IN THE MATTER OF Arizona Department of Education,
Applicant.

Docket No. 91-45-I
Impact Aid Proceeding

AMENDED ORDER RE MOTION TO STRIKE ISSUES 4, 5, AND 8

This is a proceeding to examine whether the Arizona Department of Education's aid program for free public education, which takes into consideration Federal impact aid received by its local educational agencies, is designed to equalize expenditures within the purview of Section 5(d) of Public Law No. 81-874, as amended by Section 304(c)(2) of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 and Section 1006(a) of the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143 (20 U.S.C. § 240(d))(hereinafter Section 240(d)). This proceeding was instituted at the request of the Arizona Department of Education (Arizona) following an adverse determination by the Assistant Secretary for Elementary and Secondary Education (ED).See footnote 1 1/ Thereafter, on July 31, 1991, ED and the IntervenorsSee footnote 2 2/ filed motions to strike and to limit the scope of the hearing in this matter, arguing that certain issues set forth by Arizona in its request for a hearing were raised too late in the determination process and, therefore, should be stricken from consideration in this hearing. Arizona opposed these motions and asserted that these issues were raised in a timely fashion and, alternatively, that ED's prior conduct estops the granting of a motion to strike these issues. For the reasons stated below, the motions of ED and the Intervenors are granted.See footnote 3 3/

In their motions to strike, ED and the Intervenors note that the wealth neutrality theory under which Arizona originally applied for a certification of a determination was abandoned by Arizona on September 20, 1990, and that, thereafter, Arizona proceeded under the exceptional circumstances theory. Subsequently, at the informal hearing provided the local educational agencies pursuant to Section 240(d)(2)(C)(ii), the Assistant Secretary considered only the application of the exceptional circumstances test and received evidence from the agencies regarding this test.See footnote 4 4/ Following the informal hearing, it was also the exceptional circumstances theory which the Assistant Secretary addressed in the determination issued on May 1, 1991.

In their motions to strike, ED and the Intervenors request that at least two issues proposed by Arizona in its request for a hearing in the instant case be stricken from consideration in this proceeding.See footnote 5 5/ In their view, the Assistant Secretary serves as the fact finder and initial decision-maker regarding Arizona's request for a determination, while this tribunal serves in a capacity more akin to a reviewing authority than a fact finder.

They argue, therefore, since Arizona failed to raise these issues at the appropriate time before the Assistant Secretary during the "predetermination stage," Arizona is precluded from raising these issues in its appeal of the Assistant Secretary's denial of Arizona's request for certification. In addition, ED asserts that a consideration of these new issues at this stage would usurp the function served by the Assistant Secretary--a position which possesses the agency's expertise to

evaluate the applicability of these new issues--and would otherwise denigrate the decision process.

Initially, the parties acknowledge the absence of authority which specifically addresses this issue. In such a situation, it is appropriate to examine the scheme of the statute and the regulations thereunder for guidance. Here, the statutory scheme of Section 240(d) is unique and provides significant insight in this matter. As part of the determination process involving a state and the Secretary, Congress provided a hearing under Section 240(d)(2)(C)(ii) which afforded the state's local educational agencies an opportunity to present their views regarding the consistency of the state aid program to equalize expenditures for free public education. This hearing comes after the state has provided the Assistant Secretary with the supporting information and theory or theories of its case, and before the Assistant Secretary renders a determination. Hence, it would defeat the purpose of Section 240(d)(2)(C)(ii), as well as raise significant due process concerns, if Arizona is allowed to assert theories at this stage of the process which were not advanced at the time of the informal hearing with the local educational agencies. In addition, Section 240(d)(2)(C)(i) requires the state, in effect, to set forth its theories with its original notice since the "accompan[ing] . . . information [with the notice shall] . . . enable the Secretary to determine" whether the state aid program qualifies.See footnote 6 6/ Hence, the inclusion of new theories at this stage would thwart the orderly administrative determination process within the Department and preclude the input of the expertise of the Assistant Secretary. Thus, the statutory scheme supports the view that issues which are not raised in a timely fashion in the initial submission by the state and, therefore, at variance with the state's request for hearing made pursuant to 34 C.F.R. § 222.69(b)(1989) should be stricken. Cf. Rowe v. United States, 655 F.2d 1065, 1071-1072 (Ct.Cl. 1981).

Arizona argues that the present hearing is its first hearing to which it is entitled under Section 240 and, therefore, it may assert all issues relevant to whether it has satisfied the statutory and regulatory requirements as well as its legal and constitutional challenges. While Arizona is certainly correct in its view that the present hearing is its first hearing, the process mandates that, as noted above, its pertinent theory or theories and supporting information be advanced in its initial submission to the Assistant Secretary. While the Assistant Secretary permitted Arizona to alter its theory after its initial submission (i.e. from the wealth neutrality test to the exceptional circumstances test), a matter which may be inconsistent with the regulations, this action was apparently precipitated by a change in the administrative interpretation of the wealth neutrality test and the desire to allow Arizona an opportunity to seek qualification under the exceptional circumstances test. This action conforms with the principle that an agency is free "to relax or modify its procedural rules for the orderly transaction of business when in a given case the ends of justice require it." American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970) (quoting NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. (1953)). This action was allowed, however, prior to the informal hearing with the local educational agencies and, thus, it did not significantly affect the process. In contrast, Arizona's present request was initiated as a result of its failure to obtain a favorable determination and would require the reinstitution of the entire administrative process, including the informal hearing allowed the local educational agencies. Hence, the circumstances are significantly dissimilar and justify different results.

