UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL CENTER FOR LEARNING DISABILITIES, KNOWLEDGE ALLIANCE, BNP EDUCATION PARTNERS LLC, and MASSACHUSETTS TEACHERS ASSOCIATION,	
Plaintiffs,	Case No. 26-cv-13019-ADB
v.	
OFFICE OF MANAGEMENT AND BUDGET, RUSSELL VOUGHT, in his official capacity as OMB Director, UNITED STATES DEPARTMENT OF EDUCATION, LINDA McMAHON, in her official capacity as Secretary of Education, MATTHEW SOLDNER, in his official capacity as Acting Director of the Institute of Education Sciences, and UNITED STATES OF AMERICA,	
Defendants.	

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE

MOTION HEARING

September 8, 2026

John J. Moakley United States Courthouse
Courtroom No. 17
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge for the District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 17, Boston, Massachusetts, on September 8, 2026.)

(Case called to order.)

COURTROOM CLERK: Will counsel identify themselves for the record.

10:31 MR. JACOBSON: Yes. Good morning, Your Honor. Daniel Jacobson for the plaintiffs.

MS. EISENBERG: Lynn Eisenberg for the plaintiffs.

MS. EL-MALLAWANY: Deana El-Mallawany, Protect Democracy, local counsel for all plaintiffs.

MS. LINDGRENSAVAGE: Cerin Lindgrensavage for the plaintiffs, Your Honor.

MS. MARANDOLA: Marissa Marandola for plaintiff, Massachusetts Teachers Association.

MR. LEACH: Ryan Leach for plaintiff, Massachusetts
10:31 Teachers Association.

MR. VELCHIK: Michael Velchik for the United States defendants.

THE COURT: Welcome back, Mr. Velchik. It's been a while.

MR. VELCHIK: Always a privilege.

THE COURT: Well said. Disingenuous perhaps, but well said.

All right, gang. So I'm wondering which of any of these issues you've agreed are mooted or not ripe at the moment, or is everything still alive?

Let's start with you. Let's start with him.

MR. VELCHIK: Our position is certainly to the extent that they were asking for the May spend plan and that's been produced, we think that's mooted out. With respect to all the

10:32 obligation claims, none of those are funds are uneven. The earliest batch is September 30, so we think that all of the obligation claims are not yet ripe. And in particular, I think the 750 million that's not ripe for --

THE COURT: Hold on. I know that's your position. Are there any that are agreed upon?

MR. JACOBSON: Yes, Your Honor. Our view is that none of the legal claims are mooted out as a matter of law, but several of our requests for relief are moot, specifically, our request for compelling the government or OMB to issue certain

10:32 apportionments that they've now issued or have produced a spend plan that government counsel mentioned.

If it's helpful, Your Honor, just because I know there's a lot of moving pieces here, we've prepared a summary chart that just organizes this. It certainly helps me. If I may give it to the Court.

THE COURT: Sure. Have you shown it to him? Is he in agreement that that chart is accurate?

MR. JACOBSON: Sorry, I have not given this to counsel beforehand.

MR. VELCHIK: I have never seen this.

THE COURT: Okay. You can let me know if you think it's inaccurate.

MR. JACOBSON: We tried to make it as factual as possible.

So as I was referencing, Your Honor, in that top row there are three of the four appropriations that are the focus of this case. As you can see on the far right column, they have now issued the apportionments. They have not for one of the four appropriations.

And then if Your Honor looks at the third row, the claim that focuses on not disclosing an apportionment, they have post-complaint produced that spend plan/apportionment, and I should say for the first row as well, all three of those apportionments that happened were post-complaint being filed.

THE COURT: Okay. All right. I have about an hour for this this morning, so I'm going to start by you making your arguments, and then I will follow up with questions that we have, if that makes sense to everybody.

MR. JACOBSON: Yes, Your Honor.

THE COURT: Over on the plaintiffs' side, if you could, he says that because it's not the 31st yet, none of these are really ripe for adjudication because they're intending on allocating all the funds prior to the 31st. So that's something you should hit in your presentation, but I'm going to more or less leave it to you at the moment.

MR. JACOBSON: Thank you, Your Honor. I will certainly make sure to hit that.

Your Honor, as I'm sure you're aware from having read the briefs, this case focuses on large part but not exclusively 10:35 on a once and now not obscure administrative process called apportionments, which is a statutorily created process under the Anti-Deficiency Act, which provides that, contrary to popular belief, when Congress appropriates monies for an agency like the Department of Education, the money does not go directly to the agency. Instead, the agency only receives the money after OMB, quote, "apportions" it to the agency.

And Congress provided for just a single purpose of this apportionment process under 31 U.S.C. 1512, which is for OMB to ensure that the agency doesn't spend its money too 10:35 quickly over the course of the fiscal year, such that the agency won't then go back to Congress and say, Oops, we spent our money too quickly, we now need, before the next regular appropriations bill, we need a supplemental appropriation.

That had been an issue back in the late 19th Century I believe, and so that's why Congress passed this process.

That's the sole purpose of it.

The critical features about apportionments is that in order to accomplish that purpose, OMB may specify an apportionment, certain time increments by which the money will become available to the agency. So OMB, our position is under the ADA, has to apportion all of the money within the first 30 days after an appropriations law is passed, but within that apportionment it can specify, for example, only a quarter of the money is available right now, the next quarter will become 10:36 available in three months, you know, the next quarter available in six months and so on, such that it's known to parties, outside parties that rely on this money and the agency when the money will become available to them, but it is delayed such that the agency doesn't spend its money too quickly.

The Anti-Deficiency Act is an incredibly powerful tool because it is legally binding. It is one of the few kinds of internal government laws that actually carries criminal penalties if agencies violate it. Specifically, if agency officials spend more money than OMB has made available for a 10:37 given time or spends money for a purpose for which OMB has said you can't spend it for, then the agency officials can be criminally prosecuted or face administrative penalties.

And it is because of that that it carries those consequences that OMB in this Administration has effectively hijacked the apportionment process and leveraged it in order to assert and micromanage federal agency spending across the government and try to accomplish unilaterally what OMB has been unable to accomplish through the constitutional and legislative process for Congress that's refused to enact OMB's preferred spending cuts.

