UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of

New Mexico Public Education Department,

Respondent/Applicant/Appellant.

Docket No. 20-16-I

Federal Impact Aid

Appearances: Aaron Kramer Brosnan and Jennifer Mauskapf, Brustein & Manasevit, PLLC, for Appellant, New Mexico Public Education Department.

Colin Bishop, Jill L. Martin, Office of General Counsel, for the Office of Elementary and Secondary Education, U. S. Department of Education.

Andrew M. Sanchez, Himes, Petrarca & Fester, Chtd., for Intervenors Board of Education for the Gallup-McKinley County Schools, Board of for the Education Grants/Cibola County Schools, and Board of Education for Zuni Public School District No. 89.

Germaine Chappelle, Chappelle Law, for Intervenor Board of Education for the Central Consolidated School District.

Before: Angela J. Miranda, Administrative Law Judge

INITIAL DECISION AND ORDER ON MOTION

I. Jurisdiction and Procedural History

A. Jurisdiction

The Office of Administrative Law Judges (OALJ) has proper jurisdiction of this administrative appeal. A request for a hearing under Section 7011 of the Elementary and Secondary Education Act of 1965, as amended (the Act) (20 U.S.C. § 7711(a)), was timely filed on June 13, 2020, with the U. S. Department of Education (Department), Office of Elementary and Secondary Education (OESE) by New Mexico Public Education Department (NMPED). The request

challenged OESE's determination that the State of New Mexico (NM) did not pass the disparity test and therefore, is not certified to take into account Impact Aid in making State aid payments to local education agencies (LEAs). More specifically, in a notice and report dated April 15, 2020, OESE determined NMPED's state aid formula for State fiscal year (SFY) 2020 was not certified under Section 7009(b) of the Act (20 U.S.C. § 7709). A copy of that notice and report was provided to all New Mexico Superintendents.

Consistent with Department regulations at 34 C.F.R. § 222.165(b), multiple LEAs properly intervened in this administrative appeal. By letter dated June 19, 2020, intervenors the Board of Education for the Gallup-McKinley County Schools and the Board of Education for the Grants/Cibola County Schools filed a request to intervene with the Director of the Impact Aid Program.[1] By motion filed on August 7, 2020 with the OALJ, the Board of Education for the Central Consolidated School District (Central Consolidated) exercised its right to intervene in this proceeding. By motion filed on August 13, 2020 with OALJ, the Board of Education for Zuni Public School District No. 89 exercised its right to intervene in this proceeding. The Board of Education for the Gallup-McKinley County Schools, the Board of Education for the Grants/Cibola County Schools, and the Board of Education for Zuni Public School District No. 89, are represented by one attorney and hereinafter will be referred to collectively as the School Districts.

B. Procedural History – Prior to filing of NMPED's Request for Hearing

The procedural history of this matter is complex and understanding it is critical. Although this decision and order is limited to the Department's determination and administrative appeal of the April 15, 2020 determination for NM's fiscal year 2020, some events related to NM's fiscal year 2021 are relevant to this analysis and will be referenced in this decision and order.

On December 31, 2018, NMPED sent notice to IAP and a memorandum to all school districts that the State intended to take into consideration IA payments in the calculation of school aid for the period July 1, 2019 to June 20, 2020. On February 27, 2019, consistent with the filing requirements of the statute, NMPED sought the Secretary's review of its State equalization plan for SFY 2020 by timely submitting a request to the Impact Aid Program (IAP). As in the past, NMPED selected the disparity test based on the methodology of revenue exclusion and provided supporting Stata data with its submission for the Secretary's review of the State equalization plan for SFY 2020 .

On April 3, 2019, NM substantially changed its law regarding its State aid program for SFY 2020 and for subsequent years. Due to the change in State law, NMPED was required to submit projected data to the IAP showing how NM will meet the disparity standard under the new aid formula. NMPED sent those revised projections to the IAP on June 25, 2019.

Prior to submitting those revised projections, on May 16, 2019, NMPED requested permission from the IAP to make estimated payments deducting a portion of State aid it provided to the LEAs. On June 27, 2019, the IAP approved NMPED's request and simultaneously notified the

[1] Counsel for the Department forwarded this request to the Office of Administrative Law Judges via electronic filing in the Office of Hearings and Appeals Electronic Filing System (OES) on June 23, 2020 (OES Documents 4 and 5).

LEAs of the right to request a predetermination hearing.

Three LEAs (Zuni School District No. 89, Gallup-McKinley County Schools, and Central Consolidated), all intervenors here, requested a predetermination hearing for SFY 2020, which was held on September 10, 2019.

On March 6, 2020, NMPED sought the Secretary's review of its State equalization plan for SFY 2021 by submitting a request to the IAP.[2] Again, NMPED selected the disparity test based on the methodology of revenue exclusion. On March 27, 2020, the Department notified the LEAs of the right to a predetermination hearing and on June 18, 2020, three LEAs requested that a predetermination hearing be held for SFY 2021.

By notice dated April 15, 2020, the IAP advised NMPED, and all the LEAs, that NM did not meet the requirements of section 7009(b) of the ESEA and, as a result, the State is not eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlements for the period July1, 2019 through June 30, 2020 (SFY 2020). Despite this notification, there is no evidence that NMPED adjusted its State aid payments to the LEAs for SFY 2020 and there is no evidence that enforcement of the April 15, 2020 determination was sought prior to NMPED filing its request for a hearing.

After issuance of the April 15, 2020 determination, on May 31, 2020, NMPED submitted revised disparity data for SFY 2021. With the revised disparity data, NMPED submitted a disparity analysis using the inclusion method on a revenue basis, a change from NMPED's historical practice and a change from NNPED's February 27, 2019 submission for SFY 2020 and NMPED's March 6, 2020 submission for SFY 2021.

On June 13, 2020, NMPED timely filed a request for an Administrative Law Judge Hearing for review of the April 15, 2020 determination. Pursuant to Department regulations, that request was filed with the Director of the IAP and then forwarded to the Office of Hearings and Appeals on June 18, 2020.

C. Procedural History – After the filing date of NMPED's Request for Hearing

On June 19, 2020, two LEAs (Gallup-McKinley County Schools and Grants/Cibola County Schools) filed a request to intervene with the Director of IAP, which was subsequently electronically filed with OALJ by a representative for the Department.

