No. 18-60500

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS EDUCATION AGENCY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE SECRETARY OF EDUCATION

BRIEF FOR RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The decision of the Secretary of the U.S. Department of Education under review in this case correctly upheld the Department of Education's determination that Texas is ineligible for a portion of a future Individual with Disabilities Education Act (IDEA) Part B grant due to the State's failure to comply with the statutory maintenance of State financial support requirement in state fiscal year 2012. The Court has scheduled this case for oral argument on October 3, 2018, and respondent stands ready to present argument and answer any questions from the Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Legislative Materials:

STATEMENT OF JURISDICTION

On January 17, 2017, the United States Department of Education (Department) issued a proposed determination that petitioner Texas Education Agency (Texas) was ineligible for $33,302,428 of its Individuals with Disabilities in Education Act (IDEA) Part B grant in a future year because of its failure to meet the maintenance of State financial support requirement in that amount in state fiscal year (SFY) 2012. ROA.367-371. Texas requested a hearing, and, on May 23, 2018, an agency Administrative Law Judge (ALJ) issued a decision affirming the Department's proposed determination. ROA.384. The ALJ's decision became the final decision of the Secretary of Education (Secretary) on July 9, 2018. See 34 C.F.R. 300.182(g). Texas filed a timely petition for review on July 13, 2018. This Court has jurisdiction over the petition for review pursuant to 20 U.S.C. 1416(e)(8)(A).

STATEMENT OF THE ISSUES

To establish eligibility for federal funds under Part B of the IDEA, States must meet the express conditions set forth by Congress in the statute. This case involves one such condition − known as the maintenance of State financial support or "MFS" requirement − which provides that states must not reduce financial support made available for special education and related services below the amount of such support for the preceding fiscal year. 20 U.S.C. 1412(a)(18)(A). In its petition for review, Texas challenges the Secretary's decision that the State is ineligible for approximately

$33.3 million of its IDEA Part B grant due to failure to meet the MFS requirement by that amount in SFY 2012. The questions presented are as follows:

1. Whether the Secretary correctly determined that, under the plain language of the IDEA, Texas was ineligible for a portion of its IDEA Part B grant because of its failure to meet the maintenance of State financial support requirement in SFY 2012.

2. Whether Texas had sufficiently clear notice of the MFS requirement to satisfy the Spending Clause.

3. Whether even assuming *arguendo* that the language of the MFS provision were ambiguous, the Secretary properly determined that Texas's interpretation is contrary to the statute.

STATEMENT OF THE CASE

A. Nature of the Case and Factual Background

In the present action, petitioner, the Texas Education Agency, challenges the Secretary's decision upholding the Department's determination that Texas is ineligible for $33.3 million of a future IDEA Part B grant because it had failed to meet the MFS requirement by that amount in SFY 2012. Specifically, Texas contends that the MFS provision of the IDEA is ambiguous and fails to provide sufficient notice of the requirement that the State not reduce funding made available for special education and related services for children with disabilities − measured either in the aggregate or per-capita − from one fiscal year to the next.

B. Statutory and Regulatory Background

1. Part B of the IDEA, 20 U.S.C. 1400 *et seq*., authorizes the Secretary of Education to make grants to States to assist them in providing special education and related services to ensure that all children with disabilities are provided a free appropriate public education (FAPE). See 20 U.S.C. 1411. "Congress enacted IDEA in 1970 to ensure that all children with disabilities are provided a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (internal quotations and citations omitted). "After examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services." *Id.* (citing S. Rep. No. 105–17, at 5 (1997)). Congress enacted the 1997 Amendments "'to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education.'" *Id.* (quoting S. Rep. No. 105-17, at 3).

To establish eligibility for IDEA Part B funds, a State "submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the [] conditions" set out in twenty-five subparagraphs of Section 612(a) of the Act. 20 U.S.C. 1412(a). One of the

conditions that Congress added through the 1997 amendments is the MFS requirement. The MFS provision requires that a state plan include assurances that the State will "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." 20 U.S.C. 1412(a)(18)(A). The IDEA further provides that a State must use Part B funds "to supplement the level of Federal, State, and local funds" that are "expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds," unless a State obtains a waiver from the Secretary after providing "clear and convincing evidence that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. 1412(a)(17)(C).

2. If a State, despite making the required assurances in its state plan, fails to maintain its level of funding for special education and related services in a particular year, the IDEA directs the Secretary to "reduce the allocation of funds" to the State "for any fiscal year following the fiscal year in which the State fails to comply with the [MFS] requirement * * * by the same amount by which the State fails to meet the requirement." 20 U.S.C 1412(a)(18)(B). The Secretary must make this reduction in funding unless she grants the State a waiver under the two limited circumstances set forth in the statute See 20 U.S.C. 1412(a)(18)(C). First, the Secretary may waive the

MFS requirement, for one fiscal year at a time, if she determines that doing so "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." *Id.* Second, the Secretary may also do so if she determines that the State has met the standard in Section 1412(a)(17)(C) "for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter." *Id.*

3. The Department's regulations implementing the IDEA also set forth the MFS requirement. 34 C.F.R. 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"). And, in 2009, the Department further clarified the MFS requirement, and stated that the relevant comparison from one fiscal year to the next is "the amount of State financial support provided (made available) for special education and related services from year to year, regardless of the amount actually expended." ROA.176.

C. Administrative Proceedings

1. In its 2013 IDEA Part B grant application, Texas showed that its total "state financial support made available for special education and related services for children with disabilities" had decreased in SFY 2012 by over $377 million. See ROA.200. The Department notified Texas by letter of the apparent shortfall in meeting the MFS

requirement and requested additional information. ROA.209. Texas noted that the reduction in the aggregate amount made available was due to reductions in "enrollment and in the level of special education services required by individual children with disabilities being served," and contended that the Department should take both of these factors into account in determining whether Texas met the MFS requirement for SFY 2012. See ROA.212-213.

