UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20202
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In the Matter of

Lummi Nation,

Docket No. 20-17-I

Federal Impact Aid

Applicant.

Appearances: Joseph Homel, Office of Reservation Attorney, for the Applicant, Lummi Nation

Jane Hess and Sharone Pasternak Cines, Office of General Counsel, for the Office of Elementary and Secondary Education, U.S. Department of Education

Before: Angela J. Miranda, Administrative Law Judge

DECISION[1]

I. Jurisdiction and Procedural History

The Office of Administrative Law Judges (OALJ) has jurisdiction of this administrative appeal. A request for a hearing under Section 7011 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. § 7711(a)), was timely filed on May 22, 2020, with the U. S. Department of Education (Department), Office of Elementary and Secondary Education (OESE), Impact Aid Program Office (IAPO) by the Lummi Nation (Nation), which owns and operates of the Lummi Nation School (LNS). The request challenged OESE's IAPO's reconsidered determination, dated March 27, 2020, which found that the Nation was eligible for an Impact Aid (IA) payment of $54,906.08 for Fiscal Year (FY) 2019.[2] This payment was based on the IAPO's finding that the LNS provided a free public education to thirteen (13) students enrolled in the LNS. The IAPO found that the other enrolled students were not eligible for IA

[1] This decision is an initial decision pursuant to 34 C.F.R. § 222.157(a)(1).
[2] The reconsidered determination also evaluated the fiscal year 2020 application for IA and awarded the applicant $45,866.94 for that fiscal year. Only the determination for the 2019 fiscal year application is on appeal in this proceeding.

because other Federal funding provided a substantial portion of the cost of education for those other students. Specifically, the IAPO found that funding from the Department of Interior's (DOI) Bureau of Indian Education (BIE), Indian School Equalization Program (ISEP) funds were provided for the education of those students.

Prior to issuance of the reconsidered determination, OESE's IAPO issued a determination, dated May 24, 2019, which found that the applicant, Lummi Nation, was ineligible for IA for FY 2019. On July 19, 2019, the Nation requested that the Director of the IAPO reconsider the May 24, 2019, determination.[3] Subsequently the IAPO issued a reconsidered determination, dated March 27, 2020, which the Nation appealed and is before me in this proceeding.

On June 18, 2020, the Assistant Secretary for OESE forwarded the request for hearing to the Acting Director of the Office of Hearings and Appeals. Thereafter, an Order Governing Proceeding, which established a briefing schedule, and other procedures, was issued on July 2, 2020. On August 21, 2020, the Nation motioned for an extension of time of the briefing schedule and requested an opportunity for the parties to file a Stipulation of Facts. The Motion was granted on August 25, 2020.

After an additional extension of time was granted, on December 18, 2020, the parties filed a Stipulation of Facts along with Joint Exhibits numbered 1, including 1a and 1b, through 14 (OES Document 11).[4] Lummi Nation filed its initial brief on January 15, 2021, and OESE filed its brief on February 12, 2021, along with six additional exhibits. OESE simultaneously filed a Motion for Summary Judgement with its brief.[5] This matter is ready for decision.

This proceeding is conducted consistent with Department regulations at 34 C.F.R. §§ 222.150-222.159 (Subpart J to Part 222 of Title 34 of the Code of Federal Regulations).

II. Issue

Generally, the issue is whether the Impact Aid Program Office's March 27, 2020, reconsidered determination correctly determined the Applicant's Impact Aid for Fiscal Year 2019. More specifically, the issue is what is the meaning of "at public expense" in relation to a local education agency's provision of a free public education as relevant to determine the amount of Impact Aid for which a local education agency is eligible.

