EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Plaintiff,

v. 25 Civ. 8547 (AS)

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*

Oral Argument

Defendants.

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New York, N.Y.
June 4, 2026
1:00 p.m.

Before:

HON. ARUN SUBRAMANIAN,

District Judge

APPEARANCES

NEW YORK LAW DEPARTMENT
Attorneys for Plaintiff
BY: MELANIE ASH
JUNE BUCH
GAVIN MACKIE
EMELINE KONG

U.S. ATTORNEY'S OFFICE, SDNY
Attorneys for Defendants
BY: JEFFREY S. OESTERICHER

THE DEPUTY CLERK: This in the matter of 25 Cv. 8547, *The Board of Education of the City School District of the City of New York v. The United States Department of Education et al.*

Will the parties, starting with counsel for the plaintiff, please state their appearances for the record.

MS. ASH: Thank you.

Good afternoon, your Honor.

Melanie Ash from the office of the corporation counsel on behalf of the plaintiff, the Board of Education of the City School District of the City of New York, and with me at counsel's table, I have my colleagues June Buch, Gavin Mackie, and Emeline Kong.

THE COURT: Good afternoon.

MR. OESTERICHER: Good afternoon, your Honor.

Jeff Oestericher, Assistant United States Attorney, for the defendants.

THE COURT: Good afternoon, Mr. Oestericher, and thanks to everyone for coming in.

All right. Some questions, and then I'll allow the parties obviously, to address anything that they would like.

Mr. Oestericher, first, just on the -- help me understand where we're at right now. My understanding is that a continuation decision was made with respect to the grants at issue, right?

MR. OESTERICHER: Correct.

THE COURT: And the GANS were issued, yes?

MR. OESTERICHER: Correct.

THE COURT: All right. So, as I understand it, the defendants' position is that there is still one remaining step before the signing of the check, which is an appropriate continuation award amount; is that right?

THE DEPUTY CLERK: Correct.

THE COURT: Okay. So can you help me understand where that second step, that interim step, comes from in the regulation?

MR. OESTERICHER: I will try, your Honor.

I think it's a two-step process. If you look at 34 CFR 75.253(d), this is relating to continuation awards. It says: Budget period. If the secretary makes a continuation award under this section. And then subsection (1), (d)(1): the secretary makes the award under § 75.231 through 75.236. Then, if you look at 75.231, it says: After selecting an application for funding, i.e., the continuation determination: the secretary may require the applicant to submit additional information.

And so we acknowledge that typically, a continuation determination is coupled with the continuation award, but in rare circumstances -- and we cite a couple in our papers -- and in this circumstance, the Department of Education required additional information, as in accordance with 75.231 and

75.118(a) in order to come with the amount, and that's how we submit how it works under the regulations.

THE COURT: All right. Is there any other regulatory basis for this step that we're dealing with now?

MR. OESTERICHER: That is the basis, we rely on.

THE COURT: All right. Understood.

And one of the things that the plaintiff has argued is that in the Washington litigation, counsel for the Department there had not referred to an interim step, had basically said that once the continuation decision is made and the GANS are issued, then the funding will flow.

So, do you have an understanding of why the Department is taking different positions in this case and in Washington?

MR. OESTERICHER: I don't.

I would make two points. One is, that is the typical consistent practice, that they are coupled either together or very shortly thereafter, so he may have been just speaking of the typical practice. This case is not the typical case. We cite two cases from the same grant program in Texas 2021 where the same procedure was used, so I think that is what accounts for it.

I would also say, the order in the state of Washington case does bifurcate it. It talks about a continuation determination on a specific date and a continuation award on another date. Your Honor's order speak of a continuation

determination.

THE COURT: And just to get down to brass tax, the plaintiff here says this is all made up. Okay? This is contrived because the defendants did not want to have to make their continuation decision in the first place. They wanted to rely on the Title IX determination that the Court said was improper and I forced you to do something different, and because of that, someone sat in the lab and figured out a way that they could both comply with the Court's order and sort of string out things.

That's what the plaintiff says. That's coming from them. What's your response to that?

MR. OESTERICHER: I recognize the force of plaintiff's argument, that having issued a non-continuation decision that the Court found unlawful, DOE should not be allowed to needlessly delay and cause further harm to the plaintiffs. We take that point. But -- and we take the point that at the time we requested an extension, we had not figured things out. We were desperately having to comply with the Court's order and we had not figured things out, and we take that point as well.

