
Osamudia R. James
BREAKING FREE OF CHEVRON’S CONSTRAINTS: ZUNI PUBLIC SCHOOL DISTRICT ET AL. V. U.S DEPARTMENT OF JUSTICE

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Abstract

Breaking Free of Chevron’s Constraints: Zuni Public School District 89, et al. v. U.S. Department of Education, analyzes the Supreme Court’s latest review of an administrative interpretation under Chevron review, and concludes that the doctrine’s exclusive focus on deciding “who gets to decide” led to a complete failure by the Court to consider the consequences of the agency interpretation at issue. Such a failure renders the Court unprepared to accurately determine whether the agency interpretation is “permissible” under the second prong of Chevron review. As a solution, the article advocates for the replacement of Chevron’s second prong with the more consequence-oriented arbitrary and capricious review. Although such a replacement limits agency discretion, it serves Chevron’s underlying goal of ensuring that agency actions reflect Congressional intent.

In light of the Court’s recent administrative law decisions clarifying the parameters of Chevron review, the Zuni case offers yet another opportunity

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for the Court to delineate the outer limits of the review doctrine and its accompanying deference. The article uses a case that highlights the intersection between administrative law and public education to further the debate about those parameters, and to present a situation in which decreased agency deference is particularly appropriate. Finally, the article draws attention not only to the necessity of a more rigorous review when the provision of adequate public education is at stake, but to the broader implications of a review schema that is overly deferential to agency action.

INTRODUCTION

“It is easy to forget that important Supreme Court cases involve people; it is even easier to forget they are rooted in particular places.”

Such seemed to be the case in Zuni Public School District No. 89 et al., v. United States Department of Education, (Zuni) when the Court attempted to apply Chevron review to a school-finance case. The people are Native American school-children in the state of New Mexico. The places are two public school districts, Zuni Public School District, and Gallup-McKinley Public School District, both located in the Northwest quadrant of the State. Even as the Court heard oral argument in the case, it seemed all parties forgot that the case’s outcome would have profound impacts on the people and places involved.

Zuni Public School District (Zuni) and Gallup-McKinley Public School District (Gallup) are both located on or near tax-exempt American Indian reservations. As such, the districts are eligible to receive their share of Impact Aid, federal funding meant to ensure that school districts are not penalized for their inability to raise revenues for education through property taxes. If the Department of Education determines, however, that a state’s school finance system equally distributes resources to all students, that state may offset state funding to impacted districts by the amount such districts receive in Impact Aid. Such is the case in New Mexico.

Zuni and Gallup have challenged the Secretary of Education’s use of a formula to determine that New Mexico is equalized. The statutory interpretation which led to the Secretary’s choice of formula is subject to

Chevron review. An integral element of Chevron review is to ensure that the Secretary’s interpretation, and its effects, are permissible in light of Congressional intent. The compulsion, however, to decide “who gets to decide” under Chevron review eclipsed any analysis of the consequences of the Secretary’s interpretation and formula choice. As a result, the two districts are forced to choose between school buildings with running water and hiring experienced teachers to help address the unique learning needs of its Native American students. Although this is the kind of penalty Congress sought to avoid through Impact Aid, the Court seems poised to ignore the problem all together. The application of Chevron review to the Zuni case has been too constraining, and will likely result in an outcome that is misaligned with Congressional intent.

Part I provides the historical context for the case, including a discussion of the challenges inherent in efforts to equalize financial resources in education, New Mexico’s efforts at equalizing funding within the State, and the Federal government’s role in ensuring school finance equity through the Impact Aid Program. Part II briefly summarizes the procedural history of the case, and Part III explains how Chevron review is likely to be applied. Part IV analyzes both the constraining nature of Chevron review in the case, and the failure of Chevron review to assist the Court in determining whether agency interpretation is permissible in light of Congressional intent and agency expertise. Part IV also resurrects the calls for replacement of Chevron step-two with arbitrary and capricious “hard-look” review, in an effort to ensure that the relevant policy implications and the practical consequences of the Department’s interpretation are considered when deciding to extend deference to a decision with such significant consequences for Native American school-children in New Mexico.

I. HISTORICAL BACKGROUND

A. THE CHALLENGES OF SCHOOL FINANCE

The dispute about the equity of New Mexico’s school finance system and the appropriateness of the Secretary’s equalization formula is a recent development in the long history of battles regarding education and school finance equity. Although the details of school finance systems vary from state to state, most states generally delegate responsibility for raising revenue to individual districts. A district’s ability to raise revenues for its

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schools is usually determined by the wealth of its tax base; thus, disparities in property wealth will yield disparities in educational funding. The role of the state is typically as a partner, ensuring that minimum education needs are met.

By allowing districts to raise revenues locally for education, states essentially guarantee inequalities in funding, particularly when a state has not adopted an equalization program. As such, some school districts become enclaves of affluence, while other districts are left with minimal fiscal strength. These enclaves have become adept at convincing legislatures that their advantage is justified, thus leading some scholars to note that the public school system in the United States is not public, but rather “quasi-private” or “quasi-public.”\(^3\) In this quasi-public system, the interests of wealthier districts are insulated, geographically defined, and protected by state legislatures which refuse to enact school funding programs to equalize resources.\(^4\) Challenges in state courts to education financing systems that perpetuate these inequalities proliferated in the aftermath of *San Antonio Independent School District v. Rodriguez*, where the Court held that disparities caused by school systems that relied on property taxes were not violations of the United States constitution because education is not a fundamental right.\(^5\) To date, lawsuits have been brought in forty-five states.\(^6\) At the heart of these challenges is concern for the ways in which education finance resources are distributed, and the relationship between spending and student achievement.

When assessing the distribution of resources, several equity principles can be utilized, including horizontal equity, vertical equity, and adequacy. Horizontal equity provides that students who are alike should be treated alike, and requires that all students receive equal shares of local and state revenues per pupil.\(^7\) Several statistics assess the level of horizontal equity within a state, including the federal range ratio. The federal range ratio, also referred to as a restricted range ratio,\(^8\) is the formula included in the text of the Impact Aid statute.

\(^3\) ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE, 148 (Allyn and Bacon 1995).
\(^8\) ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 235-36 (Allyn and Bacon 1995)(explaining that the federal range ratio used by the federal government in the Impact Aid program is mathematically equivalent to the restricted range ratio).
The concept of vertical equity accounts for the reality that some students need or deserve more services than others,⁹ and that more services require more funding. Accordingly, achieving vertical equity includes identifying those characteristics that can be used as a basis for distributing additional resources to certain students, or the programs and school districts that educate those students. Student characteristics that justify additional funding include physical or mental disabilities, educational disadvantage stemming from a low-income background,¹⁰ or limited English proficiency. District characteristics that justify additional funding might include unique transportation costs associated with very large, or very small, districts. School program characteristics, such as vocational programs or magnet schools, may also warrant additional resources.¹¹

Finally, adequacy is “the provision of a set of strategies, programs, curriculum, and instruction, with appropriate adjustments for special-needs students, districts, and schools, and their full financing, that is sufficient to teach students to high standards.”¹² To the extent that adequacy addresses how much is required to educate students, based on each student’s individual need, adequacy can be partly addressed through a combination of horizontal and vertical equity.¹³ At the same time, adequacy also addresses the relationship between educational inputs and educational outputs. Educational inputs include programs, curriculum, and instruction sufficient to teach students to high standards, while outputs include the

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¹³ The two concepts of adequacy and equity are often considered interchangeable, particularly in school finance reform litigation, where remedies can be justified based on either concept. See Julie Underwood, School Finance Equity as Vertical Equity, 28 U. Mich. J.L. Reform 493, 513-19 (1995)(equating adequacy and vertical equity); But See William H. Clune, The Shift from Equity to Adequacy in School Finance, 8 Educ. Pol’y 376, 376-377 (1994)(describing the shift away from an equity model to an adequacy model, where the emphasis is no longer merely on inputs, but on high minimum educational outcomes).
measurement of resulting achievement. Considering the link between equity and adequacy is integral to ensuring equal education opportunities for all students.

Adequacy, however, has not been without debate; some have argued that there is no consistent relationship between money input and achievement output, and that to obtain more money for education is simply throwing good money after bad. This “production-function” critique of school finance has its origins in the Coleman report, which was interpreted as indicating that schools have little influence on student achievement independent of family background and social context. The production-function model, however, has been criticized as inadequate when applied to the education system. Moreover, methodological flaws in the research underlying the Coleman report render the report’s

16 ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 349 (Allyn and Bacon 1995).
17 Production-function is defined as the maximum amount of product that can be obtained form a specified combination of inputs. It shows the largest quantity of goods that any particular collection of inputs is capable of producing. William J. Baumol & Alan S. Blinder, Economics: Principles and Policies 515 (Harcourt Brace Jovanovich 1988).
19 ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 351 (Allyn and Bacon 1995).
20 The model was first developed and applied to industry. Problems with applying the model to education include confusion about the relevant unit of production (individual pupil, classroom, school, or school district), and whether the chosen unit of production is maximizing academic achievement or some other output. Moreover, studies that apply the model do not identify an underlying theory of learning that defines the relationship between school inputs and academic achievement. For example, the studies all assume that teacher input can be measured by teacher characteristics, including education, experience and aptitude, and ignore the way in which these characteristics are actually implicated in the teaching-learning process. ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 356 (Allyn and Bacon 1995) (citing Wadi D. Haddad, Martin Carnoy, Rosemary Rinaldi & Omporn Regel, Education and Development, Evidence for New Priorities 50 (Washington, DC: The World Bank 1990).
conclusions a result of flawed analysis, and an inaccurate reflection of the “underlying behavioral reality.”

Since then, several production-function studies addressed the flaws inherent when the model is applied to education, and found that (1) if family income cannot be changed, improvement in school outputs requires dramatic increases in inputs or significant changes in resource combinations; (2) schools are incapable of improving the life outcomes of minorities without changing inefficiencies in expenditures for teacher experience and additional education; and (3) money is important in producing higher test scores when it purchases teachers with strong literacy skills, reduces class size to eighteen students per teacher, retains experienced instructors, and increases the number of teachers with advanced degrees. These conclusions indicate that school finance is linked to student academic achievement.

Despite the ongoing debate, it is obvious to most that, at the very minimum, money can buy educational resources like instructional materials and equipment, new facilities, or increases in the number of highly-trained teachers. It is also clear that communities, wealthy and poor alike, value the opportunities that additional money can buy. Indeed, Coons, Clune and Sugarman stated it best when they wrote:

“We regard the fierce resistance by rich districts to reform as adequate testimonial to the value of money. Whatever it is that money may be thought to contribute to the education of children, that commodity is something highly prized by those who enjoy the greatest measure of it. If money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failures.”

21 ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 360 (Allyn and Bacon 1995)(citing study by Hanushek and Kain).
If one agrees that differences in funding do affect the quality of education, it is clear that inequalities in the resources of school districts produce a wide range of educational opportunities afforded to students. It is a question of basic fairness to ensure that students are not penalized in terms of their education just because they are born into a family that is neither wealthy, nor fortunate enough to live in a wealthy district. This issue, and the responsibility of a state to address it, is at the heart of the Zuni case.

