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Introduction

The Tenth Amendment of the Constitution relegates the primary responsibility for the provision of public education to the individual states. Each state provides an established funding program that provides fiscal support for their public schools. These state educational funding programs, to be discussed later in the document, range from those that provide full state support to those programs that provide minimal funding to their local school divisions. The Commonwealth of Virginia operates under the auspice of a foundation program as the model for financing their public schools. The *Standards of Quality (SOQ)* are the Board of Education determined and prescribed standards for the operation of public schools in Virginia under which the foundation program functions. The 2004 General Assembly passed legislation recommended by the Board of Education to amend the SOQ to provide for additional funding for elementary resource positions, technology positions, planning periods for secondary teachers, and remedial programs among its other proposals.

During the 2004-2006 biennium, the Commonwealth was faced with the difficult task of providing adequate funding to support public education and the changes to the SOQ without requiring a substantial tax increase. To accomplish the task of funding the amended SOQ, without providing adequate additional revenues, required some innovative financing. One method utilized in the policy adopted by the Virginia Department of Education was to institute a deduction of certain federal revenues from the State Basic Aid formula. The process described later in this document required that the identified federal revenues be deducted from the formula before determining the amount of required fiscal assistance at both the state and local levels.

The removal of the federal funds from the Basic Aid formula is a controversial issue due primarily to provisions in the Federal legislation that prevent the funds provided by the Acts involved, from being utilized for purposes other than what they were intended. The *non-supplant* provisions in the federal legislation at issue provides the language specifying that the federal funds are to *supplement* funds provided by state and local agencies and not supplant them. The removal of the targeted federal assistance in disregard of the legislation's *non-supplant* provisions from the Basic Aid formula opens the Virginia policy to legal scrutiny. To ensure that Virginia continues to maintain a high level of fiscal integrity, research needs to be conducted through historical analysis of public education funding legislation, overview of state funding formulas, and review of case law involving the *non-supplant* issue to provide additional information on the legality of the policy. In turn, the primary purpose of this study is to assist with the determination of the legality of the policy adopted by the Commonwealth of Virginia of deducting the federal revenues from the Basic Aid formula.

Research Questions

Through historical analysis of the legislation involved in the federal support of public education, the overview of state funding formulas provided for public education, and the review of case law, I will seek to provide answers to the following questions:

1. How has the current federal supplement/supplant issue in Virginia historically evolved?
2. How does the current supplanting issue in Virginia relate to similar issues in other states?

3. Does the current Virginia policy regarding the federal supplement/supplant issue violate federal non-supplant provisions of federal aid programs?

Methodology

This study documented the legislative involvement of the federal government in public education from the establishment of the Massachusetts Bay Colony to the present. Historical documents including Constitutional acts and amendments, statutes and publications of early education scholars are reviewed. Textbooks by legal and financial experts are utilized in the document's reconstruction of the evolution of federal assistance to public education. Government websites, Congressional journals, as well as archived documents and their reproductions posted on higher education websites were used to analyze the specific language of the early legislation. The section addressing the current policy issue in Virginia utilized memoranda published by the Virginia Department of Education, Department of Planning and Budget, and Senate Finance Committee. Primary sources of information produced when the event occurred were utilized whenever possible. However, secondary sources based on the primary event and produced at later dates were used when primary sources are unavailable.

Dr. Richard G. Salmon, public education finance expert, was used as a consultant in constructing the overview of state funding formulas. The textbook, *Public School Finance*, published by Dr. Salmon and Dr. Kern Alexander was an outstanding source of information in regard to the state system of school finance. The National Center for Educational Statistics also provided information on specific state funding models utilized in the case law involving state appropriations and the *non-supplant* provisions.

The review of law contained cases found on both Westlaw and Lexis Nexis databases. The majority of the searches conducted on Westlaw utilize the key cite function to find cases in which either the citation number or the names of the parties involved in the litigation were used. Cases referenced in the reviewed litigation were another primary source for identifying case law containing the non-supplant issue. The locator function on Westlaw was utilized to search the database for key terms such as non-supplant, supplant, misappropriation, and federal funding among others that help identify case law that potentially pertained to the *non-supplant* issue. The key citing feature on Westlaw that identified cases that were either overturned or contained later rulings helped narrow the focus of the searches and eliminate irrelevant cases. During the screening process, numerous cases were initially identified but only relevant cases that actually pertain to the *non-supplant* issue were included in the final review of case law.

The chronological review of case law pertaining to *non-supplant* was organized around the format provided in the public school law class at Virginia Tech. All cases were dissected and written on a standard form and when the cases were inserted into the paper, they were be summarized containing the issue at hand, relief sought, judgments, and reasoning by the court for the judgments. The cases involving state appropriations were similarly formatted although they contained more fiscal detail and included a brief synopsis of the involved state's financial funding model for public education.

