



**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

IN THE MATTER OF

Northwest Arctic Borough School  
District (AK)

Docket No. 11-61-I  
Federal Impact Aid Proceeding

Respondent

Appearances: Saul R. Friedman, Esq. of Jermain Dunnagan & Owens, Anchorage, Alaska, for  
the Northwest Arctic Borough School District (AK)

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

Stephen C. Slotnick, Esq., Office of the Attorney General, State of Alaska, for the  
State of Alaska

Before: Chief Judge Allan C. Lewis

INITIAL DECISION

This action comes before the tribunal on an appeal by the Northwest Arctic Borough School District (Northwest) of a certification of the State of Alaska's program of state aid to its public schools under section 8009(b) of the Elementary and Secondary Education Act of 1965 (ESEA), (20 U.S.C. § 7709(b) (2011)), by Mr. Alfred D. Lott, Director, Impact Aid Programs, U.S. Department of Education (ED). At issue is whether the State of Alaska (Alaska) had in effect for fiscal year 2011 a program of aid that equalizes expenditures for free public education among its local educational agencies in compliance with 20 U.S.C. § 7709(b). The July 11, 2011 certification permits Alaska to consider Impact Aid payments as local resources when calculating the amount of state aid for each school district for the fiscal year 2011.

On September 6, 2011, Northwest requested a hearing under 34 C.F.R. § 222.165 to contest ED's determination, and subsequently, the matter was assigned to the Office of Administrative Law Judges. Due to its interest in the matter, Alaska was permitted to participate in the proceeding as an intervenor.

As presented to this tribunal, Northwest contends that Alaska's computation under the disparity test is methodologically flawed and contests ED's determination upholding Alaska's eligibility to consider Impact Aid payments as local resources when calculating state aid. Alaska responds that its interpretation and application of the pertinent regulations are reasonable, in

compliance with ED's interpretation, and consistent with past practice. ED concurs with and supports Alaska's interpretation and application of the regulations and further asserts that ED's interpretation is entitled to deference under administrative law.

Based upon the submissions of the parties and the findings of fact and conclusions of law, *infra*, it is concluded that the determination by the Director of Impact Aid Programs, that Alaska has a program of aid that equalizes expenditures for free public education among its local educational agencies, is affirmed and, accordingly, the appeal by Northwest is dismissed with prejudice.

### Applicable Law

Title VIII of the Elementary and Secondary Education Act of 1965 (the Impact Aid law) provides Federal funding for school districts, known as local educational agencies (LEAs), that are affected by Federal activities.<sup>1</sup> Impact Aid payments are considered general support to the recipient LEAs and are not subject to specific use restrictions by the Department of Education. As such, these funds represent a valuable source of significant revenue to the LEA and the state.<sup>2</sup>

Because Impact Aid payments are intended to replace local revenues lost due to the Federal presence in the district, Federal law requires that a state may not consider Impact Aid payments in determining the amount of state aid to an LEA. The exception to this rule is a situation where "the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State."<sup>3</sup> In other words, a state that mitigates the extraordinary burdens on LEAs may consider Federal Impact Aid when calculating state aid. Whether a state has done this -- equalized expenditures for free public education among local educational agencies -- is determined by the "disparity test", as outlined in 20 U.S.C. § 7709(b)(2)(A).<sup>4</sup> Under this section, a state that has been determined to have a program of equalized public education may consider Impact Aid payments to its LEAs when determining the amount of state aid an LEA may receive. Invariably, when a state considers in its computation this Federal assistance to the LEA, the amount of state aid to the LEA is diminished. If a state is determined not to have a program of equalized public education, then the state may not consider Federal Impact Aid payments, nor reduce its state aid accordingly. Thus, vital revenue resources are dependent upon the disparity test and ED's certification of a state's eligibility to consider Impact Aid payments as local resources when calculating state aid.

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<sup>1</sup> Generally speaking, the Federal Impact Aid program provides assistance to LEAs that have lost revenue due to a Federal presence but have the increased financial burden of educating additional children associated with that Federal presence. This takes the form of Indian lands or Federally-owned property (civilian or military) in the districts or Federally-connected children in the schools (*e.g.*, children who reside on Indian lands, children who reside on Federal property or in Federally subsidized low-rent housing, and children whose parents work on Federal property). Impact Aid is also available to LEAs for children with severe disabilities.

