IN THE MATTER OF LINCOLN PUBLIC SCHOOLS,
Applicant.

Docket No. 94-57-I
Impact Aid Proceeding

ORDER RE MOTION TO STRIKE AND LIMIT SCOPE OF HEARING

This is a proceeding initiated by the Lincoln Public Schools, the School District of Omaha, and the School District of Grand Island (hereinafter collectively referred to as "Lincoln") pursuant to 20 U.S.C. § 240 and 34 C.F.R. § 222.69. Lincoln requests a review of a determination by the Assistant Secretary for the Office of Elementary and Secondary Education of the United States Department of Education (Assistant Secretary) which concluded that the State of Nebraska did not have a program of State aid for free public education designed to equalize expenditures for free public education among its local educational agencies under 20 U.S.C. § 240(d)(2)(A) (1990).See footnote 1 1/

The Assistant Secretary did not certify Nebraska's program on the theory that its program failed the exceptional circumstances standard under 34 C.F.R. § 222.65 (1990) -- one of the three tests under which a state may seek to certify its program. In this action, Lincoln seeks a review of that determination and also urges that certification is appropriate under the other two standards set forth in 34 C.F.R. §§ 222.63 and 222.64, i.e. the disparity and wealth neutrality standards. In addition, Lincoln argues that the impact aid regulations are void for vagueness; that the Department's recently adopted methodology under the wealth neutrality standard violates the Equal Protection and Due Process Clauses of the United States Constitution; and that the denial of Nebraska's request for certification is contrary to the Spending Power Clause, Article 1, Section 8, Clause 1 of the Constitution and the Tenth Amendment.See footnote 2 2/

ED filed a motion to strike and limit the scope of this hearing. It argues that the only matters relevant in this hearing pertain to the exceptional circumstances standard.See footnote 3 3/ Therefore, ED urges that issues related to the other two standards governing certification, i.e. the disparity and wealth neutrality standards, should be stricken from consideration. This includes items 1, 2, 6, 11-13, 16-20, and 28 and the issues related to the disparity and wealth neutrality standards in items 4, 5, 10, and 15. In addition, ED argues that questions concerning the validity of regulations and constitutional violations in items 21, 22, and 23 should also be stricken because the tribunal lacks authority to pass on such questions.

ED's motion relies primarily on an Order issued by this tribunal in In re Arizona Department of Education, Dkt. No. 91-45-I, U.S. Dep't of Education (Nov. 8, 1991) which addressed the scope of a hearing in a similar context, namely where a state sought a review of a determination by the Assistant Secretary that denied a certification of its program.

Lincoln seeks to distinguish Arizona and urges that the breadth and scope of the present hearing should not be limited. First, it maintains that the present hearing is its first opportunity, as an aggrieved party, to present its views regarding the noncertification of Nebraska's program and, therefore, a local educational agency's hearing should not be limited by the actions of Nebraska in its dealings with the Assistant Secretary. Second, this hearing is one of several administrative checks imposed by Congress to review the issue of whether a state's program should be certified. Therefore, any limitation on the scope of this hearing would defeat this purpose. Third, the local educational agency determines the breadth and scope of the present hearing because it is required under 34 C.F.R. § 222.69(b)(2) to identify the issues of fact and law in its request for a hearing. Fourth, Lincoln argues that 20 U.S.C. § 240(g) mandates an APA-type hearing for a local educational agency and any limitation upon the issues presented therein would violate the Administrative Procedure Act and the Administrative Law Judge's duty to develop a full and complete record. Accordingly, Lincoln concludes that such a limitation would reduce the present hearing to a mere formality.

In Arizona, the State of Arizona applied to the Department for

certification of its program under the wealth neutrality standard. Later, Arizona abandoned this theory and proceeded under the exceptional circumstances standard before the Assistant Secretary. The Assistant Secretary denied certification of its program under the exceptional circumstances standard. Thereupon, Arizona filed a request for a hearing before this tribunal and sought to expand the scope of the hearing to include whether certification was possible under the disparity or the wealth neutrality standards.

This tribunal declined to expand the scope of the hearing beyond considering the standard urged by Arizona at the time of the Assistant Secretary's determination--

> 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. [footnote omitted] 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 at 3-4.

This case presents a variation of Arizona. Like Arizona, Nebraska applied for certification under one standard and changed to a different standard before the informal hearing was held with the state's local educational agencies and before the issuance of

the determination by the Assistant Secretary regarding the qualification of state's program. Unlike Arizona, Nebraska did not request a hearing following the denial of certification of its program. Rather, local educational agencies requested a hearing to challenge the denial of the certification.