The document concluded with relevant common issues between the federal revenue deduction policy in Virginia and non-supplant issues identified in the case law

reviewed. These commonalities were utilized to either provide justification for, or challenge to the federal revenue deduction. Conclusions reached were based on the results of the analysis of case law. Final comments were made, and future implications and recommendations for future studies identified.

The Concept of Non-Supplant

To begin a discussion on the issue of *non-supplanting*, one must first comprehend the meaning of supplant and its application to educational funding. To fully understand the term *supplant* one could reflect on his/her childhood experiences of “running errands” for his/her parents. Take for instance the analogy of being sent to the store by your mother with \$3.00 and given specific directions to purchase a gallon of milk and a loaf of bread. You return home with the bread and a fully restocked supply of the latest baseball cards. The money was not spent for the purpose it was intended. Mother was not happy with your decision to *supplant* the funds she provided you to spend on the gallon of milk and bread for something that enlarged your status with the neighborhood boys. There were repercussions for your actions as a child just as there are for those who choose to substitute one fund for another in public education.

The issue of *supplanting* in public education is not quite this simple; however, the intent is the same. This common sense definition applied to the funding of public education means that funds allocated by federal or state agencies are to be used by the recipient of those funds for the intended purpose of the providing agency. The funds provided by the issuing agency are not to take the place of funds that would normally be used in the absence of such funds. Money provided to local educational agencies by either federal or state governmental agencies must be used for the purpose that the

grantor intended. The same holds true for state educational agencies; money appropriated by the federal government must be used for the purpose the federal government intended. So, the term *non-supplant* is defined as the prohibition of *supplant*. Since the vast majority of federal support to public education is in the form of categorical aid, the funds provided are targeted for specific use and are not discretionary.

Definitions Related to the Virginia System of Public School Finance

The focus of this research is the non-supplant issue in regard to the state appropriation of specific federal funds to public education. The term *non-supplant* is clearly defined in the previous portion of the document. To fully comprehend the current public school funding policy in Virginia and the relationship with the non-supplant issue, other key terms must be identified and defined.

As mentioned earlier in the document, the *Standards of Quality (SOQ)* are the standards under which Virginia public schools operate. The SOQ required funding formula in Virginia is a *foundation program*, described later in the document, in which *Basic Aid* (Appendix B) is distributed to local public school divisions or their respective local governments. The *Basic Aid* grants are allocated without specific expenditure restrictions for the operation of public schools and are based on the ability of the division to provide a minimum educational program.

Simplified, the *Basic Aid* allocations are based on a determined per pupil amount multiplied by the school division's *Average Daily Membership (ADM)*, the method of accounting for a school division's membership that equals the sum of student days present and absent divided by the number of days taught. To determine the state and

local shares of the *Basic Aid* allocation Virginia's measure of school division fiscal capacity, the *Local Composite Index (LCI)*, (Appendix B) is applied. The *Local Composite Index* is composed of fifty percent True Valuation of Real Property, forty percent Virginia Adjusted Gross Income, and ten percent Taxable Retail Sales and Use Tax Receipts. The *LCI* is weighted two-thirds for *ADM* and one-third for total population.¹

System of Funding Public Education

To understand how appropriations are governed and the inter-governmental transfer of revenue, in which the *non-supplant* issue is a concern, the system of funding public education must be first examined. The funding of public education is comprised of two systems. The legal system that relegates the responsibility of public education to the individual states relying on the Tenth Amendment that provides "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."² The practical system for school finance recognizes the partnership between the federal, state, and local governments and their relationship in the funding of public education.

Definition by Law

As previously noted, the Tenth Amendment relegates the responsibility of education to the states since there is no mention of education in the Constitution. The state is the legal entity responsible for the governance and operation of public education. The state, having the primary responsibility of generating revenues for public education, has the authority to tax through legislative acts and is limited only by federal

¹ Lisa G. Driscoll, *The Local Composite Index: A Critical Analysis*. Ph.D. diss., Virginia Polytechnic Institute and State University, 1998, 158.

and state constitutions. Through the interpretation of the general welfare clause³ of the U.S. Constitution, Congress “can tax and appropriate money for the general welfare of the United States”,⁴ including education. The federal government exercises a measure of control over public education and involves itself in legislative policy regarding education through current legislation such as the *No Child Left Behind Act of 2001*.⁵ The appropriations in the form of categorical aid programs provided by the federal government and their conditions for acceptance can guide the direction of public education.⁶ The language of the federal acts providing categorical aid to public education provide specific directions as to how the money is to be used and provides stiff penalties for its misappropriation. Although the federal government only contributes approximately seven percent of the total funds for the provision of public education, the federal government’s implied powers have to some extent controlled public education⁷ and defined its direction.

