**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW MEXICO**

SHIPROCK ASSOCIATED SCHOOLS, INC.

Plaintiff.

v. Civil No. 1:11-cv-00983 MV-WDS

UNITED STATES OF AMERICA; KENNETH SALAZAR, SECRETARY OF THE INTERIOR; DEL LAVERDURE, ACTING ASSISTANT SECRETARY-INDIAN AFFAIRS; BRIAN DRAPEAUX, ACTING DIRECTOR, BUREAU OF INDIAN EDUCATION; CHARLOTTE GARCIA, EDUCATION LINE OFFICER, BUREAU OF INDIAN EDUCATION; JOSEPH WARD, DIRECTOR, NATIONAL BUSINESS CENTER, U.S. DEPARTMENT OF INTERIOR, ALL SUED IN THEIR OFFICIAL CAPACITIES,

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

## STATUTES AND REGULATIONS

**LEGISLATIVE MATERIALS**

## INTRODUCTION

The Tribally Controlled Schools Act ("TCSA"), 25 U.S.C. § 2501 *et seq*., authorizes grants composed of funds allocated under 25 U.S.C. § 2007 and 25 U.S.C. § 2008 for Indian tribes and tribal organizations to operate schools in their reservations. The funds allocated under § 2007, known as Indian School Equalization Program ("ISEP") funds, are intended to cover educational programs, while the funds allocated under § 2008 are intended to cover administrative cost ("AC") expenditures. The TCSA explicitly limits the use of grant funds to pay for AC expenditures to "the amount generated for such costs under section 2008[.]" 25 U.S.C. § 2502(b)(3).

In this case, Plaintiff Shiprock Associated Schools, Inc. ("SASI"), a tribal organization that received a TCSA grant, did exactly what § 2502(b)(3) prohibits: it incurred AC expenditures in excess of the amount generated under § 2008 and used § 2007 ISEP funds– i.e., program funds – to cover its excess AC expenditures. As required by § 2502(b)(3), the Department of the Interior's ("DOI") Bureau of Indian Education ("BIE") disallowed SASI's excess AC expenditures and attempted to recover these unauthorized expenditures of federal funds. SASI, however, filed the instant Complaint arguing that "the amount generated" for AC is not the amount generated "under section 2008," as the TCSA explicitly states, but is only the amount calculated under one part of that section – § 2008(d). Because its AC expenditures did not exceed the amount calculated under § 2008(d), SASI argues, the disallowance was improper.

The plain language of § 2502(b)(3) completely refutes SASI's argument. The statute limits AC expenditures to the amount generated under § 2008 as a whole, not to the amount calculated under any one subsection of § 2008. Furthermore, allowing a tribal organization to

use § 2007 ISEP funds for AC – as SASI did here – would violate Congress's instruction that AC funds are to enable tribes and tribal organizations to provide related administrative overhead services "without reducing direct program services to the beneficiaries of the program." 25 U.S.C. § 2008(b)(1)(A). *See also* 25 U.S.C. § 2008(b)(1)(B) (explaining that the AC funds are provided so that tribes may carry out "necessary support functions" using "resources other than direct program funds"). Congress anticipated that in some years there would not be sufficient appropriations to provide all tribes the AC amount calculated under the formulas in §§ 2008(c) and (d), and it provided instructions on how the Secretary should reduce and allocate AC funds in those circumstances. *See* 25 U.S.C. § 2008(j)(2). As BIE correctly determined, Plaintiff cannot disregard those statutory limitations, incur AC expenditures in excess of the amount generated under § 2008, and then use § 2007 ISEP funds to make up the difference. Because SASI's challenge to BIE's determination fails as a matter of law, its Complaint should be dismissed.

## BACKGROUND

### I. STATUTORY BACKGROUND

The TCSA was enacted in 1988 to establish a grant process that Indian tribes and tribal organizations could elect in lieu of the contract process under the Indian Self-Determination and Education Act ("ISDEAA"), 25 U.S.C. § 450 *et seq.*, to meet the educational needs of Indian people. *See* 25 U.S.C. §§ 2501(d)(3), 2507(b)(1). The TCSA provides for a grant composed of funds allocated "under sections 2007 and 2008 of … title [25]…." 25 U.S.C. § 2503 (a)(1).[1]

[1] The TCSA grant includes other funds, but none of these other funds are in dispute in this litigation. *See* 25 U.S.C. §§ 2503(a)(2), (a)(3).

The TCSA funds allocated under § 2007 are known as the ISEP funds. Compl. ¶ 13.[2] ISEP is a program of BIE that provides funding for Indian tribes and tribal organizations to operate schools in Indian reservations. 25 C.F.R. § 39.1; Compl. ¶ 13. ISEP funds are determined by a formula established by regulation, known as the Indian School Equalization Formula ("ISEF"), which takes into account multiple factors, including the number of eligible Indian students, the need for special educational programs, special costs for gifted and talented students, and the costs of providing academic services equivalent to those provided by public schools in the State where the school is located. 25 U.S.C. § 2007(a)(1). *See* 25 C.F.R. § 39.103-110.

The TCSA funds allocated under § 2008 are known as the AC funds. Compl. ¶ 14; 25 U.S.C. § 2008. The purpose of these funds is to "enable tribes and tribal organizations operating such schools, *without reducing direct program services to the beneficiaries of the program*, to provide all related administrative overhead services …." 25 U.S.C. § 2008(b)(1)(A) (emphasis added). In addition, the AC funds are provided to "carry out other necessary support functions which would otherwise be provided by the Secretary or other Federal officers or employees, *from resources other than direct program funds* …." 25 U.S.C. § 2008(b)(1)(B) (emphasis added). The "direct program funds" mentioned in this provision are the § 2007 ISEP funds. *See* 25 U.S.C. § 2007(a)(1)(B). The AC grant is "[s]ubject to the availability of funds." 25 U.S.C. § 2008(b)(1).

