



UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

October 25, 2010

Honorable Mark Parkinson
Governor of Kansas
Capitol Building, Room 212S
Topeka, Kansas 66612-1590

Dear Governor Parkinson:

On March 16, 2010, the U.S. Department of Education (Department) granted a partial waiver in the amount of \$44,486,326 to Kansas for State financial support for special education and related services for children with disabilities for State Fiscal Year (SFY) 2010 (July 1, 2009-June 30, 2010) 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). Subsequently, in a letter dated March 24, 2010, the State requested that the Department amend the waiver amount to \$58,174,427. On June 30, 2010, the State submitted a final request. The State's final request is to amend the waiver amount for SFY 2010 from the \$44,486,326 granted by the Department on March 16 to \$55,492,707.

The State submitted its initial request for a waiver to the Department in a letter dated May 22, 2009. In the May 22, 2009, letter, Kansas asked to reduce State financial support for special education and related services by \$60,212,507, which represented a 14.1 percent decrease for SFY 2010 when compared to the prior fiscal year. After requesting and receiving additional information, the Department, in its March 16 response letter, granted a waiver permitting Kansas to reduce the amount of State financial support for special education and related services for SFY 2010 by \$44,486,326. This reduction represents a 10.4 percent decrease from the amount of financial support made available by the State in SFY 2009, as then calculated by the State. The Department did not grant the State the full amount of the waiver that it requested because the Department determined it was inequitable to allow disproportionate reductions in the amount of State financial support for special education and related services when compared to reductions in the State General Fund as a whole.

Thereafter, as indicated above, the State submitted a request on March 24 to amend the amount of the waiver to \$58,174,427. Before the Department could respond to that request, the State informed the Department that it intended to submit another, final, request for a waiver. In a letter dated June 30, 2010, Kansas amended its waiver request for SFY 2010 from the \$44,486,326 granted by the Department on March 16 to \$55,492,707. The State is seeking an increase in the amount of the waiver granted on March 16 because the State's appropriations for its General Fund changed between the time the Department granted the waiver and the State's final request on June 30. In support of its request, the State submitted final appropriations figures for its State

General Fund for SFY 2010. The State's revised calculations for the State General Fund reflect a 12.3 percent decrease in appropriations for SFY 2010 when compared to SFY 2009. (The State had previously submitted documentation of a 10.4 percent decrease in appropriations for the State General Fund for SFY 2010 when compared to SFY 2009.) In addition, the State recalculated its level of financial support for special education and related services for SFY 2009 and SFY 2010 to reflect final figures for SFY 2010, and to reflect financial support provided by the State educational agency as well as other State agencies, consistent with the guidance provided by the Office of Special Education Programs' (OSEP's) 10-5 Memorandum issued December 2, 2009. The revised calculations for State financial support for special education and related services are \$433,384,169 for SFY 2009 and \$377,891,462 for SFY 2010, which represents a 12.8 percent decrease in the level of financial support for special education and related services.

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 made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. 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. As noted in our March 16, 2010, letter, the Department is aware that the State faces a difficult financial situation and has experienced a significant overall decrease in revenues from SFY 2009 to SFY 2010. However, 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 children with disabilities, as required in 20 U.S.C. § 1412(a)(1) and 34 CFR § 300.101.

In reviewing your June 30 request, to determine whether granting a waiver would be equitable, we considered all of the information provided by the State in all of its submissions--including that the reduction in the level of financial support for special education and related services of 12.8 percent represents a higher percentage reduction than the decrease of 12.3 percent in the State General Fund as a whole. We also considered the manner in which the State treated special education when compared to its appropriations for other agencies in the State, and 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 proposed waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act of 2009 (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make FAPE available to all children with disabilities in SFY 2010. Accordingly, we have determined that it is not 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 the full amount requested of \$55,492,707 for SFY 2010.

However, we have determined that it is equitable to grant a partial waiver due to exceptional or uncontrollable circumstances – the precipitous and unforeseen decline in the financial resources of the State – permitting Kansas to reduce the amount of State financial support made available

for special education and related services for SFY 2010 by \$53,306,253. The \$53,306,253 represents a 12.3 percent decrease from its level of State financial support made available for special education and related services in SFY 2009. This brings the percentage decrease in the level of financial support for special education and related services in line with the percentage decrease in the level of appropriations from the State General Fund. The decision to grant a partial waiver relies heavily on the award by the Department to the State of substantial Part B ARRA dollars during this time period. Without those dollars, reductions in the State's level of financial support for special education likely would have adversely affected the State's ability to ensure that FAPE was available to all children with disabilities residing in Kansas and that result is incompatible with the IDEA.

In granting this partial waiver, we want to be clear to the State that, when making decisions about its level of State support for special education and related services in SFY 2011, the State should not anticipate, or rely on, a waiver of the requirement to maintain financial support for special education and related services. Indeed, since the advent of the State's economic downturn, the State will have had an opportunity to examine its sources and amounts of revenues and to plan how it will meet its obligations under the IDEA. In addition, as provided by 20 U.S.C. § 1412(a)(18)(D) and 34 CFR § 300.163(d), the amount of financial support required of the State in SFY 2011 is the same amount that would have been required in the absence of this partial waiver (i.e., \$433,384,169).

When a State fails to maintain financial support at the level required by law, the Department must 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). The State's submissions to the Department in support of its waiver request document that it has failed to maintain financial support for special education and related services for SFY 2010 by \$2,186,454--the difference between the amount of financial support required to have been made available under this partial waiver (\$380,077,916) and the level made available by the State in SFY 2010 (\$377,891,462). Accordingly, the Department must reduce Kansas's Section 611 allocation for Federal Fiscal Year (FFY) 2011 by \$2,186,454. The funds that are not allocated to Kansas for FFY 2011 based on this reduction will be distributed, under the statutory formula, to other States as part of their FFY 2011 allocations.

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 or Federal funds for which accountability to the Federal government is not required.

The Department will be undertaking additional monitoring of Kansas's implementation of Part B of the IDEA to assess whether FAPE is available to all children with disabilities, even though the

State has been granted the partial waiver described above. OSEP is working with the State to finalize the plans for these monitoring activities. In addition, in light of the Kansas Special Education Advisory Council's 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 the Council with a copy of this letter.

To ensure that the public is fully informed regarding the partial granting of this waiver, OSEP requires the SEA to prominently post on its Web site the State's March 24, 2010, and June 30, 2010, letters to the Department and this letter. In addition, OSEP is requiring the State to report to your OSEP State contact on January 10, 2011, and May 1, 2011, information related to the following:

1. what action is the State taking, or did the State take, to ensure that children with disabilities are receiving FAPE during the current school year (2010-2011), including monitoring, review of 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 children with disabilities are receiving FAPE?

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

Sincerely,



Anthony W. Miller

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