

# South Carolina's Legal Battle to Preserve IDEA Funding

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## IDEA Maintenance Of State Fiscal Support (MSFS)

- **34 CFR § 300.163 Maintenance of State financial support.**
- (a) *General.* 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.

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## 2009–10—The Problem Was Discovered

- During the 2009–10 fiscal year South Carolina Department of Education (SCDE) realized that it would not meet the MSFS requirements of the Individuals with Disabilities Education Act (IDEA)
  - The SCDE originally submitted its IDEA application indicating that it would not meet the MSFS requirement but was told by the United States Department of Education (USED) to resubmit the application and request a waiver.

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### How Did This Happen?

- What led to the SCDE getting out of compliance with the MSFS requirement of the IDEA?

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### The Great Recession

- Great Recession's Impact on South Carolina
  - Fiscal Year 2007–08 total revenue: \$7,297,537,859\*
  - Fiscal Year 2009–10 total revenue: \$6,068,411,913\*
  - Difference: \$1.2 billion less in revenue

\* General Fund, Education Improvement Act, and Lottery Revenue

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### Education Finance Act (EFA)—In A Nutshell

- The primary source of funding for students is through the EFA.
- The state funds 70% of what is deemed to be the "base student cost".
- The amount of funds generated by students is determined by a weighted formula.
- Different categories of students are given a different factor (1.0 to 2.57).
- When the state issued across-the-board spending cuts there was no way to hold special education harmless.

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### Waiver Request

- The SCDE resubmitted the request on February 26, 2010, requesting a waiver under 34 C.F.R. § 300.163(c).
  - based on a severe and precipitous decline in state revenue, which was outside of the control of the SCDE and the state legislature.
- As of January 2011, the USED had not made a decision regarding the waiver request.

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### Change In SCDE Administration

- The new administration took office in January 2011.
- The SCDE renewed efforts to have the USED respond to the waiver request.
- During this effort it became clear that, based on appropriated revenues, the SCDE would not meet the MSFS requirement for 2010–11.
- Also discovered was a \$20,312,122 shortfall for the 2008–09 fiscal year.

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### USED Assistance

- In May of 2011, the USED staff came to SC to help the SCDE determine if there was a way to reduce the deficit and to help us compile the documentation needed to support the waiver request.
- The USED staff looked at all types of revenue and from that meeting, the USED and the SCDE, agreed upon the figures that would be used to support the waiver request.

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### Final Waiver Request

- Mick Zais, Ph.D., State Superintendent of Education, submitted a final waiver request on May 9, 2011, and the supporting documents were submitted on May 24, 2011, for:
  - 2008–09 (\$20,312,122)
  - 2009–10 (\$67,402,525)
  - 2010–11 (\$75,343,070)
  - Total request: \$163,057,717

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### USED Decision

- June 17, 2011—Dr. Alexa Posny
  - Granted the waiver, in full, for 2008–09.
  - Granted a partial waiver for 2009–10.
    - Denied the waiver of \$36,202,909.
  - Denied the waiver, in full, for 2010–11.

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### SCDE Reaction

- Dr. Zais requested that the SC General Assembly (SCGA) allocate \$75,343,070 to school districts. His request was granted, and
  - Those funds were allocated to school districts on the last day of the fiscal year.
  - The SCDE notified the USED that the funds were allocated and the USED deemed the SCDE met MSFS for the 2010–11 fiscal year.

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### South Carolina's Future "Fix"

- Beginning with the 2011–12 fiscal year, the SCDE implemented a funding "plug" for MSFS through a proviso in the appropriations act.
- The "plug" is determined by subtracting the amount of funding allocated for children with disabilities through the EFA formula from the amount needed to meet the MSFS requirement.
- The SCDE has to inform the SCGA by December 1, of the current year, of the MSFS requirement.
- Because the SCDE's EFA funding, in general, has not been restored to pre-2008–09 levels, the state cannot meet the MSFS requirement without the supplemental funding.

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### Appeal Of Denial

- The SCDE requested information about appeal rights.
- The SCDE was told by USED's attorney that there was no right to appeal this decision under the IDEA.
- SC looked at 34 CFR § 300.179 which states, a state is entitled to "notice and a hearing" before determining that it is not eligible to receive a grant.

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### IDEA Hearing Rights

- **34 CFR § 300.179. Notice and hearing before determining that a State is not eligible to receive a grant.**
- (a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State—
  - (i) With reasonable notice; and
  - (ii) With an opportunity for a hearing.
- (2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the SEA by certified mail with return receipt requested.

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### USED's Argument

- The USED argued that it was not "withholding" funds when it reduced SC's funding by \$36.2 million.
- It also argued that the issue didn't involve eligibility because SC was deemed eligible for the grant.

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### Impact Of Funding Reductions

- 34 CFR § 300.163 states:
  - (b) *Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under section 611 of the Act for *any* fiscal year following the fiscal year in which the State fails to comply with the requirement of paragraph (a) of this section by the same amount by which the State fails to meet the requirement.

