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.

REPLY TO PLAINTIFF'S RESPONSE
IN OPPOSITIONTO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case requires the Court to interpret § 2502(b)(3) of the Tribally Controlled Schools Act ("TCSA"), 25 U.S.C. § 2501 *et seq*., which limits expenditures for administrative costs ("AC") to "the amount generated for such costs under section 2008 of this title." 25 U.S.C. § 2502(b)(3). There are three provisions in § 2008 that together determine the amount generated for AC: § 2008(c), § 2008(d) and § 2008(j)(2). But SASI would have this Court ignore § 2008(j)(2) and interpret the phrase "amount generated for such costs under section 2008" to mean only the amount generated for such costs under the formulas in §§ 2008(c) and (d).[1] Pl.'s Opp'n. at 5. SASI advances this flawed interpretation of § 2502(b)(3) in an attempt to use Indian School Equalization Program ("ISEP") funds, which are allocated under 25 U.S.C. § 2007, to cover AC expenditures it incurred during 2009 that exceeded the amount generated for AC under § 2008. SASI's attempt to rewrite § 2502(b)(3) to justify improper diversion of program funds should be rejected.

First, § 2502(b)(3) does not refer to any subsections of § 2008, let alone to any formula. It simply refers to "section 2008." This means that the AC limitation is the amount generated under § 2008 as a whole, including any reductions to the amount calculated by the formulas in §§ 2008(c) and (d) that are required by § 2008(j)(2). In addition, because § 2007 ISEP funds are not "generated … under section 2008," but are rather obviously generated under § 2007, § 2502(b)(3) prevents the use of these funds for AC expenditures.

Second, Congress provided for an AC grant under § 2008 so that tribes would not have to (and would not be allowed to) pay for AC by reducing "direct program services to the

[1] Plaintiff initially argued that the AC limitation was only the amount determined under § 2008(d). Compl. ¶ 22. In its Opposition, however, Plaintiff argues instead that it is the amount generated under §§ 2008(c) and (d). Pl.'s Opp'n at 5 n.3.

beneficiaries of the program." 25 U.S.C. § 2008(b)(1)(A). *See also* 25 U.S.C. § 2008(b)(1)(B) (explaining that § 2008 AC funds are provided so that tribes may carry out "necessary support functions" using "resources other than direct program funds."). Despite these clear limitations, SASI advances an interpretation of § 2502(b)(3) that would allow it to divert $419,000 of "direct program funds" (i.e., § 2007 ISEP funds) to cover excess AC expenditures. *See* Compl. ¶ 46; Defs.' Mem. at 14. The statutes do not allow this shifting of funds, which necessarily reduces direct program services to the beneficiaries of the program (students).

Third, despite the fact that tribal organizations have asked Congress to amend § 2502(b)(3) to be able to use § 2007 ISEP funds for AC expenditures, Congress has not amended the statute. While SASI posits several policy reasons for the Court to adopt its interpretation, these arguments, whatever their appeal, are properly directed at Congress, not to this Court. Thus, the Court should grant Defendants' Motion to Dismiss.

ARGUMENT

I. THE TCSA DOES NOT AUTHORIZE SCHOOLS TO USE § 2007 ISEP FUNDS TO PAY FOR AC.

The plain language of § 2502(b)(3) explicitly limits AC expenditures to "the amount generated for such costs under section 2008 of this title." 25 U.S.C. § 2502(b)(3). There are three provisions in § 2008 that together generate the amount for AC: § 2008(c), §2008(d), and § 2008(j)(2). *See* Defs.' Mem. at 8. Subsections (c) and (d) contain formulas that are used in determining a school's "calculated need." *See* Compl. § 26, Ex. 1. But these sections alone do not generate the AC amount. When Congress does not appropriate sufficient funds to provide schools an AC amount equal to the amount calculated under subsections (c) and (d), the AC amount is generated by making pro-rata reductions pursuant to subsection (j)(2). 25 U.S.C. § 2008(j)(2). Congress did not refer to any of these subsections of § 2008 in establishing the AC

expenditure limitation in § 2502(b)(3); it simply referred to § 2008. Accordingly, the AC expenditure limitation is the amount generated under § 2008 as a whole, including any reductions required under § 2008(j)(2). *See* Defs.' Mem. at 10. In addition, because § 2007 ISEP funds are obviously not generated under § 2008, § 2502(b)(3) prevents the use of these funds for AC expenditures. *See* Defs.' Mem. at 3, 12.