Practical Financial Definition

For practical purposes, the United States system of funding public education is a tripartite system in which the federal, state, and local governments contribute to fund public education. States began exercising managerial control of public education as early as 1647 when the Massachusetts Bay Colony passed the “Olde Deluder Satan Act”. This law required local townships to establish and maintain schools to “teach students to read and write in order to prevent ye old deluder Satan from keeping the

² U.S. Const. Amend. X.

³ Article I, § 8, cl. 1.

⁴ Ibid.

⁵ P.L. 107-110, 115 Stat. 1439, 20 U.S.C. § 6301-6578.

⁶ Kern Alexander and M. David Alexander, *American Public School Law*, Fifth Edition, (Belmont: Wadsworth/Thomson Learning, 2001), 69.

people ignorant of the Scriptures.”⁸ The General Court under the provisions of the 1647 law ordered,

1. that every town having fifty householders shall at once appoint a teacher of reading and writing and provide for his wages in such manner as the town may determine; and
2. that every town having one hundred householders must provide a grammar school to fit youths for the university, under a penalty of 5 pounds (afterward increased to 20 pounds) for failure to do so.⁹

This legislation and its subsequent amendment became the foundation for state support and management of public schools; it gave taxing authority to local governments to finance public education, and demonstrated that states must provide funding for programs it wanted implemented.¹⁰ The interaction between the state and local governments began taking shape.

The federal involvement in funding public education did not occur until The Ordinance of May 20, 1785,¹¹ when Congress enacted legislation for locating and disposing of lands in the Northwest Territory. A committee chaired by Thomas Jefferson designed the method for the survey and sale of the lands in which townships of six square miles, equally divided into thirty-six one-mile square lots, were developed with

⁷ Kern Alexander and Richard G. Salmon, *Public School Finance*, (Needham Heights: Allyn & Bacon, 1995), 275.

⁸ *Ibid.*, 7.

⁹ *Ibid.*, 7.

¹⁰ *Ibid.*, 7.

¹¹ Land Ordinance of 1785. Reproduction document retrieved on July 14, 2004 from <http://usinfo.state.gov/usa/infousa/facts/democrac/5.htm>

the one-mile section of land in each township labeled number sixteen dedicated for public education.¹²

The Northwest Ordinance of 1787,¹³ enacted by the Continental Congress, provided the provisions for territories to become states and was responsible for the disposition of the lands identified in the Ordinance of 1785.¹⁴ In respect to education, the land grant legislation was instrumental for two reasons: (a) the fact the federal government issued a portion of the grants for educational purposes and (b) for those receiving grants aside from requiring that its funds be used for public education, the legislation did not try to regulate education as a stipulation of the grant.¹⁵

Herein begins the interaction between federal and state governments in the system of funding public education. Cubberly summarized the interaction best in the following passage of his book, *Public Education in the United States*:

These gifts by Congress to the new States of national lands for the endowment of public education, though begun in large part as a land selling proposition, helped greatly in the early days to create a sentiment for state schools, stimulated the older States to set aside land and monies to create state school funds of their own, and did much to enable the new States to found state school systems instead of copying parochial or charity schools of the older States to the east.¹⁶

This intergovernmental relationship, its connectivity, and the initial stages of the

¹² Supra., note 6, 283.

¹³ Northwest Ordinance of 1787 reproduction document, retrieved on July 14, 2004 from <http://usinfo.state.gov/usa/infousa/facts/democrac/5.htm>

¹⁴ Supra., note 6, p. 63.

¹⁵ Supra., note 7, p. 281.

¹⁶ Ellwood P. Cubberly, *Public Education in the United States*, (Cambridge: The Riverside Press, 1919), 60-61.

system of funding public education can be demonstrated through the use of Figure 1. The state support initiated by the Massachusetts Law of 1647 (“Ye Old Deluder Satan Act”) directly mandates local financial support of public education. The Ordinances of 1785 and 1787 stimulated state financial support, which, in turn, provided additional encouragement to the localities to support public schools.

