

July 25, 2012

Honorable Sam Brownback
State Capitol
300 SW 10th Ave., Suite 241S
Topeka, Kansas 66612-1590

Dear Governor Brownback:

This is in response to your August 17, 2011, letter to Secretary Arne Duncan (supplemented by additional information provided by the State on September 27, 2011; May 3, 2012; May 7, 2012; July 2, 2012; and July 9, 2012), in which Kansas requested a waiver in the amount of \$34,193,605 for State financial support for special education and related services for State fiscal year (SFY) 2011 (July 1, 2010 - June 30, 2011) for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1).¹ We appreciate the time and effort Kansas took to provide the initial and supplemental information. In particular, Elaine Frisbie, Kansas Division of the Budget, worked closely with U.S. Department of Education (Department) staff and provided information in May and July that enabled the Department to bring this matter to a conclusion. As discussed below, based on all of the information provided by the State, I have determined that it is equitable due to exceptional or uncontrollable circumstances to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), permitting Kansas to reduce its amount of State financial support provided for special education and related services by \$34,193,605 for SFY 2011.

A State is eligible for a grant under Part B of the IDEA if the State submits a plan (application) that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets certain conditions. 20 U.S.C. §1412(a) and 34 CFR §300.100. Specifically, under 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a), a State must not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. (In SFY 2011, the State financial support for special education and related services required of Kansas was the amount that would have been required in the absence of the State's failure to maintain effort in SFY 2010 and not the reduced level of the State's financial support in SFY 2010. 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d).) Kansas has provided such assurances in its applications for Part B funds in all relevant years and the Department awarded Part B funds to the State based, in part, on those assurances.

¹ The State's May 3rd submission included an attachment dated May 2, 2012.

While we are permitted to waive this requirement for a State, for one fiscal year at a time, if we determine that granting a waiver 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)(i) and 34 CFR §300.163(c)(1), we do so carefully and reluctantly, given the importance we place on maintaining State financial support for our most vulnerable students. Moreover, regardless of whether a State receives a waiver under this authority, the State has a continuing obligation to ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities, as required under 20 U.S.C. §1412(a)(1) and 34 CFR §300.101.

The State's data established that Kansas experienced a significant decline in financial resources in SFY 2011; as that fiscal year entered its last quarter, the State was projecting a 5.99 percent decrease in State General Fund resources, when compared to SFY 2009 (the last year in which the State maintained fiscal effort). (The State ultimately realized a 4.24 percent decrease in total financial resources in the State General Fund in SFY 2011.) The State's data also established that Kansas increased its appropriations across agencies by 4.93 percent when compared to SFY 2010. Over the same period, the State increased the amount of State financial support for special education and related services by 5.64 percent. (Although the State increased its State financial support for special education and related services in SFY 2011 compared to SFY 2010, it nevertheless failed to maintain effort because it failed to meet the level of State financial support it provided in SFY 2009.)

In reviewing the August 17, 2011, request, as part of our review of "equitability," we considered all of the information provided by the State in all of its submissions -- including the data establishing a significant decline in financial resources and that the percent increase in State financial support for special education and related services was greater than the average percent increase in appropriations across agencies. We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a FAPE available to all children with disabilities in SFY 2011. Based on all of this information, as noted above, I have determined that it is equitable due to exceptional or uncontrollable circumstances to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1), permitting Kansas to reduce its amount of State financial support provided for special education and related services by \$34,193,605 for SFY 2011.

As provided in 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d), the amount of State financial support required of the State in SFY 2012 was the amount made available in SFY 2009 --\$433,384,169. We understand from your August 17, 2011, letter that the State appropriated sufficient funds in SFY 2012 to meet the level of State financial support made available for special education and related services in SFY 2009. We remind the State that if the Department determines through an audit, or other means, that the State failed to maintain State financial support in SFY 2011 at the level permitted by this waiver (\$399,190,564), in SFY 2012 at the level made available in SFY 2009, or in any other year, the Department will be required to reduce the allocation of funds to the State under section 611 of the IDEA for any fiscal year following the fiscal year for which the State fails to maintain effort by the same amount by

which the State fails to meet the requirement. 20 U.S.C §1412(a)(18)(B) and 34 CFR §300.163(b). In addition, the Department may take action to recover funds as provided for in section 452(a)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. §1234a(a)(1). We also want to make clear to the State that, when making decisions about its level of State financial support for special education and related services in SFY 2013, the State should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services.

As you know, the State must ensure that LEAs do not count ARRA Part B funds as “State” or “local” funds for the purpose of determining whether an LEA has met its supplement/not supplant and maintenance of effort requirements at 34 CFR §§300.202(a)(3) and 300.203. Further, if it is discovered, through means such as monitoring or auditing, that an LEA has not met these requirements, the Department will seek to recover funds from the State educational agency (SEA), in an amount equal to the amount by which the LEA did not meet the requirements. The amount recovered must be paid from non-Federal funds.

The Department may undertake additional monitoring of Kansas’s implementation of Part B of the IDEA should we believe that to be necessary to assess whether a FAPE is still being made available to all eligible children with disabilities, even though the State has been granted the waiver described above. In addition, in light of the Kansas Special Education Advisory Council’s duties in 20 U.S.C. §1412(a)(21)(D), particularly its duty in 20 U.S.C. §1412(a)(21)(D)(i) to “advise the State educational agency of unmet needs within the State in the education of children with disabilities,” we are providing it with a copy of this letter.

To ensure that the public is fully informed regarding the granting of this waiver, the Office of Special Education Programs (OSEP) requires the SEA to prominently post on its Web site the State’s August 17, 2011, letter to the Department and this letter. In addition, OSEP is requiring the State to report to your OSEP State Contact on October 1, 2012, and May 1, 2013, responses to the following:

1. What action is the State taking, or did the State take, to ensure that children with disabilities are receiving a FAPE during 2012-2013, including monitoring and reviewing complaints filed or hearings requested?
2. How will the State communicate with stakeholders regarding the waiver request and the State’s actions to ensure that all eligible children with disabilities are receiving a FAPE?
and
3. What is the status of the State’s compliance with 20 U.S.C. §1412(a)(18) for SFY 2013 and does the State anticipate seeking a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) for SFYs 2012 and/or 2013?

We appreciate your State's commitment to serving children with disabilities and look forward to our continued collaboration on their behalf.

Sincerely,

/s/ Anthony W. Miller

Anthony W. Miller

cc: Kansas Commissioner of Education Diane M. DeBacker
Kansas Special Education Advisory Council