<sup>2</sup> For FY 2011, the Administration's budget request for Impact Aid payments was \$1.28 billion. *See*, <http://www2.ed.gov/about/overview/budget/budget11/justifications/c-impactaid.pdf>.

<sup>3</sup> 20 U.S.C. § 7709(b) (2011).

<sup>4</sup> Which states: "a program of State aid equalizes expenditures among local educational agencies 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 25 percent."

The Secretary promulgated regulations which outline the calculations under the disparity test. *See*, 34 C.F.R. § 222.162 and Appendix to Subpart K. This section sets forth the two methods to calculate the per pupil current expenditures or revenue for an LEA—

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses “weighted pupil,” “classroom,” “instructional unit,” or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children . . . . and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

As noted above, subsection (c)(1) calculates the current expenditures or revenues on a straight pupil count, *i.e.*, “on the basis of the total number of pupils receiving free public education in the schools of the agency”.<sup>5</sup> Correspondingly, subsection (c)(2) uses a weighted pupil count to calculate the current expenditures or revenue per pupil for an LEA, *i.e.*, “[i]f a State aid program uses ‘weighted pupil’ . . . or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases”.<sup>6</sup>

Lastly, the parties agree that section 162(c) permits a state to choose whether to calculate the disparity test under either the straight pupil count method or the weighted pupil method, and the selection is not binding on subsequent fiscal years. Thus, a state may elect the weighted pupil method in one fiscal year and employ the straight pupil count method in a succeeding fiscal year.

The question before this tribunal is whether the ED’s interpretation of its regulations and more particularly, subsection (c)(2), is reasonable, reasonably applied and therefore permissible.

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<sup>5</sup> Northwest refers to the computation described in this subsection as the “ordinary method” (NW brief at 13) while ED refers to it as the “exclusion ratio” (ED brief at 3). This tribunal will refer to this provision as “the straight pupil count” or simply “(c)(1)”.

<sup>6</sup> Northwest refers to the computation described in this subsection as an “alternate method” (NW brief at 14) while ED refers to the same provision as the “inclusion ratio” (ED brief at 4). This tribunal will refer to this provision as “the weighted pupil count” or simply “(c)(2)”.

## Discussion

Northwest and ED seek resolution of the circumstances in which it is appropriate to use the weighted pupil count method of 34 C.F.R. § 222.162(c)(2) in computing the per pupil revenue for purposes of the disparity test and whether Alaska may make its disparity test calculations using the weighted pupil count as a denominator, even as applied to unweighted revenue.<sup>7</sup> The dispute centers on how Alaska calculates its per pupil revenue, and whether its methodology is permissible under the regulations. In addressing this question, it is incumbent upon the parties to explain their interpretations of 34 C.F.R. § 222.162(c)(2) – specifically addressing what may be used in the numerator and denominator of the per pupil calculation -- and to demonstrate that their interpretation is reasonable, consistent with the regulations and therefore permissible.<sup>8</sup>

Northwest argues that the regulations do not permit Alaska to determine its per pupil computation using the weighted pupil denominator on unweighted revenues in the numerator; asserts that Alaska’s interpretation of the regulations is not reasonable; and requests review of the regulation as applied. Northwest makes clear that it does not challenge the disparity test itself, nor its validity or formulation, but rather disputes how Alaska calculates its per pupil revenue figure, which is the basis of the disparity test computation. Furthermore, Northwest states that because Alaska’s per pupil calculation is not only inaccurate but also improper under the weighted pupil count calculation of the disparity test, ED erred in certifying Alaska’s public education program as equalized.