Section 2008(c) establishes that the AC grant amount is "determined by applying the administrative cost percentage rate of the tribe or tribal organization to the aggregate of the Bureau … functions operated by the tribe or tribal organization for which funds are received

[2] The Complaint refers to these funds as ISEF funds, rather than ISEP funds. ISEF, which stands for Indian School Equalization Formula, "was established to allocate … (ISEP) funds." 25 C.F.R. § 39.100. Congress required the Secretary of DOI to establish this formula by regulation. 25 U.S.C § 2007(a)(1).

from or through the Bureau." 25 U.S.C. § 2008(c)(1). The "administrative cost percentage rate" is calculated by a formula described in § 2008(d). 25 U.S.C. § 2008(d). The amount calculated under these sections using the formula is known as the "calculated need" of a school. *See* Compl. ¶ 26, Ex. 1.

Usually, however, Congress does not appropriate sufficient funds to fully meet the "calculated need" of all tribal organizations receiving AC grants. Congress foresaw this situation and explicitly required the Secretary of DOI ("Secretary") to reduce the AC grant on a pro-rata basis in the event of insufficient appropriations:

> If the total amount of funds necessary to provide grants to tribes and tribal organizations in the amounts determined under subsection (c) of this section for a fiscal year exceeds the amount of funds appropriated to carry out this section for such fiscal year, the Secretary shall reduce the amount of each grant determined under subsection (c) of this section for such fiscal year by an amount that bears the same relationship to such excess as the amount of such grants determined under subsection (c) of this section bears to the total of all grants determined under subsection (c) section[3] for all tribes and tribal organizations for such fiscal year.

25 U.S.C. § 2008(j)(2). *See* Compl. ¶ 15. The amount provided to schools after making the reductions required under § 2008(j)(2) is known as the "prorated need" of a school. *See* Compl. ¶ 26, Ex. 1.

Section 2502(a)(3) authorizes schools to use TCSA funds to defray, at their discretion, a number of expenditures "for which any funds that compose the grant may be used," including expenditures for "school operations, academic, educational … and administrative purposes …" "[e]xcept as otherwise provided in this paragraph …." *See* 25 U.S.C. § 2502(a)(3)(A). One of the limitations described in the paragraph relates to the amount that tribal organizations can spend on AC:

[3] So in original, probably should be "of this section."

> Funds provided under any grant under this chapter may not be expended for administrative costs (as defined in section 2008(h)(1))[4] in excess of the amount generated for such costs under section 2008 of this title.

25 U.S.C. § 2502(b)(3). Schools receiving TCSA grants must "complete an annual report" containing "an annual financial audit conducted pursuant to the standards of the Single Audit Act of 1984." 25 U.S.C. §§ 2505(b)(1)(B), 2507(a)(1).

## II. FACTUAL BACKGROUND

SASI is a tribal organization of the Navajo Nation that received a TCSA grant (# GTN32X01 1519) to operate a pre-kindergarten through 12th grade school program on the Navajo Indian Reservation. Compl. ¶¶ 3, 4, 11. For the period ending June 30, 2009, SASI's AC "calculated need" amount was $1,113,800, while the "prorated need" amount actually received by the school was $694,700. Comp. ¶ 26, Ex. 1.

In compliance with the Single Audit Act, SASI retained Keystone Accounting, an independent certified public accounting firm, to perform an annual audit of its TCSA funds for the period ending June 30, 2009. Compl. ¶ 30. This audit found that SASI's total AC expenditures for that period were $766,990. *See* 2009 Audit Report (attached as Defs. Ex. 1).[5] However, pursuant to § 2008(j)(2), SASI only received its "prorated need" amount for AC: $694,700. Compl. ¶ 27, Ex. 1. Thus, SASI's AC expenditures exceeded the AC grant by approximately $72,290. Compl. ¶ 27.[6] Accordingly, the auditor issued a finding (2009-2)

[4] AC are defined in subsection (a)(1)(B), not (h)(1). This appears to be a simple drafting error.
[5] The Complaint incorrectly states that the total AC expenditures of SASI for 2009 were $713,104. Compl. ¶ 27 (citing Ex. 2). This is a mistake because Ex. 2 of the Complaint does not detail AC expenditures for 2009, but rather for 2008. *See* Compl. Ex. 2. Attached to this Motion as Def.'s Ex. 1 is the correct page from the 2009Audit Report. For purposes of this Motion, however, the correct amount of AC expenditures is not material to the dispositive legal issue.
[6] The Complaint and the Audit Report both state that the excess AC expenditures were $72,790. Compl. ¶ 27, Ex. 2. However, the correct amount appears to be $72,290 ($766,990 - $694,700). The exact amount of excess AC expenditures is immaterial for purposes of this Motion.

questioning these excess AC expenditures because they "exceeded grant revenues and carryover amounts received for the fiscal year." Compl. Ex. 2.[7]

BIE's New Mexico Navajo North Education Line Office ("ELO") received this audit report and requested SASI to submit additional documentation supporting the AC questioned in the audit. Compl. Ex. 3. On October 5, 2010, based on the audit report and the additional information that SASI submitted, the ELO issued his Findings and Determinations ("F&D") disallowing the $72,290 excess AC expenditures that were questioned in the audit report. Compl. Ex. 3. The F&D was sent to SASI on or about November 5, 2010. Compl. ¶ 34, Ex. 3. The F&D notified SASI that it could appeal the disallowance within 90 days to the Interior Board of Contract Appeals ("IBCA"),[8] or alternatively, it could file an action in federal court within 12 months of receiving the disallowance. Compl. Ex. 3. SASI did not appeal the disallowance within 90 days to the IBCA.