The Department informed Texas that consistent with the IDEA and implementing regulations, a State can meet the MFS requirement either by showing that the total amount of state funding made available was at least equal to the previous fiscal year (aggregate method) or that the state funding per individual child with a disability was at least equal to the previous fiscal year (per capita method). See ROA.209. Texas, however, proposed an alternative method of meeting the MFS requirement – one that takes into account reductions in services per child with a disability. ROA.225-226. Texas's proposed method – known colloquially as the "weighted-student model" (Pet. Br. 10) – "provides funding for students that receive special education services based on the number of hours of services received by the student each week," which is "expressed in terms of full-time equivalents." ROA.225. Accordingly, Texas does not use a per capita method for funding, but rather, "[f]unding is based on the amount of time that special education students are served in their instructional arrangements/settings." ROA.226. Funding for special

education therefore is reduced when Texas determines that "the severity of special education needs" of children with disabilities has decreased. See ROA.212.

After considering Texas's arguments and submissions, the Department took account of reductions in enrollment through application of the per capital method, but it explained that Texas's "proposed method of meeting MFS on a full time equivalency basis, rather than a total or per capita basis, is not consistent with the IDEA MFS requirement or implementing regulations." See ROA.242; ROA.367-368. Although the Department rejected Texas's proposed method of calculating MFS, after exchanges of information and further analysis, the parties agreed that, by correcting certain errors in calculations and applying the per capita method, Texas's shortfall in meeting the MFS requirement was only approximately $33.3 million for SFY 2012. See ROA.369-370. The Department notified Texas of the opportunity to seek a waiver under applicable statutory and regulatory provisions (see ROA.242-243 (citing 20 U.S.C. 1412(a)(18)(C), 34 C.F.R 300.163(c)), but the State did not do so. ROA.387. On January 17, 2017, the Department issued a proposed determination that Texas is ineligible for $33.3 million of a future IDEA Part B grant due to its failure to meet the MFS requirement by that amount in SFY 2012. ROA.367-370.

2. Texas requested a hearing, and, on May 23, 2018, following briefing by the parties, the ALJ issued a decision affirming the Department's proposed determination. ROA.384-390. The ALJ held that under the plain language of the MFS provision,

"states must maintain their previous level of appropriations funding special education services." ROA.387. The ALJ followed a binding decision of the Secretary in a prior case, which held that the language of the MFS provision was clear and unambiguous, and "simply prohibits a state from reducing its allocations, i.e., the finances made available to special education, from one fiscal year to the next." ROA.388 (internal quotations omitted). In addition, the ALJ noted that the Department had "provided guidance to states on this definition of MFS as early as 2009." *Id.*; see ROA.175 (Dec. 2009 Dept. of Education memo to Chief State School officers re MFS provision) The ALJ therefore concluded that Texas had clear notice of the requirement that it not reduce the amount of its special education funding from year to year. ROA.388.

The ALJ also rejected Texas's contention that the MFS provision was ambiguous because it did not specifically address whether the State could meet the MFS requirement under its "weighted student model" for funding special education and related services, which, according to Texas, fully funds the instructional needs of children with disabilities, even if aggregate and per capita appropriations are reduced. See ROA.389. As the ALJ explained, "[t]he Texas weighted student model contradicts the plain language of the MFS provision that Texas 'not reduce the amount of State financial support for special education' from one year to the next. *Id.* (quoting 20 U.S.C. 1412(a)(18)(A)). And, although the ALJ held that in light of the plain language it was unnecessary to examine congressional intent, he noted that

acceptance of Texas's alternative method of calculating MFS would "thwart[] the purpose of IDEA funding" by "allow[ing] a state to reduce or defund state contributions to special education funding, and shift to the federal government the burden of funding special education." *Id.*

The Secretary did not further review the ALJ's decision, which therefore became the final decision of the Secretary on July 9, 2018. See 34 C.F.R. 300.182(g). Texas filed a petition for review with this Court on July 13, 2018.

SUMMARY OF ARGUMENT

This Court should affirm the Secretary's decision because the plain language of the MFS provision is dispositive. Congress made clear that, as a condition of receiving full grant funding under Part B of the IDEA, a State must not reduce the amount of State financial support made available for special education and related services for children with disabilities. Here, there is no dispute that Texas reduced both the aggregate amount of funding it appropriated for such services as well as the amount of funding it appropriated per individual child with a disability in SFY 2012. That should end the matter. Texas did not comply with an unambiguous requirement on the face of the IDEA – *i.e.*, that States "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 of costs of educating those children, below *the*

amount of that support for the preceding fiscal year." 20 U.S.C. 1412(a)(18)(A) (emphasis added).

Texas's claim that it received insufficient notice of a condition on its IDEA Part B funding therefore fails. By conditioning states' receipt of federal grants on compliance with the expressly enumerated conditions in Part B of the IDEA, including the MFS requirement, Congress provided the requisite clarity. As the Department properly determined below, the MFS requirement unambiguously provides that States cannot reduce the amount of funding made available for special education and related services from one year to the next.

Moreover, even assuming *arguendo* that the statute were ambiguous, Texas's position would be unavailing because it clearly violated the MFS provision. The State's proposed alternative method of compliance with the MFS requirement, under which state funding is reduced when the State determines that the instructional needs of children with disabilities have decreased, is inconsistent with the statute because it allows a State to reduce the *amount* of funding made available for special education services, both in the aggregate and per child with a disability. Acceptance of Texas's method thus would permit a State to circumvent the IDEA's maintenance of State financial support requirement.

In short, regardless of what other methods might potentially satisfy the statutory standard, Texas's "weighted student model" does not. Neither Congress nor

the Department is obligated to specifically identify and address every conceivable method for complying with the MFS requirement. The MFS statutory requirement provided Texas with clear notice that it could not reduce state appropriations for special education and related services from one year to the next, and the State's proposed interpretation, which results in such a reduction, therefore conflicts with the plain language of the statute.

STANDARD OF REVIEW

Texas seeks direct review of an order of the Secretary of Education under the IDEA, which provides that the Secretary's findings of facts are reviewed under the substantial evidence standards. 20 U.S.C. 1416(e)(8)(C). This Court reviews administrative decisions "according to the deferential standards of the Administrative Procedure Act," under which the Secretary's decision must be upheld unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" or "'unsupported by substantial evidence.'" See *Cedar Lake Nursing Home v. HHS*, 619 F.3d 453, 456 (5th Cir. 2010).