While, as noted by Lincoln, the right to a hearing by a state and a local educational agency is bestowed by different statutory subsections, this distinction does not, however, warrant a result different than Arizona.See footnote 4 4/ Both hearings provide the means by which a state or a local educational agency may question the correctness of a determination by the Assistant Secretary. The Assistant Secretary's determination addressed the theory or theories advanced by the state and considered the views expressed by the local educational agencies in their informal hearing. Accordingly, a subsequent hearing, whose function is to review this determination, should be limited to the theory or theories advocated by the state and considered by the Assistant Secretary.

Such a restriction in the instant case is fully consistent with the right of certification. By statute, this right belongs to the state, not a local educational agency. With this right flows the privilege of advocating the theory or theories under which certification is sought. This right would be vitiated if a local educational agency was permitted to advance a theory which was not advocated by the state. Moreover, the introduction of a new theory or a previously abandoned theory at this stage by a local educational agency would significantly upset the orderly process of the administrative resolution of the certification issue and require, in effect, the process to begin anew. Additional financial information must be gathered from the state, additional views of the state and the other local educational agencies must be obtained, and the input of the Assistant Secretary must be procured. The process of administrative resolution should narrow matters, not enlarge the areas of dispute.See footnote 5 5/

Next, Lincoln asserts an estoppel argument. It argues that ED's motion to exclude consideration of the wealth neutrality standard should be denied due to its earlier conduct in dealing with Nebraska regarding that standard. According to Lincoln, Nebraska developed new legislation aimed at establishing an equalized program of state aid with the assistance of ED officials. After the passage of the Nebraska legislation, Nebraska was assured by ED that its program conformed with the Federal law. ED provided a data format for the wealth neutrality standard. Under this format, test data runs were made by Nebraska and revealed that Nebraska satisfied the wealth neutrality standard. ED indicated that the data format had been followed and that Nebraska's information appeared appropriate. Nebraska then proceeded to take Federal impact aid into consideration in its initial state aid calculation for fiscal 1991 in accordance with the new legislation.

In December 1990 and after the state's distributions to its local educational agencies had been made, ED informed Nebraska that the data format and methodology were now unacceptable. Over the period from December 1990 to November 1992, Nebraska and ED discussed the new data format for the wealth neutrality standard and how Nebraska felt that the new proposed data format had substantially changed the methodology of analysis and could not be applied fairly to Nebraska in light of the unique characteristics of its funding program. Nebraska ascertained that it could not qualify under the new proposed data format for the wealth neutrality standard. It was advised by ED to seek certification under the exceptional circumstances test. ED provided guidance on the data format submissions under this standard and other requirements. Nebraska then elected to seek certification under the exceptional circumstances standard and submitted its final year end data under this standard. This decision by Nebraska was influenced by a representation of a top official of ED that Nebraska's situation was very unique -- a consideration under the exceptional circumstances standard.

While ED disputes many of the above factual contentions underlying Lincoln's estoppel argument, ED also argues that its conduct must, nevertheless, rise to the level of affirmative misconduct before estoppel may be considered against the government. Bostwick Irr. Dist. v. United States, 900 F.2d 1285 (8th Cir. 1990), In re Academia La Danza Artes Del Hogar, Dkt. No. 90-31-SP, U.S. Dep't of Education, 81 Ed. Law Rptr. 1250 (1992) and In re Arizona Dep't of Educ., Dkt. No. 91-45-I, U.S.

Dep't of Education (Nov. 8, 1991). See also United States v. Manning, 787 F.2d 431, 436 (8th Cir. 1986).

Assuming the facts as set forth by Nebraska are true, ED's actions do not constitute affirmative misconduct. As the tribunal noted in Arizona, a case which is factually similar in many respects to the instant case--

> [t]he 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.

Arizona at 6.

Thus, while ED may have changed its methodology concerning the wealth neutrality standard, Nebraska's remedy was to pursue, administratively, whether this new methodology was correct. Instead, Nebraska elected to proceed under the exceptional circumstances standard. In addition, the observation by one of ED's top officials that Nebraska's program was unique does not amount to affirmative misconduct. The circumstances in this case are such that the parties were aware that this was, at best, a preliminary judgment by that individual. Hence, the facts in this case do not warrant the application of estoppel.

