IN THE MATTER OF LAPWAI SCHOOL DISTRICT #341, IDAHO,
Petitioner.

Docket No. 95-3-I
Impact Aid Proceeding

DECISION

Appearances: Alexander J. Pires, Jr., Esq., Conlon, Frantz, Phelan, Knapp & Pires, Washington, D.C.,
for the Petitioner.

Miriam H. Whitney, Esq.., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Assistant Secretary for Elementary and Secondary Education.

Before: Thomas W. Reilly, Administrative Law Judge

BACKGROUND

In letters dated August 24 and September 6, 1994, the Superintendent of Schools for Lapwai School District #341, Lapwai, Idaho (school district or Petitioner), timely appealed the determination of Charles Hansen, Director of the Impact Aid Program, U.S. Department of Education (ED or Department), Office of Secondary and Elementary Education, disallowing 63 students from the school's count of 391 claimed to be eligible for calculation of the district's Impact Aid amount under Section 3 of P.L. 81-874 (Impact Aid Law, 20 U.S.C. §238), for the school district's fiscal year 1994 (FY 1994). This proceeding is governed by 34 C.F.R. Part 218 and is conducted pursuant to Section 5(g) of P.L. 81-874 (20 U.S.C. §240(g)).

Under the Impact Aid program, ED is authorized to grant Federal financial assistance to local educational agencies (LEAs or school districts) which provide a free public education to children who either reside on "Federal property" or whose parents are employed on "Federal property" (or are on active duty in the uniformed services), or both. (20 U.S.C. §238(a) & (b).) Impact Aid program staff found that the disputed 63 children lived on property designated as "lndian Fee-Owned Tax Exempt Land," which was not eligible as "Federal property" under 20 U.S.C. §244(1), and therefore could not serve as the basis for impact aid calculation under Section 3.

Petitioner does not seriously contest ED's factual finding that the 63 students living on "lndian fee-owned tax-exempt land" are not eligible to be counted by the school district as part of its Impact Aid calculation predicated on "federal property" status.See footnote 1 [1] However, it argues that a Federal agency making such determination has no right to withhold funds before a notice and hearing have been held. It asserts, in essence, that the Federal agency must continue to make payments even after ineligibility has been found until a notice and hearing has taken place, and even though ultimately clear ineligibility is determined for that portion of the school district's student population.

To place the controversy in the words of Petitioner's counsel:

> That Respondent [ED] has chosen to myopically focus on this largely undisputed issue [ineligibility] does not make it the 'primary issue' in this case. Rather, as asserted in Petitioner's Motion for Summary Judgment, the primary issue in this case is whether or not Petitioner is entitled to notice and a fair hearing on its eligibility for impact aid funding prior to the termination of such funding.
> (Petitioner's Reply Brief, at 1, parentheses added.)

Petitioner also argues that:

> (A) person who has no adequate defense on the merits is not precluded from complaining that the deprivation of his property occurred without the hearing essential under the due process guaranty merely because in his particular case due process of law would lead to the same result. (Citing Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 [1915].) (Petitioner's Opening Brief, at 8, emphasis added.)

Similarly, at page 5 of Petitioner's Brief:

> The fact that Petitioner, or any given recipient of impact aid funding, ultimately may not have a defense on the merits to the charge of ineligibility, is irrelevant to whether its due process rights have been violated. (Citing Coe, supra.)

It should be noted that Petitioner declined the opportunity for a full evidentiary hearing, opting instead to submit the matter on the briefs and documentary exhibits.See footnote 2 [2] Both sides have sub- mitted opening and closing briefs, with closing briefs containing opposing Motions for Summary Judgment.

Correspondence between ED and the school district illustrates the confusion following the Department's field investigation which resulted in disallowance of a group of students in the district's population, which group had been accepted as eligible in prior years in calculating impact aid. It is clear that the school district anticipated and relied upon receiving the same level of funding as in prior years, and, in fact, had already budgeted and "spent" (in advance) the expected impact aid funds. However, it is not clear that the school district had no advance warning that eligibility was about to be examined more closely, and that this field review could result in loss of eligibility for some students who had been accepted by ED as being eligible in prior years, when ED had simply relied on the Impact Aid Student Count submitted by the

school district.See footnote 3 [3] It is also not clear that ED's Director of the Impact Aid Program or his staff could have acted any more promptly than they did in notifying the school district of the field investigation of eligibility, and the eventual denial of eligibility to 63 out of 391 students. The Impact Aid Program staff also promptly assisted the school district in independently re-checking eligibility status through the Bureau of Indian Affairs (BIA).