Northwest’s challenge is based on two arguments. First, it asserts that Alaska failed to exclude special cost differentials<sup>9</sup> in the current revenue figure, as required by the regulation, thus rendering the numerator of the per pupil calculation (as well as the disparity test figures) inaccurate. Northwest bases its argument that Alaska’s methodology is incorrect on a plain reading of the definition of “current expenditures” as stated in the regulations. Under 34 C.F.R. § 222.161(c)(3), “current expenditures”<sup>10</sup> excludes expenditures from “State sources for special cost differentials of the type specified in § 222.162(c)(2)”. Section 222.162(c)(2), in turn, describes two categories of items that constitute special cost differentials. Thus, Northwest concludes that the regulatory definition of current expenditures<sup>11</sup>, which is the numerator of the per pupil calculation, specifically excludes any special cost differentials. For this reason,

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<sup>7</sup> The text of the regulation uses the terms “current expenditures or revenues”. Some states employ revenues in their funding formulas while others use expenditures. Alaska adopted the revenue approach and therefore, the tribunal will address the matter in terms of revenues. The weighted per pupil count method as urged by ED and Alaska may be restated mathematically as—

current revenue per pupil = current revenue including special cost differentials ÷ weighted pupil count.

<sup>8</sup> In challenging ED’s interpretation of (c)(2) as an impermissible application, Northwest has the additional burden of explaining the circumstances under which its interpretation of the regulation would be proper. Absent such an explanation, Northwest’s argument would be tantamount to a challenge to the validity of the regulation, a question which is beyond the scope of this tribunal.

<sup>9</sup> Special cost differentials are payments made to the LEA to defray the additional expenses associated with (1) educating children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and/or (2) geographical isolation, sparsity/density of population, high cost of living or special socioeconomic characteristics within the area served by an LEA. *See*, 34 C.F.R. § 222.162(c)(2)(i)-(ii).

<sup>10</sup> Read as revenue. *See*, fn. 7.

<sup>11</sup> *Id.*

Northwest believes that Alaska erred by including any weighted revenue figures or special cost differentials in its per pupil calculations.<sup>12</sup>

Second, Northwest contends that Alaska may not use the adjusted ADM<sup>13</sup> (average daily membership), which is its weighted pupil count, as the denominator in the per pupil revenue calculation if the numerator includes revenues which were not appropriated based on weighted pupil counts, *i.e.*, unweighted revenues such as leeway taxes raised by individual LEAs that bear no relation to their student population.<sup>14</sup> Northwest posits that rules of mathematics and logic prohibit the division of an unweighted dollar amount included in the LEA's current revenue figure by a weighted number reflecting the weighted pupil count of an LEA.<sup>15</sup> Therefore, Northwest concludes that because the numerator is improper per the regulatory definition, the denominator of Alaska's calculation is also incorrect. Northwest maintains that logic requires that once the special cost differentials have been subtracted or eliminated from the current revenue category, then "there is no longer any basis for using a 'weighted pupil' denominator for calculating per pupil revenues."<sup>16</sup> Northwest argues that this approach is consistent with Congressional intent: unweighted revenues in the numerator divided by a weighted pupil count in the denominator has the effect of deflating the numerator and distorting the final figure, which is contrary to the statutory purpose.<sup>17</sup>

According to Northwest, the proper interpretation of the regulation requires that the disparity test computation "first exclude any portion of a [school] district's revenue which is attributable to those special cost differentials, and then to divide the resulting revenue amount by the district's actual ADM"<sup>18</sup>. Thus, under 34 C.F.R. § 222.162(c)(2), as interpreted by Northwest, adjustments for special cost differentials would be wholly excluded from both the numerator and denominator in the calculation of the revenue per pupil for an LEA.<sup>19</sup> Functionally, this interpretation has the effect of forcing a state to determine the eligibility of its funding program only under 34 C.F.R. § 222.162(c)(1), a provision that measures equality of a state's funding program on a simple dollar-for-dollar basis per student.

Finally, to preclude the fatal flaw that its argument be equated as a challenge to the validity of the regulation itself, Northwest provides an alternate interpretation that would allow the regulation as a whole to have meaning.<sup>20</sup> It asserts that (c)(2) remains a viable option for any

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<sup>12</sup> "Weighted revenue" and "special cost differentials" are used somewhat interchangeably by the parties. This seems to be the case because Alaska's formula for calculating the adjusted ADM (the weighted pupil count by which the weighted revenue figures are computed) considers only factors which are considered special cost differentials.

<sup>13</sup> Alaska uses two different methods for determining pupil count. One is the ADM (average daily membership), which is the number of students enrolled in school during the count period in October of each year. The second is the AADM (adjusted average daily membership), which represents a weighted student count adjusting for cost factors associated with correspondence students, school size, geographical differences affecting the LEA, special needs students, etc. Alaska brief at 4-5.