B. New Mexico

New Mexico depends on local property taxes to fund public school education. Like most states that depend on local taxes to fund public schools, differences in wealth among the State’s local education agencies (LEAs) has lead to inequity in school funding. New Mexico has faced considerable challenges in its effort to address this inequity, including differences in the depth of district tax bases, poverty levels, and enrollment figures.

Overall, New Mexico ranks forty-eighth out of fifty states in per capita personal income, with twenty-three percent of public school age children living in poverty. The percent of school-age children living in poverty in the Los Alamos School District, however, is a considerably lower 2.53 percent. In contrast, the percentage of school-age children living in poverty in the Zuni Public School District is 48.22 percent; the percentage in Gallup is 37.11 percent. In forty-nine of New Mexico’s eighty-nine LEAs, the percentage is twenty-five percent or higher; twenty-three LEAs have percentages over thirty percent, and eight LEAs have percentages over forty percent.

Variations in the number of students enrolled in schools across the State have also impeded efforts to equalize funding. Due to economies of scale, education costs may be higher in small districts, and research suggests that size economies that reduce costs by more than one dollar per

24 Throughout this article the terms “local education agencies” and “school districts” are used interchangeably.
25 New Mexico Public Education Department, New Mexico’s Ranking Among the States, http://www.ped.state.nm.us/div/fin/school.budget/nm.stat.05/index.html; Percent of Population Ages 4 to 17 Living in Poverty by District, http://www.ped.state.nm.us/div/ais/data/fs/03/05.06.poverty.dist.pdf
26 New Mexico Public Education Department, Percent of Population Ages 4 to 17 Living in Poverty by District, http://www.ped.state.nm.us/div/ais/data/fs/03/05.06.poverty.dist.pdf
pupil do exist up to, but not beyond, two-hundred pupils.\textsuperscript{27} The largest school district in New Mexico is Albuquerque, with 94,566 students, while the smallest school district is the Mosquero district, with a population of fifty students.\textsuperscript{28}

Despite these obstacles, New Mexico has remained committed to its diverse\textsuperscript{29} student population and to providing educational services to students with differing needs.\textsuperscript{30} In the wake of the Supreme Court’s decision in \textit{San Antonio Indep. School District v. Rodriguez},\textsuperscript{31} a group of Plaintiffs in New Mexico filed a lawsuit alleging that the State’s education finance system, in which school funding expenditures varied widely based on the wealth of a particular school district, was in violation of New Mexico’s constitution. The case was settled before trial when New Mexico decided, via the 1974 Public School Finance Act, to fund the operational costs of all school districts.\textsuperscript{32}

The Act’s funding formula is based on a model developed by the National Education Finance Project in the late 1960s and early 1970s,\textsuperscript{33} and includes a “state equalization guarantee distribution.” The distribution is “that amount of money distributed to each school district to ensure that the school district’s operating revenue, including its local and federal revenues…is at least equal to the school district’s program cost.”\textsuperscript{34} “Program cost” is defined as the amount of money determined under New Mexico’s funding formula to be necessary for a district with a particular

\textsuperscript{27} \textsc{Allan R. Odden & Lawrence O. Picus, School Finance, A Policy Perspective} 231 (McGraw-Hill Higher Education 2000).

\textsuperscript{28} New Mexico Public Education Department, \textit{Total Student Enrollment by District, School Year 2005-2006}, http://www.ped.state.nm.us/div/ais/data/fs/05/05.06.enroll.dist.pdf.

\textsuperscript{29} 31.1\% of public-school students in the state are classified as “Anglo;” 54\% Hispanic are classified as Hispanic; 11.1\% are classified as Native American; 2.5\% are classified as Black; and 1.3\% are classified as Asian. New Mexico Public Education Department, \textit{Percent of Student Enrollment Ethnic Category by District, School Year 2005-2006}, http://www.ped.state.nm.us/div/ais/data/fs/13/05.06.ethnic.pdf.

\textsuperscript{30} Brief for Respondent, 2006 WL 3740364, 16.


\textsuperscript{33} New Mexico Public Education Department School Budget and Finance Analysis Bureau, \textit{How New Mexico Public Schools are Funded} 3 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools_are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf.

configuration of students and educational programs to provide educational services.\footnote{Sharon S. Ball & J. Placido Garcia, \textit{New Mexico} 5, http://nces.ed.gov/edfin/pdf/StFinance/NewMexi.pdf.} The funding formula determines each district’s program cost by using cost differentials to calculate the price associated with providing educational services to students with differing needs; \footnote{For example, research indicates that the cost of educating secondary school students is more than the cost to educate primary school students. Moreover, additional funding may be required to provide bilingual education services to students with a high percentage of English-as-second-language speakers. Sharon S. Ball and J. Placido Garcia, \textit{New Mexico} 5, http://nces.ed.gov/edfin/pdf/StFinance/NewMexi.pdf.} the inclusion of these cost differentials seeks to address vertical equity. The formula also makes adjustments for several other factors, including a district’s “training and experience index,”\footnote{Sharon S. Ball and J. Placido Garcia, \textit{New Mexico} 5, http://nces.ed.gov/edfin/pdf/StFinance/NewMexi.pdf. A district’s training and experience index is based on the academic classifications and experience levels of teachers in the district.} the number of students served in nonprofit special education institutions, and the unique challenges faced by small, rural, or newly created school districts.\footnote{New Mexico Public Education Department School Budget and Finance Analysis Bureau, \textit{How New Mexico Public Schools are Funded} 3 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf.}

The state equalization guarantee distributions are disbursed from the Public School Fund.\footnote{The Public Fund also contains funding for district transportation costs, as well as supplemental costs like out-of-state tuition, emergency financial need distributions, and unexpected capital outlay emergencies.} When allocating the money, the State reduces its distribution to a particular district by an amount equal to seventy-five percent of what that district was independently able to raise through taxes.\footnote{New Mexico Public Education Department School Budget and Finance Analysis Bureau, \textit{How New Mexico Public Schools are Funded} 3 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf; See also New Mexico Statute 22-8-25(B), Sharon S. Ball and J. Placido Garcia, \textit{New Mexico} 3, http://nces.ed.gov/edfin/pdf/StFinance/NewMexi.pdf.} Funds are distributed in a non-categorical manner, and are not earmarked for specific programs; within statutory guidelines, school districts are allowed to spend their funding according to local priorities.\footnote{National Education Association-NM, \textit{How Is New Mexico’s School Budget Crafted at the State Level} 3 (April 2004), http://nea-nm.org/PDF/sprtrn04materials/Crafting%20the%20State%20Budget.pdf.}
The wealthiest school district in New Mexico enjoys per-pupil funding of $6,520.00, while the poorest district in the state has per-pupil funding of $2,672.00—a difference of 144 percent. Outliers will always exist, however, because political concerns often make it unfeasible to eliminate all disparity by completely transferring the resources of one community to another. Indeed, when devising a school finance formula to equitably fund schools throughout the state, New Mexico sought to “equalize educational opportunity at the highest possible revenue level while minimizing the financial loss to the richest districts.” Accordingly, despite the lingering outliers, New Mexico is lauded as having one of the most equalized funding formulas in the nation.

The State’s equalization guarantee distribution accounts for more than ninety percent of operational revenue for school districts, and is the largest state distribution.

C. Federal Support for Equalization: Impact Aid

The Federal government has recognized the impediment that tax-exempt federal lands, such as Indian reservations, can pose to an LEA’s efforts to raise money for public schools through property taxes. Congress addressed this problem by enacting the Impact Aid program in 1950. The program provides funding to those school districts with compromised ability to levy taxes in support of public schools due to the presence of tax-exempt federal property within the district. The program also provides federal funds to local school districts to assist with the costs of providing

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43 See John Dayton, When All Else Has Failed: Resolving the School Funding Problem, 1995 B.Y.U. Educ. & L.J. 1, 5 (discussing the tension between the altruistic wish for education equity for all children and self-interest of wanting the best for ones own children).

44 New Mexico Public Education Department School Budget and Finance Analysis Bureau, How New Mexico Public Schools are Funded 3 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf.


46 New Mexico Public Education Department School Budget and Finance Analysis Bureau, How New Mexico Public Schools are Funded 3 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf.


“educational services to federally connected children.”49 “Federally connected children” are defined as those children whose parents are in the military, children who reside on Indian lands or federal property, and children whose parents are employed on federal property.50

As originally passed, the Impact Aid statute did not speak to whether a state could consider the Aid when allocating funding to LEAs. In 1968, Congress addressed this issue by amending the Impact Aid statute to prohibit states from taking into account the receipt of Impact Aid when allocating educational funding. In 1974, however, as states like New Mexico began efforts to equalize state funding, Congress became concerned that the “[i]nability to consider impact aid payments for the purposes of establishing an equalized level of expenditure seriously interfered with State plans for school finance reform.”52 Wanting to encourage state equalization efforts, Congress changed the Impact Aid program to include an exception: if a state administers a program that equalizes funding for school districts in the state, when determining funding allocations to each LEA the state may consider an LEA’s receipt of Impact Aid and offset state funding accordingly.53 The purpose of the exception was to “prevent Impact Aid from hindering states’ equalization efforts and [to prevent] duplicative compensation [to] school districts affected by federal activity (once by the federal government through impact aid and a second time by the state’s equalization program).”54

When Congress amended the Impact Aid statute to allow States to consider Impact Aid payments as long as the state ensured that operational

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53 20. U.S.C. 7709(b)(1)(2007). H.R. Rep. No. 93-805, at 42 (1974), reprinted in 1974 U.S.C.C.A.N. 4093, 4129 (“The amendment adopted by the Committee will allow States to consider impact aid payments...as local resources under State equalization formulas if the Secretary of HEW determines that such formulas provide appropriate recognition of the relative tax resources per child to be educated which are available to local educational agencies. The Committee has adopted this amendment because it believes that Federal education laws should not serve as an impediment to State actions designed to fulfill the judicial mandates and legislative actions removing the often close relationship between values of property and quality of education in a school district.”).
expenditures were equalized among LEAs, the job of defining whether a state was “equalized” was left to the discretion of the Secretary of Education. Accordingly, the Secretary promulgated regulations, the appendix of which outlined several steps for determining whether a state was equalized. First, LEAs within a state were to be ranked in order of per-pupil revenue. Second, the per-pupil revenue of the highest and lowest ranked LEAs would be compared to determine whether expenditures were indeed equalized throughout the state. If the disparity between the highest and lowest ranked LEAs was no more than twenty-five percent, the state would be considered equalized.

During the public notice-and-comment process, the Secretary expressed concern that outlier LEAs at the top and bottom of the ranked list would distort the true nature of a state’s operational funding. Commentators proposed various methods to help minimize the impact of outliers, including (1) excluding districts above the ninety-fifth and below the fifth percentiles based on the number of districts ranked, or (2) excluding schools above the ninety-fifth and below the fifth percentiles based on the number of pupils in each of the ranked school districts.

