



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

April 15, 2020

Honorable Ryan Stewart  
Secretary of Education  
New Mexico Public Education Department  
300 Don Gaspar Avenue  
Santa Fe, New Mexico 87501-2786

Dear Secretary Stewart:

Enclosed is a report concluding that New Mexico does not meet the requirements of section 7009(b) of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (ESEA). As a result, the State is not eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlements for the period July 1, 2019 through June 30, 2020 (State fiscal year (FY) 2020).

A copy of the certification and report is being sent to all school districts in New Mexico to inform them of their right to a hearing. The State or any local educational agency adversely affected by this action may request, in writing and within 60 days of the receipt of this notice, a hearing under ESEA sections 7009 and 7011(a) and 34 C.F.R. § 222.165. A request for a hearing must specify the issues of fact and law to be considered, and should be sent to: Marilyn Hall, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244, and with a copy emailed to [Impact.Aid@ed.gov](mailto:Impact.Aid@ed.gov).

Sincerely,

Marilyn Hall  
Director  
Impact Aid Program

Enclosures  
cc: New Mexico Superintendents

[www.ed.gov](http://www.ed.gov)

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*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

REPORT FOR THE YEAR JULY 1, 2019 - JUNE 30, 2020 (STATE FISCAL YEAR 2020)  
UNDER SECTION 7009(B) OF THE ELEMENTARY AND SECONDARY EDUCATION  
ACT OF 1965 (20 U.S.C. § 7709(b))

State – New Mexico

Section I. Background

A. Procedural History

The Director, School Budget and Finance Analysis Bureau, Public Education Department (PED), State of New Mexico (State), notified the U.S. Department of Education (Department) and all New Mexico school districts of the State's intention, under Section 7009(b) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA), to take Impact Aid payments into consideration in the calculation of school aid for the period of July 1, 2019 to June 30, 2020 (State fiscal year (FY) 2020). The notice was by letter to this office dated December 31, 2018, and a memorandum to all school districts in the State with the same date. The Department received data in support of the request for certification under section 7009(b) by email on February 27, 2019. This data submission was timely submitted at least 120 days before the beginning of State FY 2020 on July 1, 2019, as required by 34 C.F.R. § 222.164(b)(2)(ii).

Subsequent to the February 2019 submission, on April 3, 2019, the New Mexico Governor signed Senate Bill 1, which made a substantial change to the State aid program for State FY 2020 and subsequent years. The Impact Aid Program (IAP) statute and regulations require that when a State makes substantial changes to its aid program, the State must submit projected data showing how the State's program will meet the disparity standard under the new aid formula, and must submit actual data soon as it is available. The projection must detail the assumptions made and come with an assurance of accuracy. Further, the State must assure that if final data do not demonstrate that it met the disparity standard for the fiscal year in question, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA. (ESEA section 7009(b)(3); 34 C.F.R. § 222.161(b)(2)).

The PED sent a letter dated May 16, 2019, requesting the ability to make estimated payments deducting Impact Aid, pursuant to 34 C.F.R. § 222.161(a)(6). In a letter dated June 25, 2019, the State submitted [revised projected data](#) that accounts for changes to the State aid formula in Senate Bill 1 with respect to the membership data, along with the assurance required by the Impact Aid regulations. The projected data is based on final revenues for FY 2018, the most recent year for which final data were available; it models the impact of Senate Bill 1 by adjusting or adding to the formula's student weights in accordance with the FY 2020 funding formula.

The Department granted the PED's request to make estimated payments deducting Impact Aid, by letter dated June 27, 2019. On that same date, the Department notified all Local Educational Agencies (LEAs) in the State of their opportunity to request a predetermination hearing within 30 days concerning the State's request, as provided in section 7009(c)(2) and 34 C.F.R. § 222.164(b)(5). Three LEAs requested such a hearing on a timely basis: Zuni School District

(ZSD), Gallup McKinley Counties School District (GMCS D), and Central Consolidated School District (CCSD). The predetermination hearing was held via teleconference on September 10, 2019. The three requesting LEAs participated, as well as individuals and representatives from several other LEAs.

A transcript was subsequently provided to all parties. During the hearing, the parties were given 15 days to submit post-hearing comments. Via email to all parties on September 11, 2019, this office granted an additional 15 days to submit post-hearing comments, making the deadline October 10, 2019. A joint LEA document was timely submitted by ZSD, GMCS D, and CCSD (collectively, “the LEAs”); the NM PED also submitted timely written comments.