ARGUMENT

I. THE LANGUAGE OF THE MFS REQUIREMENT IS UNAMBIGUOUS.

The starting point in this case – the plain language of the statute – is dispositive here. As the Supreme Court and this Court have emphasized, "[s]tatutory

construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009) (internal quotations omitted); see *Pilgrim's Pride Corp. v. Commissioner of Internal Revenue*, 779 F.3d 311, 315 (5th Cir. 2015).

The MFS provision of the IDEA requires that States not reduce the amount of financial support they make available for special education and related services from year to year. 20 U.S.C. 1412(a)(18)(A). In this case, however, the amount Texas appropriated in SFY 2012 for special education and related services was less than the amount that the State appropriated in SFY 2011, both with respect to the aggregate amount of funds and its funding per individual child with a disability. See ROA.367-370. The ALJ thus correctly held that under the plain language of the statute, Texas violated the MFS requirement, and that the Department properly determined that Texas is ineligible for a portion of its IDEA Part B grant in the same amount as the State had reduced its financial support for children with disabilities in SFY 2012. ROA.388.

A. To obtain a federal grant under Part B of the IDEA, States must satisfy express conditions set forth in the statute. See 20 U.S.C. 1412. These conditions include the MFS provision, which requires that States "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 of costs of educating those children, below *the amount of that support* for the preceding fiscal year." 20 U.S.C. 1412(a)(18)(A) (emphasis added). Congress thus made clear on the face of the IDEA that, to be eligible for IDEA Part B grants, States must "not reduce the amount" of funding they make available for special education and related services from one year to the next. *Id.* But Texas did just that in SFY 2012. Indeed, the record shows that Texas reduced the amount of financial support made available by approximately $33.3 million as compared to its SFY 2011 funding. See ROA.367-370.

Texas did not dispute that the amount of funding it appropriated in aggregate or per individual child with a disability in SFY 2012 was less than the amount appropriated in SFY 2011. Rather, the State argued that due to reduced levels of need of children with disabilities with respect to education, application of its "weighted student model," satisfies the MFS requirement because it "fully funds each special education student each year based on his or her unique instructional setting." See ROA.22.

Texas's contentions contradict the ordinary meaning of the phrase "reduce the amount of State financial support." At bottom, Texas's position is that so long as a State fully funds what it determines are the educational needs of children with disabilities, it has not reduced its "support" for special education and related services. Texas ignores the term "financial," which modifies support and makes clear that

Congress intended that States at least maintain the level of State funding available for special education and related services. See 20 U.S.C. 1412(a)(18)(A). Under Texas's interpretation, it could decrease the amount of funding made available for special education from year to year on the ground that it believes that children with disabilities needed fewer special education services. But the statute expressly forbids this; indeed, it requires that States "*not reduce* the amount of State financial support" from one fiscal year to the next. 20 U.S.C. 1412(a)(18)(A) (emphasis added). The plain language of the MFS provision therefore supports the Secretary's determination.

B. Before this Court, Texas again contends (Br. 18-23) that it satisfied the plain terms of the MFS requirement in SFY 2012. This contention is unavailing.

Texas's discussion (Br. 20-23) of the plain terms of the text of Section 1412(a)(18) fails to advance its argument. Texas notes (Br. 21) that where terms are undefined, the Court will apply their ordinary meaning. But doing so confirms the Department's interpretation. Texas does not dispute that to "reduce" ordinarily means to "diminish," or "make smaller," and that "support" ordinarily means to "pay the costs of" or "maintain." See Pet. Br. 21-22. Texas makes the puzzling assertion, however, that "[n]otably, 'support' does not necessarily mean 'spending' or 'financing.'" *Id.* at 22. Texas completely overlooks the fact that the statute expressly prohibits States from reducing "the *amount* of State *financial* support," thereby making

abundantly clear Congress's intent that "support" refer to state funding of special education and related services. 20 U.S.C. 1412(a)(18)(A) (emphasis added).

Texas's contention (Br. 23) that the phrase "made available" can include funding that "is not claimed or spent" similarly fails to support its position. Indeed, as the agency's decision made clear, it agrees that "'made available' means that the funds must be appropriated and capable of being used." ROA.387; see also ROA.161 n.3 ("'amount . . . made available' refers to the amount of financial support provided for special education related services from year to year, regardless of the amount actually expended"). The Department thus already took into account funds provided or appropriated by Texas in SFY 2012 when it determined that the State did not meet the MFS requirement by a shortfall of $33.3 million. See ROA.163.

In short, although Texas devotes several pages of its opening brief to dissecting the plain language of the statute, it fails to cast any doubt on the Secretary's holding below. On its face, the MFS provision requires that States not reduce financial support – i.e., appropriations or funding − made available for special education and related services below the amount of such support in the preceding year. The Secretary has no obligation to "prospectively resolve every possible ambiguity concerning *particular applications* of the requirements" for state eligibility to obtain an IDEA Part B grant. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) (emphasis added). Contrary to Texas's suggestion, the MFS provision is not

"'ambiguous' merely because it does not expressly forbid every possible mechanism for functional – but not actual – satisfaction of statutory requirements." *De Leon-Ochoa v. Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010). Otherwise, "near every statute would be 'ambiguous' and courts would have unfettered freedom to fashion creative mechanisms for satisfying the otherwise clear requirements mandated by Congress." *Id.*

Here, the underlying MFS requirement that a State cannot reduce the amount of financial support made available for special education and related services is clear and unambiguous. And the Secretary, in administering and enforcing the IDEA Part B grant program, has authority to determine whether particular state applications of that requirement comply with the statute. See 20 U.S.C. 1416(a)(1), (d), (e). Because Texas reduced its financial support made available for special education and related services from SFY 2011 to SFY 2012 by $33.3 million, it did not meet the MFS requirement. The Secretary therefore correctly determined that Texas was ineligible for $33.3 million of its IDEA Part B funding.