In response, the Secretary rejected the former suggestion and decided that percentile cut-offs would be based on the number of pupils rather than the number of school districts. As justification, the Secretary noted that percentile cut-offs based on the number of districts would apply the disparity standard in an unfair and inconsistent manner among states: in states with a small number of large districts, an exclusion based on the percentage of school districts might exclude a substantial percentage of the pupil population, resulting in a comparison that would not accurately reflect the experience of a significant portion of students in the state. Conversely, in states with a large number of small districts, the same approach might exclude only an insignificant portion of the pupil population.

The Secretary’s chosen formula was not without its own methodological infirmities. When applied to a state with a large number of small school districts, as is the case with New Mexico, an equalization formula that bases percentile cut-offs on student population will generally

57 Interim Regulations for Treatment of Payments Under State Equalization Programs, 41 F.R. 26320, 26323-26324 (June 25, 1976).
eliminate larger numbers of LEAs, thus making it more likely that disparities between school districts will be camouflaged. Despite this potential problem, the Secretary’s formula was promulgated in 1976; the permitted twenty-five percent disparity was contained in the body of the regulation, whereas the equalization formula which addressed methodology was produced in an appendix thereto.58 The Impact Aid statute itself did not codify any of the equalization standards or identify an equalization methodology.

An example is illuminating for purposes of understanding exactly how the Secretary’s formula is applied. New Mexico has 317,777 students, and eighty-nine school districts. Those districts can be ranked in order of per-pupil expenditures. Mosquero district is ranked first, with a per-pupil revenue of $6,520.00. Des Moines district is ranked eighty-ninth, with a per-pupil revenue of $2,672.00. If the equalization formula based percentile cut-offs on the number of school districts ranked, the first five and the last five districts would be disregarded so as to identify the per-pupil revenue for the LEA that serves pupil at the 95th and 5th percentile of the number of LEAs in the state. To determine disparity, the per-pupil revenue of the sixth-ranked Maxwell district, $3,591.00, and the per-pupil revenue of the eighty-fourth ranked Gadsden district, $2,829.00, would be compared. Because $3,591.00 exceeds $2,829.00 by more than twenty-five percent, the State would be deemed un-equalized for purposes of Impact Aid.

What the Secretary’s equalization formula requires instead, however, is that the ninety-fifth and fifth percentiles be determined by reference to a district’s student population. The effect is to identify the per-pupil revenue for the LEA that serves pupils at the ninety-fifth and fifth percentiles of the student population in the state. Applied to New Mexico’s eighty-nine LEAs, enough LEAs must be eliminated from the top of the ranking to account for 15,888 students, or as close to that figure as possible without going over. Similarly, enough LEAs have to be eliminated from the bottom of the ranking to account for 15,888 students, or as close to that figure as possible without going over. Under this formula, twenty-three LEAs are eliminated, and the per-pupil revenue of the eighteenth-ranked Penasco district, $3,259.00, is compared to the per-pupil revenue of the eighty-third-ranked Hobbs district, $2,848.00. Because $3,259.00 exceeds $2,848.00 by only 14.43 percent, New Mexico is considered equalized for purposes of Impact Aid.

In 1994, however, Congress re-authorized Impact Aid; this time, the statute itself codified the standards for determining whether a state’s educational funding is equalized.\(^{59}\) The statute reads that a state is equalized if “the amount of per-pupil expenditure made by, or per-pupil revenues available to, the local education agency in the State with the highest such per-pupil expenditures or revenues [does] not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.”\(^{60}\) The section also states that LEAs above the ninety-fifth or below the fifth percentile in per-pupil expenditures should be disregarded for purposes of determining disparity.\(^{61}\) Unlike the previous statute, which left equalization formulas entirely up to the Secretary, the language of this statute seemed to speak directly to how equalization was to be determined. It did not reference the weighted ranking methodology that the Secretary had employed for eighteen years.

In September of 1995, the Secretary promulgated regulations in furtherance of the re-authorization; those regulations reflected the statute’s mandate that districts be ranked by per-pupil expenditures, and that LEAs with per pupil expenditures or revenues above the ninety-fifth or below the fifth percentile would be disregarded for purposes of determining disparity.\(^{62}\) The regulations also, however, made reference to an appendix that outlined the “method for calculating the percentage of disparity…”\(^{63}\) This appendix essentially repeated the language from the 1976 appendix, and mandated that a weighted ranking based on the population of each school district in the state be made.

D. New Mexico and Impact Aid

Zuni Public School District and Gallup-McKinley School District (collectively referred to as “Petitioners”) have challenged the Secretary’s equalization formula. Petitioners also challenge the determination that New Mexico operates an equalized funding program which allows New Mexico to consider the Impact Aid received by both districts when determining state funding allocations.\(^{64}\) The Zuni Public School District is


\(^{62}\) 34 C.F.R. Section 222.162 (2007).

\(^{63}\) 34 C.F.R. Section 222.162 (2007).

\(^{64}\) Petition for a Writ of Certiorari, 127 S.Ct. 36 (2006).
located entirely within the Pueblo of Zuni Reservation, and has virtually no tax base. Similarly, over 65% of the Gallup-McKinley Public School District consists of Navajo Reservation lands which are not taxable. At stake is Petitioners’ share of approximately $50 million in Impact Aid, an amount by which New Mexico currently offsets the districts’ equalization distribution.

II. PROCEDURAL HISTORY

A certification hearing to determine whether operational funding for public education in New Mexico was equalized for the 1999-2000 fiscal year was held in 1999. There, the Secretary of Education determined that New Mexico’s funding scheme was equalized. Petitioners sought a hearing before a U.S. Department of Education administrative law judge to challenge both the method used to make the determination, and the determination itself. The judge there upheld the Secretary’s determination of equalization. Petitioners then appealed to the Secretary, who denied the appeal.

In 2004, Petitioners appealed to the Tenth Circuit Court of Appeals. A three-judge panel issued an opinion in December of 2004 in which two of the three judges affirmed the Secretary’s decision. Petitioners successfully petitioned for a rehearing en banc, and in February of 2006 a twelve-member panel issued a one-paragraph decision, stating that the Secretary’s decision was affirmed by virtue of an equally divided Court.

66 Brief for the Petitioners, 2006 WL 3350569, 4. The Impact Aid funding received by Petitioners accounts for almost one-half of all Impact Aid distributed to New Mexico LEAs. Brief for the Federal Respondent, 2006 WL 3742248, 10.
68 Zuni Public School District 89 v. United States Dep’t of Education, 393 F.3d 1158 (10th Cir. 2004).
69 Zuni Public School District 89 v. United States Dep’t of Education, 437 F.3d 1289, 1290 (10th Cir. 2006). The failure of the panel to issue a decision one way or another has led to confusion as to why cert was granted in the case, particularly in light of the absence of a Circuit split on the issue, and the relatively small size of Impact Aid when compared to other federal education programs. See Ebonne Ruffins, Zuni Public School District 89, et al. v. United States Department of Education, et al., Medill News Service, http://docket.medill.northwestern.edu/archives/003885.php, (interviewing Leigh Manasevit, Special Assistant Attorney General for New Mexico).
Petitioners appealed from the Tenth Circuit’s en banc decision. On September 26, 2006 the Supreme Court granted cert, and oral argument in the case was heard on January 10, 2007. Oral arguments focused exclusively on the application of Chevron review to the case.

[To be updated to reflect forthcoming Supreme Court opinion in case. Portions of article below may also be updated to reflect opinion.]

III. APPLYING CHEVRON REVIEW TO THE ZUNI CASE

A. The Theoretical Underpinnings of Chevron Review

The Chevron case involved a challenge to the Environmental Protection Agency’s (EPA) interpretation of the meaning of the phrase “stationary source” as found in the Clean Air Act Amendments of 1977. In 1981 the agency conducted a rulemaking proceeding and revised its interpretation of “stationary source” to refer to an entire plant. Referred to as the “bubble concept,” the effect was to allow a plant to increase pollution emissions from an individual pollution emitting device without triggering EPA intervention as long as net emissions for the plant were not increased as a whole. A plant could achieve this by increasing emissions from an individual pollution emitting device, while simultaneously decreasing emissions from another device. The D.C. Circuit determined that there was no clear definition of the phrase “stationary source” in the text or legislative history of the Clean Air Act, and went on to independently evaluate the EPA’s interpretation and determine that the interpretation was inconsistent with the objectives of the Clean Air Act.

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74 Natural Res. Def. Council Inc. v. Gorsuch, 685 F.2d 718, 725 (D.C. Cir. 1982) (“[T]he central issue confronting us is whether EPA’s discretion under the Clean Air Act is sufficiently broad to allow it to apply the bubble concept to the nonattainment program.”).
75 Natural Res. Def. Council Inc. v. Gorsuch, 685 F.2d 718, 726-27 (D.C. Cir. 1982) (“We must conclude that the bubble concept may not be employed in [the nonattainment provisions of the Clean Air Act]. The nonattainment program’s raison d’etre is to ameliorate the air’s quality in nonattainment areas... This purpose... rules out application of the bubble concept to the nonattainment program.”).
In reversing the D.C Circuit, the Supreme Court established a two-part test for reviewing an agency’s statutory interpretation: “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

The Court further elaborated that gaps and ambiguities in statutes indicate an “implied” delegation of interpretive authority. The two-part test articulated in Chevron has been described as “one of very few defining cases...in American public law,” and fundamentally impacted the relationship between courts and agencies in administrative law despite the intention of the test’s creators to issue just a routine environmental law opinion. Under Chevron review, a court defers to an agency’s interpretation of statute as long as the interpretation is a

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77 The assertion that ambiguity is an implied delegation has been challenged. See e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 445 (1989)(“A rule of deference in the face of ambiguity would be inconsistent with understandings, endorsed by Congress, of the considerable risks posed by administrative discretion. An ambiguity is simply not a delegation of law-interpreting power. Chevron confuses the two.”).
80 Ironically, scholars have noted that the Chevron Court never intended for the case to so fundamentally impact the law of deference and that papers of the late Justice Thurgood Marshall contains no evidence that any Justice considered the case any more than a routine opinion in environmental law. Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1257 (1997)(referring to the research of Robert V. Pervical in “Environmental Law in the Supreme Court: Highlights from the Marshall Papers”).
“permissible construction of the statute.”  

Courts have used various tests to determine what constitutes a “permissible construction,” including examining whether an interpretation is consistent with a statute’s plain language or meaning, underlying congressional intent or purpose, or legislative history.  

Chevron review, however, also recognizes agency expertise and political accountability. Courts have noted that deference to an agency’s permissible construction of a statute is justified in part because of an agency’s greater familiarity with constantly changing facts and circumstances surrounding the issue being regulated. Moreover, in areas where the subject matter of a statute is technical or complex, agencies are particularly authorized to fill in gaps where those statutes are silent. The Court also noted that although agencies are not directly accountable to the people, the Chief Executive is. Accordingly, it is appropriate for executive agencies to make policy choices and address competing interests that Congress either failed to resolve or intentionally left to the agency for administration.