### B. The Disparity Test Analysis

A State aid program is determined to equalize expenditures amongst LEAs “if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs is no more than 25 percent.” (34 C.F.R. § 222.162(a)). The regulations define “revenue” as including “only revenue for current expenditures.” (34 C.F.R. § 222.161(c)). In performing this disparity test, a state must choose to compare current expenditures or revenues and must choose whether to exclude special cost differentials (funds designated to a district because of specific characteristics of that district or specific characteristics of students in that district). (34 C.F.R. § 222.162(d)). New Mexico has chosen the “adjusted revenue per mem” basis, i.e. the exclusion method on a revenue basis. (34 C.F.R. § 222.162(d)(3)). Under this test, the State first considers each LEA’s revenue in the given fiscal year. Only revenue that can be used for current expenditures is considered. (34 C.F.R. § 222.161(c)).<sup>1</sup> Next, the State removes revenues for special cost differentials. These are funds associated with “pupils having special educational needs” or “particular types of LEAs.” (34 C.F.R. § 222.161(c)(2)). Finally, the State divides this amount by an unweighted pupil count. (34 C.F.R. § 222.161(d)(3)). This is the amount of revenue per pupil that is then compared to the other LEAs to determine if the State aid program has equalized expenditures.

### C. State School Finance Formula for FY 2020 and the State’s Data Submission

The general rule for calculating the disparity test is to use data from the second-preceding fiscal year, if the same funding formula is in effect. (34 CFR 222.161(b)(1)). For FY 2020 the same program was not in effect in the second preceding fiscal year (which corresponds to school year 2017-18). Therefore, under the regulations, the State submitted for its membership data a combination of final 17-18 data, and projected data for FY 2020 to reflect the changes in State law. See 34 C.F.R. § 222.161(b)(2). For the revenues, it submitted final data from 2017-2018.

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<sup>1</sup> The Impact Aid law defines “current expenditures” as: “expenditures for free public education, including expenditures for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities, but does not include expenditures for community services, capital outlay, and debt service, or any expenditures made from funds awarded under part A of title I. The determination of whether an expenditure for the replacement of equipment is considered a current expenditure or a capital outlay shall be determined in accordance with generally accepted accounting principles as determined by the State.” (ESEA section 7013(4)).

As we understand the New Mexico public school funding formula that is in effect for FY 2020, the State guarantees each school district 100 percent of a calculated program cost (need). The first step in the funding formula is to calculate each district's number of program units, calculated by multiplying basic education and early childhood units by a staffing cost multiplier, and adding program units that are associated with special categories of needs. The categories include early childhood education, grade levels of students, special education students, bilingual students, students considered to be at risk, district size and scarcity, enrollment growth factors, and an index for instructional staff experience and training. (NMSA 22-8-18.) For FY 2020, students considered to be at risk will receive a higher weighting in the formula than they have in previous years, resulting in more at-risk units. In addition, districts that receive funding for the K-5 Plus program (providing an early start to the school year) and Extended Learning Time program (which includes after-school programs and teacher professional development) receive additional instructional units based on the number of participating students; both of these programs are optional for school districts, which must apply for the funding. (SB 1 (2019)). The district's program cost is then determined by multiplying the district's instructional units by a set dollar figure per unit, which is established by the legislature. (NMSA 22-8-2 ("program cost"), 22-8-18).

Once each district's need is determined, the State subtracts 75 percent of the revenue raised from a uniform local mill levy, 75 percent of Federal forest reserve funds, and 75 percent of each district's eligible Impact Aid. (NMSA 22-8-25). Eligible Impact Aid will not include payments under Section 7003(d) for children with disabilities, payments under Section 7007 for construction, or 20% of the payments received for children living on Indian Lands, as required by the Impact Aid statute. (NMSA 22-8-25). The difference ("need" minus 75% of eligible local and Federal revenues) is the State's funding share for each district.

At the Department's request, the revised projected data that the State submitted in June 2019 included the additional weights for the K-5 Plus and the Extended Learning Time programs. The Department determined that these do not meet the criteria for exclusion as special cost differentials under 34 CFR 222.162(c)(2) because these are optional programs that are based on services provided rather than types of students or district factors. Thus, these amounts are properly included as revenue in the disparity test.

## Section II. LEA Arguments, State response, and Department Analysis

We address each of the LEAs' arguments below, with a summary of the argument, the State's response, our analysis, and our decision regarding each. The Department's analysis below centers on whether a given fund should be excluded or included in the State's disparity test. A fund is generally excluded if it is not revenue for current expenditures or if it is considered a special cost differential. (34 C.F.R. § 222.162).

Our decisions may refer to the F-33 Local Education Agency Finance Survey (F-33) (available at <https://nces.ed.gov/ccd/f33agency.asp>); including the Documentation for the NCES Common Core of Data School District Finance Survey; and the National Center for Educational Statistics (NCES) *Financial Accounting for Local and State Systems* (NCES Handbook) (available at

<https://nces.ed.gov/pubs2015/2015347.pdf>). Both documents are created by divisions of the United States Department of Education. The primary purpose of the F-33 is “to provide revenue and expenditure data for all school districts in the United States” by surveying LEAs across the country through the Governments Division of the U.S. Census Bureau. The data is then submitted to the NCES. LEAs use the instructions provided in the F-33 form (available at the F-33 link above) when classifying funds as either revenue or expenditure. The NCES Handbook includes additional instructions and guidelines on this topic.