It should be noted that Impact Aid funding was not completely denied for the year in question; only 63 out of 391students were disallowed from the "eligible" list. The school district received Impact Aid payments totalling $610,000 for FY 1994. (See Stipulated Facts, at 54, and Exhibits JE-7, JE-10, JE-11.) But as a result of the denial of a portion of the student count, a portion of its impact aid was lost. Thus, on August 4, 1994, the Lapwai School District found an Impact Aid deposit of $49,810 in its bank account when it had expected that final payment to be $150,000 (Petitioner's Opening Brief, at 2), or a shortfall of about $100,000 in expected revenue for the 1993-1994 school year. (On July 26, 1994, the school district's bank account had received the final Impact Aid payment for school year '93-'94 by FedWire deposit.) Due to school budget timing and the letting of school district contracts, in a sense the school district had "already spent" anticipated Federal Impact Aid funds at the "old" level, relying on the prior year's figures. On August 9, 1994, the school district received the formal allocation notice from ED.See footnote 4 [4]

ISSUE

Whether petitioner's Fifth Amendment Due Process claim relating to a reduction in Federal Impact Aid provides a bar to a Federal agency's reducing the amount of such funds prior to a hearing where, on the merits, the petitioner concedes ineligibility to qualify for those additional funds, but argues "hardship," reliance on the expectation of receiving the "same funds as last year," and argues that the district has "already spent" those funds as part of that year's school budget?

DISCUSSION

The school district argues that ED has deprived it of "property" without due process of law in violation of the Fifth Amendment, U.S. Constitution. Petitioner's Due Process argument is not persuasive. Federal Impact Aid does not constitute a cognizable property interest under the due process clause of the Fifth Amendment, nor does it constitute the school district's "property", nor does a prior year's award create a property right for a succeeding year, nor does anticipation of Federal aid create a right to Federal aid. First of all, each year's award is separately subject to qualification and eligibility, in accordance with rules laid down by Congress, and even when all students remain fully eligible, the amount of available aid, and thus the amount to be allocated to any individual school district, varies from year to year. Secondly, focussing on the Petitioner's Fifth Amendment Due Process argument, the school district does not constitute a "person" within the meaning of the Due Process clause, and thus does not have "standing" to raise such a claim. The Due Process claim, therefore, that the petitioner is being denied a property right prior to a hearing, within the meaning of the U.S. Constitution, is without merit.

The school district does have a right, under the statute and regulations, to contest the ineligibility finding at a hearing once payments are made at less than expected rates, and that is the source and reason for this hearing. (Section 5(g) of P.L. 81-874, 20 U.S.C. §240(g), and 34 C.F.R. 218.2.) But neither the applicable statutes nor the regulations require a hearing prior to the cut-off or recalculation of Impact Aid, where the cut-off is based upon ineligibility of a school district, a school, or part of its student population.

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915), cited by Petitioner, is inapposite. That case is distinguished from the instant matter because it involved the seizure of an individual stockholder's property to satisfy a debt without providing notice of a subsequent forcible seizure, thus clearly involving an individual person's property right.See footnote 5 [5] The present matter does not involve personal property nor forcible seizure, rather it concerns an "anticipated Federal benefit" or an expectation of a Federal grant, and not something which the school district had a vested "right" to, or had already earned or qualified for, or was eligible for. Furthermore, the assertion that the Petitioner may bring a Due Process claim despite having no defense on the merits (restated in Petitioner's reply brief, at 5) is invalid where the Petitioner concedes that 63 of its students were ("technically") ineligible all along. Additionally, assuming arguendo that Petitioner had a Due Process argument, the documents in the record make it clear that Petitioner had more than just casual notice, in advance, that ED might restrict or reduce Impact Aid in the future after investigating the eligibility status of all (391) of the district's students, not just the 63 eventually determined to have been ineligible. The Petitioner is also deemed to have been already on notice that it did have a right to a hearingSee footnote 6 [6] if it disagreed with the Impact Aid amount actually received, as this fact is published in the pertinent and available regulations (see 34 C.F.R. Part 222), as well as being so informed in correspondence from the Impact Aid Program Director, and as evidenced by the school district's prompt and timely appeal.