II. CONGRESS PROVIDED STATES WITH CLEAR NOTICE OF THE MFS PROVISION'S REQUIREMENTS.

The Secretary also correctly determined that Congress provided Texas with clear notice conditioning receipt of federal funding under the IDEA on compliance with the requirements set forth in Section 1412, including the MFS provision. See

ROA.386-388. Texas contends (Br. 32-38), however, that the MFS provision is ambiguous and therefore does not provide sufficiently clear notice of its requirements to validly condition Texas's eligibility for its IDEA Part B grant on compliance under the Spending Clause. Texas's argument fails because (1) as demonstrated, the MFS provision is unambiguous and Texas's interpretation is contrary to the statute's plain terms; and (2) the "clear notice" or "clear statement" rule applied in Spending Clause cases does not require a court to set aside all other canons of interpretation and accept implausible statutory arguments.

A. Under the Spending Clause, Congress "may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotations omitted). Congress "can, therefore, validly use its spending power to legislate conditions on the disbursements of federal funds *even though* those conditions would be unconstitutional if enacted as direct prohibitions." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 278 & n.23 (5th Cir. 2005) (citing *Dole*, 483 U.S. at 206-07). If Congress conditions the States' receipt of federal funds, however, it "'must do so unambiguously.'" *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *Pace*, 403 F.3d at 278. The Court thus must determine if a State had "clear notice" of the relevant condition

prior to accepting IDEA funds. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

In making this determination, courts "begin with the text" of the statute. *Arlington Central Sch. Dist.*, 548 U.S. at 296. Here, as the ALJ properly understood, application of the clear notice rule does not change the end result: the MFS provision unambiguously requires States, as a condition of obtaining federal funds under the IDEA, to maintain State financial support made available for special education and related services from one year to the next. 20 U.S.C. 1412(a)(18)(A). Congress thus provided the requisite clear notice on the face of Section 1412(a)(18)(A), which expressly imposes the MFS requirement as a condition of obtaining federal funding under the IDEA. See *Bennett*, 470 U.S. at 666 ("*Pennhurst* does not suggest that the Federal Government may recover misused *federal* funds only if every improper expenditure has been specifically identified and proscribed in advance"). The Department allows States to meet this clear requirement by showing (1) that the total amount of state funding made available for special education was not reduced from the previous year (aggregate method) or (2) that the state funding made available for special education per child with a disability was at least equal to that of the previous year (per capita method).

B. Texas relies on the Supreme Court's decisions in *Pennhurst* and *Arlington Central School District*, however, to argue that the MFS provision of the IDEA "does

not provide 'clear notice' of the aggregate and per capita metrics" that the Department applies in administering compliance with the statute. Pet. Br. 36. In those cases, the Court explained that a statute enacted pursuant to Congress's spending power ""is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist.*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17). But as the Supreme Court made clear in *Bennett*, *supra*, while grant agreements between a State and the federal government under the IDEA have "a contractual aspect," they "cannot be viewed in the same manner as a bilateral contract governing a discrete transaction." 470 U.S. at 669.

The Supreme Court's decision in *Bennett* is directly on point here. In that case, the Court considered the obligations of the States under Title I of the Elementary and Secondary Education Act. The Court rejected the contention that "because the grant program was in the nature of a contract, any ambiguities with respect to the obligations of the State must be resolved against the party who drafted the agreement, *i.e.,* the Federal Government." 470 U.S. at 666. "Unlike normal contractual undertakings, federal grant programs originate in and remain governed by the statutory provisions expressing the judgment of Congress concerning desirable public policy." *Id.* at 669. Accordingly, "[g]iven the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity

concerning particular applications of the requirements of Title I." *Id.* The Court explained that it was incumbent upon the State to seek clarification from the agency if it had any doubt about its obligations. *See id.* at 669 ("the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements"); *id.* at 672 ("if the State was uncertain" as to its obligations, "it could have sought clarification from the Office of Education").

The Supreme Court reiterated these principles in *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999). Citing *Bennett,* the Court explained that it had already rejected a "claim of insufficient notice under *Pennhurst* where [the] statute made clear that there were some conditions placed on receipt of federal funds," and had noted that "Congress need not 'specifically identif[y] and proscrib[e]' each condition in the legislation." *Id.* at 650 (alterations in *Davis).*

Just as in *Bennett*, where "the requisite clarity" to satisfy the clear notice rule was "provided by Title I," as "States that chose to participate in the program agreed to abide by the requirements of Title I as a condition for receiving funds," (470 U.S. at 666), the requisite clarity here is provided by the conditions set forth in IDEA Part B at 20 U.S.C. 1412, including the MFS requirement. 20 U.S.C. 1412(a)(18)(A). Congress was not required to set forth every method of calculating financial support that would or would not satisfy the MFS requirement, and given the cooperative

nature of the IDEA Part B grant program, the State could have sought clarification from the Department. See *Bennett*, 470 U.S. at 669.

As the Court recognized in *Bennett*, its prior decision in *Pennhurst* is entirely distinguishable. 470 U.S. at 665-66. In contrast to *Bennett* and the present case, *Pennhurst* involved statutory provisions that Congress had made clear "were intended to be hortatory, not mandatory." *Pennhurst*, 451 U.S. at 24. Moreover, the Court noted that the provisions at issue "lack[ed] conditional language," and the Secretary of Health and Human Services had "never understood [them] to impose conditions on participating States." *Id.* at 25.

Nor did the Supreme Court's decision in *Arlington Central School District* change the *Bennett* analysis. To the contrary, the Court recognized that the starting point remained the statutory text and emphasized that it had "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." 548 U.S. at 296. In *Arlington Central School District*, the Court addressed whether the IDEA provision that a court "may award reasonable attorneys' fees as part of the costs" authorizes prevailing parents to recover expert fees. *Id.* at 297. The Court held that it did not, as the relevant provision "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." *Id.* The Court further explained that the structure of the statute, the fact that the term "costs" is a term of art that

generally does not include expert fees, and recent Supreme Court precedent all indicated that the IDEA does not authorize an award of expert fees even in the absence of the clear notice rule. See *id.* at 297-302.