Thereafter, on June 29, 2020, in response to a June 5, 2020 NMPED communication to IAP, the IAP Director informed NMPED that a preliminary recalculation of the disparity test under the revenue inclusion method was performed for SFY 2020 using data that was contained in the State's FY 2021 submission. The Director informed NMPED that using the revenue inclusion method suggests that the "State may pass the disparity test for FY 2020 if it were recalculated using the same method."

[2] This request was submitted three days after the statutory time to submit such requests. Nonetheless, the IAP, without explanation, has identified this request as timely.

On June 23, 2020, this matter was assigned to me and on July 10, 2020, I issued an Order Governing Proceeding (OGP) establishing procedures to follow and a scheduling order for briefing. Following issuance of that OGP, NMPED and the Department filed a joint motion requesting an open-ended stay based on IAP's June 29, 2020 letter. The representatives were informally advised I would not grant an open-ended stay but if they submitted an amended motion, I would consider the motion. An amended motion for a stay was filed on July 20, 2020.

On July 24, 2020, I granted that motion on the paper submission. Before granting the stay, the Intervenors of record were not given an opportunity to be heard.

On August 28, 2020, NMPED filed a Motion to Withdraw Appeal. NMPED based its motion on the July 24, 2020 Order granting the motion for a stay and stated it was withdrawing its appeal on the April 15, 2020 determination "in order to foster a less adversarial process."

On September 9, 2020, I held a prehearing conference. The representatives for NMPED, the Department, and for the intervening School Districts participated in the prehearing conference. The representative for Central Consolidated did not participate, notifying this Tribunal her intended participation was prevented due to an exigent circumstance.

During the prehearing conference, a Department representative disclosed the Department had not been able to determine, as of that date, if the Department has the authority to reconsider the April 15, 2020 determination in the absence of a pending appeal. The intervening School Districts raised due process concerns that the July 24, 2020 Order was issued without the Intervenors having been allowed an opportunity to be heard. The Intervenors further argued that if the motion to withdraw was granted then the April 15, 2020 determination must be deemed a final agency determination. If the Department continued reconsideration of the April 15, 2020 determination, the School Districts asserted that the LEAs are and will be disadvantaged. Without further explanation, NMPED continued to assert that granting the motion to withdraw the request for hearing would make the process less adversarial.

On September 10, 2020, I issued an Order Following Prehearing Conference and Further Governing Proceeding. The parties and intervenors were given an opportunity to brief specific questions raised by NMPED's motion to withdraw its appeal that were identified during the prehearing teleconference. The Department, NMPED, and the intervening School Districts timely filed their briefs. Central Consolidated filed a late brief, which was accepted into the record and considered in this matter.[3]

II. Issues

1. Should NMPED's motion to withdraw their appeal be granted and what effect does that decision have on the April 15, 2020 determination?

[3] Central Consolidated was informally advised a late brief would be accepted into the record and considered absent objection from the parties. Both the Department and NMPED informally advised this Tribunal they had no objection to consideration of the brief filed by Central Consolidated.

2. If NMPED's motion to withdraw is granted, may the Department reconsider the April 15, 2020 determination?

III. Legal Framework/Applicable Laws and Regulations

A. Applicable Statute – Impact Aid

The Department provides financial assistance to LEAs. The financial assistance fulfills the Federal responsibility to assist with the provision of educational services to federally connected children, known as Impact Aid (IA) (20 U.S.C. § 7701 *et seq.*). Generally, a State may not consider IA payments to an LEA for any fiscal year when determining a LEAs' eligibility for State aid for free public education (20 U.S.C. § 7709(a)).

An exception to this general rule is allowed if that State has in effect a program of State aid that equalizes expenditures for free public education among LEAs in the State (20 U.S.C. § 7709(b)(1)). A State establishes the exception to the general rule if the State demonstrates that the State's plan will meet the disparity standard, known informally as the disparity test (20 U.S.C. § 7709(b)(3)). The statute specifies the computation that is to be used to determine if State aid has been equalized by identifying the "amount of per-pupil expenditures made by, or the per-pupil revenues available to the LEA in the State if the highest such per-pupil expenditures or revenues do not exceed the LEA in the state with the lowest such expenditures or revenues by more than 25 percent" (20 U.S.C. § 7709(b)(2)(A)). The statute considers other factors such as disregarding the LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile and the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of LEAs (20 U.S.C. § 7709(b)(2)(B)(i)-(ii)). If the Secretary determines that the State has substantially revised its program of State aid, the Secretary will certify the State aid program only if the Secretary determines the State aid plan meets the disparity test using the State's projected data and the State provides assurance, to the Secretary, that if final data do not demonstrate the State's program met the disparity standard, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA (20 U.S.C. § 7709(b)(3)(A)-(B)).

The statute sets out procedures by which the Secretary shall review a State's equalization plan (20 U.S.C. § 7709(c)). A State must provide written notice to each LEA in the State that the State has requested review of its State aid plan by the Secretary (20 U.S.C. § 7709(c)(1)(B)). The request for review shall be submitted to the Secretary no later than 120 days before the beginning of the State's fiscal year (20 U.S.C. § 7709(c)(1)(A)). Once a State requests review of its State aid plan, the Secretary shall afford the State and LEAs an opportunity to present their views (20 U.S.C. § 7709(c)(2)).

If the Secretary determines a program of State aid has been equalized, the Secretary notifies the State its program of State aid has been certified and notifies all LEAs of the opportunity for a hearing with an administrative law judge if they are aggrieved by the certification (20 U.S.C. § 7709(c)(3)(A)-(B)). If the Secretary determines a program of State aid does not qualify as equalized, then the Secretary notifies the State and provides the State and any LEA adversely affected by the non-qualification of an opportunity for a hearing with an administrative law judge

(20 U.S.C. § 7709(c)(4)(A)-(B)).

If the Secretary has certified a State's program of State aid as equalized for a particular fiscal year, then that State is authorized to take into consideration IA payments to LEAs when providing State aid to the LEAs only in a proportion as allowed under the statute (20 U.S.C. § 7709(d)((1)(A)-(B)). The State, however, may not take into consideration IA payments to LEAs prior to the Secretary's certification of the State's program of State aid as equalized (20 U.S.C. § 7709(d)(2)).

