IN THE MATTER OF North Slope Borough School District, Alaska,
Applicant.

Docket No. 90-47-I
Impact Aid Proceeding

# INITIAL DECISION

Appearances: Chris D. Gronning, Esq., of Bankston & McCollum, Anchorage, Alaska, for the Applicant

Jill Martin Eichner, Esq., of the Office of the General Counsel, United States Department of Education for the Assistant Secretary for Elementary and Secondary Education

LuAnn B. Weyhrauch, Esq., of the Office of the Attorney General, State of Alaska, for the Intervenor

Before: Judge Allan C. Lewis

This is a proceeding initiated by the North Slope Borough School District (North Slope) pursuant to 20 U.S.C. § 240(g) (1988) in which it requests a review of a certification for the 1989 Federal fiscal year by the Assistant Secretary for Elementary and Secondary Education (ED). The certification determined that the State of Alaska had a program of State aid for free public education which was designed to equalize expenditures for free public education among its local educational agencies, such as North Slope, under Section 5(d)(2)(A) of the Act of September 30, 1950, as added by Section 305(a)(2) of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (hereinafter 20 U.S.C. § 240(d)(2)(A) (1988)). Due to the potential impact of this matter upon the State of Alaska (Alaska), it was allowed to intervene and participate fully in this proceeding.See footnote 1 1/

North Slope challenges ED's determination on several grounds. It raises two statutory filing arguments which assert that Alaska's notice of intention to take Federal impact aid payments into consideration in making its State aid payments to its local educational agencies was not submitted to the Department of Education by the date prescribed by 20 U.S.C. § 240(d)(2)(C)(i).See footnote 2 2/ North Slope asserts two other procedural matters, namely that Alaska did not submit the requisite information with its notice of intention as required by 20 U.S.C. § 240(d)(2)(C)(i) and 34 C.F.R. § 222.68(b)(2) (1988) and that, before Alaska may reduce state aid to a local educational agency due to that agency's receipt of Federal impact aid, the agency must be afforded a hearing. Lastly, North Slope challenges ED's determination on the merits asserting that Alaska's equalization program did not satisfy the disparity test under 34 C.F.R. § 222.63 and, therefore, its program was not entitled to certification under 20 U.S.C. § 240(d)(2)(C)(i).

For the reasons stated infra, Alaska did not submit its notice of intention by the date prescribed by 20 U.S.C. 240(d)(2)(C)(i). Accordingly, it is not necessary to address the merits of the

remaining issues; the determination by ED is reversed; and the certification of Alaska's program for the 1989 Federal fiscal year is denied.

I. OPINION

In 1950, Congress enacted the Act of September 30, 1950 which recognized the responsibility of the United States for the impact of certain Federal activities on the local educational agencies in the areas in which these activities were conducted. These Federal activities placed financial burdens upon certain local educational agencies by reason of the fact that the revenues available to such agencies were diminished as the result of the acquisition of real property by the United States, the education provided to children residing on property owned by the United States or whose parents were employed on such property, or the sudden and substantial increase in the school attendance resulting from Federal activities. 20 U.S.C. § 236.

In order to receive Federal impact aid, an affected local educational agency was required, annually, to submit an application through its state educational agency to the Secretary of Education. 20 U.S.C. § 240(a). Though not allowed, several states subsequent to the enactment of the Federal impact aid program adopted state aid programs in which state aid to local educational agencies was reduced correspondingly by the amounts of Federal impact aid received by these agencies. These actions caused Congress in 1966 to enact 20 U.S.C. § 240(d) (1966) which reduced the local educational agency's eligibility for Federal impact aid in proportion to the state's reduction in aggregate per pupil expenditures caused by any offset in funds. H. Rep. No. 1814, 89th Cong., 2d Sess. (1966 U.S. Code & Admin. News 3844, 3878). Subsequently, in 1968, the proportional reduction approach was phased out in favor of a complete denial of Federal impact aid where a state took into consideration impact aid received by its local educational agencies in determining the eligibility or amount of state aid for such agencies. 20 U.S.C. § 240(d)(1) and (2) (1968).

