UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF	Docket No. 99-81-I
ZUNI PUBLIC SCHOOL DISTRICT #89	Impact Aid Proceeding
and GALLUP-MCKINLEY PUBLIC	
SCHOOLS.	

INITIAL DECISION

Appearances: Mark W. Smith, Esq., of Washington, D.C., Office of the General Counsel, United States Department of Education for the Office of the Assistant Secretary for Elementary and Secondary Education;

Ronald J. VanAmberg, Esq., of Santa Fe, New Mexico, for the Zuni Public School District #89;

George W. Kozeliski,, Esq., of Gallup, New Mexico, for the Gallup-McKinley Public Schools;

Leigh M. Manasevit, Esq., and Jonathan D. Tarnow, Esq., of Washington, D.C., for the New Mexico Department of Education;

Before: Chief Administrative Law Judge Allan C. Lewis

This is a proceeding initiated by two local educational agencies, the Zuni Public School District #89 (Zuni) and the Gallup-McKinley Public Schools (Gallup), to contest a determination and certification by the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) that, for the fiscal year 1999-2000, the State of New Mexico had in effect a program of aid that equalizes expenditures for free public education among its local educational agencies in compliance with 20 U.S.C. § 7709(b) (1994). Due to its interest in this matter, the State of New Mexico (New Mexico) was allowed to participate as an intervenor.

Based upon the submissions of the parties, the record, and for the reasons stated, infra, it is concluded that the determination is correct and, accordingly, the appeals by Zuni and Gallup are dismissed with prejudice.

I. OPINION

There is a general prohibition that a State may not consider Federal impact aid payments to a local educational agency (LEA) in determining the amount of the State's contribution to the LEA for free public education. 20 U.S.C. § 7709(a) (1994). An exception to the general prohibition permits a State to consider Federal impact aid if a State "has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State." 20 U.S.C. § 7709(b)(1).

In 1994, Congress adopted the disparity test as the sole means to determine whether a State had a program of State aid that equalizes expenditures among its local educational agencies. Equalization is present—

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did 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 twenty-five percent (25%).

20 U.S.C. § 7709(b)(2)(A).

In determining whether the disparity percentage is more than 25 percent, the Secretary shall "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2(B)(i); 34 C.F.R. § 222.162(a) (1999). Then, the disparity percentage is calculated, first, by determining the difference between the current expenditure or revenue per pupil of the LEA at the 95th percentile and the current expenditure or revenue per pupil of the LEA at the 5th percentile. This difference is then divided by current expenditure or revenue per pupil figure of the LEA at the 5th percentile and yields the disparity percentage.

The Appendix to Subpart K of 34 C.F.R. Part 222 mandates that the student population of the State, not the LEA population, be used to determine the per pupil expenditure or revenue at the 5th and 95th percentiles—

> [the determinations of disparity are made by ranking all LEAs and then]
> identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs.
> . . . .
> *Example:* In State X, after ranking all LEAs . . . in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditures that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820 and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000.

For the fiscal year 1999-2000, New Mexico had a range of revenue per membership (i.e. per student) between a low of $2,672 for students attending the LEA Des Moines and a high of $6,520 for students attending the LEA Mosquero. Based upon the ranking of the State's membership, the 5th percentile of membership was $2,848 and fell within the membership of the LEA Hobbs. The 95th percentile of membership was $3,259 and fell within the membership at the LEA Penasco. These two percentiles of revenue per membership yielded a disparity percentage of 14.43% which was well under the 25% maximum limitation. Thus, the Assistant Secretary certified New Mexico's program as a program that equalizes expenditures for free public education under 20 U.S.C. § 7709(c)(3)((A).

Zuni challenges the certification of New Mexico on several grounds. Its main disagreement concerns the usage of the student membership population rather than the LEA population to determine the cutoff points at the 5th and 95th percentiles for purposes of the disparity test. In its view, 20 U.S.C. § 7709(b)(2)(B) mandates the usage of a State's population of LEAs to determine the cutoff points in clear and unambiguous terms—

> (B) . . . In making a determination under this subsection, the Secretary shall—
>
> (i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State . . . .

