APPLICATION OF ARIZONA DEPARTMENT OF LIBRARY, ARCHIVES AND PUBLIC RECORDS,
Applicant.

Docket No. 93-16-O
Library Services State Plan Proceeding

DECISION

Appearances: Grant Woods, Esq., and Joseph E. Clifford, Esq., Phoenix, Arizona, for the Arizona Department of Library, Archives and Public Records.

Elizabeth Harris, Esq., Office of the General Counsel, Washington, D.C., for the Assistant Secretary for Educational Research and Improvement, United States Department of Education.

Before: Allan C. Lewis, Chief Administrative Law Judge

This is a proceeding initiated by the Arizona Department of Library, Archives, and Public Records (Arizona) to review a September 21, 1992, determination by the Assistant Secretary for Educational Research and Improvement of the United States Department of Education (Assistant Secretary) which denied Arizona a Title I grant for fiscal year 1992 under the Library Services and Construction Act, Pub. L. No. 88-269, 78 Stat. 11 (1964) (to be codified as amended at 20 U.S.C. § 351 et seq. (1988 & Supp. II 1990)).See footnote 1 [1] By application received on October 23, 1992, this matter was referred by the Secretary to the Office of Administrative Law Judges for resolution pursuant to Section 451(a)(4) of the General Education Provisions Act, Pub. L. No. 91-230, 84 Stat. 164 (to be codified as amended at 20 U.S.C. 1234(a)(4)), and 34 C.F.R. 81.3(b). See 58 Fed. Reg. 8047 (1993).

The Assistant Secretary denied the grant on two grounds. First, the Assistant Secretary determined that Arizona did not make available sufficient State aid for its public libraries and library systems as required under the maintenance of effort provision in Section 7(a)(2)(A) of the Library Services and Construction Act (20 U.S.C. § 351e(a)(2)(A))) (LSCA) to qualify for Federal assistance. Second, the Assistant Secretary determined that Arizona failed to qualify for a waiver of the maintenance of effort provision under Section 351e(a).

On appeal, Arizona argues that a county library district tax, which is used to support public libraries within each library district, should be considered "State aid" under Section 351e(a)(2)(A)) of the LSCA, and thus, Arizona satisfied the maintenance of effort requirement under the LSCA. In the alternative, Arizona urges that its request for a waiver of the maintenance of effort requirement for Federal Fiscal Year 1992 was denied unfairly on the theories that it complied with the conditions allegedly established by ED in its letter of August 22, 1991, that ED misconstrued the evidence submitted by Arizona in support of its waiver, and that ED failed

to adhere to the LSCA guidelines regarding the requested waiver. For the reasons stated below, the determination is affirmed.

BACKGROUND

Congress enacted the Library Services Act in 1956 to encourage States to expand library services primarily to rural areas. Subsequently, it was amended and expanded to provide assistance to States in the construction and expansion of public libraries in all areas of the State and was redesignated as the Library Services and Construction Act (LSCA). The majority of grant funds is allocated directly to state library administrative agencies, permitting such agencies to tailor public library expenditures to fit the needs of the State. The amount of such LSCA funds granted to a State, however, is reflective of the financial output of the State of its own funds. Due to its success, the LSCA has grown to become the largest Federal library grant program. H. R. REP. No. 237, 101st Cong., 2nd Sess., at 3 (1990), reprinted in 1990 U.S.C.C.A.N. 104.

Absent a waiver by the Secretary, there are three financial prerequisites which must be satisfied by a State in each fiscal year in order to receive such Federal funds. First, there is a matching requirement under Section 7(a)(1) in which the Secretary determines that "there will be available from State and local sources for expenditure under the programs . . . an amount which equals or exceeds" the Federal share. Second, there is a maintenance of effort-type prerequisite under Section 7(a)(2)(B) which requires the Secretary to determine that there will be available for expenditure by the State library administrative agency or its equivalent, an aggregate amount equal to 90 percent of the amount expended in the second preceding year. The parties agree that Arizona satisfies these first two prerequisites and, thus, they are not in issue.

MAINTENANCE OF EFFORT

The initial controversy between the parties involves the third prerequisite set forth in Section 7(a)(2)(A) (20 U.S.C. § 351e(a)(2)(A))) under which the current maintenance of effort in State aid for the fiscal year must equal 90 percent of the expenditures for public libraries and library systems made in the second preceding fiscal year-

> [the Secretary determines that] there will be available for expenditure for State aid to public libraries and library systems, during the fiscal year for which the allotment is made, an aggregate amount equal to 90 percent of the amount actually expended for such purposes in the second preceding fiscal year. . . .