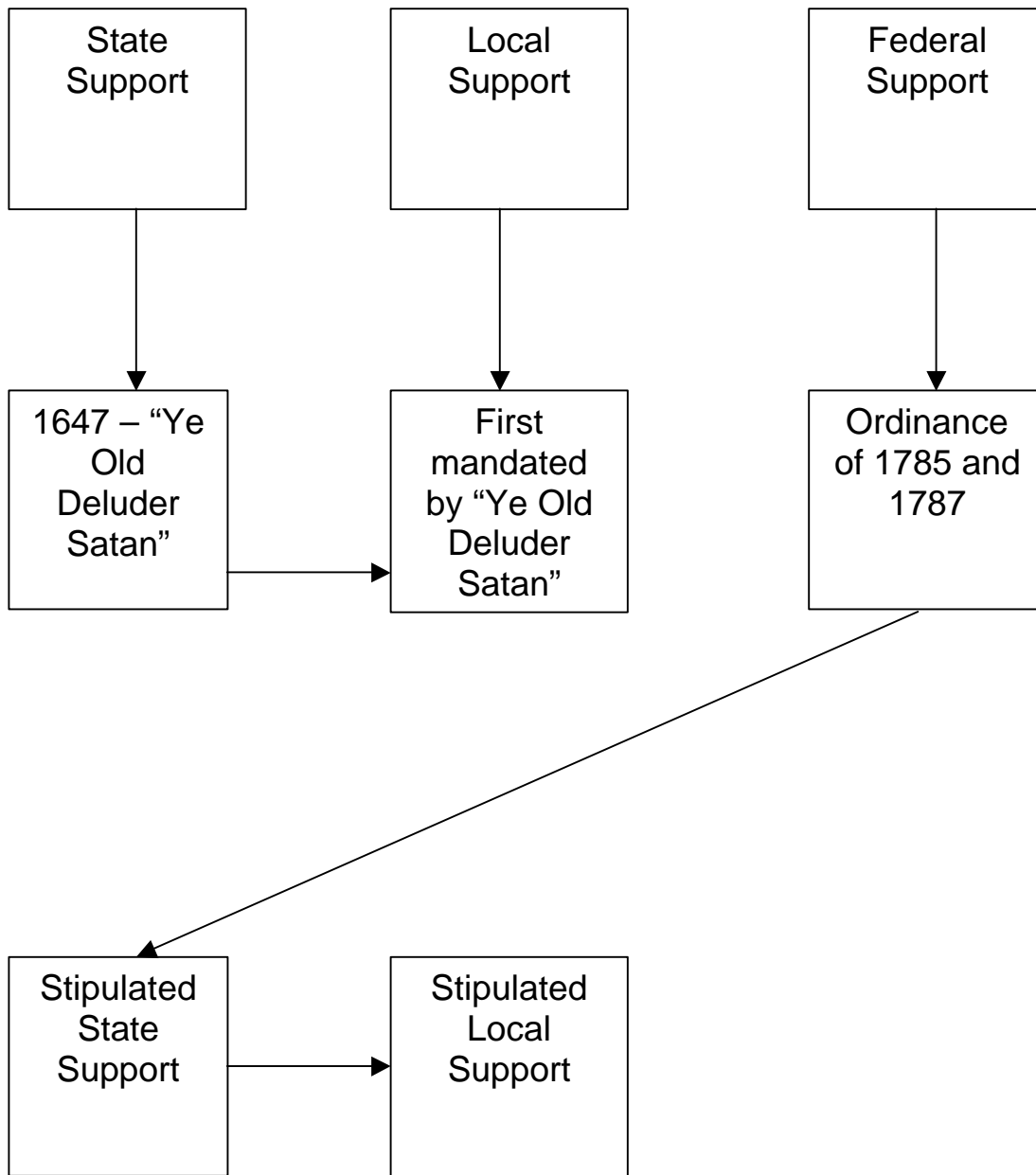
The brief explanation of the foundation of the legal and practical definitions of the system of funding public education provides a historical framework that is still functional today. The reserve powers of the United States Constitution provides states the authority to operate public schools; however, the federal government still remains active in the tripartite fiscal relationship through interpretation of its implied powers, individual rights provided by the constitution, and application of its grant programs. A more detailed history of early federal legislation in public education leading up to the first direct mention of the non-supplant issue is provided in the following section.

A Historical Analysis of the Early Legislative Acts in Public Education

The history of public education in the United States is intertwined with the westward progress of the nation. The Ordinance of 1784, in which Virginia and other states relinquished their claims to the Northwest Territory, established the framework for the nationalization of western land.¹⁷ This Ordinance set the stage for the Ordinance of 1785 that provided direction for the disposition of the federal land and specified certain considerations for public schools.

¹⁷ Howard C. Taylor, *American Education: Its Men, Ideas and Institutions*, (New York: Teachers College, Columbia University, 1922), p. 9.

Figure 1.



Note: Flowchart of the intergovernmental relationship in the initial stages of funding public education.¹⁸

¹⁸ Developed for use by the author as a visual aid.

The Ordinance of 1785

As mentioned in the earlier section on the system of funding public education, the Land Ordinance of 1785 established the requirement that all new states developed from the westward expansion direct attention toward provisions of public education. The policy established procedures for the survey and sale of the 36-square-mile townships, consisting of one square mile lots, and contained in it a provision requiring that one-square-mile lot¹⁹ (No. 16) be used for education.²⁰ Acting under the auspices of the Articles of Confederation, the initial intent of the Land Ordinance of 1785 was to raise revenues for repayment of wartime debt and to fulfill the promises made to soldiers of the Revolutionary War with land for their service.²¹

The congressional committee, under the leadership of Congressman William Grayson and influenced by Colonel Timothy Pickering,²² added the provisions for public education and religion to the reported ordinance.²³ An amendment to the proposed ordinance removed the provision for religion because it violated the First Amendment, i.e. separation of church and state.²⁴ The provision allowed, "There shall be reserved a lot No. 16, of every township, for the maintenance of public schools within said township."²⁵

Swift identified concepts supporting public schools in the land grant policy

¹⁹ Supra., note 17, p. 10, 82. The term "lot" is used in the formal language of the ordinance. However the term "section" is used interchangeably in the correspondence between those responsible for the ordinance. The term "section" is also used in the 1802 act enabling Ohio to become a state and following enactments admitting states into the Union.