<sup>14</sup> NW brief at 10-11.

<sup>15</sup> NW Rebuttal brief at 3, 11.

<sup>16</sup> NW brief at 15.

<sup>17</sup> NW brief at 15-16.

<sup>18</sup> NW brief at 14.

<sup>19</sup> This interpretation mirrors the computation prescribed in (c)(1).

<sup>20</sup> The rules of statutory construction, which also apply to regulations, require that they be read as a whole, and "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *Sutherland on Statutory Construction* § 46.05 at 154 (2000) (citations omitted). *See also*, *Gustafon v. Alloyd Co., Inc.*, 513 U.S. 561 (1995); *Smith v. U.S.*, 508 U.S. 223 (1993).

state that uses a weighted pupil count measure in determining the amount of all state aid to its LEAs.<sup>21</sup> Northwest argues that (c)(2) “is meant to be applied only in situations in which the *entire* State funding system” uses a weighted measure to determine the funding for each district (emphasis in original)<sup>22</sup> and asserts that (c)(2) requires that “the weighted pupil count may only be used [as a denominator] where the state aid program, as a whole, uses [a] weighted pupil [count].”<sup>23</sup> In other words, for a state to use the weighted pupil count method under the disparity test, most, if not all, state aid must be calculated and allocated according to a weighted measure such as special cost differentials.<sup>24</sup> Only in these limited circumstances may a state use the (c)(2) method; otherwise, a state must use the (c)(1) method with a straight pupil count as the denominator. Under this construction of (c)(2), Northwest seeks to preserve the integrity of the regulation as a whole while also rejecting ED’s interpretation. Northwest’s construction also allows it to maintain that, because Alaska’s state aid program uses the weighted pupil count to allocate some but not all of funds<sup>25</sup>, Alaska’s “funding system does not meet the requirements under . . . [subsection (c)(2) of] the regulations...”<sup>26</sup>

ED rejects Northwest’s arguments and maintains the position that its interpretation is reasonable and proper. ED’s response relies on a plain reading of the regulation and an application of the rules of statutory construction. First, it asserts that the regulations permit a state to choose its disparity test calculation from either of the two methods provided. ED notes that 34 C.F.R. § 222.162(c) states that the per pupil computations “are made on one of the following bases”. This language mandates that one of the two approaches must be used but adds no further limits. ED thus concludes that the regulation is permissive and allows a state to exercise either option.<sup>27</sup> For this reason, ED believes that Northwest’s argument -- that the (c)(1) approach is mandated in all instances except where all of the program funds constitute special cost differentials—is rejected by the plain language of the regulation.

As to Northwest’s “plain reading of the regulations” argument, ED acknowledges that the definition of current expenditures in section 222.161(c)(3) excludes special cost differentials. However, ED asserts that this “definition only applies to the general rule in 34 C.F.R. § 222.162(c)(1)”<sup>28</sup> and that (c)(2) constitutes an exception to the definition. ED argues that under the rules of statutory construction, this general definition is overridden by the specific language<sup>29</sup> in (c)(2) which permits special cost differentials to be considered for purposes of that provision. As such, (c)(2) does not require a state with special cost differentials to exclude them and use the (c)(1) approach. Indeed, the (c)(2) approach explicitly allows for the inclusion of special cost differentials. Furthermore, ED asserts that because (c)(2) specifically allows for the inclusion of special cost differentials, they must be considered in the whole calculation: “...when a State aid program uses a weighted pupil count in the denominator, the entire computation must

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<sup>21</sup> NW brief at 14; NW Rebuttal brief at 10.

<sup>22</sup> NW brief at 17.

<sup>23</sup> NW Rebuttal brief at 11.

<sup>24</sup> In Northwest’s view: “If a State uses a weighted pupil count for all of its aid, it is appropriate to use the weighted pupil count as a divisor under § 222.162(c)(2).” NW Rebuttal brief at 11.