The Petitioner is in no better position by asserting that in prior years it had collected (improperly) Federal funds for those ineligible students, and had "relied" on receiving those same exact funds again. (Receiving improper Federal funds does not create a "right" to continue to receive improperly calculated Federal funds.) As the ED documents indicate, even where ALL students claimed were eligible, the actual amount to be disbursed was solely dependent upon exactly how much Congress would actually appropriate in any given year, and in several years only a pro rata amount could be granted per school district and per student, to fairly and equally "spread around" the only available funds. It is obvious that any "charitable" impulse to allow disbursement of such Federal funds to a school district for its ineligible students would unfairly (and illegally) diminish the amount of funds going to school districts with solely eligible students.

Beyond this, a Federal agency has absolutely no authority to disburse funds outside the express terms articulated by Congress in the controlling legislation. There is no room here for "equitable discretion" or sympathetic largesse to knowingly disburse restricted funds to ineligible parties, not even on the premise that the Federal agency might be able to recoup such funds at some time in the future. Grants under Section 3 of the Impact Aid Law are "formula grants" for which school districts must annually qualify (20 U.S.C. §238(c)), annually reapply for on a timely basis (20 U.S.C. §240(a)), and for which Congress annually appropriates funds (see, e.g., Ex. JE-5, FY 1994 appropriations act). Applicants cannot reasonably rely from year-to-year on any specific

level of funding even if the total national appropriation remains exactly the same as in a prior year, because the amount any applicant receives is subject to fluctuation depending on the type, category and validity of the specific children and property basis claimed, the number of other eligible Section 3 applicants elsewhere, and the amount of their shares of available funds, and the extent of pro rata cut-backs or increases in distributive shares to qualifying school districts.

Exploring further the Constitutional Due Process argument, see Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985), citing Mathews v. Eldridge, 424 U.S. 319 (1976). There the Court promulgated a three-part Due Process determination upon the premise that "marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." (Mathews, at 348.) The three part test is: (1) What private interest is affected by the official action? (2) What is the risk of an erroneous deprivation of such interest through the procedures used? (3) What is the government's interest in adhering to the existing system?

The Petitioner's argument in the present action appears to fail on each of the three grounds. First, there is no private interest concerned where a state, municipality or governmental sub-unit (school district) is involved. (See ED's brief, at 2, citing City of Sault Ste. Marie, Michigan v. Andrus, 532 F. Supp. 157, 167-168 [D.D.C. 1980].) Second, the Petitioner here was ineligible for the disputed funds ab initio and, therefore, there is simply no chance that a limitation of funds now could constitute an "erroneous deprivation" of a property interest through the procedures used. (The present matter, thus, is clearly distinguished from the cited case of Goldberg v. Kelly, 397 U.S. 254 [1970].)See footnote 7 [7] Third, the government's interest in adhering to existing systems ensures that ED stays within the disbursement boundaries prescribed by Congress, and, as importantly, ensures that eligible impact aid applicants receive fair, prompt and proper funding not diminished by funds being illegally dispensed to ineligible recipients. (See ED's brief, at 14.)

In order not to lengthen this decision unnecessarily (and thereby frustrate the expedition Petitioner has urged from the outset), at this point I will incorporate by reference the legal discussion contained in Section I of ED's Reply Memorandum (at 2-16), particularly the Federal cases cited therein. Included therein are the established principles that a school district has no standing to raise a Fifth Amendment Due Process claim because it is not a "person" within the meaning of the Fifth Amendment,See footnote 8 [8] that even with standing a claimant must have a "property interest in a benefit ... (and) a legitimate claim of entitlement to it" (versus being ineligible for it),See footnote 9 [9] that interests or "rights" that are not legally protected do not constitute "property" for purposes of the Fifth Amendment,See footnote 10 [10] that the Due Process clause creates no affirmative right to government aid,See footnote 11 [11] that there is no Fifth Amendment property right involved in the continued receipt of Federal funding where the future receipt of such funding is merely a "unilateral expectation,"See footnote 12 [12] and that a Federal grant received on a year-to-year basis creates merely a "unilateral expectation" of continued funding.See footnote 13 [13] The courts have consistently denied due process relief to applicants for Federal grants.See footnote 14 [14]

Conclusion of Law

After due consideration of the entire record, including the Briefs and Memoranda of both sides, the Joint Statement of Stipulated Facts, and the attached documentation, l conclude that the Assistant Secretary for Elementary and Secondary Education should be granted summary judgment based upon the school district's failure to present a triable issue of material fact. (Cf., Rule 56, FRCP.) Accordingly, the Petitioner's appeal is hereby DENIED.