On May 23, 2011, SASI requested the ELO to revise the disallowed cost determination and to "allow SASI to use ISEF funds to pay for the School's over expenditure of its Administrative Cost grant." Compl. Ex. 5. On October 27, 2011, the ELO rejected this request because "[p]ursuant to the administrative cost limitation in the [TCSA] (25 U.S.C. 2502(b)(3), grant funds 'may not be expended for administrative costs in excess of the amount generated for such costs under' the administrative cost grant …." Compl. Ex. 5.

**LEGAL STANDARD**

"Under Rule 12(b)(6), a Court may dismiss a complaint for 'failure to state a claim upon which relief can be granted.' " *Rehoboth McKinley Healthcare Servs., Inc. v. U.S. Dep't of Health and Human Servs.*, 2012 WL 1155847, at *3 (D.N.M. March 28, 2012) (citing Fed. R.

[7] The auditor questioned other costs, none of which are at issue in this litigation. Compl. ¶¶ 32, 33.
[8] The correct name of this entity is the Civilian Board of Contract Appeals.

Civ. P. 12(b)(6)). A complaint can fail to state a claim upon which relief can be granted "either because it asserts a legal theory not cognizable as a matter of law, or because the claim fails to allege sufficient facts to support a cognizable legal claim." *DerKevorkian v. Lionbridge Technologies, Inc.*, 2006 WL 197320, at *2 (D. Col. Jan. 26, 2006) (citing Fed. R. Civ. P. 12(b)(6); *Morey v. Miano*, 141 F. Supp. 2d 1061, 1062 (D.N.M. 2001); *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581, 585 (Colo. App. 1976)). Dismissing a complaint under Rule 12(b)(6) is appropriate if plaintiff's factual allegations are insufficient to "raise a right of relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Twombly*, 550 U.S. at 556).

"When considering a 12(b)(6) motion, the Court must accept as true all well-pled factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor." *Rehoboth*, 2012 WL 1155847, at *3 (citing *Smith v. United States*, 561 F.3d 1090, 1097 (10th Cir. 2009), *cert. denied*, --- U.S. ---, 130 S.Ct. 1142 (2010)). The Court, however, need not accept legal conclusions couched in the form of factual allegations. *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). The Court may consider materials attached to the motion "referred to by the plaintiff and central to his claim" without converting the 12(b)(6) motion into one for summary judgment. *Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir. 1999).

## ARGUMENT

### I. AC EXPENDITURES ARE LIMITED TO THE AMOUNT GENERATED UNDER § 2008.

Section 2502(b)(3) establishes a limit for AC expenditures of tribal organizations. It provides:

> Funds provided under any grant under this chapter may not be expended for administrative costs (as defined in section 2008(h)(1) of this title) in excess of the amount generated for such costs *under section 2008* of this title.

25 U.S.C. § 2502(b)(3) (emphasis added). Accordingly, the AC expenditures of tribal organizations are limited to "the amount generated for such costs under section 2008."

There are three provisions in § 2008 that together determine the amount generated for AC: § 2008(c), § 2008(d) and § 2008(j)(2). First, § 2008(c) establishes that the AC grant amount is "determined by applying the administrative cost percentage rate of the tribe or tribal organization to the aggregate of the Bureau elementary and secondary functions operated by the tribe or tribal organization for which funds are received from or through the Bureau." 25 U.S.C. § 2008(c). Second, the AC "percentage rate" mentioned in § 2008(c) is calculated by the formula in § 2008(d). *See* 25 U.S.C. § 2008(d). And third, § 2008(j)(2) establishes that if, in any given fiscal year, "the total amount of funds necessary to provide grants to tribes and tribal organizations in the amounts determined under subsection (c) … exceeds the amount of funds appropriated to carry out this section …, the Secretary *shall reduce the amount of each grant determined under subsection (c)*" on a pro-rata basis. 25 U.S.C. § 2008(j)(2) (emphasis added). *See* Compl. ¶ 15 (acknowledging that § 2008(j)(2) affects the AC grant amount).

SASI alleges that the "amount generated" for AC is not the amount generated under section 2008, but rather only "the 'amount generated' by the statutory AC grant formula at 25 U.S.C. § 2008(d)." Compl. ¶ 22. But this is not what § 2502(b)(3) provides. Section 2502(b)(3) explicitly says that AC expenditures are limited to "the amount generated for [AC] under section 2008;" it does not say the amount generated for AC under § 2008(d).[9] And it is clear from

[9] In any event, the amount calculated under § 2008(d) – the AC percentage rate – cannot be the AC expenditure limitation because this percentage rate must be applied to an aggregate amount to determine the "calculated need" of a school. *See* 25 U.S.C. § 2008(c); Compl. Ex. 1.

§ 2008 that subsection (d) is just one of the three subsections that together determine the amount generated for AC.