<sup>25</sup> For example, the Alaskan funding program allows a city or borough school district to voluntarily collect a local contribution for use in its schools, commonly called a local leeway tax, not to exceed the greater of a two mill tax levy on real and personal property or 23% of its basic need. AS §14.17.410(c). The amount raised by this tax bears no relation to the student population in the individual LEAs.

<sup>26</sup> NW Rebuttal brief at 11.

<sup>27</sup> ED brief at 5.

<sup>28</sup> ED brief at 6.

<sup>29</sup> ED brief at 11.

be made on the basis of special cost differentials – requiring the revenue in both the numerator and denominator to include the special cost differentials.”<sup>30</sup> For this reason, ED agrees that Alaska’s calculation of its per pupil revenue figure is proper.

Moreover, ED argues that the rules of statutory construction support its interpretation of section 162(c) *in toto*. It asserts that the “rules of statutory interpretation require that the regulations be read as a whole” such that each provision is given meaning where possible.<sup>31</sup> ED contends that Northwest’s construction of the regulation -- with the special cost differentials removed from both the numerator and the denominator of the per pupil calculation – would strip (c)(2) of any real meaning, rendering it superfluous as duplicative of (c)(1). Thus, Northwest’s reading “would effectively nullify the provision specifically allowing cost differentials to be considered and run counter to the basic principle that all parts of a regulation should be given effect if possible.”<sup>32</sup> For these reasons, ED argues that Alaska’s interpretation of the Impact Aid regulations generally -- and section 162(c) specifically -- is proper.

Alaska also addresses Northwest’s “plain reading” argument that the definition in the regulations requires all special cost differentials be excluded from revenues/current expenditures. Alaska argues that its funding program complies with this definition because “the special cost differentials are removed from the revenue by dividing by AADM instead of ADM”.<sup>33</sup> In this manner, Alaska asserts that its all-revenue methodology is consistent with the regulations.

The parties have spent considerable time briefing this case and have made several nuanced arguments. The issue in question here, however, is narrow in scope: whether ED properly interpreted (c)(2) when it allowed Alaska to include both unweighted and weighted revenues (that is, special cost differentials)<sup>34</sup> as the current revenue component in the per pupil revenue calculation under (c)(2). Arguments relating to the fairness of Alaska’s funding scheme or how it calculates its adjusted average daily membership figures (the weighted pupil count for LEAs) are beyond the scope of consideration by this tribunal.

A plain reading of the Impact Aid regulations resolves several arguments presented by the parties. First is the question of what approach(es) a state may or must follow in calculating its per pupil revenue. This is directly addressed by 34 C.F.R. § 222.162(c) “Per pupil figure computations” which states:

In calculating the current expenditures or revenue disparities under this section, *computations of per pupil figures are made on one of the following bases.*  
(emphasis added)

Thus, the regulation provides the foundation for calculating the per pupil figures (“the following bases”) and requires that one of the two approaches must be used. This language is unambiguous and leaves no room for alternate approaches for computing the per pupil figures; one, and only one, of the two methods provided is to be used.<sup>35</sup> Because the regulation contains

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<sup>30</sup> ED brief at 6.

<sup>31</sup> ED brief at 10.

<sup>32</sup> ED brief at 10.

<sup>33</sup> Alaska brief at 11.

<sup>34</sup> *See*, fn. 12.

<sup>35</sup> Although the word “only” is not included in the text, the word “one” is exclusionary and allows for a single selection.

no further restrictions, it allows for the choice of one of the two methods provided, dictated only by the type of pupil count the state employs.<sup>36</sup> Thus, it is clear that the regulation provides the only formulas that may be used to calculate the per pupil figures.<sup>37</sup>

Reading further, the text of 34 C.F.R. § 222.162(c) specifically articulates the bases -- or denominators -- that are to be used in the per pupil calculations. Section 222.162(c)(1) (“the straight pupil count approach”) provides as follows:

The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the *total number of pupils* receiving free, public education in the schools of the agency. (emphasis added)

This language states unambiguously that the revenue figures for (c)(1) are divided by the total number pupils, which is an unmodified pupil count. Thus, the denominator in the per pupil calculations under (c)(1) is the unweighted pupil count or straight pupil count.