Despite the clear language of § 2502(b)(3), SASI argues that the AC expenditure limitation is the "amount … generated by the formula at 25 U.S.C. §§ 2008(c) and (d)." Pl.'s Opp'n at 5. The plain text of the statute, however, does not support this interpretation because it does not mention any "formula" or any specific subsections of § 2008. SASI suggests that the formula amount should be the AC expenditure limitation because this is what Congress determined the schools needed for administrative functions. Pl.'s Opp'n at 7. But § 2502(b)(3) does not set the AC expenditure limitation at the "amount needed," but rather at the "amount generated." Indeed, Congress explicitly provided that the AC amount is "subject to the availability of funds." 25 U.S.C. § 2008(b)(1). And the Supreme Court has stated that § 2008(j)(2), which governs when sufficient funds are not available, "clearly and directly … limit[s] the Government's total contractual liability …." *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193 n.6 (2012).

The only TCSA provision that SASI relies on for its interpretation of § 2502(b)(3) is § 2502(a)(3)(A)(i). *See* Pl.'s Opp'n at 10. SASI argues that this provision explicitly authorizes schools to use § 2007 ISEP funds for "administrative purposes." Pl.'s Opp'n at 13. This argument assumes that all of the funds that compose the TCSA grant (i.e., § 2007 ISEP funds, § 2008 AC funds, Title I Elementary and Secondary Education Act of 1965 funds, Individuals with Disabilities Education Act funds, and other funds provided under other federal education

laws)[2] can be used for all of the purposes described in that section. *See* 25 U.S.C. § 2503(a)(3). For example, under SASI's reading of § 2502(a)(3)(A), § 2008 AC funds could be used for "academic" and "guidance and counseling" purposes because § 2502(a)(3)(A) allows the use of the TCSA grant for these purposes. But SASI's reading of § 2302(a)(3)(A) is obviously incorrect.[3] Section 2502(a)(3)(A) specifies that, in order to use TCSA funds for a particular purpose, the laws under which those funds are allocated must authorize such use. *See* 25 U.S.C. § 2502(a)(3)(A) ("[G]rants 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* under the laws described in 2504(a)[4] …") (emphasis added). Accordingly, because § 2008 does not authorize the use of AC funds for "academic" and "guidance and counseling" purposes, § 2502(a)(3)(A) cannot allow the use of these funds for such purposes. *See* 25 U.S.C. § 2008(a)(1)(B) (defining AC).

Similarly, § 2502(a)(3)(A) cannot authorize the use of § 2007 ISEP funds for "administrative purposes" because it is clear from the statutes and the legislative history that these funds are not provided for such purposes. *See* Defs.' Mem. at 12-14. Congress provided for a separate AC grant so that § 2007 ISEP funds would not be diverted towards AC expenditures. Defs.' Mem. at 13 (citing S. Rep. No. 100-233, at 9). This is evident from § 2008 itself, which explicitly states that the AC grant is provided to "enable tribes and tribal organizations" to pay for "all related administrative overhead services" "without reducing direct program services to the beneficiaries of the program" and "from resources other than direct program funds." 25 U.S.C. §§ 2008(b)(1)(a) and (b). There is no dispute that the "direct

[2] As SASI acknowledges, the only TCSA funds in dispute here are the § 2007 ISEP funds and the § 2008 AC funds. *See* Pl.'s Opp'n at 3.
[3] Notably, in its Opposition, SASI makes no attempt to explain why the assumption implicit in its reading of § 2502(a)(3)(A) is correct.
[4] As SASI acknowledges, this is a reference to the laws described in § 2503(a). Pl.'s Opp'n at 3 n.2, 13.

program funds" referenced in §§ 2008(b)(1)(a) and (b) are the § 2007 ISEP funds. *See* Pl.'s Opp'n at 5 (citing 25 U.S.C. §§ 2008(b)(1)(a) and (b)). In addition, § 2007 does not mention "administrative purposes" as one of the factors that determines the amount of the ISEP grant. *See* 25 U.S.C. § 2007(a)(1). The factors listed are closely related to the costs of educational programs and are distinguishable from the description of AC. *Compare* 25 U.S.C. § 2007(a)(1), *with* 25 U.S.C. § 2008(a)(1)(B). Indeed, Plaintiff acknowledges that § 2007 ISEP funds are provided for "direct program services," while the § 2008 grant is for "administrative functions." *See* Pl.'s Opp'n at 5 (citing 25 U.S.C. §§ 2008(b)(1)(a) and (b)).