But we submit, we did figure it out. The reason is not nefarious. The reason is -- if I might, and I'm sort of previewing my arguments, but -- I think plaintiff's approach to this does not make practical sense. They essentially argue that DOE has to put the genie back in the bottle and review

this as if we were back in 2025 based on the information DOE had back then and, presumably, make the decision it was going to make back then, consistent with prior years, and award them that type of money.

But we're not in September 2025; we're near the end of the school year. And it doesn't make practical sense that DOE should allocate money for programs that the New York City Public Schools are not going to run.

And I would further submit that the remedy they're looking for is more like a tort or contract remedy of being made whole, and I appreciate that, but this is an APA case and the relief the Court ordered was a continuation decision. And that, having looked at the regs, have figured it out, we submit is that we did.

THE COURT: I guess, two responses there. I think the plaintiff's position is that the decision really is a binary one, meaning that you either make a continuation award or you don't, and there's not a separate determination of what the amount should be. That's their position is that that's what the regulations refer to, and they cite to the same regulations that you were referring to.

And they note that in 34 CFR 75.253, the only provision there that refers to the determination of an amount is subsection (e), which refers to carryover funding. I don't think there's a dispute about that.

And so their point is that you just make the continuation award.

As to your point about the allocation of funds -- because you're saying: we're near the end of the school year, so, like, what are we doing here if we gave you the full amount. I suppose that the way that you would deal with that would be under subsection (e), right, because if there was leftovers funds, and then the schools wanted to use it for the following year, then the regulation says that the secretary may use that as an offset against funding in a future period. And so I think that's the way they reconcile the regulations is to say, that's how it's supposed to be done and that's how it traditionally has been done.

That's not to say that I understand your argument. I'm just trying to put this all together on the fly.

MR. OESTERICHER: That's those are fair points, your Honor. I would fall back on what I sort of said, which is that there are two examples from 2021 where it was done differently in this exact same program where there were special circumstances that required additional information, such that they had to use a two-step process. And in these unique circumstances, ten days was just not enough. These are taxpayer dollars, right, so they needed and need information to make the proper determination, and that's what they did.

THE COURT: Okay. And then obviously, I tried to get

the parties to put their heads together and solve this so I would not have to, and that was unsuccessful.

But you pointed to the ten days. The ten days, that's a long time ago, and so it seems like there's been enough time for, perhaps, the defendants to have made these terminations. Now we're sitting here and it's June 4. Where are we?

MR. OESTERICHER: I totally take that point.

Where we are is, June 30 is the date that DOE has set. I'm happy to discuss what we talked about, but I don't want to do it in a way that is unfair to the plaintiff. We tried to work it out. We offered a slightly earlier date based -- if they could respond to an additional request for certain information rapidly.

I understand that they are not willing, and I'm not saying -- I'm just saying we tried to move it up earlier, but June 30 is the expedited date. Our client would tell you that usually these things take months and so they are expediting it. They received most of the information they needed on May 15, is my understanding.

THE COURT: Okay. Thank you very much.

Ms. Ash, just a couple of questions. So, the first one is, let's say I grant the motion. What is it that you want? Help me frame that order, given the back and forth in the papers. I think initially, you had said that you wanted the GANS to be issued, but my understanding, from

Mr. Oestericher that the papers that I've seen, is that those were issued in April, and so that's not it.

MS. ASH: Right.

THE COURT: Just to give you something to start with and to make sure we're on the same page, is it essentially that, let's say by tomorrow at 5 p.m., the defendants make decide the appropriate continuation award amount and, for the avoidance of doubt, take any and all steps that are prerequisites to the funding of these grants.

I can't make them fund the grants. You'd have to go to the Court of Federal Claims for that, but just to be very clear, there's nothing else, just whatever it is, get it done by 5 p.m. tomorrow, and then, period; is that right, or is it something different?

MS. ASH: I think that's right. I think, though, the point your Honor made about a GANS having been issued, they were zero-dollar GANS. They were basically empty GANS. We're asking for GANS which reflect an actual continuation award along the lines of what your Honor said, so, taking all steps nest to come up with a determination -- which, we would say they've made a partial determination at this point; they haven't made a complete determination -- and so by 5 p.m. tomorrow, the time your Honor uses, again, that reflects a continuation award.

