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

SHIPROCK ASSOCIATED SCHOOLS, INC.

Plaintiff,

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

UNITED STATES OF AMERICA; *et al.*,

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This matter comes before this Court per 25 U.S.C. § 450m-1 and 25 U.S.C. § 2507(e) by means of a challenge to a Bureau of Indian Education ("BIE") disallowed cost determination and the subsequent issuance of a bill of collection demanding that the Shiprock Associated Schools, Inc. (the "School") repay to the BIE $72,790.00 in "disallowed costs." (Compl., ¶s 32-41). The School is a tribal organization authorized by the Navajo Nation to operate certain elementary and secondary school programs on the Navajo Reservation per the Tribally Controlled Schools Act, 25 U.S.C. § 2501 et seq. ("TCSA") (Compl., ¶s 3, 4 and 11).

The "disallowed costs" were incurred by the School in FY 2009 to pay for certain administrative functions as defined at 25 U.S.C. § 2008(a)(1) (Compl., ¶s 19, 23, 26, 27, 41, 46). The School used a portion of its Indian School Equalization Program ("ISEP") funds (awarded per 25 U.S.C. § 2007 and 25 U.S.C. §§ 2502, 2503) to pay these costs, because the administrative cost grant funds awarded to the School were insufficient to cover all of the costs it incurred to pay for those necessary administrative functions in operating its school programs for that year. *Id.* Defendants have sought to force the School to repay these funds with interest on the

theory that ISEP funds cannot lawfully be spent to cover any portion of the School's administrative costs ("AC"). (Compl., ¶ 27, 34, 35, 37, 38; Def. Memo, *passim*).

The School timely filed this suit to seek a ruling by this Court that Defendants' view of the controlling law on this issue is wrong, that the School had (and still has) the legal right to pay for such AC using a portion of its ISEP funding, and that the School does not have any duty to repay these funds to the BIE.

THE APPLICABLE LEGAL STANDARD

The School adopts Defendants' articulation of the legal standard applicable to this Motion. (Def. Memo, pp. 6-7). However, this is not a case in which Defendants have attacked the factual allegations of the Complaint as being legally insufficient to trigger a right to relief under an otherwise cognizable legal theory. Instead, the sole basis for Defendants' motion is Defendants' contention that the School is relying on an erroneous interpretation of the controlling law; and, that if Defendants "correct" interpretation of the law is endorsed by this Court, that the School has no right to the relief sought; hence, will not have pled a claim which can survive Defendants' Rule 12(b)(6) Motion to Dismiss. (Def. Memo, p. 1).

Given this procedural posture, to prevail Defendants will have to convince this Court that the School has not put forward a plausible claim for relief based upon a reasonable interpretation of the statutes, whether based on their plain language or aided by the "Indian canon" of construction, and has not pled any valid procedural bar to enforcement of Defendants' new position.

Under the Indian canon, to the extent there is any ambiguity in these statutes, Defendants are required to interpret them in favor of the School because ambiguities in statutes enacted for the benefit of Indians must be construed in their favor; and, where the tribal party's interpretation

is reasonable, the statute must be read that way. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (statutes enacted for the benefit of Indians "are to be liberally construed, with ambiguous provisions interpreted to their benefit"); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (since Pub. L. 93-638 was enacted for the benefit of Indians and is ambiguous and could reasonably be construed as tribes read it, the Court must accept tribes' interpretation; the Indian canon trumps the *Chevron* rule in such circumstances).[1]

ARGUMENT

I. THE STATUTE EXPRESSLY AUTHORIZES TCSA SCHOOLS TO USE ISEP FUNDS TO PAY FOR ADMINISTRATIVE COSTS

The TCSA was originally enacted in 1988 as Pub. L. 100-297, Act of April 28, 1988, 102 Stat. 130. That law authorizes and requires the Secretary of the Interior to award grants to Indian tribes or tribal organizations to operate schools on their reservations if requested by a tribe. Per 25 U.S.C. § 2503(a),[2] those grants are composed of ISEP funds allocated under 25 U.S.C. § 2007 and AC funds allocated under 25 U.S.C. § 2008 (and certain other funds not here relevant). These grants are subject to the same contract, disallowed cost and audit resolution dispute

[1] Since Defendants have not published any rule or regulation announcing their new more restrictive interpretation of these statutes. Defendants' interpretation is not entitled to *Chevron* deference *Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1162-1163 (10th Cir. 2011); and, even if *Chevron* deference were warranted, the "Indian canon" would nonetheless control. *Ramah Navajo Chapter v. Lujan*, *supra* at 1462. Moreover, for the reasons set out in this Memorandum, Defendants' interpretation of these statutes is so absurd, so inconsistent with the statutes' purpose, text and the legislative history, and so at odds with Interior's prior practice, that Defendants' interpretation is not entitled to any form of deference. *Gonzales v. Oregon*, 546 U.S. 243, 260 (2006) (when *Chevron* deference is not due, deference to agency's interpretation is only to the extent it has "power to persuade" based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier or later pronouncements"… etc.).

[2] This section was originally codified at 25 U.S.C. § 2504(a). *See*, Title 25 U.S.C.A., § 1901 to end (West Group 2001). Later in 2002 (per Pub. L. 107-110, Title X, 115 Stat. 2063) all sections of the TCSA were renumbered following elimination of the original Congressional findings which had previously been codified at 25 U.S.C. § 2501. Thus, § 2504 became § 2503. However, the old cross-reference to § 2504 which formerly appeared in the text of what was then § 2503(a)(1)(A) (now codified at § 2502(a)(1)(A)) was not corrected in the new codification. This codification error is implicitly acknowledged by Defendants. (Def. memo, p. 15).

procedures that apply to Pub. L. 93-638 contracts. 25 U.S.C. § 2507(e); 25 C.F.R. §§ 44.110(a) and (b).