It is an elementary rule of statutory construction that courts "seek the meaning of the statute from its very language, and if it is straightforward, [they] simply enforce it according to its terms." *Gardner v. Chrysler Corp.*, 89 F.3d 729, 736 (10th Cir. 1996). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there … When the words of a statute are unambiguous, then … judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Courts do not "add to or alter the words employed [in a statute] to effect a purpose which does not appear on the face of that statute." *Hanover Bank v. Comm'r of Internal Revenue*, 369 U.S. 672, 687 (1962). *See Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (refusing an Indian party's interpretation of a statute that would essentially require the Court to rewrite the statute). A "statute is not to be read so as to add or subtract from [that] which is stated ...." *Gardner*, 89 F.3d at 736 (citations omitted). *See Bell v. Bd. of Education*, 2008 WL 4104070, at *17 (D.N.M. March 26, 2008) (rejecting plaintiff's construction of the statute because it "would require the Court to add words to the statute that Congress did not write into its legislation.").

Here, the plain language of § 2502(b)(3) explicitly says that AC expenditures cannot exceed "the amount generated for such costs under section 2008 of this title." Had Congress intended the amount generated to be only the amount calculated under §2008(d), instead of the amount generated under § 2008 as a whole, it would have explicitly said so. But Congress did not refer to any specific subsection of § 2008 in establishing the AC limitation; it referred to § 2008 as a whole. Accordingly, the AC limitation in § 2502(b)(3) is not solely the amount calculated under § 2008(d).

Finding that the AC limitation is the amount calculated under § 2008(d), as SASI argues, would alter the plain language of § 2502(b)(3). Moreover, such an interpretation would disregard the fact that § 2008(d) is not the only provision in § 2008 that determines the amount generated for AC. Section 2008 (j)(2) must be taken into account in reading the AC limitation in § 2502(b)(3) because it affects the amount generated for AC. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (noting that a "statute should be interpreted so as not to render one part inoperative[.]"); *Stickley v. State Farm Mutual Auto. Ins. Co.*, 505 F.3d 1070, 1077 (10th Cir. 2007) ("A statute should, where possible, be construed according to its plain meaning and, as a whole, giving meaning to all its parts.") (citations omitted). Indeed, the Supreme Court has indicated that § 2008(j)(2) "clearly and directly … limit[s] the Government's total contractual liability …." *Salazar v. Ramah Navajo Chapter*, 132 St. Ct. 2181, 2193 n. 6 (2012). Because the AC grant is made "[s]ubject to the availability of funds," 25 U.S.C. § 2008(b)(1), the provision that governs when sufficient funds are not available—§ 2008(j)(2)—cannot be ignored. SASI cannot "subtract from" what § 2502(b)(3) explicitly says. *Gardner*, 89 F.3d at 736. Therefore, the AC limitation in § 2502(b)(3) is the amount generated under § 2008 as a whole, not solely the amount calculated by the formula in §2008(d).

Tribal organizations appear to have understood this in the past, as their requests for Congress to change the statute indicate. When the TCSA was amended by the Native American Education Improvement Act of 2001, several tribal organizations asked Congress to change the language in § 2502(b)(3) and set the AC limitation at the amount calculated under the formulas in §§ 2008(c) and (d):

> MBCI supports the request of other tribal school representative for a technical clarification to Sec. 5204(b)(3) of the Tribally Controlled Schools Act regarding the

amount of Grant funds that may be expended for administrative costs. Suggested language follows:

> "Funds made available through any grant provided under this part may not be expended for administrative costs (as defined in section 1127(a) of the Education Amendments of 1978) in excess of the amount generated for such costs under the formula established in section 1127 of such Act."[10]

*To Amend the Education Amendments of 1978 and the Tribally Controlled Schools Act of 1988 to Improve Education for Indians, Native Hawaiians, and Alaskan Natives: Hearing on S. 211 Before the S. Comm. on Indian Affairs*, 107th Cong. 231 (2001) (testimony of the Mississippi Band of Choctaw Indians) (emphasis in original).[11] Similarly, another tribal organization requested:

> We ask you to make a technical correction in the TCSA portion of the bill regarding the amount which a Grant school may spend for administrative costs. Our requested clarification is intended to specify that the amount produced by the formula in Sec. 1127 is the amount a Grant school may spend for its administrative costs. Suggested language follows:
>
> > "Funds made available through any grant provided under this part may not be expended for administrative costs (as defined in section 1127(a) of the Education Amendments of 1978) in excess of the amount generated for such costs under the formula established in section 1127 of such Act."

*Id.* at 238-39 (testimony of Lorena Zah Bahe, Executive Director, Association of Navajo Community Controlled School Boards) (emphasis in original).

These tribal organizations asked Congress to do the same thing that SASI is asking this Court to do: change the language of the statute. While Congress is the appropriate forum for such a request, this Court is not. This is especially the case here because Congress did not change the language of the statute despite specific requests from tribal organizations. It is not

[10] Section 1127 is a reference to 25 U.S.C. § 2008.
[11] Publication No.: S. Hrg. 107-32, available at http://www.gpo.gov/fdsys/pkg/CHRG-107shrg22888/pdf/CHRG-107shrg22888.pdf

within the province of this Court to do what Congress "failed to do or elected not to do." *See Hanover Bank*, 369 U.S. at 687 ("Simply stated, an informed Congress enacted Section 125 … but chose not to make any distinction between [special call provisions] and general redemption rights…the Government now urges this Court to do what the legislative branch … failed to do or elected not to do. This, of course, is not within our province.").[12]

## II. ISEP FUNDS ALLOCATED UNDER § 2007 CANNOT BE USED FOR AC EXPENDITURES.

Two statutory provisions clearly establish that ISEP funds allocated under § 2007 cannot be used for AC expenditures. First, as described above, § 2502(b)(3) explicitly limits AC expenditures to the amount generated for such costs under § 2008. Since ISEP funds are allocated under § 2007, they are not generated under § 2008 and cannot be used for AC expenditures.