85 The Chevron case itself made only implicit reference to agency expertise as a rationale for judicial reference, writing that the regulatory scheme at issue was “technical and complex,” and that Congress may have consciously desired the agency to “strike the balance. . . , thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.” Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 865 (1984).
86 Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 59 U.S. 120 (2000). See also, Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 103 (1983)(“It is well established that when a court is reviewing predictions within an agency's area of special expertise, at the frontiers of science, the "court must generally be at its most deferential.").
B. Chevron Review in the Zuni Case

Supreme Court briefs and oral argument in Zuni focused exclusively on whether the Secretary’s determination should be given Chevron deference. Recent Supreme Court jurisprudence, however, has complicated determinations of when Chevron review applies to administrative decisions. Coined “step-zero” analysis, scholars have identified three cases in which the Court has attempted to clarify the applicability of Chevron analysis: Christensen v. Harris County, United States v. Mead Corp., and Barnhart v. Walton.

Christensen involved the validity of an opinion letter issued by the Department of Labor concerning compensatory time. The Court determined that application of the Chevron framework was unwarranted because, similar to policy statements or enforcement guidelines, the letter lacked the force of law, and could be distinguished from those interpretations arrived at after formal adjudications or notice-and-comment rulemaking.

Mead further clarified the relationship between agency rulemaking and the processes used by agencies to interpret statutes. Deciding that a tariff ruling by the United States Custom Service was not entitled to Chevron deference, the Court explained that Chevron analysis was applicable when “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” A good indication of such delegation is congressional authorization to “engage in the process of rulemaking or adjudication that

agency is independent or with the executive branch; high levels of presidential involvement with executive branch agencies warrant higher degrees of deference.

The Question Presented on certiorari was “[w]hether the Secretary has the authority to create and impose his formula over the one prescribed by Congress and through this process certify New Mexico’s operational funding for fiscal year 1999-2000, thereby diverting the Impact Aid subsidies to the State and whether this is one of the rare cases where this Court should exercise its supervisory jurisdiction to correct a plain error that affects all State school districts that education federally connected children.” Supreme Court docket, http://www.supremecourtus.gov/docket/05-1508.htm.


produces regulations or rulings for which deference would be claimed.” 96 Mead also noted, however, that Chevron analysis might be applicable even when formal procedures were not employed by the agency.97

Finally, Barnhart built upon the principle in Mead which suggested that Chevron analysis might be applicable even when an agency did not use formal procedures and the agency’s actions lacked the force of law.98 In ruling that the Social Security Administration’s initial use of less formal procedures to develop regulations did not preclude Chevron deference, the Court explained that Chevron deference would depend on the “interpretive method used and the nature of the question at issue.”99 Writing for the Court, Justice Breyer rejected a simple deference rule, and instead advocated for a case-by-case inquiry which would examine “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.”100

Taken together, the three cases suggest that the application of the Chevron framework, and the ultimate extension of Chevron deference, will depend on Congress’ instructions in a particular statutory scheme. Although, the grant of authority to act with the force of law is sufficient, it is not a necessary condition for a court to find that Congress has granted an agency the authority to interpret ambiguous statutes.101

The Secretary of Education is authorized by law to “make, promulgate, issue, rescind, and amend rules and regulations” in order to govern programs administered by the Department of Education, and carry out functions vested in the Secretary by law.102 At issue in Zuni is the Secretary’s interpretation through regulation of the Impact Aid statute the Department is charged with administering. As such, this case involves the type of rulemaking through regulation which was recognized in Mead as

102 20 U.S.C. 1221e-3 (2007)(“The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.”).
warranting Chevron analysis. Although the Secretary declined to follow notice-and-comment rulemaking procedures when promulgating the regulations at issue, the APA’s “good cause” exemption allows agencies to make rules that are binding and have the force of law, even without a notice-and-comment process.\textsuperscript{103} In this case, the Secretary utilized the exemption.\textsuperscript{104}

Moreover, the Impact Aid statute explicitly directs the Secretary of Education to determine whether a state has in effect a program that equalizes expenditures for public education, and to certify that state’s program as equalized if so.\textsuperscript{105} Only then may a state offset their education funding to a district by the amount of Impact Aid received by that district. These adjudications carry the force of law, as they are binding on the states. In this sense, the Secretary is engaging in the type of adjudication that was also recognized in \textit{Mead} as warranting Chevron analysis.

In light of the rulemaking and adjudicatory nature of the Secretary’s actions, the Supreme Court is likely to apply Chevron analysis. Accordingly, the Court’s opinion will focus on the two prongs of Chevron review: (1) whether Congress has spoken directly to how equalization is to be determined in the Impact Aid Statute; and (2) assuming Congress was silent or ambiguous regarding equalization determinations, whether the Secretary’s determination is a permissible and reasonable interpretation of the statute.\textsuperscript{106}

Application of Chevron review to the Zuni case will not be simple despite the doctrine’s seemingly straightforward two-part test. Briefs filed in the Supreme Court, as well as oral argument, focused heavily on the first prong of Chevron: whether Congress has spoken directly to the method which must be used for purposes of determining whether a state operates an equalized education system. Petitioner’s brief argued that the explicit

\textsuperscript{104} Brief for Respondent, 2006 WL 3740364.
\textsuperscript{105} 20 U.S.C. 7709(b)(1) (2007)(“A State may reduce aid to a local education agency that receives a payment under [Impact Aid]…if the Secretary determines…that the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State.”); 20 U.S.C. 7709(b)(2)(B)(“In making a determination under this subsection, the Secretary shall…”); 20 U.S.C. 7709(c)(3)(A)(“If the Secretary determines that a program of State aid qualifies under subsection (b) of this section, the Secretary shall certify the program and so notify the State.”).
\textsuperscript{106} Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984)(Under Chevron review, the Court must first determine whether the statute in question is silent or ambiguous as to the precise question decided by the agency.).
language used by Congress in the 1994 statute requires that the Secretary disregard LEAs with per-pupil expenditures or revenues above the ninety-fifth and below the fifth percentile of such expenditures in the state. Accordingly, an equalization formula which requires a weighted ranking of LEAs based on population is a direct contradiction to Congressional intent and is completely precluded by the language of the statute.\textsuperscript{107} Petitioners point out that counsel for both the Department and the state of New Mexico admitted to this conflict during the administrative hearing on the issue.\textsuperscript{108}

Petitioners also argue that even if Congress was not entirely clear, and the second step of Chevron review is warranted, traditional tools of statutory construction, including performing a “natural reading,” considering “interpretive clues” from Congress, and viewing the statute in its “textual setting,” all illustrate that as of 1994 the Secretary was precluded from using his weighted average. Petitioners note that Congress was aware that the Secretary used a weighted formula and could have easily adopted language incorporating the formula into the statute but declined to do so.\textsuperscript{109} Moreover, because the two formulas are mutually exclusive, it is unlikely that Congress could have implicitly contemplated the weighted average.\textsuperscript{110} Finally, the Secretary’s formula is completely at odds with Congressional intent to ensure that LEAs eligible to receive Impact Aid actually receive the benefit of that Aid unless the state’s educational funding is equalized.\textsuperscript{111} Therefore, the Secretary’s interpretation is not “permissible.”\textsuperscript{112}

To the extent that Chevron and its’ progeny have reinforced the cardinal rule that Chevron review begins first with an examination of the text, a plain reading of the Impact Aid statute seems to reinforce Petitioners’ position. In response, however, New Mexico argues that the language of the statute does not unambiguously answer the “precise question at issue;” that is, statutory language does not address

\textsuperscript{108} Brief for the Petitioners, 2006 WL 3350569, 25. Noting that Department counsel explained that the only way in which ambiguity in the language of the Impact Aid statute could be proven was by reference to the statutory purpose of the program. Noting also that New Mexico Department of Education’s counsel admitted that on its face, the Departments’ regulations were “probably not” consistent with the language of the Impact Aid statute.
\textsuperscript{109} Brief for the Petitioners, 2006 WL 3350569, 35.
\textsuperscript{110} Brief for the Petitioners, 2006 WL 3350569, 36-37.
\textsuperscript{111} Brief for the Petitioners, 2006 WL 3350569, 37, 46.
\textsuperscript{112} Brief for the Petitioners, 2006 WL 3350569, 46.
“whether, when applying the ninety-fifth and fifth percentile exclusions set forth in the statute, the Secretary is required to eliminate five percent of the LEAs from each end of the spectrum...or the outlying five percentiles of pupils...”

Furthermore, the language of the Impact Aid statute is ambiguous; although the statute instructs the Secretary to disregard LEAs with per-pupil expenditures above and below certain percentiles, the statute does not specify a methodology for doing so. The statute neither provides the Department with directions for determining the ninety-fifth and fifth percentiles of “per-pupil revenues,” nor does it make clear what is meant by the phrase “per-pupil expenditures or revenues above the ninety-fifth or below the fifth percentile of those expenditures or revenues in the State.” What Petitioners fail to consider, argues New Mexico, is that “per-pupil revenues in the state” may refer to all per-pupil revenues for which each LEA is responsible. Accordingly, every student in the state has a “per-pupil revenue” which must be accounted for in the equalization formula.

The rest of New Mexico’s arguments are devoted to proving that the Secretary’s interpretation is indeed permissible under step-two of Chevron review, and make heavy use of legislative history and congressional intent analysis. Respondent notes that the Secretary historically maintained three regulatory options under which a state could qualify as equalized, and that it was at the Secretary’s request that Congress even altered the Impact Aid regulatory scheme in 1994. In fact, the Secretary drafted what would become the language of the re-enacted Impact Aid program, and that language referenced an equalization method to be placed in the appendix. As such, despite the language of the statute, it would be illogical to believe that the Department was rejecting its own disparity test, or advocating that Congress adopt a disparity test based on a formula the Secretary had already rejected in 1976. Rather, the Secretary’s intent to include in the equalization formula a weighted ranking based on student population was imputed to Congress. Moreover, the statutory scheme as a whole supports the Secretary’s interpretation as illustrated by the fact that Impact Aid awards are calculated using a method that considers the

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118 Brief for Respondent, 2006 WL 3740364, 30-31, 34.
119 Brief for Respondent, 2006 WL 3740364, 30-31, 34.
pupil population of an LEA. Finally, Petitioners’ formula removes only eleven LEAs for purposes of determining equalization. According to New Mexico, eleven LEAs amount to an insignificant portion of the student population and fails to completely eliminate anomalous outliers.

The Department of Education, as federal respondent, makes an additional statutory construction argument in support of the Secretary’s interpretation. The same Act through which Congress enacted Impact Aid also enacted the Education Finance Incentive Grant Program (EFIG). EFIG is another program that seeks to encourage equitable education funding within states. Not only does the statutory language of EFIG require the Secretary to consider the number of pupils in each LEA when assessing expenditure disparity, but the EFIG program also extends favorable treatment to a state as long as that state meets the disparity standard described in the regulations promulgating the 1994 Impact Aid program. To be sure, the language of the EFIG statute makes reference only to the body of the Impact Aid regulations, and makes no reference to the weighted ranking requirement included in the appendix of the regulations. Nevertheless, the Department of Education considers the reference to Impact Aid regulations as encompassing the appendix and argues that Congress can not be considered to have explicitly endorsed the Secretary’s Impact Aid formula for EFIG, but implicitly prohibited it under the Impact Aid program.