Our analysis also refers to the State PED’s School Budget and Finance Analysis (SBFA) Stat Books, available at <https://webnew.ped.state.nm.us/bureaus/school-budget-finance-analysis/stat-books/>. In addition, we refer to the State PED Manual of Procedures, accessed at <https://webnew.ped.state.nm.us/bureaus/school-budget-finance-analysis/manual-of-procedures-psab/>. We cite to the pre-determination hearing transcript (Trans.), the post-hearing comments submitted by the State (State Post-Hearing) and those submitted by the LEAs (LEA Post-Hearing).

#### A. Funds that the LEAs argue should be included in the disparity test

As an initial matter, in response to the LEAs’ arguments that certain funds should be added to the disparity test, the State argued that State revenues that are outside of the State-designated equalization guarantee (“SEG”) should automatically be excluded from the disparity test. We reject that argument. Under the IAP statute and regulations, the disparity test is intended to capture all revenues for current expenditures; there is no narrow focus on only the revenues that the State decides to consider when it equalizes revenues among LEAs. If we were to adopt the State’s argument, any State could pass the disparity test by choosing only a narrow range of revenues or expenditures to equalize, leaving a vast amount of other revenues “outside” of that program which in fact are disequalizing. Moreover, the fact that the Department has approved the State’s submission in past years does not mean that we can ignore other existing revenues, if they should in fact be included as revenues, once we have been made aware of these other funds. The State argues that the Department’s 1977 Federal Register comments on its program regulations support its position. (State Post-Hearing at 4). However, those comments clarified that only current expenditures and not capital outlay should be included in the test of a State’s equalization for Impact Aid purposes; the Department was not distinguishing between what is labelled as “state equalization program” and what is not. (42 Fed Reg 15544 at 15546 (3/22/77)).

Below we address in turn each of the funds that the districts argue should be included, that are currently excluded in the State’s submission.

##### 1. Student Transportation

The districts argue that the transportation allocation should be included in the disparity test. The PED transportation allocation to each LEA is the combination of a base amount for each student in the LEA and a variable amount calculated in part on site characteristics, number of days of operation for the district, number of students transported, number of students with special needs, density of the district, and the number of miles the buses must travel. (See State Post-Hearing at 8). The districts argue that the transportation allocation should be included because “pupil

transportation services” are specifically included in the definition of current expenditures in ESEA section 7013(4), and that the adjustment factor outlined in NMSA 22-8-29.4, designed to ensure that the various transportation allocations do not exceed the appropriated amount, overrides the specific site-based factors in the formula. (Trans.53; LEA Post-Hearing at 9-13). The State counters that the site factors included in the variable amount, including density of the district and number of miles travelled, classify the fund as a special cost differential. (Trans.102-103, 129; State Post-Hearing at 7).

Under the IAP regulations, special cost differentials include funds associated with “pupils having special educational needs” and LEAs “affected by geographical isolation, sparsity or density of population...” (34 C.F.R. § 222.162(c)(2)). Although we agree that the NM transportation fund generally meets the federal definition of a revenue for current expenditures (ESEA 7013(4); F-33 Documentation, p.B-9, “transportation programs”), it appears that under State law the amounts that LEAs receive are determined in part based on site characteristics. (See NMSA 22-8-29.4 and the Manual of Procedures, PSAB Supplement 19, Transportation, available at [https://webnew.ped.state.nm.us/wp-content/uploads/2017/12/SBFAB\\_Manual-of-Procedures-PSAB\\_PSA19-Transportation.pdf](https://webnew.ped.state.nm.us/wp-content/uploads/2017/12/SBFAB_Manual-of-Procedures-PSAB_PSA19-Transportation.pdf)).

While we agree that part of the transportation funding to New Mexico districts is based on special cost differentials (e.g. number of students in special education, and geographic factors of the district), we are unable to separate out how much of the funds are attributable to those special cost differentials. Therefore, because transportation funding is generally considered revenue for current expenditures, all of the transportation funds should be included in the disparity test. In future years, the State may wish to separate out the portion of the funding attributable to special cost differentials.

## 2. Instructional Materials

The districts argue that the fund for instructional materials (Section 22-15-5 NMSA) should be included as revenues in the disparity test, since these funds may be spent on operational funding, and many of the items that can be purchased with the funds are considered supplies. (Trans. 54, 137; LEA Post-Hearing at 7). The State argues that these revenues should be excluded as they are capital assets; the fund is allocated on a six-year cycle, and according to the State, the GASB labels library books with a useful life of more than a year as capital assets, and textbooks are similar to library books. (Trans. 107, 129; State Post-Hearing at 10).

