March 4, 2021, deadlines were set for the parties to file briefs. Before the parties filed their briefs and before the deadlines set for their filing, the parties filed a Joint Motion to Stay Order Governing Proceeding, asking that the Order Governing Proceeding be stayed pending final resolution of the motion to dismiss that DESE intended to file. The parties also asked that the Order Governing Proceeding be stayed until DESE's anticipated motion to dismiss was finally resolved, including any appeal of OHA's ruling on the motion to the Secretary. On March 17, 2021, I granted the parties' motion and set deadlines by which the motion to dismiss and any response and reply were to be filed.

On March 22, 2021, DESE filed its Motion to Dismiss; on April 27, 2021, OSERS filed its opposition; and, on May 11, 2021, DESE filed its reply. In its Motion to Dismiss, DESE requested oral argument on its motion, but withdrew its request for oral argument on May 19, 2021.

Facts

The facts concerning the Department's action that DESE relies upon to support its motion to dismiss are as follows:

DESE receives funding from the Department under Part B of the IDEA. Beginning with the 2013 Annual State Application for funding under IDEA, Part B, OSERS required states to submit their MFS data for the two previous state fiscal years to demonstrate compliance with IDEA MFS requirements. DESE's Motion at 3; Exhibit (Exh.) R-3 at 2.

In its application for FY 2013 funding, DESE listed the amounts made available by the state for SFYs 2012 and 2013, instead of submitting data for the two previous fiscal years, SFYs 2011 and 2012, as required. DESE's Motion at 3; Exh. R-3 at 1. OSERS questioned the amounts of state funding listed in DESE's application and the state's underlying methodology because DESE had submitted data for the wrong years, as well as because the amount of State support reported appeared low given the population of Massachusetts and the number of children with disabilities and because DESE had rounded the support dollar amounts for each year to whole millions when States typically provide exact dollar amounts. *Id*. OSERS informed DESE that it needed to revise the methodology used to calculate MFS. DESE's Motion at 3; Exh. R-3 at 1 and 2.

DESE and the Department worked collaboratively for three years, from 2013 to 2016, to reach agreement on a revised methodology for calculating MFS. DESE's Motion at 3; Exh. R-3 at

[1] The Department's denial of DESE's requests for waivers is not at issue in DESE's motion to dismiss.

2. On this record, it is unclear whether the parties reached agreement on a revised methodology.[2]

On May 18, 2016, the Department informed DESE that it had failed to meet the MFS for SFYs 2010, 2011, and 2012, and that, therefore, it would be issuing a determination. DESE's Motion at 3; Exh. R-3 at 3. The Department invited DESE to submit requests for waivers of the MFS requirements. *Id*.

On January 10, 2017, DESE submitted a request to OSERS for waivers of the MFS requirements for SFYs 2010 and 2011. DESE's Motion at 3; Exh. R-3 at 5. The waiver requests were not acted upon until January 2021. At that time, OSERS rejected DESE's waiver requests and, for the first time, issued a proposed final determination finding that Massachusetts was not eligible for portions of its IDEA Part B grants for SFYs 2010 and 2011 under § 1412(a)(18) of the IDEA because it had failed to maintain state financial support for special education and related services for those fiscal years. DESE's Motion at 3; Exhs. R-1 and R-3.

Specifically, on January 6, 2021, and as revised and reissued on January 15, 2021, the Department issued a proposed final determination regarding DESE's alleged failure to maintain its level of state-provided funding for SFY's 2010 and SFY 2011. *Id*. The proposed determination charged that DESE provided $42,835,083 less than the required $630,075,008 in financial support for SFY 2010, and that DESE provided $71,188,558 less than the required $630,933,050 financial support for SFY 2011, resulting in ineligibility in the total funding amount of $114,023,641. *Id*.

DESE'S Motion to Dismiss

By its Motion to Dismiss, DESE asks that the proposed final determination issued by the Department in January 2021 be dismissed because the underlying action concerning SFYs 2010 and 2011 is time-barred.

In support of its motion, DESE argues that OSERS was required to issue any determination concerning DESE's violations of MFS requirements for SFYs 2010 and 2011 within the five-year time period allowed under the General Education Provisions Act (GEPA), 20 U.S.C. § 1234a(k), or, alternatively, the general government statute of limitations, 28 U.S.C. § 2462, and that OSERS' failure to do so bars the Department from penalizing DESE for violating MFS requirements for those years.

[2] In its proposed determination, OSERS states that the parties agreed upon a revised methodology. Exh. R-3 at 1. However, in its motion to dismiss, DESE does not state that the parties reached such an agreement, but implicitly suggests that the parties did not. DESE's Motion at 3.

DESE further argues that the five-year limitation periods under either 20 U.S.C. § 1234a(k) or 28 U.S.C. § 2462 were not tolled by the discovery rule because OSERS did not act in a timely manner to pursue the violations and resulting claims that it should have known or actually knew about and had identified well before the applicable five-year limitation period.[3]

OSERS's Opposition to Dismissal

OSERS advances three arguments in opposition to dismissal: (1) the five-year statute of limitations under 28 U.S.C. § 2462, not 20 U.S.C. § 1234a(k), is the applicable statute of limitations; (2) under § 2462, OSERS' MFS eligibility claim did not accrue until January 2017, when DESE submitted its waiver request; and, (3) even if OSERS' claim accrued at the time DESE committed the MFS violations, OSERS' claim is not time-barred under equitable tolling principles.

Analysis and Discussion

Issues Presented

DESE's motion to dismiss presents three issues: (1) whether the five-year limitation period under GEPA, 20 U.S.C. § 1234a(k), or, alternatively, the general government statute of limitations, 28 U.S.C. § 2462, applies to an action for a violation of MFS support under the IDEA; (2) whether OSERS' ability to take action for DESE's failure to maintain the required level of state financial support in SFYs 2010 and 2011 has expired; and, (3) whether the statute of limitations was tolled under the circumstances of this case.