III. Legal Framework/Applicable Laws and Regulations

A. Applicable Statutes

The distribution of Impact Aid Program (IAP) funds is administered by the IAPO within the OESE and provides payments to an LEA that is burdened by the loss of local tax revenue or

[3] The request simultaneously requested an administrative hearing.
[4] The Stipulation of Facts is a Portable Document Format (PDF) consisting of 347 pages. The Stipulation, including the list of the Joint Exhibits, is eight pages in length. The joint exhibits follow, beginning on page 9, but are not labeled with the joint exhibit identifier that was listed in the Stipulation.
[5] This decision addresses and disposes of the issues raised in OESE's Motion for Summary Judgement.

because of the presence of the Federal government within that LEA (20 U.S.C. § 7701). Payments are calculated for a fiscal year, based on the number of children who are in average daily attendance in the schools for whom the LEA provided a free public education, during the preceding school year, under specified circumstances (20 U.S.C. § 7703(a)(1)). One circumstance that renders a child eligible for IA is that the child resides on Indian lands (20 U.S.C. § 7703(a)(1)(C)). LEAs are eligible for basic support payments in a fiscal year only if the number of children is the lesser of at least 400 children or the number of children equals at least 3 percent of the total number of children who were in average daily attendance and were provided a free public education (20 U.S.C. § 7703(b)(1)(B)).

The statute defines "free public education" as an education that is provided at public expense, under public supervision and direction, without tuition charge, for elementary or secondary education, as determined under State law. Elementary and secondary education includes preschool education but does not include any education provided beyond grade 12 (20 U.S.C. § 7713(6)). The statute does not define "at public expense."

B. Applicable Regulations

The Department's regulations for the IAP are found at Title 34 of the Code of Federal Regulations, Part 222. Subparts A, B and C are applicable to the issues herein. The Department's regulations provide a definition of "free public education" at 34 C.F.R. § 222.30.[6] The regulation is consistent with the definition in the statute, defining "free public education" as an education provided at public expense for elementary and secondary educational programs through grade 12, including preschool education, in a school of the LEA and under public supervision and direction (34 C.F.R. § 222.30(1)). The regulation specifies education is provided "at public expense" if there is no tuition charged to the child or the child's parents and Federal funds, other than Impact Aid and charter school startup funds,[7] do not provide a substantial portion of the educational program, in relation to other LEAs in the State (34 C.F.R. § 222.30(2)).

IV. Findings of Fact

1. The Lummi Tribe of the Lummi Reservation, also known as the Lummi Nation, is a federally recognized tribe in Washington State, also considered a local education agency. Lummi Nation owns and operates the Lummi Nation School (LNS), providing kindergarten through 12th grade education services.

2. The Nation or LNS received funding from the Department of Interior's Bureau of Indian Education (BIE), Indian School Equalization Program (ISEP) for the education of a portion of students attending LNS in FY 2019.

3. Prior to FY 2019 the Nation did not apply for Impact Aid (IA), but the Nation did file a timely application for FY 2019.

[6] The regulation when initially published was at 34 C.F.R. § 222.81.
[7] The exclusion of charter school startup funds was not included in the initial version of the regulation when proposed as 34 C.F.R. § 222.81.

4. On May 24, 2019, the Department's Impact Aid Program Office (IAPO) issued a letter about the Nation's FY 2019 application for IA. This letter indicated that the Nation was not eligible for IA funds because the IAPO determined the LNS was not providing a free public education to the children attending the school. This determination was based on the IAPO's determination that federal funds from BIE provided approximately 61% of the LNS's educational program costs.[8]

5. Pursuant to 34 C.F.R. §§ 222.152 and 222.153, the Nation requested a reconsideration and administrative hearing by letter dated July 19, 2019.

6. Upon review of the request, dated July 19, 2019, the IAPO issued a reconsidered determination, dated March 27, 2020, revising its initial determination. In the reconsidered determination, the IAPO determined the Nation, as the applicant, was eligible for an IA program payment of $54,906,08 in FY 2019. In making this determination, the IAPO recognized that federal funds from the BIE's ISEP provided for education costs for some of LNS's students, but not all eligible students received ISEP funds. The IAPO found that for FY 2019, LNS met the minimum number of eligible federally connected students because 13 of 23 children (equaling 56.52%), who lived on eligible Indian lands were federally connected students and were provided a free public education. A payment voucher for that amount was processed and paid to the Nation, the LEA applicant.

V. Arguments

A. The Lummi Nation's Initial Brief

The Nation asserts that it is a federally recognized tribe that operates the LNS. The LNS educates children from kindergarten through grade 12 who live almost exclusively on federal land. The Nation operates as a local education agency (LEA) for the purposes of federal funding. In 2018, the Nation applied for Federal Impact Aid pursuant to 20 U.S.C. §§ 7001 and 7003. Although initially denied IA by the IAPO, upon reconsideration, the IAPO granted the Nation IA funds for FY 2019, but only for a portion of the children educated by the LNS.

