



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

**ZUNI PUBLIC SCHOOL DISTRICT #89 and
GALLUP-McKINLEY PUBLIC SCHOOLS,**

Docket No. 99-81-I

Impact Aid Proceeding

Applicants.

DECISION OF THE SECRETARY¹

Zuni Public School District #89 (Applicant) is a local education agency (LEA) in the State of New Mexico seeking review of the April 17, 2001 Initial Decision of Chief Administrative Law Judge Allan C. Lewis (ALJ). The ALJ dismissed Applicant's challenge to a determination by the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) regarding the Assistant Secretary's certification of the State's request, for the purpose of participation in the Federal Impact Aid Program, to calculate its expenditure of public education funds for fiscal year 1999 under an equalization standard pursuant to the Impact Aid Act, Pub. L. No. 81-874, 64 Stat. 1100 (20 U.S.C. §§ 236-244).²

¹ This decision serves as contemporaneous notice that the petitions requesting review of the Initial Decision have been granted.

² The Impact Aid Act was repealed; see the Improving America's Schools Act of 1994, § 331(b), Pub.L. No. 103-382, 108 Stat. 3518, 3965, and a new Impact Aid statute enacted, Title VIII, § 8001, 108 Stat. at 3749, codified at 20 U.S.C. §§ 7701-7714 (1994). As a consequence of those legislative judgments, the impact aid program is now governed by Title VIII of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's School's Act of 1994.

The ALJ dismissed Applicant's³ challenge after concluding that the outcome of the Assistant Secretary's determination was correct. For the reasons noted below, I affirm the ALJ's decision, and uphold the Assistant Secretary's certification for the State of New Mexico for fiscal 1999. Inasmuch as the ALJ's decision is unclear or ambiguous on an important question raised by the parties, this decision modifies – to the extent necessary - - and clarifies the ALJ's decision as to why the impact aid regulations at issue control the outcome of this case, and are not in conflict with the impact aid statute.

The impact aid statute requires that a state participating in the federal impact aid program that calculates the state's share of expenditures for participation in the impact aid program by including federal impact aid funds in the state's share of expenditures for public education have in effect a program of aid that equalizes expenditures for free public education among its local educational agencies.⁴ The ALJ agreed with the Assistant Secretary that New Mexico met the equalization standard for fiscal 1999. Applicant contends that the Assistant Secretary erred in concluding that the state met the equalization standard by using what is termed a "disparity test"⁵

³ Gallup-McKinley Public Schools, an LEA, appeared before the ALJ raising its own challenges to the Assistant Secretary's determination on the basis of policy arguments; ostensibly arguing that New Mexico is using the equalization exception to transfer the State's own responsibility for funding public education to the federal government by way of the impact aid program. In support of its position, the LEA offers a number of alternative calculations to determine the proportional share of local tax revenues covered under the equalization program. The ALJ dismissed those challenges because they were inconsistent with the clear statutory mandate on proportionality. As the ALJ pointed out, it is apparent that the LEA is frustrated with the State's funding of public education over the previous two decades, but the LEA seeks a remedy that is far outside the scope of the limited and narrow purposes of impact aid funding. Upon my review, the ALJ's findings and determinations with regard to Gallup-McKinley Public Schools challenges are upheld.

⁴ Under the Federal impact aid program, a school system or district may be eligible for Federal assistance due to the presence of the Federal government in the school district.

⁵ The disparity test is a means to determine whether a State equalizes public school expenditures among its LEAs. Equalization is present—

if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

20 U.S.C. § 7709(b)(2)(A).

that is inconsistent with the impact aid statute. Although the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR Part 222.

In support of its petition, Applicant makes it clear that it does not seek to have the Initial Decision “overturn[ed].” Instead, Applicant seeks review of a question the ALJ did not resolve; namely, a definitive statement that the Department’s impact aid regulations contained in an appendix to Subpart K of 34 CFR Part 222 are “invalid.”⁶ Notably, Applicant points out that the record is replete with indications that the reason the ALJ did void the regulations at issue was due to the ALJ’s determination that he did not have authority to do so.