(emphasis added).

The dispute concerns whether a county free library district tax, levied to raise funds to establish and maintain county free libraries in Arizona, may be considered as "State aid" in the maintenance of effort requirement.

Initially, ED argues that the term "State aid" is defined by 34 C.F.R. § 770.4(c) (1993), which provides that-

> State aid means funds that are appropriated by a State legislature for aid to public libraries and to library systems for library services, including funds appropriated for subgrants by the State library administrative agency for those purposes.

ED asserts that this definition must be applied in the instant case and that the Administrative Law Judge may neither adopt nor consider any contrary interpretation, an act which is prohibited under 34 C.F.R. § 81.5(b), because an "ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid."

Regulation Section 770.4(c) was promulgated, however, in February 1993, some four months after the close of the 1992 Federal fiscal year, the year in which the grant in question was made. See 58 F.R. 11166. It is well established that regulations promulgated subsequent to the year of the program may not govern the program in a prior year. Bennett v. New Jersey, 470 U.S. 632 (1985); In re Temple University, Dkt. No. 89-26-S, U.S. Dep't of Education (1990) at 5-6; Denver Paralegal Institute, Dkt. Nos. 92-86-SP and 92-87-SA, U.S. Dep't of Education (1994) at 17; In re MBTI Business Training Institute of Puerto Rico, U.S. Dep't of Education (1994) at 6. Thus, the regulation is not applicable in the instant case. Accordingly, the tribunal must interpret the term "State aid" in a manner consistent with its usage in the statute and apply it to the instant facts.

The plain meaning of the term "State aid" is aid which originates with the State. Thus, the source of funds for purposes of the maintenance of effort provision in Section 7(a)(2) must be the State. As such, any local funds would not qualify. This interpretation is consistent and supported by the terminology employed by Congress within Section 7(a). Under the matching provision of Section 7(a)(1), States are required to expend "from State and local sources" an amount not less than the minimum allotment for that State. Thus, by virtue of Section 7(a)(1), Congress was well aware of the distinction between State sources of funds and local sources of funds and employed such a distinction when it enacted Section 7(a)(2) in 1990.

The next inquiry is whether Arizona's county free library district tax constitutes a local source of revenue or a State source of revenue. As is evident below, the county free library tax bears the indicia of a local tax and, therefore, revenue raised therefrom and expended on the county free library is not State aid.

Initially, county free library districts may be created by their respective county boards of supervisors; their creation reflects a discretionary action by each board. Ariz. Const. Chpt. 24, §48-3901.See footnote 2 [2] Each county free library district constitutes a political taxing subdivision of the State and enjoys all the powers, privileges and immunities granted generally to municipal corporations by the constitution and laws of the State of Arizona. Id. at § 48-3902.A.

The county free library tax is a secondary property tax levied by a participating county, not the State-

> The board of directors [of the county free library district] . . . shall annually levy in the same manner and at the same time as other county secondary property taxes are levied a county free library district tax sufficient . . . to insure payment of [the expenses] . . . of

> the county free library district. The tax shall be levied and collected upon all property in the county and upon all property within incorporated cities and towns in the county.

Id. at § 48-3903 (emphasis added).

Furthermore, as a secondary property tax, the county free library tax is not subject to the county's general limitation on primary property taxes imposed by Arizona's constitution and State law. Ariz. Const. Chpt. 2, § 42-201.01. In addition, the revenue raised by this tax is retained by the county treasurer in a separate fund and expended solely for the benefit of the county's free library. Ariz. Const. Chpt. 7, § 11-913.

The county free library tax, however, has none of the attributes of a State tax, such as uniformity of imposition, collection and retention of the revenue by a State treasurer or comptroller, and its expenditure by the State. Thus, within the scheme of taxation and the statutory scheme overall, the county free library tax has the characteristics and attributes of a local tax. As such, the expenditure of funds raised by this tax does not constitute State aid for purposes of Section 7(a)(2).

Arizona argues that the State legislature was the source of the taxing authority for the county free library tax and, therefore, any revenue collected by the county treasurer was collected by an arm of the State. Arizona notes, in contrast, that true local jurisdictions, like chartered cities, are governed by charters authorized by the State's constitution and are independent of State legislation in all areas of strictly municipal concern.