In 1974, Congress reversed its approach regarding whether a state may consider Federal impact aid payments received by its local educational agencies in determining the amount of state aid received by these agencies. While it retained the general prohibition denying Federal impact aid payments to local educational agencies, it enacted an exception in the form of 20 U.S.C. § 240(d)(2)(A). Under this exception, a state could take Federal impact aid payments to local educational agencies into consideration in determining the amount of state aid to such agencies "if a State has in effect a program of State aid for free public education . . . which is designed to equalize expenditures for free public education among the local educational agencies of that State."

By 1978, Congress added 20 U.S.C. § 240(d)(2)(C), the jurisdictional provision in issue which required a state, desiring to take Federal impact aid payments into consideration in determining the amount of state aid to its local educational agencies, to submit notice of its intention to do so to the Department so as to enable the Department to determine whether its program qualified. During the period in issue, 20 U.S.C. § 240(d)(2)(C)(i) (1988) provided--

> If a State desires to take [Federal impact aid] payments under this section into consideration as provided in this paragraph for any fiscal year, that State shall, not later than sixty days prior to

the beginning of such fiscal year, submit notice to the Secretary of its intention to do so. Such notice shall be in such form and be accompanied by such information as to enable the Secretary to determine the extent to which the program of State aid of that State is consistent with the provisions of subparagraph (A). In addition, such notice shall be accompanied by such evidence as the Secretary finds necessary that each local educational agency in that State has been given notice of the intention of the State. If the Secretary determines that the program of State aid of a State submitting notice under this subparagraph is consistent with the provisions of subparagraph (A), the Secretary shall certify such determination to that State.

In the instant case, Alaska's certification of March 30, 1990 by Charles Hansen, Director, Impact Aid Program, Elementary and Secondary Education of the Department did not disclose any facts which reflected whether the notice was timely filed. The certification stated the general conclusion that "[t]he notice of intention was timely filed." Jt. Ex. 15 at 4. In this proceeding, the parties were given an opportunity to submit evidence regarding this issue. The only evidence presented by the parties was that Alaska's notice of intention letter had the date August 1, 1988 typed thereon and that ED received this letter on August 10, 1988. Stip. para. 47; Hansen Affid. para. 11. The record contains no evidence establishing the postmark on the envelope containing the notice of intention.

As a result, North Slope argues that the notice of intention was not submitted by the date prescribed by 20 U.S.C. § 240(d)(2)(C)(i) on two alternative grounds. First, North Slope asserts that the notice must be submitted no later than sixty days prior to the beginning of Alaska's 1989 fiscal year which began on July 1, 1988, i.e. no later than May 2, 1988. ED counters that the term fiscal year in 20 U.S.C. § 240(d)(2)(C)(i) refers to the Federal fiscal year, not the State fiscal year and, therefore, North Slope's argument has no merit.

In its alternative and second contention, North Slope argues that, even if the Federal fiscal year is the proper fiscal year, Alaska's notice is still untimely since it was not received by ED on or before August 1, 1988--the 60th day prior to the beginning of the 1989 Federal fiscal year. ED responds that it is the practice of the Impact Aid Program personnel to treat the date typed on the notice by the State as the day the notice was submitted to the Department. Since the letter's date was August 1, 1988 and the last filing date was August 2, 1988, according to ED, Alaska's notice was submitted within the period prescribed by the statute.See footnote 3 3/

Inasmuch as North Slope's alternative contention is clearly dispositive of the matter herein, the tribunal assumes, without deciding, that the term fiscal year in 20 U.S.C. § 240(d)(2)(C)(i) means the Federal fiscal year, not the state fiscal year.