A primary purpose of the TCSA was to give the tribes more effective control over and more funds with which to administer their reservation schools than had previously been available under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450 et seq. and the Education Amendments of 1978, Pub. L. 95-561, § 1128, 92 Stat. 2143, 2320-2321 (1978) (in the form in force prior to the 1988 Amendments enacted as part of Pub. L. 100-297). 25 U.S.C. §§ 2501(a) and (b) set out the core policies Congress sought to promote via the TCSA and Pub. L. 100-297:

> (a) Recognition
>
> Congress recognizes that the Indian Self-Determination and Education Assistance Act which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial positive step toward tribal and community control and that the United States has an obligation to assure maximum Indian participation in direction of educational services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of the Indian communities.
>
> (b) Commitment
>
> Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children through the establishment of a meaningful Indian self-determination policy for education that will deter further perpetuation of Federal bureaucratic domination of programs. (Emphasis added).

Likewise, 25 U.S.C. § 2011(a) (also enacted as part of P.L. 100-297) provides that:

> It shall be the policy of the United States acting through the Secretary, in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education. (Emphasis added).

As Defendants admit, "[o]riginally, schools received only one grant calculated under [the Indian School Equalization Formula ("ISEF")] from which they paid for program services and AC." Def. Memo, p. 13. This changed in 1988 with enactment of Pub. L. 100-297 by which the Congress intended to achieve three things as regards funding for tribally controlled schools:

1. To give tribes an increase in school operations funding by adding an amount to pay for necessary administrative functions (calculated under a formula codified at 25 U.S.C. §§ 2008(c) and (d))[3] on top of their regular ISEP funds, in the hope this would enable the schools to cover these costs without having to resort to use of their ISEP funds to cover those critical administrative functions. 25 U.S.C. § 2008; *see*, in particular §§ 2008(B)(1)(A) and (B).[4]

2. To retain the prior arrangement under which TCSA schools implicitly had the authority "at the discretion of the school board" to use "any funds that compose the grant" to pay for costs incurred "for school operations, academic, educational, residential, guidance and counseling, and ***administrative*** purposes…" (Emphasis added), an authority made explicit in Pub. L. 100-297 via the above-quoted language now codified at 25 U.S.C. § 2502(a)(3)(A)(i).[5]

3. To limit or cap how much of the total TCSA grant funds awarded could be spent for administrative purposes to the amount which Congress had determined would be sufficient to enable the schools to pay for "the cost of necessary administrative functions" (25 U.S.C. § 2008(a)(1)). The Congress set that cap at the "amount generated for such costs under Section 2008 of this Title." (25 U.S.C. § 2502(b)(3)). That cap is the dollar amount for "necessary administrative functions" generated by the formula at 25 U.S.C. §§ 2008(c) and (d). In practice,

[3] Defendants (Def. Memo, pp. 3-4, 9) suggest that the School's references in the Complaint (e.g. ¶ 22) to the formula set out at "25 U.S.C. § 2008(d)" were incomplete, in that how the administrative cost amount is determined using that formula requires implementation of the additional calculation instruction at § 2008(c). The School agrees that a more accurate reference would have been to §§ 2008(c) and (d).

[4] The aspiration that instituting this additional funding source to cover administrative costs would enable tribes to cover those costs without having to use their program funds is also reflected in S. Rep. 100-233, p. 9 as referenced at Def. Memo, p. 13. However, nothing in that legislative history or the statute itself prohibits tribes from using ISEP funds to pay for administrative functions when the AC funds awarded to them fall below the amount needed to fund the "necessary administrative functions" as required by § 2008(a)(1). As explained at pp. 6-8 *infra*, the Congress knew this was only an aspiration, not a prohibition on the use of ISEP funds to pay for AC.

[5] The House did initially propose retaining the old arrangement in which both program and administrative costs would have been paid solely from ISEP funds (Def. Memo, p. 13). Instead, the final bill enacted as Pub. L. 100-297 adopted the Senate's approach of adding a separate administrative cost grant award in the hope this would enable tribes to cover those costs without having to use any of their ISEP money to do so. *See*, fn. 4 and Part II, *infra*.

that full AC amount determined by the formula is referred to by BIE as the School's "calculated need" AC. Compl., ¶s 22, 26 and 46 and Ex. 1 to Compl.; Def. Memo, p. 14, n. 15 (acknowledging that the $1,113,800 amount identified in ¶s 26 and 46 of the Complaint "…is the 'calculated need' determined by the formulas in §§ 2008(c) and (d)."). That formula generated amount imposes an AC cost spending cap on the TCSA schools.

It is undisputed that Pub. L. 100-297 "anticipated that in some years there would not be sufficient appropriations to provide all tribes the AC grant amount calculated under §§ 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)." Def. Memo, p. 2. There is also no dispute here as to the requirement imposed on the Secretary by § 2008(j)(2) in such circumstances:

> (2) Reductions
> If the total amount of funds necessary to provide grants to tribes and tribal organizations in the amount 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 for all tribes and tribal organizations for such fiscal year. (Footnote omitted). (Emphasis added)

However, nothing in this provision alters the calculated need amount for AC as determined or "calculated under the formulas in subsection §§ 2008(c) and (d)." (Def. Memo, p. 2). That is the only AC cost amount "generated" under § 2008, also known as the "calculated need" for AC (Def. Memo, pp. 4, 14 and n. 15). Section 2008(j)(2) only addresses how the Secretary is to allocate the insufficient appropriations the Department receives for AC grants for a given year. Defendants are reading § 2502(b)(3) as if the AC spending cap there set was phrased to bar AC expenditures "in excess of the prorated administrative cost amount paid to the school for such costs." The statute does not contain these words. If that is what Congress

intended, that is what the law would have said. It does not. *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009) (holding that if Congress had "intended to legislate" a definition in 25 U.S.C. § 479 with the meaning urged by the government, "it could have done so explicitly…"). Section 2008(j)(2) is simply an AC grant award limitation imposed on the Secretary which determines the reduced (prorated) AC payment amounts each school will receive. In contrast, § 2502(b)(3) is a spending limitation applicable to the schools, capping how much of their TCSA total funding (ISEP and AC) can be spent to pay for administrative functions.