Hence, Zuni urges the tribunal to disregard the student membership approach adopted in the regulation and to follow the statute in determining whether New Mexico has an equalized program.[1] This argument requires the tribunal to invalidate the Appendix to the regulation. [2]

The Assistant Secretary responds that 20 U.S.C § 7709(b)(2)(B)(i), as enacted in 1994, was an attempt to codify the disparity standard set forth in the regulations interpreting the former 20 U.S.C. § 240(d)(2) (1993) and that, for unknown reasons, the draftsmen "slightly altered" its language creating the present controversy over its construction. He argues that the current appendix of the regulation, which mandates cutoff points based upon the population of students, represents a reasonable interpretation of the provision. In his view, such an interpretation is fully consistent with the remainder of 20 U.S.C § 7709, its predecessor statute, and underlying regulations. It is also consistent with the standards used in statistics and the financial measurement of educational institutions. In his reply brief, the Assistant Secretary belatedly adds that the tribunal lacks the authority to overturn a Departmental regulation under In re Smithville R-II School District, Dkt. No. 91-4-I, U.S. Dept of Education (Sec. Dec. July 27, 1992).

In Smithville, the Secretary held that "[t]he Administrative Law Judge does not have authority to overturn a Department regulation, and as a matter of public policy the Secretary is extremely reluctant to overturn a regulation established through the formal rulemaking process." Id. at 1. The rational for this holding is set forth in Lemont Township High School, Dkt. No. 89-48-I, U.S. Dept of Education (ALJ Op. Feb. 6, 1992) (aff'm May 4, 1992). A tribunal must have either the inherent authority or a specific statutory authority to rule on such a question. Inherent authority lies with an Article III court such as a Federal district court. Tribunals with specific statutory authority include legislative courts such as the Article I, United States Tax Court or other boards such as the Benefits Review Board within the Department of Labor. Lemont concluded that a hearing authorized under 20 U.S.C. § 240(g) (1988) and conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and 34 C.F.R. Part 218 (1988) had neither the inherent authority nor the specific statutory authority to rule on the validity of regulations. Id. at 5-6.

Zuni invites the tribunal to reconsider the Lemont decision as it pertains to the absence of specific statutory authority to rule on this type of an issue. In Lemont the tribunal stated that—

> Congress created several boards or other tribunals with specific authority to pass upon this question. For example, the Tax Court of the United States . . . Similarly, the Benefits Review Board, a body within the Department of Labor, was created by Congress in 1972 and was given this specific authority according to the Sixth Circuit in Gibas, 748 F.2d 1112 (1984). . .
>
> In Gibas, the Sixth Circuit noted that the Board was created to fulfill the review function previously performed by the [federal] district courts regarding benefit requests under several federal workers' compensation programs. Congress expressly granted the Board the authority under 33 U.S.C. § 921(b)(3) "to hear and determine appeals raising a substantial question of law or fact." The Board could not engage in de novo review of an administrative law judge's determination and could only set aside this determination if it was not supported by substantial evidence or not in accordance with the law. Decisions by the Board were appealable to the courts of appeal. In these circumstances, the Sixth Circuit concluded that—
>
> > [I]n sum, the Board performs the identical appellate function previously performed by the district courts. Therefore, it appears that Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts. See Carozza v. United States Steel Corp., 727 F.2d 74 (3d Cir. 1984).
>
> Id. at 1118. It held, therefore, that the specific statutory authority conferred by Congress on the Board to decide appeals raising a "substantial question of law" included the authority to declare invalid regulations promulgated by the Secretary of Labor.
>
> In the case at bar, it is apparent that Congress did not specifically authorize the tribunal to pass on the validity of regulations issued by the Secretary of Education. . . [The hearing is conducted in accordance

with the Administrative Procedure Act. The initial decision is] made subject to the published rules of the agency . . . [that includes] the regulations promulgated by the Secretary of Education. . . Hence, it is apparent that Congress did not specifically authorize the tribunal to pass upon the validity of regulations promulgated by the Secretary of Education. In fact, Congress required that the administrative law judge should follow the published rules of his or her agency.