So in this case, as Your Honor knows, we focus on the Department of Education funds and specifically educational research funds, mainly funds that are administered by what's known as the Institute of Education Sciences at the Department 10:38 of Education, or IES.

The case, as indicated on the chart, focuses on four specific appropriations plus one broader policy that's at issue in Count 6 of our complaint. Those appropriations are appropriations for IES, which is supposed to be divvied up among various IES programs. IES appropriations are somewhat different than normal in that they last for two years as opposed to just one fiscal year. So there's money that Congress appropriated in 2025 that now expires this year, September 30, so in 22 days.

10:38 Then there's a second appropriation that Congress appropriated in 2026 that doesn't expire until next year. We call that the 26/27 appropriation. And then there's other two programs we focus on. One is called the Comprehensive Centers Program, and one is called EIR, Education, Innovation, and Research. Those are programs typically run by Department of

Education, not IES, which is why they get their own separate appropriation, although the Administration recently moved them under IES. That money also expires this year, and then Comprehensive Center's money in particular expires in 22 days from now.

THE COURT: But I only need to focus on the September money, right?

MR. JACOBSON: Your Honor, that is our focus at this point in terms of obligating the funds. So with respect to 10:39 apportioning the money, we do think that it's extremely important that, as indicated in that top row, they have not apportioned $465 million of the IES funds that expire next year, but our focus for that is just on the apportionment by OMB or the lack thereof. It is not on the obligation. We're not bringing a claim saying they need -- that the Department of Education needs to spend that money now. We recognize -- and that was never a part of our -- education spending the money.

THE COURT: Okay.

MR. JACOBSON: Cutting just to Your Honor's question 10:39 about what's at issue that expires at the end of September, there is, for the Comprehensive Centers, the Department of Education has not obligated at this point $49.5 million of the $50 million that Congress appropriated, so 99 percent of the money remains unobligated.

And I will note, Your Honor, this is a program that

10:40 the Administration really, really dislikes. They have tried to cut it. They proposed to Congress to cut it several times unsuccessfully. Last year I litigated a separate case in the District of Maryland where they were trying to impound the money for this program last year, and the Court there found that they were trying to do that and ordered them to spend the money before the end of the year. So it is not a coincidence that this money was both delayed in being apportioned by OMB and now remains unobligated.

Then the other set of funds that expire at the end of September are the 25/26 IES money. And for that, as you can see in the second row, there's $180.5 million that remains unobligated as of today.

Your Honor, I will try to be as efficient as possible in going through the merits of our claims. I am happy to answer, of course, any questions along the way. And if Your Honor has questions about any of the many threshold defenses the government raised, I'm happy to address them. I won't plan to address all of them. Otherwise we'd be here for most of the

10:41 day, given that they raised about 20 threshold defenses.

On our Counts 1 and Count 2, which relate to the failure to timely apportion the money, the Anti-Deficiency Act very clearly provides that OMB must apportion funds such as these within 30 days of when Congress appropriates them. The government advances this odd interpretation that says, actually, no, it's just a requirement, this is in Section 1513(b), that it's just a requirement that OMB notify the agency about something, but the requirement is that within 30 days, OMB must notify the agency of the fact that it has apportioned the money and how it's done so. That is the content of the notification. It would make no sense --

THE COURT: I think I agree with you there. So move on. He can respond to that.

MR. JACOBSON: Yes. So here it's undisputed, there's no dispute between the parties factually that OMB did not apportion this full set of money within the 30 days required by statute. And for all four of these appropriations, when OMB did first issue an apportionment, it relegated a substantial percentage of the funds to a line that it calls unallocated, with OMB specifying that any money on the unallocated line is essentially unavailable for any use unless and until -- indefinitely, unless and until OMB chooses to issue an apportionment. As we detailed, this is a new policy and practice by OMB with respect to education money. It's not something that was ever done before.

THE COURT: So that's still only live, though, with the 465.6 million, right?

MR. JACOBSON: No, Your Honor, because we present in Count 6 a claim about that they've adopted a policy of doing this, an ongoing standing policy.

THE COURT: But in terms of the actual allocation, it's only --

MR. JACOBSON: Yes.

THE COURT: Okay, all right.

MR. JACOBSON: Yes, that's exactly right, Your Honor. And there's a striking pattern as we set forward in our brief where the policy is that they are using this unallocated line specifically for programs that they disfavor on policy grounds, as evidenced by the fact that these are all programs that OMB and the Administration asked Congress to stop funding or substantially cut, Congress said no, and so they are then trying to accomplish via these unallocated lines essentially, you know, a veto on Congress's denial of their request.

What's really striking is they have not done this for the programs, the few programs that the Department of Education that the Administration has no policy qualms with. For those there is no unallocated line. They are apportioning the money as it would be typical and expected in normal times.

And so the failure to apportion within 30 days both violates the requirement, the 30-day requirement, and unlawfully creates what's called a reserve under the Anti-Deficiency Act, Section 1512(c), which provides that OMB may only create, quote, "a reserve of funds" rather than apportioning them. That's the one exception that you have to apportion within 30 days. OMB can create a reserve, but

Congress specified only three very limited circumstances when OMB can do that, and there's no dispute that none of those circumstances are met here.

I'll note here that Congress specifically amended this part of the law back in 1974 at the same time it passed the Impoundment Control Act to narrow when OMB can create these so-called reserves to make clear that they cannot do it for policy reasons or because of policy objections to the relevant programs. There used to be much broader language in there that 10:44 allowed OMB to create reserves, and they substantially tightened it for this reason. This was discussed in the City of New Haven case that we cited in our brief, in the D.C. Circuit where they discussed this change and what Congress did and why they did it.

I don't think, just as a matter of basic English language, that there could be any real dispute that parking money on an unallocated line where it can sit indefinitely unless and until OMB wants to release it is creating a reserve. As far as I can tell, the government's only response is this is 10:45 not a reserve because this is not a reserve. There's no reasons provided. I think under plain dictionary definitions, this is clearly a reserve.

So that relates to both the money, as Your Honor noted, on the unallocated line for that one set of funds, the 465 million plus the policy which is quite important to my clients because they don't want to be doing this and filing a new lawsuit every single year for every single set of funds if this keeps happening over and over again.

