IN THE MATTER OF BELLEVUE PUBLIC SCHOOLS,
Applicant.

Docket No. 97-55-I
Impact Aid Proceeding

INITIAL DECISION

Appearances: Patrick J. Sullivan, Esq., Papillion, NE., for Bellevue Public Schools

Jane A. Hess, Esq., Washington, D.C., for the Office of Assistant Secretary for Elementary and Secondary Education

Before: Chief Judge Allan C. Lewis

This is an action by Bellevue Public Schools (Bellevue) to overturn a determination by the Assistant Secretary for Elementary and Secondary Education (ED) regarding the amount of Federal impact aid due Bellevue for the Federal fiscal year 1997.See footnote 1[1] Bellevue argues that revenues distributed to local educational agencies under Neb. Rev. Stat. § 79-3804 should be considered as revenues derived from local sources in determining Bellevue's local contribution rate for purposes of ascertaining the amount of its Federal impact aid. Based upon the facts and conclusions of law, infra, the determination of the Assistant Secretary for Elementary and Secondary Education is upheld.

I. OPINION

A. Background

In 1994, Congress reaffirmed its responsibility for the impact of certain Federal activities on the local educational agencies (LEAs) within a state. These Federal activities place financial burdens upon local educational agencies. Revenues available to such agencies are diminished as the result of the acquisition of real property by the United States, the provision of education for children residing on the property owned by the United States and for children whose parents are employed on property owned by the United States, and the sudden and substantial increase in school attendance resulting from Federal activities. Section 8001 of the Improving America's Schools Act of 1994, Pub. L. 108-382, 108 Stat. 3518, 3749 (20 U.S.C.A. § 7701).

In order to receive Federal impact aid, an affected local educational agency is annually required to submit an application to the Secretary of Education. Section 8005(a) (20 U.S.C.A.
§ 7705(a)). The amount of basic support or payment is determined by a student weighing system and a local contribution rate (LCR) or its equivalent. In Bellevue's case, the comparable LCR approach provided the maximum amount of basic support for Federal fiscal year 1997. The amount of its payment was determined by--

> the sum of the total weighted student units . . . multiplied by . . . the comparable local contribution rate certified by the State, as determined under regulations prescribed to carry out the Act of September 30, 1950 (Public Law 874, 81st Congress) as such regulations were in effect on January 1, 1994;

Section 8003(b)(1)(C)(iii) (20 U.S.C.A. § 7703(b)(1)(C)(iii)).

The comparable LCR, as determined by the State educational agency, is a LCR for a group of generally comparable LEAs. It represents the “aggregate local current expenditures of the comparable LEAs in [the] . . . group for the third

fiscal year preceding the fiscal year for which the LCR is being computed" divided by the aggregate number of children to whom the generally comparable LEAs provided a free public education during that year. 34 C.F.R. § 222.41 (1996).

In computing the aggregate local current expenditures, the State educational agency is directed by 34 C.F.R. § 222.41(a)(2) to "consider only those aggregate current expenditures made by the generally comparable LEAs from revenues derived from local sources. No State or Federal funds may be included."

B. Revenues Derived From Local Sources

The dispute between the parties focuses upon whether the state income tax receipts distributed to Bellevue's comparable LEAs pursuant to Neb. Rev. Stat. § 79-3804(3) (1994) may be considered as revenues derived from local sources and, therefore, are included in the determination of Bellevue's comparable LCR.See footnote 2[2]

The term "revenues derived from local sources" has two definitions. First, the term was recently defined by Congress in October 1994 when it enacted Section 8013(11) (20 U.S.C.A. § 7713(11)) as part of the Improving America's Schools Act of 1994. Congress provided that revenues derived from local sources are the--

> (A) revenues produced within the boundaries of a local educational agency and available to such agency for such agency's use; or
>
> (B) funds collected by another governmental unit, but distributed back to a local educational agency in the same proportion as such funds were collected as a local revenue source.