²⁰ Supra., note 7, p. 283.

²¹ Ibid., p.281.

²² According to Taylor, 36, Pickering, who was not a member of the congressional committee, had a great deal of influence on the addition of the educational provision.

²³ Supra., note 17, p.36.

²⁴ Ibid., 36.

including: the need for development of the western territories, the necessity for other sources of revenue to pay off debt, the established colonial states that provided parcels of land for public schools in recently developed townships, and the influence of legislators such as Thomas Jefferson who recognized the importance of an educated citizenry.²⁶

The Ordinance of 1787

The Ordinance of 1787, otherwise known as the Northwest Ordinance, established the principles in which the lands identified in the Ordinance of 1785 were to be disposed and set the requirements for the territories to become states. The Ordinance established a precedent that contributed to national policy on the provision for public education in the United States.²⁷ The renowned provision in Article III of the ordinance stated,

Religion, morality and knowledge, being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.²⁸

According to Taylor, "... this sentence was the cornerstone in the foundation of the free public school system..."²⁹

The Ordinance of 1787 did not convey any land for the purpose of education; however, it did complement the Ordinance of 1785 by requiring the new states to have

²⁵ United States Congress, *Journals of the American Congress Vol. IV*, (Washington, DC: Way and Gideon, 1823), 520-521.

²⁵ Fletcher Harper Smith, *A History of Public Permanent Common School Funds in the United States, 1785-1905* (New York: Henry Holt, 1911), p. 217 quoted in Kern Alexander and Richard G. Salmon, *Public School Finance*, (Needham Heights: Allyn & Bacon, 1995), 283.

²⁷ *Supra.*, note 17.

²⁸ *Ibid.*, 53.

²⁹ *Ibid.*, 53.

an educational provision in its basic law for the responsibility of the sixteenth section of land or the proceeds from its sale.³⁰ The intention of the Congress was to aid and encourage public education with federal aid ensuring that states establish common schools and public universities.³¹

Although the Ordinances of 1785 and 1787 are two of the most important pieces of legislation ever produced, they are not without fault. As noted by Cubberly,

In the states of the Northwest Territory the cession was made directly for the benefit of the schools of the township in which that section was located, though later in other states the fund arising from these sections was vested in the state and for the benefit of the schools of the state as a whole. This early idea of equal division among all and aid to particular localities instead of the state as a whole has since given rise to marked inequalities.³²

Swift concurs with the logic provided by Cubberly; when he makes the recommendation, “Place upon the state (which is the only unit capable of equalizing school burdens and educational opportunities) the major portion of the burden of school support.”³³ The problem identified by Cubberly and Swift has plagued public schools throughout its history and continues into the 21st century. Local communities with extraordinary resources usually provide their students high quality educational service while in the same state, those local communities with meager resources usually provide substandard educational opportunities.

³⁰ Supra., note 6, p. 63.

³¹ Julia Johnsen, *The Reference Shelf: Federal Aid to Education*, (New York: The H.W. Wilson Company, 1933), 42.

³² Ellwood P. Cubberly, *School Funds and Their Apportionment*, (New York: Teachers College, Columbia University, 1906), 57.

³³ Fletcher Harper Swift, *Studies in Public School Finance: The West, California and Colorado*, (Minneapolis: University of Minnesota, 1902), 150.

The land ordinances provided that free public education was a right afforded to everyone living in the new democratic society.³⁴ The Ordinance of 1784 provided for the governance of the Northwest Territories, the Ordinance of 1785 provided for the distribution of the land and the educational use of the land grants, and the Ordinance of 1787 provided the foundation for educational provisions in the laws of the new states. However, the “educational intent”³⁵ of the ordinances would not come into fruition until Ohio became a state in 1802. The admittance of Ohio to the Union was the turning point in the funding of public education due to the fact that the promise relayed in the land grant ordinance was being carried out through the negotiations between the state and Congress.

The First Land Grant State

The intent of the Ordinances of 1785 and 1787 was first accomplished with the admittance of the state of Ohio, and the state’s agreement with Congress not to tax federal lands, if “the United States would in turn give to the new State the sixteenth section of land in every township for the maintenance of schools within that township”.³⁶ The act established for Ohio was utilized for every future state admitted to the Union with the exception of three states that either owned their own land or were formed from original states until 1850, when the grant increased to two sections³⁷ for all other states admitted thereafter.³⁸

The Admittance of Illinois to The Union and the First Mention of Non-Supplant

The federal government exercised little control over the management of the land

³⁴ Supra., note 32, pp. 40-41.