For the year of analysis in question, the Instructional Materials fund could be used for “instructional materials,” defined by NMSA 22-15-2 as “school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media.” The fact that the fund may be used by some districts for a use that is categorized as a capital asset for State purposes would affect the disparity test if the State analyzed the districts on an expenditure basis, but on a revenue basis we must determine whether this fund is for current expenditures or not. We determine that it is. Instructional materials are current expenditures for purposes of the F-33 reporting (F-33 Documentation, p.B-9 “other programs.”). Because instructional materials meet the definition of current expenditures under ESEA section 7013(4), the revenues for instructional materials meet

the definition of “revenues for current expenditures.” The instructional material fund revenues should therefore be added to the disparity analysis.

### 3. Dual Credit Instructional Materials

The districts argue that the disparity test should include revenues from the Dual Credit Fund, which pays for the excess cost of instructional materials for students who are dual enrolled in a college program while in high school. (Trans.55; LEA Post-Hearing at 9; see 6.30.7.8(H)(15) NMAC). The State argues that these revenues are special cost differentials because they are paid only on the basis of a particular type of student, in this case students enrolled in a college program while in high school. The State also argues that districts must apply for this fund, and that including it in the equalization formula would serve as a disincentive to districts. (State Post-Hearing at 7; Trans. 104-105).

Under the IAP regulations (34 C.F.R. § 222.162(c)(2)), special cost differentials include funds associated with “pupils having special educational needs, such as... gifted and talented children...” Under the State law, it does not appear that the dual credit program is limited to a particular type of student, such as gifted and talented; rather these funds are paid to any students participating in a dual credit program. Thus, the program is similar to a State fund paid for students in an after-school program. Because these funds are not associated with students with special educational needs, we agree with the districts that these funds should be included in the disparity test.

### 4. NM Reads to Lead

The districts argue that NM Reads to Lead, a competitive grant that funds strategies to reduce the number of students reading below grade level, should be included in the disparity analysis. (Trans 56; LEA Post-Hearing at 14). The State argues they should be excluded because they are competitive grants and are outside of the equalization program, and because of the chilling effect that including them would have on the State’s ability to make fair award decisions without considering the award’s effect on the state’s equalization. (State Post-Hearing at 8-9). The State further notes that including funds supplemental to the SEG would increase disparity because the funds are designed to “reflect costs that vary across entities.” (State Post-Hearing at 9). The districts contend that the State has not provided a valid reason for excluding the funds from the disparity analysis, and that a chilling effect on grants is neither a reason for excluding these funds from the disparity test nor is the NM Reads to Lead fund a type of special cost differential.

As noted previously, a fund’s exclusion from the SEG is not a reason to exclude it from the disparity analysis. Further, there is no federal rule against including competitive grants in the disparity analysis. The NM Reads to Lead funds meet the definition of “revenue for current expenditures” under ESEA section 7013(4) and 34 C.F.R. § 222.161(c). These revenues do not qualify as a special cost differential under 34 C.F.R. § 222.162(c)(2) because they are not given on the basis of a particular type of student or type of district; rather they are awarded based on planned activities and on reading score growth. (See <https://webnew.ped.state.nm.us/bureaus/literacy-humanities/reads-to-lead/>.) The funds therefore should be included in the disparity test.

## 5. Capital Improvements: SB-9 (Local and State) and HB-33

The Public School Capital Improvements Act (“SB-9”), allows for the collection of funds through local levies and state match funds, and is designed to fund capital improvements in schools. (NMSA 22-25-2 – 22-25-7 (1978)). The districts argue that although SB-9 funds are mainly used for capital improvements, they can also be used for operational expenditures including maintenance and supplies. They cite to NMSA 22-25-2, which provides that “capital improvements” includes expenditures for “maintenance.” (LEA Post-Hearing at 17). As the State has chosen to use revenues and not expenditures in their disparity analysis, the districts argue that the entirety of the SB-9 fund should therefore be included. (LEA Post-Hearing at 20). The State contends that the majority of the SB-9 funds are used for capital outlay and therefore these funds are properly excluded from the disparity analysis. (State Post-Hearing at 11-13; Trans.105).

We agree with the districts that SB-9 funds should be included in the disparity analysis because they are revenues for current expenditures. Although the purpose of the SB-9 fund is clearly for “capital improvements,” that term is defined broadly in the SB-9 State law to include “maintenance of public school buildings or public school or pre-kindergarten grounds, including the purchasing or repairing of maintenance equipment and participating in the facility information management system as required by the Public School Capital Outlay Act.” (NMSA 22-25-2.) The State definition of “capital improvements” also includes computer software and hardware for student instructional use (NMSA 22-25-2), and those generally constitute “supplies” as defined in the Federal Uniform Guidance (2 CFR §200.94). For Impact Aid purposes the statutory definition of “current expenditures” includes “operation and maintenance of plant” as well as expenditures for instruction. (ESEA § 7013(4); 34 CFR § 222.161(c)). Because the State has chosen to calculate the disparity analysis on a revenue basis, all revenues for current expenditures must be included, regardless of how the fund is spent. Since SB-9 funds can be used for maintenance and supplies, which are current expenditures, the State and local revenues relating to this fund should be included in the disparity analysis.