Lastly, the statute provides remedies when a State violates the requirements under this statute (20 U.S.C. § 7709(e)). Notably, when specified circumstances are met, the Secretary or any aggrieved LEA may bring an action in a United States district court against the State for violation of, or failures under, this statute and the State shall not be deemed immune under the 11th Amendment to the Constitution of the United States (20 U.S.C. §7709(e)(1)-(2)).

B. Applicable Regulations – Impact Aid

The Department's regulations related to IA are found in Part 222 of Title 34 of the Code of Federal Regulations (C.F.R.). Regulations applicable to this matter are found in Subpart K, 34 C.F.R. § 222.160 *et seq*. The regulations implementing 20 U.S.C. § 7709 are found at 34 C.F.R. §§ 222.161 – 222.164. The Appendix to Subpart K of Part 222 describes the methods for making certain calculations in the review of a State's request to certify the State's program of State aid as equalized. The Department's regulations generally mirror the federal statute and provide appropriate additional requirements related to implementation of the federal statute.

C. Applicable Statute – Request for Hearing

Under the IA statute, an administrative hearing is made available to States and LEAs when those entities are adversely affected by ***any action*** (emphasis added) by the Secretary and a request for a hearing has been filed no later than 60 days after the date of the action by the Secretary (20 U.S.C. § 7711(a)). Judicial review of a Secretary's final decision following an agency's administrative hearing proceeding is available by filing, within 30 working days of receipt of notice of a final agency decision, such a request for review with the United States court of appeals for the circuit in which the agency or State is located (20 U.S.C. § 7011(b)(1)).

D. Applicable Regulations – Request for Hearing

The regulations implementing 20 U.S.C. § 7711(a) as related to 20 U.S.C. § 7709 are found at 34 C.F.R. § 222.165. This regulation mirrors and properly supplements the Federal statute regarding these proceedings and processes for the administrative appeal. One such supplement addresses corrective action that is available within the Department. Absent a timely appeal, if a State has been found to violate this section, then the State shall provide satisfactory written assurances that it will undertake appropriate corrective action if necessary (34 C.F.R. § 222.165(i)(1)). The same written assurances are required upon disposal of the hearing request, either by final decision or by withdrawal of the hearing request (34 C.F.R. § 222.165(i)(2)). Lastly, the regulation regarding corrective actions allows a State to provide appropriate assurances that it will undertake corrective action if necessary and the ALJ may stay the proceeding pending completion of

corrective action (34 C.F.R. § 222.165(i)(3)).

In July 2009, the Secretary delegated certain authorities to Department of Education Administrative Law Judges, including proceedings related to appeals of administrative actions under the Impact Aid laws. With that delegation, the regulations at 34 C.F.R. Part 81 are applicable.

IV. Arguments and Analysis

A. Department's Brief

The Department set out the applicable law and regulations upon which it relied in answering the specific questions identified after the prehearing conference. The Department provided a summary of the four options (methods to pass the disparity test) that are available to States when submitting a request to the Secretary for certification that the State has equalized expenditures for free public education. When a State submits its equalization plan to the Secretary, it must submit data to show compliance with one method available in the disparity test. Notably, the IAP does not dictate which methodology a State must use, and that choice is made only by the State. Presumably, the State will select the methodology it believes will establish that the State has equalized expenditures for free public education for a particular fiscal year.

Although the Department's representative expressed uncertainty at the prehearing conference whether the Department could continue the reconsideration of the April 15, 2020 determination in the absence of a pending appeal, it argues in its brief that there are two reasonable options: 1) deny the withdrawal and extend the stay to allow IAP to continue the reconsideration of the April 15, 2020 determination, or 2) grant the motion and dismiss the hearing. The Department argued if NMPED's withdrawal is granted, that the hearing should be terminated as none of the LEAs are adversely affected by the Department's reconsideration of the April 15, 2020 determination and none of the LEAs have an independent basis for appeal. If NMPED's withdrawal is granted, the Department argues the hearing should be dismissed with prejudice only with respect to NMPED (the State).

Contrary to the argument it advanced at the prehearing conference, the Department argued in its brief that whether the withdrawal was denied or granted, the Department has the right to continue reconsideration of the April 15, 2020 determination. The Department argued if the withdrawal is denied, the Department would continue reconsidering the April 15, 2020 only under the authority of my July 24, 2020 Order. If the withdrawal is granted, the Department argued it is proper to continue the reconsideration of the April 15, 2020 determination because an agency is not precluded from revisiting and modifying a final IAP determination that is deemed final when two conditions are met: (1) the reconsideration is timely, and (2) Congress must not have limited the agency's authority to reconsider a final agency determination. In support of this argument, the Department primarily relies on *Voyageur Outward Bound School v. United States,* 444 F.Supp. 3d. 182 (D.DC March 17, 2020).

B. Appellant's Brief

NMPED's brief informed the Tribunal that since 1974, when the ESEA created the disparity test, NM had consistently sought certification from the Department that its State aid program had equalized expenditures for free public education. NMPED explained NM had always used an exclusion method to calculate disparity in education funding but on April 15, 2020, the IAP, for the first time, found that NM did not meet the disparity test using the exclusion method which NMPED relied upon when it submitted its February 27, 2019 request for certification for SFY 2020. NMPED informed this Tribunal that after NMPED timely appealed that April 15, 2020 determination, the "IAP then decided to reconsider the State's certification for SFY 2020."[4]

Seemingly following the lead of the Department's brief, NMPED argues the withdrawal of its request for a hearing should be permitted because NM decided it only wants the IAP to consider its SYF 2020 request for certification based on an inclusion methodology. This certification request was not submitted to the IAP until July 31, 2020, after the June 29, 2020 letter wherein IAP invited/permitted NMPED to resubmit its request for certification for SFY 2020 and after NMPED had filed its appeal of the April 15, 2020 determination. Like the Department, NMPED asserts the intervenors are not adversely affected by the April 15, 2020 determination, do not have an independent claim to pursue in relation to that determination, and would not be/are not adversely affected by the Department's willingness to reconsider the April 15, 2020 determination.