Moreover, the Congress and Defendants were and are charged with the knowledge that the schools' "calculated need" for AC—the amount the Congress determined that these schools will need to pay for their "necessary administrative functions"—does not decrease just because the AC grant appropriation in a given year falls below the amount needed to enable the Secretary to fully fund those necessary AC. This is a logical inference from these statutes and the allegations of the Complaint. This is also acknowledged in the Bureau of Indian Education's ("BIE") "Allocation Distribution Document" for FY 2009 (Ex. 1 to Compl.), where the BIE admitted that the School's final AC grant payment amount (the "prorated need" amount of $694,700) was only 62.3610% of the School's full AC grant amount (the "calculated need" amount of $1,113,800 generated under the § 2008 formula) which the Congress had by statute determined was required for proper School administration for that year. (Compl., ¶s 26, 46). This is also acknowledged at H.R. Conf. Rep. 100-567, 100th Congress, Second Session 1988, U.S.C.C.A.N. 259, 1988 WL 170252 (Leg. Hist.), p. 55, ¶ 30: "The Senate amendment, but not the House bill, authorizes such sums as may be necessary for the administrative grants. The House recedes with an amendment authorizing pro-rata reduction if funds are insufficient for full funding of these grants at the mandated amounts." (Emphasis added). (L.H. App., p. 9). The

"mandated amount" is the full AC need amount generated by the § 2008 formula. The pro-rata amount is the reduced amount that is to be paid to the schools via AC grant awards when AC appropriations are too low.

There is also no dispute here that the Congress has in fact for many years (including for the fiscal year here at issue) appropriated insufficient funds to enable the Secretary to pay the full amount of AC generated by the AC grant formula per 25 U.S.C. §§ 2008(c) and (d). Compl., 23, 26-27; Def. Memo, p. 4; and, *see* the legislative history addressing this problem in Part II, *infra*.

The dispute here is about what the Congress expected and authorized the tribally controlled schools to do in those circumstances. Under Defendants' interpretation—under which the schools may not lawfully use any of their ISEP funds to pay any of their AC—the Congress intended TCSA schools to be left with no lawful way to pay for the "necessary administrative functions" required to operate their schools in the manner required "by law or prudent management practices" (25 U.S.C. § 2008(a)(1)(A)(iii)(II)), which they cannot cover with the reduced AC grant amounts awarded to them. Defendants utterly ignore this fundamental defect in their interpretation.

In Defendants' view, the schools will simply be unable to pay for these necessary administrative functions e.g. financial management staff, insurance, audits, etc. (25 U.S.C. § 2008(a)(1)(B)). If this were true, it would eventually and inevitably force TCSA schools to retrocede their school operations to the federal government or force the government to otherwise reassume those operations. *See,* 25 U.S.C. § 2507(a)(12); 25 C.F.R. § 44.105. This is an absurd result at odds with the plain intent of Congress. Defendants' position in this suit rests upon nothing but this absurd interpretation of these statutes. Defendants' position is untenable. *McNeill v. United States*, 131 S.Ct. 2218, 2223 (2011) (in construing federal statutes'

interpretations which produce "[a]bsurd results are to be avoided," citing *United States v. Wilson*, 503 U.S. 329, 334 (1992)).

Indeed, if Defendants' view of the law were correct (or had otherwise been enforced since 1988), none of the TCSA schools would now remain open except those subsidized with tribal funds.[6] Thus, the only reason these schools have been able to stay open is that Defendants have not historically taken the position they have now taken and applied to the School based on its FY 2009 audit. As alleged in the Complaint at ¶ 55, Defendants had not prior to commencement of the audit period ending June 30, 2009 announced or lawfully published in any form (in the Federal Register or otherwise) any rule, policy, guideline or interpretation of 25 U.S.C. §§ 2008, 2502(A)(3)(a)(i) and 2502(b)(3) which put schools on notice that ISEP funds could no longer be used to cover AC grant shortfalls. Instead, Defendants have *sub silentio* adopted and are now enforcing this new policy retroactively against the School via the audit review and bill of collection process without any prior publication or announcement thereof. Doing this also violates the core holding of *Morton v. Ruiz*, 415 U.S. 199 (1974), fundamental due process notice principles, and statutory and regulatory duties of Defendants respecting tribal consultation and Federal Register publication requirements. *See*, Part IV, *infra.*

The Interior Department has published regulations addressing implementation of 25 U.S.C. § 2007 (25 C.F.R. Subpart B, § 39.100 et seq., for ISEP funds) and 25 U.S.C. § 2008 (25 C.F.R. Subpart J, § 39.1000 et seq., for AC grant funds) and the TCSA regulations (25 C.F.R. Part 44). Nowhere in these regulations does Interior inform TCSA schools that they cannot use their ISEP money to pay for administrative functions not covered by the AC grant funding they

[6] TCSA schools could in theory use interest earnings as an alternate funding source to cover their necessary AC costs. (25 U.S.C. § 2506(b)(1). The decreasing AC grant funding percentage (*see*, legislative history excerpts at Part II of the Argument) and the historic lows for interest rates available in recent years on the narrow range of investments allowed for TCSA funds (25 U.S.C. § 2506(b)(2)) have now drastically reduced those interest earnings.

receive. Further, nothing in the School's TCSA grant agreements barred or bars the School from using ISEP money to pay for administrative costs not covered by the School's AC grant, so long as the School's total AC expenditures are below the statutory AC grant formula amount determined per 25 U.S.C. §§ 2008(c) and (d); and, the School has not otherwise agreed to any policy forbidding that practice. Compl., ¶ 49.