North Slope argues that 20 U.S.C. § 240(d)(2)(C)(i) requires actual receipt of the notice by the Department. On the other hand, ED urges that the phrase, the "[s]tate shall . . . submit notice to the Secretary of its intention to," means the date typed by the state on the notice, i.e. August 1, 1988 in this case, and therefore, the notice was submitted by Alaska on the second to the last day permitted by the statute. In my view, 20 U.S.C. § 240(d)(2)(C)(i) requires actual receipt of the notice by the Department within the applicable period.

Initially, the focus is solely on the statutory language since the Department has not issued a regulation interpreting this provision. The term submit, as defined by Black's Law Dictionary 1426 (6th ed. 1990), means "to present for determination" and this act is not performed until the notice is received by ED. Thus, the common usage of the term submit mandates the construction urged by North Slope.

The phrase "shall submit . . . to" is employed in other statutory filing provisions governing the Department which are similar to 20 U.S.C. § 240(d)(2)(C)(i) and these statutes are construed to require receipt by the Department of the notice or application filed by the third party. For example, 20 U.S.C. § 240(a), a sister filing provision to the statute in issue, requires that a local educational agency seeking Federal impact aid, such as North Slope, "shall submit an application therefor . . . to the Secretary." Under 34 C.F.R. § 222.10(a) (1988), the Secretary provided that the annual filing date was January 31st and that--

> [e]ach application must be received by the Secretary on or before the final filing date, after transmittal through and certification by the State educational agency. The applicant is responsible for obtaining the certification of the State education agency and for securing a timely transmittal of the application to the Secretary.

Thus, the Secretary declared that the submission of an application occurred on its presentation to the Department, i.e. the receipt thereof, and that the local educational agency bore the risk of any delays, etc. in the transmission of the application to the Department. This policy was the position of the Department for over 30 years from 1956 (45 C.F.R. § 113.6 (1956)) through November 1989 and, therefore, was the position of the Secretary when Alaska submitted its notice of intention on August 10, 1988.See footnote 4 4/

In a similar fashion, 20 U.S.C. § 1094(b)(1) provides that an institution which desires to have a final audit or program review determination "reviewed by the Secretary shall submit to the Secretary a written request for review not later than 45 days after receipt of notification of the final audit or program review determination." The phrase "submit to the Secretary" is construed by the Department as requiring actual receipt by the Department of the written appeal as evidenced by either "the date of hand-delivery or the date of receipt indicated on the original U.S. Postal Service return receipt." 34 C.F.R. § 668.122(c).

In addition, the term submit is construed to require receipt of the document in statutes affecting other agencies. For example, in Cardenas v. Walters, 633 F.Supp. 776 (D.C.Pa. 1985), the court held that the "submission to the [Veterans Administration] agency" under 29 C.F.R. § 1613.220(d) (1985) of a recommended decision by a complaints examiner of the Equal Employment Opportunity Commission occurred on "the date the recommendation is received by the reviewing agency." Id. at 777. Thus, there is strong authority to support the interpretation urged by North Slope.

It is also apparent that the Department employs the term file in its regulations interchangeably with the term submit employed in its statutory filing provisions. E.g., 34 C.F.R. §§ 222.10(a) and 668.113(a) and (b). The long established interpretation of filing, as succinctly stated by the Third

Circuit in Heard v. Commissioner, 269 F.2d 911, 913 (1957) which relied in part upon the Court's opinion in Lombardo, is--

> [a]ctually, unless otherwise defined by statute,
> filing does not occur until the paper to be filed is delivered at the office of the official designated to receive it. United States v. Lombardo, 1916, 241 U.S. 73, 76, . . . .