³⁵ Supra., note 7, p. 284.

³⁶ Supra., note 16, pp. 59-60.

³⁷ Utah, Arizona and New Mexico were allowed 4 sections due to the poor value of the land.

grants for education. Congress hesitated to require that the states comply with the terms of the land grants or funds obtained from them. The first such case where there was an obvious direct violation of the terms of the Land Ordinance, involved the admittance of Illinois into the Union.

In the resolution of December 3, 1818, the people of Illinois were enabled to form a constitution and state government and were granted admission as a state into the Union. Statute I, Chapter 68, section six of the statute contained the first provision for the use of lot sixteen for public schools. The third provision of section six contained the following language,

That five percent of the net proceeds of the lands lying within such state, and which shall be sold by Congress, from and after the first day of January, one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the state; the residue to be appropriated by the legislature of the state, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university.³⁹

On December 12, 1820, Statute II, chapter II of the acts of the Twenty-First Congress entitled "An act to provide for paying to the state of Illinois three per centum of the net proceeds arising from the sell of the public lands"⁴⁰ included a provision that the state of Illinois provide an annual account from the Secretary of Treasury for the application of the "three percent" funds. Illinois, for a period of time thereafter the

³⁸ Supra., note 31, p. 60.

³⁹ U.S. Statutes at Large III (1818), 430.

enacted legislation, diverted the funds from the sale of these public lands for other purposes.

After several unsuccessful attempts by Congress to pressure Illinois to adhere to the conditions of the funds, Congress yielded the right of control of the land grants, amended Statute II, Chapter II⁴¹ and repealed the law that required an accounting of the funds to the federal government. Illinois did, however, comply with the provisions of the land grants thereafter.⁴² This documentation of misuse of land grant funds indicates that the requirements for compliance of the use of federal funds were written in the early statutes; however, they were rarely enforced.

The Morrill Act and the Early Language of Non-Supplant

In the 1850s with the expansion into the western territories, a need developed among the pioneers for those with advanced engineering, agricultural, and practical application skills. Under the leadership of Justin Morrill from Vermont, legislation entitled “An Act Donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and Mechanical Arts”⁴³ was proposed in 1859, vetoed, then proposed again in 1862 and adopted. The legislation stated,

That there be granted to the several States, for the purpose hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States...⁴⁴

⁴⁰ U.S. Statutes at Large III (1820), 610-620.

⁴¹ U.S. Statutes at Large IV (1831), 431-432.

⁴² *Supra.*, note 17, p. 83.

⁴³ Land Grants: First Morrill Act, 7 U.S.C.301 et.seq. retrieved June 23, 2004 from <http://www.higher-ed.org/resources/morrill1.htm>

⁴⁴ *Ibid.* Section 1.

The legislation, second only to the Land Ordinances of 1785 and 1787 for providing federal support of education, required that proceeds from the granted land and land scrip be used for,

The endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislature of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes on the several pursuits and professions in life.⁴⁵

The federal grant provided by the Morrill Act was the first such grant targeted for specific educational purposes. The act contained several conditions of agreement for use of the funds including: use of the funds for building purposes; time requirements for application for, and utilization of the funds; reporting requirements; and price adjustments for the lands sold. The most noteworthy of these conditions, however, was that of the “diminution” of funds. The language of the act implies that all of the principal and interest of the fund remain undiminished. The state in turn was held responsible for the replacement of those funds that were not utilized for the intended purpose of the act.⁴⁶

The Morrill Act was followed by the Hatch Act of 1887⁴⁷ in which the colleges funded by the Morrill Act received an additional endowment of \$15,000 a year for

⁴⁵ Ibid. Section 4.

⁴⁶ Ibid. Section 5.

⁴⁷ Act of 1877 Establishing Agricultural Experiment Station, Hatch Act, retrieved July 19, 2004 from <http://www.cals.ncsu.edu/agexed/aee501/hatchact.html>

research. For receipt of this endowment, the research results were required to be shared and disseminated with the general public. The second Morrill Act of 1890 also provided the colleges with an additional annual subsidy of \$15,000 in federal governmental support from the sale of public lands.⁴⁸ The language of both the Hatch Act of 1887 and the Morrill Act of 1890⁴⁹ contained similar conditions as the first Morrill Act for the specific expenditure of the federal grant funds.

This historical perspective of federal legislation involving the funding of public schools has proceeded to the first documentation of inclusion of the non-supplant provision. Later legislative acts involving federal support of public education include the Act of May 23, 1908 (Federal Forest Reserve Act),⁵⁰ Federal Impact Aid Relief Act,⁵¹ Vocational Education Act,⁵² Title I of the Elementary and Secondary Education Act,⁵³ Education of the Handicapped Act,⁵⁴ among others and their subsequent revisions. Each of these acts contained provisions addressing the non-supplant issue in their language and will be addressed in more detail when they are implicated in the case law in the body of this document.