Lincoln challenges the validity of the impact aid regulations asserting that they are void for vagueness. ED moves to strike this argument asserting that the tribunal lacks authority to pass upon the validity of regulations. In this regard, ED relies upon In re Lemont Township High School District #210, Dkt. No. 89-48- I, U.S. Dep't of Education (1992), certified by the

Secretary (May 4, 1992). Lemont is squarely on point and supports ED's position. There, this tribunal held that--

> it is apparent that Congress did not specifically authorize the tribunal to pass upon the validity of regulations promulgated by the Secretary of Education. In fact, Congress required that the administrative law judge should follow the published rules of his or her agency.
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> . . . .
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> As noted above, the initial decision by an administrative law judge is made subject to the substantive regulations of the agency. Thus, absent a clear mandate from Congress and corresponding implementing regulations which authorize the administrative law judge to pass upon the validity of regulations--all of which are not present in this case--the tribunal must follow the substantive regulations.

Lemont at 6.

Subsequent to the Secretary's decision in Lemont, the Secretary

in In re Baytown Technical School, Inc., Dkt. No. 91-40-SP, U.S. Dep't of Education (April 12, 1994) implicitly invalidated his regulation governing the admissibility of exhibits in the recovery of fund cases in the student financial assistance area. Hence, there appears to be considerable doubt regarding the viability of Lemont, that is, that an Administrative Law Judge does not have the authority to consider the validity of regulations.See footnote 6 6/ See Plaquemines Port v. Federal Maritime Comm'n, 838 F.2d 536 (D.C. Cir. 1988). At this juncture, however, the doctrine of stare decisis mandates that this tribunal follow Lemont. Accordingly, the tribunal will not pass upon the validity of the impact aid regulations and item 23 will be stricken from consideration.

Lastly, Lincoln raises constitutional issues in items 21 and 22. In item 21, it asserts that the current wealth neutrality methodology violates the Equal Protection and Due Process Clauses of the United States Constitution. Since the issues in item 21 are predicated upon an adverse determination by the Assistant Secretary under the wealth neutrality standard -- a circumstance which did not occur -- and, as noted above, a standard which will not be addressed by this tribunal, it is appropriate to strike this item.

In item 22, Lincoln urges that the denial of Nebraska's request for certification to consider impact aid is contrary to the Spending Power Clause, Article 1, Section 8, Clause 1, and the Tenth Amendment. Inasmuch as the tribunal lacks the authority to consider the validity of regulations, it naturally follows that it also lacks the authority to pass upon more serious, constitutional issues.

On the basis of the foregoing, it is HEREBY ORDERED that the motion by the Assistant Secretary to strike is granted as to
items 1, 2, 6, 11-13, 16-23, and 28 and as to the issues related to the disparity and wealth neutrality standards in items 4, 5, 10, and 15.

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Allan C. Lewis
Chief Administrative Law Judge

Issued: February 1, 1995
Washington, D.C.

Footnote: 1 1/ The State of Nebraska is aware of this proceeding and has not requested to participate as an intervenor.

Footnote: 2 2/ Lincoln Public Schools and the School District of Omaha filed identical requests for a hearing which set forth 34 disputed issues. These 34 disputed issues also encompass the issues raised by the School District of Grand Island. Thus, this

Order governs each of the local educational agencies.

Footnote: 3 3/ Bellevue Public Schools, an intervenor in this proceeding, supports ED's position and filed a reply brief in support thereof.

Footnote: 4 4/ A State is granted a hearing under Section 240(d)(2)(C)(iii) while a local educational agency's hearing is governed under Section 240(g). Section 240(d)(2)(C)(ii) is not applicable in this case as it provides for the informal, predetermination hearing permitted a local educational agency before the Assistant Secretary renders his or her determination.

Footnote: 5 5/ For similar reasons, Lincoln's literal construction of 34 C.F.R. § 222.69(b)(2) is rejected. This regulation requires a local educational agency in its request for a hearing "to specify the issues of fact and law to be considered." Under Lincoln's construction, it could designate, and therefore demand, the resolution of issues which are beyond the scope of the present hearing. In the scheme of the regulations, this regulation

serves merely to inform the Department which of the issues urged before the Assistant Secretary that the local educational agency or the state seeks to contest in the post-determination hearing.

Footnote: 6 6/ It is clear that administrative agencies may not invalidate a statute. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robison, 415 U.S. 361, 368 (1974); Gibas v. Siginaw Mining Co., 748 F.2d 1112, 1117 (6th Cir. 1984).