I would just point out, the name of a GAN is a Grant

Award Notification. It should notify of the award of a grant, of the grant award. Right now, we got a zero-dollar grant award, so it was an empty piece of paper with no legal effect other than to extend the time period of what was previously 6/30/2026, June 30. They extended it through the end of the grant period, which would have been September 30, 2026, but with $0 associated with that period.

THE COURT: All right. And in terms of the issue that I was talking to Mr. Oestericher about in terms of the amount, is it your position that there isn't like a determination of the amount. If you continue the grant, it just -- you continue the grant. Or am I wrong about that, that you can decide the amount; it's just that you have to do it at this same time that you make the continuation -- when you grant the continuation award.

Like, which one of those is right?

MS. ASH: A grant continuation includes an award. It must include an award by definition, and your Honor pointed to the language that we've cited in your papers. If it is actually going to be -- if the determination is to continue the grant -- because as your Honor pointed out, there were two options. They could have chosen not to continue. They chose to continue, which they have purported to do, there must be an award associated with that continue indication, or it is not a through continuation determination.

THE COURT: Is that -- just want to be -- like, I'm not going to use the language in the regulation, because I think sometimes it's a little confusing. Is that just a set amount? If they decide to continue is it just like: Well, then here it is, because you made -- it's a binary decision. It's, if you continue then the amount is X, or is it: No. If you continue, then there is, like, a determination of the amount; it's just that those two things have to be done at the same time.

MS. ASH: Technically, at the beginning, when these programs were chosen to receive awards, there was sort of an approximate or expected grant amount. Each year would be $2,999,999, basically, for each grant for each year for five years, so that was the expectation in the grant sort of announcement of these grants were available. It was up to a certain amount. That was the amount that was targeted for these particular grants.

As your Honor pointed out, there is a section where the Department of Education could make a determination to take into account carryover and make some adjustment to the amount, but the starting amount, the expected amount of all parties was, essentially, $3 million per grant per year for five years.

THE COURT: Okay. But it could be different.

MS. ASH: There is the ability for them to adjust that number based on -- I think, the most obvious was the one your

Honor pointed to, which was the language around carryover. They could determine that they would make some adjustment based on the fact that there was a significant amount of carryover.

THE COURT: But based on your organization's experience, what usually happens is that there will be a continuation award notification, and it has the amount in there.

MS. ASH: And it has always been 2.999 million.

THE COURT: All right.

MS. ASH: And then the money is carried over. Part of the reason behind this is because the grant, the initial grant period does not coincide with the school year, so you receive your grant mid-way, your first grant mid-way through the school year you are in the planning year of the process. And you could never spend the first grant, $3 million, in the remaining amount of that first year of your grant.

So it's carried over with the expectation that you will continue to use it. It will continue to be carried over every year. At the very end of the five years, there will be what's called a no-cost extension, which we've spoken about before in our papers, whereby the remainder of the carry-over would be used to wind down the program. Because the goal of program has always been self-sufficient, free-standing magnet schools that continue after the end of the five years of funding.

And the way in which that's done is by having these carry-overs allowed. At the end of the whole program, all of that carry-over money would be spent in that last year just to fully stand up the schools so that they're ready to proceed and operate without any further funding after that point.

THE COURT: All right. Just to be clear, let's say this fight never happened and there was a continuation award last year, and instead of 2,999,000 it was instead 2.5 million, okay? Is it your position that no, that the defendants could not do that? Like, they looked at it, they crunched the numbers, and they said: Actually, you only need 2.5 million. Is it your position they could not do that or, yeah, they could do that. If they use the information we gave them and they came up with a different number, then it is what it is?

MS. ASH: Theoretically, they could make a determination that they're not going to give the full expected amount, but it's never happened before.

THE COURT: Okay. All right. That's helpful.

And what is your response to the regulations cited by Mr. Oestericher -- so, I think the way he -- in the briefing, he cited to 34 CFR 75.231. That's the provision that generally says the secretary can seek further information.

But now I'm understanding, based on Mr. Oestericher's presentation, is that the reason that's relevant is because in subsection (d) of § 75.253, it refers to the making of a

continuation award and then in that context, refers to these other regulations, one of which says the secretary can ask for more information. So, he's saying: If that's true, then it has to be the case that in this context, having been put to the making of a continuation award, they can ask for more information. I think that's their position.