We also find it relevant to note that we disagree with the State’s argument that most of the funds are in fact used for capital purposes. We examined the State’s SBFA Statbook, specifically the “Expenditures by Object Code” in Section C, representing actual expenditures for State FY 2018, and found that a majority of expenditures made from SB-9 local and State revenues, state-wide, were for maintenance and repair (object code 54315) and supplies, including software (object code 56000). Although these codes are included in the overall reporting category of capital expenditures for F-33 purposes, they meet the Impact Aid definition of revenues for current expenditures, and State law authorizes their use for current expenditures.

The Public School Buildings Act (HB-33) is similar to SB-9 funds in that it authorizes local school districts to levy mills for “capital improvements” (Section 22-26-3 NMSA 1978). The districts argue that HB-33 funds should be included in the disparity analysis because subsection (E) of the definition of “capital improvements” in NMSA 22-26-2 includes administering the projects undertaken pursuant to Subsections A and C of that section, including expenditures for “facility maintenance software, project management software, project oversight and district personnel specifically related to administration of projects funded by the Public School Buildings Act....” (Trans. 63-64). The State argues that HB-33 funds should be excluded as

capital expenses because the vast majority of the fund goes to capital assets, and because the administration of projects included in Subsection (E) is an ancillary charge that may be capitalized along with the other costs of the capital improvement project, consistent with the advice in the GASB. (Trans.106-107, State Post-Hearing at 12).

We agree with the State that HB-33 funds are properly excluded from the disparity analysis. Unlike SB-9, the authorized use of HB-33 funds under State law does not include general maintenance of school buildings, or software and hardware for student instruction. It does include costs for administering the capital projects, but those are limited to 5% of the total cost of the capital project (see definition of “capital improvements” in NMSA 22-26-2). Furthermore, we agree that, consistent with the GASB, districts can capitalize ancillary charges along with the other costs of the capital improvement project. We also note that a review of the State’s SBFA Statbook shows that only a very small amount of total funds was spent by districts on maintenance of buildings, unlike the situation for SB-9 funds.

6. Certain Local Funding (Spaceport Gross Receipts Tax (GRT) Fund, Wind Farm Projects, Industrial Revenue Bond (IRB) Payment in Lieu of Taxes (PILT))

The districts argue that the revenue from the Spaceport GRT local funding to Dona Ana and Sierra County should be included in the disparity analysis as revenue for current expenditures because failing to include these revenues is potentially disequalizing. (See LEA Post-Hearing 21; Trans. 58). The Spaceport GRT Fund provides funds to Dona Ana and Sierra County, which the counties then transfer to the regional spaceport district; each county may retain up to 25% for spaceport-related projects, including spaceport-related educational opportunities. (NMSA 7-20E-25(D)). The districts also argue that “in lieu of tax revenues” (wind farm projects, IRB PILTS) qualify as revenues, and that excluding them from the disparity analysis is disequalizing because the revenues circumvent the tax revenues that would otherwise flow to the State for operational purposes and instead only benefit individual schools. (LEA Post-Hearing at 20-21; Trans. 58, 62-63).

The State argues that, with regard to the Spaceport funds, even though the county is choosing to use the retained portion of the Spaceport GRT revenue for spaceport-related educational opportunities, the county is not required to do so because the funds can be spent on any spaceport-related projects. The State argues that these funds are not revenues for current expenditures because they are not a compulsory charge levied on behalf of an LEA for current expenditures. To support its argument, the State cites to the IAP regulatory definition of “local tax revenue” at 34 CFR § 222.161(c), which defines local tax revenue as “compulsory charges levied by an LEA or by an intermediate school district or other local government entity on behalf of an LEA for current expenditures for educational services.” (State Post-Hearing at 13). The State claims that “[t]he legislative history of equalization makes clear that the idea is to equalize funding through taxes that are generated by either the district or the state. Payments in lieu of taxes are not included and, under New Mexico law, would not be available to be included.” (State Post-Hearing at 13; Transcript 103). With regard to the IRB PILTs, the State argues that revenues to school districts from this source are “payments from private companies to the LEA for the use of their land” and are not tax revenue. (State Post-Hearing at 14). The State argues

that because neither wind farm payments, nor the payments from IRB PILT are taxes, they should not be included in the disparity analysis. (State Post-Hearing at 13-14).