I'll turn now, Your Honor, to our claims relating to what we call the EO footnotes, these footnotes in apportionments. Again, this is a new phenomenon, the use of these footnotes for substantive policy reasons in this Administration. OMB has used footnotes in the past but never like this, where they are including footnotes and 10:46 apportionments to substantially restrict how agencies may use the money.

THE COURT: How are you distinguishing between okay footnotes and not okay footnotes?

MR. JACOBSON: Yeah. So, you know, in the past, and I think okay footnotes would be things that -- sorry -- that impose sort of restrictions that are like the ones set forth in the Anti-Deficiency Act itself that says, you know, this money won't become available until this point of time, or you only may use the money that's available right now for this statutory 10:46 purpose, and the money that becomes available midway through the year you can use for the other statutory purpose. Right? Things like that that relate to not spending the money too quickly, and specifically just tracking what is in a statute, whether it's the Anti-Deficiency Act or the substantive, here, Department of Education statutes, right?

So here, even if they have a footnote that said, you know, within these different statutory IES programs, like I said, you know, focus first on this program and then that program, well, what they can't do is just out of whole cloth invent their own policy restrictions that don't come from any statute and say, Actually, we're preventing you from spending the money this way or you must spend it that way.

Congress nowhere told OMB or the Administration to restrict the use of this money to not allow it to be used for any, quote, "DEI activities." I think there's no dispute about that, that that comes only from this Executive Order that the President issued. It does not come from statute.

We note in our papers that its intention with some of the specific requirements for these programs, but I want to make clear our claim here about the footnotes is not that it affirmatively will force the Department of Education to violate some other statute. It is that the OMB simply lacks any authority at all to impose these conditions.

The government notes in its brief that the Department of Education already is required to follow these Executive Orders, so what's the big deal? The big deal is that when OMB does it through these footnotes and the reason they do it through these footnotes is because it carries those criminal penalties under the Anti-Deficiency Act, and that makes a whole heck of a lot difference to these agencies, Your Honor.

And there's a reason OMB is doing this, right? If it was the case, as they say, what's the big deal, agencies already have to follow these Executive Orders, they wouldn't be included in these footnotes. They're doing it because they know that puts the real hammer down and it deters the agency from doing anything that even remotely could be seen as coming close to the line of being DEI, whatever that means.

So, like we said, there's just no statutory authority anywhere in the Anti-Deficiency Act that lets OMB act as this 10:48 kind of roving super Congress that can impose its own policy conditions via apportionments.

With respect to, I'll turn now to our claims that have to do with these explanatory statements. And I apologize, there's a lot of appropriations jargon that we use, Your Honor. So explanatory statements are, every year we're in Congress -- and this is mainly Count 7 of our complaint but also referenced in Count 1. Every year when Congress passes its annual appropriation law, it appends to the law a, quote, "explanatory statement," which essentially sets forth Congress' official 10:49 views of how it wants certain money to be spent.

We recognize that, by default, these explanatory statements do not carry the force of law, they are not public law. Sometimes they do carry the force of law, as I'll mention here in one case where Congress said in the actual bill text you must follow the explanatory statement for this particular program or this particular appropriation. But for the first set of money at issue here, the FY 25/26 IES funds, the explanatory statement, the parties all agree, does not carry the force of law in that sense.

However, the OMB, and we establish this in several declarations both statistically and as a qualitative matter. OMB previously -- sorry. OMB and the Department of Education previously had a policy of following these explanatory statements for these specific funds for IES.

So to be clear, and this is Exhibit 2 in our brief, or Exhibits 1 and 2 to our motion, these explanatory statements say, you know, Congress is giving you $790 million for IES. Here is how we, Congress, want you to allocate that $790 million amongst these various different IES programs or centers that are all statutory.

In prior years, as I mentioned, OMB as a matter of policy, and the Department of Education followed those explanatory statement breakdowns. This year is the first time they are not. That's also undisputed. As reflected in the supplemental declaration that defendants submitted with their brief, they are doing a reprogramming that of most concern to our clients will shortchange a program called the REL program, Regional Education Laboratories, it will shortchange it by $16 million compared to what's in the explanatory statement.

There is much case law coming from the Supreme Court starting with the *Fox TV* case and other cases that when an agency changes any practice, it has to at least display awareness of the change to pass arbitrary and capricious review, and it must explain why it's changing the practice.

There's absolutely none of that here. There's no explanation either in the reprogram notification or anywhere else that says why they are not following for the first time these explanatory statement allocations. So it's just a matter of basic arbitrary and capricious review. This flunks the most basic requirement of providing some sort of reasoned explanation for why they're doing what they're doing.

With respect to the second set of IES money at issue, which is the 26/27 money, Congress did make that legally binding. It did provide in the bill text you must follow the allocations in the explanatory statement. And yet, OMB's apportionment does not follow those allocations. It provides zero dollars for several of the relevant programs and centers that are supposed to get non-zero dollars under the explanatory statement. And as far as I can tell, defendants don't have any real defense for that claim at all, other than maybe ripeness, which I'm happy to address.

I'll now turn to what Your Honor asked about, which is the claims about -- moving the attention from OMB to the Department of Education about our claim in Count 8, which is that they are unreasonably delaying or unlawfully withholding the actual obligation of this money.

So just to take a step back and sort of the path of a federal appropriation, Congress first appropriates it, OMB then has to apportion it to the agency, and then the agency has to, quote, "obligate" it before it expires. An obligation means essentially just awarding it. So they must issue some notice of award saying, You, relevant research entity," could be one of our clients or their members, "are awarded X amount of dollars," and that obligates the money. So they have to do that all before September 30.

10:53

We've presented data. So starting first with the Comprehensive Centers, as I mentioned, 49.5 million of the $50 million has not been obligated. There's nothing in the administrative record other than a kind of hedging wishy-washy declaration statement that says their current understanding is they intend to obligate the money. There's nothing in the administrative record that shows concrete plans and concrete decisions to obligate the money and how they will do so.

And as I mentioned, this is against the backstop of

10:53

this being a program that they really, really dislike and they tried to impound the money last year. That's the *Child Trends* case, that's the Maryland case I mentioned before, cited in our briefs.