In any event, whatever § 2502(a)(3)(A) provides, it does not control in this case. While § 2502(a)(3)(A) is a general provision regarding the use of TCSA funds, both § 2503(b)(3) and § 2008(b)(1) are specific limitations on the use of these funds.[5] As such, § 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). *See* Defs.' Mem. at 16-17.[6] 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* Defs.' Mem. at 17.[7]

SASI attempts to limit the effect of § 2502(b)(3) on § 2502(a)(3)(A) by arguing that "[§] 2502(b)(3) is not part of the paragraph set out at § 2502(a)(3)(A)." Pl.'s Opp'n at 12. This

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[5] SASI characterizes § 2008(b)(1) as merely expressing a hope or an aspiration. Pl.'s Opp'n at 5, 5 n.3. The language Congress used in this provision, however, does not support that view. To make its intent even clearer, Congress expressly limited AC expenditures to the amount generated under § 2008. 25 U.S.C. § 2502(b)(3).

[6] For the same reason, the general policy statements in 25 U.S.C. §§ 2501(a) and (b) that SASI relies on, *see* Pl.'s Opp'n at 4, do not control.

[7] SASI asserts that the "various rules of statutory construction" that Defendants cite in pp. 9-10, 16-17 "support the School's interpretation." Pl.'s Opp'n at 13. But SASI provides no explanation for this bare assertion. Indeed, it is impossible for the rule of statutory construction that specific provisions control over general ones to support SASI's argument because SASI argues that a general provision, § 2502(a)(3)(A)(i), should control a specific one, § 2502(b)(3). *See* Pl.'s Opp'n at 10-13.

argument is pointless. Regardless of whether § 2502(b)(3) is part of the same paragraph of § 2502(a)(3)(A), it cannot be disputed that § 2503(b)(3) is a limitation applicable to § 2502(a)(3)(A). While § 2502(a)(3)(A) generally describes the permissible uses of TCSA funds, §§ 2502(b)(2) and (b)(3) are specific limitations on the use of these funds.

Recognizing that the plain language of the statutes does not support its position, SASI argues that the Court should adopt its interpretation of § 2502(b)(3) because, otherwise, it would not be able to pay for necessary administrative functions and to operate. Pl.'s Opp'n at 8-11. It is clear, however, that Congress required schools to limit their AC expenditures to the amount generated under § 2008, and thus they cannot use ISEP funds generated under § 2007 for such expenditures. Accordingly, SASI should make the adjustments necessary to operate within this limitation. In any event, SASI's bare assertions about the wisdom or the effects of § 2502(b)(3) do not control the interpretation of this statute. *TVA v. Hill*, 437 U.S. 153, 194 (1978) (court's appraisal of the wisdom or unwisdom of a statute is put aside in interpreting it); *Zuni Pub. School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Kennedy, J., concurring) (traditional tools of statutory construction, rather than policy concerns, shape judicial interpretation of statutes); *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (rejecting a particular reading of a statute that was appealing from a policy perspective because it was untenable as a matter of statutory construction). If SASI would like to spend more on AC than the amount generated under § 2008, it should try to convince Congress to change the language of the statute, as other tribal organizations have tried to do. *See* Defs.' Mem. at 10-12. *See also Hall v. United States*, 132 S. Ct. 1882, 1893 (2012) (Congress, not the Court, can rewrite a statute based on compelling policy reasons).

II. THE LEGISLATIVE HISTORY CONFIRMS THAT SCHOOLS CANNOT USE § 2007 ISEP FUNDS TO PAY FOR AC.

There is no need to consider legislative history in this case because "legislative intent is clear from the text." *Jones v. United States*, 88 Fed. Cl. 789, 794 (Fed. Cir. 2009). Courts do not "resort to legislative history to cloud a statutory text that is clear," even if some parts of the legislative history contradict a statute. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 483 (1997) (adopting an interpretation of a statute despite contrary indications in a Senate report); *Frederick v. Shinseki*, 684 F.3d 1263, 1275 (Fed. Cir. 2012) ("The legislative history, no matter how creatively spun, cannot trump the plain and unambiguous language of the statute.") (citations omitted). But to the extent it may be considered, the legislative history supports Defendants' interpretation of § 2502(b)(3).

SASI argues that the sentence "no more can be spent on administrative costs than was generated under the administrative formula provision" in a House Report dated May 15, 1987, shows that Congress intended the AC limitation to be the amount "determined under §§ 2008(c) and (d)." Pl.'s Opp'n at 14 (citing House Report 100-95, 100th Congress, First Session, May 15, 1987, at 85). But "[t]here is no basis either in law or in reality for th[e] naïve belief" that "what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole …." *Zedner v. United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in part and concurring in the judgment). Indeed, as SASI acknowledges, the "House later receded to most of the Senate version of this bill," Pl.'s Opp'n at 15, and the language in this report did not make it to § 2502(b)(3), which was enacted almost a year later in April 1988.

