



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

JUN 17 2011

Honorable Mitchell M. Zais
South Carolina State Department of Education
1429 Senate St., Room 1006
Columbia, South Carolina 29201-3799

Dear Dr. Zais:

This is in response to former State Superintendent Jim Rex's February 24, 2010 letter and your May 9, 2011 letter (supplemented by additional information provided by your staff and staff from the Office of State Budget on June 17, 2010, July 7, 2010, July 12, 2010, September 24, 2010, February 24, 2011, March 11, 2011, and May 18, 2011, and your letter on May 24, 2011), in which the State of South Carolina requests waivers of the requirements related to the maintenance of State financial support for special education and related services for fiscal years (FYs) 2009, 2010, and 2011 for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18) and 34 CFR §300.163.¹ We appreciate the time and effort your staff took to provide the supplemental information and to meet with my staff on May 4, 2011 in South Carolina at the offices of the State Department of Education to review the data provided by the State. During the course of that meeting, my staff discussed with your staff the consequences under the IDEA (discussed below) of a State's failure to maintain fiscal effort and the U.S. Department of Education's (Department) concern that the State take steps to ensure that it would maintain effort this fiscal year (2011). Subsequent to the visit, the State had an opportunity to provide any additional information that it chose to submit, and it did so on May 18, 2011 and May 24, 2011.² Since that time, on several occasions, Department officials have spoken with State officials about this matter.

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. One of these conditions is that 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 financial support for the preceding fiscal year. 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a). South Carolina 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 first requested a waiver for FY 2009, which the State later clarified was FY 2010 (July 1, 2009 – June 30, 2010), by letter dated February 26, 2010. However, the Department did not receive the letter until April 22, 2010. The State submitted a request for waivers for FYs 2009 and 2011 on May 9, 2011.

² Attached is a table that summarizes the data provided by the State at the meeting on May 4th. The May 18th and May 24th submissions by the State were consistent with information provided by the State on May 4th, although the May 24th submission included more recent revenue projections which were updated in the attached table.

While we are permitted to waive the requirements related to the maintenance of financial support 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 in 20 U.S.C. §1412(a)(1) and 34 CFR §300.101.

Each of the State's waiver requests is discussed below.

Fiscal Year 2009 (July 1, 2008 – June 30, 2009)

In a May 9, 2011 letter, the State requested a waiver of State-level maintenance of effort for FY 2009. From the information your agency provided, we are aware that the State faced a very difficult financial situation in that year and experienced a significant decrease in revenues – total State revenues dropped by 12.73 percent from FY 2008 to FY 2009. Based on information provided by your agency, South Carolina reduced State financial support for special education and related services by \$20,312,122 in FY 2009 from FY 2008 levels, as calculated on a per capita basis. This represents a 4.87 percent decrease in State financial support for special education and related services from FY 2008 to FY 2009. The State cut its total State appropriations by 13.69 percent in the same time period. While it is regrettable that these cuts were made to special education funding, we recognize that the reduction in State financial support for special education and related services was relatively small compared with cuts to other State appropriations.

In reviewing your request, as part of our examination of “equitability,” we considered all of the information provided by the State in all of its submissions--including that the percent reduction in State financial support for special education and related services was less than the average percent reduction in appropriations across agencies and less than the percent reduction in revenues. 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, while it is not a factor in determining whether a State experienced an exceptional or uncontrollable circumstance, 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 FY 2009.

Based on all of the information discussed above, I have determined that it is equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for FY 2009 by \$20,312,122.

Fiscal Year 2010 (July 1, 2009 – June 30, 2010)

South Carolina's February 26, 2010 letter based its request for a waiver for FY 2010 on "a severe and precipitous decline in State revenue which is outside the control of the South Carolina Department of Education (SCDE) and the state legislature." In FY 2010, the financial support for special education and related services required of the State was the amount that would have been required in the absence of a failure to maintain effort in FY 2009 and not the reduced level of the State's financial support permitted by the waiver granted for FY 2009, adjusted to account for any changes due to the State's per capita calculation (i.e., \$413,300,247). 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d). The State's financial support for special education and related services in FY 2010 was \$345,897,722, or \$67,402,525 less than its required level of effort. Accordingly, we consider the State's request for a waiver for FY 2010 to be a request for a waiver for \$67,402,525.