Id. at 4-6.

Zuni advances several arguments urging that the tribunal may rule on the validity of a regulation. First, 20 U.S.C. § 7711(a) permits a broad scope of adjudication as it provides that "any action of the Secretary" may be reviewed and thus, it may include this issue. Second, unlike a typical chain of review that consists of the administrative law judge, a district court, and a court of appeals, the present process utilizes only an administrative law judge and a court of appeals. As such, Zuni asserts that the function of the district court must now be performed by the administrative law judge and, therefore, the tribunal may rule on the validity of a regulation.

In Gibas, the chain of review was an important factor because it showed that the Benefits Review Board replaced the Federal district court as the reviewing tribunal and that, coupled with a review authority similar to that possessed by a Federal district court, led the court to conclude that the Benefits Review Board had the authority to pass on the validity of a regulation. Under 20 U.S.C. § 240(g) (1980), the predecessor of 20 U.S.C. § 7711, and 34 C.F.R.§ 222.69 (1980), the chain of review began with the administrative law judge. His decision was subject to review by the Secretary of Education before the matter proceeded to a Federal district court. In 1994, Congress changed the process and eliminated the Federal district court. Thus, an appeal of an adverse decision by the Secretary of Education now goes directly to a Federal court of appeals. While the chain of review was modified, Congress carried over intact, in 20 U.S.C. § 7711(a), the language of 20 U.S.C. § 240(g) that authorized a LEA or State to contest "any action of the Secretary" in an administrative hearing before an administrative law judge. Thus, neither the present appeal process nor the provision authorizing the administrative hearing suggest that Congress granted the administrative law judge the authority to invalidate a regulation.

Zuni also notes that 5 U.S.C. § 706 and case law in the Tenth Circuit require that, in order for an appellate court to consider a matter on review, the issue must have been raised below and a record made thereof. Accordingly, it urges that the tribunal must consider the validity issue. Zuni's point is true as a general matter. However, this rule is limited to a matter that the lesser tribunal has authority to address and resolve. Here, the first tribunal with authority to address the validity of a regulation is the Federal court of appeals. In sum, Zuni's arguments do not persuade the tribunal to request the Secretary to reconsider the Smithville decision.

Next, Zuni argues that several errors were made in computing LEA revenue per membership for purposes of the disparity test. In this calculation, 20 U.S.C. § 7709(b)(2)(B)(ii) requires that the total expenditures or revenues of a LEA be adjusted to eliminate any additional expenditures or revenues incurred for the special needs of students or for the unusual needs of a LEA—

(B) . . . [I]n making a determination . . . the Secretary shall . . .
(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

These additional costs or revenues, commonly called special cost differentials, are further defined by the Secretary as--

(i) [t]hose [costs] associated with pupils having special education needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and
(ii) [t]hose [costs] associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

34 C.F.R. § 222.162(c)(2).

New Mexico considered three categories of LEA revenue as special cost differentials and, therefore, excluded these revenues from each LEA's total revenue in computing the LEA's revenue per membership. Zuni disagrees with this treatment. Each category of revenue possesses, however, the characteristics of a special cost differential. The "save harmless" category (N.M.S.A. § 22-8-25(D)(3)) represents an adjustment for sparsity of population and economic adversity as it provides additional revenue for a small school district, i.e. one with less than a 200 membership or that experiences a decline in membership. A LEA experiencing abnormal growth (N.M.S.A. § 22-8-23.1) receives additional revenues to cope with the effect of a sudden increase in density of its student population. A small and rural school district (N.M.S.A. § 22-8-23) is entitled to additional revenue to offset the economic impact of its rural isolation. Accordingly, the revenue attributable to these three categories was properly excluded from the LEA's total revenue in computing its revenue per membership.

