

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

QUECHEN INDIAN TRIBE
v.
**SAN PASQUAL VALLEY UNIFIED
SCHOOL DISTRICT**

Docket No. 96-42-I
Indian Impact Aid Proceeding

MEMORANDUM DECISION

Background

On April 25, 1996, the Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, pursuant to 20 U.S.C. § 7704(e) and 34 CFR § 222.102 *et seq.*, requested that the Director, Office of Hearings and Appeals, appoint a hearing examiner to conduct a hearing regarding a complaint filed by the Quechen Indian Tribe (Tribe) against the San Pasqual Valley Unified School District, California (District). The Tribe's complaint is dated March 12, 1996, and the undersigned was appointed on April 26, 1996.

The Tribe's basic grievance was that the District failed to develop and implement Indian Policies and Procedures (IPPs) in accordance with Section 8004(a) of the Improving America's Schools Act . The complaint described five general categories of allegations and supporting evidence. These are:

1. The District failed to implement its IPPs to assess the extent to which Native American children participate on an equal basis with non-Native American children in the District because it failed to prepare an annual report based upon school data and surveys.
2. The District failed to disseminate relevant applications, evaluations, program plans and information related to the education programs to the tribes and parents in sufficient time to allow an opportunity to review these materials and make recommendations.
3. The District did not give the tribal officials and parents of Native American children a meaningful opportunity to comment on whether Native American children participate on an equal basis with non-Native American children in the District's education program and activities by its failure to provide the tribal officials and parents with the relevant data and assessments.
4. The District failed to modify its education program to ensure that Native American children participate on an equal basis with non-Native American children by not properly reviewing or taking action on recommendations of the Indian Education Parent Committee.

5. The District failed effectively to implement its IPPs by its inadequate dissemination procedures, unwillingness to acknowledge the importance of active and knowledgeable community and parent participation, and its failure to designate a compliance officer whose responsibility would be to ensure that actions are taken to fulfill the intent of the IPPs.

A hearing was scheduled for June 23, 1996, but was postponed three times at the request of the parties because they were engaging in settlement negotiations. The need for a hearing was obviated when the parties executed a Settlement Agreement and Memorandum of Understanding in October 1996. In these documents, the District acknowledged that it had not fully complied with the IPPs that it had previously adopted, but it agreed to comply with said procedures in the future. To that end, the District agreed, *inter alia*, to provide student assessment data to the Tribe, to conduct a briefing and an explanatory session on its 1996-97 budget, and to collaborate with the Tribe on future funding possibilities. The Tribe agreed, *inter alia*, to assist with student residency verification and to establish a tribal impact aid committee. To further the need for the collection of student data and data assessment, the parties jointly agreed to contract with an individual to perform duties as an Impact Aid Compliance Liaison for a period of 18 months. The agreement further provided for the Compliance Liaison to provide the parties with quarterly reports beginning in December 1996 and concluding with a final report in March 1998. I recommended approval of this Settlement Agreement on November 22, 1996, in an Interim Findings of Fact and Recommendations, with a further recommendation that I retain this case in an open status until March 1998. On January 2, 1997, the Assistant Secretary approved my findings and recommendations.

The Tribe and the District hired Mr. Al Owen on April 1, 1997, to serve as the Federal Impact Aid Compliance Liaison. This late hiring necessitated a revision of the due dates of the quarterly and final reports, the latter being due on September 30, 1998. During the term of his employment, Mr. Owen collected student data, including information on the following: suspensions, expulsions, voluntary and involuntary transfers or placements, attendance, drop-outs, achievement test results, grade point averages, and elementary school passes/failures. He also procured or developed computer programs to assist in the analysis of this student data.

Mr. Owen filed reports for the first and second quarters with this tribunal in July and November 1997, respectively; a Preliminary Joint Report in November 1998; and the Final Report which was received on April 26, 1999. Apparently the Tribe had earlier access to a draft of the final report and this prompted the Tribe to submit a November 30, 1998, request that this tribunal schedule a hearing to address a list of concerns in which it believed the Final Report fell short of the requirements of the Settlement Agreement. This November 30 letter also asked that this tribunal order further federal review and monitoring of the District's actions to implement the corrective plan pursuant to the California Department of Education's Consolidated Compliance Review and the Improving America's Schools Act, as these authorities relate to the participation of Native American children on an equal basis.