This appears to be a case of first impression. The issue of whether either the statute of limitations under 20 U.S.C. § 1234a(k) or 28 U.S.C. § 2462 applies to an action for a violation of MFS support under the IDEA has not been previously addressed in a reported decision. Neither parties' counsel nor this administrative tribunal located previously issued trial or appellate court, agency, or administrative tribunal decisions that decided the issue.

[3] Both five-year limitation periods under 20 U.S.C. §1234a(k) and 28 U.S.C. §2462 are referred to in DESE's Motion as "statutes of limitations." While both five-year periods are statutory in nature, they are not both statues of limitations. Statutes of limitation govern how long a claimant can bring an action after one has accrued while statutes of repose govern whether an action can be brought regardless of whether it has accrued. *Jones v. United States.,* 789 F.2d Supp. 883, 888 (M.D. Tenn. 2011); *National Credit Union Admin. Bd. v. Barclays Capital Inc*., 785 F.3d 387, 393 (10th Cir. 2015). Only 28 U.S.C. § 2462 contains a limitation on how long the government has to bring an action after one has accrued. 20 U.S.C. §1234a(k) does not contain such a limitation and, therefore, is a statute of repose. Statutes of repose generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control. *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014). In contrast, statute of limitations, including 28 U.S.C. § 2462, may be tolled under certain circumstances. *Id*. As both parties recognize, if this case falls under the five-year time bar of 20 U.S.C. §1234a(k), the five-year limitation period therein cannot have been delayed by tolling because §1234a(k) is a statute of repose.

Burden of Proof

A defendant may raise a statute of limitations defense in a motion to dismiss under Federal Rule of Procedure 12(b)(6) when the facts that give rise to the defense are clear from the face of the complaint. *Rodriguez-Wilson v. Banco Santander de Puerto Rico*, 501 F. Supp. 3d 53 (D. Puerto Rico 2020); *Rudder v. Williams*, 47 F. Supp. 3d 47, 50 (D.D.C. 2014), *citing Smith-Haynie v. D.C.,* 155 F.3d 575, 578 (D.C. Cir. 1998) (granting a motion to dismiss as time-barred by the statute of limitations). When evaluating a motion to dismiss, the court may consider exhibits attached to the complaint or motion. *Ward v. D.C. Dep't of Youth Rehab. Servs*., 768 F. Supp. 2d 117, 119 (D.D.C. 2011). Additionally, when evaluating a motion to dismiss, "the court takes all facts alleged in the complaint as true." *Rudder v. Williams*, 47 F.Supp. 3d at 50. When the issue of the statute of limitations is raised, the movant has the burden of proving the applicability of the statute. *Appeal of the State of Massachusetts*, Education Appeal Board, Dkt. No. 14 (107) 82, U.S. Dep't of Education (Dec. Sec'y 1986) (movant had burden of proving that the funds at issue were obligated prior to the statutory cut-off date). When equitable tolling is raised as a defense to application of a statute of limitations, the party seeking to use it bears the burden of proving that equitable tolling applies, even if that party is the non-movant. *Donovan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002); *Mesnick v. General Elec. Co*., 950 F.2d 816, 822 (1st Cir. 1991).

Historical background

The IDEA was previously known as the Education for All Handicapped Children Act (EHA) from 1975 until 1990, when its title was changed to the IDEA. Pub. L. No. 93-380, 88 Stat. 484 (1974); Pub. L. No. 101-476, 104 Stat. 1103 (1990). The overall goal of the IDEA, as was its precursor the EHA, is "to ensure that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. §1400(d)(1)(A). This goal was and is primarily accomplished through distribution of grants of federal funds to States for the education of children with disabilities to defray the additional costs of educating children with disabilities. EHA, 20 U.S.C. § 1414(a)(1); IDEA, 20 U.S.C. §1400(d)(1)(C). Federal funds are to be used only to supplement, not to supplant or diminish, state or local funds. *Id*.

Under the EHA, state agencies responsible for providing free public education for children with disabilities were eligible to receive federal grants based on a formula tied to average per pupil expenditures. The EHA did not specifically require a maintenance of fiscal effort by local school districts, 20 U.S.C. §1414, but the Department long-read maintenance-of-effort requirements into similar statutes and courts recognized and accepted this reading as applicable to EHA programs. *State of Washington v. United States Dep't of Education*, 905 F.2d 274, 277 (9th Cir. 1990), citing *Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 661, 671 (1985). While the EHA did not specifically require a maintenance of fiscal effort or contain conditions of eligibility or compliance requirements, it contained evaluation measures to assess implementation progress of the Act. Pub. L. No. 93-380, 88 Stat. 484 (1974); Pub. L. No. 98-199, 97 Stat. 1357 (1983); Pub. L. No. 99-457, 100 Stat. 1145 (1986); Pub. L. No. 100-630, 102 Stat. 3289 (1988);

Pub. L. No. 101-476, 104 Stat 1103 (1990); Pub. L. No. 102-119, 105 Stat. 587 (1991).