Second, § 2008 (b)(1) establishes that the AC grant is awarded to (a) "enable tribes and tribal organizations operating such schools, *without reducing direct program services to the beneficiaries of the program*, to provide all related administrative overhead services ..." and (b) "carry out other necessary support functions which would otherwise be provided by the Secretary or other Federal officers or employees, *from resources other than direct program funds*, in support of comparable Bureau-operated programs." 25 U.S.C. § 2008(b)(1) (emphasis

[12] SASI suggests that the Indian Canon of Construction empowers this Court to adopt its interpretation of the statute. Compl. ¶ 45. This canon, however, does not apply in this case because there is no ambiguity in § 2502(b)(3); it explicitly provides that the AC expenditure limitation is the amount generated under § 2008. *See Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ( "[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims.") (citations omitted); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."); *United States v. Doe*, 572 F.3d 1162 (10th Cir. 2009) ("[T]his canon of construction only applies to ambiguous statutes…[W]e only consider the effect on Indian sovereignty if the statute remains ambiguous even after consulting the legislative history."). Even if this canon favors reading a statute liberally in favor of tribal organizations, it is not a license to add words to the statute. *See Garcia v. Arribas*, 363 F. Supp. 2d 1309, 1316 (D. Kansas 2005).

added). In other words, Congress provides an AC grant under § 2008 so that "direct program funds," which are § 2007 ISEP funds, are not reduced by using them for AC expenditures.

Although there is no need to consider legislative history because "legislative intent is clear from the text," *Jones v. United States*, 88 Fed. Cl. 789, 794 (Fed. Cir. 2009), legislative history confirms congressional intent to preclude the use of § 2007 ISEP funds for AC expenditures. Originally, schools received only one grant calculated under ISEF from which they paid for program services and AC. Education Amendments of 1978, Pub. L. No. 95-561, § 1128, 92 Stat. 2143, 2320-2321 (1978) (prior to 1988 amendments).[13] In 1988, Congress amended the law and established a separate AC grant. During the debate, a House bill proposed that the AC grant be paid out of "funds appropriated for payment of the formula under subsection (a)."[14] School Improvement Act of 1987, H.R. 5, 100th Cong. § 8107 (1987), 133 Cog. Rec. H3817 (May 21, 1987). The Senate, however, rejected this House bill and established a separate source of funding for AC, and a separate formula to calculate AC, in order not to reduce funds for direct program services. *See* S. REP. NO. 100-233, at 9 ("The formula…authorizes the Secretary to pay, subject to appropriations, administrative costs which enable tribes and tribal organizations that operate contract schools, to provide all related administrative overhead services and operations necessary to meet the requirements of law and prudent management practice *without reducing direct program services to the beneficiaries of the programs operated*.") (emphasis added). The House and Senate bills were sent to conference, where the House receded and gave way to the Senate version separating AC from ISEF to prevent decreases in direct program services. *See* H.R. REP. NO. 100-567, at 400 (Conf. Rep.) ("The House bill amends the Indian Student Equalization Formula to make the administrative cost

[13] The current language of this provision appears at 25 U.S.C. § 2007.
[14] Subsection (a) required the Secretary to establish a formula for calculating the funds to be provided to Indian tribes, which eventually became the ISEF. The current version of this provision appears at 25 U.S.C. § 2007.

factor a part of the formula. The Senate bill creates a new grant authority for administrative cost payments, which would be in lieu of any payments to which contractors might otherwise be entitled. The Senate also spells out specific uses and purposes for the money. The House recedes."). Therefore, the legislative history confirms that Congress did not intend § 2007 ISEP funds to be used to cover AC expenditures.

In this case, SASI argues that it can do exactly what § 2008(b)(1) prohibits. Although SASI only received $694,700 for AC under § 2008, it alleges that it "was legally authorized to spend up to $1,113,800[15] on [AC] for that audit period and could have used *up to $419,100 in ISEF and carry over funds* to cover that additional amount …." Compl. ¶ 46 (emphasis added). But diverting $419,100 of § 2007 ISEP funds to cover AC expenditures necessarily reduces the funds for direct program services, in clear violation of § 2008(b)(1).

SASI incorrectly argues that § 2502(a)(3)(A)(i) explicitly authorizes schools to use ISEP funds allocated under § 2007 for AC expenditures because it permits the use of TCSA funds for "administrative purposes." Compl. ¶¶ 18, 20. SASI attempts to support this flawed interpretation of § 2502(a)(3)(A)(i) with the baseless argument that the AC limitation in § 2502(b)(3) is the amount calculated under the formula in § 2008(d) and that § 2007 ISEP funds can be used for AC expenditures as long as this formula amount is not exceeded. Compl. ¶¶ 21, 22.

The plain language of the statutes refutes SASI's argument. Section 2502(a)(3)(A) provides:

> (3) Use of Funds
>
> (A) In general

[15] This is the "calculated need" determined by the formulas in §§ 2008(c) and (d). Compl. ¶ 26; Ex. 1.

> Except as otherwise provided in this paragraph, grants provided under this chapter shall be used to defray, at the discretion of the school board of the tribally controlled school with respect to which the grant is provided, any expenditures for education related activities for which any funds that compose the grant may be used under the laws described in section 2504(a) of this title, including expenditures for--
>
> > **(i)** school operations, academic, educational, residential, guidance and counseling, and administrative purposes; and
> >
> > **(ii)** support services for the school, including transportation.