This tribunal deferred action on the Tribe's November 30 request on December 15, 1998, citing three reasons: 1) the request appeared to be based upon a reading of a draft, not the final version of the Final Report; 2) there was no evidence the District had had an opportunity to review and comment on the Tribe's concerns, and 3) prior to requesting a hearing, the parties should make an attempt to resolve their differences. In a March 22, 2000, letter to the tribunal the Tribe reported that it was in receipt of the Final Report and that it requested it be afforded 30 days to review and make comments on the report. Additionally, the Tribe asserted that the data and the commentary in the report are biased and unfounded. This position is based upon the allegation that Mr. Owen failed to act in a neutral manner in the performance of his duties. The Tribe believes this is substantiated by the fact that the District hired Mr. Owen as its interim superintendent immediately after his liaison contract expired.

The District had no objection to the Tribe's request for a 30 day period in which to provide comments to the Final Report; it did, however, take issue with the Tribe's attack on Mr. Owen's neutrality during his performance of liaison functions. The District reports that Mr. Owen's employment as a liaison ended as of October 1998 and the Final Report was finished and distributed on April 2, 1999. In January 2000 the School District hired Mr. Owen to serve as an interim superintendent after the person previously serving in that position unexpectedly resigned. The District maintained that during the time Mr. Owen served as a liaison, neither he nor the District ever contemplated that Mr. Owen would, in the future, serve as an interim superintendent.

I approved the Tribe's request for a 30 day period to provide a response to the Final Report, ordering its report be forwarded to me by May 22, 2000, and the District to forward its reply by June 19, 2000. I have received both submissions.

Tribe's Objection to the Final Report

In its May 20, 2000, letter, the Tribe reiterates that the District remains out of compliance with the settlement agreement for two reasons. The first is that not all data required by the Settlement Agreement was included in the final report and second, the commentary and data generated by Mr. Owen are not useful due to his failure to maintain neutrality as the Federal Impact Aid Compliance Liaison.

I reviewed the Final Report for which Mr. Owen developed a comprehensive system of collecting and analyzing education data which has the potential to provide a meaningful basis for evaluating the past and future performance of Native American students in the San Pasqual Valley Unified School District. His orchestration of the two real parties in interest in this proceeding, who admittedly have not been very compatible because of "past negative experiences," has produced an enhanced recognition of the true needs and capabilities of both parties. This having been said, I will note briefly the chief subject areas of the data collection and analysis for which the Liaison was responsible. These 11 categories are:

- a. Suspensions
- b. Expulsions
- c. Voluntary and Involuntary Transfers or Placements
- d. Attendance
- e. Drop-Outs
- f. Student Achievement Test Results (CAT test scores)
- g. Student Grade Point Averages
- h. Elementary School Pass/Fails
- i. School Counseling Services
- j. Evaluation Data on Categorical Programs Assisted by Impact Aid Funds
- k. Other Information Specified or Developed by the consulting Compliance Liaison

In its May 20 submission, the Tribe addresses the first nine of these categories and their complaints or objections fall into four basic findings. For the first finding, the Tribe concludes that the data is in compliance with the requirements of the Settlement Agreement. This finding includes categories b, f, and i. The second finding is that the data is not specific enough as to the individual students and this applies to categories a, c, g, and h. The third finding is that the data in category d complies with the Settlement Agreement, but the Tribe questions its accuracy. The last finding is that the Tribe would like a further breakdown of the data in category e and also questions the accuracy of certain portions of that data. Additionally, in a more general sense, the Tribe questions Mr. Owen's neutrality during the performance of his duties because, among other items, the commentary sections of the Final Report "repeatedly discuss the Tribal Impact Aid Committee and the Tribe's failure to attend meetings or cooperate in certain discussions," but the Report fails "to address the [District's] lack of involvement." The Tribe further criticizes Mr. Owen for his refusal to provide documentation to support a specific finding, even though he explained that to provide the data requested would violate the privacy of the students involved. For these reasons, the Tribe expresses doubt that the Final Report will serve as a useful tool for either party. The Tribe concludes by requesting that the case be rescheduled for a hearing that would incorporate Mr. Owen's following recommendations into a remedial plan:

1. If in the future it is necessary to have a liaison type position to work between the Tribe and District, that position should be a third party position. That is, a position filled by an appointment of someone hired by the United States Department of Education Office of Hearings and Appeals. The liaison should be paid by the appointing party, with the appointing party billing the Tribe and District for the cost of the liaison. This recommendation would provide the liaison with a greater level of authority over a settlement agreement process.

2. The Compliance Officer for the District and those assisting him need to insist and hold more accountable those that have any role or job that produces data needed to meet Federal, State, and Local compliance requirements.
3. The Tribal Council needs to appoint to committees that interface with the District representatives who are willing and committed to serving on those committees. That is, representatives who will attend meetings and actively participate.