Summary

The initial stages of the tripartite system of public education were described in detail in this section of the document. *Ye Old Deluder Satan* first authorized the state to exert managerial control over local townships for the provision of public education. The

⁴⁸ Supra., note 17, p.45.

⁴⁹ Second Morrill Act, 7 U.S.C. 322 et.seq. Section 3, retrieved July 19, 2004 from www.ans.iastate.edu/archives/morrill1890.html

⁵⁰ 16 U.S.C.A. § 500.

⁵¹ 20 U.S.C. § 236 et seq.

⁵² 20 U.S.C. § 2301 et seq.

⁵³ 20 U.S.C.A. § 241a.

⁵⁴ 20 U.S.C. §§ 1400-1485.

Land Ordinance Acts of 1785 and 1787 encouraged aid to public education through its educational provisions for use of the land grants. The first violation of the provisions of the Land Ordinance arose with the admittance of Illinois to the Union and the misuse of the “three percent” funds. Beginning with the Morrill Act, the first federal grant targeted specifically for educational purposes, the language of the legislative acts became more concise in their conditions of agreement. The “diminution” of funds language requiring the repayment of funds spent for other purposes provided the first documentation of the *non-supplant* provision in federal aid to public education.

The non-supplant issue in the federal support of public education and how it relates to state responsibility is beginning to evolve in this paper. The stage is now set for the next portion of this document that will address the non-supplant issue and how it relates to the current problem facing the Commonwealth of Virginia. A description of the problem will be provided and the purpose of this historical analysis and review of law will become evident.

The Current Problem in the Commonwealth with the Non-Supplant Issue

As mentioned earlier in the document, there has been a great deal of controversy in recent months surrounding the biennial budget for 2004-2006 in the Commonwealth of Virginia in regard to educational funding. The 2002 Joint Legislative Audit and Review Commission (JLARC) report⁵⁵ recommended that Virginia re-base⁵⁶ the Standards of Quality (SOQ) foundation model for education at a cost of \$1.06 billion for the 2004-2006 biennium, Governor Mark Warner, Senate Finance Committee Chairman John

⁵⁵ Virginia Legislature, Joint Legislative Audit and Review Commission, *Review of Elementary and Secondary School Funding*, (Richmond, 2002), 9, retrieved on June 29, 2004 from <http://jlarc.state.va.us>

⁵⁶ Re-basing of the SOQ cost model includes routine updates and adjustments in estimating current SOQ costs.

Chichester, and the other members of the General Assembly realized that the projected revenues failed dramatically to meet even the most modest expenditure needs of the Commonwealth.

Furthermore, the political climate that permeated the state capitals, including Richmond, Virginia, during 2004 did not bode well for significant tax increases. It was generally understood the budgetary needs for Virginia, including public education, had to be met without a substantial tax increase or repeal of the popular state car tax rebates.⁵⁷ Governor Warner was committed to developing a tax reform plan that included a commitment to public education, a fairer tax code, and preserving Virginia's fiscal integrity.⁵⁸

The Technical Update

As discussion began on the budget, a growing controversy arose about a proposed policy change described as a **Technical Update** in Superintendent of Public Instruction, Jo Lynne DeMary's Memorandum No. 223, Attachment A.

- **Institute Federal Revenue Deduction in Basic Aid Formula** – Beginning in the 2004-2006 biennium, certain federal revenues will be deducted from the Basic Aid calculation, a practice that is similar to the local revenue deduction⁵⁹ noted above. This deduction is based upon a per pupil amount for each division that is the lower to the school division's actual federal receipts per pupil or the prevailing federal revenues per pupil on a statewide basis. To calculate the federal deduction amount on a per-pupil basis, federal revenues received by all school divisions related to Title I, Title II-B, Special Education (Title VI-B), Vocational Education (Perkins Act) and Educational Technology (Title II-D) were totaled and divided by a base Average Daily Membership (ADM) figure. Please note that the

⁵⁷ VA. Code, Chapter 35.1, Title 58.1.

⁵⁸ Department of Planning and Budget, *Virginia's Budget* (Richmond, December 17, 2003), A-3, retrieved from www.dpb.state.va.us/Budget/04-06

⁵⁹ Local revenues recommended for deduction include rebates, textbook sales, day school tuition, insurance adjustments, etc... These revenues were deducted for several years, but the practice was eliminated following the recommendations of the 2000 JLARC study for FY 2004. The local deduction was initially reinstated for the upcoming biennium resulting in a reduction of Direct Aid funding of \$55.1 million in fiscal year 2005 and \$55.6 million in fiscal year 2006, however the final adopted budget did not include the local deduction in Direct Aid.

federal revenues used for capital outlay are not a part of this deduction because school divisions do not use these revenues as operating funds. This action results in a Basic Aid decrease of \$153.2 million in fiscal year 2005 and \$154.2 million in fiscal year 2006.