Based on the information provided by your agency, it is evident that the State continued to face difficult financial circumstances in FY 2010 - total State revenues dropped by 4.71 percent between FY 2009 and FY 2010. Additionally, revenues were 16.84 percent lower than in FY 2008, the year that South Carolina last met the maintenance of effort requirement. Based on these data, we believe that the State experienced an exceptional circumstance in FY 2010, i.e., a precipitous and unforeseen decline in the financial resources of the State. In addition, data provided to the Department demonstrate that the State had revenues in excess of its appropriations by \$59,816,035 in FY 2010. Of this amount, \$26,835,463 consisted of revenues in excess of appropriations in the General Fund. In your May 24, 2011 letter, you provided satisfactory evidence that the \$26,835,463 in the General Fund could not have been made available for special education and related services in FY 2010. However, the revenues in the State's Lottery and Education Improvement Act funds were \$32,980,572 in excess of appropriations made from those same funds in FY 2010. Although the State ended the year with \$32,980,572 more in revenues than appropriations, this amount was substantially less than \$67,402,525 -- the amount by which the State failed to maintain effort in FY 2010. Given that the excess revenues were less than the \$67,402,525 maintenance of effort shortfall and that the revenue forecasts in FY 2010 had been erratic, the surplus in FY 2010 is not inconsistent with our determination that the State experienced an exceptional or uncontrollable circumstance in FY 2010. To be clear, when weighing the equities of a waiver request for a fiscal year, particularly when the State had a surplus that year, the Department does not take a rigid formulaic approach. Rather, for FY 2010, the Department very carefully considered whether it was reasonable under all the circumstances facing the State in FY 2010 to maintain fiscal effort for special education and related services. We were persuaded by the fact that the surplus was small compared to the State's overall budget and to the State's maintenance of effort shortfall and that it was not clear to the State towards the end of FY 2010 how much of the surplus would actually be realized. Nevertheless, although the Department finds that the State experienced an exceptional or uncontrollable circumstance in FY 2010, the Department expected the State to treat special education equitably compared to overall State appropriations.

As part of our examination of "equitability," in order to determine whether to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) for FY 2010, the Department examined a variety of factors. The reduction in State financial support for special education and related services in FY 2010 of \$67,402,525 represents a 12.02 percent cut from its State financial

support for special education and related services in FY 2009 and a 16.31 percent cut from its required level of effort. The reduction in State financial support for special education and related services (12.02 percent) in FY 2010 from the FY 2009 level was a larger percentage cut than the reduction in total State appropriations (7.55 percent) from FY 2009 to FY 2010. The State seeks to compare the percentage reductions in special education and other appropriations to the amounts appropriated in FY 2008 (the “MOE base year”), and stated (in your May 24, 2011 letter) that “since the comparison for MOE purposes is the 2007-2008 year, the comparison for percentage decrease in funding should also be to that year.” The Department believes that comparing revenue reductions to the MOE base year (as well as the immediate prior fiscal year) is appropriate because the level of revenues in the MOE base year supported the level of State financial support for special education and related services. However, when considering waiver requests, the Department examines the treatment of special education and related services each fiscal year compared to the prior fiscal year because that is the best method to protect the Federal interest in ensuring the equitable treatment of State funding for special education and related services every year. Therefore, in evaluating whether the State’s appropriations decisions treated special education proportionately relative to total State appropriations, comparisons are made to the prior year rather than to the year in which the State last met the MOE requirement.

In reviewing your request, we considered all of the information provided by the State in all of its submissions--including the totality of the State’s circumstances in FY 2010: (1) revenues decreased when compared to the prior year, and decreased substantially when compared to FY 2008 (the year in which the State last met its required level of effort); (2) the State had a surplus of \$32,980,572 in FY 2010, which was not sufficient to maintain the required level of State financial support for special education and related services; and (3) the percent reduction in State financial support for special education and related services (12.02) was higher than the average percent reduction in appropriations across agencies (7.55) and higher than the percent decrease in revenues (4.71). 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, while it is not a factor in determining whether a State experienced an exceptional or uncontrollable circumstance, when evaluating the equity of the requested waiver, we considered the fact that the Part B IDEA ARRA funds were available to assist the State and LEAs in meeting their obligation to make a FAPE available to all children with disabilities in FY 2010.

Accordingly, based on all of the information discussed above, the Department finds that the State did not treat special education and related services in an equitable manner when compared to State agencies as a whole. Therefore, I have determined it would not be equitable to grant a waiver under 20 U.S.C. §1412 (a)(18)(C)(i) and 34 CFR §300.163(c)(1) that would permit the State to reduce State financial support for special education and related services by \$67,402,525 for FY 2010. However, I have determined that it is equitable to grant a partial waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting South Carolina to reduce its amount of State financial support provided for special education and related services for FY 2010 by \$31,199,616, representing a 7.55 percent decrease from the amount required to be made available, adjusted to account for changes due to the State’s per capita calculation. This level brings the percentage decrease in State financial

support for special education and related services in line with the percentage decrease in appropriations for the State as a whole.

The State's submissions to the Department in support of its waiver request establish that it has failed to maintain financial support for special education and related services for FY 2010 by \$36,202,909 – the difference between the amount of financial support required to have been made available under this partial waiver (\$382,100,631) and the level made available by the State in FY 2010 (\$345,897,722). Thus, the State has a \$36,202,909 shortfall in the amount of State financial support for FY 2010.

