No.

# In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89 AND
GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT NO. 1,
*Petitioners*,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
*Respondent*,

NEW MEXICO STATE DEPARTMENT OF EDUCATION,
*Intervenor*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Federal Impact Aid Program, 20 U.S.C. § 7709, was enacted to subsidize local State school districts which have a federal presence within the district such as military bases or, as in the present case, Indian Reservations. These local districts are not able to tax such federally impacted lands. The Impact Aid Program prohibits the State from counting these federal subsidies as part of an impacted district's budget when the State allocates operational funds to the local districts, unless the State's operational funding to districts throughout the State is "equalized" under an equalization formula under the Impact Aid Program. If the State's operational funding is determined to be "equalized," the State can reduce operational funding to an impacted district by the amount of the Impact Aid subsidy.

In 1994, the equalization formula was statutorily created and effectively repealed the equalization formula previously created by the Secretary of the United States Department of Education by regulation. However, in 1996, the Secretary, by regulation, reinstated his repealed and conflicting equalization formula and refuses to follow Congress' equalization formula. Under Congress' formula, New Mexico is not "equalized" and the intended beneficiaries receive the Impact Aid. Under the Secretary's formula, New Mexico is deemed "equalized" and the Impact Aid is taken from the impacted districts. The impacted districts are losing approximately $50,000,000 per year in Impact Aid. The Tenth Circuit was split 6 to 6 on the question, leaving the Secretary's formula in effect.

The question presented is:

1. Whether the Secretary has the authority to create and impose his formula over the one prescribed by

Congress and through this process certify New Mexico's operational funding for fiscal year 1999-2000 as "equalized," thereby diverting the Impact Aid subsidies to the State and whether this is one of the rare cases where this Court should exercise its supervisory jurisdiction to correct a plain error that affects all State school districts that educate federally connected children.

Petition

Respond

Interven

Education.

## PARTIES TO PROCEEDINGS

Petitioners are New Mexico public school districts.

Respondent is the United States Department of Education.

Intervenor is the New Mexico State Department of Education.

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Petitioners Zuni Public School District No. 89 and Gallup-McKinley County Public School District No. 1 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The *Per Curiam* ruling of the United States Court of Appeals for the Tenth Circuit dated February 23, 2006 is officially reported at 437 F.3d 1289 and is reproduced in App. at 2a.

The Opinion of the United States Court of Appeals for the Tenth Circuit dated December 30, 2004 was vacated and is reproduced in App. at 3a.

The decision of the Secretary of the United States Department of Education dated October 11, 2001 is reproduced in App. at 34a.

## JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on February 23, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254. Federal jurisdiction is invoked under 20 U.S. C. § 7711(b)(1) which allows appeals of decisions of the Secretary to the United States Court of Appeals.

## STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relate to the federal Impact Aid Program and are:

1. 20 U.S.C. § 240(d) repealed (App. at 69a)
2. 20 U.S.C. § 7709 (2000) (App. at 59a)
3. 34 C.F.R. Part 222, Subpart K (2000) (including App. to Subpart K) (App. at 76a)
4. Former 34 C.F.R. §222.63 (1993) (App. at 97a)
5. Former 34 C.F.R. App. §222 (1993) (App. 99a)

## STATEMENT OF THE CASE

The Zuni Public School District is a New Mexico public school district located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State school districts. Under the Impact Aid Program (20 U.S.C. § 7709 *et seq.*) public school districts such as Zuni and Gallup impacted by a federal presence which reduces ordinary bonding and taxing capacity are entitled to receive federal Impact Aid funding to offset the negative financial impact of this federal presence. *Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk*, 91 F.3d 1240 (9th Cir. 1996). The Impact Aid Program, however, allows States to take credit for the Impact Aid payments by correspondingly reducing operational funding to Impact Aid districts if the State can establish that operational funding for its school districts (statutorily referred to as LEAs) is otherwise "equalized." Under Congress' 1994 formula (the current statutory formula) a 25% disparity in per-student funding is permitted between the highest funded LEA and the lowest funded LEA in a field of LEAs identified

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under the statutory formula. Under this formula, all LEAs are first ranked by per-student funding. The Secretary of the United States Department of Education (the "Secretary") is then instructed by statute to "disregard local educational agencies (LEAs) with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State. . . ." (20 U.S.C. § 7709(b)(2)(B)) (App. at 61a). The Secretary, however, has by regulation created a formula which uses a different method for developing this final field of LEAs. Congress' formula eliminates percentiles of "LEAs." The Secretary eliminates percentiles of "pupils," (App. at 92a) and is thereby able to develop a much reduced field of LEAs for use in making the equalization determination. This produces a radically different outcome than required by the statutory formula enacted in 1994.