SASI notes that a subsequent Senate bill dated August 7, 1987, referred to "the amount generated for [AC] under section 1128(c)," which corresponds to § 2008(c). *See* Pl.'s Opp'n at 15 (citing § 204 of S. 1645), L.H. App., P. 000014-15. SASI fails to explain, however, that in

the final legislation this language was changed to "the amount generated for [AC] under *section 1128A* of such Act." *See* H.R. Rep. No. 100-567, at 270 (Conf. Rep.) (April 13, 1988) (emphasis added) (L.H. Appx. 024) [8]; Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 5204, 102 Stat. 130 (1988) (emphasis added) (L.H. Appx. 034-35). Section 1128A is a reference to § 2008 as a whole, including what is now § 2008(j)(2). *See* H.R. Rep. No. 100-567, at 252, 256 (Conf. Rep.) (L.H. Appx. 17, 21); Pub. L. No. 100-297, § 5108 (1988) (L.H. Appx. 29, 32). When the Senate bill (S.1645) that SASI relies on referred to section 1128(c) as setting the AC limitation, § 2008(j)(2) had not been added to the draft amendment of § 2008. *See* S. Rep. No. 100-233, at 41-47 (Nov. 30, 1987) (L.H. Appx. 005-011). When § 2008(j)(2) was added, the AC limitation was changed from 1128(c) to 1128A. *See* H.R. Rep. No. 100-567, at 252, 256, 270 (Conf. Rep.) (L.H. Appx. 17, 21, 24); Pub. L. No. 100-297, § 5108, (L.H. Appx. 29, 32, 34, 35). This change confirms that the AC limitation in § 2502(b)(3) is not the amount determined by the formulas in §§ 2008(c) and (d), but rather the amount generated under § 2008 as a whole, including § 2008(j)(2).

Congress has twice refused to do what SASI asks this Court to do: set the AC expenditure limitation at the amount calculated by the § 2008 formula. In 1988, when Congress enacted the TCSA, it could have left the AC expenditure limitation at the amount generated under § 1128(c) (§ 2008(c)), instead of changing it to § 1128A (§ 2008). In addition, in 2001, when tribal organizations specifically requested Congress to add the word "formula" to § 2502(b)(3), Congress could have done so. *See* Defs.' Mem. at 10-12. By this time, several tribal organizations had told Congress that the AC grant was insufficient to meet their full AC expenditures. *See* Pl.'s Opp'n at 16-17. Congress, however, did not change the language of the

[8] This is a reference to the Legislative History Appendix (L.H. Appx.) of this Reply, which includes all the legislative history that Defendants discuss in this Part.

statute. Courts should not do what Congress "failed to do or elected not to do." *See* Defs.' Mem. at 12 (quoting *Hanover Bank v. Comm'r of Internal Revenue*, 369 U.S. 672, 687 (1962)).[9]

III. THE INDIAN CANON OF CONSTRUCTION DOES NOT APPLY BECAUSE THE STATUTES ARE CLEAR AND SASI'S INTERPRETATION IS NOT REASONABLE.

It is well established that the Indian Canon of Construction does not apply when a statute is clear. *See* Defs.' Mem. at 12 n.12; Pl.'s Opp'n at 18 (canon only applies to ambiguous statutes). Indeed, the canon is applicable only when a statute "remains ambiguous even after consulting the legislative history." *United States v. Doe*, 572 F.3d 1162, 1183 (10th Cir. 2009) (Holmes, J., concurring in part and dissenting in part) (citing *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir. 1991)). In this case, the plain text of § 2502(b)(3) is not ambiguous. *See* Defs.' Mem. at 7-10. Assuming that there is some ambiguity in the text, as explained above, the overall statutory framework and the legislative history confirm Defendants' interpretation. Therefore, this canon does not apply.

SASI suggests that § 2502(b)(3) is ambiguous because the term "amount generated" is undefined. *See* Pl.'s Opp'n at 19. This is an attempt to inject confusion where there is none. As an initial matter, the term "generate" simply means "to bring into existence." *See* MERRIAM-WEBSTER DICTIONARY, at http://www.merriam-webster.com/dictionary/generate; DICTIONARY.COM, at http://dictionary.reference.com/browse/generate. In the context of this case, the only amount brought "into existence" is the amount actually provided to a school for

[9] SASI argues that Defendants cannot enforce the disallowance because testimony in congressional hearings put them on notice that tribes were using § 2007 ISEP funds to pay for administrative functions. Pl.'s Opp'n at 16. SASI, however, provides no support for the proposition that such testimony can estop the Government from enforcing the law. Indeed, the disallowance is proper even assuming that BIE has not always properly enforced § 2502(b)(3) in the past. *See* Defs.' Mem. at 18. SASI also erroneously contends that Larry Echohawk, who at the time was Assistant Secretary-Indian Affairs, suggested that tribes can lawfully use ISEP funds for AC expenditures. *See* Pl.'s Opp'n at 18. But the sentence that SASI references does not express any view regarding the legality of using § 2007 ISEP funds for AC expenditures. It rather simply states that the increase in the budget for AC would allow tribes to cover AC expenditures without decreasing ISEP funds, which is what the statutes require.