Arizona argues that, in March 1990, the Department substantially modified its long established approach in applying the wealth neutrality test; that the revised position was unworkable and ridiculous; and therefore, this action by the Department was arbitrary and capricious. As a result thereof, Arizona was induced to employ the exceptional circumstances test and, therefore, abandoned the wealth neutrality test. Arizona asserts, and it is uncontradicted, that the Assistant Secretary did not specifically inform Arizona that the exceptional circumstances test is "rarely, if ever, . . . used." Consequently, Arizona asserts that it was "setup" and requests relief in the form of a denial of the motions to strike and a remand to the Assistant Secretary for consideration of the wealth neutrality and disparity standard tests.

In Arizona's view, the present hearing is "an appeal from an initial decision" and, therefore, "the appellant need only to prove that the officials' conduct [in modifying ED's interpretation of the wealth neutrality test] was arbitrary and capricious" in order to pursue this test in the present proceeding. This proposed standard, as noted by Arizona, is a judicial standard which would justify "a remand to the agency had this proceeding been a judicial review."

The present hearing is not, however, an appellate-type review. Factual disputes may be aired by the parties in the present proceeding under 34 C.F.R. § 222.69(f). In addition, this tribunal will render the first decision on this matter--an "initial decision" according to 34 C.F.R. § 222.69(g)--which is then forwarded to the Secretary. Hence, this proceeding is not akin to a judicial review. Rather, it is part of a process under which the adverse determination by the Assistant Secretary for Elementary and Secondary Education is further scrutinized at the request of Arizona, an affected party. Thus, the arbitrary and capricious argument lacks a proper foundation and merit.

There is also a question of whether the doctrine of estoppel applies. Generally, estoppel is not permitted against the Federal government although this view is apparently eroding. The Court has not passed definitively on whether estoppel may apply against the Federal government.See footnote 7 7/ Compare Schweiker v. Hansen, 450 U.S. 785 (1981) with Moser v. United States, 341 U.S. 41 (1951). In these circumstances, it is appropriate to follow the views of the Court of Appeals for the circuit within which an appeal by Arizona would lie. Cf. Golsen v. Commissioner, 54 T.C. 742, 756-757 (1970), aff'd on other issue, 445 F.2d 985 (10th Cir. 1971), cert. denied, 404 U.S. 940 (1971).

Arizona is in the Ninth Circuit. The Ninth Circuit addressed the estoppel issue in Rider v. U.S. Postal Service, 862 F.2d 239, 240 (1988) where it held that--

> [t]he federal government may not be estopped on the same terms as other litigants. Heckler v. Community Health Serv., Inc., 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984). In addition to the traditional requirements for estoppel, this Circuit requires a showing of "affirmative misconduct going beyond mere negligence." E.g. Wagner v. Director, Fed. Emergency Management Agency, 847 F.2d 515, 519 (9th Cir.1988).

In the Ninth Circuit's view, affirmative misconduct requires more than a government official's erroneous statement which was contrary to an internal administration handbook (Schweiker v. Hansen, 450 U.S. 785 (1981)) or an Army recruiter's erroneous representations concerning an entitlement to pension benefits which induced an individual to join the Army Reserves (Lavin v.

Marsh, 644 F.2d 1378 (9th Cir. 1981)). An official's action which is "a deliberate lie" or reflects "a pattern of false promises" clearly constitutes affirmative misconduct. Rider, 862 F.2d at 241. Watkins v. U.S. Army, 875 F.2d 699, 707-708 (9th Cir. 1989).

Under the circumstances in this case, affirmative misconduct by the ED officials has not been shown. The Department is charged with the execution of the Federal impact aid legislation. As such, it is within its powers to interpret the statute as well as to alter or modify its interpretation. Similarly, it is within ED's powers to disregard the subsequent protestations by Arizona that the new formula was unworkable and ridiculous.See footnote 8 8/ Arizona's remedy vis-a-vis the wealth neutrality test was to pursue this matter administratively which it elected not to do. Thus, there is no evidence of affirmative misconduct in this regard.

In addition, following Arizona's submission of the final fiscal 1989 data utilizing the wealth neutrality test in January 1990, ED officials suggested and advised Arizona to apply under the exceptional circumstances test and even critiqued Arizona's tentative submission. These officials led Arizona to believe that, due to Arizona's unique facts, the exceptional circumstance test was the appropriate test for Arizona. The ED officials did not, however, inform Arizona that the exceptional circumstance test will rarely, if ever, be used. Other than the published view of the Department regarding the perceived frequency of the applicability of the exceptional circumstances test as set forth in 42 Fed. Reg. 15544 and 65525 on March 27 and December 10, 1977, respectively, ED officials were silent on this matter. Thus, Arizona was neither misinformed that it would qualify under the exceptional circumstances test, nor was it misinformed regarding the perceived frequency with which the exceptional circumstances test would apply. Hence, once again, there is no evidence of affirmative misconduct.See footnote 9 9/ Watkins, 875 F.2d at 707. Accordingly, Arizona's argument is without merit.