Here, in contrast, the IDEA unambiguously imposes a maintenance of financial support obligation on States, and the only question before the Court is the scope and interpretation of that clear obligation. See *Forest Grove Sch. Dist.*, 557 U.S. at 276 (distinguishing *Arlington Cent. Sch. Dist.*). That question involves application of ordinary principles of statutory construction; it does not implicate the clear notice rule. See *Bennett*, 470 U.S. at 665-66 (distinguishing *Pennhurst*). Applying those principles, it is clear that Texas violated the MFS provision by appropriating millions less in funding to educate students with disabilities in SFY 2012 than in SFY 2011.

C. Contrary to Texas's argument (Br. 34), this Court's decisions upon which Texas relies are also entirely consistent with the Secretary's determination below. In *Pace*, for example, this Court held that the IDEA validly conditioned receipt of federal funds on State waiver of Eleventh Amendment immunity. 403 F.3d at 282 (noting that "the conditions contained in" IDEA at 20 U.S.C. 1403 "are unambiguous"). The other cases upon which Texas relies are distinguishable because they involve statutes that fail to unambiguously make States or local governments subject to suit in federal court. See *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 330-331 (5th Cir. 2009) (statute did not waive State's Eleventh Amendment immunity; "spending provision is

not sufficiently clear in light of the Court's sovereign-immunity jurisprudence, rather than, strictly speaking, under *Dole*), *aff'd* 536 U.S. 277 (2011); *Hurst v. Texas Dep't of Assistive & Rehab. Servs.*, 482 F.3d 809, 814 (5th Cir. 2007); *United States v. St. Bernard Par.*, 756 F.2d 1116, 1121 (5th Cir. 1985). This case, in contrast, does not involve an issue of state immunity from suit, and does involve a statute that sets forth clear and unambiguous conditions for eligibility to receive federal grants.

Texas's reliance (Br. 34-35) on the Fourth Circuit's decision in *Virginia Department of Education v. Riley,* 106 F.3d 559 (4th Cir. 1997) (en banc), similarly fails to advance its argument. As an initial matter, the holding of that case – that the IDEA does not condition the receipt of federal funds on States' continued provision of education services to students with disabilities who have been expelled or suspended long-term due to misconduct unrelated to their disabilities – was overridden by Congress. See Pub. L. No. 105-17, § 612, 111 Stat. 37, 60 (1997). In any event, *Riley* is distinguishable because the court held that the plain language of the pre-1997 IDEA did "not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities." 106 F.3d at 561. In contrast, as set forth above, the IDEA expressly and unambiguously requires compliance with the MFS provision as a condition of receiving federal grant money.

Finally, Texas's contention (Br. 38-40) that the Department's argument that its interpretation was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), constitutes an implicit concession that the MFS provision is ambiguous is baseless. The Department raised *Chevron* only as an alternative argument; the Department's primary argument was (and is) that the statute is clear and unambiguous. See ROA.159-160. In any event, the Secretary's decision under review expressly held that it was unnecessary to reach the issue of *Chevron* deference because the MFS provision is unambiguous and Texas's interpretation is contrary to the statute. See ROA.388-389. For the foregoing reasons, that holding is correct, and the Secretary's decision should be affirmed.

III. TEXAS'S READING OF THE STATUTE IS IMPLAUSIBLE AND INCONSISTENT WITH THE STATUTORY LANGUAGE.

As demonstrated, the plain language of the MFS provision is dispositive, and provides clear notice of its requirement that States cannot reduce funding from one year to the next for educational services to students with disabilities. Even assuming *arguendo* that the language of the MFS provision were ambiguous, however, the Secretary properly rejected Texas's interpretation as "contrary to the plain text of the federal statute." ROA.389; see *Bennett*, 470 U.S. at 669-73 (even if there is "ambiguity in the application of [statutory] requirements to other situations," the State's interpretation must be rejected where '[n]o plausible reading of the statute" supports

it and it "clearly violated" statutory requirements). Indeed, in applying "the familiar *Chevron* framework," in which the Court "defer[s] to an agency's reasonable interpretation of a statute it is charged with administering," the Supreme Court has held that although an agency can "give authoritative meaning to the statute within the bounds" of any ambiguity, the "presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation" of the statute. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009). Rather, the interpretation still must be consistent with the statute's plain text. *Id.*

This principle applies with even greater force in the present case, since it is the U.S. Secretary of Education, not Texas, who administers and enforces state compliance with the IDEA Part B grant program, and there is no deference due to the State's interpretation of the statute. See 20 U.S.C. 1416(d), (e). As the ALJ explained, because Texas's "weighted student model" allows the State to reduce funding when it reduces the services that it determines are necessary for children with disabilities, it "contradicts the plain language of the MFS provision that Texas 'not reduce the amount of State financial support for special education' from one year to the next." ROA.389 (quoting 20 U.S.C. 1412(a)(18)(A)). In contrast, the methods that the Secretary uses to determine compliance with the MFS requirement both focus on the amount of *financial* support the State makes available for special education and related services: The aggregate method focuses on the total amount of funding, while

the per capita method focuses on the amount of funding per child with a disability. See ROA.209; ROA.367-368.

Allowing a State to satisfy the MFS requirement merely by showing that its "per-weighted-student expenditures" rather than aggregate funding or funding per individual student would give States far too much leeway to circumvent Congress's intent that, to be eligible for an IDEA Part B grants, States at least maintain the same amount of financial support for special education and related services from year to year. Cf. Pet. Br. 28. In real terms, while Texas's "per-weighted-student expenditures" may have remained the same from SFY 2011 to SFY 2012, the amount of financial support made available by Texas for educational services for children with disabilities was reduced because the State determined that for SFY 2012 children with disabilities needed funding for fewer services. Regardless of whether Texas properly found a reduced need for such instructional services, the resulting reduction in State financial support violated the plain meaning of the MFS provision. Indeed, the MFS requirement does not provide for any exceptions based on State estimates of reduced need for services or different levels of services. See 20 U.S.C. 1412(a)(18).

IV. THE DEPARTMENT'S INTERPRETATION OF THE MFS REQUIREMENT IS CONSISTENT WITH THE STATUTORY LANGUAGE AND CONGRESSIONAL PURPOSE.