120 Brief for Respondent, 2006 WL 3740364, 27.
121 Brief for Respondent, 2006 WL 3740364, 30.
123 U.S.C. 6337(b)(3)(A)(ii)(II)(2007)(“Variation: In computing coefficients of variation, the Secretary shall weight the variation between per-pupil expenditures in each local educational agency and the average per-pupil expenditures in the State according to the number of pupils served by the local educational agency.”).
125 34 C.F.R. § 222.162(a) (2007)(a)(“Percentage disparity limitation: The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.”).
IV. THE CONSTRAINTS OF CHEVRON REVIEW

Missing, however, from the briefs submitted in the case is detailed discussion about the effects of the equalization formulas on New Mexico public school children in terms of horizontal equity, vertical equity, or adequacy.\textsuperscript{127} Briefs submitted to the Court neither assessed whether the Secretary’s interpretation has detrimental effects on education finance in the two challenging districts, nor inquired into whether the Secretary’s formula potentially masks an un-equalized education funding scheme; both outcomes would be contrary to Congressional intent in enacting Impact Aid.

Briefs also neglected to address the failure of the Secretary to engage in notice-and-comment rulemaking after the changes to statutory language in 1994,\textsuperscript{128} and never explored the sincerity of the Secretary’s assertion that the interpretation allows for the most consistent application of Impact Aid state-to-state. The fact that only three states—New Mexico, Kansas, and Alaska—even aspire to prove equalized funding for purposes of Impact Aid begs the question of why the Secretary cannot make determinations of equality on a case-by-case basis, thus avoiding the problem of potentially masking funding inequalities.

Oral argument, which focused almost entirely on the doctrinal parameters of Chevron review, did not fare any better than the briefs. The hour largely mirrored briefs submitted in the case, and was limited to the question of whether Congress actually spoke to the precise question at issue, debates on what could be gleaned from legislative history, and the

\textsuperscript{127} Only an amicus brief submitted by New Mexico public school districts in support of Respondents draws the Court’s attention to possible funding losses that will be incurred by other school districts if New Mexico is deemed un-equalized, is no longer allowed to consider Impact Aid in its funding allotments, and thereafter fails to find additional funding to offset the loss. The brief goes on, however, to primarily argue that a sudden change in status would be harmful to school districts, and requests that the Court grant only prospective relief. Brief of Amici Curiae Public School Districts in Support of Respondent, 2006 WL 3742249, 11-12, 22-23.

\textsuperscript{128} The Department maintains that it declined to engage in notice-and-comment procedures because the regulations were essentially a “re-issuance of regulations that had initially been promulgated in 1976, and those preexisting regulations were issued through notice-and-comment procedures.” Brief for the Federal Respondent, 2006 WL 3742248, 40.
definition of the word “percentile.” The latter topic created mass confusion among the Justices.\textsuperscript{129}

The nearly exclusive focus on the purely doctrinal aspects of Chevron review in the case has been overwhelmingly constraining. The parties’ efforts to decide “who gets to decide” led to a complete failure to understand the policy implications of the formulas at the level where it counts—public school education in New Mexico. The constraints of Chevron review also eclipsed an opportunity for the Department to prove that its decision-making process was comprehensive, that it brought agency expertise to bear in making a decision, and that Congressional goals are achieved through the Department’s interpretation.

The narrow presentation of the case will prove particularly problematic if the Court’s review proceeds to step-two of Chevron analysis. Conflicting, but equally plausible, interpretations of the plain language and legislative history of the Impact Aid statute make it likely that the Court will find that Congress did not speak directly to the question at issue.\textsuperscript{130} Even Petitioners admitted during the administrative hearing

\textsuperscript{129} See, e.g., Transcript of Oral Argument Transcript at 11 (Justice Breyer: “What are, what is it we are distributing? A simple question, I guess, for a statistician. I unfortunately am not one and can’t find one, so I have no idea what this statute means.”)

\textsuperscript{130} Scholars have opined as to how much clarity, or lack thereof, a Court must encounter before moving to step-two of Chevron review. \textit{See e.g.}, Mark Seidenfeld, \textit{A Syncopated Chevron: Emphasizing Reasoning Decisionmaking in Reviewing Agency Interpretations of Statutes}, 73 Tex. L. Rev. 83, 94-95 (November 1994)(Noting that deferential courts, who read Chevron as a strong signal from the Supreme Court that courts should not interfere with agency interpretation unless the statute clearly expresses a contrary meaning on the precise question at issue, generally find statutes silent or ambiguous at step one and tend to affirm agency interpretations at step-two. In contrast, active courts read Chevron as a limited suggestion that Courts may overturn an agency interpretation only if the court is certain about congressional intent regarding the meaning of the statute. Accordingly, active courts tend to find statutes clear at step one of Chevron review, and less often reaches step-two.). \textit{See also} Gary Lawson, \textit{Proving the Law}, 86 Nw. U. L. Rev. 859 (1992)(arguing that Courts must know what counts as evidence of a statute’s meaning, how significant the evidence is, and when enough evidence has been gathered to warrant a legal truth about statutory meaning. Once such theories are established, the answer to the question of statutory meaning varies based on the standards of proof required); \textit{How Clear is Clear}, 118 Harv. L. Rev. 1687 (March 2005)(arguing that at step-one of Chevron review, courts should consider the institutional preferences of Congress when deciding what level of clarity is needed to determine that Congress spoke clearly to the precise issue at question).
below that the statute “may be ambiguous [as] to the precise formula that is being used.” At the second prong of review, the Court will be tasked with determining whether the Secretary engaged in a “permissible” interpretation of the Impact Aid statute. Unable to glean a clear answer from legislative history or plain meaning of the statute, the determination of whether the interpretation was “permissible” will involve an inquiry into whether the effects of the Secretary’s interpretation are in line with congressional intent upon enacting Impact Aid. Once there, however, the Court will have insufficient information to properly determine whether the Secretary’s decision-making process was thorough, and whether the Secretary’s interpretation, in both theory and practice, is in furtherance of Congressional intent.

A. Congressional Intent and Policy Implications

As discussed earlier, Chevron review strikes a balance between deference to Congressional intent, and deference to agency expertise in the policy arena. The Chevron Court emphasized the latter when noting that “…policy arguments are more properly addressed to legislators or administrators, not to judges.” Even when, however, Congress is deemed to have delegated policy decisions to agencies through ambiguous statutory language, the agency’s policy decisions must still be reasonable in light of Congressional intent; those policy decisions must be consistent with a statute’s underlying purpose, plain meaning, or legislative history. In light of this mandate, a policy decision by an agency that produces consequences contrary to Congressional intent can hardly be deemed to be a “permissible construction.”

Impact Aid was originally enacted to ensure that students educated in areas impacted by federal lands are not penalized by the inability of their school district to levy taxes against those lands, and to provide support for the equalization efforts of the states. The statute was amended in 1974

with the intent of avoiding duplicative compensation to LEAs impacted by federal lands.\textsuperscript{138} The statute accomplishes all three goals by providing aid to LEAs, while also allowing states to consider the aid received by LEAs if the Secretary considers that state equalized.\textsuperscript{139}

True to its original purpose, Impact Aid goes to many school districts on or near American Indian reservations. The Aid often comprises significant portions of these school district budgets,\textsuperscript{140} and helps the districts address unique learning challenges faced by Native American school-children. When cuts to Impact Aid are made, school districts on or near tribal lands often suffer the most, leading Senator Tom Daschle to note that cuts to Impact Aid make it “harder for Native Americans to receive [the] high quality education they deserve.”\textsuperscript{141} In the aftermath of Aid cuts, school districts like Lapwai School District in Idaho, located within the Nez Perce Indian Reservation, have to choose between paying for extra academic programs that help students excel academically, and making desperately needed capital improvements.\textsuperscript{142}

Petitioners are similarly compromised. Zuni and Gallup have felt the impact of insufficient funding for education, and argue that allowing New Mexico to reduce their equalization distribution by the amount received in

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\textsuperscript{138} \textsc{U.S. Gen. Accounting Office, School Finance: State Efforts to Equalize Funding Between Wealthy and Poor Districts, GAO/HEHS 98-92, 16 (June 6, 1998)} (The purpose of the exception was to “prevent Impact Aid from hindering states’ equalization efforts and [to prevent] duplicative compensation [to] school districts affected by federal activity (once by the federal government through impact aid and a second time by the state’s equalization program).”)
\textsuperscript{139} \textsc{20. U.S.C. 7709(b)(1).}
\textsuperscript{141} \textsc{David Melmer, South Dakota Schools Lose Due to Cuts in Impact Aid, Indian Country Today}, March 19, 2003, www.indiancountry.com/content.cfm?id=1048084252.
\textsuperscript{142} See \textsc{Bryan Jernigan, Lapwai School District Depends on Impact Aid, Indian Country Today}, February 20, 2003, www.indiancountry.com/content.cfm?id=1045754055. Despite the success of reading programs that have brought significant percentages of students to grade level, the district must consider foregoing the programs to instead address building ventilation and mold problems that are causing illness in teachers and students.
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Impact Aid\textsuperscript{143} has led to a “shortfall of support for some of the neediest public school students in the state.”\textsuperscript{144} Petitioners emphasize that educating Native American children in rural, isolated environments entails addressing special problems which stem from poverty, language differences and cultural differences.\textsuperscript{145} Just twenty-eight percent of Native American ninth-graders in New Mexico are at reading level, compared to thirty-five percent of the State’s Hispanic students, and sixty-two percent of the State’s Anglo students.\textsuperscript{146} More than eighty percent of students in the Gallup district are Native American,\textsuperscript{147} and ninety-nine percent of students in the Zuni district are members of the Zuni Tribe.\textsuperscript{148} Tutoring and other academic programs for which Impact Aid pays would help close the performance gap of these students.

Moreover, the districts’ compromised taxing capacity has impeded their ability to fund capital improvements. New Mexico’s capital outlay funding system, which had previously been declared unconstitutional due to a failure to abide by the state constitution’s “uniformity clause,”\textsuperscript{149} is continually being monitored by a New Mexico District Court. Through the Public School Capital Outlay Act, the State evaluates the adequacy of facilities in each district and provides funding for facilities based upon relative need.\textsuperscript{150} Wealthier districts with higher bonding and taxing capacities, however, are also able to approve additional local property levies, and issue general obligation bonds to independently raise additional

\textsuperscript{143} New Mexico Public Education Department School Budget and Finance Analysis Bureau, \textit{How New Mexico Public Schools are Funded} 11 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf, (“The state takes credit for 75 percent of all Impact Aid revenues flowing to local districts…when calculating the state equalization guarantee.”).
\textsuperscript{145} Petition for Writ of Certiorari, 2006 WL 1491269, 18.
\textsuperscript{148} Zuni Public School District Background, http://www.zuni.k12.nm.us/ZPSDBackground.html.
\textsuperscript{149} Zuni School v. State, CV-94-14-II (Dist. Ct. McKinley County, Oct 14, 1999).
\textsuperscript{150} New Mexico Public Education Department School Budget and Finance Analysis Bureau, \textit{How New Mexico Public Schools are Funded} 8 (August 2006), http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20schools%20are%20fundedFY0806.pdf.
resources for capital improvements. Moreover, districts with political clout may be able to obtain direct legislative appropriations for capital outlay projects, as was the case in May of 2006 when Albuquerque’s West side received its share of an extra $90 million for capital projects in high-growth areas.\footnote{Access: Education Finance Litigation, School Funding Policy and Advocacy, \textit{New Mexico Plaintiffs Claim State is Backtracking on Capital Funding}, \url{http://www.schoolfunding.info/news/litigation/5-11-06nmfacilitiesreview.php3}.