The Nation argues that the definition of "at public expense" defined in the Department's regulation at 34 C.F.R. § 222.30(2)(ii) (2020) defeats the purpose of the IAP, has no statutory basis, and is not a "permissible construction" of the statute. The Nation argues there is a unique government-to-government relationship between the Nation and the Federal government based on the court-recognized trust obligation between these two sovereigns. Relying on that court-recognized trust obligation, the Nation argues that Impact Aid must be based on the full student population at the LNS even if LNS, or the applicant, received other federal funding, like that from BIE's ISEP funds for the education of children at the LNS.

Primarily, the Nation argues it is entitled to IA funds for all federally connected children who are provided a free public education by LNS and the exclusion of those children for whom the

[8] Correspondence from the IAPO seems to use the designations of Lummi Nation and Lummi Nation School interchangeably. Overall, the evidence in this record shows the Lummi Nation is the LEA and applicant for IA. The Lummi Nation School is owned and operated by the Lummi Nation.

LEA received other federal funds violates the IA statute. The Nation further argues that the intent of Congress was clear and unambiguous, and the application of the Department's regulatory exclusion violates the statute because the statute does not include the same restriction, the additional limitation defeats the purpose of IA, and it is not a "permissible construction" of the statute.

In making the argument that the intent of Congress was clear and unambiguous, the Nation relies on the language in 20 U.S.C. §§ 7703 and 7709 to argue that Congress did not allow the Department to exclude children from the statutory formula if those children received a substantial amount of funding from other federal funds. The Nation goes on to argue that, consequently, the statute requires only that the Department determine the number of federally connected children and then calculate the payment based on that number.

The Nation argues in the alternative that all federally connected children are eligible for IA even if Congress' intent was not clear and unambiguous. The Nation argues in the circumstance when the intent of Congress is not clear and unambiguous, the agency's interpretation must be reasonable. The Nation asserts the restriction implemented in the regulation, that there be no duplication of federal funds, is not reasonable. The Nation argues that it is therefore entitled to IA based on the number of [federally connected] children educated by LNS.

B. The Office of Elementary and Secondary Education's Brief in Support of the Impact Aid Program Office's Reconsidered Determination, Dated March 27, 2020.

The OESE frames the issue as whether the portion of LNS children who already generated a substantial portion of federal funds from another agency for their education are eligible for additional assistance under section 7003 of the IA statute. The OESE explains the availability of IA is based on meeting statutory and regulatory eligibility using third year preceding financial data if that LEA has provided a free public education, at public expense, to federally connected children.

The OESE argues the FY 2019 payment determined by the IAPO provided under the reconsidered determination properly calculated the IA payment due the Nation. The OESE argues that the Nation's FY 2019 payment was correctly based on eligible children for whom LNS provided a free public education and who did not generate a substantial portion of other federal funds for their education. Lastly, the OESE argues that the reconsidered determination was consistent with the statute, applicable regulation, and also consistent with how other similarly situated LEAs are treated under the IAP.

In support of its basic arguments, the OESE provided a brief overview of the IA basic support payments that are provided to eligible LEAs burdened with providing a free public education to federally connected children. The OESE explains that the basic support payments are intended to assist with the local share of the financial burden that LEAs experience because of Federal activities or presence in the LEA.

The OESE notes some of the legislative and regulatory history for context in support of its argument. The OESE asserts that prior to 1950, multiple funding streams provided relief to LEAs that were burdened because of Federal activities or presence in the LEA. The OESE indicated with

the passage of the Federal Activities Financial Assistance Act of 1950 (Public Law 81-874), the Impact Aid Program came into existence and Public Law 81-874 consolidated the appropriations to multiple governmental departments providing relief related to financially burdened LEAs when there is a federal presence within the LEA. The OESE asserts that the stated goal of Public Law 81-874 was "to provide for Federal assistance for current operating expenses on a uniform and permanent basis" to the burdened LEAs while avoiding the duplication and overlapping authorities that existed before (OES Document 15, p. 3).[9]