IT IS SO ORDERED.

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Thomas W. Reilly
Administrative Law Judge
Issued: July 7, 1995.
Washington, D.C.

SERVICE LIST

On July 7, 1995, a copy of the attached document was sent by U.S. Post Office, CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following parties:

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Footnote: 1 [1] *1/ Indeed, there is simply no evidence that the contested group of 63 students (out of 391 total) could be found to be "eligible". A careful reading of the statutes and regulations shows that they were clearly not eligible under the "Federal property" provision. (See P.L. 81-874, 20 U.S.C. §§ 236, 237, 238, 244, and successor provisions in the amendments to Title VlIl, Elementary and Secondary Education Act of 1965, as amended by P.L.103-382, the Improving*

America's Schools Act of 1994, 20 U.S.C. §7701 et seq., and 34 C.F.R. 222.3.) (See also Exhibits JE-2, JE-3, and JE-4.)

Footnote: 2 [2] *2/ The record includes the pleadings, opening and closing briefs, cross-motions for summary judgment, and an eight-page Statement of Stipulated Facts with attached Joint Exhibits. The briefs also have attached affidavits, declarations, and correspondence from persons at ED and the school district who were involved in this matter. Correspondence from Petitioner's counsel, dated June 13 & 14, 1995, including further argument and attachments, was also duly considered, along with the reply of ED counsel, dated July 6, 1995.*

Footnote: 3 [3] *3/ Before FY 1993, ED simply accepted an LEA's statement on its Section 3 application that students resided on eligible Impact Aid Indian lands without requesting any documentation that the lands complied with the definition in 20 U.S.C. §244(1)(A). Impact Aid staff found, however, through its field review process, that some students claimed by applicants to be living on "trust" or "restricted" property were, in fact, not living on such property. As a result, beginning with students claimed on FY 1993 applications (basis for FY 1994 payments), Impact Aid staff required applicants to document the status of all property claimed as eligible under 20 U.S.C. §244(1)(A). Impact Aid staff informed LEAs in states other than Alaska of this requirement by memorandum (Feb.10, 1992), which was sent to all school districts in those states, including Lapwai School District #341 in Idaho. (ED's opening memorandum, at 5-6, citing exhibits.)*

Footnote: 4 [4] *4/ For the balance of the historical chronology of this dispute, see the eight-page Joint Statement of Stipulated Facts, signed May 4th and 8th, 1995, respectively, and the Chronological History portion of Petitioner's Opening Brief, at 1-6, both of which are hereby incorporated by reference.*

Footnote: 5 [5] *5/ The Coe case was not a 5th Amendment due process case; it involved the issue of whether a state statute complied with due process requirements of the 14th Amendment, U.S. Constitution. The case also differed in that the state statute in Coe did not afford any hearing. (The Supreme Court noted that the Florida statute provided: "Against one and all, execution may be issued without notice or hearing ...." [Coe, supra, at 424] and "...(A)ny course of procedure having for its object the taking of property ... and which yet accorded no hearing ... could itself hardly be termed 'due process of law' ." [Coe, at 419, emphasis added.] Thus, Coe is not authority for the proposition that any time a hearing is afforded, it must come prior to action by a Government agency. As the Supreme Court stated in Parratt v. Taylor, 101 S.Ct. 1908, 1915-16 (1981): Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner' .... However, ... we have rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." [Emphasis added.]*

Footnote: 6 [6] *6/ Petitioner argues that it should have been given a hearing on its FY 1994application "before May 1993." However, this would have been impossible as well as premature, as the district's FY 1994 application was not even due until January 31, 1994, and*

Federal FY 1994 did not begin until October 1, 1993. Thus, in May 1993, the Impact Aid staff could not yet have known whether this school district was going to file a timely application for FY 1994.