\footnote{Access: Education Finance Litigation, School Funding Policy and Advocacy, \textit{New Mexico Historical Background}, \url{http://www.schoolfunding.info/states/nm/lit_nm.php3}.}

Unfortunately, these additional options are not available to poorer districts with impaired taxing capabilities. Accordingly, facilities in low-property-wealth districts like Zuni and Gallup have deteriorated.\footnote{Gabriela C. Guzman, \textit{Civil War Over School Funding}, \textit{ALBUQUERQUE JOURNAL}, January 7, 2007, at B1.} In the Gallup school district, construction delays have forced middle schools to operate out of portable classrooms with no running water and inadequate heating.\footnote{Gabriela C. Guzman, \textit{Civil War Over School Funding}, \textit{ALBUQUERQUE JOURNAL}, January 7, 2007, at B1.} Both districts need the additional resources provided by Impact Aid to repair and replace dilapidated school buildings.\footnote{Gabriela C. Guzman, \textit{Civil War Over School Funding}, \textit{ALBUQUERQUE JOURNAL}, January 7, 2007, at B1.}

Additional funding is also needed to provide housing and salary incentives for teachers in the two districts.\footnote{Gabriela C. Guzman, \textit{Civil War Over School Funding}, \textit{ALBUQUERQUE JOURNAL}, January 7, 2007, at B1.} In Zuni, where district-provided housing is often the only option for teachers who are not tribal members, some of the homes are over fifty years old. Teachers living there have had to deal with raw sewage backing up into their homes, or deteriorated construction which in one trailer led to a toilet literally falling through the floor.\footnote{N.M. Stat. Ann. § 22-8-24 (2007); New Mexico Public Education Department School Budget and Finance Analysis Bureau, \textit{How New Mexico Public Schools are Funded} 5 (August 2006), \url{http://www.ped.state.nm.us/div/fin/school.budget/how.nm.schools.are.fundedfy0806_files/How%20NM%20Schools%20are%20fundedFY0806.pdf}, (noting that calculations of program cost for each district considers a district’s “training and experience index”); Sharon S. Ball and J. Placido Garcia, \textit{New Mexico, 5-6}}
that depend on national programs like Teach for America to recruit recent
college graduates to teach, rural isolation and poor conditions compromise
the districts’ ability to hire and retain highly-qualified teachers.158 The
result is that wealthier and more desirable districts easily retain their
teachers and receive additional funding to support their higher salaries,
while the impacted districts do not receive additional funding, but have to
pay higher salaries nevertheless to attract instructors. Zuni Superintendent
Kaye Peery explains that additional funding is desperately needed to attract
and retain highly-qualified teachers for the rural district.159

Accordingly, the Secretary’s formula may allow New Mexico to
ignore not a problem of horizontal equity, but one of vertical equity and
adequacy. New Mexico’s funding formula does result in per-pupil
expenditures that seem equalized on paper. For the 2000 fiscal year, a per-
pupil revenue of $3,320.00 placed Zuni at thirteenth in a ranking of
districts throughout the state. Although the first ranked Mosquero district
still had $3,200.00 more in per-pupil revenues, Zuni’s per-pupil
expenditure for that year was just above the mean of $3,192.08.160
Nevertheless, the unique needs of impacted districts populated by Native
American students warrant additional funding in order to successfully
provide adequate educations that result in academic achievement.

Although New Mexico’s funding formula does use cost differentials,
the hardships suffered by both districts suggest that the formula fails to
account for the districts’ significant academic, recruiting, and facilities
challenges. As one Zuni school board member said, “educating a student
here is not the same as in Albuquerque. It takes a little bit more.”161 If
both the Zuni and Gallup districts were allowed to receive Impact Aid for
the 2005-2006 school-year without a corresponding decrease in their state
equalization distributions, the districts would have received an additional
4.6 million and 15.6 million, respectively, allowing them to implement
additional academic support programs and make needed capital
improvements. This additional funding would not be the “duplicative”

http://nces.ed.gov/edfin/pdf/StFinance/NewMexi.pdf (explaining how New
Mexico’s “training and experience index” is determined and applied to determine
program costs). See also Petition for Writ of Certiorari, 2006 WL 1491269, 18.
158 Gabriela C. Guzman, Civil War Over School Funding, ALBUQUERQUE
159 Gabriela C. Guzman, Civil War Over School Funding, ALBUQUERQUE
161 Gabriela C. Guzman, Civil War Over School Funding, ALBUQUERQUE
compensation that Congress sought to prevent, but the supplemental funding needed by the districts to educate its students in a way that is comparable to other districts in the states with fewer special needs. Moreover, as admitted by New Mexico Education Secretary Veronica Garcia, the $50 million loss incurred by the State due to the inability to take credit for Impact Aid payments is insignificant, particularly when compared to the $2.2 billion the State spends annually on public education,\textsuperscript{162} and in light of the fiscal strength of New Mexico.\textsuperscript{163}

State aid that supplements a district’s shallow tax base may fall far short of the amount needed to educate underachieving, isolated students in a district with deteriorating facilities. Accordingly, whether a state’s funding system provides enough to meet the fair cost of adequately educating students with special needs can not be accurately assessed by a determination of horizontal equity alone. In the same vein, the Secretary’s formula accounts for horizontal equity in New Mexico, but fails to account for adequacy in New Mexico.\textsuperscript{164} Arguably, the Secretary has little control over the equalization formula preferred by Congress. Technically referred

\textsuperscript{162} Reply Brief for the Petitioners, 2006 WL 3854045, 16-17 (noting that Impact Aid payments amount to only 2.6 percent of New Mexico’s educational budget). \textit{See also} Gabriela C. Guzman, \textit{Civil War Over School Funding}, \textsc{Albuquerque Journal}, January 7, 2007, at B1 (interview with New Mexico Education Secretary Veronica Garcia, during which she expressed that the issue is not the money, but the questioning of “the philosophical foundation of [New Mexico’s] funding formula…”).

\textsuperscript{163} Press Release, State of New Mexico, Office of the Governor, Governor Richardson Releases Statement on New Revenue Estimates (October 23, 2006), http://www.governor.state.nm.us/press/2006/oct/102306_02.pdf (announcing that an additional $576 million in recurring revenues is available for the 2007 legislative session, that $913 million is estimated to be available for capital outlay projects, and that $142 million is estimated to be set aside for efforts to modernize schools across the State).

\textsuperscript{164} \textit{See e.g., High Court to Rule on Equalization}, IMPACT ’07 (National Association of Federally Impacted Districts, Washington, DC), January-February, at 8, http://www.nafisdc.org/images/Jan-Feb%2007%20Impact%20Newsletter.pdf. (“[T]he current position held by the Department…does not insure that all children within a state receive a “adequate education,” but rather only recognized a form of spending per pupil that, although equalizes per-pupil spending as interpreted by the regulations, makes no attempt to ensure students within a state are receiving adequate education.”)
to as a “restricted range ratio,” the Department’s practice of comparing revenue at the ninety-fifth and fifth percentiles assesses the degree of horizontal equity; this is true whether percentile cut-offs are based on the number of LEAs or student population. Congressional language mandates the restricted range ratio, and the Secretary can not independently replace the ratio with a formula which it believes takes better account of vertical equity.

The Secretary can, however, consider the consequences of both versions of the restricted range ratios available. Without the additional aid, the two school districts are forced to address the very situation Congress intended to prevent: an inability to effectively address achievement gaps, maintain adequate facilities, or attract qualified teachers because of the presence of tax-exempt federal lands in the school district. This consequence suggests that use of the harder-to-meet equalization formula, which bases percentile cut-offs on the number of LEAs, might have been warranted. Such a choice is even more appropriate in light of plain statutory language that seems to require it, and Congressional intent to insulate impacted districts from the burden of tax-exempt federal lands. The constraining nature of Chevron review, however, led the Court to ignore the consequences of the Secretary’s interpretation, or evaluate how those consequences informed the Secretary’s decision. Accordingly, the Court will be unable to accurately determine whether the Secretary’s interpretation and ensuing choice of formula are in accordance with Congressional intent.

B. Agency Expertise and the Department of Education

Ensuring the quality of primary and secondary education is a job historically left to state and local governments. Congress established the Department of Education in 1979 as a cabinet-level agency through the Department of Education Organization Act (DEOA). Although one of the Department’s seven stated purposes is to “supplement and complement the efforts of States” in improving the quality of education, the Act specifically notes that the establishment of the Department did not “increase the authority of the federal government over education or diminish the responsibility for education which is reserved to the States

165 ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 235-36 (Allyn and Bacon 1995)(explaining that the federal range ratio used by the federal government in the Impact Aid program is mathematically equivalent to the restricted range ratio).
and the local school systems...”168 In addition, neither the Secretary nor the Department of Education can exercise any “direction, supervision, or control over the curriculum [or] program of instruction...of any educational institution, school, or school system...except to the extent authorized by law.”169

The emphasis on local control of education has similarly been reinforced by the Supreme Court. In Milliken v. Bradley the Court emphasized that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools.”170 Likewise, the Court in U.S. v. Lopez noted that although Congress has authority under the Commerce Clause to regulate commercial activities that affect the educational process, that authority does not include the authority to regulate “each and every aspect of local schools.”171 As such, schools are controlled locally and the majority of decisions that affect hiring, curriculum and funding are made by individual school districts.172

Accordingly, the Department interacts at an arm’s-length distance with local education agencies.173 Even the No Child Left Behind Act of 2001 (NCLB),174 a law that represented a dramatic departure from the federal government’s traditional hands-off approach to state and local education,175 evinces an effort on the part of federal lawmakers to avoid taking too heavy a hand in public schools operation: NCLB does not impose any uniform federal student assessment measure upon the states,

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175 Historically, the federal government has preferred to suggest, and encourage states to adopt, voluntary reform goals. In contrast, NCLB is the first federal education program to impose requirements that students progress to a measure of proficiency within a certain time period.
opting instead to require individual states to develop assessments and submit them for approval to the Department of Education.\textsuperscript{176}

This is not to say, however, that the federal government has played absolutely no role in ensuring quality education. To the contrary, the federal government administers hundreds of educational aid programs, including Title \textsuperscript{177} of the Elementary and Secondary Education Act—the largest single federal investment in schooling.\textsuperscript{178} Historically, the federal government has also supported the equalization of educational opportunities for students and has played a major policy role in the education of “insular and discrete”\textsuperscript{179} student populations.\textsuperscript{180} Furthermore, the Department of Education serves as a “clearinghouse” for ideas, facts and figures related to the improvement of education,\textsuperscript{181} monitors local

\textsuperscript{176} Michael Heise, \textit{The Political Economy of Education Federalism}, 56 Emory L.J. 125, 141 (2006) The one aspect of the Act which imposes a test, the requirement for participation in the National Assessment of Education Progress (NAEP) testing program, does not trigger consequences for a state or district’s failure to participate.