Lastly, New Mexico treated two LEA programs (the special education and bilingual programs) as special cost differentials. It, therefore, eliminated the revenue from these programs in the LEA's total revenue in computing the LEA's revenue per membership. The amount of the reduction was determined by multiplying the number of membership program units attributable to each program by the statewide program unit value, a dollar value set, in effect, by the legislature each year. The parties do not dispute the appropriateness of a revenue reduction only the amount thereof. The issue is whether, in determining the amount of the revenue reduction for each LEA, its teacher training and experience index should be taken into consideration. New Mexico argues that the index should not affect the amount of the revenue reduction because it was simply following prior instructions by the Department regarding the treatment of this item. The Assistant Secretary and New Mexico also argue that the exclusion of the index produces a revenue reduction directly related to these programs.

The resolution of this issue lies in understanding the function of the index within the State's funding formula Under the funding formula, a LEA determines the number of its membership program units. This is the sum of the product of the student membership in each of the four educational programs (early childhood, basic, special education, and bilingual) and the cost differential factor for each program. The total number of membership program units is multiplied by the LEA's teacher training and experience index and, for purposes relevant here, yields the LEA's number of program units. The LEA's revenue or program cost is then the product of its program units and the statewide program unit value.

The cost differential factors assigned to the four educational programs represent an effort by the legislature to establish a comparative cost basis among the programs. While a cost differential factor has a salary component, it does not reflect, as to each LEA, the particular salary level of its staff. This is accomplished under the funding formula through the teacher training and experience index, an index that varies between 1.0 and 1.227, and is assigned based on the academic training and teaching experience of the LEA's staff. N.M.S.A. § 22-8-24. Since the cost differential factor and the index are adjustments to reflect costs incurred in the various programs, each must be considered in order to determine the total revenue attributable to a particular program. As such, the proper approach to determine the revenue attributable to the special education or the bilingual program for a LEA is to multiply three items: the membership program units for the particular program (which includes an adjustment for its cost differential factor), its teacher training and experience index, and the statewide program unit value.

While New Mexico's computation of the disparity test is in error due to the exclusion of the teacher training and experience index, its inclusion has minimal effect on the disparity test computation and does not change the result under the disparity test. Accordingly, New Mexico's program remains qualified under the disparity test.

Gallup maintains that New Mexico took too much of Gallup's Federal impact aid into consideration in determining the amount of the State's contribution to the LEA. As noted above, a State that has a qualified program may take into consideration payments of Federal impact aid in determining the financial need of its LEAs. The State may consider "as local resources [Federal impact aid] funds . . . only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues." Section 7709(d)(1)(B); 34 C.F.R. § 222.162(a). The proportion is obtained "by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA." 34 C.F.R. § 222.163(b). [3]

In its filings with the Department for the fiscal year 1999-2000, New Mexico considered as local revenue 75% of the LEA's Federal impact aid. New Mexico levied a statewide .5 mil property tax to raise funds for current expenditures for educational services. N.M.S.A. § 7-37-7.B(2). Of this amount, 75% was designated as local tax revenue under the State's equalization program. N.M.S.A. § 22-8-25(B).

Gallup raises three alternative arguments in an effort to substantially reduce the amount of Federal impact aid that may be considered by New Mexico under its equalization program. It urges that, for the fiscal year 1999-2000, the offset for Federal impact aid funds be limited to—

1. The amount of local tax revenues generated by the .5 mil levy in fiscal year 1999-2000, e.g. approximately $245,774 in Gallup's case;

2. The proportion of statewide property tax revenues that existed in 1974-1975, the first year of the equalization program, i.e. that Federal impact aid may be considered as a local resource to the extent of 35% of the projected property tax revenues;[4] or

3. The proportion that a LEA's local property taxes imposed to support its schools bears to the total local property taxes imposed to support all public schools within the State.[5]

At the heart of Gallup's arguments is its frustration with the actions of the State over the past two decades toward funding public education. It has significantly reduced the property tax as a source of revenue while continuing to rely heavily upon the Federal impact aid revenues received by Gallup and other LEAs.