With respect to the IES money, there is still $180.5 million that remains unobligated. Again, the administrative record has absolutely nothing to show concrete plans of how they intend to obligate that money before the end of the year. We just have a bare statement and declaration saying, you know, their intent to do so.

I think, you know, given the context here of the Administration's efforts around Department of Education specifically, around education research money specifically, that bare declaration does not suffice. At a bare minimum, though, we prevail on our claims about it being unreasonably delayed. And, you know, we are now three weeks before the money expires and have this enormous percentage still remaining.

You know, I don't quite understand the government's argument that this claim is unripe. The argument seems to be it's unripe until it's moot, which I guess we're saying a lot these days, but obviously it can't become ripe after it expired because the Court couldn't order them to spend the money at that point. Once it expires, it is expired.

The unreasonable delay factors, the courts, I don't think the First Circuit has formally adopted it, and I know Your Honor has applied what are known as the track factors the D.C. Circuit has set forth to evaluate an unreasonable delay claim. I won't belabor it, but all of those factors as we set forth in our brief weigh in our favor. Congress has provided a hard deadline here that informs the, quote, "rule of reason."

And then I think most notably, the government in its brief disputes the factor about does this involve human health and welfare.

They say it only involves economic regulation. That is just frankly absurd. This is about money for education research and specifically money for students and schools that are the neediest in the country, talking about kids with disabilities, kids in high poverty areas that face structural changes. This is not just money about economic regulation, like an FCC regulation or something like that. This is education money.

So Your Honor, like we said, at a minimum we should prevail on those unreasonable delay claims, which would then, you know, under the APA, Section 706(1), the remedy is that the Court shall compel, that is the language of the statute, the agency to take the action that is being unreasonably delayed, in this case, to spend the money before it expires.

Our last claim, I'll touch on it briefly, has to do with the failure to disclose this one apportionment. There's a statute, 31 U.S.C. 1513 note that says OMB has to disclose all of its apportionments within two business days, precisely to, you know, guard against the kind of manipulation of the apportionment process that we see here.

It's undisputed here -- and that statute, according to the D.C. in a case both myself and Mr. Velchik are handling, have heavily litigated there, the Court there in D.C., Judge Sullivan held that these include these, quote, "spend plans" that effectively apportion money. It's undisputed here that OMB did not disclose that spend plan within two days.

And one really jarring thing I would note is that in the Dinkes declaration that we submitted from Knowledge Alliance's president, she addresses a conversation she had with the head of IES, Matt Soldner, he raised that conversation in his opening declaration, and she notes that Mr. Soldner said, Yeah, the money will be apportioned, but it won't be made public anywhere.

THE COURT: But it's already been disclosed now, right? So your what's remaining is that they did it too slowly?

MR. JACOBSON: It's that they violated the law saying it was within two days. Then that lends itself to declaratory injunctive relief, Your Honor. So that is the merits of our claims.

On mootness, if I may just briefly, Your Honor, address why it's very important to us to get relief about all of these apportions that relate, even the ones that they have now done, as mentioned, this is part of a standing policy that we separately raise in Count 6. The courts in this circuit have held that -- and the First Circuit itself has held that as long as it's possible for the Court to provide any effectual relief at all for the plaintiff, the case is not moot, and it's the defendant's burden to show it's moot.

Here, because this is part of an ongoing policy, these are funds that Congress appropriates each and every year that our clients depend on. Some of them, their entire business depends on this money and knowing if and when they're going to be able to compete for this money. So having declaratory relief combined with a permanent injunction as we just discussed will absolutely provide relief for our clients to put 10:59 a stop to this so they're not playing Whack-A-Mole every single year.

THE COURT: We will decide all these issues, but what needs to be decided in the next week or so is the apportionment, right?

MR. JACOBSON: So what needs to be decided we would say most urgently are Department of Education's -- obligation of the funds before they expire.

THE COURT: Right.

MR. JACOBSON: That's our second row. We also think 10:59 it's time sensitive but not quite as time sensitive, one of the four appropriations they still have not apportioned.

THE COURT: Okay. We're not going to get all this done in the next week.

MR. JACOBSON: I understand, I understand, Your Honor.

THE COURT: I'm just trying to figure out what needs to be addressed more quickly and what can -- I don't want to say back burner but can be pushed off a little bit.

MR. JACOBSON: May I amend my answer very slightly and just add one for more next week? Our claim about not following the explanatory statement, that is part and parcel of how they're going to obligate the money, so once they obligate it, if they obligate it in a way that doesn't follow the explanatory statement, that bell can't really be unrung. If they award it to someone, it's hard to un-award it, so that 11:00 would also be time sensitive as to the money that expires this year. Thank you, Your Honor.

THE COURT: Okay. Thanks very much.

MR. VELCHIK: May it please the Court. I just want to say a brief word about the past, the present, and the future, picking up where we left off on some of the posting requirements.

So historically, Congress' appropriated money, the Executive Branch made apportionments, but they haven't been public or online. This would have been Intra-Executive Branch 11:00 conversations between the agencies where OMB asked the agencies how are you going to use the money, and that informs their decision on what timeline they want to apportion money and for what specific projects.

A couple of years ago, as part of two Consolidated Appropriations Act, Congress said you now need to post that publicly, and this is the Section 1513 note. There's currently separate litigation going on in D.C. The Solicitor General provided --

THE COURT: You have to slow down.

MR. VELCHIK: The Solicitor General submitted a 530D letter to Congress explaining the position of the Executive Branch that that was unconstitutional. It required the disclosure of purely deliberative information, and that led to that litigation. That's currently on appeal before the D.C. 11:01 Circuit, and OMB is complying with the court-ordered injunction to post those Excel sheets online.

I say that in context because in this lawsuit, plaintiffs are looking to this newly published information, which used to never be public, and are now trying to find a private cause of action under the ICA or the EPA and say that they want to challenge the specific apportionments and obligations, which historically individuals have not been able to challenge, and most of them have never been public, which sort of brings us to today, where we still have three more 11:01 weeks until even the earliest batches of funds expire.