Subsequent to the enactment of the Improving America's Schools Act of 1994, the Secretary promulgated new regulations. These regulations included the Secretary's definition of the revenues derived from local sources which differs from the statutory definition. This definition represented the reissuance of his prior regulatory definition. Hence, the second definition of revenues derived from local sources is set forth in 34 C.F.R. § 222.2(c) and provides that these revenues are the--

> (i) Tax funds derived from real estate; and
>
> (ii) Other taxes or receipts that are received from the county, and any other local tax or
>
> miscellaneous receipts.
>
> . . . . .

This controversy centers on which definition governs. Bellevue contends that the definition in Section 8013(11) controls because the regulatory definition does not reflect the statutory definition. Hence, Bellevue argues, in effect, that the regulatory definition is invalid. ED urges that the regulatory definition in 34 C.F.R. § 222.2(c) is applicable. In an unusual twist and to avoid Bellevue's invalidation argument, ED denounces that part of 34 C.F.R. § 222.2(c) which states that Section 8013(11) is the statutory basis for this definition and, instead, maintains that the regulatory definition was promulgated under a different Congressional directive, namely Section 8003(b)(1)(C)(iii) (20 U.S.C.A. § 7703(b)(1)(C)(iii)).See footnote 3[3]

As ED correctly notes in its brief, this tribunal lacks the authority to invalidate a regulation promulgated by the Secretary and must, therefore, follow the regulation. In re Smithville R-II School District, Dkt. No. 91-4-I, U.S. Dep't of Education (Sec. Dec. July 27, 1992). Therefore, any differences between the statutory and regulatory definitions are meaningless before this tribunal. The regulatory definition controls.

Under 34 C.F.R. § 222.2(c), revenues derived from local sources means real estate tax funds, other taxes or receipts received from the county, and any other local tax or miscellaneous receipts. A reasonable interpretation of this regulation would limit local source revenues to taxes levied by the local government such as real estate taxes, local sales

taxes, and local income taxes. This view would exclude taxes levied by a state such as a state income tax.

ED, however, advances a much broader interpretation of this regulation. In its view, local source revenue may also include taxes levied by the state if, under the taxing statute, the tax is "dedicated" as a local revenue and is distributed to the LEAs precisely in the proportion that it was generated within their geographical area. According to ED, this qualifies as a "local tax or miscellaneous receipts" under 34 C.F.R. § 222.2(c).

As applied to the instant case, ED argues that the Nebraska State income tax in question does not qualify as a local tax since it is not dedicated as a local revenue and is not distributed to the LEAs in the proportion that it was generated in their local areas. Under the Nebraska taxing statute, ED maintains that the income tax is dedicated as a state tax, not a local tax, because it is designated as a "distribution of state aid to [the] districts" under Neb. Rev. Stat. § 79-3804(1). In addition, ED asserts that some LEAs do not receive a distribution proportionate to income tax collected within their district. Of the six classes of school districts, ED notes that the two school districts, i.e. class I (K-8) and class VI (9-12 only) do not receive the full 20 percent of the projected State income tax receipts which is made available to schools in the other four classes. Neb § 79- 3804(2) and (3).

Given ED's interpretation of revenue derived from local sources under 34 C.F.R. § 222.2(c), the tribunal agrees with ED's position. The Nebraska state income tax is not a revenue derived from local sources because it is not dedicated as a local tax or revenue. As such, the Nebraska state income tax may not be considered in determining Bellevue's comparable local contribution rate. Accordingly, Bellevue's complaint must be rejected.

C. Bellevue's Argument

In order to make and preserve the record for purposes of an appeal, it should be noted that Bellevue argues that the distributions of Nebraska State income tax to the local educational agencies constitute revenues derived from local sources as that term is defined by Section 8013(11). Bellevue maintains that the statutory definition, not the regulatory definition, must be used in computing the comparable local contribution rate under 34 C.F.R. § 222.41 because the introductory "except" clause of this regulation mandates that the statutory definition applies--

> Except as otherwise specified in the Act, the [state educational agency] . . . shall compute an LCR . . .[by] divid[ing] . . . [t]he aggregate current expenditures . . . by . . . [t]he aggregate number of children . . .