Do you have a response there?

MS. ASH: Our response is, firstly, we believe that allowing them to drag out the process -- as I think your Honor would characterize it, which we would agree -- they're stringing us along for -- now, we're almost a year --

THE COURT: I was characterizing your position.

MS. ASH: Understood. You're characterizing my position and I am saying you correctly characterized my position.

Basically, we do believe that they had the necessary information on April 8 when your Honor made the decision, because every other year, they have based their decision, made in September, on the prior year's annual performance reports which come out in May, and they reflect a half year worth of performance. That would be the typical process and so that was your position and it remains or position.

That being said, there can be situations where after they've received that APR, as they're called, they might request some additional information. That has happened in the

past in between May when that information goes to them and in September when they're supposed to issue their decisions.

I think the administrative record in this case shows that they didn't even look at the APR. They made their decision on unlawful grounds, which your Honor has vacated. So, our position is they had the information in their possession since last May. That being said, obviously this is important, and we recognize that we're trying to get a solution quickly.

On May 1, we produced to them full-year annual performance reports for last year. That is an additional six months worth of information, taking us through the entire year of the grant performance last year, which is supposed to be, under the registrations, what they base their determination on. We believe, as of May 1, even though we didn't believe we were required to produce it, we did produce it. We believe they had all the information they could possibly need to make determinations based on performance of the grants last year.

They underplayed, that suggesting they didn't get the information until May 15. They May it on May 1. On May 15, what they got was information about the current year's grant. From October 1 through the present, the schools have been operating on what we are calling an austerity budget. They have no new funding and they are using carry-over funding only, which, as your Honor knows, became available to them in

December, once there was a settlement on the preliminary injunction piece of this dispute.

So, they had no money at all until December. December, they got to access to the carry-over money but and so we have produced to them on May 15, which is three weeks ago tomorrow, three weeks, all of the information that they had request about the current year's performance. And so we're talking about it, they've had it for three weeks on the issue saying they need more time with it, which we think shows a decided lack of desire to expedite this decision.

Early on in the process before the original deadline, which would have been April 18, 10 days from your Honor's initial decision, they asked for a two-week extension and said if we produced information in one week, they could give us decisions in one more week. That would have been May 1.

We felt they didn't need additional information. We refused. And they chose not to come to this Court for more time. They chose not to bring a motion or in any way raise the issue with the Court. They did what we're calling self-help; they just decided we're going to do it in two parts, which we believe not compliance with this Court's order, which brings us here today before your Honor.

THE COURT: Help me with the numbers here, because I think what Mr. Oestericher said here today and what they've mentioned in their papers is that that carry-over funding

totaled up to over $7 million. And I know in reply you address that and you say: Well, actually, that's deceptive and there's no money left.

But can you put and finer point on it? When you say the schools were operating on an austerity budget, how can that be, given the amount of carry-over funding that was available? And then I've got another question on a related issue, but why don't you start there.

MS. ASH: Your Honor, basically the budgets -- the expected amount for each grant was $3 million, and the planning for these schools goes over the course of five years, so each year they have sort of planned ahead: These are the things we're going to accomplish in Year 1, in Year 2, in Year 3, with the goal of standing up, as I said, fully-sustainable magnet schools at the end of five years.

And so the make commitments. They hire contractors. There's a lot of relationships they build with, let's say, colleges to be able to grant college credits. It's very, very involved and very detailed. And those are laid out in these performance reports as well as in the initial application.

So we had a situation where they had no money through December because they were cut off, basically, from October 1 to December 1 with no funding whatsoever, so they had to basically act responsibly and cancel programs, stop planning avoid -- all of the things they would normally have done, they

couldn't do them. Once they received funding on December 1, they started to try to get back in place, get up to speed, make commitments where they could, but they obviously did not know when they would get a decision and they did not know what the decision would be from the defendants. And so they weren't able to run the full programming that they expected to run, planned to run.

And because of the difference between 7 million and 15 million, they had about half of the money that they would have expected to have in a full-funded year, and so about half the things they would have done, they were not able to do. So when I say austerity budget, 7 million sounds like a lot of money, but when they had planned $15 million of expenses of expenditures and activities and teachers and all of the other pieces, half of that money is a substantial cut, and that explains it.