The OESE relies on a 1950 Congressional Report in support of the assertion that Congress intended to exclude children for Impact Aid if the LEA received other Federal funds, including funds from the DOI's Bureau of Indian Affairs (BIA) and BIE for the education of those children. In support of this argument, the OESE points to the June 20, 1950, Report from the Committee on Education and Labor that accompanied H.R. 7940, which came to be Public Law 81-874.[10] The OESE notes that because other laws provided for the education of Indian children at government expense by contract or arrangement with the BIA, only children living on Indian lands whose education is not already provided for by the BIA will be considered as eligible children for Impact Aid. The OESE continues the argument indicating the BIA school system is a federally funded school system with the purpose, then and now, to provide eligible Indian students with a quality education. The OESE also notes that the 1986 eligibility regulations followed the same reasoning and therefore made clear that schools or students receiving BIA funding for education were precluded from receiving Impact Aid funding for those students.

The OESE also relies on notices published in the Federal Register in 1986 explaining that the Department's regulation was promulgated to further the purpose of IA funds and to specifically address LEAs that are burdened by having to educate federally connected children but are not otherwise compensated [by the Federal government] for the loss of local revenue due to the federal presence. The OESE notes that the Notice of Proposed Rulemaking, published on May 14, 1986, provided notice that the Department will determine if other Federal funds that are provided to the LEA are substantial and whether those Federal funds were intended to provide the entire cost of the educational program. In the final rule published on November 17, 1986, the Department responded to a comment to the proposed rule defining public expense that excludes receipt of Federal funds other than IA funds and stated its position to exclude students who receive other Federal funding from receipt of IA is consistent with the generally accepted definition of "public education" meaning "education provided by a local or State community and not by the Federal Government" (OES Document 15 at p. 5).[11]

The OESE represents that in 1994, Pub. Law 81-874 was repealed, and the Impact Aid Program was reauthorized under Title VIII of the ESEA and is currently authorized in Title VII

[9] Citing H.R. Rep. No. 11381-2287, at 3 (1950) and 96 Cong. Rec. 10,096 (1950).
[10] OES Document 14 includes OESE's exhibits in support of its brief. It includes exhibits ED-1, HR. 7940 (September 30, 1950, Public Law 874); ED-2, Report No. 2287, Report dated June 20, 1950, accompanying HR 7940; ED-3, House Congressional Record from July 13, 1950 pp. 10090-10111; ED-4, Final Regulations published in 51 Fed. Reg. 41562 (November 17, 1986); ED-5 Notice of proposed rule making published in 51 Fed. Reg. 17720 (May 14, 1986); and ED-6, Affidavit of Kristen Walls.
[11] Citing 51 Fed. Reg. 41566 (November 17, 1986).

of the ESEA, though many of the provisions today are the same or similar to those that were in the original 1950 statute (OES Document 15, p. 3).[12]

Although the OESE initially denied the Nation any IA due to its receipt of Federal ISEP funds through the BIA, upon reconsideration, Department officials, LNS staff, Lummi Nation, and the Lummi Business Council worked cooperatively and identified that some of the LNS students did not generate BIA ISEP funds. In the reconsidered determination of March 27, 2020, the IAPO determined the LNS was eligible for Impact Aid in the amount of $54,906.08, which was paid to the Nation as the LEA. The IAPO arrived at that amount for FY 2019, because it determined the LNS was providing a free public education to only thirteen (13) children who lived on eligible Indian lands and were otherwise eligible consistent with the requirements of 34 C.F.R. § 222.31(b) and did not receive ISEP funds from the BIA. In making this determination, the IAPO relied on the statutory definition of "free public education" and the number of children that met all the eligibility requirements to receive IAP funds. The IAPO also relied upon the regulatory definition of "at public expense," defined as no tuition charged to the child or the child's parents and that federal funds other than Impact Aid funds and charter school startup funds do not provide a substantial portion of the education program, in relation to other LEAs, as determined by the Secretary (34 C.F.R. § 222.30(2)(i) and (ii)).

The OESE argues that Congressional intent was clear regarding the meaning of "free public education." In support of that argument, the OESE uses the traditional tools of statutory interpretation to argue that Congress precisely addressed whether "at public expense" excluded Federal funds other than IA funds. OESE points to the legislative history of the IA statute, which specifically discussed Federal funds to support education from DOI's BIA and BIE. OESE argues that the regulation that incorporated the statute's legislative history to further define "at public expense" was within the Secretary's delegated authority and was properly promulgated. In conclusion, OESE argues that the regulation is entitled to controlling weight.