As we noted earlier, under the IAP statute and regulations, the disparity test is intended to capture all revenues for current expenditures. There is no narrow focus on local tax revenue (unlike the proportion analysis under 34 CFR 222.163, discussed below). A review of the PED Statbook shows that almost all the Spaceport and Wind Farm funds are used for current expenditures by the districts. Therefore, because these funds (the Spaceport GRT, Wind Farm Projects, IRB PILTs) meet the definition of “revenues for current expenditures,” we agree with the districts that the State should add the revenue from these funds to the disparity analysis.

## 7. Ed Tech Equipment Act Bonds

The districts argue that proceeds from the Educational Technology Equipment Act (“Ed Tech”) should be included in the disparity test because the state law allows for their use on technical support and training. (Trans. 65-66). The State argues that these are ancillary charges necessary to the related technology assets, which can be capitalized, citing NMSA 6-15A-1 (1978). (State Post-Hearing at 12-13).

The Ed Tech Act authorizes school districts to “create a debt . . . by entering into a lease-purchase arrangement to acquire education technology equipment.” (NMSA 6-15A-2). Thus, the proceeds received from this Ed Tech fund are generated by the sale of bonds. For purposes of F-33 reporting, proceeds from bond sales are not classified as revenue, but as debt. (see F-33 instructions, Part VI). Therefore, these funds do not meet the Impact Aid definition of “revenues for current expenditures” and have been properly excluded from the disparity test.

### B. Funds that the LEAs argue should be excluded from the disparity test

#### 1. Refund of prior year’s expenditures

The Districts argue that refunds of prior year’s expenditures should not be included in the disparity test, citing the IAP regulations at 34 C.F.R. § 222.161, which exclude “the recovery of an expenditure” from the definition of “revenue.” (LEA Post-Hearing at 47). The State argues that, under generally accepted accounting principles, if a refund and expenditure occur in the same year, then there is no “revenue” reported, but if the refund is for a prior year, it becomes general revenues available for current expenditures, citing to the PED Manual of Procedures, p. 38 and generally accepted accounting principles. (State Post-Hearing at 15). The State also cites the federal Uniform Guidance (2 C.F.R. § 200.302) to argue that State laws and procedures control how a State and LEA account for their funds, and therefore, the State should not be required to use a separate accounting method for their disparity test.

Under the NCES Handbook, a refund of a prior year’s expenditures is classified as revenue (see NCES Handbook, 118), whereas a refund of a current year expenditure does not fall within the definition of revenue (see NCES Handbook, 118; F-33 Documentation, p.B-8, definition of “revenue”: ‘net of refunds and other correcting transactions.’). We agree with the State that these refunds of a prior year expenditure are properly included in the disparity test.

## 2. Indirect costs

The districts argue that indirect costs associated with a federal or state grant should be removed from the disparity test because they are the reimbursement of an expenditure, and the IAP definition of “revenue” in 34 C.F.R. § 222.161(c) specifically excludes the “recovery of an expenditure.” (LEA Post-Hearing at 48; Trans.70). The State argues that these indirect costs, once reimbursed, become part of a general fund that may be spent as general revenue and should be considered revenue for current expenditure. (State Post-Hearing at 15-16).

Indirect costs are not a type of revenue but a classification of expenditure. For federal reporting purposes, once grant funds are spent, the portion of the grant that is used for indirect costs (e.g. administrative purposes) would constitute the reimbursement of an expenditure. When a district receives grant funds, however, the grant funds received do not have to be used for indirect costs, even though an indirect cost rate was included in a grant application. “Indirect costs” should not be broken out as a separate type of revenue and excluded from the disparity test; rather the entire grant is revenue to the district. Therefore, since PED has chosen to conduct the disparity test on a revenue basis, these indirect costs from federal and state grants are properly included in the disparity test.

## 3. Access Board (e-rate)

LEAs have the option to contract with certain vendors who provide lower rates for their services through the federal e-rate program. The amount of the discount is calculated based on the number of students in the LEA that receive free and reduced lunch. (See NCES Handbook at 58). LEAs have two options for reimbursement of the discount. The first option is to pay their vendor the full price of the service and then file for a direct deposit reimbursement through the Universal Service Administrative Company (USAC). The State counts these direct deposit reimbursements as revenue (State Post-Hearing at 15). The LEAs that do not follow this reimbursement method choose to have the USAC pay the vendors the reduced price initially. In these cases, the discount appears as a credit on the vendor’s bill, and the LEA never pays the full price of the service – only the reduced price. The State does not count this credit as a revenue. Therefore, the State only considers discounts from e-rates as revenue if the LEA receives the discount as a reimbursement as opposed to a credit.

The districts argue that e-rates should be excluded for two reasons. First, referencing 34 CFR §222.161, which provides that “*revenue* ...does not represent the recovery of an expenditure,” they argue that the e-rate reimbursement is the recovery of an expenditure, and therefore should be excluded. Second, they argue that because the state chooses to consider the discount as revenue if the LEA receives it as a subsequent reimbursement, but not if the LEA chooses to pay the lower price in the first place, this is an arbitrary distinction that leads to misleading results and “elevates form over substance.”