As we demonstrated, the Secretary properly determined that (1) the language of the MFS provision is unambiguous; (2) the MFS provision satisfies the "clear notice"

rule under the Spending Clause; and (3) Texas's proposed method of complying with the MFS provision contravenes the plain language of the statute. This Court should affirm the Secretary's decision that Texas is ineligible for $33.3 million of its IDEA Part B grant on these grounds alone. Where, as here, Texas's interpretation is contrary to the plain language of the statute because it resulted in a reduction in funding for special education, this Court need not reach Texas's argument (Br. 27-31) that the Secretary's interpretation is unreasonable and ignores the statutory purpose of the IDEA. See *Bennett*, 470 U.S. at 670 (because the State's interpretation violated clear statutory requirements, Court had no need to determine "if a State may be held liable where its interpretation of an ambiguous requirement is more reasonable than an interpretation advanced by the Secretary"). In any event, Texas's argument is baseless.

A. Texas contends that the Department's acceptance of two methods – the aggregate and per capita methods – to calculate whether a State has complied with the MFS requirement "adds words that Congress left out." Pet. Br. 28-29. Texas notes that Congress did not prescribe the specific methods by which the Department should calculate the amount of financial support a State has made available in a particular year. That is true, but irrelevant. The IDEA Part B grant program, like the grant program administered by the Department under Title I of the Elementary and Secondary Education Act at issue in *Bennett*, *supra*, involves "multiple levels of

government in a cooperative effort to use federal funds." *Bennett*, 470 U.S. at 669. Such federal grant programs, "originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Id.* Congress need not set forth every possible mode of compliance with such statutory provisions, however. Rather, the Department, in administering the grant program, has leeway with respect to the methods it employs to determine whether a State has complied with statutory conditions on state eligibility so long as such methods are consistent with the statute. See *id.*

Here, Congress made clear in IDEA's MFS provision that a State must not "reduce the amount of State financial support" made available for special education and related services from year to year. 20 U.S.C. 1412(a)(18)(A). Texas does not challenge either of the Secretary's accepted methods for calculating financial support – i.e., the total amount of financial support made available (the aggregate basis) or the amount made available per child with a disability (the per capita basis) – as contrary to the statute. See ROA.159 n.1. That is not surprising, since Texas's shortfall with respect to MFS for SFY 2012 would have been even higher if the Secretary had not used the per capita method, which took account of declining enrollment in Texas. See ROA.367-368.

Rather, Texas argues that it is unreasonable for the Department to accept the per capita method–which allows a State to comply with the MFS requirement even if

it has reduced its total financial support for special education and related services so long as it has not reduced the amount of such financial support per child with a disability–but reject Texas's alternative "per-weighted-student expenditures" method. See Pet. Br. 28. Texas overlooks a key difference between the two methods, however: the per capita method focuses on the amount of "financial support" per individual child with a disability, and requires that a State not reduce the amount of funding made available to each student with a disability; while the "per-weighted-student expenditures" method would allow a State to satisfy the MFS requirement even if the State had reduced both the total amount of financial support made available *and* the total amount made available per individual child with a disability. It is thus Texas's interpretation, not that of the Department, which conflicts with the text of the IDEA.

B. Texas also claims that the Department's interpretation of the MFS provision "does not ask * * * whether 'children with disabilities' receive the funding they require." Pet. Br. 29. The Department does not ask that question because it is not the relevant inquiry with respect to the only statutory condition at issue here − the MFS provision. Rather, the Department asks a different question (and the only relevant question) in determining compliance with the MFS provision – *i.e.*, whether State funding for special education and related services is at least equal to the funding made available in the prior fiscal year. 20 U.S.C. 1412(a)(18)(A).

Texas also criticizes the Department for "tak[ing] a *statewide* view," rather than focusing on individualized funding for children with disabilities. See Pet. Br. 29. But the MFS provision on its face requires that "[t]he *State* does 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." 20 U.S.C. 1412(a)(18)(A) (emphasis added). Thus, because the statute focuses on State appropriations, the Department's focus necessarily must be on statewide funding.

Texas's contention (Br. 29) that the Department's interpretation renders the phrase "children with disabilities" superfluous is equally meritless. The phrase specifies that both the State financial support for "special education and related services" and the support "otherwise made available" must be for "children with disabilities" in order to be included within the calculation of whether a State has met the MFS requirement.

C. Texas's argument (Br. 30-31) that the Department's interpretation is inconsistent with the purpose of the IDEA also misses the mark. Texas contends that Congress's purpose in enacting the IDEA was "'to ensure that all children with disabilities have available to them a free appropriate public education [FAPE],'" and that its weighted student model complies fully with that purpose. Pet. Br. 31 (quoting 20 U.S.C. 1400(d)). The FAPE requirement and the MFS requirement are two

separate conditions of State eligibility for IDEA Part B grants, however, and Texas's contention thus conflates the programmatic FAPE requirement in 20 U.S.C. 1412(a)(1) with the MFS requirement in 20 U.S.C. 1412(a)(18).

Texas also overlooks the specific purpose of the MFS provision, which was to ensure that States do not reduce their own special education funding. See 20 U.S.C. 1412(a)(18)(A); see also 143 Cong. Rec. S4295, S4300 (daily ed. May 12, 1997) (statement of Senator Thomas Harkin) (MFS provision was meant "to ensure that increases in Federal appropriations are not offset by State decreases"); *id.* at S4304 (statement of Senator James Jeffords) (MFS provision "say[s] to the States that, if we give them more money, they can't just reduce their share").[1] As the ALJ explained in the decision below, "[a]ccepting Texas' interpretation thwarts the purpose of IDEA funding" because it "would allow a state to reduce or defund state contributions to special education funding, and shift to the federal government the burden of funding special education." ROA.389; cf. 20 U.S.C. 1412(a)(17)(C). Regardless of whether