VI. Analysis

The parties filed a joint stipulation regarding the legal background, exhibits, and findings of fact (OES Document 11). There are no factual disputes to be resolved. The Nation did not challenge the formula used by the IAPO to determine the IA payment. Rather, it only challenged that all children educated by the LNS were not included in that formula to determine the IA payment. The OESE contends the Nation's challenge is an oversimplification of the program that ignores entire portions of the statute related to student and LEA eligibility. Both parties argue and rely on the analysis by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) in support of their arguments. While both parties have argued that the test established in *Chevron* must be followed, neither party cited any federal court decision

[12] This representation seems to be an abbreviated summary of the initial IA statute through the current statute. With the passage of Public Law 89-10 on April 11, 1965, Public Law 81-874 was repealed, and IA was incorporated into the ESEA of 1965. Since that date there have been about 20 versions of the law, many of which were appropriation laws that may have included some minor changes to the IA statute. On January 8, 2002, with the passage of Public Law 107-110, the IA statute was incorporated into Title VIII of No Child Left Behind Act, an amendment to the ESEA of 1965. On December 10, 2015, Public Law 114-96 reauthorized and amended the ESEA of 1965, with the passage of the "Every Student Succeeds Act" (ESSA). Therein, IA was incorporated into Title VII of the ESSA, as an amendment to the ESEA of 1965.

that addressed whether the Secretary's regulatory definition of "at public expense" is an interpretation of the IA statue that is entitled to deference. In the absence of such a review, there is no precedential court decision upon which this initial decision must adhere to or consider.

The reliance by the Nation and OESE upon the Chevron analysis is misplaced and their arguments that this Tribunal apply the *Chevron* test in this administrative proceeding are also misplaced. *Chevron* does not apply to an agency's internal administrative proceeding.[13] Chevron describes the deference courts give to statutory interpretations made by administrative agencies within their areas of expertise.[14] As the Secretary explained in *In the Matter of Central Kitsap School District (WA)*, *Chevron* has no bearing on an ALJ's analysis of a departmental officer's interpretation of a statute.[15] Nor does it have any bearing on the Secretary's review of an initial decision by an ALJ.[16] Because the administrative review process ultimately leads to a final agency action, the appropriate analysis in this administrative proceeding is to determine the definition of "at public expense" as used in the statute and not an analysis of deference under *Chevron*.[17]

The argument advanced by the Nation to "overrule" the reconsidered determination and OESE's argument to "affirm" the Assistant Secretary's determination and grant the motion for summary judgement are inconsistent with the duty and responsibility of the administrative law judge to make an initial decision pursuant to 34 C.F.R. § 222.157. The reconsidered determination, under review in this matter is not a final agency decision but merely notice of the IAPO's action on the application by the Nation for IA for FY 2019.

Consistent with 34 C.F.R. § 222.151, a LEA may request an administrative hearing when that LEA is adversely affected by the Secretary's decision, or a decision by the Secretary's delegate. Under such circumstances, as the Secretary has previously recognized there is no entity within the Department that is a court owing deference to another entity within the Department that is an "Executive."[18] Therefore, the critical determination that must be made in this initial decision is what is the meaning of "at public expense" as used in both the statute, which does not provide a definition, and regulation, which does provide a definition.

Based on the evidence provided in this appeal, it seems this issue was first identified by the Secretary in 1986 (OES Document 14, p. 77 (Ex. ED 5)).[19] On February 19, 1986, the Department published a Notice of Intent to Regulate in the Federal Register,[20] wherein it was announced that the Department has "obtained some difficult interpretive questions regarding eligibility for section 3 payments" referring to IA payments related to BIA-funded schools (*Id.*). The February 19, 1986,