MFS Support Requirement

Effective July 1, 1998, the Individuals with Disabilities Education Act Amendments of 1997 placed statutory eligibility and compliance requirements on states. 20 U.S.C. §§1412(a)(19)(A)(B), Pub. L. No. 105-17, §101, 111 Stat 37, 68 (1997). Beginning with the Education Act Amendments of 1997, states that receive grants have been required to meet several ongoing conditions as to the State's eligibility for allocated grant funds, including MFS. 20 U.S.C. § 1412; 34 C.F.R § 300.100. MFS support prevents states from reducing the amount of state-provided support for special education and related services for children with disabilities below the amount of support that the state provided during the preceding fiscal year. 20 U.S.C. § 1412(a)(18); 34 C.F.R. § 300.163(a). Each year when a state applies for an IDEA, Part B grant, the state must submit an application that includes assurances that the state meets those conditions. *Id.*

The MFS requirement is not merely a pre-grant eligibility screening device. Rather, the requirement provides both pre-grant and post-grant checks to assure that federal funds supplement rather than supplant state funds. Pre-grant, states must budget at or above the level of expenditures for the previous year. Post-grant, they must maintain the same level of state yearly expenditure and not replace state funds with federal funds. *State of Washington v. United States Dep't of Education*, 905 F.2d at 277.

Failure to satisfy the MFS condition can lead to proportionate ineligibility. 20 U.S.C. §§1412(a) and 1416(e)(8)(A). Relatedly, under §1411 of the IDEA, the Secretary is required to reduce the allocation of federal funds in subsequent fiscal years following the fiscal year in which the State fails to comply by the same amount the state failed to maintain the level of required financial support. 20 U.S.C. § 1412(a)(18)(B); 34 C.F.R § 300.163(b).

Consequence of failure to meet MFS eligibility condition

A state's failure to satisfy the required conditions, including failure to maintain the financial support level required by 20 U.S.C. § 1412 and 34 C.F.R. § 300.100, can lead either to the failure of funding eligibility under §1412, or to non-compliance enforcement action under §1416. Whether agency action is taken under §1412 or §1416 drives what procedures are prescribed. Therefore, which of the two courses is implicated by the agency action must be discerned in order to apply the procedures prescribed for the course taken. *South Carolina Dep't of Educ. v. Duncan*, 714 F.3d 249, 255 (4th Cir. 2013).

Waiver of the MFS eligibility condition

Alternatively, the Secretary may grant the State a waiver of the MFS eligibility condition, for one fiscal year at a time, if doing so "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." 20 U.S.C. §1412(a)(18)(C); 34 C.F.R. § 300.163(c)(1). To grant a waiver, the Secretary must "determine[ ] that ... the State 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). Paragraph (17)(C), in turn, permits a waiver "where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education ...." *Id*. §1412(a)(17(C).

If the MFS requirement is not waived for a year in which a State fails to maintain MFS, the Department must reduce a future IDEA Section 611 grant by the same amount by which the State failed to meet the requirement. 20 U.S.C. §1412(a)(18(B). 20 U.S.C. §1412(a)(18(B) does not specify the future year in which the reduction must be taken, and Congress has provided the Department with discretion to spread out the reduction over a period of up to five consecutive years. Consolidated and Further Continuing Appropriation Act, 2015, Pub. L No. 113-235, 128 Stat. 2130, 244 (Dec. 16, 2014).

Administrative appeal process

Before making a final determination that a state is not eligible to receive a grant under Section 611, Part B of the Act, the Secretary must provide the State with written notice of a proposed determination and an opportunity for a hearing. 34 C.F.R. § 300.179(a). The notice must contain, among other things, the basis for the proposed determination as well as the right to request a hearing and the time frame in which to do so. 34 C.F.R. § 179(b).

Following issuance of a proposed determination, a State has 30 days to request a hearing regarding the proposed determination. 34 C.F.R. § 300.179(b)(3). Once a State requests a hearing regarding the proposed determination, the Secretary must designate, within 15 days, a hearing official to preside over the hearing. 34 C.F.R. § 300.181(b).

The hearing official then schedules proceedings in the case, including filing of briefs and other documents in which their parties present their positions. 34 C.F.R. § 300.181(m). The parties may request the hearing official schedule an evidentiary hearing, with the opportunity to present and cross-examine witnesses. *Id.* Any hearings are conducted on the record. 34 C.F.R. § 300.181(p)(1). After the proceedings are concluded, the hearing official renders an initial decision.

The parties then have 15 days to file comments and recommendations to the Secretary regarding the hearing official's decision. 34 C.F.R. § 300.182(d). The Secretary then has 25 days to decide whether to review the initial decision and then 30 more days to issue a Final Decision. 34 C.F.R. §§ 300.182(g) and (k).

If the State disagrees with the Secretary's decision, the State has 60 days to file a petition with the United States Circuit Court for the circuit in which the State is located. 34 C.F.R. § 300.184.

Applicability of 20 U.S.C. §1234a(k) or 28 U.S.C. §2462 to IDEA MFS cases

Statutes of limitation reflect the concern that after the passage of time "evidence has been lost, memories have faded, and witnesses disappear." *Order of R.R. Telegraphs v. Railway Express Agency*, 321 U.S. 342, 349 (1944). Consistent with that notion, as a general rule, courts

are reluctant to allow the federal government unlimited time in which to bring a civil penalty claim. Opp. at 4, citing, e.g., *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

The IDEA contains no statute of limitations

The parties agree that neither the IDEA nor its implementing regulations place explicit time limitations by which the Department must act following a state's failure to satisfy ongoing eligibility conditions, including the requirement to maintain the requisite financial support. Nor does the IDEA place explicit time limitations by which the Department must act following a state's non-compliant performance. 20 U.S.C. §§ 1400 - 1419; 34 C.F.R. Part 300.

Applicability of 20 U.S.C. § 1234a(k)

In the absence of a statute of limitations under the IDEA, DESE urges application of the five-year time-bar found under the General Education Provisions Act (GEPA), 20 U.S.C. § 1234a(k), or, alternatively, the general government statute of limitations found in 28 U.S.C. § 2462. OSERS acknowledges that the action here is subject to a statute of limitations, but posits that 20 U.S.C. § 2462, not § 1234a(k), is applicable because, in short, §1234a(k) of GEPA does not apply to MFS determinations, which involve eligibility, not enforcement.

