



STATE OF SOUTH CAROLINA DEPARTMENT OF EDUCATION

Mick Zais
Superintendent

1429 Senate Street
Columbia, South Carolina 29201

TO: Dr. Zais
State Superintendent of Education

FROM: Shelly Kelly
General Counsel

DATE: August 1, 2011

RE: Appeal of IDEA MOE Waiver denial

The SCDE's appeal of the United States Department of Education's denial of a waiver of the maintenance of effort requirement for the Individuals with Disabilities Education Act, is being filed today. Below is a summary of the legal arguments.

Summary of SCDE's appeal to OALJ

The SCDE is petitioning the Office of Administrative Law Judges (OALJ) of the United States Department of Education (USDE) for the review of the decision by Assistant Secretary Alexis Posny to grant only a partial waiver to South Carolina in response to its request for a waiver of the Maintenance of Effort (MOE) requirements under the Individuals with Disabilities Education Act (IDEA) and the determination by the USDE to reduce South Carolina's allocation of funds under Part B of the IDEA by \$36,202,909, annually.

The SCDE was informed by the USDE that the decision to deny a waiver and to reduce funds for the failure to meet MOE is not appealable. The SCDE is contesting this decision as well. The SCDE is raising the following issues on appeal:

1. The USDE failed to provide the SCDE with notice and opportunity for a hearing regarding the loss of \$36,202,909 in IDEA funding
2. Assistant Secretary Posny erred in Failing to Grant the SCDE a complete waiver of the MOE requirement for the 2009–2010 fiscal year
3. The USDE erred in not considering South Carolina's level of services provided to students with disabilities
4. The USDE erred in its interpretation of 34 CFR § 300.163(d) by finding that South Carolina's IDEA allocation would be forever reduced by \$36,202,909

The SCDE maintains that both the IDEA and the General Education Provisions Act (GEPA) provide states with a right to appeal an adverse decision by the USDE related to funding and that the USDE violated both IDEA and GEPA in not providing the SCDE notice of the right to appeal the decision. The SCDE filed the appeal to preserve its right to appeal even though it has not received proper notice under either section of the law.

With regard to the merits of the appeal, the SCDE maintains that the USDE abused its discretionary authority when it failed to grant a total waiver of MOE for the 2009-10 fiscal year. The SCDE argues that the sixteen month delay in issuing an opinion adversely impacted South Carolina and in no other case did the USDE take this long to issue a denial. Additionally, the USDE erred when it considered unanticipated budget surpluses that South Carolina realized towards the end of the 2009-10 fiscal year. Those budget figures were not finalized until August 2010, after the end of the fiscal year. The SCDE could not have used those funds to meet IDEA MOE. Also, the USDE erred in comparing the reduction in funding to IDEA to the preceding fiscal year and not the fiscal year where South Carolina last met MOE. Finally, the SCDE argues that the USDE erred in not considering the level of services provided to South Carolina's students with disabilities in its waiver determination. South Carolina received a "meets" determination based on the data from the 2009-10 fiscal year.

The SCDE is also asking for a declaration that the reduction, if ordered, should be for one year and that the USDE's interpretation of the IDEA and regulations is contrary to the plain reading of the law.

cc (via email):
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