25 U.S.C. § 2502(a)(3)(A). This provision describes the permissible uses of all funds provided under the TCSA ("grants provided under this chapter"), which comprise not only ISEP funds allocated under § 2007, but also AC funds allocated under § 2008. *See* 25 U.S.C. § 2503(a)(1) ("The grant provided under this chapter to an Indian tribe or tribal organization for any fiscal year … shall consist of … funds allocated for such fiscal year under sections 2007 *and 2008*.") (emphasis added). Section 2502(a)(3)(A)(i) thus authorizes the use of TCSA grants for "administrative purposes" because § 2008 funds, which are provided for AC expenditures, are part of the TCSA grant. But it simply does not follow, as SASI contends, that § 2502(a)(3)(A)(i) authorizes the use of § 2007 ISEP funds for administrative purposes. This contention assumes that § 2502(a)(3)(A)(i) authorizes the use of <u>either</u> § 2007 ISEP funds or § 2008 AC funds for all the purposes mentioned in that provision. But the clear language of § 2502(a)(3)(A)(i) refutes that assumption.

The first few words of § 2502(a)(3)(A)(i) are "[e]xcept as otherwise provided in this paragraph." The paragraph later limits AC expenditures to the amount generated for AC under § 2008. 25 U.S.C. § 2502(b)(3). Thus, ISEP funds generated under § 2007 clearly cannot be used for AC expenditures. In addition, § 2502(a)(3)(A) explicitly says that the "grants provided under this chapter shall be used to defray … any expenditures for education related activities for which any funds that compose the grant *may be used* …." 25 U.S.C. § 2502(a)(3)(A) (emphasis

added). Since § 2502(b)(3) and § 2008(b)(1) preclude the use of § 2007 ISEP funds for AC expenditures, § 2502(a)(3)(A)(i) cannot possibly authorize the use of § 2007 ISEP funds for AC expenditures. Furthermore, it certainly makes no sense to say that § 2502(a)(3)(A) authorizes the use of § 2008 AC funds for "academic, educational, residential … purposes …." (which would have to be the case under SASI's reading), because it is clear from the statutory framework that these funds are not provided for these purposes. Similarly, it makes no sense to say that § 2502(a)(3)(A) authorizes the use of § 2007 ISEP funds for "administrative purposes" because it is clear that from the statutory framework that these funds are not provided for such purposes.

Canons of statutory construction confirm that neither § 2502(a)(3)(A)(i) nor § 2502(b)(3) authorize the use of § 2007 ISEP funds for AC expenditures. Specific provisions in a statute control other provisions of more general application. *See Bloate v. United States*, 130 S.Ct. 1345, 1347 (2010) ("[A] specific provision … controls one[s] of more general application ….") (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991)); *Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."). Section 2502(a)(3)(A)(i) is a general provision describing how schools can use TCSA grants. Indeed, the provision explicitly says that the description of the use of funds is "In general." 25 U.S.C. § 2502(a)(3)(A). This general provision must be interpreted in light of specific limitations on the use of funds and the overall statutory framework. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental cannon of statutory construction that the words of a statute must be read in their context with a view to their place in the overall statutory scheme."). Both § 2503(b)(3) and § 2008(b)(1) are specific provisions limiting the use of funds. First, § 2503(b)(3) clearly provides that AC expenditures cannot exceed the amount generated under § 2008. Since § 2007 ISEP funds are not generated under

§ 2008, they cannot be used for AC expenditures. Second, § 2008(b)(1) precludes the use of § 2007 ISEP funds—funds for direct program services—for AC expenditures. Therefore, § 2502(a)(3)(A)(i), a general provision, cannot be construed in a way that conflicts with the specific, clear limitations in § 2502(b)(3) and § 2008(b)(1). And to the extent that § 2502(a)(3)(A)(i) is arguably ambiguous, it must be interpreted in accordance with the unambiguous language in § 2502(b)(3) and § 2008(b)(1). *See Chickasaw Nation*, 534 U.S. at 89 (interpreting arguably ambiguous provision in a statute in accordance with unambiguous language in the statute).

## III. THE DISALLOWANCE WAS BASED ON THE STATUTE, NOT ON AN AGENCY POLICY, AND THEREFORE DOI WAS NOT REQUIRED TO ENGAGE IN RULEMAKING OR TRIBAL CONSULTATION.

The disallowance of SASI's use of § 2007 ISEP funds to pay for AC expenditures in excess of the amount generated for AC under § 2008 was based on a straight application of the statute. *See* Compl. Ex. 5 ("Pursuant to the administrative cost limitation in the [TCSA] (25 U.S.C. 2502(b)(3), grant funds 'may not be expended for administrative costs in excess of the [sic] amount generated for such costs under' the administrative cost grant; therefore, I am not revising my decision …."). The ELO did not rely on any agency policy; he only relied on the plain text of § 2502(b)(3). Indeed, SASI acknowledges that there is no agency "rule, policy, guideline, or interpretation" of the relevant statutes. Compl. ¶ 55.