Correspondingly, section 222.162(c)(2) (“the weighted pupil count method”) provides the means of computing the per pupil figure where a measure other than the total number of pupils is used in determining state aid to LEAs. The text of this provision, in pertinent part, reads:

If a State aid program uses “weighted pupil,” “classroom,” “instructional unit,” or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made *on those bases*. (emphasis added)

The language of (c)(2) is not as succinct as that of (c)(1), making the meaning less easily ascertained at a glance.<sup>38</sup> However, reading this provision in tandem with (c)(1), it is clear that the term “bases” at the end of the sentence refers to the antecedent language of weighted pupil or other designated measures. Accordingly, if those designated measures of need are the “bases”, then they are also the divisor (denominator) in the per pupil calculation.

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<sup>36</sup> Contrary to Northwest’s assertion, the text of (c)(2) does not contain the word “only”, “entire” or similarly restrictive language. *See*, ED brief at 17 and NW Rebuttal brief at 10-11.

<sup>37</sup> The tribunal notes that the regulations do not explicitly state the full equation for calculating the revenue per pupil, only the denominators. However, the numerators are inferred through principles of math, logic and syntax, which lead to the conclusion that “revenue per pupil” is computed by dividing the revenue by the number of pupils to arrive at a figure representing the amount of money spent on a single student (in aggregate).

<sup>38</sup> An exercise in semantics helps clarify the meaning of the regulation. If the two provisions were written using parallel structures but making the appropriate textual substitutions (underlined), (c)(2), following the construction of (c)(1), would read as follows:

“The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of “weighted pupil,” “classroom,” “instructional unit,” or another designated measure of need.””

Conversely, if the language of (c)(1) were substituted into the syntax of (c)(2), (c)(1) would read:

“If a State aid program uses the total number of pupils receiving free, public education in the schools of the agency, the computation of per pupil revenue or current expenditures may be made on those bases.”

Thus, the text of 34 C.F.R. § 222.162(c) provides that per pupil revenue figures may be calculated using a straight, unweighted pupil count as the divisor (denominator) under (c)(1) or using a weighted pupil count that accounts for special cost differentials as the divisor (denominator) under (c)(2). Any other reading contravenes the plain language of the regulation. Indeed, neither party disputes this interpretation.<sup>39</sup> The next question thus becomes – what is the numerator for these calculations, *i.e.*, what revenues are included in the per pupil computations?

This question is the crux of the present controversy, what revenues should be included in the numerator of the formula under section 222.162(c)(2).<sup>40</sup> There can only be three possible answers: only unweighted revenue, only weighted revenue, or all eligible revenue (weighted and unweighted), regardless of source. Northwest makes arguments for only unweighted revenue and only weighted revenue. ED and Alaska make the argument for all revenue. The tribunal concurs with ED and Alaska.

We turn to the text of section 162(c) for guidance as to its proper interpretation. Initially, inasmuch as the current revenues in (c)(1) exclude revenue attributable to special cost differentials and (c)(2) focuses on including special cost differentials in its computation, these subsections, when construed together, require that the current revenue figure under (c)(2) include the revenue attributable to the special cost differentials excluded under (c)(1). As discussed above, it is clear that weighted revenues such as special cost differentials are specifically included in (c)(2) by its language. It is also clear, however, that unweighted revenues, such as funds contributed by the locality, are also included in (c)(2) as required by 34 C.F.R. § 222.162(d). This provision requires that “all revenues” be included for each LEA in determining the disparity. Therefore, “all revenue” of an LEA, whether unweighted revenue of any type including leeway taxes or weighted revenue, must be included in the current revenue component of the computation. Thus, the text of the regulations supports ED’s and Alaska’s all-revenue argument.

This conclusion is also supported by the statutory language. The purpose of the statute is to ensure that “the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State” (before Impact Aid may be considered as local funding). The language does not mandate that a state provide equal revenues, but that it has a program which equalizes revenues. In order to determine whether revenues are equalized among the LEAs, a state must consider all revenues that are available to the districts; one cannot make that determination with an incomplete picture of a district’s funding. In this manner, the “all-revenue” argument finds support in the language of the statute.