In Bellevue's view, the statutory definition is that which is "as otherwise specified in the Act." Therefore, the statutory definition, not the regulatory definition, is applicable in the computation of the comparable local contribution rate.See footnote 4[4]

Bellevue then argues that, under either subsection of Section 8013(11), the distribution of the Nebraska state income tax qualifies as revenues derived from local sources as it provides that--

> [t]he term "revenue derived from local sources" means--
>
> (A) revenues produced within the boundaries of a local educational agency and available to such agency for such agency's use; or
>
> (B) funds collected by another governmental unit, but distributed back to a local educational agency in the same proportion as such funds were collected as a local revenue source.See footnote 5[5]

The income tax revenues qualify under subsection (A) because these revenues were paid by the residents of the LEAs and 20% of these revenues were made available to the LEAs for their use in school related matters. In a similar fashion, Bellevue argues that the state income tax reflects funds collected by the state government and that 20% of these funds were distributed back to the comparable LEAs in the same proportion as the funds were collected from the residents of the LEAs.See footnote 6[6] Hence, the distribution of state income tax revenues also qualifies as local source revenue

under subsection (B) of Section 8013(11).

Therefore, under Bellevue's view, the Nebraska State Department of Education must consider the distribution of the State income tax receipts to Bellevue's comparable LEAs in determining Bellevue's local contribution rate.[See footnote 7][7]

II. ORDER

On the basis of the foregoing, it is HEREBY ORDERED that Bellevue's appeal is dismissed with prejudice.

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Allan C. Lewis
Chief Administrative Law Judge

Issued: July 13, 1998

Washington, D.C.

SERVICE

On July 13, 1998, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 [1] *This matter is before the Office of Administrative Law Judges pursuant to 20 U.S.C.A. § 7711(a).*

Footnote: 2 [2] *In the initial LCR determination for Federal fiscal year 1997 made by the Nebraska Department of Education, these receipts were not included as "revenues derived from local sources."*

Footnote: 3 [3] *ED's position is untenable. First, 34 C.F.R. § 222.2(c) specifically states that the statutory basis for its definition of revenues derived from local sources is the statutory definition, Section 8013(11). Hence, this is the basis for the definition in the regulation. ED cannot maintain a position contrary to the regulations. Only the Secretary has*

the discretion to disregard his regulations. In re Smithville R-II School District, Dkt. No. 91-4-I, U.S. Dep't of Education (Sec. Dec. July 27, 1992). Second, Congress clearly indicated that the scope of Section 8013(11) is not limited because the definition applies for all of Subchapter VIII -- Impact Aid, i.e. it defined this term "[f]or purposes of this subchapter." Section 8013 (20 U.S.C.A. § 7713). Third, under ED's view, Congress defined a term in Section 8013(11) and then failed to employ that term elsewhere in the statute. I find that position unpersuasive. Simply put, Congress sought in Section 8003(b)(1)(C)(iii) to carryover the existing method for determining the comparable contribution rate set out in the regulations existing on January 1, 1994, i.e. in 34 C.F.R. § 222.35 (1993). Congress then added, in Section 8013(11), a new definition for the term revenues derived from local sources which was employed, but not defined, in 34 C.F.R. § 222.35 (1993).

Footnote: 4 [4] *Under this view, the regulatory definition of 34 C.F.R. § 222.2(c) applies in all other aspects of the regulations other than in the comparable local contribution rate computation.*

Footnote: 5 [5] *The parties agree that the essence of this statutory definition was taken from the current federal accounting manual, Financial Accounting for Local and State School Systems 1990, p. 18, which is published and used by the Department's National Center for Education Statistics to collect, analyze, and disseminate statistics and other data related to education.*

Footnote: 6 [6] *Neb. Rev. Stat. § 79-3804 provides, in part, that "(1) . . . twenty percent of the projected state income tax receipts shall be dedicated to the use and support of the public school system . . . [and] (3) [the State Department of Education] shall calculate [and distribute] each district's allocated income tax funds."*

Footnote: 7 [7] *The amount of additional Federal impact aid due to Bellevue under its theory has not been determined. The parties agreed to perform such a recomputation in the event that the tribunal issued a ruling favorable to Bellevue.*