SASI contends, however, that the disallowance represents an unenforceable "new policy on this issue" because Defendants allegedly had not treated the practice of using § 2007 ISEP funds to pay for excess AC expenditures "as grounds for a disallowed cost determination prior to June 30, 2009." Compl. ¶¶ 23, 41. But whether AC expenditures have been disallowed before on this basis is not material to the dispositive legal issue in this case. Because § 2502(b)(3)

precludes SASI from using § 2007 ISEP funds to cover AC expenditures in excess of the amount generated for AC under § 2008, the disallowance is proper even assuming that BIE may not have always properly enforced § 2502(b)(3) in the past. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420-434 (1990) (agency is not estopped from enforcing a statute simply because an employee of the agency may have misinterpreted the statute and provided incorrect advice); *Kowalczyk v. Immigration and Naturalization Serv.*, 245 F.3d 1143, 1149-1150 (10th Cir. 2001) (malfunction of administrative process does not estop agency from enforcing the law); *Downtown Med. Ctr./Comprehensive Health Care Clinic v. Bowen*, 944 F.2d 756, (10th Cir. 1991) (an employee's mistake does not estop the government from enforcing the law based on its reasonable construction of statutory language) (citing *Richmond*, 496 U.S. at 433); *Cavanagh v. Humboldt County*, 1 Fed. Appx. 686, 688 (9th Cir. 2001) (absent affirmative misconduct "failure previously to enforce a law does not estop the government from subsequently enforcing a law ….") (citing *Mukherjee v. INS*, 793 F.2d 1006, 1008-09 (9th Cir. 1986)). *See also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("where … the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

SASI also incorrectly argues that the disallowance is improper because Defendants did not follow the Administrative Procedure Act's ("APA") notice-and-comment requirements, 5 U.S.C. § 553, referenced in the Statement of Policy of 36 Fed. Reg. 8336 (May 4, 1971). *See* Compl. ¶ 52 (citing 36 Fed. Reg. 8336 (May 4, 1971)). These requirements, however, are inapplicable to this case because Defendants have not engaged in any rulemaking. *Id.* (policy of DOI is "to give notice of proposed *rule making* and to invite the public to participate in *rule making* ….") (emphasis added). Rather, the disallowance was the product of an adjudicative

proceeding, to which APA notice-and-comment requirements do not apply. *See City of Arlington v. Fed. Communications Comm'n*, 668 F.3d 229, 240 (5th Cir. 2012) (agency did not need to comply with APA notice-and-comment requirements because its ruling "was the result of an adjudication and not a rulemaking.") (citing 5 U.S.C. § 554); *R/T 182, LLC v. F.A.A.*, 519 F.3d 307, 310 (6th Cir. 2008) (APA's notice-and-comment requirements did not apply because agency order was the product of an adjudicatory process); *Franks v. Salazar*, 816 F. Supp. 2d 49, 59 (D.D.C. 2011) (agency did not need to comply with APA's notice-and-comment procedures because its order applying regulatory standards was the product of an adjudication rather than rulemaking). In any event, because the disallowance simply involved the application of a statute, the notice-and-comment requirements do not apply. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99-100 (1995) (agency guideline was not subject to APA notice-and-comment requirements because it was "an application of [a] statutory ban" not the "adopt[ion of] a new position inconsistent with … existing regulations."); *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (agency not required to comply with APA notice-and-comment requirements because "[n]o law was created; the regulations simply explained something the statute already required."); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 559 (D.C. Cir. 1983) (notice-and-comment requirements were inapplicable because agency merely interpreted a statutory term). *Cf. Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1222-23 (10th Cir. 2009) (agency rulings not subject to notice-and-comment because they did not create any new duties, but simply interpreted existing regulations) (citing 5 U.S.C. § 553(b)(3)(A)).

SASI further argues that the disallowance violates 25 U.S.C. § 2011, and the "Obama Administration's consultation policies," because "Defendants have not engaged in any form of tribal consultation regarding this policy change …." *See* Compl. ¶ 59 (citing 25 U.S.C. § 2011;

74 Fed. Reg. 57881-57882 (Nov. 9, 2009)). But neither this statutory provision nor these consultation policies are applicable to this case. Section 2011 applies when the issues involve "agency discretion" or "policy action." *See Yankton Sioux Tribe v. Kempthrone*, 442 F. Supp. 2d 774, 783, 786, 788 (D.S.D. 2006). Likewise, the Obama Administration consultation policies apply when the agency is considering "*policy decisions* that have tribal implications …." *See* 74 Fed. Reg. 57881 (Nov. 9. 2009) (emphasis added). Here, however, the disallowance was not an exercise of agency discretion or a policy decision, but was rather required by the plain language of § 2502(b)(3). *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (unambiguous terms of a statute leave no room for agency discretion) (citing *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008) (citing *Brand X*, 545 U.S. at 967); *Defenders of Wildlife, Earth Island Institute v. Hogarth*, 330 F.3d 1358, 1376 (Fed. Cir. 2003) (Newman, J., concurring in part and dissenting in part) (matter was not left to agency discretion or interpretation because it was explicitly required by statute) (citing *Chevron*, 467 U.S. at 842); *Gressley v. Califano*, 609 F.2d 1265, 1268 (7th Cir. 1979) ("Congress leaves no discretion in the agencies and courts but to limit payment of benefits to those statutorily entitled to them."); *Yankton*, 442 F. Supp. 2d at 776 (a "specific statutory limitation" restricts agency discretion).[16]

For similar reasons, Defendants have not violated "the core holding of *Morton v. Ruiz*, 415 U.S. 199 (1974)." Compl. ¶ 55. In *Morton*, the Bureau of Indian Affairs ("BIA") relied on a rule in an internal manual to deny certain benefits to Indians living outside, but near, a

[16] In addition, the Obama Administration consultation policies do not "create any right or benefit … enforceable at law or in equity by any party against the United States …." 74 Fed. Reg. 57881. Therefore, even assuming that these policies apply, SASI is not entitled to relief. *See Yankton Sioux Tribe v. U.S. Dep't of Health and Human Servs.*, 553 F.3d 634, 643 (8th Cir. 2008); *Crow Creek Sioux Tribe v. Donovan*, 2010 WL 1005170, at *5 (D.S.D. 2010); *Caratini v. Salazar*, 2010 WL 4568876, at *7 (E.D. Okla. 2010).

reservation. 415 U.S. at 204-05. The relevant statutes, however, did not impose "any geographical limitation on the availability of general assistance benefits and d[id] not prescribe eligibility requirements or the details of any program." 415 U.S. at 207. Indeed, it was evident that "Congress did not itself intend to limit its authorization to only those Indians directly on, in contrast to those 'near,' the reservation …." *Id.* at 237. The Court found that BIA erred in not following the procedures of the APA, including publishing in the Federal Register, to adopt the rule in the manual. *Id.* at 231-236.