The statutory formula was followed and reproduced by the Secretary in the body of the regulations at 34 C.F.R. 222.162(a) (Subpart K) (App. at 81a). Under the statute and the body of the regulation, in making the "equalization" determination the Secretary is to "disregard LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State." (App. at 81a). The Appendix to this regulation provides what purports to be an example of a calculation made under the statutory and regulatory formula. However, instead of reflecting the statutory formula, the Appendix example uses the Secretary's pre-1994 equalization formula created by regulation in 1976 but which was specifically repudiated by the 1994 statute. Under the Appendix formula, instead of disregarding "LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile. . .," as required by the Congress, the top 5% and bottom 5% of "pupils" are eliminated to determine the LEAs to be used in

the final calculation.[1] (App. at 92a) The Secretary insists on following the Appendix formula.

Under Congress' formula, New Mexico's operational funding is not "equalized" and New Mexico's federally impacted districts are entitled to retain their share of approximately $50,000,000 of Impact Aid funds without suffering offsetting reductions in their State provided operational funding. Under the Secretary's formula, more than twice as many LEAs are excluded from the final field, New Mexico's funding is deemed "equalized," and New Mexico is permitted to reduce operational funding to the federally impacted districts by the amount of their Impact Aid receipts.[2] To further allow a State to qualify for the equalization exception, weighted funding from the State to LEAs to help cover costs associated with unique conditions found in certain LEAs such as low student count, urban density, rural location, etc. (34 C.F.R. § 222.162(c)(2)) is backed out to establish a base funding level (App. at 82a). Even with this weighted funding backed out, in New Mexico the highest per student operational funding for all LEAs is $6,520 and the lowest is $2,672 per student, a disparity of approximately 244% (App. at 212a). Under Congress' formula, 10 LEAs of the 89 LEAs are eliminated to form the final field. (App. at 24a). Under the Secretary's formula, 25

[1] Under the example in the Secretary's Appendix, LEAs are ranked in order of wealth. Five percent of the entire State student population is eliminated from the top ranked LEAs and then bottom ranked LEAs. As students are subtracted, LEAs are eliminated and the remaining field of LEAs is established. In stark contrast, under the statute, percentiles of LEAs are eliminated without reference to pupils.

[2] New Mexico by statute takes credit for 75% of the Impact Aid payments. NMSA 1978 § 22-8-25. (App. at 72a)

out of 89 LEAs (or approximately 28% of all LEAs) are eliminated and the disparity is reduced to 14.43%. (App. at 45a-46a)

The legislative and regulatory sequence is as follows.

1. Prior to 1974, all Impact Aid went to the recipient school districts.

2. In 1974, Congress enacted 20 U.S.C. § 240(d), which was later repealed. (App. at 69a) This allowed States to take "into consideration, Impact Aid payments, provided there were equalized operational expenditures made to school districts." The term "equalized expenditures" was to be "defined by the Secretary by regulation." (App. at 70a)

3. In 1976, the Secretary conducted a series of "comments and responses" relating to the formulation of the regulations. One exchange discussed whether it was preferable to eliminate percentiles of LEAs or percentiles of pupils in developing the final field of LEAs. Some experts recommended the percentile elimination of LEAs. Others recommended the percentile elimination of pupils. The Secretary chose to eliminate percentiles of pupils. (App. at 129a-131a)

4. The Secretary then published the "equalization" regulation in 1976 (App. at 141a). The Secretary, in the body of the regulation (§ 115.62(b)), established the disparity limit at 25%, but did not further define the process except through the Appendix to the regulation. (App. at 99a, 159a)

5. The Appendix provided:

> Identifying those local agencies in each ranking which fall at the 95th and 5th percentile of the total number of pupils in attendance in the schools of these agencies. . .. (Emphasis added)