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[13] *In the Matter of Central Kitsap School District (WA),* Dkt. No. 11-86-I (Sec. Dec. June 18, 2015, p. 5).
[14] *Id*. at 5, citing *Perez v. Mortgage Bankers Ass'n,* 575 U.S. ____ (Mar. 9, 2015)(Scalia, J. concurring)(No. 13-1041), at 2 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-843 (1984). The updated cite for *Perez v. Mortgage bankers Ass'n* is 575 U.S. 92, 109-110.
[15] *Id.*at 6.
[16] *Id.*
[17] *See, Id.*
[18] *In the Matter of Central Kitsap School District (WA),* Dkt. No. 11-86-I (Sec. Dec. June 18, 2015, p. 6), citing Richard J. Pierce, Administrative Law Treatise, at 991 ("[T]he relation between the ALJ and agency is not the same as or even closely similar to the relation between agency and reviewing court[.]").
[19] William J. Bennet was the Secretary of Education in 1986.
[20] The Notice of Intent to Regulate, referenced in the NPRM dated May 14, 1986, was not filed as an exhibit in this record. The cite to the Notice of Intent to Regulate is 51 Fed. Reg. 6011 (February 19, 1986).

Notice of Intent to Regulate was followed by a Notice of Proposed Rulemaking (NPRM), published May 14, 1986, that further addressed the eligibility question whether an LEA may claim students for section 3 IA payment if the LEA is not providing those students a free public education because the students are attending BIA-funded schools (*Id.*). The NPRM indicated that the proposed rulemaking was based on the eligibility requirements in Pub. L. 81-874, as amended, and the proposed rulemaking would "further the purpose of the program by directing the limited Federal funds to the LEAs that are burdened by having to educate federally connected children" (*Id.*). The NPRM proposed 34 C.F.R. § 222.81,[21] which specified that a free public education requires that the education "be at public expense" and further explained that "Federal funds (other than Impact Aid funds) do not provide a substantial portion of the educational program" (*Id.*).

The Department published its Final Regulation on November 17, 1986 (OES Document 14, pp. 70-75 (Ex ED 4)). In that Final Regulation, the Department specifically responded to comments that questioned the Secretary's authority to define "at public expense" to exclude programs substantially supported by Federal funds and to urge the Secretary to specifically recognize that "education provided by the BIA is education provided at public expense" (*Id.* p. 73). In his response, the Secretary explained that the Department has broad authority to promulgate regulations to interpret and implement the Impact Aid law (*Id.*). The response noted that the preamble to the NPRM indicated these "regulations that preclude duplicate payments of Federal funds are fully consistent with, and contribute significantly to, the purposes and objectives of the Impact Aid program" (*Id.*). The response also cited the legislative history which included House Report 2287 (in this record at OES Document 14, pp. 13-45 (Ex. ED 2)), in support of the regulatory definition of "at public expense" (OES Document 14, p. 73). Also in his response, the Secretary relied on the meaning of "public, as applied to an agency, organization, or institution," defined at 34 C.F.R. § 77.1 to mean "the agency, organization, of institution is under the administrative supervision or control of a government other than the Federal Government." The Secretary further explained that "[p]ublic education generally means education provided by a local or State community, not by the Federal Government" (*Id.*).

The parties agree the statute is silent on the definition of "at public expense." The Nation points out that the statute does not define "at public expense." The OESE provided evidence that the Secretary acknowledged this on February 19, 1986, when the Department published a Notice of Intent to Regulate, indicating that it "needed to address some difficult interpretive questions." I am persuaded by the parties' agreement and find that Congress left a gap in the statute when it created the IAP.

While the *Chevron* test and deference are not applicable to this proceeding, understanding the Supreme Court's reasoning provides guidance for the issue in this matter that requires a determination of the definition of "at public expense" as used in the statute. The Court in *Chevron* reasoned when Congress passes a statute that creates a program to be administered by an agency, but leaves a gap, the administrative agency is delegated the authority to establish policy and rules to fill that gap.[22] When a gap left by Congress is explicit, there is an express delegation of authority and the legislative regulations are given controlling weight unless they are arbitrary, capricious, or

[21] As indicated in the OESE brief, this section of the regulation was the regulation that is now 34 C.F.R. § 222.30.
[22] *Chevron* at 843 citing *Morton v. Ruiz,*415 U.S. 199, 231 (1974).

manifestly contrary to the statute.[23] When the gap left by Congress is implicit, the legislative regulations shall be sustained if the provision is a reasonable interpretation by the agency.[24]

In filling that gap, the Supreme Court indicated the agency should consider the statutory language and legislative history, traditional tools of statutory construction.[25] The Supreme Court ruled a challenge to the agency's construction of a statutory provision must fail if that challenge is based on the wisdom of the agency's policy.[26] Therefore, this decision will consider whether the agency's regulation defining "at public expense" is a reasonable interpretation of the statutory construction and legislative history.