Fiscal Year 2011 (July 1, 2010 – June 30, 2011)

In its May 9, 2011 letter, the State requested a waiver of State-level maintenance of effort for FY 2011. As noted above, the financial support required of the State in FY 2011 is the amount that would have been required in the absence of a failure to maintain effort in prior years and not the reduced level of the State's financial support provided by the State, or permitted by the waiver granted for FY 2009 and the partial waiver granted for FY 2010, adjusted to account for any changes due to the State's per capita calculation (i.e., \$410,232,370). The State's financial support for special education and related services in FY 2011 was \$334,889,301, which is \$75,343,070 less than the amount the State is required to provide in FY 2011.

South Carolina's total State revenues increased by 2.58 percent from FY 2010 to FY 2011. However, total State revenues in FY 2011 are still 14.70 percent lower than FY 2008, the year that South Carolina last met the maintenance of effort requirement. Even though the State's revenues increased by 2.58 percent between FY 2010 and FY 2011, the State provided 2.46 percent less in financial support for special education and related services in FY 2011 than in FY 2010 and 18.37 percent less than its required level of effort. The 2.46 percent reduction in financial support for special education and related services from the FY 2010 level is a larger percentage cut than the reduction in total State appropriations, which were cut by 0.65 percent from FY 2010 to FY 2011.

Moreover, the State's revenue projections indicate that the State expects to have sufficient funds available to maintain its required level of State financial support for special education and related services in FY 2011. Current revenue projections provided to the Department by the State demonstrate that the State anticipates \$6,225,067,605 in total State revenues for FY 2011.³ These revenues exceed total appropriations by \$255,232,057 in FY 2011, an amount that is substantially higher than the amount by which the State failed to maintain financial support for special education and related services in FY 2011. We understand that revenue projections for FY 2011 have increased since the FY 2011 appropriations legislation was passed by the State legislature. We also carefully considered the State's position, discussed on May 4th and confirmed in your May 24, 2011 letter, that it did not increase its financial support for special education and related services once it passed its original budget for FY 2011 because it was not aware of its maintenance of effort shortfall until March 2011, and the surplus in FY 2011 was realized "outside of the budget cycle." While the Department is cognizant of the State's usual budget process, a shortfall in a State's required fiscal effort for special education and related

³ This figure is derived from the Board of Economic Advisors' May 12, 2011 estimate of \$5,958,897,625 in General Fund revenue, less the Tax Relief Trust Fund, in order to obtain a comparable figure to the one provided by the State in Attachment A of its May 24th, 2011 submission to the Department.

services may not be treated as an ordinary circumstance. In contrast to the information the State provided for FY 2010 with respect to its use of General Fund revenues, the State did not provide similar information for FY 2011. Rather, your May 24, 2011 letter merely stated that the General Assembly is debating the use of these funds and “until the budget process is completed...I cannot provide you with the exact manner in which these funds will be appropriated.”

The State has accumulated a surplus well beyond the size of its maintenance of effort shortfall and can rely on the existence of sufficient funds being available for special education and related services. Under these circumstances, the State must maintain financial support for special education and related services even if doing so requires the State to act outside of its normal legislative budget cycle. In short, the State has offered no fiscal or practical reason why the State did not – and could not *now* – make available an additional \$75,343,070 for special education and related services to meet its requirement under the IDEA to maintain fiscal effort in FY 2011. The State’s fiscal situation at the end of FY 2011 is in stark contrast to the State’s fiscal situation at the end of FY 2010. In FY 2011 the existence of a substantial surplus is certain, and the Department must consider it when weighing whether the State experienced an exceptional or uncontrollable circumstance. (The Department notes that, even if the State had not accumulated a substantial surplus in FY 2011, the State did not treat special education and related services equitably when compared to overall State appropriations. Accordingly, even if the State had not accumulated a substantial surplus, the Department would not have granted a waiver to the State permitting the State to cut special education and related services by 2.46 percent. Rather, based on the decrease in revenues when compared to the MOE base year and an examination of the proportionality of cuts to special education and related services compared to other appropriations, the Department would have granted a partial waiver to South Carolina of \$2,646,332, leaving a shortfall of \$72,696,737 for special education and related services for FY 2011.)

Therefore, while the State has not reached the level of revenue it had in 2008, because the State has a substantial surplus in FY 2011, accompanied by an increase in revenues from the prior year, the Department finds that the State has not experienced an “exceptional or uncontrollable” circumstance that prevents it from meeting its required level of State financial support in FY 2011. Accordingly, we have determined it would not be equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) that would permit the State to reduce financial support for special education and related services by \$75,343,070 for FY 2011.