I believe plaintiffs' counsel provided some numbers. We've obviously got different snapshots based on the administrative record when we submitted this brief. There have been subsequent developments. Two things that I will flag for the Court, the IES funds that are set to expire on September

30, at the time we filed our brief, I believe that we had obligated roughly $580 million out of the 760. As of last Friday, we've now obligated a further $60 million, which I think is consistent with the government's stated commitment that we're trying to get this all out the door before the end of September.

Plaintiffs raised today the Comprehensive Centers, so I want to make sure I address that, too. Relatively, I think we have a lower percentage obligated so far, but in absolute 11:02 terms it's still less than the IES because it's only out of a total 50 million. We still intend to spend that money. We have the discretion to decide whether to continue grants from last year or to enter into a new competition. Historically in September 2024 we did that through a new competition in mid to late September, so we still have the time to do that. Our commitments remain the same in our sworn declarations that we intend to obligate all the funds by September 30 for both of these groups.

And I just say this because, going forward, I mean, 11:03 the Executive Branch has sort of a strong interest in making sure that we don't create some new precedent outside of this specific case for these three educational grants. I mean, we could have situations in future administrations where every single plaintiff who is interested in getting some government grant could go and look at these online Excel files, run to the

Northern District of Texas or San Francisco and try and sue before the money is even due, trying to micromanage who needs to get the money, what really should be enjoined.

And so I understand that this is very important for these particular grants that comes in three weeks, but in terms of setting precedent for how we deal with these appropriation cases going forward, I think that's a very important concern for the Executive Branch. I think this cashes out some of the doctrines that we try to highlight.

11:03 We emphasize a lot of this is committed to agency discretion. These are lump sum appropriations. The agencies can obligate that consistent with the confines of the statutes, and we would emphasize textually Title 31 does say, "as appropriate," which I do think lends some textual basis and some level of discretion in terms of how they want to go about the process. I think the clearest legal grounds for this Court to get rid of this case would be on the lack of a private cause of action.

So as far as we can tell, we think plaintiffs are 11:04 trying to bring an impoundment claim under the Impoundment Control Act. Obviously, there's case law that limits that, at least in the D.C. Circuit, so I think we're interpreting their ADA claims as trying to plead around that and base it on the Anti-Deficiency Act.

We cite case law suggesting that these sorts of private plaintiffs typically have not had a private cause of action.

The one point I would emphasize -- I would emphasize to the Court, the whole point of the Anti-Deficiency Act and even the title itself is to prevent Executive Branch agencies from obligating and spending money they don't have. This is sort of the opposite where we have private plaintiffs trying to force the government to spend money before it's even due. And I think there's nothing in the text of the ADA that creates a private cause of action for that purpose.

11:05

THE COURT: So what is the remedy then?

MR. VELCHIK: The remedy?

THE COURT: If the funds aren't being allocated, if there's no private cause of action, what's the resource?

MR. VELCHIK: Well, there are a couple ways to do it. Number one, I mean, Congress iteratively deals with all these appropriations each year, so if they want us to make the explanatory statements binding -- they do that sometimes, they don't do it other times -- they can do that where we're in constant communications with them through notification requirements. We obviously do hearings, things like that. I think if we have a specific policy saying it is officially the policy that we don't want to spend this money and refuse to give it to anyone and they want to compete for the grants, I think that would be a much easier case for plaintiffs to try

11:05

and sue. But I think the Anti-Deficiency Act specifically is more about spending money that we're not allowed to spend, so it's the criminal penalties for the Executive Branch officer who spent the money.

I think the fact pattern you're raising is the Impoundment Control Act, so I think we would look to whatever Congressional remedies there are. The comptroller general has a cause of action to bring suit in those cases as well, but I think that's the scheme for the Impoundment Control Act.

11:06 THE COURT: Okay.

MR. VELCHIK: I'm happy to answer any other questions.

THE COURT: So do you want to respond to plaintiffs' argument about 1513(b)(2) and when the notification and the apportionment should be done in terms of time?

MR. VELCHIK: Yes. Happy to move past the point about whether or not this is a notification requirement versus we need to apportion. The government's position is we have apportioned all of the apportionments that we're required to. I think the delta between the two parties is we believe that 11:06 under the statute it gives us discretion in how we want to do that, and when we say "unallocated" or "undistributed," I think plaintiffs are interpreting that as creating a reserve, whereas we have a different understanding of that.

As we understand it, we can do that. That releases the funds to the agencies subject to certain limitations, some of which I think plaintiff concedes, which is, under the text of the statute, we can apportion funds on a time basis, so like per month, per quarter, you can't used these funds, or I'm going to release these funds in 30 days or 60 days. We can apportion them for programatic reasons and say, We apportion these funds to use for this project or for that grant or for some other activity.

And so when we are apportioning records in an undistributed or unallocated line, what we're doing is we're apportioning them and telling the agency they need to come back with further information trying to describe, sometimes we have specific questions, sometimes we want to know how they're going to use that. So it's a placeholder for those further communications before it can get released to those specific projects.

We use this all the time to facilitate different conversations with agencies, and of course these aren't the only three programs. OMB has to coordinate all of the appropriations. We're now approaching the end of the fiscal year, so this is sort of crunch time for them. They're dealing with a lot of competing tradeoffs.

So that's how we sort of organize these conversations about getting information from the agencies, what programs are they going to use it for, then we will release it. And once it's been released to a specific program activity, they can obligate the funds and they're on track to do so by September 30.

THE COURT: How about the footnotes?

MR. VELCHIK: The footnotes, so the footnotes are different tabs in the Excel sheets. Again, before this was all public, usually these were sort of like sticky notes where you could have these different conversations with the agency saying, you know, it's currently unallocated or undistributed, but we could request specific information about this.

11:08 Now that they've become public, I think that's chilled the way that we've used some of these footnotes. But in terms of the specific allegations made here about Executive Orders, agencies are required to follow these Executive Orders anyway, so it's not really adding much in that way.

It sounds like plaintiffs concede today that nothing in the Executive Orders contradicts a statute, and so we cite the example of *Lincoln v. Virgil* about how these are lump sum appropriations. The agencies can exercise their discretion in making these obligations however they want. If there's an
11:09 Executive Order, certainly they need to comply with that, and I don't understand the Executive Orders to be challenged as unconstitutional or conflicting with separate statutory authority.