Footnote: 7 [7] *7/ As a further distinction from Goldberg, supra, this is not a situation of curtailing a continuing grant. It is simply a case of making a new annual grant calculated in accordance with a statutory formula based on the number of eligible children, and within the limits of currently available Congressional appropriations. Such a grant is not a "protectible property interest" within the meaning of the due process clause of the Fifth Amendment, U.S. Constitution.*

Footnote: 8 [8] *8/ South Carolina v. Katzenbach, 383 U.S. 301, 323-4 (1966) (a State has no standing); City of Sault Ste. Marie, Mich. v. Andrus, F.Supp. 157,167-8 (D.D.C. 1980) (a city has no standing); Aguayo v. Richardson, 473 F.2d 1090,1101 (2d Cir.1973), cert. denied, 414 U.S. 1146 (1974) ("...difficult to see how a city can be a 'person' if its progenitor [the State] is not"). Note that a school district is merely an agent or further subdivision of a municipality, county, or state.*

Footnote: 9 [9] *9/ City of Los Angeles v. McLaughlin, 865 F.2d 1084,1087 (9th Cir. 1989), citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972).*

Footnote: 10 [10] *10/ Ruckelshaus v. Monsanto, 467 U.S. 986, 1001-04 (1984); U.S. v. Willow River Power Co., 324 U.S. 499, 503 (1945); Fern v. U.S., 908 F.2d 955, 958 (Fed. Cir.1990).*

Footnote: 11 [11] *11/ Rust v. Sullivan, 111 S.Ct. 1759, 1776 (1991); Webster v. Reproductive Health Services, 492 U.S. 490 (1989).*

Footnote: 12 [12] *12/ Section 3 Impact Aid grants are not a "statutory entitlement" in the sense that Congress must continue a certain level of funding. (Cf., Highland Falls-Fort Montgomery Central School District v. United States, 48 F.3d 1166 [Fed.Cir. 1995].) They are part of a formula grant program, subject to submission of annual applications for funds and the vagaries of annual Congressional budget and appropriations decisions. (Due to insufficient appropriations, Section 3 payments had to be prorated for FY 1994.) An annual applicant is not necessarily automatically eligible for funding in later years, much less does he remain entitled to any specific level of funds. See 20 U.S.C. §238(c), 240(a). Also, the changing residence addresses of a number of students each year changes the annual eligibility numbers, regardless of amount of prorated funds then available.*

Footnote: 13 [13] *13/ Board of Regents v. Roth, supra: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it." (At 577, emphasis added.) "(T)he respondent does suggest that most teachers hired on a year-to-year basis ... are, in fact, rehired. But the District Court has not found that there is anything approaching a 'common law' of re-employment so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him." (At 578.) Note that in the instant case, the school district was given a statement of reasons and*

an opportunity for a hearing to contest the non-eligibility of a portion of their student count. See also Conservative Caucus, Inc. v. United States, 650 F. 2d 1206,1211 (Ct.CI. 1981); and National Consumer Information Center v. Gallegos, 549 F.2d 822, 828 (D.C. Cir.1977).

Footnote: 14 [14] *14/ Mil-Ka-Ko Research and Development Corp. v. Office of Economic Opportunity, 352 F.Supp. 169 (D.D.C. 1972), aff'd. 497 F.2d 684 (D.C. Cir. 1974)(OEO grant); Pueblo Neighborhood Health Centers, Inc. v. U.S. Dept. Of Health and Human Services, 720 F.2d 622, 625 (10th Cir. 1983) (HHS grant); Missouri Health and Medical Org., Inc. v. U.S., 641 F.2d 870, 875 (Ct.CI. 1981) (HEW grant); Gallegos, supra, 549 F.2d, at 828 (OEO grant); Guttmacher Institute v. McPherson, 597 F.Supp.1530, 1544, n.6 (S.D. N.Y. 1984), aff'd. as modified, 805 F.2d 1088, (2d Cir.1986) (AID grant); Community Action Org. Of Erie County v. ACTION, 546 F.Supp. 494 (W.D. N.Y. 1982) (Domestic Volunteer Services Act grant).*