There is no support for the proposition that the county acted as the agent of the State in collecting or disbursing the county free library tax. While the authority to create county free library districts came from a State action in the form of legislation, the exercise of this power is made by an autonomous entity -- a county board of supervisors -- and is strictly a discretionary and optional action. These attributes, coupled with the other indicia of a local tax as noted above, far outweigh the source of the taxing authority in determining whether the revenue raised by this tax constitutes State aid for purposes of the LSCA.

WAIVER

In the alternative, Arizona argues that it is entitled to a waiver of the maintenance of effort requirement under Section 7(a) (20 U.S.C. 351e(a)), which provides that-

> The Secretary may, in accordance with regulations, waive the requirements of paragraph (2) of this subsection, if the Secretary determines that the application of such paragraph would be unjust or unreasonable in light of exceptional extenuating circumstances.

(emphasis added).

By letter of August 22, 1991, ED granted Arizona a waiver for the Federal Fiscal Year (FY) 1991, the year prior to the year in issue. Arizona asserts that this letter also established "written instructions outlining the steps it should take to perfect its waiver request for FY 1992." AZ Br. at 12. Arizona further argues that the continued absence of a definition of State aid in ED's regulations throughout FY 1992, coupled with Arizona's good faith compliance with the terms

and conditions in ED's letter and continued State budget problems, constitutes "exceptional extenuating circumstances," and, therefore, warrants the approval of its waiver request.

In response, ED argues that exceptional extenuating circumstances are not present. In ED's view, Arizona's shortfall in its State aid for FY 1992, the year in issue, was the natural effect of a legislative initiative passed in 1986 which, over several years, transferred from the State to the counties a substantial portion of the financial responsibility for the funding of public libraries. Despite ample constructive and actual notice by ED that the State would have to increase its aid for FY 1992, the Arizona legislature failed to override the effect of the 1986 legislation by appropriating additional funds needed to satisfy the maintenance of effort requirement. Lastly, ED maintains that its August 22, 1991, letter did not establish prerequisites under which Arizona could perfect a waiver for FY 1992.

ED's letter of August 22, 1991, granting Arizona's request of a waiver for FY 1991, plainly limits its consideration to FY 1991 and grants no assurances with regard to FY 1992. See AZ Ex. at 29-32. Indeed, language such as "I have determined to waive the . . . maintenance of effort requirement -- for FY 1991 only -- " and "caution you that the rationale for this waiver decision is limited to the facts in this case and is unlikely to apply in FY 1992 or future years," speaks for itself. Id. at 31 (emphasis added). The only "condition" in the 1991 letter dealt with FY 1991 and required, as a prerequisite for a waiver for that fiscal year, that the State Librarian request the State Legislature to provide sufficient funding for subsequent years.

The second prong of Arizona's argument -- that a waiver was justified -- is predicated upon its assertion that the Assistant Secretary established guidelines and then misconstrued the evidence Arizona submitted in support of its 1992 waiver request. According to Arizona, the Assistant Secretary "repudiate[d] the prior directives which had guided the state's actions in seeking a second waiver." AZ Br. at 15. Arizona maintains that the issue of "State aid" was "brushed aside as unimportant" and that the Assistant Secretary's acknowledgement of the State legislature's favorable action regarding 1993 funding was ignored with regard to the 1992 request. Arizona argues that the Assistant Secretary misinterpreted the legislature's funding for 1993 as evidence of a lack of economic hardship, rather than as an effort of compliance.

As noted above, the 1991 waiver letter did not establish specific "conditions" which bound the Department to grant a waiver for 1992. Secondly, the absence of a definition of "State aid" by regulation was never central to the 1991 waiver process; as such, it was not an important aspect of the decision. Thirdly, I disagree with the argument that the relevance of the State Legislature's action to bring itself into conformity with regard to FY 1993 was misconstrued. In assessing the evidence submitted to justify Arizona's claim of economic hardship, ED's letter of September 21, 1992, the following year, stated that the legislative action was "some evidence that the State has not experienced a fiscal crisis that would have necessitated a reduction in the Fiscal Year 1992 expenditures for State aid." AZ Ex. at 60 (emphasis added). It is also true that the legislature's action to increase funding for FY 1993 was not mentioned in that portion of the Assistant Secretary's letter which addressed Arizona's non-economic arguments in favor of a waiver for FY 1992. Its absence from this aspect of ED's letter is far more likely due to its lack of relevance to the noneconomic arguments raised by Arizona. Therefore, I find no basis upon which to find that the Assistant Secretary misinterpreted the State's submissions.