Another thing is clear—the Congress did not intend that P.L. 100-297 would make it harder for tribal schools to administer their school programs. The Congress intended to make it easier and, thereby, to promote the policies of maximizing tribal participation in and Indian control of Indian education by facilitating tribal decisions to assume responsibility for their reservation schools and by diminishing the "federal bureaucratic domination of" those Indian school programs. 25 U.S.C. §§ 2011(a) and 2501(a) and (b). Defendants' interpretation is plainly at odds with these policy objectives. Defendants' interpretation makes it fiscally impossible for TCSA schools to operate in accordance with the legal, audit and prudent management standards which the Congress—in the same statute—required them to adhere to.

Thus, the School's Complaint asked this Court to rule that there is a reasonable alternative interpretation of these statutes. Under that interpretation, the plain language of 25 U.S.C. § 2502(a)(3)(A)(i) is given its plain meaning:

> § 2502. Grants authorized (a)
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> * * * *
>
> (3) Use of funds
>
> (A) In general
>
> 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—
>
> (1) school operations, academic, educational, residential, guidance and counseling, and administrative purposes; and
>
> (2) support services for the school, including transportation. (Emphasis added).

And, § 2502(b)(3)—the separate provision which limits how much grant money can be spent for administrative functions—is given the only meaning true to its text which harmonizes all of these provisions and advances the core Congressional objectives set out at 25 U.S.C. §§ 2501(a) and (b). Under the School's interpretation, § 2502(b)(3) merely sets an upper limit on the total amount the School can spend to pay for "necessary administrative functions" from all the funds awarded in the grant. That upper limit is set by the School's "calculated need amount" as generated by the AC grant formula of §§ 2008(c) and (d). Compl., ¶ 26, 46 and Ex. 1.

Under this interpretation, the statute imposes no bar to the use of ISEP funds to pay for "necessary administrative functions" up to that limit to the extent the amount awarded by BIE in a given year (the School's "prorated need amount") is less than the full amount of AC generated by the AC grant formula (the School's "calculated need amount") as annually determined by BIE. (Compl., ¶s 26, 46 and Ex. 1). The School's interpretation is the only interpretation which would allow these tribally controlled schools to continue operations. The School's interpretation is also the only interpretation that is consistent with the statutes' text and legislative history. (*See*, Part II, *infra*). Moreover, both Defendants and the Congress have long been on notice based on Congressional hearing testimony that TCSA schools are having to use their ISEP funds to cover necessary AC which they cannot cover with the declining AC grant funding. (Compl., 23), and Interior witnesses have never voiced any opposition to that practice at or subsequent to those hearings (*see*, Part II, *infra*).

Defendants' argue (Def. Memo, pp. 15-16) that 25 U.S.C. § 2502(a)(3)(A)(i) cannot be interpreted as proposed by the School because that interpretation is barred by Defendants' interpretation of § 2502(b)(3). This argument is circular. It rests on Defendants' assumption that

their view of the meaning of § 2502(b)(3) is correct and then seeks to restrict the meaning of the earlier paragraph (at § 2502(a)(3)(A)(i)) based on that flawed assumption.

Obviously, if the School's view of § 2502(b)(3) is correct, nothing in that provision would in any way limit the School's right to spend ISEP funds to pay for AC (up to the AC grant formula amount generated in §§ 2008(c) and (d)) under the express authority conferred by § 2502(a)(3)(A)(i) ("Except as otherwise provided in this paragraph, grants provided under this Chapter shall be used to defray, at the discretion of the school board…any expenditures for education related activities…including expenditures for--…administrative purposes…"). (Emphasis added).

Defendants' attempt (Def. Memo, pp. 4, 15-16) to make the paragraph containing § 2502(b)(3) part of the paragraph containing § 2502(a)(1)(A)(i) (and thus included in the "this paragraph" reference therein) likewise fails. Section 2502(b)(3) is not part of the paragraph set out at § 2502(a)(1)(A). It is a separate paragraph not referenced in the "[e]xcept as otherwise provided in this paragraph" introduction to § 2502(a)(1)(A). *See, Pennsylvania v. Union Gas Company,* 491 U.S. 1 (1989) (analyzing meaning of the phrase "[t]he exclusion provided under this paragraph" in 42 U.S.C. § 9601(20)(D) based only on the text which appears in § 9601(20)(D), while looking to other provisions to ascertain the statute's meaning as a whole); In Re Hart, 328 F.3d 45, 48 (1st Cir. 2003) ("Congress uses 'paragraph' to refer to the numbered sections of the statute, and specifically, uses 'this paragraph' [in the Bankruptcy Code] to refer to § 522(f)(2)" and all its subparts. In contrast, the Court held the phrase "this subsection" refers to "all of § 522(f)").

The "this paragraph" reference in § 2502(a)(1)(A) does not refer to the AC cost spending limitation at § 2502(b)(3)—which is not part of paragraph (a)(1)(A). Instead, the "this

paragraph" reference refers to the funding use requirement that the School's expenditure of its grant funds may only be for "expenditures for education related activities for which funds may be used under the laws described in Section 2504(a)[7] of this title… including expenditures for …administrative purposes." Defendants' pretense that the cross-reference is to § 2502(b)(3) rather than to § 2504(a) (now § 2503(a)) underscores the paucity of their entire argument.

