



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

**MASSACHUSETTS DEPARTMENT
OF ELEMENTARY AND
SECONDARY EDUCATION**

Docket No. 21-08-O

IDEA Determination

Complainant.

REQUEST FOR INTERLOCUTORY REVIEW ACCEPTED
BRIEFING SCHEDULE ESTABLISHED

The Massachusetts Department of Elementary and Secondary Education (DESE) has filed a petition for interlocutory review in the above-captioned case. As described below, I grant the petition and establish a briefing schedule.

The underlying case involves DESE's hearing before Department's Office of Hearings and Appeals (OHA) on a proposed determination by the Department's Office of Special Education and Rehabilitative Services (OSERS) denying DESE eligibility for \$114,023,641 in Individuals with Disabilities Act (IDEA) Section 611, Part B grants.¹ In the course of that case, DESE filed a motion to dismiss, arguing that OSERS' proposed determination was time-barred.² After reviewing the arguments of the parties, the Hearing Official, Administrative Law Judge (ALJ) Elizabeth Figueroa, denied DESE's motion to dismiss.³ While denying the motion to dismiss, the Hearing Official noted that DESE already expressed its intent to file a petition for interlocutory review should its motion be denied.⁴ To facilitate such a petition, the Hearing Official ordered that a previously imposed stay of the hearing proceedings remain in place, subject to lifting once a petition is either denied or otherwise resolved.⁵

On August 17, 2021, DESE filed a petition for interlocutory review. DESE argues that a review is appropriate because the Hearing Official's ruling involved a controlling question of law as to which there is a substantial ground for difference of opinion, and because an immediate appeal will materially advance the ultimate termination of the litigation.⁶ OSERS has filed a

¹ *Mass. Dep't of Elementary and Secondary Educ.*, Dkt. No. 21-08-O (Order) (Aug. 2, 2021) at 1.

² *Id.* at 3.

³ *Id.* at 17.

⁴ *Id.*

⁵ *Id.*

⁶ DESE Petition for Interlocutory Review at 3–10.

response indicating that it does not oppose the petition for interlocutory review.⁷ The Hearing Official has also filed a statement indicating her opinion that this review is appropriate.⁸

In the case *In the Matter of State of South Carolina*, Dkt. No. 13-43-O, then-Secretary Arne Duncan held that a controlling question of law in an IDEA eligibility hearing was ripe for interlocutory review.⁹ Though the IDEA regulations do not expressly provide for interlocutory review, decisions from IDEA eligibility hearings are appealable to the Secretary, and interlocutory review is “warranted when immediate review of a controlling question of law will materially advance the disposition of the case or where subsequent review will be an inadequate remedy.”¹⁰

The Hearing Official’s ruling proposed for review by DESE is whether the entire proposed determination by OSERS is barred by a statutory or regulatory provision. Interlocutory review of this question is warranted because a resolution favorable to DESE would obviate the need for the eligibility hearing. Therefore, immediate review of the question will materially advance the disposition of the case. The detailed 17-page order issued by the Hearing Official on the motion to dismiss also demonstrates the substantial ground for difference of opinion on the legal question presented.

As OSERS notes in its response, my authority to review this question of law derives from my authority to review initial decisions in IDEA eligibility hearings. Therefore, OSERS urges me to clarify the same standard of review applies to this petition for interlocutory review that would apply to an initial decision of the Hearing Official. The standard of review of an initial decision is the “clear error” or “clearly erroneous” standard of review.¹¹ This is because in an IDEA eligibility hearing “the Hearing Official’s decision is a ruling on a question of fact, or a mixed question that depends primarily on factual work.”¹² The clear error standard is used in law to set a high bar for reviewing a lower tribunal’s rulings on questions of fact, whereas purely legal questions are reviewed *de novo*.¹³

By its very nature, a petition for interlocutory review is suitable to obtain a ruling on a controlling question of law. In the context of this petition, I will not review an initial decision of a Hearing Official that is predominantly a ruling on a question of fact. As such, the regulations at 34 C.F.R. § 300.182 that apply to review of initial decisions do not control this review. Rather, I will review an interim ruling on a purely legal question. Therefore, the standard of review is *de novo*.

⁷ OSERS Response to Petition for Interlocutory Review at 1.

⁸ ALJ’s Statement to the Secretary Pursuant to 34 C.F.R. § 81.20(d) at 2.

⁹ *In the Matter of State of S.C.*, Dkt. No. 13-43-O (Order of the Secretary) (May 29, 2015) at 2–3.

¹⁰ *Id.* at 2.

¹¹ 34 C.F.R. § 300.182(h); *In the Matter of State of N.J.*, Dkt. No. 17-10-O (Decision of the Secretary) (Dec. 23, 2020) at 5.

¹² *In the Matter of State of N.J.*, Dkt. No. 17-10-O at 10 (and cases cited).

¹³ *Id.*

ORDER

For the foregoing reasons, the petition for interlocutory review is **GRANTED**.¹⁴ DESE shall have to and including October 1, 2021 to file a brief in support of its position. OSERS shall have 30 days from receipt of DESE's brief to file an answer. Parties' briefs shall not exceed 20 double-spaced pages, excluding exhibits.

So ordered this 1st day of September 2021.



Miguel A. Cardona, Ed.D.

Washington, DC

¹⁴ Because the Hearing Official has already imposed a stay on the eligibility hearing pending the outcome of the interlocutory review, any stay imposed by me would be redundant. Therefore, I do not impose a stay.

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