Finally, not only does the language of the statute and regulation in question support this determination, but also logic leads to the conclusion that (c)(2) includes “all revenues” as well. As reiterated repeatedly by all parties, the purpose of the disparity test is to determine that funding for education is equalized across the state. The statute and regulations do not require the funding to be absolutely equal – that conclusion would be absurd – but equalized, or relatively

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<sup>39</sup> Although Northwest first proffered the argument that the adjusted ADM (weighted pupil count) is an improper denominator, in its Rebuttal brief, it refines this argument to urge that the weighted pupil count may be used in (c)(2), but only where all state aid is distributed solely on the basis of the weighted pupil count. *See*, NW Rebuttal brief at 9-11.

<sup>40</sup> There is no dispute over the proper numerator for (c)(1). If a state does not use a weighted measure to allocate funding, then that unweighted revenue amount, divided by a straight pupil count is the appropriate calculation under (c)(1).

equal. This means that the *value* of the dollars spent per pupil in each district must be similar.<sup>41</sup> Implicit in this analysis are two considerations: first, that the figures being compared are subject to comparison, that is, they are “like” figures representing the same information;<sup>42</sup> and second, that the figures capture the appropriate data to provide an accurate picture. In order for the disparity test to be a true indicator of the extent to which Alaska has equalized funding across LEAs, these two conditions must be met.

The first issue – the “apples to apples” question – arises because an education dollar spent in a relatively low-cost district cannot be compared to that of a high-cost district because the former buys much more than that of the latter.<sup>43</sup> It is because of this reality that (c)(2) specifically allows for calculations to be made based on weighted figures including special cost differentials. Notably, the regulation does not prescribe how those weight calculations are to be made. This is left to the states and is beyond the purview of this tribunal.

The second issue -- ensuring that the data accurately reflects the reality in each district -- is, however, relevant to the present case and within the scope of the tribunal’s review because the question concerns what revenues are included in the numerator, per the formula outlined by (c)(2).<sup>44</sup> The diversity in Alaska means not only that the costs to educate students across the state vary widely, but it also means that the funding resources also vary tremendously district to district, a point underscored by Northwest. However, contrary to Northwest’s position, this tribunal believes that logic dictates that if one is comparing per pupil funding levels, then all funds that are used for the education of the students in the district must be included in the calculation, regardless of source.

As to Northwest’s arguments for “only unweighted revenue” and/or “only weighted revenue”, this tribunal finds both to be unavailing. As discussed above, the argument that only unweighted revenues may be used in calculating the disparity finds no support in the regulations or statute.<sup>45</sup> Not only would this interpretation render (c)(2) duplicative of (c)(1), but it also contravenes one of the express purposes of the statute, which is to take into account special cost differentials.

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<sup>41</sup> To put this in terms of the disparity test, the per pupil expenditures across 90% of student population in Alaska may not exceed a 25% variation.

<sup>42</sup> This question is relevant to the calculations made under (c)(2), but not (c)(1) because it is a straight per pupil computation that does not allow for adjustments based on cost differentials.

<sup>43</sup> In order to make a valid cross-district comparison in a state so large and diverse as Alaska, the per pupil revenue computation must account for the disparate cost of education across the state so that the resulting figure represents the cost of educating one student (in aggregate) in each district, irrespective of the cost factors facing that district. To accomplish this, Alaska multiplies the student count by a factor that takes the special cost differentials into account, resulting in an adjusted ADM, which is not only the denominator in the (c)(2) option, but it is also part of the calculation of a district’s “basic need” or state aid (weighted revenues). In this way, per pupil figures are normalized for the cost of educating one student, which allows Alaska to compare the funding amounts across the districts. To make a straight comparison of revenue per pupil ignores the reality of geographical differences, economies of scales, and other special cost differentials. Absent a weight factor (in states where educational costs vary widely), the straight revenue figures cannot be compared to discern funding disparities.

<sup>44</sup> As discussed at length, the denominators are prescribed by the regulations.

<sup>45</sup> The tribunal notes that Northwest essentially abandons this position when it proffers the argument that weighted revenues may be considered under (c)(2) only when a state allocates its aid on a weighted basis, *i.e.*, the “only weighted revenue” argument.