School District Reply

The District's Reply addresses each of the Tribe's comments and its responses generally fall into these six categories, followed by the respective paragraphs in the Tribe's complaint:

1. The District explains that the Tribe's request cannot be honored because the data it requested is not maintained or generated by the District: Paragraphs – a(1), f, and g.
2. The District provided the requested information in its reply letter: Paragraphs – a(2), c(1), c(2), and e.
3. The District describes where in the final report the requested information is located: Paragraphs – a(3), c(1), e, and i.
4. The District disputes the Tribe's allegation of inaccuracy, but invites the Tribe to supply any corrected data: Paragraph – d.
5. The District refuses to provide the data, explaining that to do so would improperly compromise the student(s) identity: Paragraph – e.
6. The District will, as a result of the Tribe's request, begin collecting this data and using it in future analyses: Paragraphs – g, h, and i.

As to the Tribe's concluding criticism that the commentary in the report is biased in favor of the District and, therefore, does not believe that the final report will be a useful tool for the parties to address their issues, the District submits that the Tribe is in error. It surmises that the Tribe reached this conclusion because Mr. Owen characterized the District's cooperation in this data collection and analysis venture as being consistently compliant, while he described the Tribe as being "reasonably cooperative." As is addressed above, the District responds that this challenge stems from the fact that Mr. Owen was hired as its interim superintendent in January 2000, more than a year after he simultaneously completed both his initial contract with the District and Tribe and issued the Final Report. The District assures the Tribe that it had no input for the commentary portion of the Final Report and Mr. Owen has assured the Tribe he was not influenced in any manner by his subsequent employment by the District. The District also points out that the Tribe's complaint refers to the commentary in the Final Report and not to the actual collection and reporting of the data contained in it, except as addressed above. Therefore, the District believes that the overall objectives of the Settlement Agreement and the Memorandum of Understanding have been achieved. Specifically it notes that these documents will: 1) provide a baseline report of this information, 2) help fine-tune the reporting process so as to obtain meaningful data, and 3) encourage the continuation of the process from year-to-year to obtain long-range data. It explains that the data contained in the Final Report is primarily a compilation of data derived from District records and State mandated reports and is not susceptible to being skewed by the Liaison. The District also notes that the Tribe has produced no factual evidence of data inaccuracies.

The District agrees that the data collection procedures and presentation should continue to be fine-tuned by the parties, but it strenuously disagrees that a subsequent monitoring plan is necessary. It also recognizes that in the future, if it becomes apparent that additional data not currently required by the Settlement Agreement might be useful to this process, it will collect and provide such data if it can reasonably do so. The District concludes by reaffirming that it has complied with the terms and intent of the Settlement Agreement and requests that I deny the Tribe's request for further monitoring.

Discussion and Findings

Based upon my review of the Final Report, I conclude that there has been reasonable compliance by both parties to the Settlement Agreement and Memorandum of Understanding, and that Mr. Owen has created a new, or refined an

existing, comprehensive program of data collection. It is now incumbent upon the parties to maintain the spirit of cooperation that they have developed since October 1966 to continually examine, and refine as necessary, the wealth of data available to them to serve the true purpose of this very long and complicated procedure – the assurance that the District’s Native American children are participating in District programs and activities on an equal basis with all other District children. The parties have a workable process here to satisfy their needs, despite complaints that some data is incomplete, too broad, missing, or inaccurate, and that Mr. Owen provided comments which were somewhat critical of participation by Tribal representatives. These complaints, which I find to be unsupported, do not detract from the significant amount of data which can provide a good, solid baseline against which future student performances can be compared. Both parties to this litigation and Mr. Owen should be commended for their perseverance in working together to develop this data collection process.

Although it appears that some animosity continues to exist between the parties, I believe that this can be overcome through continued efforts by both sides to focus on their mutual goal of supplying a superior education to their students. For this reason, I see no need for any further participation in this issue by this tribunal. In principle, both parties are effectively complying with the terms of the Settlement Agreement and Memorandum of Understanding. Any continued monitoring of this process is not within the province of a tribunal within the Department of Education’s Office of Hearings and Appeals. Although minor disagreements may exist between the parties regarding the implementation of the Indian Policies and Procedures, the more appropriate authority for monitoring this compliance would be the agency within the U.S. Department of Education which administers the basic support payments to local educational agencies serving children who reside on Indian lands, and not this tribunal. Accordingly, the Tribe’s request for a hearing to incorporate Mr. Owen’s recommendations into a remedial plan is denied. The complaint submitted by the Tribe on March 12, 1996, is hereby returned to the Assistant Secretary for whatever further action he deems appropriate.

Judge Richard F. O’Hair

Dated: August 10, 2000

SERVICE

A copy of the attached document was sent to the following:

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