In stark contrast to *Morton*, the relevant statute here—§ 2502(b)(3)—clearly limits AC expenditures to the "amount generated for such costs under section 2008." 25 U.S.C. § 2502(b)(3). Moreover, § 2008(b)(1) confirms congressional intent to preclude the use of § 2007 ISEP funds for AC expenditures. 25 U.S.C. § 2008(b)(1). Accordingly, unlike in *Morton*, here Congress explicitly imposed the limitation. Therefore, *Morton* has no application to this case and Defendants were not required to follow APA procedures before disallowing SASI's excess AC expenditures.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request the Court to dismiss SASI's Complaint under Rule 12(b)(6) because it fails to state a claim upon which relief can be granted.

Respectfully submitted,

KENNETH J. GONZALES
United States Attorney

JAN ELIZABETH MITCHELL
Assistant U.S. Attorney
P. O. Box 607
Albuquerque, NM 87103
505.346.7274
Jan.mitchell@usdoj.gov

STUART F. DELERY
Assistant Attorney General

JOHN R. GRIFFITHS
Assistant Branch Director

*Filed electronically 7/27/12*
HECTOR G. BLADUELL
Trial Attorney
U.S. Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
Tel: (202) 514-4470
Fax: (202) 616-8470
hector.bladuell@usdoj.gov

*Counsel for Defendants*

I HEREBY CERTIFY that on July 27, 2012, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

C. Bryant Rogers, Esq.
CBRogers@NMLawGroup.com

*/s/ Héctor G. Bladuell*
Héctor G. Bladuell
Trial Attorney

# Defendants' Exhibit 1

# SHIPROCK ASSOCIATED SCHOOLS, INC.

## STATEMENT OF FUNCTIONAL EXPENSES

Year Ended June 30, 2009

| | BUREAU OF INDIAN AFFAIRS | | | | | |
|---|---|---|---|---|---|---|
| | INDIAN STUDENT EQUALIZATION PROGRAM | | | | | |
| | SASI Academic | Residential | Special Education | Student Transportation | Contract Support | Facilities, Operations, and Maintenance |
| Salaries and wages | $ 2,024,566 | $ 236,335 | $ 591,577 | $ 264,450 | $ 371,055 | $ 604,353 |
| Employee benefits | 709,090 | 124,037 | 229,498 | 107,575 | 129,939 | 229,283 |
| Travel and training | 36,174 | 4,003 | 18,762 | 1,682 | 38,264 | 17,134 |
| Supplies and materials | 235,157 | 17,661 | 41,144 | - | 19,327 | 664,950 |
| Contracted services | 167,805 | 19,727 | 402,273 | 10,376 | 144,308 | 204,400 |
| Parental involvement | - | 731 | - | - | - | - |
| Transportation | - | 25,834 | - | 176,167 | - | 11,583 |
| Student activities | 52,800 | 8,388 | 3,341 | - | - | - |
| Food services | 21,008 | - | 5,256 | - | - | - |
| Other | - | - | - | - | - | - |
| Equipment | 2,197 | 7,780 | 436 | - | - | 2,809 |
| Board stipends and travel | - | - | - | - | 56,401 | - |
| Utilities | - | - | - | - | - | - |
| Insurance | - | - | - | - | 7,693 | 85,000 |
| Depreciation | - | - | - | - | - | - |
| Total expenses | $ 3,248,797 | $ 444,496 | $ 1,292,287 | $ 560,250 | $ 766,990 | $ 1,852,512 |

| | TES IDEA-B Special Education | Title I | Residential Title I | SASI Title IV Drug-free | Indian Child and Family Education FACE | Total BIA |
|---|---|---|---|---|---|---|
| Salaries and wages | $ - | $ 242,098 | $ 388 | $ 17,698 | $ 220,967 | $ 4,573,487 |
| Employee benefits | 441 | 113,805 | 1,609 | 6,873 | 95,976 | 1,718,126 |
| Travel and training | - | 5,243 | 501 | 550 | 21,150 | 113,463 |
| Supplies and materials | 7,965 | 26,609 | - | 2,364 | 23,772 | 1,038,949 |
| Contracted services | - | 16,762 | 11,912 | 23 | 4,398 | 984,984 |
| Parental involvement | - | 26,026 | - | - | 18 | 26,775 |
| Transportation | - | - | - | - | - | 246,584 |
| Student activities | - | 13,744 | 1,385 | - | - | 79,658 |
| Food services | - | 644 | - | - | 410 | 27,318 |
| Other | - | - | - | - | - | - |
| Equipment | - | - | 23,760 | - | 2,433 | 39,415 |
| Board stipends and travel | - | - | - | - | - | 56,404 |
| Utilities | - | - | - | - | - | - |
| Insurance | - | - | - | - | - | 92,693 |
| Depreciation | - | - | - | - | - | - |
| Total expenses | $ 8,406 | $ 444,931 | $ 12,555 | $ 27,508 | $ 369,124 | $ 9,057,856 |

See accompanying notes.