Summary

When a State fails to maintain State financial support at the level required by law, the IDEA directs that the “Secretary shall reduce the allocation of funds under section 611 of the IDEA for any fiscal year following the fiscal year for which the State fails to comply with the requirement” 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). Accordingly, unless the State provides confirmation in writing to the Department that it has made available an additional \$75,343,070 in State financial support for special education and related services for FY 2011, the Department will reduce the State’s section 611 allocation by \$75,343,070, in addition to the \$36,202,909 by which the State failed to maintain effort in FY 2010, for a total of \$111,545,979. Because of the Department’s concern over this matter, several Department officials reached out to State officials

during the week of June 6th to alert the State to the Department's decision and to encourage the State to take action to restore funding for special education and related services for FY 2011, and offered the Department's technical assistance to the State to resolve this matter. We remain available to assist the State.

In addition, under 20 U.S.C. §1411(d)(3)(B)(i), (ii), and (iii), some of the State's minimum and maximum allocations for a fiscal year are based on the amount the State received for the preceding fiscal year. The reduced allocation that South Carolina will receive will be used as the amount the State received for the preceding fiscal year when the Department calculates the State's future grants.

Further, as discussed above, 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 FY 2012 is the same amount that would have been required in the absence of a waiver or a failure to maintain fiscal effort. We also want to make clear to the State that, when making decisions about its level of State support for special education and related services in FY 2012, the State should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services. Indeed, since the advent of the State's economic downturn, the State has had an opportunity to examine its sources and amounts of revenues and to plan accordingly, consistent with its obligations under the IDEA.

As you know, the State must ensure that LEAs do not count Part B IDEA ARRA 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 in 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 will be undertaking additional monitoring of South Carolina's implementation of Part B of the IDEA to assess whether a FAPE is still being made available to all children with disabilities. In addition, in light of the South Carolina Advisory Council on the Education of Students with Disabilities' duties under 20 U.S.C. §1412(a)(21)(D), particularly its duty under 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 these waivers, OSEP requires the SEA to prominently post on its Web site the State's February 24, 2010 and May 9, 2011 letters to the Department and this letter. In addition, OSEP is requiring the State to report to your OSEP State Contact on August 1, 2011, and December 1, 2011, 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 the current school year (2010-2011), including monitoring and reviewing complaints filed or hearings requested? and
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?

Page 8 – Honorable Dr. Mitchell M. Zais

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

Sincerely,

A handwritten signature in black ink that reads "Alexa Posny". The signature is written in a cursive, flowing style.

Alexa Posny, Ph.D.

Attachment

cc: South Carolina Advisory Council on the Education of Students with Disabilities

South Carolina IDEA MOE Waiver Request Data

	2007-2008 SFY 2008	2008-2009 SFY 2009	2009-2010 SFY 2010	2010-2011 SFY 2011	% change prior year FY 2008	% change prior year FY 2008	% change FY 2008
REVENUES							
General Fund	\$ 6,392,394,378	\$ 5,544,172,770	\$ 5,241,895,775	\$ 5,413,017,413			
Lottery	\$ 269,841,217	\$ 262,989,055	\$ 275,158,138	\$ 256,000,000			
Education Improvement Act	\$ 635,302,264	\$ 561,072,910	\$ 551,358,000	\$ 556,050,192			
TOTAL REVENUES	\$ 7,297,537,859	\$ 6,368,234,735	\$ 6,068,411,913	\$ 6,225,067,605	-4.71%	-16.84%	-14.70%
APPROPRIATIONS							
General Fund	\$ 6,597,675,103	\$ 5,682,262,921	\$ 5,215,060,312	\$ 5,191,885,141			
Lottery	\$ 272,128,271	\$ 271,760,556	\$ 262,027,686	\$ 255,716,300			
Education Improvement Act	\$ 659,875,000	\$ 545,191,538	\$ 531,507,880	\$ 522,234,107			
TOTAL APPROPRIATIONS	\$ 7,529,678,374	\$ 6,499,215,015	\$ 6,008,595,878	\$ 5,969,835,548	-7.55%	-20.20%	-20.72%
STATE FINANCIAL SUPPORT (per capita calculation)							
IDEA MOE BASE FY2008	\$ 424,311,879	\$ 416,805,807	\$ 413,300,247	\$ 410,232,370			
FY IDEA EFFORT	\$ 424,311,879	\$ 396,493,685	\$ 345,897,722	\$ 334,889,301	-12.02%	-16.31%	-2.46%
MOE DEFICIT	\$ -	\$ (20,312,122)	\$ (67,402,525)	\$ (75,343,070)			Total Shortfall: \$ (163,057,717)
WAIVED MOE SHORTFALL PENALTY	\$ (20,312,122)	\$ -	\$ (31,199,616)	\$ -			Total Waived: \$ (51,511,738)
	\$ -	\$ (36,202,909)	\$ -	\$ (75,343,070)			Total Penalty: \$ (111,545,979)