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### Any Fiscal Year

- The USED interpreted this language to mean that the funding reduction would be in *perpetuity*.
- The SCDE did not have a chance to challenge this interpretation because Congress acted to limit the reduction in funds to one year, in the *Consolidated and further Continuing Appropriations Act, 2013*. (H.R. 933)

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### SCDE's First Move

- On August 1, 2011, the SCDE filed an appeal with the Office of Hearings and Appeals.
- The SCDE argued that the IDEA provided a right to an appeal under 34 CFR § 300.179.
- In the alternative, the SCDE argued that the General Education Provisions Act (GEPA) applied under 20 USC § 1234d.
  - The SCDE argued that the Office of Administrative Law Judges (OALJ's) decision in *The Matter of State of California* was controlling.
    - The Secretary reversed that decision but it was never appealed.

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### SCDE's Subsequent Filings

- After receiving no response, the SCDE filed a motion to expedite on September 16, 2011.
  - The SCDE still received no response.
- The SCDE filed a request for Reconsideration of the Denial of Waiver/Reduction in Funds on September 28, 2011.
- On November 15, 2011, the USED's Secretary of Education, Arne Duncan (Secretary Duncan), issued an order requiring the Office of Special Education and Rehabilitative Services (OSERS) to file a brief addressing the SCDE's "claim that it had not been provided with an appropriate hearing."

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### OSERS's Reply

- On December 15, 2011, the OSERS issued a ruling on the SCDE's request for reconsideration, upholding the original ruling.
- On December 16, 2011, the OSERS submitted a response to the SCDE's appeal.

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### Secretary Duncan's Order

- On May 22, 2012, Secretary Duncan issued an order ruling that the SCDE had no right to appeal under the IDEA or under the GEPA and dismissed the case.
- This was the final order that the SCDE was waiting for--
  - The SCDE appealed this decision to the 4<sup>th</sup> Circuit Court of Appeals.

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### Why File In The 4<sup>th</sup> Circuit?

- The appeal of the decision made by the Secretary shall be made to the "United States Court of Appeals for the circuit in which the State is located" 34 CFR § 300.184 and 20 USC § 1416(e)(8).
- "If any state is dissatisfied with the Secretary's action with respect to the eligibility of the state under section 612, such state may. . .file with the United States Court of Appeals."

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### Department Of Justice (DOJ)

- The DOJ filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the matter should be heard in district court.
  - The DOJ argued that the state's had a right to appeal the issue of the denial of the waiver in district court
  - The Court of Appeals differed on the DOJ's motion to dismiss until after a full briefing.

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### Court Of Appeals

- The SCDE maintained the argument that the MSFS is one of twenty-five eligibility requirements, and because the SCDE received the full waiver for the 2009–10 year, it did not meet all of the eligibility requirements under the IDEA.
- Once a state is deemed ineligible, the appeal rights in 34 CFR § 300.179 apply.

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### 4<sup>th</sup> Circuit Ruling

- “[W]e do agree that in this case, the partial denial of the maintenance-of-effort waiver not only provides us with jurisdiction under Section 1412(d)(2) but also amounts to a ‘determination that a State is not eligible’ for under Section 1412(d)(2), albeit only to the extent of \$36.2 million.”
- “Thus, under Section 1412(d)(2), South Carolina was entitled to notice and an opportunity to be heard before a final determination on its waiver request was made.”

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### Planning For The Loss Of Federal IDEA Funds

- With knowledge that its IDEA funds were going to be reduced by \$36.2 million, the SCGA allocated funds to replace those IDEA funds, if necessary.
- When the Court ordered the restoration of funding to the SCDE, those funds were not needed, and were allocated to the school districts for general purposes.

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### Uncertainty

- Because of the uncertainty of the SCDE's future IDEA funding, due to the fact that the administrative hearing is still pending, Dr. Zais requested the availability of \$36.2 million in additional funding for the 2014–15 budget in the event the SCDE's future IDEA funding is reduced in a future year.

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### Where Are We Now?

- The Court of Appeals ordered the restoration of the \$36.2 million.
- The SCDE filed a request for appeal, with Secretary Duncan, of the denial of the entire request for a waiver of MSFS for fiscal year 2009–10.
- Secretary Duncan issued an order allowing the Office of Hearings and Appeals to have jurisdiction over the hearing.
- To date, the SCDE has not had a hearing.

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### After The Administrative Hearing

- The case won't necessarily end after the administrative hearing.
- Secretary Duncan has the right to review the administrative judge's decision.
- Secretary Duncan's decision is reviewable under 34 CFR § 300.184 and 20 USC § 1416(e)(8)—
  - The same provisions in which the 4<sup>th</sup> Circuit used to find jurisdiction was proper.

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### Importance Of Case

- Provides a right to appeal *anytime* there is a determination that a state doesn't meet the MSFS requirement—
  - It is much broader than a denial of a waiver request
  - Anytime there is a disagreement with regard to the "amount" of SFS that would result in the automatic reduction in funds, I believe this case gives the state the right to a hearing

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### Questions?

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