\textsuperscript{177} The Department of Education has, however, been criticized for its failure to issue guidelines governing the funds’ use, the lack of which has led to abuse. Molly S. McUsic, \textit{The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation}, in \textit{Law and School Reform}, 88, 94 (Jay P. Heubert ed., Yale University Press 1999).


education agencies, and enforces federal anti-discrimination laws in federally funded educational institutions through the Department’s Office of Civil Rights.

The Department of Education has also played a role in ensuring quality education for Native American students in particular. The Department maintains an Office of Indian Education, the mission of which is to “support the efforts of local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities to meet the unique educational and culturally related academic needs of American Indians…so that these students can achieve to the same challenging state standards as all students.” Moreover, the Department is familiar with the unique challenges faced by children living on Indian reservations, and has noted that “Impact Aid is often an extremely important source of revenue for school districts that serve children living on Indian reservations and other Indian lands because these districts frequently have a very small local property tax base from which to raise revenues for schools…”

Accordingly, the Department possesses considerable expertise which should have been brought to bear in considering the consequences of its

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182 School accountability as maintained by the Department of Education, however, can differ from the accountability provided by agencies like the Food & Drug Administration (FDA). Paul Weckstein, co-director of the Center for Law and Education, has written about the dearth of accountability regarding federal programs that regulate local schools in the area of standards-based reform. When FDA issues rules regarding medication, he argues, the norm is that doctors will become immediately aware of those rules, that there will be a high degree of compliance, and that the agency will be ready to take remedial action should it discover that regulations have not been followed. In contrast, most teachers are not familiar with the substantive provisions of the federal programs that regulate their schools, and non-compliance is not considered outside the norm. Paul Weckstein, Enforceable Rights to Quality Education, in LAW AND SCHOOL REFORM, 306, 319 (Jay P. Heubert ed., Yale University Press 1999).


application of the federal equalization formula. In particular, the Department should understand the methodological flaws inherent in the formula it uses to determine equalization among the states. The “restricted range ratio,”186 compares revenue at the ninety-fifth and fifth percentiles to assess the degree of horizontal equity in a state school system. The ratio, however, only measures two extreme points in a data set. Consequently, the restricted range ratio is a poor indicator for assessing the degree of equity in an entire education system,187 and fails to provide information concerning the entire distribution of per-pupil revenues. As a result, the formula is limited in its ability to detect inequity in a school finance system,188 and fails to consider the amount of vertical equity needed to result in adequate education for all students.

Although the Secretary can not mandate the use of an alternate formula, the Secretary can use its understanding of the methodological flaws in the formulas, and the context of equalization in New Mexico, to make a decision about which formula to use. The Secretary is aware that once deemed equalized, a state is likely to reduce its funding to impacted districts by the amount of Aid received by those districts. The Department must also be aware that it is precisely those districts with compromised taxing capabilities that are most likely to be affected when a state exercises its option to offset Impact Aid. Moreover, it is foreseeable that impacted districts populated by Native American students are more likely to have special needs that warrant additional funding to ensure adequacy. In light of the context of equalization in New Mexico, and the knowledge that the formula which bases percentile cut-offs on student population is particularly problematic in New Mexico, the Secretary should have considered using the equalization formula which was harder for New Mexico to meet. The easier standard made it possible for New Mexico to qualify as an equalized state, but resulted in denying additional funding to those students who need it the most.

Of course, it is possible that the Department considered the consequences of applying both versions of the equalization formula, and

186 ALEXANDER & SALMON, PUBLIC SCHOOL FINANCE 235-36 (Allyn and Bacon 1995)(explaining that the federal range ratio used by the federal government in the Impact Aid program is mathematically equivalent to the restricted range ratio).
188 ROBERT BERNE & LEANNA STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE 69 (The John Hopkins University Press 1984)(illustrating that the inability of the federal range ratio to measure per-pupil revenues for all students results in a failure to detect an unequal proportional increase in per-pupil revenue).
nevertheless decided that its formula was the best option. Neither submitted briefs nor transcripts of oral argument, however, illustrate that the Department considered the actual consequences of its formula on impacted districts in New Mexico. There is also no indication that the Department evaluated whether its formula deemed New Mexico equalized at the expense of the population that Congress sought to protect through the enactment of Impact Aid. The doctrinal confines of Chevron review constrained analysis of the Zuni case by failing to provide a forum for the Department to illustrate, and the Court to genuinely inquire about, the extent to which agency expertise in this matter was brought to bear in the Department’s decision. To the extent that Chevron review recognizes agency expertise, the Court will have little evidence of the Department’s expertise to consider.

C. A Solution: Resurrecting the “Hard-Look” Review

The failure to consider the practical implications of the Secretary’s interpretation, to determine whether Congressional intent is being met, or to ensure whether the Department of Education spent sufficient time considering its interpretation of the Impact Aid statute, is particularly problematic in light of the highly deferential second prong of Chevron review,189 and the unlikelihood that once there, the Court will find the Secretary’s interpretation impermissible.190 Automatic deference without

189 See Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 96 (1994)(“Regardless of whether a reviewing court is deferential or active, once it reaches step-two it rarely reverses an agency interpretation as unreasonable”); Gary Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions, 48 Rutgers L. Rev. 313, 314 (1996)(“Observers of modern administrative law know that most of the action in Chevron cases is focused on step one. If the reviewing court finds the relevant statute ambiguous, the agency’s interpretation is almost always upheld at step-two, with little discussion by the court.”); Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1261 (1997)(finding that as of the date of the article, the Supreme Court had never once struck down an agency’s interpretation by relying squarely on the second step of Chevron review).

190 See Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1270 (1997)(noting that generally, the Court grants certiorari in order to resolve clear-cut legal issues, and leaves to the lower courts responsibility for evaluating the manner in which agencies apply legal principles to fact situations. Accordingly, the Court is unlikely to take a case with the expectation of holding that the agency’s interpretation passes step one of Chevron review but fails step-two).
consideration of the concerns invoked by the case can lead to a failure to apply Impact Aid in its intended manner, to the detriment of New Mexico school children.

The Court and the parties before it, however, could have been released from the constraints of traditional Chevron review and freed to consider these concerns if the Department was required to justify the validity of its statutory interpretation. By requiring the agency to address the policy implications of its interpretation, illustrate that their interpretation does not result in consequences that clash with Congressional intent, and prove that their decision-making process was thorough, the Court could avoid rubber-stamping an agency decision that warrants a more rigorous review.

Insisting that agencies justify their reasoning and policy decisions to a court is hardly a new idea. When reviewing informal agency rulemaking under the Administrative Procedure Act’s (APA) “arbitrary and capricious” standard,191 courts have invoked a standard of review that extends deference to the agency but also mandates a “substantial inquiry” into the facts.192 Although a court may not substitute its judgment for that of the agency, and the agency’s decision is entitled to a “presumption of regularity,”193 a substantial inquiry into whether the decision was made based on consideration of all relevant factors is still required.194 In elaborating on this standard, the D.C. Circuit has written that close scrutiny of evidence, particularly in complex matters, is meant to educate the court, as the court must understand “enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made.”195 In

192 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971) (In determining whether the Secretary made a choice that was arbitrary, capricious, or an abuse of discretion, although the Secretary’s decision was entitled to a presumption of regularity, the applicable standards of 706 required the Court to engage in a substantial inquiry. To make a decision, the Court had to make a searching and careful consideration of whether the decision was based on a consideration of all relevant factors. Nevertheless, the Court is not permitted to substitute its judgment for that of the agency).
this way, a court can determine whether the agency decision was “rational and based on consideration of the relevant factors.”\textsuperscript{196}

The application of arbitrary and capricious review is not without challenge, and has been subject to critiques that it contributes to the “ossification” of informal rulemaking.\textsuperscript{197} According to this critique, arbitrary and capricious review, particularly as performed in the D.C. Circuit, is both too intensive and too costly. To pass the arbitrary and capricious review to which informal rules may be subject under the APA, an agency must explain its reasoning in excruciating detail, respond to every comment, and anticipate which issues will be of most concern to a reviewing court.\textsuperscript{198} Moreover, even when agencies take these steps, there is only a fifty percent chance their process will pass review.\textsuperscript{199} Faced with this daunting task, agencies have become reluctant to use the informal rulemaking process, despite the advantages of prior notice and public participation that informal rulemaking provides.\textsuperscript{200}

In response to the critiques, scholars and judges alike argue that the effects of arbitrary and capricious review do not warrant any changes in standard. Judge Wald has written that when applying arbitrary and capricious review, courts merely seek “to ensure that the agencies do what Congress has told them to do and that they exercise discretionary power in a reasonable fashion.”\textsuperscript{201} Additionally, Professor William S. Jordan has found that agency regulatory programs have continued despite failing hard

\textsuperscript{196} Ethyl Corp. v. Envtl. Prot. Agency 541 F.2d 1, 36 (D.C. Cir. 1976).
look challenges, and that when rules were remanded under arbitrary and capricious review, agencies tended to recover quickly.\textsuperscript{202} Despite the ongoing debate, “hard-look”\textsuperscript{203} arbitrary and capricious review has long been thought to overlap substantially with the second step of Chevron review. Judge Laurence Silberman, a D.C. Circuit Court judge, first noted in 1988 that the second step of Chevron is “not all that different analytically from the APA’s arbitrary and capricious review,” and that both require a court to ask whether the agency considered and weighed the factors that Congress envisioned it would.\textsuperscript{204} Since then, judges have noted the places in which the two doctrines converge and diverge. The D.C. Circuit, the tribunal that hears a significant number of challenges to agency action,\textsuperscript{205} has issued a line of opinions that have highlighted the distinction between the two doctrines, including Texas Office of Public Utility Counsel v. Federal Commc’n Commission,\textsuperscript{206} and Arent v. Shalala.\textsuperscript{207} In drawing the distinction, Texas noted that “‘arbitrary and capricious’ review under the APA differs from Chevron step-two review because it focuses on the reasonability of the agency’s decision-making processes rather than on the reasonability of its interpretation.”\textsuperscript{208} Arent noted that although Chevron review and arbitrary and capricious review “overlap at the margins,” the two doctrines ask different questions: step-two of Chevron review asks “whether an agency has authority to act under a statute,” while arbitrary and capricious review asks whether the discharge of that authority was reasonable.\textsuperscript{209}


\textsuperscript{203} The D.C. Circuit has adopted this test for the review of informal policymaking under the arbitrary and capricious standard. See Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981); Ethyl Corp. v. EPA, 541 F.2d 1, 33-36 & n.75 (D.C. Cir. 1975).


\textsuperscript{205} Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1256 (1997)(noting that the D.C. Circuit is the forum with the “greatest frontline responsibility for judicial review of agency action”).