Basically, while currently, they appear to have some money left in their accounts, the way in which these grants are funded is a reimbursement, so they have so make the contracts or hire the personnel or commit to the various things, issue purchase orders. They have to wait for the goods to arrive or for the services to be provided before they can pay for them. There's a time to pay for them, but the money has been spoken for. It's committed. It's encumbered to other, to specif- --

THE COURT: You're saying the 7 million has been

spoken for.

MS. ASH: Largely, with the exception of -- and I think we have two that are overdrawn, so they're in the negative, based on either expenses they have actually spent or drawn down or ones they've committed to, a lot of personnel costs. They have to pay teachers through the end of the school year, for example. They have various purchases they've made that they haven't yet received the items, or they've received them, but they still haven't finalized the payment for those goods. But they're encumbered. The money's not available to spend on any other purchase.

And so some of them, two of them are in the negative. One of them has $40,000 available to spend, and the other two have in the low $200,000s. So that, to us -- and that is not enough to make purchases for the summer. They usually spend the summer doing planning, doing teacher education. There would have been summer programming for students; that had to be cancered because they did not have funding for it.

So, we're talking about a situation that's desperate for the schools because they count on the summer funding to plan for the following year, so without the funding, they're left in a situation where they have n o ability to plan, and that's why we're here on an expedited bass.

THE COURT: Okay Mr. Oestericher says, look, we said June 30. Maybe we can push the date up a little bit. But

what's the problem with that?

MS. ASH: The problem with that is that by June 30, another three weeks will have passed and the schools will continue -- I mean, if they receive the amount of the award now, if they know what they have to spend, they can start planning now. But three more weeks and you've cut into the very limited amount of time they have to plan in the first place.

I would also say that normally, in a normal year they have carry-over, so they can also start spending for the following year knowing that they have some money to cover those things even before the subsequent year's grant decision is made in September. The longer they wait, every day takes away from their ability to try to recapture some of the things they've already lost and to plan for next year.

THE COURT: All right. Understood.

So, anything else you'd like to add, and then I'll obviously give Mr. Oestericher a chance to respond.

MS. ASH: A couple of things I would say. One is that I would say, your Honor, as you noted in your decision, they had the opportunity to ask for more time or to contest the scope of the injunction at the beginning. They had the opportunity to say to the Court: If your Honor makes this order, we need more information. They chose to make none of those representations and, as your Honor said, they waived

them.

We would submit that they were required to make this full decision by April 8, ten days after April 8, and they failed to do so. And their request from an extension from us is a reflection of the fact that they knew they had to make a complete determination. And should -- when we refused to give that extension, they should have come to this Court and asked for more time. Instead, they've taken upon themselves to just delay, and we think that reflects a lack of compliance with this Court's order or with the spirit of the order, at the very least.

I would also say that I think I pointed out that they have had the bulk of the information in their hands for five weeks. They've had the most recent information they requested, which is for the current year, for three weeks in their hands.

We brought this case as an expedited case for a reason, because the timing really matters here. We filed for a preliminary injunction. We agreed to do an expedited summary judgment motion. Your Honor has and expeditiously heard and decided this matter. We all thought we had a resolution, and now the only people are not, I believe, acting expeditiously is the government, and I would ask that they provide some actual, specific, concrete reasons why they can't act expeditiously.

They have said, sort of vaguely: We have these processes; they take time. Well, this is an expedited issue,

and they can act expeditiously, and we ask that they be ordered to act expeditiously by making these award determinations forthwith.

THE COURT: Okay. And so just to be clear to where we started from, in terms of if I were to grant the motion, the order that I would issue, would it essentially be that the defendants are required to determine the appropriate continuation award amount for the grants at issue by Friday at 5 p.m. and for the avoidance of doubt, defendants must make any determination that serves as the predicate for the funding of the grants by that deadline.

MS. ASH: I think that's right, as well as issue GANS reflecting those determinations.

THE COURT: Reflecting those --

MS. ASH: Those award determinations, the continuation awards amounts.

THE COURT: Okay. All right.

Mr. Oestericher.

MR. OESTERICHER: Thank you, your Honor.

Just a few points. On the carry-over balances, just so we're clear, I think the $7 million number was as of May 20. I think the actual carry-over balance set forth in ECF No. 95, the declaration of Jennifer Todd, paragraph 11, as of December 1, 2025, I think they had about 11 million, I think. May math on site may not be totally right, bit it's set forth

in paragraph 11. So I think the 7 million was as of May 20, and the actual carry-over from the beginning was closer to 11 million.