The GEPA five-year time bar, 20 U.S.C. § 1234a(k), which was enacted in 1988, provides that "….(N)o recipient under an applicable program shall be liable to return funds which are expended in a manner not authorized by law more than 5 years before the recipient receives notice of a preliminary departmental decision."

As DESE correctly points out, GEPA applies to any applicable program over which the Secretary has administrative authority unless otherwise provided. 20 U.S.C. §§ 1221(b)(1), (c)(1); 1234i. Since the Secretary is responsible for administering the IDEA program, 20 U.S.C. § 1402, GEPA provisions apply to the IDEA program. Neither the IDEA nor GEPA excepts the IDEA program from GEPA provisions. 20 U.S.C. §§ 1400 – 1419; 20 U.S.C. §§ 1221 – 1234i, respectively. Therefore, the IDEA program is an "applicable program" as defined by GEPA. 20 U.S.C. § 1221(c)(1). Consequently, GEPA's provisions, including §1234a(k), are applicable to cases involving the IDEA program.

Although the IDEA does not expressly incorporate § 1234a(k) of the GEPA, 20 U.S.C. §§ 1400 - 1419; 34 C.F.R. Part 300, it explicitly provides that the monitoring and enforcement provisions thereunder shall not be construed to restrict the Secretary from utilizing any authority under the GEPA to monitor and enforce the IDEA. *Id*. The IDEA also is silent as to whether states may avail themselves of defenses, such as the statute of limitations, provided in the GEPA, 20 U.S.C. § 1412(a), but the Secretary has construed the GEPA to allow states to avail themselves of the GEPA-provided defenses to Department actions, even if the action and any administrative proceeding are conducted in accordance with the IDEA. See *Consolidated Applications of the Pennsylvania Department of Education*, Dkt. Nos. 93-136-R and 93-44-R, *U.S. Dep't of Educ*. (Feb. 3, 1995), *aff'd* Dkt. Nos. 93-136-R and 93-44-R, *U.S. Dep't of Education* (Sec. Dec. April 7, 1995).

Three federal circuit courts have addressed maintenance of state fiscal support disputes under the EHA and IDEA. In *State of Washington v. United States Dep't of Education*, 905 F.2d 274 (9th Cir. 1990), the circuit court held that the EHA required maintenance of funding efforts and that the Department had properly calculated the amount of required state funding but remanded the case for the Department to determine whether an exception to maintenance of effort was available. In *South Carolina Dep't of Education v. Duncan*, 714 F.3d 249 (4th Cir. 2013), the circuit court held that the IDEA entitled the state to a hearing on denial of the state's request for a waiver of the MFS requirement, rejecting the Department's argument that a hearing was not required by GEPA because a waiver, not withholding, was at issue. In *Texas Education Agency v. U.S. Dep't of Education*, 908 F.3d 127 (5th Cir. 2018), the court held that the state had violated the plain requirements of the MFS clause by reducing the amount of state funding for special education and the Department's consequential reduction in future federal funding was warranted. None of the cases addressed application of statute of limitations to an EHA or IDEA maintenance of state funding dispute.

This administrative tribunal, as DESE notes in its motion, has addressed fiscal support disputes in federally funded state educational programs other than IDEA. In *Appeal of the State of Wyoming*, Dkt. No. 16(191)85, U.S. Dep't of Educ. (Feb. 16, 1988), the Department sought recovery of disallowed federal funds granted under the Vocational Education Act Amendment of 1976 (the VEA), following a fiscal audit determination finding violations of the VEA. In *Consolidated Applications of the Pennsylvania Dep't of Education*, Dkt. Nos. 93-136-R and 93-44-R, U.S. Dep't of Educ. (Feb. 3, 1995), the Department sought recovery of funds based on findings that the State failed to comply with maintenance of fiscal effort requirements under the VEA. In *Appeal of Los Angeles Community College District*, Dkt. No. 26-(91)-81, U.S. Dep't of Educ. (Sec. Dec., May 17, 1984), the Department sought recovery for the school's improper expenditures of funds under Title VII grants. In *State of Florida*, Dkt. No. 9-(45)-78, U.S. Dep't of Educ. (Oct. 21, 1982), *aff'd* Dkt. No. 9-(45)78 (Sec. Dec., Dec. 21, 1982), the Department sought recovery of Title I funds based on Florida's non-compliance under the Elementary and Secondary Education Act. In *In re State of Michigan*, Dkt. No. 13-(188)-85, U.S. Dep't of Education (Sec. Dec., Jan. 2, 1987), the Department sought recovery of Title I funds for disallowable expenditures. None of the cases cited by DESE in support of application of §1234a(k) of GEPA involved IDEA MFS proposed determinations.

OSERS acknowledges that the GEPA is applicable to monitoring and enforcing IDEA requirements but contends that §1234a(k) of GEPA does not apply to MFS determinations, which involve eligibility, not enforcement. OSERS Opp. at 4. In support of its contention, OSERS argues that §1234a(k), by its plain text and purpose, applies only to actions to recover funds, not to eligibility determinations. *Id.*[4]

[4] OSERS asserts that it is entitled to deference with respect to the underlying purpose of GEPA's recovery limitation. Opp. at 6. This case does not involve reconciliation of conflicting policies or agency expertise on matters subjected to agency regulation as OSERS argues. Rather, this case involves legal issues concerning competing statutes of limitation and application of any applicable statute of limitations, issues that this tribunal can address without agency expertise. *See State of California,* 851 F.2d 241, 244 (9th Cir. 1988) (citing *Chevron U.S.A., Inc. v. Nat. Res. Council*, 467 U.S. 837, 843 (1984)). Therefore, OSERS'

To interpret a statute, courts look first to the language, giving the words their ordinary meaning. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citing *B.P.AM. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). Courts do not insert additional language to reach a desired conclusion. *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014). Courts assume that the ordinary meaning of the statutory language expresses Congress's intent. *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 175-176 (2009). Courts need not scrutinize legislative history to determine congressional intent when the intent is clear from a statute's plain language. *In the Matter of New Mexico Public Educ. Dep't*, Dkt. No. 13-41-O, U.S. Dep't of Educ. (Dec. Sec'y, Oct. 8, 2015), citing *In the Matter of College America-Denver*, Dkt. No. 06-24-SP, U.S. Dep't of Educ. (Dec. Sec'y, May 6, 2009) at 4.