6. In 1993, this regulation was codified as 34 C.F.R. § 222.63. (App. at 97a)

7. In 1994, the system changed with the enactment of 20 U.S.C. § 7709. This statute removed the Secretary's authority to establish the equalization formula. Instead, a new and different equalization formula was created by statute. Now, instead of eliminating pupils above the 95th percentile and below the 5th percentile, the statute required the Secretary to "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile" (§ 7709(b)(2)(i)) thus reversing the Secretary's 1976 decision to eliminate pupils instead of LEAs. (App. at 61a)

8. The Secretary subsequently enacted regulation 34 C.F.R. § 222.162(c) (Subpart K) the body of which mirrored the 1994 statutory change. (App. at 76a, 81a)

9. However, the Secretary then followed with an Appendix to the regulation. That Appendix purported to provide an example of how the statutory formula was to be applied. In the example set out in the Appendix, instead of disregarding "LEAs with per pupil expenditures or revenues above the 95th percent

> or below the 5th percentile . . ." as required by the statute, the Secretary eliminated the top 5% and bottom 5% of "pupils," repeating virtually verbatim the 1976 formula and defying Congress' clear change. (App. at 92a)

Impact Aid funding in New Mexico in 1999-2000 was approximately $62,671,000[3], went to 30 of 89 LEAs and was about 2.7% of New Mexico's total operational budget.[4] Impact Aid is provided to every State in the country which is impacted by a federal presence. However, only New Mexico, Kansas and Alaska currently attempt to take credit for the Impact Aid in distributing their other operational funds to LEAs.

An annual certification hearing before the United States Department of Education is conducted to determine whether a State's operational funding is equalized. This hearing was conducted for fiscal year 1999-2000 and objection was made to the Secretary's use of the formula in the Appendix as opposed to the statutory formula. (App. at 222a) The Secretary insisted on using the Appendix formula and New Mexico's funding was determined to be "equalized." (App. at 41a) Petitioners sought a hearing before a United States Department of Education administrative law judge pursuant to procedures set forth in 20 U.S.C. § 7711(a). Hearings were conducted before the administrative law judge who shared Petitioners' concern that the Appendix being followed by the Secretary could not be reconciled with the statutory formula. At the conclusion of the hearing, however, the administrative law judge questioned whether, as an employee of the United States Department of Education, he could invalidate the

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[3] App. at 226a, 234a

[4] App. at 234a-236a

Appendix created by the Secretary, citing certain judicial precedent. Ultimately, the administrative law judge ruled that he did not have that power and could not rule on the validity of the formula in the Secretary's Appendix. (App. at 43a) That decision was appealed to the Secretary seeking to prohibit use of his Appendix. The appeal was denied. (App. at 34a)

Petitioners appealed to the Tenth Circuit Court of Appeals pursuant to 20 U.S.C. § 7711(b)(1). A three judge panel of the Tenth Circuit Court of Appeals issued its opinion on December 30, 2004. Two of the judges affirmed the decision of the Secretary and one judge dissented. (App. at 3a) Petitioners successfully petitioned for rehearing en banc. The decision of the three judge panel was withdrawn. Months after a second oral argument, the Tenth Circuit announced that the 12 members of the *en banc* panel were evenly divided and no decision would be issued. (App. at 2a) The decision of the Secretary stood by default. Accordingly, the only articulated review on the merits the Petitioners have received is from the Secretary of the Department of Education sitting in a quasi-judicial capacity judging a challenge to his own actions.

## REASONS FOR GRANTING CERTIORARI

### I. THE STATUTES AND REGULATIONS

The pertinent parts of the relevant statutes and regulations are reproduced in the Appendix and display a statute and a regulatory appendix which are irreconcilable.

Petitioners understand that a detailed analysis of the merits of a case is not always the appropriate vehicle for convincing this Court to accept a Petition for Writ of Certiorari.

However, in this instance, an analysis of the merits establishes the clear wrong being committed by the Secretary, invokes the strong public policy against an administrative agency defying an act of Congress and doing as it pleases and reveals the resulting substantial economic loss of federally impacted districts for whom the Impact Aid Act was created.

## II. THE IMPACT AID FORMULA AND *CHEVRON* ANALYSIS

The Impact Aid Program, 20 U.S.C. § 7709, prevents the State from taking credit for Impact Aid payments in determining the amount of operational funding to be allocated to a federally impacted LEA.[5] An exception exists for a State with "a program . . . that equalizes expenditures for free public education among local educational agencies in the State." 20 U.S.C. § 7709(b)(1). A State's educational spending is equalized "if . . . the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25%." 20 U.S.C.