\textsuperscript{207} Arent v. Shalala, 70 F.3d 610 (D.C. 1995).


\textsuperscript{209} Arent v. Shalala, 70 F.3d 610, 615-16 (D.C. 1995).
Scholars have also analyzed the extent to which the two review schemas overlap. Finding that Chevron deference is under-girded by a flawed pluralistic democracy model, Professor Mark Seidenfeld has argued that a more satisfactory “deliberative democracy” requires a revamping of Chevron review. In this new version of Chevron the emphasis would be on the second step instead of the first, and would force agencies to explain why their interpretations are good policy in light of the purposes and concerns underlying the statutory scheme in question. Professor Seidenfeld likens this revamped second prong to the D.C. Circuit’s arbitrary and capricious “hard look” test, and envisions encouraging courts to require agencies to identify those concerns addressed by the statute and explain how the agency’s interpretation accounted for those concerns. Moreover, the agency would be forced to explain why it emphasized certain interests instead of others, and be required to address contentions that its interpretation will have deleterious consequences.

Going even further, Professor Ronald Levin has argued that while step-one of Chevron review should encompass all traditional tools of statutory construction, step-two of Chevron review should be replaced entirely with arbitrary and capricious review. Professor Levin

210 Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 83 (1994) (Professor Seidenfeld advocates for a modification to Chevron review that fosters deliberative democracy. Through review of statutory interpretation Courts have an opportunity to interact with agencies and ensure that agencies both act deliberatively and remain politically accountable. Adding a policy emphasis to the second step of Chevron review ensures that agencies have avoided excessive special interest influence.).
214 This includes textual and non-textual statutory interpretation, statutory structure and purpose, legislative history.
characterized the second step of Chevron review as vague,\textsuperscript{216} verging on internal incoherence,\textsuperscript{217} and potentially redundant.\textsuperscript{218} Replacing step-two of Chevron review with arbitrary and capricious review would transform the second prong from being overly deferential to being a credible step in Chevron review that ensures that an agency’s decision is not only consistent with congressional intent, but that it is also socially responsible.\textsuperscript{219}

The substitution of arbitrary and capricious review might be considered yet another step in the erosion of Chevron deference to agency decisions. Indeed, recent Supreme Court cases have whittled down the scope of Chevron review. The Court, in Christensen, denied deference to a Department of Labor opinion letter that was not promulgated subject to formal rulemaking procedures.\textsuperscript{220} In Mead, a tariff classification ruling by the United States Custom Service was similarly denied deference because of the lack of formal procedures and the sheer volume of tariff classification rulings issued by the department; rulings “churned out at a rate of 10,000 a year at the agency’s 46 scattered offices” simply could not have the force of law.\textsuperscript{221} This was so, despite ambiguity in the relevant administering statute, and the authoritativeness of the agency’s position regarding that ambiguity.\textsuperscript{222}

\textsuperscript{216} Ronald M. Levin, \textit{The Anatomy of Chevron: Step Two Reconsidered}, 72 Chi.-Kent L. Rev. 1253, 1260 (1997)(“The Court initially framed step two as a question of whether the agency’s interpretation is “permissible,” but that phrasing was circular: obviously an interpretation that is not permitted is prohibited, but on what grounds would that Court refuse to “permit” an interpretation?”)

\textsuperscript{217} Ronald M. Levin, \textit{The Anatomy of Chevron: Step Two Reconsidered}, 72 Chi.-Kent L. Rev. 1253, 1260-61 (1997)(“Under the structure of the Chevron formula, a court should not reach step two unless it has already found during step one that the statute supports the government’s interpretation or at least is ambiguous with respect to it. In other words, the agency’s view is not clearly contrary to the meaning of the statute. If the court has made such a finding, one would think that the government’s interpretation must be at least “reasonable” in the court’s eyes. Why, then, is the second step not superfluous?”)

\textsuperscript{218} Ronald M. Levin, \textit{The Anatomy of Chevron: Step Two Reconsidered}, 72 Chi.-Kent L. Rev. 1253, 1277 (1997)(suggesting that Chevron step two inquiry contributes nothing to judicial review that arbitrary and capricious review, in conjunction with Chevron step one review, does not already provide.


\textsuperscript{221} United States v. Mead Corp., 533 U.S. 218,233 (2001).

\textsuperscript{222} United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting)
Williamson Tobacco Corp., the Court denied deference to the FDA’s assertion of jurisdiction over tobacco products because it involved a policy question that Congress could not have intended for the agency to address unilaterally.\textsuperscript{223} Moreover, \textit{Barnhart v. Walton} suggests that Chevron deference will not always be given uniformly, but will be assessed on a case-by-case basis.\textsuperscript{224}

Similarly, substitution of arbitrary and capricious review for the second prong of Chevron would deny agencies automatic deference in the face of statutory ambiguity, in an effort to require agencies to justify their decisions and encourage courts to perform nuanced and detailed reviews of the processes used to make those decisions. In the Zuni case, such a detailed look could lead to the denial of deference to an agency interpretation of a direct legislative directive with an arguably reasonable, if impractical in application, methodological intent.

Nevertheless, the implementation of arbitrary and capricious review in the Chevron framework has significant benefits. Such an application would strengthen the overly deferential nature of the second prong, transforming it into a test that genuinely ensures that agency action is aligned with Congressional intent. Moreover, it removes the artificial distinction drawn between legal interpretations usually associated with Chevron review and reasoned decision-making usually associated with arbitrary and capricious review. At the heart of arbitrary and capricious review is careful examination of an agency’s reasoning process; an evaluation, therefore, of the conclusions an agency drew from its interpretation of a statute during its reasoning process is a necessary and integral part of arbitrary and capricious review.\textsuperscript{225}

Equating step-two of Chevron review with arbitrary and capricious review would also deter a court’s inclination to review the decision-making process employed by the agency without any regards to the policy consequences of an agency’s decision. The questionable policy consequences of an agency’s interpretation should be among the factors a court considers when reviewing the decision-making process: a decision with absurd, short-sighted, or nonsensical consequences necessarily calls into question the decision-making process, and should prompt the court to

require an agency explanation addressing how such a decision resulted from a supposedly rational procedure.  

D. Applying the Solution to the Zuni Case

Although Respondents framed the issue as one of simple deference to the Department of Education’s choice of methodology, Zuni involves the much broader topic of public school finance and how it affects equal access to educational opportunities. Unfortunately, traditional Chevron review constrained the parties’ opportunities to educate the Court on the practical effects of the Secretary’s formula, thus denying the Court an opportunity to make a proper determination of permissibility at step-two of Chevron review. To be sure, wrangling during oral argument and in the briefs about the definition of the word “percentile” is important in identifying the intent behind the Impact Aid program, but that determination should not be made in isolation from a review of the practical effects of a chosen definition. Moreover, there is scant evidence that the agency used its expertise regarding the academic challenges faced by Native American school-children, or the methodological weaknesses inherent in the equalization formulas at issue, to make a decision in the case.

Replacing the highly deferential second prong of Chevron review with the “hard-look” of arbitrary and capricious review would require the Court to “steep themselves in agency policy and the substantive debate framing the issue,” and would give the Department an opportunity to explain why their interpretation is good policy in light of the Impact Aid program’s purpose. Professor Levin’s model provides the appropriate structure for such a change to Chevron review. At step-one of Chevron review, the Court should use all tools of statutory interpretation to determine whether Congress has indeed spoken to the question at issue. In the Zuni case, tools of statutory interpretation do not yield a clear answer: the plain language does not address whether Congress intended for the Department to weight LEAs based on population when ranking those same


LEAs in order of per-pupil expenditure, legislative history can be interpreted both for and against the agency, and review of the statutory scheme in which Impact Aid exists is inconclusive. As a result, the case should go to step-two of Chevron review.

Arbitrary and capricious review at step-two of Chevron review would result in a more nuanced and holistic review of the Secretary’s interpretation, starting with a review of process. Such a review would examine why, for instance, the Department declined to engage in formal notice-and-comment procedures when the statutory language of Impact Aid changed in the 1994 re-authorization. The agency could also detail the alternatives that have been considered. For instance, in light of the participation of just three states in the Impact Aid program, did the agency consider making equalization determinations on a case-by-case basis so as to avoid masking un-equalized funding schemes?

Step-two arbitrary and capricious review would also encourage the Court to consider the practical consequences of the Department’s interpretation, and whether those consequences are in contrast to Congressional intent underlying Impact Aid. What will be the effect of the Department’s interpretation on educational funding for students in New Mexico? In direct contradiction to congressional intent, does the Secretary’s interpretation negatively affect students impacted by a federal presence in their school district? Does the interpretation allow a state to mask a funding system that is not genuinely equalized? In light of evidence that the answer to the last two questions is “yes,” why did the Secretary insist on using the agency’s easier-to-meet equalization standard?

Finally, arbitrary and capricious “hard-look” review at step-two of Chevron review would address the tension in this case regarding agency expertise. Neither submitted briefs nor oral argument in the case suggest that the agency’s expertise regarding education of Native American school-children, or methodological flaws inherent in restricted range ratios, was brought to bear in making a decision. Not only would arbitrary and

229 Arguably, Congress did not have to speak to this question because it used language explicitly stating that LEAs are to be ranked based on per-pupil expenditure alone. In light, however, of the Secretary’s use of weighted ranking prior to 1994, and because of the inconclusive results of legislative history and statutory construction review, a more nuanced review at step-two is warranted.

230 The Department did not maintain specific expertise on its part but did argue that “[t]he uniform view of practitioners in the field of education finance . . . is that a disparity test like the one in the Impact Aid statute must take into account the number of pupils served by an LEA.” Brief for the Federal Respondent, 2006 WL
capricious review allow the Department to illustrate the extent to which its expertise informed the Secretary’s interpretation, but the review would also provide for the appropriate deference once that illustration is made. After-all, arbitrary and capricious review does not allow a Court to substitute its judgment for that of the agency, but rather ensures that a decision was made based on consideration of all relevant factors required to make a decision that both falls within the agency’s scope of authority and heeds the original intent of Congress.

V. CONCLUSION

At one point during oral argument in the Zuni case, Justice Breyer noted, “What are, what is it we are distributing? A simple question, I guess, for a statistician. I unfortunately am not one and can’t find one, so I have no idea what this statute means.” 231 Although comedic, the quote illustrates that should Chevron review proceed to step-two, the Justices will not have been presented with sufficient information to properly determine whether the Secretary’s interpretation was made with the expertise that Congress intended the Department to use, or whether the interpretation is in furtherance of Congressional intent. To avoid this problem, step-two of Chevron review should be fortified with the standards of arbitrary and capricious review so that the Supreme Court itself, or a lower court on remand, can properly consider agency process, policy consequences, pursuit of congressional intent, and agency expertise when making a decision. In light of the impact that equalized education funding has on the educational opportunities of students, such a rigorous review is not only warranted, but necessary.

3742248, 18. The Department did not elaborate, however, on whether such an application is reasonable if it eliminates twenty-five percent of LEAs in New Mexico.

231 Justice Breyer, Transcript of Oral Argument at 11.