A close reading of the plain language of §1234a(k) supports OSERS' position that the statute's scope is limited to recovery actions. Section 1234a(k) is contained in Chapter 31, Subchapter IV, which subchapter is entitled "Enforcement." Section 1234a(k) itself is entitled "Recovery of Funds." Neither "recovery of funds" nor "recovered funds" are defined in the definitions section of Chapter 31. 20 U.S.C. §1224i. But the plain language of §1234a reveals that §1234a covers only the "return (of) funds because the recipient has made an expenditure of funds that is not allowable." 20 U.S.C. §1234a(a)(1). Here, the Department does not seek to recover funds for disallowed expenditures. Rather, the Department seeks to reduce future funding based on ineligibility.

This interpretation is consistent with the Fourth Circuit's interpretation of the MFS "penalty." In *South Carolina Dep't of Education v. Duncan*, 714 F.3d 249, 255 (4th Cir. 2013), the Fourth Circuit concluded that IDEA's MFS "penalty" is an ineligibility, not a recovery, action. As explained by the Fourth Circuit, MFS is an eligibility requirement. 20 U.S.C. 1412; 34 C.F.R. § 163. The distinction between a finding of ineligibility or non-compliance is meaningful. "A condition of eligibility looks forward such that its failure leads to ineligibility. A finding of non-compliance, on the other hand, is an evaluation that looks backward in assessment of performance." *South Carolina Dep't of Education v. Duncan*, 714 F.3d at 255. When a state does not meet eligibility requirements, the Secretary reduces allocation of funds for the next fiscal year. *Id*.; 34 C.F.R. § 163(b).

Further, and consistent with this interpretation that reduction of funds under the IDEA for MFS deficiency is not a recovery action, but a reduction in prospective funds based on ineligibility, IDEA's regulations on MFS speak only in terms of ineligibility and a consequential reduction in funds. 34 C.F.R. § 300.163. IDEA regulations make no mention of "recovery of funds" with respect to MFS. 34 C.F.R. § 300.163(a)-(d).

Rather, when a state does not meet MFS eligibility requirements under 20 U.S.C. §1412 and 34 C.F.R. § 163, the Secretary merely reduces allocation of funds for the next fiscal year, as opposed to seeking recovery of funds for disallowed expenditures, which the GEPA five-year limitation period covers. 20 U.S.C. §1234a(k); 34 C.F.R. § 163(b).

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positions in this case are not ones that are due deference.

DESE has not alleged and there is no record evidence to support a conclusion that the Department intended to avail itself of the enforcement mechanisms allowed by § 1416. The agency action here is related to funding eligibility, not enforcement. On this record, the course implicated by the agency action was failure of funding eligibility under § 1412, not non-compliance enforcement action under §1416. Neither the IDEA nor its implementing regulations place time limitations by which the Department must act following a state's failure to satisfy the eligibility condition of maintaining requisite financial support. 20 U.S.C. §§ 1400 - 1419; 34 C.F.R. Part 300.

In view of the plain language in §1234a(k), and in the absence of any authority to the contrary, DESE's argument that the GEPA statute of limitations is applicable to IDEA MFS determinations is unavailing.

Applicability of 28 U.S.C. § 2462

The general government statute of limitations, which is entitled "Fines, Penalties and Forfeitures," states that "(e)xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." It is a default, catch-all statute of limitations which applies where Congress did not specifically include time limitations in statutes and has force in penalty actions. *Federal Election Comm'n v. National Republican Senatorial Comm.*, 877 F. Supp. 15 (D.D.C. 1995).

Extending the reasoning in *South Carolina v. Duncan* --- that MFS concerns forward-looking eligibility, not penalties--- to applicability of the statute of limitations to MFS cases, one might conclude that, on the face of it, this statute of limitations does not apply to MFS cases. Nonetheless, both parties argue that courts, in their reluctance to allow the federal government unlimited time to bring claims, have found the five-year statute of limitations in 28 U.S.C. §2462, applicable to administrative agency cases and that § 2462 is applicable to IDEA MFS actions because the consequence of ineligibility that DESE will suffer is punitive.

Neither party has provided authorities that persuasively support a ruling that § 2462 is properly applied to an MFS action. OSERS cites only to *Wilson v. Garcia*, 471 U.S. 261, 271 (1985), a Section 1983 action involving injuries the plaintiff sustained in a beating by a state police officer, for the proposition that courts, as a general rule, are reluctant to allow a civil penalty claim to be brought by the federal government indefinitely. DESE cites only to *S.E.C. v. Kokesh*, 137 S.Ct. 1635 (2017), which involved a disgorgement action brought by the S.E.C. Neither of the cases cited by OSERS or DESE involved IDEA funds or proposed actions against future funding years for failure to meet ongoing eligibility conditions like here.

