SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into by and between the United States Department of Education ("Department") and the South Carolina Department of Education (SCDE) (collectively, "the Parties").

BACKGROUND

A. On September 17, 2015, the Department's Office of Special Education and Rehabilitative Services (OSERS) issued an amended proposed determination that the State of South Carolina ("South Carolina" or "the State") was not eligible for $51,336,578 of its section 611 grant under Part B of the Individuals with Disabilities Education Act (IDEA) because of its failure to maintain State financial support (MFS) for special education and related services by that amount in State fiscal year (SFY) 2010 (July 1, 2009 – June 30, 2010), under 20 U.S.C. § 1412(a)(18)(A) and 34 CFR § 300.163(a).

B. In the September 17, 2015, amended proposed determination, OSERS noted that South Carolina had additional potential MFS shortfalls for SFYs 2011, 2012, and 2013, and that OSERS would address the issues for those years at a later date.

C. On October 30, 2015, the Department granted SCDE's timely request for a hearing on the proposed denial of eligibility for an IDEA Part B section 611 grant because of its MFS failure in SFY 2010, giving rise to the proceeding before the Department's Office of Hearings and Appeals (OHA) entitled *In the Matter of State of South Carolina*, Docket No. 15-58-O.

D. The Parties mutually desire to resolve the current claim for South Carolina's failure to maintain State financial support under IDEA Part B in SFY 2010, terminate the current administrative proceeding regarding the SFY 2010 claim, and resolve any future claims for South Carolina's failure to maintain State financial support under IDEA Part B in SFYs 2010, 2011, 2012, 2013.

In consideration of the mutual covenants and conditions contained herein, the releases contained herein, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in accordance with the legal authorities provided under IDEA Part B and the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. § 3711, the Parties agree to the following provisions, intending to be legally bound thereunder:

TERMS

<u>MFS Shortfalls</u>

1. SCDE acknowledges for the purposes of this settlement agreement that South Carolina's MFS shortfall is $51,336,578 for SFY 2010. SCDE also acknowledges that South Carolina had MFS shortfalls in SFYs 2011, 2012 and 2013.

2. Except as provided in Paragraph 14, the Department will not otherwise reduce South Carolina's IDEA Part B section 611 grant in any future year as a result of the MFS shortfalls for SFYs 2010, 2011, 2012, and 2013.

Additional Targeted Appropriations

3. SCDE will ensure that additional State funds are appropriated either as a new or supplemental appropriation for special education and related services, totaling $51,336,578, above the amount otherwise required to meet its MFS requirement under IDEA Part B.

4. The additional appropriations of $51,336,578 will be made over a period of not more than three consecutive years, beginning in SFY 2017, resulting in no less than $17,112,192 of additional appropriations in each of Year 1 and Year 2 until the full amount is appropriated. This assumes that SCDE's spending plan will be approved by the Department no later than June 1, 2016 so that SCDE may timely implement the Spending Plan in accordance with this Agreement. If the Spending Plan is approved after June 1, 2016, SCDE may delay implementation of this Agreement until SFY 2018, starting July 1, 2017.

5. SCDE will specifically identify the additional appropriations for special education and related services in their accounting system for tracking purposes as "Additional Targeted Appropriations" made pursuant to the Agreement, which will be monitored to determine whether SCDE has met the Agreement separately from all other appropriations made available for special education and related services ("Regular Appropriations"). The Regular Appropriations will be counted to determine whether South Carolina has met the MFS requirement under IDEA Part B in any given fiscal year, but the Additional Targeted Appropriations will not be counted for that purpose, as referenced in Paragraph 13, or for purposes of meeting the local-level maintenance of effort and excess cost requirements, as referenced in Paragraph 15.

6. SCDE will provide the Department with a copy of the appropriations acts and any other documentation required by the Department to verify that the State Legislature made the additional appropriations available until expended, in accordance with the Agreement.

Spending Plan

7. SCDE will spend, and will require any Local Educational Agency (LEA) that receives any amount of the Additional Targeted Appropriations to spend, the Additional Targeted Appropriations of $51,336,578 on special education and related services, pursuant to a Spending Plan that the Department approves – specifically, on programs and initiatives to implement South Carolina's Results Driven Accountability (RDA) activities, in particular those described in its State Systematic Improvement Plan (SSIP). Though the Additional Targeted Appropriations must be appropriated in no more than three years, SCDE and its LEAs will have four full fiscal years to expend the Additional Targeted Appropriations.