Gallup's three alternative interpretations are not consistent with the statutory language of 20 U.S.C. § 8009(d)(1)(B). The first proposal limits the Federal impact aid to the amount of the local property tax imposed; however, 20 U.S.C.§ 8009(d)(1)(B) requires a proportion of local taxes to determine the percentage of Federal impact aid that may be considered as a local resource. While the second alternative employs a proportional method, the proportion is based on the local taxes collected during 1974-1975, the first year of the equalization program. The statute requires a yearly computation of the proportion using tax revenue figures appropriate to that year.

Gallup's third alternative utilizes a proportional approach; however, neither the numerator nor the denominator conform to the statutory mandate. Gallup's numerator is the LEA's total local property tax revenue while 20 U.S.C. § 8009(d)(1)(B) limits the local tax revenue only to the revenue covered under the equalization program. Gallup's denominator reflects the local property tax revenue on a statewide basis rather than the total local tax revenue of an individual LEA as required by the statute—

> [the proportion is obtained] by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

34 C.F.R. § 222.163(b) (emphasis added).

In summary, the Assistant Secretary's determination is upheld in all respects except for the treatment accorded the teacher training and experience index. This index must be considered as one factor in determining the amount of revenue attributable to the special education and bilingual programs. The Assistant Secretary properly certified New Mexico's program as complying with 20 U.S.C. § 7709(b).

II. ORDER

On the basis of the foregoing findings of fact and conclusions of law and the proceedings herein, it is HEREBY ORDERED that the appeals of Zuni and Gallup are dismissed with prejudice.

Allan C. Lewis
Chief Administrative Law Judge

Issued: April 17, 2001
Washington, D.C.

SERVICE

On April 17, 2001, the initial decision was forwarded, in accordance to 34 C.F.R. § 222.157 (1997) to the Honorable Rod Paige, Secretary of Education, U.S. Department of Education.

In addition, a copy of the initial decision was also sent by certified mail, return receipt requested to the following:

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[1] Zuni advances several approaches in ranking the LEAs. Under all of its methods, New Mexico exceeds the maximum allowable disparity percentage and, therefore, its program was not in compliance with 20 U.S.C. § 7709(b)(2)(A).

[2] During the oral argument, the tribunal voiced a serious concern whether it could invalidate a regulation that conflicted with a statute. In a subsequent filing, Zuni reconfigured its argument. Now, it emphasizes the disharmony between the Appendix and 34 C.F.R. § 222.162(a), a regulation whose language is identical to 20 U.S.C. § 7709(b)(2)(B). This view requires the tribunal to resolve only a conflict within the regulations, something that Zuni urges the tribunal is empowered to do. While Zuni's argument is quite resourceful, it ignores the substance

and reality of the present issue, namely whether the Appendix is consistent with its underlying statute. As explained below, this is a matter for a Federal court to resolve.

[3] Local tax revenues covered under the equalization program are defined as local tax revenues levied for current expenditures for educational services that are taken into consideration in a State aid program. 34 C.F.R. § 222.161(c). Total local tax revenues are all local tax revenues levied for current expenditures for educational services but excludes revenues from State and Federal sources. 34 C.F.R. § 222.161(c).

[4] In 1974-1975, the percentage of total statewide property tax revenues and Federal impact aid revenues was 65% and 35% , respectively. Based upon projected property tax revenues of $7,208,379 for the fiscal year 1999-2000 and assuming these revenues represent 65% of the districts' contribution, then the corresponding amount of Federal impact aid revenue is $3,881,435. Since Gallup's share of the total statewide Federal impact aid revenue is 46% for fiscal year 1999-2000, it argues that the State may consider as local resources only 46% of the $3,881,435 or $1,785,460. Under this alternative, Gallup retains approximately $ 23 million of its Federal impact aid revenue.

[5] For example, in McKinley county where Gallup operates, the local tax assessment was $245,774 and the statewide total local tax assessment was $7,699,000. As such, McKinley's share was 3.19%. Accordingly, the amount of Federal impact that may be considered as local resources is the product of the amount of McKinley's Federal impact aid and 3.19%.