On the basis of the foregoing, it is HEREBY ORDERED that the motions by the Assistant Secretary and the Intervenor are granted as to issues 4 (disparity standard) and 5 (wealth neutrality) as identified in Arizona's request for a hearing dated May 18, 1991, and are stricken from consideration in this hearing.See footnote 10 10/

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Allan C. Lewis
Administrative Law Judge

Issued: November 8, 1991
Washington, D.C.

Footnote: 1 1/ The term ED refers not only to the action by the Assistant Secretary, but also to the actions taken on his behalf by other employees of the Department including the Office of the General Counsel during the course of the determination process.

Footnote: 2 2/ The Intervenors represent fifteen Arizona school districts or local educational agencies which were subject to a reduction in state aid due to the State's consideration of impact aid payments received by these local educational agencies.

Footnote: 3 *3/ An initial order was issued on October 16, 1991, which was adverse to Arizona. Subsequently, Arizona moved for reconsideration on the grounds that the initial order failed to address its principal argument regarding arbitrariness and that the tribunal misapplied the Ninth Circuit law on estoppel as to the Federal government. ED and the Intervenors filed responses. In view of the motion for reconsideration, the initial order is reissued in a modified form. Hence, this order is entitled amended order.*

Footnote: 4 *4/ 20 U.S.C. § 240(d)(2)(C)(ii) 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).*

Footnote: 5 *5/ ED and the Intervenors urge that issue 4 raising the disparity standard test (34 C.F.R. § 222.63(1989)) and issue 5 raising the wealth neutrality test (34 C.F.R. § 222.64) be stricken. In addition, the Intervenors urge that issue 8 raised by Arizona in its request for a hearing dated May 18, 1991, be stricken, i.e. whether agents of the United States Department of Education, in their contradictory interpretations of 34 C.F.R. § 222.64, from year to year, acted arbitrarily and capriciously, to Arizona's detriment. This latter issue is a matter not within the jurisdiction of the present proceeding. Therefore, this issue, like the constitutional issue raised by Arizona, will not be addressed in any subsequent initial decision.*

Footnote: 6 *6/ Moreover, the state in its initial submission must "(i) demonstrate how its program of State aid comports with the criteria and standards in § 222.62 and (ii) indicate for each local educational agency receiving funds under the Act the proportion of those funds which will be taken into consideration in accordance with § 222.66." 34 C.F.R. § 222.68(b)(2). The phrase "standards in § 222.62" includes the disparity standard test, the wealth neutrality test, and exceptional circumstances test. 34 C.F.R. § 222.62(d). Thus, Arizona had notice that it must assert the pertinent test or tests under which it sought approval of its state aid program.*

Footnote: 7 *7/ Contrary to ED's view, the Secretary has recognized that some equitable principles, such as laches, might be applied against the Federal government in certain forums. In re Platt Junior College, U.S. Dep't of Education (Sec. Dec. Jan. 19, 1990) at 2. Subsequently, laches was applied by the administrative law judge. In re Platt College, Dkt. No. 90-2-SA, U.S. Dep't of Education (Oct. 31, 1991) at 6-14.*

Footnote: 8 *8/ To view it otherwise would permit Arizona and others to exert influence and control over a matter solely within the province of a Federal executive agency. Thus, the Watkins decision cited by Arizona, while instructive in general on estoppel, is distinguishable from the instant case since the Federal agency involved--the U.S. Army--was estopped to bar the reenlistment of a dedicated and talented, but avowed homosexual because the Army affirmatively acted repeatedly over a span of 15 years in violation of its own regulations which disqualified without reservation a homosexual for reenlistment.*

Footnote: 9 9/ In addition, even if there was an affirmative duty to inform Arizona on this matter, which has not been shown, this is arguably satisfied by the publication. Thus, there was no affirmative misconduct on the part of ED. Watkins, 875 F.2d at 707.

Footnote: 10 10/ This interlocutory order is certified to the Secretary for a decision due to the controlling nature of this issue and the significant amount in controversy and in order to materially expedite the disposition of this matter. The hearing in this matter is scheduled to commence on Tuesday, December 10, 1991. This will allow the parties an opportunity to express their views to the Secretary regarding this order and, should the Secretary choose to review this order, allow ample time for its review. In the event the present order is in error, a remand to the Assistant Secretary will only delay the overall disposition of this matter by two or three months while the Assistant Secretary gathers additional information, provides the local educational agencies with an informal hearing as required by Section 240(d)(2)(C)(ii), and issues his determination. This is a minor delay when compared to a delay of at least 12 to 15 months in the overall process if the reversal by the Secretary comes after an appeal of an initial decision by the administrative law judge. In the event this order is affirmed by the Secretary, this action will not have delayed the proceeding and will have resolved a significant issue.