BIE's interpretation is not a legally permissible interpretation for another reason: it cannot be reconciled with § 2502 when read as a whole. This is because BIE's interpretation leaves no circumstance in which § 2502(a)(3)(A)(i) could operate as regards the expenditure of TCSA grant funds for education related "administrative purposes" as is expressly authorized by that provision. *Corley v. United States*, 556 U.S. 303, 314 (2009) (rejecting government's statutory interpretation because it renders part of statute "superfluous" and thus "at odds with one of the most basic interpretative canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant…'"); *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Department of Housing and Urban Development*, 567 F.3d 1235 (10th Cir. 2009) (tribal rights and agency obligations based on federal statute must be defined via consideration of all provisions of the statute; agency interpretation or action which is manifestly contrary to provisions of federal statute will be rejected; such agency positions are not entitled to any deference).

None of Defendants' other arguments based on various rules of statutory construction (Def. Memo, pp. 9-10, 16-17) validate their interpretation. Instead, all those rules of construction support the School's interpretation.

[7] As shown in footnote 2, this reference to § 2504 should be understood as a reference to § 2503.

II. THE LEGISLATIVE HISTORY MAKES CLEAR THAT TCSA SCHOOLS CAN USE ISEP FUNDS TO PAY FOR ADMINISTRATIVE COSTS

The TCSA and the Education Act of 1978 have been subjected to many amendments. *See*, legislative history references in 25 U.S.C.A. §§ 2008, 2502 and 2503. The legislative history is voluminous.[8] However, that history does not support Defendants' new interpretation. The contrary is true. The following passage makes clear that the Congress intended the "amount generated" for AC in § 2008 (as that phrase is used in 25 U.S.C. § 2502(b)(3)) to refer to the AC "amount generated" by the §§ 2008(c) and (d) formula, not to any reduced AC grant award amount that might be required by § 2008(j)(2). *See*, House Report 100-95, 100th Congress, First Session, May 15, 1987 (to accompany H.R. 5-the "School Improvement Act of 1987" parts of which became Pub. L. 100-297) (L.H. App., pp. 1-5).

This passage also shows that the Congress intended § 2502(a)(1)(A)(i) to authorize TCSA schools to spend their ISEP funds to pay for necessary administrative functions at their discretion up to the full amount of their calculated need for AC as determined under §§ 2008(c) and (d):

> The Committee has recommended a formula which generates a sliding range of administrative cost rates ... which would then be applied to the funds received under the Indian Student Equalization Formula. This use of the formula will simplify accounting and administration, and will lend an element of stability to the program. It will also allow schools to predict, with a certain degree of accuracy, what they will receive. (p. 83).
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> * * * *
>
> Under the amendment, one grant per year shall be made to each school or program, which will include all funds attracted by the school from the Bureau for one year. (p. 84)
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> * * * *
>
> *Section 8204*—the grants under this act shall go into a general fund and may be used to defray a wide range of expenses, except that no more may be spent on administrative costs than was generated under the administrative formula provision, and that in instances where one grantee operates more than one school site, no less than 95% of the funds generated by site must be spent at the site. (p. 132). (Emphasis added).

[8] All legislative history and hearing testimony referenced in this Part is compiled in a "Legislative History Appendix." All documents included there have been sequentially Bates stamped. Reference to those documents in this Part will also be referenced as "L.H. App., P. __;" referencing the page number of the Appendix where the referenced document appears, but omitting the Bates stamp "0s" which precedes each page number.

The House later receded to most of the Senate version of this bill. *See*, H.R. Conf. Rep. 100-567, *supra* Pages 54-55 and Points 14-18 and 20. (L.H. App., pp. 6-8). However, the Senate bill by that time had incorporated earlier House bill language on this issue from § 8204 of H.R. 5 as referenced in H. Report 100-95. *See*, H.R. Conf. Rep. 100-567, *supra* at p. 58, ¶ 52; "The Senate amendment, but not the House bill, contains a statement on the use of funds and the need to submit an application. The House recedes." (Emphasis added). (L.H. App., pp. 9-11).

The referenced Senate provisions to which the House receded (the final form of which now appear at 25 U.S.C. §§ 2502(a)(1)(A) and (3)) were set out in § 204 of S. 1645. (L.H. App., pp. 14-15) *See*, Senate Report 100-233, 10th Cong. 1st Sess. (Nov. 30, 1987) p. 12 (L.H. App., pp. 12-13):

> Sec. 204 authorizes grants to tribally controlled schools to cover costs of school operations and support services. Only one grant may be made to any tribe to cover the costs of all education programs operated by such tribes and election to receive a grant rather than a contractor contracts is entirely voluntary. (Emphasis added);

and see, the School's earlier reference to H.R. Conf. Report 100-567 *supra* at p. 7. § 204 of S. 1645 (L.H. App., pp. 14-15) provided:

> (a) Grants under this title shall go into a general operating fund of the school to defray, at the determination of the tribally controlled school board, any expenditures, including but not limited to, expenditures for school operations, academic, educational, residential, guidance and counseling, and administrative purposes and for the operation and maintenance (where funds for same are provided at the request of the tribally controlled school board) and for support services including transportation, of the school. Funds provided pursuant to this title may not be used in connection with religious worship or sectarian instruction.
>
> (b) Funds may not be expended for administrative costs (as defined under section 1128(g) of the Education Amendments of 1978) in excess of the amount generated for such costs under section 1128(c) of such Act. (Emphasis added).

Section 1128(c) as referenced above is a reference to the AC formula provision enacted by P. L. 100-297, now set out at 25 U.S.C. § 2008(c). *See*, 102 Stat. 369 and 370 (L.H. App., pp. 16-17). This legislative history makes clear that § 2502(b)(3) imposes an AC spending cap on the

schools. They cannot spend more for AC than is generated under the AC grant formula at §§ 2008(a) and (b), but nothing in § 2008(j)(2)—which tells the Secretary how to allocate AC grant appropriations which are insufficient to meet the AC needs of the TCSA schools—alters the schools' right as conferred by § 2502(a)(1)(A)(i) to use ISEP funds as needed to pay for the cost of necessary administrative functions in those circumstances.