[1] Texas's statement (Br. 26 n.4) that the ALJ "relied not on the statutory text, but rather on a floor statement of Senator Harkin" when analyzing congressional intent does not accurately reflect the ALJ's decision. The ALJ's primary holding, based on the statutory text, was that the MFS provision is clear and unambiguous. ROA.388. The ALJ cited Senator Harkin's statement only after expressly stating that because the text was so clear, "Congressional intent is not a required tool for statutory construction in this appeal." ROA.389. Accordingly, the ALJ cited Senator Harkin's statement as further support for Congress's purpose in the context of holding that even assuming *arguendo* that the MFS provision were ambiguous, Texas's interpretation is impermissible. See *id.*

Texas is in good faith providing a free appropriate public education to children with disabilities through application of its weighted student model, its interpretation, if accepted, would enable states to circumvent the IDEA's prohibitions on reducing State funding made available for special education. See *Bennett*, 470 U.S. at 664 ("[n]or do we think that the absence of bad faith absolves a State from liability if funds were in fact spent contrary to the terms of the grant agreement"); see also *Arlington Cent. Sch. Dist.*, 548 U.S. at 303 (Congress's goals of ensuring that a free appropriate public education is made available to all children with disabilities and safeguarding parents' right to challenge school decisions are "too general to provide much support for respondents' reading of the terms of the IDEA").

In short, Texas's interpretation of the statute would allow it to obtain full federal grant funding even when reducing State financial support made available for special education and related services for children with disabilities. Not only would this result be directly contrary to the plain text of the MFS provision, but it could also encourage state or local education agencies to reduce services provided to children with disabilities, so as to save State finances while continuing to obtain the same amount of federal grant funding.

This does not mean that a State has no recourse with respect to the MFS requirement if it can demonstrate by clear and convincing evidence that it is providing a free appropriate public education to all children with disabilities. Rather, Section

1412(a)(17)(C), which prohibits States from supplanting State funds with federal IDEA Part B grants, provides that "where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State." 20 U.S.C. 1412(a)(17)(C). In such circumstances, the Secretary may also waive the MFS requirement: "The Secretary may waive the [MFS] requirement, for 1 fiscal year at a time, if the Secretary determines that * * * (ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter." 20 U.S.C. 1412(a)(18)(C)(ii).

The Secretary may also waive the MFS requirement if she determines 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). Notably, the grant of a waiver in either of these circumstances does not equate to a finding of State compliance with the MFS requirement; to the contrary, the statute merely authorizes the Secretary to waive a State's non-compliance for a particular fiscal year.

Here, Texas has forfeited any argument that it is entitled to a waiver of the MFS requirement by failing to apply for one after the Department informed the State of its right to do so in the administrative process. See ROA.242-243; ROA.387.

Moreover, because Texas did not apply for a waiver, it did not even attempt to make the required evidentiary showing for obtaining a waiver in the administrative record. Accepting Texas's position based on arguments in its brief, without support from the record and outside the context of a waiver request, would permit an end run around not only the MFS requirement, but also the standards established by Congress for obtaining a waiver of that requirement. The sole question before this Court is whether Texas reduced the amount of State financial support made available for special education and related services for children with disabilities from SFY 2011 to SFY 2012. Because the answer to this question is yes, the Secretary properly determined that Texas is ineligible for a portion of a future IDEA Part B grant.

* * * * *

In sum, none of Texas's arguments can overcome the plain meaning of the statutory text of the MFS provision, which requires that States "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 of costs of educating those children, below *the amount of that support* for the preceding fiscal year." 20 U.S.C. 1412(a)(18)(A) (emphasis added). The Secretary's decision that Texas is ineligible for a portion of its IDEA Part B grant in a future year due to its failure to comply with the MFS provision in SFY 2012 is correct, and this Court should deny Texas's petition for review.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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September 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2018, I electronically filed the foregoing Brief For Respondent with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. I further certify that on this 11th day of September, 2018, I served the foregoing Brief For Respondent on counsel of record for petitioner by electronic service via the CM/ECF system:

s/ Stephanie R. Marcus
Stephanie R. Marcus

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I hereby certify that the foregoing brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. 32(a)(6). The word processing program (Microsoft Word 2013) used to prepare the brief reports that the brief is 8,372 words long. The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 with Garamond, 14 point font.

I further certify, pursuant to Fifth Circuit ECF Filing Standard A(6) that

(1) any required privacy redactions have been made;

(2) the electronic submission is an exact copy of the paper brief; and

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s/ Stephanie R. Marcus
Stephanie R. Marcus

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

Page

20 U.S.C. § 1412 State eligibility.

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children--

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility--

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

. . . .

(17) Supplementation of State, local, and other Federal funds

. . . .

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support

(A) In general

The State does 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.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that—

(i) 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; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement

to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

20 U.S.C. § 1416 Monitoring, technical assistance, and enforcement.

(a) Federal and State monitoring

(1) In general

The Secretary shall—

(A) monitor implementation of this subchapter through—

(i) oversight of the exercise of general supervision by the States, as required in section 1412(a)(11) of this title; and

(ii) the State performance plans, described in subsection (b);

(B) enforce this subchapter in accordance with subsection (e); and

(C) require States to—

(i) monitor implementation of this subchapter by local educational agencies; and

(ii) enforce this subchapter in accordance with paragraph (3) and subsection (e).

(2) Focused monitoring

The primary focus of Federal and State monitoring activities described in paragraph (1) shall be on—

(A) improving educational results and functional outcomes for all children with disabilities; and

(B) ensuring that States meet the program requirements under this subchapter, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

(3) Monitoring priorities

The Secretary shall monitor the States, and shall require each State to monitor the local educational agencies located in the State (except the State exercise of general supervisory responsibility), using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in the following priority areas:

(A) Provision of a free appropriate public education in the least restrictive environment.

(B) State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services as defined in sections 1401(34) and 1437(a)(9) of this title.

(C) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

(4) Permissive areas of review

The Secretary shall consider other relevant information and data, including data provided by States under section 1418 of this title.

. . . .

(d) Secretary's review and determination

(1) Review

The Secretary shall annually review the State performance report submitted pursuant to subsection (b)(2)(C)(ii)(II) in accordance with this section.

(2) Determination

(A) In general

Based on the information provided by the State in the State performance report, information obtained through monitoring visits, and any other public information made available, the Secretary shall determine if the State—

(i) meets the requirements and purposes of this subchapter;

(ii) needs assistance in implementing the requirements of this subchapter;

(iii) needs intervention in implementing the requirements of this subchapter; or

(iv) needs substantial intervention in implementing the requirements of this subchapter.