AC expenditures, which is determined after making any reductions required under § 2008(j)(2). Furthermore, the AC limitation is not merely the "amount generated," but rather the "amount generated … *under section 2008*." 25 U.S.C. § 2502(b)(3) (emphasis added). Because Congress did not refer to any specific subsection of § 2008, this is the amount generated under § 2008 as a whole, including § 2008(j)(2). In any event, it is beyond dispute that the § 2007 ISEP funds that SASI claims it can use for AC are not "generated under § 2008." Accordingly, the statute is not ambiguous.

SASI's interpretation of § 2502(b)(3) also should not be adopted under the canon because it is not reasonable. *See* Pl.'s Opp'n at 18-19 (acknowledging that the canon applies only where the Indian party's interpretation is reasonable). SASI asks the Court to read this provision as if it contains the word "formula" or a reference to subsections (c) and (d) of § 2008. *See* Pl.'s Opp'n at 5. But courts do not "add to or alter the words employed" in a statute. *See* Defs.' Mem. at 9 (citing *Hanover Bank v. Comm'r of Internal Revenue*, 369 U.S. 672, 687 (1962); *Gardner v. Chrysler Corp.*, 89 F.3d 729, 736 (10th Cir. 1996) (a "statute is not to be read so as to add or subtract from [that] which is stated ....") (citations omitted)). Instead, "courts 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). *See Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (refusing to apply the Indian Canon to adopt an Indian party's interpretation of a statute because it would require the Court to rewrite the statute); *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.").

IV. THE DISALLOWANCE IS LEGALLY ENFORCEABLE.

SASI suggests that the disallowance is improper under the Obama Administration's tribal consultation policies,[10] 25 U.S.C. § 2011, and the APA because Defendants did not provide SASI "any form of notice, rule or guidance announcing this position." Pl.'s Opp'n at 20. But Defendants were not required to provide SASI any anticipated notice of the disallowance, nor to engage in tribal consultation. The disallowance was required by the plain text of the statute and was not a policy decision[11] made within the context of agency discretion. *See* Defs.' Mem. at 20. *See also Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783, 786, 788 (D.S.D. 2006) (Section 2011(b) applies when the issues involve "agency discretion" or "policy action."); Pl.'s Opp'n at 22 (citing *Oglala Sioux of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (Section 2011(b) applies when "Bureau policy is made.")). Indeed, the ELO only relied on the plain text of § 2502(b)(3) in disallowing SASI's excess AC expenditures. *See* Defs.' Mem. at 17. Where, as here, "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

The APA notice-and-comment requirements are likewise inapplicable because Defendants have not engaged in any rulemaking. *See* Defs.' Mem. at 18. None of the cases that SASI references in its Opposition to argue that Defendants have violated the APA are relevant because all of those cases concern changes in agency rules, regulations, programs, or policies. *See* Pl.'s Opp'n at 22-24. In contrast, the APA's notice-and-comment requirements do not apply

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[10] SASI ignores that these policies do not create a right enforceable at law or equity. Defs.' Mem. at 20.

[11] SASI argues that the disallowance is a new policy based on its assumption that "Defendants have decided to read these statutes more restrictively than in the past …." Pl.'s Opp'n at 21. SASI provides no evidence that Defendants have in fact "read" § 2502(b)(3) differently in the past. Indeed, SASI acknowledged that there is no agency "rule, policy, guideline, *or interpretation*" of the relevant statutes. Compl. ¶ 55 (emphasis added). *See* Pl.'s Opp'n at 9. Whether AC expenditures have been disallowed before on the ground at issue here is not material to the question of whether SASI's actions are authorized by statute. *See* Defs.' Mem. at 17-18.

here because the disallowance was the result of the application of a clear statutory provision in an adjudicatory proceeding. *See* Defs.' Mem. at 18-19.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action under Rule 12(b)(6) because it fails to state a claim upon which relief can be granted.

Respectfully submitted,

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I HEREBY CERTIFY that on September 14, 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:

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