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[5] 20 U.S.C. § 7709(a) General Prohibition

Except as provided in subsection (b) of this section, a State may not –

(1) consider payments under this subchapter in determining for any fiscal year –

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount such State aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would received if such agency were not so eligible.

§ 7709(b)(2)(A). In developing the field of LEAs against which this percentile differential is developed, the Secretary is required to "disregard local educational agencies [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(I). As the dissent in the withdrawn Tenth Circuit Court of Appeals Opinion (App. at 24a-29a) put so succinctly:

> These requirements are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretation; it is a simple, straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. (App. at 30a) It lists all of the 89 New Mexico LEAs along with the per-pupil revenues for each. Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829). When those revenues are multiplied by 125%, the result is $3,536, an amount less than the highest non-excluded district, Maxwell – with per-pupil revenues of $3,591. The 25% test is not met. New Mexico has not equalized school funding as statutorily required. Therefore, federal Impact Aid cannot be counted as part of the LEAs resource.

Contrasted against Congress' formula is the Secretary's formula described by the dissent as "complex and mystifying." (App. at 25a) Here, the Secretary does not eliminate percentiles of LEAs. Instead, the Secretary replaces Congress' percentiles of LEAs with percentiles of pupils. The

LEAs are ranked in accordance with wealth. Then the Secretary eliminates the top 5% of the pupils of those ranked LEAs. As the pupils are eliminated, so are the LEAs with which they are associated. The same process is applied to pupils at the bottom of the ranking. This clearly conflicts with the Congressional mandate. Initially, it is bewildering why the Secretary would eliminate percentiles of pupils (Why not eliminate percentiles of teachers or administrators or football fields?). However, the statutory and regulatory history is revealing. The Secretary apparently took umbrage at Congress removing his authority to establish the equalization formula and repealing the formula which the Secretary had previously developed through regulation. The Secretary repeated the 1994 statutory equalization formula in the body of his regulation, but then installed, almost verbatim, his pre-1994 formula in the example set forth in his Appendix, apparently believing that his defiance of Congress would go undetected. It almost did.

Whether the Secretary has exceeded his statutory authority in creating and following his Appendix equalization formula is determined under the two step test established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). That analysis distinguishes between the absence of authority to act and the arbitrary exercise of valid authority. Step one addresses the existence of agency authority. Step two, addressed only if the agency has authority, tests whether the exercise of such discretion is arbitrary and capricious.

The Secretary in these proceedings has glided over step one and argues that eliminating pupils instead of LEAs is a reasonable approach and deserving of deference. However, the Secretary does not identify the source of his authority to countermand a federal statute which removed his former

authority to create the equalization formula and by the same statutory action mandated that the equalization formula involve the elimination of LEAs and not pupils, a significant distinction and the subject of pre-regulation policy discussions in 1976. There is no such authority. It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (internal quotations omitted); *see also Louisiana Pub. Serv. Comm'n v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it").

*Chevron* is clear in its holding:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether an agency's answer is based on a permissible construction of the statute. *Id.* at 842-43

Even if one could read an ambiguity into Congress' formula, this is not a license for the Secretary to do as he pleases. A permissible construction is one consistent with the statute. *Manning v. U.S.*, 146 F.3d 808 (10th Cir. 1998). *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979). "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official. *Gonzales v. Oregon*, at ___ U.S. ___, 126 S. Ct. 904, 916 (2006); *United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). The 1994 legislation makes clear that the Secretary was divested of his authority to continue using the old equalization formula and diverting Impact Aid funds from impacted districts to the State. *See*, *Gonzales v. Oregon*, ___ U.S. at ___, 126 S.Ct. at 921.

The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.")

