THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

Complainant.

Docket No. 21-08-O

IDEA Determination

DECISION ON INTERLOCUTORY APPEAL

On September 1, 2021, I granted the Massachusetts Department of Elementary and Secondary Education's (DESE's) petition for interlocutory review of the Order dated August 2, 2021, issued by Administrative Law Judge (ALJ) Elizabeth Figueroa in the above-captioned case. The parties have since briefed the question certified for review. The question presented in this case is whether a determination by the U.S. Department of Education (Department) that DESE failed to meet its maintenance of financial support (MFS) requirement is subject to a limitations period and therefore unenforceable. Based on the following analysis, I find that no limitations period applies in this case.

Congress authorizes yearly grants to states under the Individuals with Disabilities Education Act (IDEA) to support special education and related programs.[1] The Department, through its Office of Special Education and Rehabilitation Services (OSERS), administers these grants and ensures that states receiving them meet all applicable qualifications. Since 1997, Congress has required that states meet an MFS requirement to prohibit a state from supplanting its funding of special education with federal funds. "To comply with this requirement, a state must maintain its level of financial support for special education and related services at no less than the level of support from the previous fiscal year."[2] The statute includes flexibility and waiver provisions. However, when these do not apply and a state fails to meet its MFS obligation, the Department reduces the state's IDEA allocation equal to the amount by which the state failed to maintain its funding of special education.[3]

[1] *See* 20 U.S.C. § 1401; *N.M. Public Educ. Dep't*, Dkt. No. 13-41-O, U.S. Dep't of Educ. (Oct. 8, 2015) (Decision of the Secretary) at 1.
[2] *N.M. Public Educ. Dep't*, Dkt. No. 13-41-O at 2.
[3] *Id*. at 5; *Mass. Dep't of Elementary and Secondary Educ.*, Dkt. No. 21-08-O, U.S. Dep't of Educ. (Aug. 2, 2021) (ALJ Order) at 6–7.

In the instant case, on May 18, 2016, OSERS informed DESE that it failed to meet the MFS requirement for state fiscal years (SFYs) 2010, 2011 and 2012, but invited DESE to submit waiver requests.[4] Thereafter, DESE requested waivers of the MFS requirement for SFYs 2010 and 2011. In January 2021, OSERS denied those requests and issued a proposed final determination that DESE underfunded special education by a combined $114,023,641 in SFYs 2010 and 2011, which would make DESE ineligible for Section 611, Part B grants in that amount.[5]

Prior to determining that a state has failed to meet its MFS requirement, the Department must provide the state with an opportunity for a hearing on the matter.[6] DESE requested a hearing on OSERS's proposed final determination. During that hearing before the Department's Office of Hearings and Appeals (OHA), DESE filed a motion to dismiss, arguing that OSERS's proposed determination was time-barred.[7] After reviewing the arguments of the parties, the ALJ issued the Order denying DESE's motion to dismiss.[8] DESE has since petitioned for this review of the ALJ's Order.

As described in my order dated September 1, 2021, in an interlocutory review of a purely legal question, my standard of review is *de novo*. Although I do not afford deference to legal conclusions made by the ALJ under such a standard, for the sake of brevity I adopt certain segments of the Order with which I am in complete agreement.

Analysis

DESE asserts that OSERS' determination is time barred by either 1) the General Education Provisions Act, § 1234a(k) (GEPA), 2) the general statute of limitations applicable to civil penalties at 28 U.S.C. § 2462, or 3) the limitation to all federal causes of action at 28 U.S.C. § 1658. As described in the following analysis, I find that none of these authorities bars OSERS' determination.

GEPA

Under § 1234a(k), "No recipient under an applicable program shall be liable to return funds which were expended in a manner not authorized by law more than 5 years before the recipient received written notice of a preliminary department decision."[9] The plain language of this provision establishes a time bar to recovering liabilities for funds already expended. The provision does not apply to the OSERS proposed determination at issue in DESE's case, because the proposed determination sets the amount of a future grant allocation based on the statute's MFS requirement. The ALJ held that OSERS' proposed determination of grant eligibility is not a decision of "monitoring and enforcement" and therefore not a decision subject to the 5-year time limit under § 1234a(k).

[4] ALJ Order at 1, 3.
[5] *Id*.
[6] 34 C.F.R. § 300.179.
[7] ALJ Order at 3.
[8] *Id*. at 17.
[9] 20 U.S.C. § 1234a(k).

DESE argues that the ALJ's "distinction between recovery actions and eligibility determinations" was arbitrary because there is no such distinction.[10] DESE asserts that recovering already-allocated funds and reducing the amount of a future grant are legally indistinguishable because, in either case, the grantee is deprived of the same amount of money.[11] I disagree.

I wholly agree with and adopt the ALJ's analysis of the statute's plain language and the precedent underpinning that analysis.[12] There is a material distinction between a determination of eligibility that would set the amount of a future grant and a determination of non-compliance that would set the amount of a finding of liability.[13] DESE's theory that determining the eligibility of an entity for not-yet awarded grant funds is legally identical to recovering already-expended funds for which an entity is liable cannot be reconciled with the statute's text. The reduction in future grant eligibility is established within the statute. The Department has no authority to avoid the statutory consequences by treating this case as a generic "recovery of funds" proceeding. I need look no further than the statutory text to conclude that § 1234a(k) does not bar OSERS' proposed determination.

Nevertheless, I also note that the cases cited by DESE to support its theory are inapposite here. DESE cites *State of Florida* for the proposition that the five-year time bar in GEPA applies to eligibility determinations and therefore applies to OSERS' proposed final determination.[14] That case arose from an appeal of a final audit determination based on an audit of expenditures.[15] The determination ordered the refund of an already-expended sum, $618,151, based on the audit.[16] The appellant in that case described the Department's action as "collecting misspent funds."[17] *State of Florida* does not address the issue of the Department determining eligibility for a future grant allocation and does not apply the GEPA rules to the MFS provision of IDEA. Accordingly, this case does not support DESE's position.