THE COURT: And what's your response to Ms. Ash's point that all of that money has been allocated and it correlates with either expenditures that have been made or that have been planned to have been made and so the residual amounts are either negative or very small amounts?

MR. OESTERICHER: It does appear, based on the representations that were made, that they've spent almost the entire budget amount through the allocated budget period, which is June 30. I don't have a basis to dispute that as I stand here.

A couple other small points. With regard requesting information and what dates are the appropriate dates for DOE to review, I, again, would rely on 75.118(A), which talks about providing the most current performance and financial expenditure information, which makes sense in this scenario where they're continuing the grant. They need to know, as the City has proffered, how much money they have left, what they intend to do for the period that's left, and therefore, asking for current information is important.

In addition to evaluating the amount, the budget amount -- and I don't mean to step on a difficult issue, but there also has to be a Civil Rights certification that goes

along with it. I understand that the Court found the prior basis to be unlawful, but they still have to go through that process in addition to reviewing the financial information for purposes of budgeting, which is another reason why it takes a little longer.

THE COURT: Why didn't all this stuff come up on the prior round of motions?

Because if you recall, the defendants' position on the motion for summary judgment and the cross-motion was that doing any of this stuff was -- should be going to the Court of Federal Claims because, essentially, we were ordering the defendants to may money. But now I'm hearing, for the first time, that there are like 20 different steps between the continuation determination and the payment of funds.

And so it seems like something's inconsistent, because it seems like you're saying there are now all these other things at issue, but none of this came up the last time we were here. And we had a hearing and we had these elaborate motions and all of that stuff, so what's going on?

MR. OESTERICHER: I get your point, but I may be missing some of it. A large part of what's being done -- so, we made a Tucker Act argument that the Court couldn't order the government to pay money and that should go to the Court of Federal Claims, and I understand the Court has rejected that.

But I don't think there are 20 different things going

on. What's going on is, essentially, two different things. One is the evaluation of the financial and the performance information in order to properly budget for the rest of this year -- the three-month period that's left -- as well as the certification that's required in order to make a continuation award, which is the Civil Rights certification, not based on a Title IX basis, unless we go through those procedures as set forth by the Court.

THE COURT: Okay. That's two. Anything else?

MS. ASH: I believe that's what's going on.

THE COURT: Well, you've got to issue the GANS.

MR. OESTERICHER: Yes.

THE COURT: So, those three things.

MR. OESTERICHER: Right.

But we would submit, your Honor, that they're complicated, that it's taxpayer money. We have to consider, as in (e), they don't have a carry-over balance, so getting the right amounts is important, based on the programming that they actually did and the programming they're projecting to do.

And DOE would submit that this is a process that usually takes several months and that they are trying to expedite it as fast as possible.

And I would raise that the delta between what the plaintiffs have requested, five days would be -- if it were five days from today would be June 9, and June 30 is three

weeks, which is not a --

THE COURT: So when the Court put in place that ten-day deadline, you're telling me that the defendants -- that you, representing the defendants, and the defendants, themselves, thought: The ten days just means we just need to say, yeah, we're going to continue your grant.

That amount of the grant might be zero, because we may determine that, you know, we can give you the green light but we're not going to give you any money, or maybe we're not going to certify you under the Civil Rights laws that you're in compliance, or maybe we won't give you a GAN that has an actual number in there, and we can do that on any timeframe that we want.

Is that what you're telling me?

MR. OESTERICHER: What I'm telling the Court is that when the ten-day order came, there was confusion. The typical scenario is that the continuation decision is coupled with the award, and there was sort of a frenzy of activity until we analyzed the regs and determined that a continuation determination can be a two-step process, as it was done for the two Texas schools in 2021 in the same program.

And I would submit to your Honor, to really step on a thorny issue, but if DOE wanted to act in bad faith, they would have awarded a normal amount, which surely would have sent them no the Court of Federal Claims at that point, in our view.

DOE, is -- I don't know the amount they're going to award, but DOE is trying to go through the proper steps to do a proper procedure. There was a lot of confusion because the typical process is, the continuation decision comes with the award. Ten days; oh, my God, how are we going to do that? We reached out for more time but then figured this out, not in, I think, any nefarious suggestion but in the way that we are going to continue these grants, but we need to figure out the amounts, and that's --

THE COURT: How could there have been confusion when the briefing of the motions had been over a course of months, and the defendants did not challenge the scope of the injunction?