(B) Notice and opportunity for a hearing

For determinations made under clause (iii) or (iv) of subparagraph (A), the Secretary shall provide reasonable notice and an opportunity for a hearing on such determination.

(e) Enforcement

(1) Needs assistance

If the Secretary determines, for 2 consecutive years, that a State needs assistance under subsection (d)(2)(A)(ii) in implementing the requirements of this subchapter, the Secretary shall take 1 or more of the following actions:

(A) Advise the State of available sources of technical assistance that may help the State address the areas in which the State needs assistance, which may include assistance from the Office of Special Education Programs, other offices of the Department of Education, other Federal agencies, technical assistance providers approved by the Secretary, and other federally funded nonprofit agencies, and require the State to work with appropriate entities. Such technical assistance may include—

(i) the provision of advice by experts to address the areas in which the State needs assistance, including explicit plans for addressing the area for concern within a specified period of time;
(ii) assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research;

(iii) designating and using distinguished superintendents, principals, special education

administrators, special education teachers, and other teachers to provide advice, technical assistance, and support; and

(iv) devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service agencies, national centers of technical assistance supported under subchapter IV, and private providers of scientifically based technical assistance.

(B) Direct the use of State-level funds under section 1411(e) of this title on the area or areas in which the State needs assistance.

(C) Identify the State as a high-risk grantee and impose special conditions on the State's grant under this subchapter.

(2) Needs intervention

If the Secretary determines, for 3 or more consecutive years, that a State needs intervention under subsection (d)(2)(A)(iii) in implementing the requirements of this subchapter, the following shall apply:

(A) The Secretary may take any of the actions described in paragraph (1).

(B) The Secretary shall take 1 or more of the following actions:

(i) Require the State to prepare a corrective action plan or improvement plan if the Secretary determines that the State should be able to correct the problem within 1 year.

(ii) Require the State to enter into a compliance agreement under section 457 of the General Education Provisions Act [20 U.S.C.A. § 1234f], if the Secretary has reason to believe that the State cannot correct the problem within 1 year.

(iii) For each year of the determination, withhold not less than 20 percent and not more than 50 percent of the State's funds under section 1411(e) of this title, until the Secretary determines the State has sufficiently addressed the areas in which the State needs intervention.

(iv) Seek to recover funds under section 452 of the General Education Provisions Act [20 U.S.C.A. § 1234a].

(v) Withhold, in whole or in part, any further payments to the State under this

subchapter pursuant to paragraph (5).

(vi) Refer the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(3) Needs substantial intervention

Notwithstanding paragraph (1) or (2), at any time that the Secretary determines that a State needs substantial intervention in implementing the requirements of this subchapter or that there is a substantial failure to comply with any condition of a State educational agency's or local educational agency's eligibility under this subchapter, the Secretary shall take 1 or more of the following actions:

(A) Recover funds under section 452 of the General Education Provisions Act.

(B) Withhold, in whole or in part, any further payments to the State under this subchapter.

(C) Refer the case to the Office of the Inspector General at the Department of Education.

(D) Refer the matter for appropriate enforcement action, which may include referral to the Department of Justice.

(4) Opportunity for hearing

(A) Withholding funds

Prior to withholding any funds under this section, the Secretary shall provide reasonable notice and an opportunity for a hearing to the State educational agency involved.

(B) Suspension

Pending the outcome of any hearing to withhold payments under subsection (b), the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate funds under this subchapter, or both, after such recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate funds under this subchapter should not be suspended.

(5) Report to Congress

The Secretary shall report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate within 30 days of taking enforcement action pursuant to paragraph (1), (2), or (3), on the specific action taken and the reasons why enforcement action was taken.

(6) Nature of withholding

(A) Limitation

If the Secretary withholds further payments pursuant to paragraph (2) or (3), the Secretary may determine—

(i) that such withholding will be limited to programs or projects, or portions of programs or projects, that affected the Secretary's determination under subsection (d)(2); or

(ii) that the State educational agency shall not make further payments under this subchapter to specified State agencies or local educational agencies that caused or were involved in the Secretary's determination under subsection (d)(2).

(B) Withholding until rectified

Until the Secretary is satisfied that the condition that caused the initial withholding has been substantially rectified—

(i) payments to the State under this subchapter shall be withheld in whole or in part; and

(ii) payments by the State educational agency under this subchapter shall be limited to State agencies and local educational agencies whose actions did not cause or were not involved in the Secretary's determination under subsection (d)(2), as the case may be.

(7) Public attention

Any State that has received notice under subsection (d)(2) shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the State.

(8) Judicial review

(A) In general

If any State is dissatisfied with the Secretary's action with respect to the eligibility of the State under section 1412 of this title, such State may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of Title 28.

(B) Jurisdiction; review by United States Supreme Court

Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(C) Standard of review

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall be conclusive if supported by substantial evidence.

. . . .

34 C.F.R. § 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.

(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.

(c) Waivers for exceptional or uncontrollable circumstances. The Secretary may waive the requirement of paragraph (a) of this section for a State, for one fiscal year at a time, if the Secretary determines that—

(1) 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; or

(2) The State meets the standard in § 300.164 for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the Act.

(d) Subsequent years. If, for any fiscal year, a State fails to meet the requirement of paragraph (a) of this section, including any year for which the State is granted a waiver under paragraph (c) of this section, the financial support required of the State in future years under paragraph (a) of this section shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

United States Court of Appeals

FIFTH CIRCUIT
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September 11, 2018

Ms. Marleigh D. Dover
Ms. Stephanie Robin Marcus
U.S. Department of Justice
Civil Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Room 7539
Washington, DC 20530

No. 18-60500 Texas Education Agency v. EDUC
USDC No. 17-07-0

Dear Counsel,

We have reviewed your electronically filed Brief of Appellee and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L. Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

cc: Mr. James Cole Jr.
Ms. Elisabeth Prince DeVos
Mr. Kyle Douglas Hawkins