Further, on a number of occasions the problem posed for TCSA schools due to declining AC grant funding has been addressed in Congressional hearings. Tribal testimony in a number of instances has made clear that the insufficiency in AC grant appropriations has forced tribes to use ISEP (program or education) money to pay for critical administrative functions:

1. Testimony of Faye BlueEyes, Director of Facilities Shiprock Alternative Schools, Inc. (SASI)[9] Navajo Nation, Shiprock, New Mexico, submitted at a Hearing of the Committee on Education and the Workforce Early Childhood, Youth and Families Subcommittee U.S. House of Representatives regarding the Bureau of Indian Affairs-Funded School System (July 20, 1999), for which the Hearing Record appears at Serial Number 106-60 (L.H. App., pp. 18-22):

> Administrative Cost Grant Funds. Tribally-operated schools receive their overhead funds through the Administrative Cost Grant formula developed by this Committee and enacted in 1988. Only once in the past decade has BIA supplied funds to us in the amount required by that formula.
>
> Furthermore, for the past two years, the Appropriations Committee, by legislating on the appropriations bill, has placed a cap on the amount of funds that can be supplied for AC Grants. That cap means we will get only about 84% of what the statutory formula requires in the upcoming school year. Of course, when we do not receive what we need to meet overhead, even with very frugal and prudent management, we must make up the shortfall with education funds. It also severely limits our flexibility at the local level to implement self-improvement ideas. (Emphasis added). (L.H. App., pp. 21-22).

2. Testimony of Charley Tallman, School Board President, Greasewood Springs Community School, Inc., submitted to the House Interior Appropriations Subcommittee Regarding Bureau of Indian Affairs School Operations Budget for FY 2001 (March 31, 2000), Hearing Record, Part 6, Public Witness for Indian Programs, 106th Congress, Second Session (L.H. App., pp. 23-25):

> Administrative Cost Grants.

[9] The predecessor in interest to the Plaintiff here—the Shiprock Associated Schools, Inc.

> AC grants provide funds to tribes or tribal organizations for school operations in lieu of contract support. They are designed to enable tribes and tribal organizations to operate contract or grant schools without reducing direct programs services to students. Tribes are provided funds for related administrative overhead services and operations which are necessary to meet the requirements of law and prudent management. When 100% of our costs are not funded, we are forced to use critically-needed dollars which should be used to provide classroom instruction to students.
>
> * * * *
>
> …AC grant funding has been frozen at $42.16 million for three years, despite the fact that dozens of additional tribes have contracted to take on school operations. (pp. 315-316). (Emphasis added). (L.H. App., p. 24-25).

3. Testimony of John W. Cheek (Muscogee Creek) Executive Director of the National Indian Education Association Before the Senate Committee on Indian Affairs Re Reauthorization of Indian Sections of the Elementary and Secondary Education Act (April 26, 2000) (L.H. App., pp. 26-27):[10]

> The Administrative Cost grant mechanism was created by Congress in 1988 to more precisely identify the amount of funding needed for indirect and administrative costs of tribes and tribal organizations who operate BIA-funded elementary and secondary schools for Indian children.
>
> * * * *
>
> Congress changed the system in 1988 by adding the Administrative Cost (AC) Grant provision to the basic education law. The amount of each tribally-operated schools AC Grant is calculated under a formula set out in the law, but funding for AC Grants is subject to appropriation. The addition of AC Grants within H.R. 4148 would allow entitlement payments for purpose of paying administrative costs associated with delivery of education services for Indian children. By not having this function dependent upon annual appropriations, instructional dollars would not be sacrificed when insufficient administrative costs are available… (p. 5). (Emphasis added). (L.H. App., p. 27).

4. Testimony of W. Ron Allen, Treasurer, National Congress of American Indians, Submitted for Senate Hearing 112-31, on the President's Fiscal Year 2012 Budget for Tribal Programs, Before the Committee on Indian Affairs, United States Senate, 112th Congress, First Session, March 15, 2011. (L.H. App., pp. 33-36):

> The operation of schools by tribes or locally elected tribal school boards is a major exercise of tribal self-determination, encouraged by federal Indian policy for the last 35 years. Tribes and tribal organizations that exercise this option are entitled by law to receive Tribal Grant Support Costs or TGSC (formerly known as Administrative Cost Grants) to cover the administrative or indirect costs incurred when they take over a

[10] Mr. Cheek presented similar testimony in 2001 at the Senate Hearing referenced in Def. Memo, pp 10-11: "The amount of each tribally-operated schools AC grant is calculated under a formula set out in the law, but funding for AC grants is subject to appropriation. By having this function dependent upon annual appropriations … instructional dollars are being sacrificed when insufficient administrative costs are available." (L.H. App., pp. 28-32). (Emphasis added). *See,* in particular, L.H. App., p.32.

> school. Currently, 124 of the 183 BIE-funded schools are operated by tribes or tribal school boards. In FY2010 the funding available to TGSC met only 60 percent of need, the lowest rate to date. Given this reality, schools are required to reduce staff to bare bones levels and to divert funds from educational programs to meet their statutorily mandated administrative requirements. ***For current contract and grant schools, $70.3 million should be appropriated to fully fund TGSC need, with an additional #2 million to fund the administrative needs of those schools that convert to contract or grant status in FY 2012, to avid diverting funds from existing tribally operated schools.*** (P. 8). (Emphasis added) (bold italics in original). (L.H. App., p. 36).