NMPED argues the dismissal should be granted without prejudice because it is a voluntary dismissal in contrast to the Department's argument that if NMPED's motion is granted, it should be dismissed with prejudice only as to NMPED. NMPED asserts it would have no right to appeal the April 15, 2020 determination upon the granting of its motion, acknowledging the time to appeal will have expired if its motion is granted. NMPED asserted it has a right to appeal any future adverse determination or reconsideration for SFY 2020. Without additional explanation, NMPED reiterated granting the motion would foster a less adversarial process and rejected the Department's position that the right to appeal any future adverse reconsidered determination does not constitute a "second bite at the apple" as proclaimed by the Department.

NMPED, like the Department, cited *Voyager Outward Bound School v. United States* in support of the view that the Department may reconsider any prior determination. NMPED emphasized that it was the Department, via the IAP, which pointed out that NM may pass the disparity test for SFY 2020 if NMPED followed the same methodology for obtaining certification as it was now pursuing for SFY 2021. NMPED suggested this invitation/permission to resubmit was acknowledgement by the Department that it had erred in its April 15, 2020 determination that NMPED did not pass the disparity test for SFY 2020.

Lastly, NMPED relied on *In the Matter of the State of South Carolina,* Dkt. No. 13-43-O, a final

[4] The IAP's invitation/permission to NMPED to resubmit its request for certification was included in the June 29, 2020 letter to NMPED. That letter indicates it is in response to NMPED's June 5, 2020 correspondence to the IAP. The June 5, 2020 correspondence was NM's request for permission to make estimated or preliminary payments for SFY 2021 that considered a portion of Impact Aid payments to be received by school districts and charter schools in SFY 2020.

decision of the Secretary, dated February 26, 2016, which reversed an initial decision, dated October 1, 2015, to support the argument that the Department may revise or make a new determination even once an administrative hearing has commenced.

C. Intervenor's Briefs

Intervenor briefs were filed by the School Districts and Central Consolidated.[5] The brief for the School Districts, like that of the Department, provided an overview of the Federal statute and Department regulations related to how State aid is treated under section 7009 of the ESEA of 1965, as amended. The School Districts also provided a brief overview of the New Mexico Public School Financing Act, explaining a unique feature of NM's public-school operational funding scheme known as the State Equalization Guarantee (SEG) distribution formula, and the effect of that formula on the four public school districts, otherwise identified in the Federal statute and Department regulations as LEAs, intervening in this proceeding. The School Districts identified relevant events since NMPED first filed its request for certification for SFY 2020 on February 27, 2019 and continuing through the required briefing on the specific questions.

The School Districts responded to the specific questions raised in the prehearing teleconference by arguing that the principles of due process and fairness must be considered. The School Districts argued that when a government agency adjudicates or makes binding determinations, the agency must use procedures that honor the principles of due process and fairness. Relying on these basic concepts, the School Districts argued that NMPED's withdrawal of its request for a hearing constitutes an affirmative waiver by NMPED of any and all hearing rights that NMPED had or could have had in relation to the April 15, 2020 determination. The School Districts argued that upon granting NMPED's Motion for Withdrawal, the April 15, 2020 determination becomes a final agency decision and any further reconsideration of NMPED's request for certification of its State plan for SFY 2020 is unsupportable.

The School Districts further argued if NMPED's Motion for Withdrawal is granted, the request for hearing should be dismissed with prejudice and the School Districts point out that NMPED concedes it has no appeal rights after withdrawal and termination of this proceeding. The School Districts also challenged the Department's asserted authority to continue reconsideration of the April 15, 2020 determination and NMPED's request for certification of its State SFY 2020 plan.

The School Districts argue that the briefing to date has been general and incomplete, noting the Department's authority to reconsider its April 15, 2020 determination is not without limitations. They suggest that Rule 60 of the Federal Rules of Civil Procedure should be used as a guiding standard of review in this matter because reconsideration is an extraordinary remedy that should not be used for achieving "a second bite at the apple." They further argue that NMPED's actions in seeking reconsideration of its request for certification and my granting a stay to allow the reconsideration is just that – a second bite at the apple. The School Districts note that NMPED always had the financial information being used now to obtain certification after the April 15, 2020 determination which denied certification and thereby could have used that financial information in the February 27, 2019 submission. They also point out that the statute and

[5] The brief filed by Central Consolidated indicates it adopts the brief filed by the School Districts. For ease in review and analysis this decision will primarily address the brief and exhibits submitted by the School Districts.

regulations allow the State to choose any one of four methodologies to obtain certification from the Secretary. They assert that NMPED made its choice of methodology with its February 27, 2019 submission and its request was denied in the April 15, 2020 determination.

The School Districts challenge the assertion by the Department and NMPED that the intervenors are not prejudiced by the Department and NMPED's actions to reconsider the April 15, 2020 determination. They characterize the Department's guidance to NMPED on how to obtain certification for SFY 2020 by application of a different methodology as evidence of the Department's advocacy that works to the benefit of NMPED and to the detriment of the intervenors.

Lastly, the School Districts argue that upon NMPEDs withdrawal of its request for a hearing, the April 15, 2020 determination becomes a final agency determination and consistent with the statute and Department regulations, that determination would be subject to enforcement by the Department or by a court of competent jurisdiction. Further, they argue this administrative appeal may not be used as a vehicle to circumvent the appeal process or circumvent procedural due process or other fairness requirements necessary to justify reconsideration of a final agency determination.

In conclusion, the School Districts request that upon granting NMPED's motion, the April 15, 2020 determination be deemed a final agency decision and that the Department should be barred from further reconsideration of that determination. The School Districts assert they participated in IAP's joint predetermination hearing in relation to SFYs 2020 and 2021, but the participation in relation to SFY 2020 was under duress and they reserve all rights to further challenge the actions of the Department in relation to SFY 2020.

D. Analysis – First Issue: Should NMPED's motion to withdraw their appeal be granted and what effect does that decision have on the April 15, 2020 determination?

As indicated previously, jurisdiction in this matter is limited to NMPED's appeal of the April 15, 2020 determination by the IAP. That determination addresses IAP's determination that NM is not eligible to consider a portion of IA payment to LEAs as local resources when determining State aid entitlements for the period July 1, 2019 through June 30, 2020 (SFY 2020). While this decision and order identifies critical events as related to SFY 2021, this Tribunal does not have current jurisdiction over NMPED's request for certification for SFY 2021 because IAP has not yet issued a determination for SFY 2021. The mention of critical events as related to SFY 2021 are only noted for understanding the chronology of events as related to the SFY 2020 and acknowledging that the parties held a consolidated predetermination hearing as related to the Department's reconsideration of its April 15, 2020 determination and NM's request for certification of its program for State aid to local school districts for SFY 2021.