DESE cites *State of Pennsylvania* for the proposition that the Department previously applied the GEPA time bar to a state fiscal support requirement.[18] Like *State of Florida*, this case dealt with a demand for "repayment of . . . Federal funds awarded" to the appellant.[19] Because the matter addressed repayment of funds rather than a determination of future eligibility, this case is also inapposite to DESE's appeal. Furthermore, despite DESE's assertions, the

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[10] DESE Brief at 6.
[11] *Id.* at 8–10.
[12] ALJ Order at 10.
[13] *S.C. Dep't of Educ. v. Duncan*, 714 F.3d 248, 255 (4th Cir. 2013) ("The distinction that the [U.S. Department of Education] makes is indeed 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 an assessment of performance.").
[14] DESE Brief at 6–7 (citing *State of Fla.*, Dkt. No. 9-(45)-78, U.S. Dep't of Educ. (Dec. 21, 1982) (Decision of the Secretary)).
[15] *State of Fla*., Dkt. No. 9-(45)-78, U.S. Dep't of Educ. (Oct. 21, 1982) at 1.
[16] *Id*. at 1–2.
[17] *Id*. at 6.
[18] DESE Brief at 7 (citing *State of Penn.*, 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 Educ. (Apr. 7, 1995) (Decision of the Secretary)).
[19] *State of Penn*., Dkt. Nos. 93-136-R and 93-44-R at unp. 1.

decision certified by the Secretary in *State of Pennsylvania* affirmed the entire amount of the appellant's liability sought by the Department.[20]

DESE cites *Los Angeles Community College District* for the proposition that "recovery of funds" is a broad concept, including funds expended by a grantee who was ineligible, funds expended in a noncompliant manner, and funds "which were never 'expended' at all."[21] This case is inapposite because the instant case does not involve any recovery of funds, regardless of how, when, or whether such funds were spent. OSERS's proposed final determination applies a statutory requirement to reduce the amount of funds a grant recipient is eligible for in a future allocation.

Having concluded that GEPA does not bar OSERS from issuing the proposed final determination, I now turn to the question of whether 28 U.S.C. § 2462 does.

28 U.S.C. § 2462

Under 28 U.S.C. § 2462, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" is subject to a five-year statute of limitations. The proposed final determination is not a penalty and is therefore not subject to the limitations period in 28 U.S.C. § 2462. The ALJ concluded that OSERS' action "does not punish DESE, but returns DESE to the *status quo ante* . . . ."[22]

The Department has long held that liability for a sum of money to the Department is not a fine or penalty subject to 28 U.S.C. § 2462.[23] Such liability is not punitive because it is "calculated as the funds for which" the liable entity failed to comply with the legal requirements of receiving the money in the first place.[24] The Department has further considered the effect of *Kokesh v. Securities and Exchange Commission* on this precedent, finding that *Kokesh* stood for the principle that

> "SEC disgorgement" is a "penalty" because it "is imposed by the courts as a consequence for violating . . . public laws" and because it "is imposed for punitive purposes" which are "intended to deter, not to compensate."[25]

In this case, the reduction of eligibility for a future grant is "a consequence for violating . . . public laws" only to the extent the statute expressly requires the reduction when a state violates the MFS requirement. The reduction of eligibility is not a punitive measure triggered by the commission of a "crime or offense." The reduction of eligibility is not measured by the state's budget to ensure it adequately punishes or deters the state. OSERS is not empowered to consider the reduction based on the state's culpability or intent nor may OSERS modify the reduction based on positive mitigating factors. The reduction is simply measured by the amount of the

[20] *Id*. at unp. 7.
[21] DESE Brief at 9.
[22] ALJ Order at 12.
[23] *E.g. Hair Cal. Beauty Acad.*, Dkt. No. 18-13-SP, U.S. Dep't of Educ. (Jan. 21, 2021) (Decision of the Secretary) at 6–7.
[24] *Id*. at 7.
[25] *Id*.

state's allocation shortfall. Accordingly, the reduction of eligibility is not a penalty under *Kokesh* because it is not "imposed for punitive purposes" and it is not formulated "to deter."[26]

Having concluded that 28 U.S.C. § 2462 does not bar OSERS' proposed final determination, I turn to the question of whether 28 U.S.C. § 1658 bars it.

28 U.S.C. § 1658

Under 28 U.S.C. § 1658, "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." DESE argues this statutory provision bars OSERS' proposed final determination for the first time in the context of this interlocutory appeal, so this argument was not addressed by the ALJ's Order. Accordingly, this argument is not encompassed in the question certified and is not properly raised for review in this proceeding. Despite this procedural problem, I note that 28 U.S.C. § 1658 does not apply to an agency decision such as OSERS' proposed final determination, which is a ministerial action compelled by the IDEA statute and within the authority of the Department. Such an agency decision does not constitute a "civil action," which is a noncriminal judicial proceeding.[27]

ORDER

Based on the foregoing analysis, I find no basis to disturb the ALJ's Order or grant the relief sought by DESE. Accordingly, the ALJ Order is **AFFIRMED**.

So ordered this 8th day of June 2022.

Miguel A. Cardona, Ed.D.
U.S. Secretary of Education

Washington, DC

[26] Despite DESE's assertions to the contrary, OSERS's inartful use of the term "penalty" in the proposed final determination does not bind the Department to an incorrect legal interpretation. *See* DESE Brief at 13.
[27] Black's Law Dictionary, 11th ed. (2019)

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