To the extent we're using footnotes as a way to communicate with the agencies, that puts in one place for the agencies to say, Yes, this is the funds that we have, these are how they've been apportioned, OMB is flagging these footnotes. There's a difference between type A footnotes and type B footnotes. Type A are typically seen as binding, so that would create certain requirements for the agency officials to use funds that reference type A footnotes. But, again, that's consistent with the Executive Orders, and it's consistent with the statutory decision.

I think this would be a different case if we had a set of plaintiffs saying, Well, there are contents of the A footnotes that are putting in all sorts of other requirements that conflict with some other constitutional right or some other statute. That's not the claims here. The claims here are that we're using footnotes and we can't use footnotes at all. I think that's overbroad and inconsistent with the Executive Branch practice.

THE COURT: I don't think they said you couldn't use footnotes at all. I think what they said is you can't use footnotes to have policy restrictions. You can have footnotes sort of more around logistical issues than around policy issues.

MR. VELCHIK: I guess within that framework I would emphasize that our position is we are exercising discretion within the contours of the statutes, and that's what the Executive Orders are doing. And I don't understand any arguments being raised today as saying we're having Executive Orders to exercise that discretion in a way that conflicts with some other statute, because I think that would be a harder case and you'd have to engage in the statutory interpretation question. But as long as everyone agrees that the Executive Orders are directing Executive Branch agencies to exercise discretion that they clearly have under the statute, I think that's fine.

And indeed the whole point of these discretionary activities, whether it's the apportionments or the obligations, is just for some agency official to exercise discretion on how to take these lump sum appropriations from Congress and cash them out in specific competitions, grants, and other awards.

THE COURT: So if I order that the last appropriation be done and that all the funds be obligated by September -- what was it, September 31?

MR. VELCHIK: I believe it's the 30th.

THE COURT: 30th, right. I know there's something with your fingers, right, but I'm not good at that.

So if I order that, you wouldn't have any objection to an order that said you needed to apportion and obligate by September 30, right?

MR. VELCHIK: We would intend to comply with that. Obviously we have institutional objections to being under a court order to do anything, so we formally would object, but we do intend to obligate all the money by then.

THE COURT: So if I order it and you don't, then what?

MR. VELCHIK: Then we would have compliance issues and we'd be before the court. Again, it's my understanding, we've made sworn declarations, we have notified Congress, and in my conversations with my clients, we intend to do so. I have every reason to think we will. If we didn't, then it just becomes a compliance issue with a court order.

THE COURT: Do you intend to do it consistent with the 11:12 explanatory statements?

MR. VELCHIK: We intend to certainly do it consistent with any binding explanatory statements. I think there's a difference between, sometimes Congress passes these appropriation statutes, they're very long Consolidated Appropriation Acts or omnibus. Sometimes these explanatory statements are binding, and we will treat those as binding. To the extent they're not binding, we reserve the right to make sure that we comply with any binding provisions of the statute, but we have the discretion to depart from any nonbinding 11:12 explanatory statements.

THE COURT: Okay. This is not my area of expertise. Is it clear which ones are binding and which ones are not binding?

MR. VELCHIK: Yes. I believe there's agreement between the parties about the one binding explanatory statement, and the other three do not have binding explanatory statements.

THE COURT: All right. I'm going to give you a chance to respond to what he said.

MR. JACOBSON: Yes, Your Honor. Just picking up where you left off in answering that question, the parties all agree that there's only two appropriations here that have explanatory statements. They're both for the IES money. So the money that expires in 22 days, there is no -- the explanatory statement is 11:13 not legally binding. That's the one for which we've said there was a prior practice of the government, prior policy of complying even where it's not legally binding, and they are departing from that practice without explanation.

It is the money that expires next year that's legally binding. And we have a claim about that, too, but it's not as time sensitive as we've talked about.

THE COURT: So you think that the APA forbids them from deviating from practices that are -- it's a prior -- you think they have to act consistently with prior practices?

11:13 MR. JACOBSON: It's not that it forbids them. It's just that they have to provide a reasoned explanation under arbitrary and capricious.

THE COURT: Just on a previous practice, even if that practice wasn't mandated or required, or is it a -- does it have to be an official policy? Like, where are you kind of drawing the line there?

MR. JACOBSON: So I don't think there's any factual dispute here that it was an official policy, even if it wasn't in writing. I mean, the statistics bear that out. They've always followed these explanatory statements before.

So of course the APA provides for kind of two different types of claims. One is you're violating a law, and the second is, even if you're not violating a law, you need to explain why you're doing what you're doing. So this claim is the latter, and there's just no explanation anywhere for why they've decided to --

THE COURT: But your position is that they have to explain what they're doing if they're deviating from a prior practice?

MR. JACOBSON: Yes, where there are reliance interests on that prior practice.

THE COURT: Do you agree with that?

MR. VELCHIK: No, in no small part, because these are the questions I think we are trying to elicit. There's no final agency action. It's one thing if we have a formal policy saying in the past these are not statutory binding explanatory statements but we're going to follow them anyway, and we issued a new amount. That would be final agency action, maybe that's subject to the APA.

THE COURT: Slow down.

MR. VELCHIK: We don't have any final agency action policy to challenge. They simply point to, well, in the past, when we've exercised discretion about how to use some of the money, oftentimes we will use the money that's consistent with the Congressional explanatory statements, sometimes we do, sometimes we don't. But there's no final agency action to challenge, and even if there were, we would disagree with them on arbitrary and capricious review.

THE COURT: Okay.

11:15 MR. JACOBSON: No. On the no final agency action, I'm not sure I quite understand that. There's been a final decision here, right? They have notified Congress in this recent notification that they are going to deviate from the explanatory statements by reprogramming funds and particularly not -- shortchanging this one program, the REL program that our clients really rely on. So that is a final decision. It is the final agency action.

In terms of a policy, you know, there's case law, we cite a case from the D.C. Circuit which is kind of the lead 11:16 case on this that an agency's adoption of a policy constitutes final agency action, and therefore the departure from that policy also constitutes final agency action. Even if they don't put their policy in writing, an agency can't avoid APA review by having a policy and acting on it for years but simply not committing it to writing.