NM's request for certification of its program for State aid to the local school districts for SFY 2020 was timely filed with the IAP. NM's request for certification used the exclusion method based on revenue, as it had for at least the past two decades. NM properly submitted the projected data in support of meeting the disparity test with its initial submission. The record shows that there was a substantial change in NM's law regarding the State aid program for SFY

2020, and for subsequent years, and because of that change NM was required to submit projected data showing how the State's program will meet the disparity test under the new State aid formula. After submission of the data, IAP issued its April 15, 2020 determination that NM is not eligible to consider a portion of IA payments as local resources in determining State aid entitlements for SFY 2020 and, therefore IAP did not certify NM's State aid formula for that fiscal year. The IAP explained under the new State aid formula, NM did not pass the disparity test using the exclusion method based on revenues.

Just a few weeks prior to issuance of that determination, on March 6, 2020, NMPED requested that it be allowed to take IA payments into account in determining state aid payments to school districts during SFY 2021. Again, NM's submission used the exclusion method based on revenues. On May 31, 2020, after learning its request for certification for SFY 2020 was denied using the exclusion method based on revenue, NMPED submitted revised disparity data for SFY 2021 and changed its methodology from *exclusion* method based on revenue to the *inclusion* method based on revenue. Thereafter, on June 5, 2020, NMPED formally requested permission to make estimated or preliminary payments for SFY 2021 that allow the State to consider a portion of the IA payments received by local school districts and charter schools in FY 20.

On June 13, 2020, NMPED timely filed the request for a hearing on the April 15, 2020 determination, giving this Tribunal jurisdiction to hear NMPED's appeal. On June 19, 2020, one day after the request for hearing was forwarded to OHA/OALJ, the Boards of Education for Gallup-McKinley County Schools and Grants/Cibola County Schools filed their request to intervene with IAP.

On June 29, 2020, IAP issued a letter to NMPED regarding NMPED's request for permission to make estimated or preliminary payments for SFY 2021 that allowed the state to consider a portion of the IA payments received by local school districts and charter schools. The IAP granted that permission to NMPED. In this same letter, the IAP noted that using a revenue inclusion method for SFY 2020 may result in NM passing the disparity test for SFY 2020, if it were recalculated using the revenue inclusion method instead of the revenue exclusion method upon which the April 15, 2020 determination was based.

Relying on this additional note by the IAP, the parties filed a Joint Motion to Stay this administrative proceeding.[6] The motion indicates that NMPED assured the IAP that it will submit revised data in support of the revenue inclusion method for certification of its State aid program and the parties will proceed consistent with a timeline developed by the parties. On July 24, 2020, I granted the requested stay upon review of the parties' filings, without providing any opportunity for the known intervenors to respond or be heard.

On August 28, 2020, NMPED filed a Motion for Withdrawal of its appeal. NMPED asserted it was withdrawing its appeal to challenge the April 15, 2020 determination because the prior stay was granted, a predetermination hearing scheduled by IAP was pending, and NMPED desired to foster a less adversarial process. The filing of this Motion for Withdrawal raised numerous questions and the parties and intervenors were allowed an opportunity to be heard and brief specific questions that were raised with the filing of this motion. The Motion for Withdrawal

[6] An initial Joint motion was filed on July 10, 202 and an Amended Joint Motion was filed on July 20, 2020.

prompted a reevaluation of the stay that was granted.

While it is generally accepted that parties to an administrative appeal may be afforded an opportunity to resolve their controversy during an administrative appeal, the facts and circumstances of this matter raise an important exception to that general procedure. Given the nature of IA, and specifically Section 7009(b) of the Act, a determination by the Department, in this case IAP, may result in rights of appeal for either States or LEAs. The April 15, 2020 determination to deny certification to the NM's State aid plan essentially benefited the LEAs because the State is not allowed to consider any portion of IA provided directly to the LEAs as local resources when making State aid payments to the LEAs. Given NMPED's timely filing of this administrative appeal, the April 15, 2020 determination is not deemed to be a final agency decision until an initial decision has been issued and the time to appeal to the Secretary by either party or the intervenors has expired, or the Secretary has issued a final agency decision. A voluntary withdrawal of the request for hearing brings an early conclusion to this this administrative appeal and upon the granting of the withdrawal, the April 15, 2020 determination becomes a final agency determination.

NMPED is correct that it may at any time, voluntarily withdraw its request for a hearing. The granting of that withdrawal will terminate NMPED's right to appeal, as NMPED acknowledges. In this circumstance, the granting of NMPED's withdrawal after the time to appeal has expired renders the April 15, 2020 a final agency determination. Again in this circumstance, since the April 15, 2020 determination benefited the LEAs, the intervening LEAs will be entitled to statutory and regulatory enforcement of the April 15, 2020 determination upon the granting of NMPED's Motion for Withdrawal. Consistent with NMPED's motion, the voluntary withdrawal of the June 13, 2020 request for a hearing, is **GRANTED, with prejudice** and the April 15, 2020 determination, is deemed a final agency decision by operation of law and regulation.

The IAP, with delegated authority, granted advance permission to NMPED to make estimated State aid payments to the LEAs that deducted a portion of the IA made to the LEAs. Now that the April 15, 2020 determination is a final agency decision, the advanced permission is vacated. With the granting of NMPED's Motion for Withdrawal, NM and NMPED must adhere to the April 15, 2020 determination and may not take into consideration IA payments when calculating State aid to the LEAs for SFY 2020. NM and NMPED must adhere to any assurances it made in its May 16, 2019 request to make estimated State aid payments to the LEAs that deducted a portion of the IA made to the LEAs. Lastly, NM must adhere to the regulatory requirement to provide satisfactory assurances to the Secretary that it is taking corrective action necessary in compliance with the now final agency determination dated April 15, 2020. The statutory remedies for State violations are applicable here (20 U.S.C. § 7709(e)).