To translate, you didn't raise any issue with the ten days that you were saying caused so much confusion and chaos after the Court's decision was reached.

MR. OESTERICHER: I take the Court's point.

I can only tell you that when the decision came down, that is what --

THE COURT: Understood.

MR. OESTERICHER: The last point I'll make -- which I've made before, but I can't resist -- 2575.31 speaks, and I do think the text really supports the two-step reading because it speaks of: After selecting an application for funding, DOE selected these grants for continuation and may require the

applicant to submit additional information, and that's what happened.

THE COURT: I mean, isn't that just the normal provision that just says that -- so, most people would probably think it's pretty obvious that if you just need information, you can go and get more information for whatever it is. And actually, you'd agree with me that that provision, 231, actually appears in the section governing the initial giving of a grant, right?

MR. OESTERICHER: Yes.

THE COURT: And the way that -- obviously, like, it's like, if you play for a grant and the secretary needs some more information, they can come ask for more information. I don't know if you need a regulation for that, but they put one in that said that you can do that. Right?

And so you seem to be trying to read that in a very focused way, to say that: Well, that actually means then, in the context of a continuation award, the secretary can have an additional step where they get further budget information and have an independent budget allocation step that's not in the regulations otherwise, but the secretary can basically do whatever they want because there's this provision about getting additional information. That's sort of how I'm understanding this.

MR. OESTERICHER: Yes, but no, your Honor, if I may

push back a little, because 75.253(d) incorporates that provision into continuation awards. That's why it works.

It says, if the secretary makes a continuation award under this section, which it's going to do, the secretary makes the award under 75.231. It incorporates the new grant provision into the continuation award, allowing the secretary, after selecting an application, to ask for more information.

And it's not used often, and I grant that, but it was used twice in the same grant program in 2021. And these are unusual circumstances where there was this whole period of performance and spend down that needed to be accounted for.

THE COURT: As to subsection (d), let's just look at this, since you've raised it. It says: If the secretary makes a continuation award under this section, then the secretary makes the award under 75.231 through 75.236, right?

MR. OESTERICHER: Correct.

THE COURT: So you would agree that ten days after the Court's decision, the secretary made a continuation award, right? I mean, that's what you said in your papers, so --

MR. OESTERICHER: No, made a continuation decision determination, I believe.

THE COURT: What's the difference?

MR. OESTERICHER: It's the two-step process. The secretary selected this application for continuation and then

it's going to make the award subsequent.

THE COURT: In the regulation, where does it say that there's a continuation decision and then, separately, a continuation award?

MR. OESTERICHER: It doesn't; it's only the section we're pointing to.

THE COURT: Okay. All right. Understood.

Anything further, Mr. Oestericher?

MR. OESTERICHER: No. Thank you.

THE COURT: Anything further, Ms. Ash?

MS. ASH: Two things just to correct myself, and I think my colleague is right that the $7 million figure we were working with was the figure that was in the declaration that reflected the more recent numbers and it was, in fact, around 11 million. My points stand that I made about how the money was spent and that it was less than they had originally planned and had budgeted for and plans for, but I just want to correct that it wasn't $7 million; it was more.

And the second point, I think, is the one your Honor is really highlighting. The language of the -- I'm looking for the numbers here. 75.231 is referring to an initial application. They didn't select an application for continuation.

Once the grant is selected in the initial part, there are five years of expectation, and it's not competing. It's a

non-competitive grant once it's been selected, because they're not competing with new applicants. They're all expected to get their continuation funding as a matter of course.

So the language actually reveals the fact that this regulation is not intended to address this situation. After selecting an application? Our applications -- first of all, we didn't submit applications. We submitted the documentation required for a continuation determination, but there was no application.

Because your Honor might recall that we submitted some regulations where they changed the regulation to make it to continuation was no longer an application. It became a process where it was expected and all you needed to do was put in your APR every year, and barring some problematic issues with your APR, you would receive your continuation. So the language of selecting an application makes clear that this is not intended to apply to a continuation, but rather to an initial application, so that would be my answer to that point.

Thank you, your Honor.