The evidence in this record shows that in 1986 the Secretary identified a gap in the statute that created the IAP. The evidence also shows the Secretary engaged in rulemaking consistent with the requirements of the Administrative Procedure Act. The Secretary's publications in the rule making process provide the Secretary's reasoning in support of the rule. The rulemaking in 1986 resulted in a rule/regulation where the Secretary's interpretation of the statute allowed IA funds only for children whose education is not otherwise substantially provided by federal funding but is funded by the LEA or State.

It is settled law that providing public education is the responsibility of the State and local education agencies. Prior to the passage of Public Law 81-874, there was recognition that the State education agencies (SEAs) and the LEAs were financially burdened when there was a federal presence that either reduced the State or local tax base or increased the demands on the SEA and LEA to provide increased educational services because of an increase in children needing education services due to the federal presence. As indicated earlier, prior to Public Law 81-874, there were multiple sources of federal funding and appropriations to address the burden. While the statute itself did not provide a definition of "at public expense," the legislative history, as indicated by the OESE in its argument, establishes that it was the intent of Congress to streamline federal appropriations and to eliminate duplication of Federal funding sources (OES Document 15, p. 5).

Upon identification of a gap created in the statute, the Secretary commenced the process for rulemaking. The Department first published a Notice of Intent to Regulate (51 Fed. Reg. 6011, February 19, 1986).[27] The Notice of Intent to Regulate specifically identified that the circumstance when an LEA claims students attending schools funded by the DOI's BIA as one situation where eligibility of a child for IA funds would be addressed in a soon to be published NPRM. The NPRM, (51 Fed. Reg. 17720, May 14, 1986), was even more specific when it indicated the Department needed to determine how it would treat the claim of an applicant LEA for children who reside within its boundaries but attend schools that are not operated by the LEA. The Department indicated this includes schools funded by the BIA and noted these schools may not claim students for payment purposes if it is not providing them a free public education. In addressing the gap, the Secretary proposed a regulation that defined "at public expense" as used in relation to the

[23] *Id.* at 844.
[24] *Id.*
[25] *See Id.,* at 859-864.
[26] *Id.* at 866.
[27] I take administrative notice of the February 19, 1986, Notice of Intent to Regulate. While it was not filed as an exhibit by the Department, it is specifically referenced in the Department's Exhibit ED 5.

requirement of providing a free public education.[28]

Paragraph (a) of that proposed regulation followed the language of the statute and required that the education be provided at "public expense." Paragraph (b) of the proposed regulation explained that eligibility of IA funds for a child required that Federal funds (other than IA) do not provide a substantial portion of the educational program.[29] The NPRM explained the condition in the definition of "at public expense" would ensure that duplicate payments are not made on behalf of children whose education is the financial responsibility of another Federal agency. The published Final Regulation responded to the comments received in response to the NPRM and made no change to the portion of the regulation at issue in this matter.

The published notices in 1986 show the Secretary considered the statutory language and legislative history when he developed the rule that defined the term "at public expense." The analysis published during the rulemaking process in 1986 provided an interpretation of the IA statute that closed the gap left when Congress did not specifically define "at public expense." The Secretary provided a reasoned explanation in the 1986 published notices to support the proposed regulatory definition of "at public expense" that excluded other federal funding, except for IA funds, and specifically identified DOI, BIA funds as federal funds that provide substantial funding to the LEA for the education of children. The 1986 published notices provide the Secretary's reasoning and rationale for concluding that Federal funds, including BIA funds, cannot be considered in the determination if an LEA is providing a free public education. The Secretary's rationale relied, in part, upon the definition of "public" when applied to an agency, organization or institution under a different regulation, where the Secretary defined "public" as being under the administrative supervision or control of a government other than the Federal Government (34 C.F.R. § 77.1).