Next we consider Northwest’s argument that the weighted pupil count may not be used as a divisor on unadjusted revenues.<sup>46</sup> Stated another way, Northwest argues that “only weighted revenue” should be included in the numerator of (c)(2) where the divisor is the weighted pupil count.<sup>47</sup>

Alaska argues that Northwest’s interpretation of (c)(2) is not reasonable and demonstrates that this approach, dividing only the weighted revenues by the weighted pupil count, is a tautology which provides no insights as to disparities between the districts.<sup>48</sup> This is because Alaska allocates funds based on the “basic need” computation for districts. “Basic need” represents the weighted state aid to the LEAs and is the product of base student allocation (a statutorily defined amount) multiplied by the adjusted ADM:

$$\begin{array}{lclcl} \text{Basic need} & = & \text{base student allocation} & \times & \text{adjusted ADM} \\ \text{(weighted revenue)} & & \text{(legislated amount)} & & \text{(weighted pupil count)} \end{array}$$

Alaska notes that if one follows Northwest’s proposed interpretation of (c)(2) -- calculating the per pupil revenue figure by dividing only weighted revenues (a district’s basic need) by the weighted pupil count (the adjusted ADM) -- then the result is the base student allocation figure:

$$\text{Per pupil revenues} = \frac{\text{weighted revenue (basic need)}}{\text{weighted pupil count (AADM)}} = \text{base student allocation}$$

Thus, the per pupil revenue figures are nothing more than the base student allocation.<sup>49</sup> Alaska further argues that since base student allocation is statutorily defined, the “only weighted revenue” calculation method proffered by Northwest provides no perspective on how the cost of education differs throughout the state and is therefore unenlightening for the purposes of the disparity test.

As noted, *supra*, the text of the (c)(2) rejects Northwest’s interpretation. Northwest’s restrictive reading of (c)(2) finds no support in the text of the regulation. No qualifier other than type of pupil count is stated in the regulation. Moreover, if (c)(2) were interpreted as suggested by Northwest, all or the vast majority of the states would be barred from using this option because one or more of their LEAs receives unweighted revenue in some form, whether it is from leeway taxes, investment income, or other forms of revenue. As a result, these states would be precluded from considering special cost differentials in calculating their per pupil revenue for

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<sup>46</sup> This argument has two implications: one, that (c)(2) must be read as available only to states that allocate most or all of their funding based on a weighted pupil count; and two, that a state may not combine both weighted and unweighted revenues (the “all-revenue” approach) in computing the per pupil expenditures.

<sup>47</sup> Although Northwest does not make this argument, this interpretation of (c)(2) also accommodates ED’s claim that section 222.162(d) requires all revenues be included in the disparity test calculations. Under Northwest’s interpretation, if (c)(2) may only be used where all state revenues are allocated using a weighted measure, then, by definition, all revenues have been included in the calculation in compliance with section 162(d).

<sup>48</sup> Transcript at 84.

<sup>49</sup> The tribunal notes that this argument is somewhat simplified because Alaska does not provide the full calculated amount of basic need to each district. The percentage of basic need funded by Alaska varies across districts, and each district also provides local revenues to account for the difference. Accordingly, if only weighted revenues were divided by the weighted pupil count, then the result would be a figure similar but not equal to the base student allocation amount.

purposes of the disparity test, a circumstance that conflicts with the intent of section 7709(b)(2)(B)(ii).

Because the language of the Impact Aid statute and its implementing regulations provide sufficient guidance as to their meaning and interpretation, the analysis need not proceed further.<sup>50</sup> For the reasons discussed above, this tribunal concurs that ED's interpretation of the regulations is reasonable, reasonably applied and therefore permissible. Accordingly, the determination by the Director of Impact Aid Programs on July 11, 2011 is affirmed and Alaska's program was properly certified.

ORDER

On the basis of the foregoing findings of fact and conclusions of law and the proceedings herein, it is HEREBY ORDERED that the appeal of Northwest Arctic Borough School District is dismissed with prejudice.



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Allan C. Lewis

Chief Administrative Law Judge

Issued: January 2, 2013  
Washington, DC

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<sup>50</sup> Accordingly, there is no need to address whether or to what extent ED's interpretation of the regulation is entitled to deference.

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SERVICE

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On January 2, 2013, a copy of the attached initial decision was sent by certified mail, return requested and, as a courtesy by email, to the following:

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