In support of its argument for application of § 2462, DESE relies chiefly on *S.E.C. v. Kokesh*, 137 S.Ct. at 1643 - 44, to establish that OSERS' determination seeks enforcement of a penalty, together with the language in OSERS' proposed final determination that characterizes its

action as one to "enforce the required penalty" and refers to the "MFS penalty." In *S.E.C. v. Kokesh*, the Supreme Court held that an SEC disgorgement action was a penalty for violating federal securities law, and thus subject to the APA's generally applicable five-year statute of limitations in § 2462 governing any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." Key to that decision was the Court's finding that a penalty is designed to punish and deter future violations rather than to compensate a victim. *Id*. at 1643 - 1644. The Court reasoned that SEC disgorgement was an action that left the defendant worse off, since a court could order disgorgement in excess of the profits gained as a result of the violation, and that disregarded a defendant's expenses that reduced the amount of illegal profit. *Id*. The Court emphasized that a sanction is "punishment" when it can only be explained as serving either retributive or deterrent purposes. *Id*.

Here, OSERS is merely seeking to reduce DESE's future funding by the same amount of federal monies it was ineligible to receive because the State reduced state funding for IDEA programs in abrogation of continuing eligibility conditions. 20 U.S.C. § 1412(a)(18); 34 C.F.R. § 300.163(a). As a result of the State's reduction of funding for IDEA programs, the State held no entitlement to federal funds for years in which it reduced state funding under the IDEA statute and implementing regulations. *Id*. OSERS' action is not a retributive measure. Nor is OSERS' action a sanction imposed for the purpose of deterring infractions against public law, contrary to DESE's argument. Rather, it is designed to ensure that states meet the obligations and conditions of eligibility funds imposed on them and to which they have agreed. Moreover, OSERS action does not punish DESE, but returns DESE to the *status quo ante* by seeking to recover for the Department alleged windfall to which DESE was not entitled under the IDEA. Any negative financial impact that DESE may experience as a result of reductions in future fiscal years' funding based on the State's underfunded contributions toward its own IDEA programs does not transform OSERS' action into a sanction or penalty, even though OSERS' proposed final determination inartfully characterizes its action as one to "enforce the required penalty" and refers to the "MFS penalty."

For this reason and in the absence of any authority to the contrary, this tribunal is constrained to rule, and therefore holds, that § 2462 is not available as a defense in MFS actions.

Application of 28 U.S.C. § 2462

Had this tribunal held that § 2462 applies to MFS actions, it would have proceeded to consider whether this proceeding falls within the meaning of § 2462, and then whether OSERS' claim first accrued beyond the five-year limitation period, and determined as follows.

In applying the statute of limitations in § 2462 to OSERS' proposed determination, the plain language of §2462 requires this tribunal to first determine whether OSERS' action falls within the meaning of "action suit or proceeding" and then decide when OSERS' claim "first accrued" for filing that "action, suit, or proceeding."

The five-year statute of limitations under §2462 applies to civil penalty cases whether they are brought in court or in administrative agencies. *3M Co. v. Browner*, 17 F.3d 1453, 1455-58 (D.C. Cir. 1994). In so ruling, the D.C. Circuit Court looked to the use of the word "proceeding" in the agency's statute and the Administrative Procedure Act (APA). *Id*. at 1455. In fact, as noted

in *3M Co. v. Browner, supra,* courts have assumed, without discussion, that § 2462 covers administrative hearings. See, *e.g*., *Williams v. U.S. Dep't of Transportation*, 781 F. 2d 1573, 1578 n. 8 (11th Cir. 1986); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F. 2d 819, 822 (1st Cir. 1965); *A/S Glittre v. Dill*, 152 F. Supp. 934, 940 (S.D.N.Y. 1957).

An MFS administrative adjudication contains the elements of an administrative adjudication under the APA. The adjudication process requires the Secretary to issue a written notice that sets out the legal and factual bases for the ineligibility and provide the State an opportunity for a hearing. 34 C.F.R. § 300.179. The parties are then provided an opportunity to present their positions through briefs and arguments, as well as to request an evidentiary hearing at which they may present and cross-examine any witnesses. 34 C.F.R. § 300.181(m). All hearings are conducted on the record, 34 C.F.R. § 300.181(p)(1), and the OHA administrative law judge, as the designated hearing official, must issue a written initial decision that includes findings of fact and conclusions of law. 20 U.S.C. § 1234(a); 5 U.S.C. § 557(c). The parties may then file comments and recommendations with the Secretary, who, in turn, will first decide whether to review the initial decision and later issue a Final Decision. 34 C.F.R. § 300.182. Finally, if the State disagrees with the Secretary's decision, the State may file a petition in United States Circuit Court. 34 C.F.R. § 300.184. Clearly, an MFS administrative adjudication is mandatory and incorporates the hallmarks of an adjudication proceeding.

The Department has long applied § 2462 to proceedings before it, finding § 2462 applicable to some, but not all, proceedings before it. See, *e.g*., *In the Matter of Lincoln University*, Dkt. No. 13-68-SF, U.S. Dep't of Education (Sec. Dec., Sept. 13, 2016) (§ 2462 statute of limitations applies to Federal Student Aid fine actions); *In the Matter of San Francisco College of Mortuary Science*, Dkt. No. 92-8-ST, U.S. Dep't of Education (Sec. Dec. Mar. 26, 1993) (§ 2462 statute of limitations applies to proceedings in which Department seeks termination and/or fine); and, *In the Matter of the Hair California Beauty Academy*, Dkt. No. 18-13-SP, U.S. Dep't of Education, Office of Hearings and Appeals (Jul. 2, 2019) (§ 2462 statute of limitations not applicable to action for liabilities for improper expenditure of Title IV funds).

Had this tribunal held that § 2462 applies to MFS actions, it would have gone on to rule that this proceeding falls within the meaning of a proceeding under § 2462.