Arizona's next assertion with regard to the issue of waiver is that the Assistant Secretary failed to follow LSCA guidelines. The LSCA states that -

> [[t]he Secretary may, in accordance with regulations, waive the requirements of paragraph (2) of this subsection, if the Secretary determines that the application of such paragraph would be unjust or unreasonable in the light of exceptional circumstances.

20 U.S.C. § 351(e)(a) (emphasis added).

Arizona's argument is unclear. It appears to argue that the Assistant Secretary acted in an arbitrary manner when, given no regulation defining "State aid" in FY 1991 and FY 1992, she denied a waiver for FY 1992 after granting a waiver for FY 1991. In granting the 1991 waiver, the Assistant Secretary first mentioned the absence of a regulation defining the term "State aid" sue sponte; however, the absence of this regulation was not, as Arizona implies, central to the basis for the FY 1991 waiver. The 1991 waiver was granted on the basis of insufficient time for Arizona to alter its plans for FY 1991, ie. because the Federal law was amended in 1990 and the State "would have difficulty altering its FY 1991 plans [in order] to accommodate this change." AZ Ex. 30. Therefore, the Assistant Secretary's determination for FY 1992 was not an arbitrary action.

Next, Arizona argues that the LSCA specifies that ED must construe statutory provisions in a manner that preserves State and local initiative and responsibility in the conduct of library services and that, by refusing to defer to Arizona's definition of State aid, ED violated this guideline. AZ Br. at 18. This argument, however, misconstrues the policy statement upon which its argument is based. See 20 U.S.C. § 351(b). Congress sought to avoid and preclude Federal interference in the conduct of State and local matters affecting the libraries, such as the administration of libraries and the best uses of Federal funds. This policy does not limit the authority of the Department to promulgate regulations implementing the LSCA.

Finally, Arizona asserts that the LSCA specifies that a State must be given 2 years to comply with changes in the law affecting grant eligibility, 20 U.S.C. § 351e(a)(2)(A), and that the denial of the 1992 waiver, despite the good faith efforts to meet the new maintenance of effort requirement, is "untenable." AZ Br. at 18. The section at issue provides -

> there will be available for expenditure for State aid to public libraries and library systems, during the fiscal year for which the allotment is made, an aggregate amount equal to 90 percent of the amount actually expended for such purposes in the second preceding fiscal year . . . .

20 U.S.C. § 351e(a)(2)(A)) (emphasis added).

Arizona seems to believe that the phrase "in the second preceding year" allows a state 2 years in which to comply with the revised maintenance of effort requirement. This argument lacks merit. The act was amended in March 1990 and became effective in October 1990. Id. This phrase designates, simply, for all subsequent fiscal years, that the benchmark year - whose expenditures are used to determine the minimum amount of State aid which must be expended during the grant year -- is the second fiscal year before the grant year. It does not impose a 2-year period to bring systems into conformity.

With regard to both the issue of the absence of a promulgated definition of "State aid" and of waiver, the chronology of this matter demonstrates one overriding impression. Arizona was cautioned in no uncertain language that its 1991 waiver was limited to the facts concerning that year only, one of which was the shortness of time between the enactment of the 1990 amendments and the opening of the next Arizona legislative session. Arizona's legislature certainly understood the construct of ED's intent by allocating sufficient funds to satisfy its FY 1993 maintenance of effort requirement during the legislative session that began in the early part of calendar year 1992. Arizona clearly could have provided for an increased allocation of funds for Federal FY 1992, which ended on September 30, 1992, but it failed to do so.

In summary, the tribunal concludes that the Assistant Secretary's determination that, for FY 1992, Arizona failed to make available sufficient State aid for its public libraries and library systems as required under the maintenance of effort provision at 20 U.S.C. § 351e(a)(2)(A)) to qualify for federal assistance and that Arizona failed to show sufficient basis for waiver of that provision, is supported by the law and facts. Moreover, it is found that the Assistant Secretary's action in denying Arizona's request for a waiver was appropriate.

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that the determination by the Assistant Secretary for Educational Research and Improvement which denied Arizona a Title I grant be affirmed.

Allan C. Lewis
Chief Administrative Law Judge

July 21, 1995
Washington, D.C.

SERVICE

On July 21, 1995, a copy of the attached document was sent to the following by certified mail, return receipt requested:

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Footnote: 1 [1] *This Act was originally enacted as the Library Services Act, ch. 407, 70 Stat. 293 (1956).*

Footnote: 2 [2] *"The board of supervisors may establish at the county seat a county free library district for the county and for all cities and towns within the county as may elect to become part of, or to participate in (the district.)" Ariz. Const. Chpt. 24, _48-3901.*