Senior Interior Department witnesses were at several of these hearings and never made or submitted any statement for the record (much less any notice to tribes) opposing this tribal practice[11]. Moreover, as pled (Compl., ¶ 24) Defendant Larry Echo Hawk in his capacity as Assistant Secretary-Indian Affairs publicly acknowledged by his news release of February 14, 2011 that TCSA schools may lawfully use ISEF program funds to cover AC grant shortfalls:

> The total FY 2012 budget request for BIE is $795.6 million with targeted increases for … Tribal Grant Support Cost ($3.0 million) ***so that*** Tribes operating BIE-funded programs can meet administrative costs ***without decreasing program funds***. (Emphasis added).

The other tribal testimony noted by Defendants (Def. Memo, pp. 10-11) is not to the contrary. That testimony simply reflects tribal desires to avoid the cost and inconvenience of having to endure future disputes (like this one) that might arise over the implementation of these statutes by eliminating any ambiguity on this issue.

III. THE STATUTES' AMBIGUITY AND THE INDIAN CANON SUPPORT THE SCHOOL'S INTERPRETATION

The Indian canon of construction requires that courts seeking to interpret an ambiguous statute enacted for the benefit of Indians apply a liberal rule of construction which requires adoption of the interpretation most beneficial to the Indian party when there are competing reasonable interpretations to choose from. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)

[11] Joe Christie, Acting Director, Office of Indian Education Programs ("OIP"), BIA; Bill Mehojah, Director, OIP, BIA; and Larry Echo Hawk, Asst. Sec. – Indian Affairs. (*See*, L.H. App., pp. 18, 30, 33, verifying their presence as witnesses at these hearings).

(applying the rule that "statutes passed for the benefit of dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455, 1462 (10th Cir. 1997) (ambiguous provisions of Pub. L. 93-638 must be construed as reasonably interpreted by the Indian parties. In deciding between two reasonable interpretations, "the canon of construction favoring Native Americans controls over the general rule of deference to agency interpretation of ambiguous statues….The result, then, is that if the [Act] can reasonably be construed as the tribe would have it construed, it must be construed that way."); *accord, Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062-1063 (10th Cir. 2011), *aff'd Salazar v. Ramah Navajo Chapter*, 567 U.S. __, 132 S.Ct. 2181, 2187 and 2193 (2012) (applying the liberal rule of construction incorporated into § 1(a) of the ISDA model contract at 25 U.S.C. § 450*l*(c)).

The School has at minimum set out a reasonable alternative interpretation of these statutes different from the absurd interpretation proffered by Defendants. In this regard, the term "amount generated" in § 2502(b)(3) is undefined—forcing this Court to determine if the referenced "amount" is the "calculated (AC) need" amount generated by the § 2008(c) and (d) formula for a given year ***OR*** the "prorated (AC) need" amount which the Secretary has paid to a school for that year, and whether the word "generated' means "calculated" or "determined" ***OR*** means "awarded" or "paid." Again, if this Court does not agree that the School's interpretation is the only one permitted by these statutes, the School has at minimum made the case that the statute is ambiguous and subject to the Indian canon, and, therefore, should be interpreted as pled in the Complaint. *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009) "[T]hat there are two reasonable, competing interpretations…is the very definition of ambiguity." quoting *Doe v. Bush*, 261 F.3d 1037, 1062 (11th Cir. 2001)); *Zuni*

Public School District v. Department of Education, 550 U.S. 81, 98 (2007) ("…statutory 'ambiguity is a creative not [just] of definitional possibilities but [also] of statutory context'…[m]eaning—*or ambiguity*—of certain words or phrases may only become evident when placed in context'") (citations omitted).

Whether based on the statutory text and legislative history or by aid of the Indian canon, the School has clearly pled a plausible claim under which the relief sought can be granted.

IV. EVEN IF DEFENDANTS' INTERPRETATION WERE OTHERWISE VALID, IT CANNOT BE IMPOSED ON THE SCHOOL FOR ITS FY 2009 EXPENDITURES

In adopting their new position that ISEF funds cannot be used to pay administrative costs, Defendants have not engaged in any form of tribal consultation regarding this policy change, as required by the Obama Administration's consultation policies, *see*, Presidential Memorandum of November 5, 2009 regarding tribal consultation, 74 Federal Register 57881-57882 (November 9, 2009), and as separately required by statute at 25 U.S.C. § 2011 (Compl., Count V), and have not issued a Federal Register notice on this issue as required by 36 Fed. Reg. 8336 (May 4, 1971)[12] (Compl., Count III),[13] nor any form of notice, rule or guidance announcing this position.

[12] a. 36 Federal Register 8336 (May 4, 1971), (copy appended as Exhibit B). That notice provides in part:

> Notice is hereby given of the policy of the Department of the Interior to give notice of proposed rule making and to invite the public to participate in rule making in instances where not required by law.
>
> * * * *
>
> The law [APA] excepts from these [notice and comment] requirements matters relating to public property, loans, grants, benefits, or contracts.
>
> * * * *
>
> Therefore, effective immediately, all offices and bureaus of the Department in issuing rules and regulations relating to public property, loans, grants, benefits, or contracts, are directed to utilize to the fullest extent possible the public participation procedures of 5 U.S.C. § 553. (Emphasis added).

[13] It is well-settled that when a federal agency voluntarily adopts a requirement to use APA §§ 553 (notice and comment for rulemaking) 552 (publication) or other procedures in circumstances when the APA itself would not require that such procedures be used, the agency is nonetheless required to adhere to those procedures and any rules issued or policy decisions made without compliance with those procedures are invalid and unenforceable. This outcome results no matter whether the rule in question would in other contexts constitute a substantive rule, or an interpretative rule, or would otherwise be exempt from APA rulemaking procedures, where (as here) the agencies' (1971) policy does not distinguish between legislative and interpretative rules. 36 C.F.R. Part 8336, *supra; Federal Farm Credit Bans Funding Corporation v. Farm Credit Administration*, 731 F.Supp. 217 (E.D.Va. 1990) (where