Notwithstanding Applicant’s argument, it is clear that the ALJ applied the appropriate regulations to the issues at hand, and ultimately determined, correctly, that New Mexico’s program complied with the statutory requirements. The Department’s regulations at the appendix of Subpart K of 34 CFR Part 222 were promulgated in the exercise of the Department’s rule-making authority by implementing a specific statutory provision with regulations that clarify the general rights and obligations, beyond a specific case, of states that seek federal impact aid funds using the congressionally mandated equalization formula.

The impact aid statute requires that in determining whether a state’s funding is equalized, the Department direct states to calculate their disparity percentage by disregarding per-pupil public education funding for LEAs whose funding is above the 95th percentile or below the 5th percentile of public education revenues in the state.⁷ The Department implemented this statutory obligation by promulgating the regulations at the appendix of Subpart K of 34 CFR Part 222, wherein it requires states to compute the state’s disparity percentage by ranking the state’s LEAs and disregard those LEAs in the ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs. There is nothing within the text of the statute that precludes this interpretation or *requires* another result.

The appendix regulations simply assist states in determining how to decide the percentile cut-off points designated by the statute, but not defined by the statute. The fact that Applicant disagrees that the percentile cut-off points should not be positioned precisely at the per-pupil

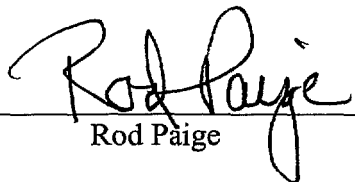
⁶ Although Applicant states that it does not seek a reversal of the ALJ’s decision, Applicant ostensibly seeks the same outcome as a reversal by requesting that I “decertify New Mexico as an equalized state.” Apparently, in Applicant’s view, this outcome is warranted as a result of a conclusion that the Department’s impact aid regulations are in conflict with the governing statute.

⁷ See 20 U.S.C. § 7709(b)(2)(B)(i) and 34 C.F.R. § 222.162(a).

level does not render the Department's interpretation of the statute "invalid" or unreasonable.⁸ As such, the regulatory appendix is binding "unless procedurally defective."⁹ In this regard, the Applicant does not dispute that the regulations at issue were promulgated in accordance with the Department's rule-making authority and in compliance with the Administrative Procedure Act's requirements of notice and comment.

The considerable weight usually accorded the Department's interpretation of the statute that it is entrusted to administer should apply to the regulations at the appendix of Subpart K of 34 CFR Part 222;¹⁰ those regulations are consistent with the statutory provision they implement. Accordingly, consistent with this modification of the Initial Decision of Chief Administrative Law Judge Allan C. Lewis, the challenges by the Applicants are DISMISSED, and the determination by the Assistant Secretary for Elementary and Secondary Education is affirmed.

So ordered this 11 day of October 2001.


Rod Paige

Washington, D.C.

⁸ According to Applicant, there are two additional interpretations of the statute, either of which would satisfy Applicant; namely, to direct states to calculate the disparity percentage by disregarding the top and bottom 5% of the ranked LEAs or "multiply the per-pupil figures for the highest LEA by 95% and per-pupil figures for the lowest LEA by 105%" and disregard LEAs above and below the respective lines. Since these methods were presented to the ALJ and flatly rejected by the ALJ's judgment, I need not revisit reasons why Applicant's proposed calculations are not pertinent to whether the Department's regulatory appendix contains a reasonable implementation of the statute's disparity test.

⁹ *U.S. v. Mead*, No. 99-1434, __ U.S. __ (June 18, 2001).

¹⁰ The Supreme Court recently spoke directly to this issue by explaining that it should be "apparent from the agency's generally conferred authority and other statutory circumstances that congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *Id.* at 9.

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