We agree with the districts that including e-Rate reimbursements, but not discounts, as revenue creates a misleading picture of the funds afforded as operating expenses to each district and creates a potential unfairness to districts who choose one method over another. E-Rate reimbursements thus should be excluded from the disparity test.

#### 4. Fees and contract revenue from governmental agencies

The districts argue that fees from governmental agencies should be excluded from the disparity test because there is a liability created and a repayment expected, so they do not meet the Impact Aid definition of revenues for current expenditures. (LEA Post-Hearing at 50). The State addresses this issue along with refunds of prior year expenditures, arguing that if the amounts are received in a subsequent year, they qualify as revenue to the district.

The State treats fees from government agencies as a State revenue in their uniform chart of accounts, and prior F-33 reporting indicates that these amounts are being included as revenue from State sources. Assuming that these amounts do not represent the recovery of a current year expenditure, in which case they would not count as revenue, they appear to be revenues to the districts, which are properly included in the disparity test.

#### 5. Insurance recoveries

The LEAs argue that insurance recoveries should be excluded from the disparity test because they are the recovery of an expenditure and are thus excluded from the definition of “revenues for current expenditures. (LEA Post-Hearing at 46; Trans. 73). The State argues that if the reimbursement is made in a year subsequent to the expenditure, it counts as revenue. (State Post-Hearing at 15).

The NCES handbook classifies insurance recoveries as an “extraordinary item” that is not included as operating revenue for purposes of F-33 reporting. (See NCES Handbook at 122). We agree with the districts that funds from this source should be removed from the disparity test.

### C. Other Issues Raised by the LEAs

#### 1. Disparity test by grade levels

The LEAs argue that the State should have separated out charter schools with similar grade levels and conducted the disparity test according to the procedure in the Appendix to subpart K of part 222 of the regulations, by making separate disparity calculations for different groups of LEAs that have similar grade spans. (See LEA Post-Hearing at 16). However, the regulations provide that the Secretary will calculate disparity in that manner “if a State requests it,” 34 CFR 222.162(b), and in this case the State did not request that treatment.

#### 2. Proportion of Impact Aid that can be taken into account by the State

The LEAs argue that the State should not be taking into account 75% of Impact Aid receipts for every district, because the proportion should be unique to each district; they argue that the State is only including the “yield controlled 0.5 mill levy, it is not taking any credit for the 2 Mill SB9 Levy or the up-to 10 Mill HB33 Levy.” (LEA Post-Hearing at 51). Because we have determined that the State does not pass the disparity test for State FY 2020 (see below), this issue is not relevant to this determination. However, we provide our analysis of the issue here in case the State passes the disparity test in a future year and thus is able to take a proportion of Impact Aid payments into account in making State aid payments. Note that unlike the disparity test, which

uses all revenues for current expenditures, the calculation to determine the proportion of Impact Aid funds that can be taken into account by the State is limited to tax revenues.

The IAP regulations provide in 34 CFR 222.163:

(a). . . a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(b) (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

The State argues that the reason the proportion is 75% for every LEA in the State is because, pursuant to State law, 75% of local tax revenues are covered under the equalization program, and “there is only one local tax revenue for school district operating purposes.” (SEA Post-Hearing at 17).

Although the regulations define the terms *Local tax revenues* and *Local tax revenues covered under a State equalization program* in 34 CFR 222.161(c), the question is whether there are any other “local tax revenues attributable to current expenditures for free public education,” which is the operative phrase in 34 CFR 222.163(b)(1), for inclusion in the denominator of the proportion fraction. Because we determined above that the “2 Mill SB9 Levy” produces revenue to the districts that should be counted as revenues for current expenditures, we agree with the districts that those funds should be included in the denominator, for the proportion analysis. However, because we concluded that the proceeds from the “HB33 Levy” are for capital expenditures, they are not “attributable to current expenditures for free public education.” Thus, those funds are properly excluded from the proportion calculation.

For any future year in which the State is authorized to take into account Impact Aid, it must calculate the proportion of Impact Aid funds that can be used to reduce State aid by including the SB9 revenues in the denominator of the proportion for each district.

### 3. Disparity test methodology in the Department’s regulations

The LEAs urge the Department to change the methodology that is in the Appendix to 34 CFR part 222, subpart K, despite that fact that such methodology was upheld by the Supreme Court in the case of Zuni v US Department of Education, 550 U.S. 81 (2007). As the Department explained in the predetermination hearing, that issue is outside the scope of the hearing and of this determination. Department officials may not waive or alter regulatory requirements in an administrative proceeding.