Thus, the construction urged by North Slope, i.e. receipt, is consistent with the construction accorded the synonymous term file.See footnote 5 5/

ED argues that the date typed on the letter of notice constitutes the date of submission of Alaska's notice to the Department under 20 U.S.C. § 240(d)(2)(C)(i). ED cites no authority, i.e. regulation, statute, or case law, which supports its construction directly or indirectly. The tribunal's research reveals no support or even an instance in which such an argument was advanced. ED's sole support for its position is an affidavit declaration by Charles Hansen, the Director of the Impact Aid Program, that, in the absence of "a specific regulatory requirement . . . it is the practice of the Impact Aid Program to rely on the date of correspondence as the filing date." Hansen Affid. para. 13. Mr. Hansen opined further that "[f]actors outside the control of the sender . . . influence[d] the Program's use of alternatives to actual receipt include U.S. Postal Service delays and internal Departmental difficulties with verification of receipt dates." Id. at para. 12.

Mr. Hansen's declaration is rejected for a variety of reasons. First, and most obviously, 20 U.S.C. § 240(d)(2)(C)(i) is a statutory filing provision and the date typed on Alaska's letter of notice does not reflect in any manner the date of its presentation to the Department as required by the statute as amplified above. Second, this declaration represents, apparently, his private view. There is no evidence that this purported practice was adopted by the Department. ED has not proffered any documentation in which the Department publicly or internally adopted such a declaration as its practice.See footnote 6 6/

Therefore, it is concluded that none exists.

Third, within the area of the Federal impact aid program which Mr. Hansen oversees, Mr. Hansen's view conflicts in principle with over 30 years of policy and interpretation by the Department accorded local educational agencies which seek Federal impact aid payments as discussed supra, at 5-6. The Department required the local educational agencies to accept the risks of untimely submission for whatever reason. Applications by local educational agencies were submitted to the Department upon their receipt by the Department. Mr. Hansen's view rejects the Department's well established policy and treats the local educational agencies and the states unequally to the potential detriment of the local educational agencies. In passing upon whether Alaska's program is designed to equalize expenditures for free public education among the local educational agencies, the Department functions in a manner similar to a referee. Alaska and North Slope have opposing interests. In such an atmosphere, the Department must be consistent in its interpretations accorded its statutory filing provisions.

Fourth and lastly, the date typed on the notice is meaningless and establishes nothing in the context of a deadline statute. A notice may never be submitted to the Department or submitted days or weeks later, yet under ED's view, the notice of intention requirement would be satisfied as of this artificial date under all of these scenarios. Moreover, unlike the date of receipt, the date typed on a letter notice is also subject to manipulation or error by the state. The letter may be backdated or misdated.See footnote 7 7/ Simply put, a date typed at the top of a letter establishes nothing and is not trustworthy.

It may be argued that the result in this case is harsh. Statutory filing provisions are designed to establish arbitrary deadlines; however, at the same time, the public is afforded advance notice of such deadlines and, due to several past filings, Alaska had actual notice of the deadline in this case.

The Court addressed the significance of statutory deadlines in United States v. Locke, 471 U.S. 84, 94 (1985)--

"[d]eadlines are inherently arbitrary," while fixed dates "are often essential to accomplish necessary results." United States v. Boyle, 469 U.S. 241, 249 (1984). Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by the statute. Cf. United States Railroad Retirement Board v. Fitz, supra, at 179. (footnote omitted)

Accordingly, it is concluded that Alaska's notice of intention was not submitted by the date prescribed by 20 U.S.C. § 240(d)(2)(C)(i).

II. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is concluded that the certification of the State of Alaska for the 1989 Federal fiscal year by the Director, Impact Aid Program, Elementary and Secondary Education is reversed and that the State of Alaska's program for free public education is not certified pursuant to 20 U.S.C. § 240(d)(2)(C)(i) for the 1989 Federal fiscal year.

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Allan C. Lewis
Administrative Law Judge

Issued: March 3, 1992
Washington, D.C.