8. SCDE will use, and will require any LEA that receives any amount of the Additional Targeted Appropriations to use, the Additional Targeted Appropriations to augment, and not replace, any other funding, whether Federal, State, or local, that is received by South Carolina

for, or that has already been allocated for, or is being used to support, South Carolina's RDA and SSIP programs and initiatives. The Additional Targeted Appropriations may not be used for general personnel costs, indirect costs, or other administrative costs, unless included in the approved Spending Plan.

9. The Additional Targeted Appropriations must be expended in a manner that is necessary and reasonable for the performance of the Spending Plan, and allocable to and in accordance with the approved Spending Plan and Paragraphs 16 through 19 (Accounting and Auditing of Additional Funds) in order to be counted toward the minimum Additional Targeted Appropriations required under the Agreement.

10. Notwithstanding section 605 of the IDEA, SCDE will ensure that no portion of the Additional Targeted Appropriations will be expended for constructing new facilities, for altering existing facilities, or for acquiring equipment of over $5,000 per unit or over $50,000 in a single purchase, unless included in the approved Spending Plan.

11. SCDE agrees to monitoring by the Department to ensure that the Additional Targeted Appropriations are actually expended in accordance with the spending plan approved by the Department. Annually, on a mutually agreed upon date, SCDE will submit to OSERS documentation demonstrating that the Additional Targeted Appropriations for that SFY have been expended at the State and/or LEA levels pursuant to the spending plan, and identifying any remaining amount of the Additional Targeted Appropriations not expended in that SFY that will be carried over to the following SFY. In the event that OSERS finds the documentation to be deficient, OSERS will document its reasoning and provide a detailed explanation of the documentation required for compliance purposes, and SCDE will provide any additional required documentation.

12. SCDE will submit to OSERS two evaluations – one after 18 months, and one after the third fiscal year of the Agreement period – conducted by an external entity and approved by the Department, of the impact of those expenditures on children with disabilities in the State. SCDE may use the IDEA Part B funds it sets aside for other State-level activities to pay for each of the two evaluations, pursuant to 34 CFR § 300.704(b)(4)(viii). However, SCDE may not reserve more than the maximum amount of IDEA Part B funds it is allowed to reserve under 34 CFR § 300.704(b)(1).

<u>Additional Targeted Appropriations Do Not Affect MFS Base</u>

13. The Department will not count Additional Targeted Appropriations made pursuant to the Agreement towards the amount of appropriations for special education and related services that South Carolina is required to make available in a given fiscal year under the MFS requirement (also known as the "MFS base"). Any increase in Regular Appropriations above the MFS base, however, will increase the State's MFS base as it would in normal course.

<u>Consequence of Failure to Appropriate and Spend</u>

14. Notwithstanding Paragraph 2, if, at any point during the period of the Agreement, OSERS determines that South Carolina has failed to appropriate at least one third of the funds in

the first or second fiscal year, or the full amount by the end of the third fiscal year, or if SCDE fails to spend, or fails to ensure that its LEAs that receive any amount of the Additional Targeted Appropriations spend, the Additional Targeted Appropriations by the end of the fourth fiscal year in accordance with the Spending Plan and as required under the Agreement, the Department will reduce South Carolina's IDEA Part B section 611 grant for a single year, the year to be determined by the Department, in the amount of the total remaining MFS shortfall, and South Carolina will not contest the reduction through an administrative hearing or judicial proceeding, except to pursue a claim that the reduction is not consistent with the terms of this Agreement. The amount of that reduction shall be $85,397,967 subtracted by the total amount of Additional Targeted Appropriations that South Carolina already made available and spent pursuant to the Agreement.