### 4. Yazzie-Martinez State court decision

The LEAs argue that under the Impact Aid regulations, the Department should not certify the NM State aid program because it is no longer in effect following the decision in the Yazzie-Martinez Judgment (County of Santa Fe First Judicial District No. D-101-CV-2014-00793, 12/20/18). (see LEA doc p.54). The Impact Aid regulations provide in 34 CFR 222.161(a)(2) that:

No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

Arguably, the court did determine that the State aid program violated the State constitution. However, it is not clear from either the decision of July 20, 2018, or that of December 20, 2018, whether the court held that the State aid program is no longer in effect. Given that we find that the State does not pass the disparity test for FY 2020, the issue is moot as to this fiscal year. For future fiscal years, however, we request that the State submit, along with any disparity test submission, a State legal opinion on this matter.

### Section III. Description of Disparity Calculation

In a year where a State has substantially revised its State aid program, it may take into consideration Impact Aid payments in calculating State aid under section 7009(b) if the Secretary determines that the projected amount of per-pupil expenditures or revenues of the LEA with the highest per-pupil expenditures or revenues in the State did not exceed the projected per-pupil expenditures or revenues of the LEA with the lowest per-pupil expenditures or revenues by more than 25 percent.

As required by ESEA section 7009(b)(2)(B)(ii), we take into account the extent to which the State's program reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students. First, we examined the weights used by the State in calculating instructional units to determine which of them qualify to be taken into account as special cost differentials under section 7009(b)(2)(B)(ii) and 34 C.F.R. § 222.162 (c)(2). The additional allocations listed in the PED's disparity test data, Table 3, meet these standards.

According to the State's June 25, 2019 projected data submission, the revenue per-pupil at the 95th percentile was \$6,234 (Carlsbad) and the revenue per-pupil at the 5th percentile was \$5,192 (Alamogordo). The resulting disparity was 20.1 percent in the State's submission.

However, the Department ran the disparity test excluding revenues from E-rate and insurance recoveries, and adding revenues from Transportation, Instructional Materials, Dual Credit, NM Reads to Lead, SB-9, Spaceport, Wind Farm, and IRB pilots, for the reasons explained above in section II (see revised disparity test, Enclosure). In making this determination, we disregarded LEAs with expenditures or revenues above the 95th percentile or below the 5th percentile of such revenues or expenditures in the State as required by the statute and regulations. (See ESEA 7009(b)(2)(B)(i) and 34 C.F.R. § 222.162(a)). With the changes noted above, the revenue per-pupil at the 95th percentile was \$7,438 (Carlsbad) and the revenue per-pupil at the 5th percentile was \$5,731 (Socorro). Because the resulting disparity is 29.79%, which is more than 25%, the

State does not pass the disparity test and is not certified to take into account Impact Aid in making State aid payments.

Section IV. Findings

Pursuant to delegation from the Assistant Secretary for Elementary and Secondary Education to the Impact Aid Program Director, the New Mexico State aid formula is not certified under section 7009 for FY 2020, because the revenue disparity percentage is not within the 25 percent disparity allowed under section 7009(b)(2).

Therefore, the State may not take into consideration Impact Aid payments when calculating State aid to districts for FY 2020.

The State or any local educational agency adversely affected by this action may request, in writing and within 60 days of the receipt of this notice, a hearing under ESEA sections 7009 and 7011(a) and 34 C.F.R. § 222.165. A request for a hearing must specify the issues of fact and law to be considered, and should be sent to: Marilyn Hall, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244, and with a copy emailed to [Impact.Aid@ed.gov](mailto:Impact.Aid@ed.gov).

Report Approved and Issued By: \_\_\_\_\_  
Marilyn Hall, Director  
Impact Aid Program

\_\_\_\_\_ Date

Enclosure

Enclosure: Impact Aid Program Calculation of Disparity

This document is available online at <https://impactaid.ed.gov/wp-content/uploads/2020/04/NM-FY-2020-Disparity-Analysis-after-7009-Determination.xlsx>

[The spreadsheet](#) contains the following tabs:

- Disparity per Mem Table 1: Using the PED spreadsheet, IAP recalculated disparity using data from revised Table 2.
- 17-18 Revenue per Mem Table 2: Using the PED spreadsheet, IAP recalculated revenues using data from revised Table 4.
- 17-18 Adjustments Table 3: The PED spreadsheet showing special cost differentials. IAP made no changes.
- 17-18 Rev for Disparity Table 4: Using the PED spreadsheet, IAP recalculated revenues per LEA, using the data from Tab “Revenue Subtotal by LEA.”
- Revenue Subtotal by LEA: Using the original PED spreadsheet of revenues by fund for each LEA, IAP recalculated revenues by deleting (in pink) E-rate and insurance recoveries, and adding (in green) Transportation, Instructional materials, Dual Credit, NM Reads to Lead, SB-9, Spaceport, Wind Farm, and IRB pilots. Additions were taken from the PED revenue data on tab “1718 revenues orig.”
- 1718 revenues orig: The original PED spreadsheet showing all detailed revenues per LEA. IAP made no changes.