In the case at bar, Congress in 1994 rescinded the Secretary's authority to establish the equalization formula and mandated use of a different formula. The Secretary is required to use Congress' formula, not ignore it and then

reassert his statutorily repealed formula.[6] This action of the Secretary involves more than administrative overreaching. The Secretary cannot maintain with any candor that there is sufficient flexibility within Congress' legislation to allow the Secretary to create an equalization formula that eliminates percentiles of pupils and not LEAs. The difference between these approaches was a significant focus of discussion thirty years ago when the Secretary was developing his original regulations. It is absolutely clear in the historical context of the development of the equalization formula, eliminating percentiles of LEAs precludes elimination of percentiles of pupils. "Ambiguity is a creature not of definitional possibilities but of statutory context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, *Davis v.*

[6] It is noteworthy that while the Secretary requests and in fact needs unprecedented deference to support his position, the regulatory process he conducted in 1995 reveals the request to be disingenuous. In his own published regulations (App. at 163a-164a), the Secretary claimed that his new regulations had no significant economic impact and were essentially busy work of little consequence, qualifying the regulatory process for an exception under 5 U.S.C. §533(b)(B) from public notice and comment requirements when such process is "unnecessary" or "contrary to the public interest." The Secretary did not even contend that his regulations qualified for the public notice and comment exception under 5 U.S.C. §533(b)(A) when the proposed regulations are "interpretative." With the Secretary's 1995 regulations not even being "interpretative," no deference should be paid to these regulations as being useful in interpreting a federal statute. Even interpretative regulations are generally only given deference to the extent they interpret an agency's own regulations, not a federal statute. *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997); *Gonzales v. Oregon*, ___ U.S. at ___, 126 S.Ct. at 916. Also, "regulations . . . not promulgated as substantive rules . . ." do not have the "binding effect of law." *Chrysler Corp. v. Brown*, 441 U.S. at 315.

*Michigan Department of the Treasury*, 489 U.S. 803, 809 (1989).

The Secretary's formula finds no Congressional support and is of no force or effect. *Gonzales v. Oregon, supra* (regulation enacted by United States Attorney General attempting to regulate controlled substances was invalid due to lack of authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 126 ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" FDA regulations purporting to control the tobacco industry struck down.)

## III. CONFLICT WITHIN THE TENTH CIRCUIT COURT OF APPEALS AND FAILURE TO HAVE A SUBSTANTIVE AND DEFINITIVE REVIEW OF THE SECRETARY'S ACTION.

A three judge panel of the Tenth Circuit Court of Appeals initially issued a majority decision which confirmed the decision of the Secretary of the Department of Education. The dissenting judge issued a vigorous and pointed dissent. The Petitioners sought an *en banc* review. It was granted and the Tenth Circuit decision was withdrawn in its entirety. Twelve judges participated in the *en banc* review. The Court reported that the panel was evenly divided and could not issue a decision on the merits. The original Tenth Circuit decision was vacated and by default the Secretary's decision was affirmed. One consideration in determining whether a petition for certiorari should be accepted is a divided appellate court. *Oil Workers Union v. Mobile Oil Corp.*, 426 U.S. 407 (1976); *Communications Workers America, et al., v. Beck, et al.*, 487 U.S. 735 (1988); and *Rinaldi v. United States*, 434

U.S. 22 (1977). In *Ratchford, President, University of Missouri, et al., v. Gay Lib, et al.*, 434 U.S. 1080 (1978), Justices Rehnquist and Blackmun joined in a written dissent to a decision of the majority of the Supreme Court to deny certiorari.

> Courts by nature are passive institutions and may decide only those issues raised by litigants in lawsuits before them. The obverse side of that passivity is the requirement that they do dispose of those lawsuits that are before them and entitled to attention. The District Court and the Court of Appeals were doubtless as chary as we are of being thrust in the middle of this controversy but were nonetheless obligated to decide the case. Unlike the District Court and the Court of Appeals, Congress has accorded to us through the Judiciary Act of 1925, 28 U.S.C. §1254, the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases. *Id.* at 1081.

One possible interpretation of the action or lack thereof by the Tenth Circuit Court of Appeals is that six of the judges did not want to disturb the status quo but could not author a credible decision which supported the Secretary's actions. Petitioners believe that an issue of such magnitude and consequence should receive meaningful review. This need is not met by a quasi-judicial review by the Secretary of his own actions.

VI.

## VI. IMPORTANCE OF IMPACT AID TO RESERVATION DISTRICTS AND MILITARY DISTRICTS

The Impact Aid Program was created to "fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that *promotes control by local educational agencies with little or no Federal or State involvement.*" 20 U.S.C. § 7701 (emphasis added). The merits of this case are clear. Congress created one equalization formula and the Secretary insists on using another. Given the legislative and regulatory history and the obvious differences between the Secretary's and Congress' equalization formulas, the controversy within the Tenth Circuit must have centered around something other than the merits of the case. Perhaps it was thought to be more important for New Mexico to be able to rely upon Impact Aid to fund its general educational operations than for impacted LEAs to receive the Impact Aid. While Congress' wisdom should never be a judicial issue, apparently it has been in these proceedings.