E. Analysis – Second Issue: Upon the granting of NMPED's motion to withdraw its request for a hearing, may the Department reconsider its April 15, 2020 determination?

Although initially questioning the Department's ability to continue the reconsideration of the April 15, 2020 determination, in the absence of continuation of this administrative proceeding, the Department eventually argued, in its brief, the legal theory of administrative reconsideration to support its decision that the Department may reconsider the April 15, 2020 determination even

if this Tribunal grants NMPED's Motion for Withdrawal, thereby terminating this proceeding. In support of that argument, the Department relies on the March 17, 2020 decision by the United States District Court, District of Columbia, *Voyageur Outward Bound School v. United States*.[7]

In relying on *Voyageur Outward Bound School v. United States,* the Department and NMPED argue that administrative reconsideration is allowed subject to only two limitations, 1) that the reconsideration must be timely, and 2), that Congress must not have limited this power. Both the Department and NMPED argue that this reconsideration is timely and there has been no congressional limitation on reconsideration. Both also argue that none of the intervening LEAs have been harmed by the April 15, 2020 determination and therefore none have an independent right to continue the appeal if NMPED's motion is granted. The reliance by the Department and NMPED on *Voyageur Outward Bound School v. United States* is misplaced.

The Department and NMPED indicate, in their briefs, that they relied on the July 24, 2020 Order to proceed with the reconsideration of April 15, 2020 determination. The July 24, 2020 stay was granted, to allow the parties to proceed as they indicated in the July 10, 2020 and July 20, 2020 Motion for a Stay and Amended Motion for a Stay. While the stay was in place, the April 15, 2020 determination and any modified determination that resulted from a subsequent predetermination hearing would remain within the jurisdiction of this Tribunal. In the Amended Motion for a Stay, the parties committed that NMPED would submit revised SFY 2020 data to the IAP no later than July 31, 2020 and the IAP would hold a predetermination hearing on the revised SFY 2020 no later than mid-August. After a predetermination hearing, the IAP is required to hold the proceeding open for 30 days so the State and any interested school districts may submit additional information. The filings and events herein establish that NMPED was seeking certification based on a methodology different from its initial request submitted to IAP on February 27, 2019. The filing of NMPED's Motion for Withdrawal of its request for a hearing, and the subsequent granting of that motion requires a careful examination of the Department's ability to reconsider the April 15, 2020 determination, which became a final agency determination only with the issuance of this Order.

With the filing of NMPED's request for a hearing on June 13, 2020, the Department had no authority to revisit its April 15, 2020 determination without a stay from this Tribunal. The School Districts assert that IAP's June 29, 2020 letter, which included the invitation/permission to allow NMPED to resubmit its State data and change the methodology to establish the disparity test was met, amounts to IAP's inexcusable advocacy to the benefit of the State. The School Districts assert the IAP supplied advice and support to the State in violation of its obligation to evaluate the State's request for certification of its State aid plan fairly, impartially, and not at the expense of the rights of the LEAs. They suggest the reconsideration of the April 15, 2020 determination cannot be used by the Department or NMPED to circumvent the appeal process that began with NMPED's filing of its request for a hearing. The Department denies that IAP's actions were advice and support to the State. Instead the Department asserts those actions were required by IAP to meet its statutory and regulatory obligation to obtain a correct set of data on which to base the SFY 2021 determination. It is not critical to resolve this difference of opinion to arrive at a correct analysis of the issues herein, but it is important to recognize the invitation/permission included in the June 29, 2020 letter and NMPED's Motion for Withdrawal

[7] Notably, the plaintiff appealed this decision on April 20, 2020.

gave rise to the issues addressed in the decision and order. The application of the facts of the events and occurrences to the statutory and regulatory requirements will guide the further analysis of this second issue.

The Department and NMPED argue in their briefs that the Department may reconsider a final determination when the reconsideration is timely and not prohibited by Congress. The Department's and NMPED's argument that reconsideration of the April 15, 2020 determination is not prohibited by Congress upon the granting of NMPED's Motion for withdrawal is not persuasive. The argument that the statute does not impose a statutory limitation on reconsideration of a final IA determination is not supported by a full reading of the statute and the Secretary's regulations provide no express authority to reconsider a determination under Section 7009(b) of the Act.

Section 7009(b) includes a general prohibition that a State may not consider a LEAs eligibility for or amount of IA payments received when determining the amount of State aid a State will provide to an LEA to support free public education (20 U.S.C. § 7709(a)). There is an exception to this general prohibition when a State's aid plan is found to have equalized expenditures for free public education among the LEAs in the State (20 U.S.C. § 7709(b)(1)). The statute specifically identifies the computation to determine if a State's aid plan has been equalized (20 U.S.C. § 7709(b)(2)(A) and (B)). The statute includes additional requirements when the Secretary determines that the State has substantially revised it program of State aid (20 U.S.C. § 7709(b)(3)). Since NM substantially changed its State plan for SFY 2020 and thereafter the Secretary was required to use projected data to determine if the State plan will meet the required disparity test, and NM was required to provide an assurance that if the final data does not demonstrate that the State's plan met the disparity test, then the State will pay each LEA an amount equal to the amount by which the state reduced State aid to that LEA. The Statute provides procedures that must be followed for review of State equalization plan (20 U.S.C. § 7709(c)). The Secretary is to notify the State if the Secretary determines that the State's aid plan qualifies as equalized and any LEA that is adversely affected by the Secretary's certification of the State aid plan must be provided an opportunity for an administrative hearing (20 U.S.C. § 7709(c)(3)). If the Secretary determines that the State's aid plan does not qualify as equalized, proper notice must be provided and the State and any LEA adversely affected by the determination must be provided an opportunity for an administrative hearing (20 U.S.C. § 7709(c)(4)). The statue provides remedies for State violations of this statute (20 U.S.C. § 7709(e)). The remedies allow for the Secretary or any aggrieved LEA to bring an action in a United States district court against the State for such violations or failure and the State is prohibited from claiming immunity under the 11th Amendment to the Constitution of the United States (20 U.S.C. § 7709(e)(1) and (2)). Consistent with this statute, the Department's regulations allow an aggrieved party to file a request for a hearing but do not provide any availability for reconsideration of the Secretary's determinations under Section 7009(b) of the Act (34 C.F.R. § 222.165).