<u>Effect on Local-Level Maintenance of Effort and Excess Cost</u>

15. Any amount of the Additional Targeted Appropriations made under the Agreement that are distributed to and expended by an LEA for the education of children with disabilities need not affect the LEA's required level of effort under the LEA maintenance of effort requirement (the local-level requirement under IDEA Part B that LEAs maintain expenditures for the education of children with disabilities from year to year), 20 U.S.C. § 1413(a)(2)(A)(iii) and 34 CFR § 300.203, or the minimum amount of funds the LEA must spend to meet the excess cost requirement (the local-level requirement under IDEA Part B that LEAs use Part B funds only to pay the excess costs of providing special education and related services to children with disabilities), 20 U.S.C. § 1413(a)(2)(A)(i) and 34 CFR § 300.202(a)(2) and (b). The LEA will not be required to count the Additional Targeted Appropriations it receives and expends as State or local funds for the purpose of meeting the LEA maintenance of effort and/or excess cost requirements.

<u>Accounting and Auditing of Additional Funds</u>

16. After the Additional Targeted Appropriations are separately appropriated and identified pursuant to Paragraph 5, SCDE will continue to track and account for the Additional Targeted Appropriations, and any expenditures thereof at the State level, separately from the Regular Appropriations made outside the Agreement for special education and related services, to ensure that the Additional Targeted Appropriations are used for the required purposes in accordance with the spending plan.

17. SCDE will require LEAs that receive any Additional Targeted Appropriations under the Agreement to track and account for those funds separately from all other funds it expends for special education and related services.

18. SCDE will submit to OSERS documentation demonstrating that all expenditures of Additional Targeted Appropriations, at the State and local levels, are tracked and accounted for separately to ensure they are used to augment, and not replace, any other funding already being used to support the State's programs and initiatives for special education and related services.

19. SCDE will inform its State audit office that is responsible for conducting audits in accordance with the Single Audit Act, of this Agreement, to facilitate an accurate audit of the State and local-level expenditures for special education and related services, including the Additional Targeted Appropriations and that, under the Agreement, SCDE will need to track and account for separately all expenditures made with the Additional Targeted Appropriations.

Other Terms

20. Upon execution of the Agreement, the Parties shall file a Joint Stipulation of Dismissal with prejudice of all OHA proceedings regarding the proposed denial of eligibility for an IDEA Part B section 611 grant because of South Carolina's MFS failure in SFY 2010.

21. South Carolina waives its right to an administrative hearing or judicial proceeding on the Department's claims against South Carolina for its failure to maintain State financial support under IDEA Part B in SFYs 2010, 2011, 2012, and 2013, except to pursue a claim that the reduction is not consistent with the terms this Agreement.

22. Except as provided in Paragraph 14, the Department waives its right to bring a future claim against South Carolina for the State's failure to maintain State financial support under IDEA Part B in SFYs 2010, 2011, 2012, and 2013.

23. The provisions of the Agreement do not waive, compromise, restrict, settle, or set a precedent for, any issue relating to South Carolina's maintenance of State financial support for SFY 2014 and subsequent years.

24. The Agreement constitutes the full and complete Agreement between the Parties and cannot be altered or amended except by express written consent of the Parties.

25. The Agreement supersedes any prior and contemporaneous understandings and agreements and contains the entire Agreement of the Parties with respect to the subject matter herein.

26. If any provision of the Agreement is held illegal, invalid, or unenforceable in a judicial proceeding, such invalidity does not affect other provisions of the Agreement that can be given effect without the void provision, and, to this end, the provisions of the Agreement are severable.

27. The Agreement shall be governed by, and construed in accordance with, Federal law.

28. The Parties will each bear their own legal and other costs incurred in connection with these proceedings and the Agreement.

29. The Parties and signatories to the Agreement represent that they freely and voluntarily enter into the Agreement without any degree of duress or compulsion.

Each of the Parties warrants that its undersigned representatives are fully authorized to sign the Agreement on its behalf.

Date: **08/22/16**

FOR THE U.S. DEPARTMENT OF EDUCATION

By: **/s/**
SUE SWENSON
Acting Assistant Secretary for Special Education and Rehabilitative Services
U.S. Department of Education

By: **/s/**
JAMES COLE, JR.
General Counsel
U.S. Department of Education

Date: **08/08/16**

FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

By: **/s/**
MOLLY SPEARMAN
Superintendent
South Carolina Department of Education