(Compl., Count IV). Defendants' conduct here plainly reflects adoption of a new policy position and a change in their prior practice which will cause major harm to TCSA schools. Defendants have decided to read these statutes more restrictively than in the past and to do so without properly applying the "Indian canon" to validate Interior's prior practice. They have done this surreptitiously without giving any notice or explanation; and, without giving the tribes and TCSA schools a chance through consultation to try to persuade BIE not to make this change in course. This conduct plainly violates 25 U.S.C. § 2011(b):

> (1) In general
> All actions under this Act shall be done with active consultation with tribes. …
> (2) Requirements
> (A) Definition of consultation
> In this subsection, the term "consultation" means a process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau and all interested parties. (Emphasis added).
> (B) Discussion and joint deliberation
> During discussions and joint deliberations, interested parties (including tribes and school officials) shall be given an opportunity—
> (i) to present issues (including proposals regarding changes in current practices or programs) that will be considered for future action by the Secretary; and
> (ii) to participate and discuss the options presented, or to present alternatives, with the views and concerns of the interested parties given effect unless the Secretary determines, …. (Emphasis added).

§ 2011(b) imposes on Defendants an enforceable duty to consult with tribes before taking the kind of action as occurred here. *Yankton Sioux Tribe v. Kempthorne,* 442 F.Supp.2d 774 (D.S.D. 2006) (DOI plan to restructure Indian education offices could not be implemented without first consulting with Indian tribes). Defendants have violated that duty. *See, Oglala Sioux of Indians v. Andrus,* 603 F.2d 707, 721 (8th Cir. 1979) barring BIA from implementing a proposed administrative personnel change without tribal consultation:

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agency rule was issued without compliance with other agency rules governing promulgation of all agency rules, the new rule is invalid even if it could otherwise be characterized as an interpretative rule under the APA).

> By holding that the Bureau failed to comply with its own procedures, we are not, as the government asserts, holding that the Oglala Sioux Tribe is entitled to a superintendent of its choice. We hold only that where the Bureau has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded. Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, … but also violated "'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" Morton v. Ruiz, supra at 236, 94 S.Ct. at 1075. (Emphasis added).

The Courts routinely invalidate federal actions taken to change existing agency practices and interpretations of statutes or regulations without compliance with statutory requirements in circumstances where those procedures were not required by the APA, but were required by other statutes or by the agency's own regulations or internal policies, as is the case here. *Id.; Morton v. Ruiz*, 415 U.S. 199 (1974) (new, restrictive eligibility standards for BIA social services were invalid in part because they were only published in the BIA manual when BIA policy then required publication in the Federal Register in all circumstances where new rules or policies would affect substantive rights; the court also held that the failure to honor those self-imposed publication requirements would also violate the government's trust obligations to the Indian tribes); *see, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (while APA establishes "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion…"); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) (new BIA policy reflecting more restrictive interpretation of eligibility standards for school lunches for Indian students were invalid for failure to promulgate under APA notice and comment procedures per 5 U.S.C. § 553 because Interior Department had in 36 C.F.R. 8336 voluntarily adopted requirement to use such

rulemaking procedures before promulgating any new rule or policy affecting "contracts, grants or benefits;" new standard was also invalid for failure to publish in the Federal Register under 5 U.S.C. § 552); *Lewis v. Weinberger*, 415 F.Supp. 652, 661 (D. N.M. 1976) (IHS policy announcing restrictive eligibility standard was invalid for failure to follow APA rulemaking procedures in part because "HEW, the agency of which the IHS is a part, has placed itself under the procedural requirements of § 553 in all its rulemaking relating to 'public property, loans, grants, benefits or contracts.' 36 Fed. Reg. 2536 (Feb. 5, 1971). Thus, the IHS was bound to comply with APA rulemaking procedure in this case despite the otherwise applicable exemption found at subsection (a)(2) of Section 553. *Morton v. Ruiz*. . .. Further, administrative actions taken pursuant to this unpublished policy are void with respect to persons adversely affected thereby."); *See, Lincoln v. Vigil*, 508 U.S. 182 (1993) (holding that IHS could lawfully discontinue Indian children's program without following APA notice and comment rulemaking procedure because that decision was committed to the IHS's discretion and where the court distinguished from *Morton v. Ruiz, supra* on the grounds that there "the [BIA's] own regulations required it to publish the provision in the Federal Register, the Bureau had failed to do so … we held that the Bureau's failure to abide by its own procedures rendered the provision invalid, stating that under those circumstances, the denial of benefits would be 'inconsistent with the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and exploited people."' ... No such circumstances exist here."); *see, Beth Rochel Seminary v. Bennett*, 624 F.Supp. 911 (D. D.C. 1985) (rule adding enrollment requirement to test for eligibility for federal financial aid for unaccredited institutions of higher education was exempt from APA rulemaking procedures since it related to "grants, benefits or contracts" and where agency rule had been issued prior to education department's adoption of internal policy

requiring compliance with APA procedures for policies affecting such grants, benefits or contracts.") The Court in *Bennett* distinguished *Vigil v. Andrus* because the challenged BIA rule at issue in *Andrus* was published without APA rulemaking after Interior had voluntarily adopted its own rule requiring rulemaking procedures in such circumstances).

Whatever the general rule applicable to these issues in other contexts (Def. Memo, pp. 17-21), Defendants' conduct in abruptly and silently adopting a new statutory interpretation of these critical Indian education statutes at odds with their prior practice, without the required tribal consultation per § 2011(b), and without any public announcement to that effect (much less the Federal Register publication required by 36 Fed. Reg. 8336), was unlawful. Defendants' new interpretation cannot lawfully be applied to the School to disallow any portion of its FY 2009 expenditures even if that new interpretation were otherwise valid. The School has thus also pled a valid claim for relief based on Defendants' violation of these procedural rights.

CONCLUSION

For the reasons set out above, the School respectfully submits that Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 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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