The silence of the Department's regulations in relation to reconsideration of a final decision under Section 7009(b) is significant. It is an indication that the Secretary has precluded reconsideration under this section with reason, the reason being that the Secretary is responsible for balancing rights of States and LEAs under Section 7009(b) so that both are treated fairly and

impartially. Consistent with the cannon *expressio unius est exclusio alterius,* it is also significant that the Department's regulations do allow for reconsideration of certain determinations made pursuant to IA. The Department's regulations specify that a filing deadline will not be affected by requests for other forms of relief, and one other form of relief is the recognition that a LEA may avail itself of reconsideration under Section 8011 of the Act (34 C.F.R. §§ 222.15, 222.150, and 222.152). Notably, the Department's regulations specifically preclude the application of these regulations to Section 7009 of the Act.

The initiating statute must also be closely reviewed to determine if it provides any limitation to IAP's reconsideration of NMPED's request for certification of its State aid plan. The statute requires that any State that is seeking certification of its State aid plan to make that request no later than 120 days before the beginning of the State's fiscal year. I take administrative notice that NM's fiscal year begins on July 1st and ends on June 30th of the next year.

NMPED's request for SFY 2020, filed on February 27, 2019, meets that requirement for a timely filing. As the Department correctly asserts, the State is required to submit supporting data and to select the methodology to be used to determine if the State's plan is equalized, which was done in the NMPED's February 27, 2019 submission. Since there was a change in NM's law on April 3, 2019, NMPED was required and did send revised projections to the IAP program on June 25, 2019. Upon the IAP's June 27, 2019 approval of NMPED's request for permission to make estimated payments deducting a portion of State aid provided to the LEAs, the IAP notified the LEAs of a right to a predetermination hearing, which was held by teleconference on September 19, 2019. Thereafter, the IAP issued the April 15, 2020 determination, which is the subject of this administrative appeal.

On June 29, 2020, one day before the end of NM's SFY for 2020, NMPED realized if they had submitted their SFY 2020 request using a different methodology than was presented in their February 27, 2019 request, it was possible NM would pass the disparity test and NM's State plan would be certified as equalized for SFY 2020. This realization came to be only after the IAP commenced work on NMPED's request for certification of its State aid plan for SFY 2021 that was filed with the IAP and only after the IAP included a suggestion that NM would pass the disparity test for FY 2020 by using a different methodology than was previously submitted. These events led to the parties filing a motion for a stay so the parties could, as they described it, reconsider NMPED's SFY 2020 request for certification.

Having obtained the requested stay on July 24, 2020, the parties proceeded to restart the procedure for review of NMPED's request for certification for SFY 2020. On July 31, 2020, NMPED submitted the required state data to the IAP and selected a methodology for evaluation of the disparity test that was different from the methodology NMPED selected in its timely request filed on February 27, 2019. To date, the IAP has continued to follow the procedures required by the statute. A predetermination hearing was held, and the State and LEAs were afforded an opportunity to attend and submit information for the required period after the predetermination hearing.

NMPED characterized the IAP's willingness to "reconsider" the April 15, 2020 determination as implicit acknowledgement it erred in the denial of certification for NM's State aid plan. The

Department's argument that if NMPED's Motion for Withdrawal is granted it should be done so with prejudice against the State. Because these two positions are in conflict, it is reasonable to find that the Department's willingness to engage in all the statutory required procedures for review of a State's equalization plan is not a reconsideration of its April 15, 2020 determination but a review of NMPED's July 31, 2020 new and different submission for certification of its State aid plan for SFY 2020. Upon the termination of this proceeding, with the granting of NMPED's Motion for Withdrawal, NMPED's July 31, 2020 submission must be considered a new request for certification for SFY 2020 that is based on revised disparity data for SFY 2020 and the selection of a disparity test based on a different method than its February 27, 2019 submission. Notably, NMPED's subsequent request for certification of its State aid plan for SFY 2020, filed on July 31, 2020, cannot be considered timely filed consistent with the filing requirements in 20 U.S.C. § 7709(c)(1)(A).

The only authority provided by the Department and NMPED in support of their position that administrative reconsideration is allowed is *Voyageur Outward Bound School v. United States.* The Department's and NMPED's reliance on that case is misplaced. The theory of administrative reconsideration applies only to final agency determinations. During the pendency of this appeal, the April 15, 2020 was not a final agency determination. It only achieved final determination status upon the granting of NMPED's Motion for Withdrawal and the termination of this administrative proceeding. As discussed previously, NMPED's July 31, 2020 request for certifications of its State aid plan for SFY 2020 was a new and different request from its February 27, 2019 request. Submission of the request occurred after this appeal was started and only after IAP extended an invitation to/granted permission for NMPED to do so. The invitation/permission was extended after the statutory time for submission of such a request had long passed and at a time when the April 15, 2020 determination was under appeal. Contrary to the assertions of the Department and NMPED, the invitation/permission by IAP is an action that adversely affects the intervening LEAs now that NMPED's Motion for Withdrawal has been granted.

NMPED's reliance on the Secretary's final decision *In the Matter of South Carolina,* Dkt. No. 13-43-O (February 26, 2016) is also misplaced because the Department in *South Carolina* had no requirement to fairly and impartially determine the rights between two entities with opposing interests.

In this circumstance, upon the granting of NMPED's Motion for Withdrawal, the April 15, 2020 determination is deemed a final agency determination. NMPED may not take into account IA funds that were provided to any of the LEAs when providing State aid to the LEAs. Because NM was granted advance approval to take into account a portion of the IA received by the LEAs and the April 15, 2020 determination later showed that NM failed the disparity test, the State must now refund to LEAs the amounts previously deducted from the State aid payments to the LEAs. Unless and until the State makes those refunds, the State is in violation of Section 7009(b) of the Act, and therefore, subject to corrective action allowed by the Department's regulations.

Further reconsideration of that determination and NMPED's February 27, 2019 request for certification of its State aid plan is prohibited by the applicable statute and the Department's regulations with the termination of this proceeding. IAP shall discontinue any further

consideration of NMPED's revised request for certification and revised State data submitted that was submitted after April 15, 2020. The Intervenor's request that I order immediate enforcement of the April 15, 2020 determination is beyond my jurisdiction. The statute provides specific remedies for State violations that places jurisdiction in a United States district court and may be commenced by the Secretary or by an aggrieved LEA (20 U.S.C. § 7709(e)).