In this respect, Your Honor, I would point -- and I understand it's odd to cite to a dissent, but I will explain why in a second. There is a case in the D.C. Circuit about the Administration's efforts to shut down the CFPB. And in the three-judge panel, Judge Pillard out of the D.C. Circuit has a long opinion about this exact issue about having an unwritten policy and how that constitutes final agency action. The D.C. Circuit then took that case en banc, which is why I'm comfortable citing the dissent, it's pending en banc.

11:16 It's been case law coming down from the Supreme Court in the *Fox TV* case that when you depart from longstanding policy, you need to at least display awareness that you're doing so, say, Hey, we realize we're departing from policy here, and here is why we're doing it. If they had done that here and checked off the normal arbitrary and capricious factors, we would have no claim. They just didn't do that. It's completely unexplained.

THE COURT: Okay.

MR. JACOBSON: With respect to the implied preclusion 11:17 arguments, do we have a right of action here, this is really straightforward. The APA -- it's the APA that provides our right of action. We're not suing under the Anti-Deficiency Act under a prior right of action there. We're certainly not bringing a claim under the Impoundment Control Act. The APA says any aggrieved party may, you know, challenge final agency action, including where it is contrary to some other law. The Anti-Deficiency Act is some other law. The Appropriations Acts here are a law, and they are acting contrary to --

THE COURT: What's your view on whether or not they have a cause of action under the APA?

MR. VELCHIK: No.

THE COURT: Not whether or not you agree with their cause of action but whether they have one.

MR. VELCHIK: 5 U.S.C. 701(a)(1) of the APA specifically says you cannot use the APA where other statutes preclude judicial review. That's why we argue consistent with the law that there's case law for the ICA, and we also argue the case law for the ADA for why those statutory schemes preclude judicial review, even under the APA for purposes of 701(a)(1). I think that's logically how it fits into the statutory scheme.

MR. JACOBSON: So if I may endeavor to translate that, I don't think there's any dispute that in general we have a cause of action under the APA. What government counsel is arguing is that normal cause of action is displaced in this particular case, and they claim that these two other statutes displace it, which is the Impoundment Control Act and the Anti-Deficiency Act, and I'll address those in turn.

I'll note at the outset that there is an extremely strong presumption of judicial review under the APA, and so this exception, which is an exception to that, is interpreted quite narrowly.

So starting with the Impoundment Control Act, this is really, really easy. Congress itself wrote in the Impoundment Control Act, "Nothing in this act shall be construed in any way as affecting the claims of any party concerning any impoundment." It is like an anti-preclusion provision. That's 2 U.S.C. 681(3). We cite it in our briefs. Congress enacted that provision against a long line and at that point very recent cases of private parties suing over the exact thing we're suing over here, agencies refusing to spend their money, or, in this case, OMB refusing to provide money for agencies to spend.

And what Congress was doing in that provision was saying, Nothing we're doing here -- it was almost like they were forecasting into the future -- Nothing we're doing here should be read for any suggestion that we're trying to preclude private rights of action by creating this, you know, system under which the Administration can propose recisions and then the comptroller general can sue in certain circumstances. So that makes that a really, really easy case.

The government cites the Supreme Court's stay order from last year. Having litigated that case, still litigating that case, extremely long procedural history, so we address it in our briefs. I'm happy to rest on the briefs, unless Your

Honor wants to hear on that.

THE COURT: No. That's fine.

MR. JACOBSON: With respect to the ADA and their argument on the Anti-Deficiency Act impliedly precludes our claims for violations of the Anti-Deficiency Act, I'm not sure if counsel has abandoned that argument now, but it fails at the git-go.

They point to the fact that there's some remedies under the Anti-Deficiency Act for violations like the administrative penalties and criminal liability, but that is for a different type of Anti-Deficiency Act violation than for what we're suing over here. Those penalties are where OMB does apportion money, but an agency official spends more than has been apportioned or spends it for different purposes. So those penalties are for the agency official. They don't apply to OMB, for OMB failing to apportion the money, which is, those are the provisions we're suing about in 1512 and 1513.

There is no statutory remedies provided for that, and so the argument that, you know, Congress foreclosed, you know, private APA suits because it provided for these other remedies just fails at the git-go. It just doesn't apply to the types of claims we're bringing here.

Then one last thing I'll note, Your Honor. There was a case in the Northern District of California from late last year that addressed this exact argument from the government.

They rejected it and said plaintiffs are not bringing a private right of action under the Anti-Deficiency Act, they're suing under the APA, and, you know, all the things I just said. Sorry, Your Honor.

THE COURT: It's not me. It's Kelly you need to be apologizing to.

MR. JACOBSON: I apologize.

Two last points. One, on the unallocated, you know, it's just wordplay, Your Honor. To say, Yes, we apportion the 11:22 money, but we said you can't use it for any purpose ever until we tell you in the future that you can, that is not apportioning the money. The whole point of apportioning it is you provide it and make it available. If they said, Here is the money, you can only use it to, you know, go to Pluto, it's not providing the money if you can't use it for anything.

And then the last point, just going back to Your Honor's question about what's time sensitive, I failed to include also the EO footnotes. We would consider those time-sensitive because, again, they will restrict how the 11:22 agency apportions money -- I'm sorry -- how the agency spends the money over the next few weeks, if they do spend it, right, those footnotes will restrict it, and it will restrict who they're selecting even for the grants, including our clients. If they think they need to look at it, they're required to look at it through this lens.

On government counsel's point about, you know, again, he reiterated they're required to comply with the Executive Orders, so these footnotes aren't really adding much. Again, the question is why are you including them then, right? If they didn't add anything, then why are you including them? Why go through the litigation? Why not just withdraw them? It's because they know they're so powerful by including them under the pains and penalties of the Anti-Deficiency Act for agency officials get really -- when there is criminal liability provisions.

11:23

THE COURT: Can you respond to that? Why are they there?

MR. VELCHIK: Why are the footnotes in the Executive Orders?

THE COURT: Yeah.

MR. VELCHIK: I mean, that's how the Executive Branch coordinates. The whole point is so the President can have discretion to coordinate all the different appropriations that come in. He delegates that to OMB. There's a lot of money moving around. There's a lot of paperwork. We have a lot of Executive Orders. Ideally, every single line obligation attorney or other officer at every agency is familiar with every different Executive Order and is tracking all of them and will make sure to implement all the President's priorities.