The Secretary's interpretation of the IA statute as evidenced in the 1986 published notices that led to the regulatory definition of "at public expense" is straightforward, logical, and a fair interpretation of the IA statute. It is that interpretation that the IAPO relied upon when it issued the reconsidered decision that is under review in this proceeding. The Nation's argument that the exclusion of BIE funds in the assessment of an LEA's application for IA is not persuasive given the notable legislative history of the IA statute. Furthermore, the Secretary's interpretation of the IA statute is supported by clear language of the regulatory definition of "at public expense" as indicated in the 1986 rule-making notices. For these reasons, the OESE's argument that the reconsidered decision was a correct determination of the amount IA due to the Nation for FY 2019 is persuasive.

VII. Conclusion of Law and Order

As explained above, the Department's regulatory definition of "at public expense" is consistent with the Impact Aid statute, states the Secretary's rationale for the rule, and properly followed the requirements for rule making. Therefore, the agency action indicated in the reconsidered determination dated March 27, 2020, is **confirmed in this initial decision**. Therein, the Office of Elementary and Secondary Education's Impact Aid Program Office determined that, for FY 2019,

[28] The cite to this regulation was 34 C.F.R. § 222.81 but is now found at 34 C.F.R. § 222.30.
[29] Subsequent versions of this regulation added charter school startup funds as an additional exclusion.

Lummi Nation, the LEA applicant, met all the requirements for Impact Aid in the amount of $54,906.08. This payment was determined based on LNS's provision of a free public education to 13 students out of 23 federally connected children**.** The Impact Aid Program Office properly determined eligibility for 13 students and properly excluded other students when the IAPO, along with representatives from the Nation and the LNS, identified that the education for some of the 23 federally connected children was substantially funded by the Indian School Equalization Program and properly excluded only those children from formula to determine the amount of IA due to the Nation.

Date: February 1, 2023

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Angela J. Miranda
Administrative Law Judge

NOTICE OF DECISION AND APPEAL RIGHTS

This is the initial decision pursuant to 34 C.F.R. § 222.157(a). The regulation does not authorize motions for reconsideration. By operation of regulation at 34 C.F.R. § 222.157(a)(2) the decision constitutes the Secretary's final decision unless the Secretary determines to review this decision within 45 days of receipt of this decision or an appeal is timely filed and granted by the Secretary.

The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 222.157(b). An appeal to the Secretary shall be in writing and request review of the decision. An appeal must be filed within 30 days from receipt of this notice and decision by the party.

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appeal shall clearly indicate the case name and docket number. The appealing party shall provide a copy of the appeal to the opposing party, supported by a certificate of service filed with the appeal.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system by selecting "Appeal to Secretary" in the Filing Primary drop-down options and identifying party affiliation in the Filing Secondary drop-down options. Otherwise, appeals must be timely filed in OHA by mail or hand delivery. Appeals filed by mail or hand delivery shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery *	Mail*
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 34 C.F.R. § 222.157(b). Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

* OHA/OALJ is now operating in accordance with the Department's "steady-state operations." OHA/OALJ operating procedures that were in place prior to March 2020 may not be fully restored. Delivery and processing of mail to the OHA/OALJ may be delayed and office coverage to accept hand delivered filings is limited. If a party uses traditional paper documents for submission to OHA/OALJ, service upon the opposing party shall be consistent with the regulatory requirements, by means other than OES, and properly indicated in a certificate of service. The preferred method of filing with OHA/OALJ is by OES.

SERVICE

Service completed by Office of Hearings and Appeals Electronic Filing System (OES) automatic email notice** sent to the email of record for the following registered e-filers:

For Lummi Nation:
Joseph Homel, Staff Attorney
Sharon DeGrave
Office of Reservation Attorney
2665 Kwina Rd.
Bellingham, WA 98226

For OESE:
Sharone Pasternak Cines
Jane Hess
Colin Bishop
U.S. Department of Education
Office of the General Counsel
400 Maryland Avenue, S.W.
Washington, DC 20202

**Service and receipt thereof will be the date indicated in the confirmation of receipt email for E-filing consistent with the parties' voluntary consent to use the Office of Hearings and Appeals Electronic Filing System (OES). Paper copies will NOT follow.

Digital Copy To:
Dr. Miguel Cardona,
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202
By email delivery confirmation requested to: Charles.Yordy@ed.gov