THE COURT: All right. And how do you -- just while you're on the subject, I think what Mr. Oestericher is saying is that if you -- you're right about how the regulation reads standing alone, but in subsection (d) of § 253, it says that if the secretary makes a continuation award, then the secretary makes the award under those provisions that you're talking

about. So, I think what he's saying is, the continuation award process matches the process of the initial award of the grant in terms of setting the amounts and everything else and that's what this provision is saying. And so I think that's his position.

Now, whether that means that there's something separate as between the continuation award notification and the continuation award amount, that, I think Mr. Oestericher is saying, yeah, that's not in there. So it may not get the defendants anywhere, but I think that's the point.

MS. ASH: I understand the point he's making.

I would say that the receipt of an APR is the up-to-date information. And so while we took the position, and I think we were justified in taking it, that they didn't need additional information, we have proceed provided it a long time ago now. I would submit, May 1 and May 15, they've had all the information.

So even if there was some entitlement to more information than we would have normally have provided, that time has passed, and they should expedite their decision. And they've had enough time, and I don't think they've provided any specific, concrete reasons why they can't expedite it and make it immediately.

THE COURT: Understood.

Let's take a five-minute recess, and we'll be back.

(Recess)

THE COURT: Plaintiff's motion to enforce the judgment is granted.

As an initial matter, defendants' argument that the Tucker Act strips this Court of jurisdiction to order defendants to determine the amount of the award is meritless. As the Supreme Court made clear in the *NIH* case, what the Tucker Act bars is an order to expend funds pursuant to a grant or other contract, so if defendants had done everything other than to sign the checks, the Court would lack the ability to order them to sign the checks. That much is clear.

But all plaintiff is seeking is for the defendants to determine the amounts of funding. If they determine the amounts of funding and then fail to actually disperse funds, plaintiff would have to go to the Court of Federal Claims under *NIH*. But there's clearly no Tucker Act issue here.

Moving to the merits, the Court finds that defendants forfeited any objection to waiting to determine the amount of the grants. As the Court noted in its prior order, defendants did not challenge the scope of any injunction.

While there might have been good arguments that ten days was too short a time to make a determination of the amount to be granted, defendants did not make those arguments at that time. Those arguments were, therefore, forfeited, and defendants cannot maneuver around a forfeiture by adding in

more steps into the grant process.

Defendants, themselves, tacitly conceded that no further determinations were required before funds were to be disbursed. In their summary judgment briefing, defendants tried to argue that a ruling in favor of the plaintiff would not tantamount to ordering defendants to expend funds, which is outside of the Court's jurisdiction. That has been shown should be clearly incorrect, as defendants were ordered to make a continuation decision, made such a decision, and yet no funds have flown.

But incorrectness aside, it shows that defendants never suggested that further steps were required between a continuation determination and the determination of a grant reward, since they even claim there were no steps between a continuation determination and the flowing of funds.

But even setting aside the forfeiture issue, defendants have not pointed to any basis in the regulations for making a continuation determination first and then making a determination as to the amount later.

The only regulatory basis cited to by the defendants is 34 CFR 75.231, but all this says is after selecting an application for funding, the secretary may require the applicant to submit additional information. Even without context, it is not clear what relevance that has, and it certainly does not mean that there is a separate step in this

continuation award process, nor is there anything in the regulation that would suggest that. In fact, in questioning counsel, he acknowledged that there was no specific regulation that has the multi-step grant approval process in the continuation context that he could point to.

All the defendants are left with is pointing to two isolated instances from several years ago where the determination of funding and the determination of amount were made separately, but it does not appear that the grantees there raised any challenge to the separate determinations, and those two instances do not allow the agency to otherwise avoid following these regulations.

So for these reasons, plaintiff's motion to enforce the Court's order is granted. The Court will docket a written order as well.

Now, Ms. Ash, I had mentioned tomorrow by 5 p.m., but I think in your papers you had said five days, and so I'm going to say five days as opposed to tomorrow, so that would be June 9. I have the language that I talked to you, Ms. Ash, about, and so that will be reflected in the order.

Anything else, Ms. Ash, that we should raise before we adjourn today?

MS. ASH: No, thank you, your Honor.

THE COURT: Mr. Oestericher, anything else that you would like to raise?

MR. OESTERICHER: No. Thank you, your Honor.

THE COURT: Very good.

Thanks, everyone, for coming in, for the good argument.

We are adjourned.

(Adjourned)