V. Findings of Fact

1. On February 27, 2019, NMPED submitted a timely request to the Secretary for certification of its program for State aid to local school districts for SFY 2020. The certification if obtained would allow the State through NMPED to take impact aid payments to the local school districts into account when determining State aid for each of the school districts for SFY 2020. In support of its request for certification, NMPED selected the exclusion method based on revenue and included disparity data in its timely submission to the Secretary.

2. On May 16, 2019, NMPED requested the Secretary's permission to make estimated payments to the LEAs deducting a portion of State aid provided to the LEAs. That permission was granted on June 27, 2019 and the Secretary notified the LEAs of its right to a predetermination hearing.

3. On June 25, 2019, NMPED submitted revised data projections in support of its request for certification of its state plan. Resubmission was necessary due to an April 3, 2019 change in state law that substantially changed NM's law regarding the State aid program for SFY 2020 and subsequent years.

4. The IAP held a predetermination hearing on the NMPED's request for certification for SFY 2020 on September 10, 2019.

5. On March 6, 2020, 117 days prior to the start of NM's SFY 2021, NMPED submitted a request to the Secretary for certification of its program for State aid to local school districts for SFY 2021. Although submitting on this date is untimely pursuant to the Federal statute and Department regulations, to date the IAP appears to be treating this request as having been timely filed. Included with this request was disparity data and again NMPED selected the exclusion method on a revenue basis.

6. In the April 15, 2020 determination, the director of IAP informed NMPED that NM is not eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlement for the period July 1, 2019 through June 30, 2020 (SFY 2020). This determination properly notified of the State or any LEA of the right to request a hearing if the State or any LEA was adversely affected by this determination.

7. Following issuance of the April 15, 2020 determination, relating to certification of NM's State aid plan for SFY 2020, on May 31, 2020, NMPED submitted revised disparity data to be used in the inclusion method on a revenue basis for its SFY 2021 request for certification.

8. On June 13, 2020, NMPED timely filed a request for an administrative hearing on the April 15, 2020 determination for SFY 2020. On June 18, 2020, the Assistant Secretary for Elementary and Secondary Education forwarded the request for an administrative hearing and requested that an Administrative Law Judge be appointed to conduct the hearing. On June 19, 2020, the Board of Education for Gallup-McKinley County Schools and the Board of Education for the Grants/Cibola County Schools filed a request to intervene with the IAP Director.

9. On June 23, 2020, the attorneys for NMPED and the Assistant Secretary for Elementary and Secondary Education were notified that an appointment of an Administrative Law Judge had been made and a docket number had been assigned to this appeal.

10. On June 29, 2020, in response to NMPED's June 5, 2020 request for the Secretary's permission to make estimated payments to the LEAs deducting a portion of State aid provided to the LEAs for SFY 2021, the Director for the IAP program notified NMPED that permission was granted to NMPED. In that same correspondence, the Director informed NMPED that NMPED may indeed pass the disparity test for SFY 2020 if it were recalculated using a revenue inclusion method, as was resubmitted for SFY 2021.

11. On July 10, 2020, the initial Order Governing Proceeding was issued to NMPED, the Department, and the first two intervening school districts.

12. On that same date, NMPED and the Department filed a Joint Motion for Stay of Proceeding. After providing an informal response to the parties, an Amended Joint Motion for Stay of Proceeding was filed on July 20, 2020. That motion was granted by an order on July 24, 2020, without having given the first two intervening school districts an opportunity to be heard.

13. On July 31, 2020, NMPED submitted revised data for SFY 2020 and requested its State aid plan be evaluated based on a methodology different than its request submitted on February 27, 2019.

14. On August 7, 2020, the Board of Education for the Central Consolidated School District filed a motion requesting the right to intervene in this proceeding. On August 13, 2020, the Board of Education for Zuni Public School District No. 89 motioned to intervene in this proceeding. Those motions were granted by Order dated August 18, 2020.

15. On August 28, 2020, NMPED filed a Motion for Withdrawal of Appeal.

VI. Conclusion and Order

New Mexico Public Education Department's Motion for Withdrawal is **GRANTED, with prejudice**, and this proceeding is concluded. The April 15, 2020 determination is deemed a final agency determination and is not subject to reconsideration by the Department. NMPED has failed the disparity test for SFY 2020 and must now refund to each LEA an amount equal to the amount that NM deducted from its State aid provided to each LEA for SFY 2020. Consistent

with the requirements of 34 C.F.R. § 222.165(i)(2), NMPED shall file written assurances that it will undertake appropriate corrective action following the withdrawal of its request for an administrative hearing. A copy of which, shall be filed in this record no later than 30 days from the date of this decision and order. An aggrieved LEA may pursue remedies for State violations as described in 20 U.S.C. § 7709(e).

Date: January 15, 2021

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Angela J. Miranda
Administrative Law Judge

NOTICE OF DECISION AND APPEAL RIGHTS-

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 222.165(h)(1)(i). The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 222.165(h)(2).

An appeal to the Secretary shall be in writing. An appeal must be filed within 30 days from receipt of this notice and decision. If an appeal is not timely filed and the Secretary does not otherwise determine to review this decision within 45 days of receipt thereof, by operation of regulation, the decision will automatically become the final decision of the Department.

An appeal to the Secretary may be filed in the Office of Hearings and Appeals (OHA). The appealing party shall provide a copy of the appeal to the opposing party and counsel for the intervenors. The appeal shall clearly indicate the case name and docket number.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed in OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail*	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12th Street, S.W., 10th Floor Washington, DC 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington DC 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at (cite). Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

* Until further notice, due to the consequences from the current COVID-19 event, OHA's office is not regularly staffed. Hand delivery or courier-delivered mail or parcels at the OHA's physical location may be accepted by Education's mail delivery personnel/contractors. Hand delivery and delivery by U.S. Mail to OHA will be delayed due to COVID-19 modifications to interoffice mail delivery.

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Pursuant to 34 C.F.R. § 222.165(h)(1)(ii), copy to:

Mick Zais
Acting Secretary of Education
By email, delivery and read confirmation requested to Charles.Yordy@ed.gov