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SERVICE

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A copy of the attached initial decision was sent by certified mail, return receipt requested, on March 3, 1992, to the following:

Jill Martin Eichner, Esq.
Office of the General Counsel
U.S. Department of Education
Room 4091, FOB-6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Chris D. Gronning, Esq.
Bankston & McCollum
1800 Ensearch Center
550 West Seventh Avenue
Anchorage, Alaska 99501

LuAnn B. Weyhrauch, Esq.
Office of the Alaska Attorney General
Alaska Department of Law
P.O. Box K
Juneau, Alaska 99811

A copy of the attached initial decision was also sent on March 3, 1992, to--

The Honorable Lamar Alexander
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-0100

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Footnote: 1 *1/ While Alaska was afforded the opportunity to present its views separately, it chose to join together with ED in its presentation. Accordingly, references in this initial decision to ED also refer to positions or arguments urged by Alaska.*

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Footnote: 2 *2/ 20 U.S.C. § 240(d)(2)(C) was added by Section 1006(a) of the Education Amendments of 1978. Section 1006(a) added subparagraph (c)(i) through (iii) despite an existing subparagraph (c). For purposes pertinent herein, the references are to subparagraph (c), as added by Section 1006(a).*

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Footnote: 3 *3/ While the parties differ by one day the last day for submission of the notice, i.e. August 1st according to North Slope and August 2nd according to ED, this difference is of no consequence here under the arguments advanced by the parties. Inasmuch as October 1st is the beginning of the Federal fiscal year, 60 days prior thereto is August 2nd of the same calendar year. Hence, the notice must be submitted to the Secretary by August 2, 1988, in order to comply with 20 U.S.C. § 240(d)(2)(C)(i).*

Footnote: 4 *4/ Effective November 1989, 34 C.F.R. § 222.10 was changed and amended to provide in subparagraph (f) that the filing date was the date an application was received by the Secretary or the U.S. Postal Service postmark. 54 Fed. Reg. 37,257 (1989). Even under this modification which is not applicable to notices of intention filed under 20 U.S.C. § 240(d)(2)(C)(i), Alaska's notice is not timely. There is no evidence in the record regarding the U.S. Postal Service postmark for Alaska's notice and the actual receipt of the notice by the Department was August 10, 1988.*

Footnote: 5 *5/ Although submit is not otherwise defined by statute, the Department has wavered slightly in the interpretation of this term in its regulations, but this is of no consequence here. Under 20 U.S.C. § 1234a(b)(1) (1989), a recipient seeking review from an adverse preliminary departmental decision in the General Education Provisions Act area "shall submit to the Office [of Administrative Law Judges] an application for review not later than 30 days after receipt of notice of the preliminary departmental decision." While the term submit is, again, construed to mean file (34 C.F.R. § 81.27 (1989)), the date of filing is slightly more flexible as it occurs on either the "date of hand-delivery or mailing." 34 C.F.R. § 81.12(d) (1989).*

Footnote: 6 *6/ There is certainly no indication in the certification determination by Mr. Hansen which discloses this position. The determination did not disclose any facts which reflected whether the notice was timely filed or the legal analysis under which the notice was purportedly timely filed. Jt. Ex. 15 at 4. The determination avoided these troublesome problems by baldly asserting that the notice was timely filed.*

Footnote: 7 *7/ This point is well illustrated in this case. Alaska forwarded to ED its final computations for the disparity test for fiscal year 1989 in a letter dated January 26, 1989. Jt. Ex. 11. According to ED's date stamp, it was received on January 30, 1990, a year and four days later. It is apparent from a date on the computations attached to the letter that the January 26, 1989 date was in error and that the letter was typed sometime in January 1990. Thus, under Mr. Hansen's view, the document would be considered as submitted approximately one year before it was, in fact, created by Alaska.*

Footnote: 8 *8/ In the Federal income tax area, Congress recognized that "it is possible to predate postmarks where mailing machines or other devises are used" and provided that a postmark not made by the United States post office shall be deemed the date of delivery only to the extent permitted by regulations.*