Accrual of the statute of limitations

Where the parties disagree and what is at the heart of this case is the meaning of "first accrued" under §2462, as applied to the MFS eligibility conditions and consequential reduction of funding set out in the IDEA, as amended. DESE argues that a claim first accrues when the ineligibility violation occurs. OSERS counterargues that a claim first accrues only when a grant recipient faced with ineligibility exercises or relinquishes their right to seek waiver of funds to be reallocated due to ineligibility. Application of DESE's view would result in OSERS' claim falling outside of the five-year limitation. Application of OSERS' view would result in the entire alleged MFS deficiency falling within the limitations period.

In deciding "the date when the claim first accrued" for purposes of applying the statute of

limitation in administrative agency actions, courts have distinguished those administrative actions that lack elements of adjudicatory procedures, but are only investigative in nature, from those that extend adjudicatory procedures.

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In administrative actions that require an adjudication proceeding, the applicable limitations period begins to run only after completion of the administrative proceeding rather than at the time of the predicate violation. *Federal Energy Regulatory Comm'n v. Powhatan Energy Fund, LLC (Powhatan)*, 949 F. 3d 891 (4th Cir. 2020); *Federal Energy Regulatory Commission v. Silkman (Silkman),* 359 F. Supp. 3d 66 (D. Me. 2019). Stated another way in an earlier case, "if disputes are subject to mandatory administrative proceedings (before judicial action may be taken), the claim does not accrue until their conclusion." *Lins v. United States*, 688 F.2d 784, 786 (Ct. Cl. 1982).

In *Silkman*, the court applied §2462 in the Federal Energy Regulatory Commission's (FERC's) administrative action to impose a civil penalty under the Federal Power Act where FERC had not prescribed time limits covering either an administrative claim to impose a civil penalty or an action to enforce such a penalty. In so holding, the court reasoned that FERC's process for assessing penalties, which process included making findings of fact and applying the law to those facts, constituted an administrative adjudicatory proceeding rather than a prosecutorial determination. The court concluded that §2462 afforded the agency a five-year period for the administrative assessment of a civil penalty, followed by a five-year period to enforce the action.

Similarly, in *Powhatan*, the Fourth Circuit addressed whether FERC's process was adjudicative in nature and when the five-year time limitation under §2462 accrued. In affirming the trial court's ruling that FERC's process is an administrative adjudicatory process, the court noted that FERC's administrative process required it to issue an Order to Show Cause within five years of the alleged unlawful conduct giving rise to the claim and then later to fulfill Federal Power Act perquisites before filing a suit in federal district court. The Court went on to uphold application of § 2462's five-year limitation period to the administrative stage leading up to FERC's issuance of the Order to Show Cause and at the later stage leading up to filing suit in federal district court.

The *Silkman* and *Powhatan* decisions as applied here lead to the same conclusion reached by the parties - the five-year limitation period under § 2462 requires that OSERS' proposed determination have been issued within five years of when OSERS' claim "first accrued." But neither *Silkman* nor *Powhatan* provide the answer as to when OSERS' claim "first accrued."

The date of accrual, as provided in §2462, has been defined by the United States Supreme Court as the date when the cause of action comes into existence as a claim and not when it is discovered. *In the Matter of Lincoln University*, Docket No. 13-68-SF, U.S. Dep't of Education, Office of Hearings and Appeals (Remand Order 2016), citing *Gabelli v. S.E.C.*, 568 U.S. 442 (2019).

OSERS' argument that its claim did not come into existence until DESE exercised or relinquished its right to seek waiver of funds to be reallocated due to ineligibility is not supported by the process the IDEA statute and regulations set out. The statutory right to seek a waiver of liability for MFS deficiencies and DESE's failure to relinquish or assert that right, does not, as

OSERS argues, present an obstacle to the Department's timely issuance of a proposed determination. Neither the statute nor the regulations require that a state have first applied for or relinquished the right to a waiver before the Department may issue a notice. Additionally, neither the IDEA statute nor its implementing regulations impose a time frame within which a State must relinquish or assert its right to seek a waiver. Thus, DESE's relinquishment or assertion of the right to a waiver could have been made at any time following issuance of a proposed determination. As a practical matter, while such timing might be judicially inefficient, as OSERS argues, it could well result in a more knowing relinquishment or request for waiver once the factual and legal bases for the ineligibility are provided to the State, as they must be in a proposed determination. 34 C.F.R. § 300.179.

The statute provides only that the state has the right to seek a waiver and the regulations require only that the notice provide the legal and factual bases for the ineligibility and provide the State an opportunity for a hearing and confer the right to seek a waiver on the State. 20 U.S.C. § 1412(a)(18); 34 C.F.R. § 300.179. Thus OSERS' ability to issue the notice was not impeded by DESE's failure to relinquish the right to a waiver or its having not submitted a request for waiver. To impose this requirement on issuance of a notice would be to read into the statue and regulation a requirement that is not there. But in examining statutory language, courts are not free to read into the language what is not there. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Consequently, if § 2462 were applicable, the Department's underlying action concerning the 2010 and 2011 SFYs would be time-barred under the 5-year statute of limitations.

Tolling of the five-year statute of limitations

If § 2462 had been held applicable and OSERS' claim determined to have fallen outside of the five-year statute of limitations of 28 U.S.C. § 2462, OSERS' argument that the statute of limitations was tolled would have been addressed thusly.