New Mexico could adjust its operational funding system so that it is equalized. It has chosen not to do so. Including all 89 LEAs, a 244% disparity in per student funding exists between the top ranked LEA and the bottom ranked LEA. No policy reason for such a disparity has ever been articulated. Also, if the impacted districts receive their Impact Aid, Gallup-McKinley moves to about the middle of the rankings in expenditures per student, Zuni moves to fourth from the top and the district of Alamogordo, which contains a military base, moves up about four positions. (App. at 212a, 226a and 234a)

Most importantly, educating Native American children in rural, isolated environments involves special problems stemming from poverty, social conditions, language differences and cultural differences. A compromised or, in Zuni's case, a non-existent bonding and taxing capacity resulting from a federal presence has far reaching consequences. New Mexico's capital improvement funding system has been declared unconstitutional by a New Mexico District Court (App. at 227a) and the ongoing attempts by the Legislature to meet the District Court mandate continues to be monitored by the District Court. Property taxes, bonds and mill levies are major sources for districts with healthy bonding and taxing capacities to fund capital improvements. Those without such bonding capacities have limited options. Without quality facilities, including staff housing, isolated districts have difficulty attracting and retaining staff. Further, to attract staff, these districts must devote a greater percentage of their budget to salaries. Even with this, the turn over rate for staff remains high. Under New Mexico's operational funding system, additional payments are made to districts which employ experienced and advanced degreed teachers. This additional funding is substantial.[7] The result is that the "desirable" districts easily retain their teachers and receive additional funding to support their higher salaries, while the impacted district does not receive the additional funding but has to pay the higher salaries, thus diverting funds needed for other programs. While Impact Aid retained by New Mexico is only 2.7% of its operational budget, spreading an additional $50,000,000 around the thirty impacted districts would ease

[7] *See*, App. at 237a, NMSA 1978 §§22-8-4 and 22-8-25D.(4). The training and experience index which ranges between 1.000 and 1.316 is used to multiply units (essentially per student funding). For 10,000 units, Gallup's training and experience index would produce an extra $934,800, while a higher training and experience index of 1.271 would produce an extra $6,666,600.

some of the disability under which they operate and achieve the Congressional purpose underlying the Impact Aid program.

## V. THIS COURT'S SUPERINTENDING CONTROL

The administrative law judge and the Tenth Circuit Court of Appeals failed to substantively rule on the actions of the Secretary. It is assumed that the Secretary would in a quasi-judicial capacity defend his own administrative actions. However, one assumes that the judiciary would not be similarly predisposed and a fair judicial review of the Secretary's actions under the *Chevron* standard would occur. To date there has been no substantive review and explanation of the Secretary's actions.

Petitioners submit that this is a matter of compelling importance, as the decision of the Secretary to impose his unauthorized formula will undoubtedly be repeated every year during the federal certification process, and has been in the years following 2000. Allowing New Mexico and perhaps other jurisdictions to qualify for the exception under an unauthorized construction of the Impact Aid Program at the expense of Congress' intended beneficiaries should be compelling reason for this Court to exercise its supervisory power and decide this matter on certoriari. *See*, *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984), where Justice Stevens stated:

> As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation.

Petitioners' claim goes far beyond a request for pure error correction.

Further, this appeal to the Tenth Circuit related to a certification determination for the fiscal year 1999-2000. It is now 2006. For each of the approximately six years that have since passed, the Secretary has continued to impose the Appendix formula and determined that New Mexico is equalized. Administrative appeal proceedings, however, have been stayed pending the final outcome of this fiscal year 1999-2000 appeal and now this application for certiorari. If certiorari is not granted, then a hearing will be conducted before the administrative law judge for the fiscal year 2000-2001 and, assuming the same result, another appeal will be brought before the Tenth Circuit. Until there is a change in the collective mind or the composition of the Tenth Circuit, there will continue to be repeats of this futile ritual. Until a dispositive judicial review of the Secretary's actions occurs, a clear impropriety will persist.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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