11:23

THE COURT: If you think the Executive Orders already have that force, why do you need the footnote?

MR. VELCHIK: That's how we choose to organize ourselves. Again, this is all Intra-Executive Branch coordination activity.

THE COURT: But if you put it in a footnote that there's criminal penalties, if you just leave it in the Executive Order off to the side, there's no criminal penalties, right?

MR. VELCHIK: If it's in footnote 8, yes. That's one 11:24 way to organize how we coordinate with appropriations officers.

THE COURT: Okay. It's like strong-arm way to make sure they do what you want them to do, right?

MR. VELCHIK: Well, we also don't want them appropriating monies that they aren't authorized to do so. As long as the Executive Orders aren't violating some other statute, we can exercise our discretion how to disburse funds. This is one of the ways that we're allowed to do so. We have all sorts of criminal policies for doing all sorts of things, using computer IT systems. We are stewards of taxpayer 11:24 dollars, and we don't want line appropriations individuals putting out money in a way that's either inconsistent with law or inconsistent with the President's priorities. As long as everyone agrees that the Executive Orders isn't violating a statute, this is how we want them exercising that discretion.

THE COURT: But the footnotes are binding them to something that's not necessarily otherwise required, right?

MR. VELCHIK: Well, that just gets to the dispute about to what extent the Executive Orders are required. We think they are required. I think at most it adds penalties for violating that requirement, but we would still say everyone in the Executive Branch is directed to follow the Executive Orders. They have force within the Executive Branch, maybe not outside, but this is how they're exercising their Intra-Executive Branch discretion.

11:25 THE COURT: But if they conflict with what Congress has ordered --

MR. VELCHIK: That would be a separate question. I don't understand that to be raised here, but we've had separate litigation where we've had Executive Orders, some other plaintiff has sued and said, I think that's unconstitutional, it violates this amendment, and then we can litigate that. But I don't think that's the argument here. The argument here is that we're not allowed to do Executive Orders even where they don't violate some other statute, and I think that's novel.

11:26 THE COURT: Okay.

MR. JACOBSON: Brief response, Your Honor?

THE COURT: Brief response. You have four minutes left.

MR. JACOBSON: Okay. I'll be very brief.

The Anti-Deficiency Act has been around since the 19th

Century. Executive Orders have been since before then. No Executive Branch has ever included these footnotes that you have to comply with Executive Orders in apportionments until now. It's not some common way to manage the Executive Branch.

And then I think, more importantly, on this point of, well, we're allowed -- I think government counsel said OMB is allowed to do this because no statute says they can't. That has it exactly backwards.

OMB is an agency. They have no power to do anything unless Congress authorizes them to do it. There is nothing in the Anti-Deficiency Act that authorizes them affirmatively to do this. They can apportion money for one purpose and one purpose only, which is the purpose we've talked about, that you don't exhaust your money too quickly. That has nothing to do with saying you can't use the money for DEI or whatever it is the President says.

And so that is why our claim here is one that exceeds statutory authority. There just is no statutory authority for OMB to do this. They're not allowed to do anything and everything they want as long as we can't point to some statute that specifically prohibits it.

With that, Your Honor, unless you have any questions, I'm happy to rest on that.

MR. VELCHIK: Just three quick bullet points. I'm not going to argue -- but it would be 2 U.S.C. 681, Subsection 3, that rule of construction, I would just refer the Court to the D.C. Circuit's majority opinion in *Global Health*. It goes through that, specifically explains how that just says it doesn't have retroactive effect. The opinion that they rely on, footnote 8, specifically cites that as being brought before the ICA. That's how we read the provision. That's the only other point I want to put in the record for the purposes of the merits.

Two administrative items I would like to raise with

11:27 the Court are, first, to the extent you have any inclination of putting defendants under a court order, one thing I can offer to the Court, if you think it would be useful, at some date prior to September 30 we can provide supplemental declarations, whatever the latest obligation numbers are, if you want to continue to see whatever progress we've made by that point, that might be a step short of a court order.

And lastly, to the extent the Court is considering ruling against the government, I just want to make sure I get into the record that the government orally requests that the

11:28 Court stay any such decision pending any appeal that the government might take.

THE COURT: Well, what happens to the funds if I stay the decision? If they need to be allocated by that date and we stay the order to allocate it and they're not allocated, where does that leave us?

MR. VELCHIK: I would want to see the specific order, but, again, we intend to allocate all of them. And if you are asking for anything more, I think we would have very strong irreparable harm --

THE COURT: Are you intending to allocate them on the 30th or before that?

MR. VELCHIK: Consistent with whatever the appropriation laws are. I believe it's -- my understanding was by end of the day, but I would have to check appropriation laws.

11:28

THE COURT: Okay. So you put me in a bad spot because if I wait until -- if I don't put in -- depending on how I decide this, if I don't put in an order and you don't allocate until the end of the day, then what happens?

MR. VELCHIK: We don't think we would get there, but, again, I would have to check with the appropriations the way the order is written.

THE COURT: If you intend to go right up until the end, then the funds expire and I haven't put an order in place or I stay the order, what happens?

11:29

MR. VELCHIK: I would have to think through the specifics.

THE COURT: What happens?

MR. JACOBSON: The money goes poof, Your Honor. That's what happens.

THE COURT: Are you thinking about that? You look like you're thinking.

MR. VELCHIK: I'm thinking.

MR. JACOBSON: Your Honor, if I may?

THE COURT: It's his turn.

MR. VELCHIK: I'm thinking but I don't have anything further to stay. I stand by my last statement. I apologize for creating a misimpression.

MR. JACOBSON: Just on the sort of oral stay motion I

11:30 think we just heard, I don't think that's procedurally proper. But even if the Court considered it, you know, the government just said they intend to spend this money, so what's the irreparable harm that would support a stay pending appeal? I can't think of any.

THE COURT: Well, I guess that depends on how narrow the order was, right?

MR. JACOBSON: Yes.

THE COURT: All right. Thanks everyone. We're in recess.

(Adjourned, 11:30 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Professional Reporter, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 9th day of September, 2026.

/s/ Kelly Mortellite

____

Kelly Mortellite, RPR, RMR, CRR

Official Court Reporter

11:30