In support of its argument for tolling in the event of a ruling the proposed determination was issued outside of the five-year statute of limitations, OSERS argues that the statute of limitation was tolled because its claim was not complete and present until November 16, 2016, when DESE submitted revised calculations to replace its initial fraudulent calculations. Opp. at 11. DESE counters that the discovery rule tolling OSERS seeks to have applied cannot be relied upon by the government in an enforcement action. DESE further argues that, even if the tolling doctrine were available, OSERS cannot meet the high evidentiary bar to show it applies here. DESE disputes OSERS' assertion that its initial calculations were fraudulent and contends that its initial calculations were accidentally, but not fraudulently, based on calculations for the wrong SFYs. DESE Mot. at 3; Exh. R-3.

As DESE correctly argues, courts have rejected application of the discovery rule to the running of the statute of limitations under § 2462. See, *e.g.*, *3M Co. v. Browner* at 1461 (agencies may experience problems in detecting statutory violations, but failure to detect violations for whatever reasons does not toll the statute of limitations until after the violations are finally discovered). But DESE's argument that OSERS seeks discovery rule tolling is misplaced and conflates the discovery tolling rule with the doctrine of equitable tolling, which OSERS argues should be applied.

The discovery tolling rule is not synonymous with the doctrine of equitable tolling. "Discovery rule" tolling postpones the beginning of the limitations period from the date when the plaintiff is wronged to when he discovers he has been injured. *Oueltette v. Beaupre*, 977 F. 3d 127, 136 (1st Cir. 2020). In contrast, the doctrine of equitable tolling comes into play if the defendant takes active steps to prevent the plaintiff from suing in time. *Id*. The doctrine of equitable tolling differs from discovery rule tolling in that plaintiff is assumed to know that he has been injured so that the statute of limitations has begun to run, but plaintiff cannot obtain information necessary to decide whether his injury is due to wrongdoing and, if so, wrongdoing by defendant. *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 450 - 451 (7th Cir. 1990). Under the doctrine of equitable tolling, the plaintiff may avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. *Id*.

The party who seeks to invoke equitable tolling bears the burden of persuasion and must, therefore, establish a compelling basis for awarding such relief. *Donovan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002). In meeting that burden, the party who seeks equitable tolling must support its claim to establish that the statute was tolled. *Mesnick v. General Elec. Co*., 950 F.2d 816, 822 (1st Cir. 1991).

The doctrine of equitable tolling suspends the running of the statute of limitations if a plaintiff, in the exercise of reasonable diligence, could not have discovered information essential to the suit. *Gonzalez v. United States*, 284 F.3d 281, 291 (1st Cir. 2002). To establish that equitable tolling applies, a plaintiff must prove the following elements: (1) fraudulent conduct by defendant resulting in concealment of the operative facts; (2) failure of plaintiff to discover operative facts that are the basis of its cause of action within the limitations period; and, (3) due diligence by plaintiff until discovery of those facts. *Federal Election Comm'n v. Williams,* 104 F. 3d 237, 241, citing *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), cert denied, 454 U.S. 1164 (1982) and *Dayco Corp. v. Goodyear Tire & Rubber Co*., 523 F.2d 389 394 (6th Cir. 1975); *Trinkler v. United States*, 268 F.3d 16, 25 (1st Cir. 2001).

In support of its argument that equitable tolling stopped the statute of limitation until November 2016, OSERS asserts that it was prevented from considering vital information it needed to make an MFS determination because DESE knowingly submitted false information that was not corrected until November 2016. To establish that DESE knowingly submitted false information, OSERS merely points to the difference in state dollar amounts that DESE reported in 2013 and the state dollar amounts DESE submitted in November 2016. Opp. at 11-12.

On this record, without more, OSERS has not established that the doctrine of equitable tolling applies in its MFS action against DESE. OSERS' request for application of equitable tolling involves facts surrounding DESE's purported concealment of operative facts. OSERS has asserted and argued without providing supporting evidence, followed by opposing assertions and arguments by DESE, that DESE fraudulently concealed operative facts within the limitations period and that OSERS failed to discover those facts until DESE presented recalculations in November 2016.

However, OSERS request for application of equitable tolling would not have been denied

at this stage. Because OSERS' request for application of equitable tolling involves contentions of facts outside the pleadings, the contest over facts concerning whether DESE fraudulently concealed operative facts and whether OSERS exercised due diligence is not properly before this tribunal on a motion to dismiss. Contentions of fact are not before a tribunal on a motion to dismiss. *Doe v. Harvard University*, 462 F. Supp. 3d 51, 59 (D. Mass. 2020). Therefore, rather than denying OSERS' request for application of equitable tolling, the parties would have been allowed time in which to submit evidence to support their contended facts related to equitable tolling.

Conclusion and Order

For the reasons explained above, the Department's action is not time-barred.

However, this case will not proceed to address the issue of equitable tolling or to adjudication on the merits at this time. The issue regarding application of the statute of limitations raised by DESE involves a controlling question of law and immediate resolution of the issue will materially advance final disposition of the proceedings. 34 C.F.R. § 81.20(a). Therefore, the stay of the Order Governing Proceeding that was entered by Order issued on March 17, 2021, will remain in place, as requested by the parties, pending resolution of the anticipated interlocutory petition for review of this Order to the Secretary. Because the stay will remain in place, no further events will be scheduled in this proceeding at this time. The parties shall file a motion to lift stay in the event no petition for interlocutory review of this Order is filed with the Secretary, if any request for review is deemed denied by the Secretary because the Secretary takes no action within 15 days of receiving the request, or upon resolution of any interlocutory petition accepted for review by the Secretary. 34 C.F.R. § 81.20.

Notwithstanding the stay of proceedings in this case, any issues that remain to be adjudicated, and any interlocutory appeal of this Order that may be filed with the Secretary, the parties are encouraged to fully explore potential settlement while complying with this Order.

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Elizabeth Figueroa,
Administrative Law Judge

Dated: August 2, 2021

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This order has been sent by OES automatic electronic service to the following:

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