The per pupil deduction was designed so no locality had a reduction in the Basic Aid calculation greater than the amount actually received by the locality. The Basic Aid deduction initially proposed at 100 percent was reinstated at 70.78 percent of the federal revenues, or \$108.4 million in fiscal year 2005, and \$109.1 million in fiscal year 2006, leaving a 29.22 percent deduction of federal revenues from the Basic Aid formula in the Commonwealth's final budget.⁶⁰

Basic Aid Calculation

Virginia has long enjoyed the reputation of having strict control over fiscal accountability throughout its state agencies. The practice of allocating anticipated revenues from targeted federal assistance grants with localities being reimbursed only for expenditures meeting the criteria established in the provisions of the grants has established the precedence of tight state control.⁶¹ The foundation program in which the Standards of Quality and Accreditation Requirements are applied to every school in each of the school divisions in the state, is the funding model utilized in Virginia. The foundation program features include; a guaranteed per-pupil minimum amount of funding under which no division may fall, uniform minimum local tax effort, and the ability of school divisions to generate local leeway funds.⁶² A description of the Basic Aid formula will help clarify this process.

⁶⁰ JoAnne DeMary, Virginia Department of Education, Superintendent's Memorandum No. 3, Attachment A Technical Update, May 17, 2004.

⁶¹ Joel S. Berke and Michael W. Kirst, *Federal Aid to Education: Who Benefits? Who Governs?*, (Lexington: D.C. Heath and Company, 1972), 281.

⁶² *Supra.* note 7, p. 201.

To start the discussion on how the reduction of federal revenues from the SOQ funding formula could be challenged, a brief description of how the Basic Aid formula was calculated for this biennium is necessary. The SOQ funding process began by determining instructional (number of funded positions x funded salaries) and support costs⁶³ (position and non-personal support) and converting them to a per pupil amount. The federal revenues were then deducted on a per pupil basis to determine a final per-pupil amount. The per-pupil amount was multiplied by projected enrollment or Average Daily Membership (ADM) to determine total cost. After sales tax was subtracted, the local composite index was applied to determine state and local shares. Both the required state and local shares to Basic Aid were reduced by the federal revenue deductions. According to the Virginia Department of Education, the purpose of the deductions of the federal revenues from the SOQ model was to eliminate any expenditure supported by these revenues before calculating total SOQ costs.⁶⁴

The Challenge to the New Policy

The new policy of deducting federal revenues from the Basic Aid formula could be challenged based on the compounding of fiscal disparities between school divisions, withholding of targeted federal assistance to students, and the inadequacy of federal resources.⁶⁵ The most obvious challenge to the policy of deducting federal funds from the Basic Aid formula is that it is likely illegal under federal law. The language in each of

⁶³ Derived from the example provided by the Senate Finance Committee in the Proposed Amendments to the 2002-2004 Budget (Senate Bill 29) and Proposed 2004-2006 Budget (Senate Bill 30), January 21, 2004. See Appendix B.

⁶⁴ Virginia Department of Education Briefing, *Direct Aid to Public Education for the 2004-2006 Biennium* (Richmond, January 15, 2004), 5.

⁶⁵ Richard G. Salmon, Professor of Educational Finance at Virginia Polytechnic Institute, correspondence, June 22, 2004.

the Federal acts that provide funds to state and local education agencies contain provisions that require both agencies to agree to use the funds to *supplement not supplant*, other revenues. These provisions have evolved from the historical legislative acts, including the 1862 Morrill Act, to ensure that the federal funds are used for their intended purpose. The specific language in each of the federal grants involved in the non-supplant issue is included in this next section of the document.

Language of the Federal Grants

The citations of the Federal acts involved in the Basic Aid deduction and the specific language addressing the *supplement not supplant* issue are listed below:

- Title 20, United States Code, Chapter 70, Subchapter I – Improving the Academic Achievement of the Disadvantaged (Title I)
20USCA § 6321(b)(1) Fiscal requirements. In general. A state educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not supplant such funds.
- Title 20, United States Code, Chapter 70, Strengthening and Improvement of Elementary and Secondary Schools Preparing, Training, and Recruiting High Quality Teachers and Principals (Title II-B)
20 USCS § 6763(b)(6) An assurance that financial assistance provided under this subpart [20 USCS §§ 6761 et seq.], will supplement, and not supplant, State and local funds.

- Title 20 United States Code, Education, Chapter 33. Education of Individuals with Disabilities (Title VI-B, Special Education)

20 USCS § 1412(a)(18)(C) In general. Prohibition against supplantation and conditions for waiver by Secretary. Except as provided in section 613 [20 USCS §§ 1413] funds paid to a State under this part 613 [20 USCS §§ 1411 et seq.] will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part 613 [20 USCS §§ 1411 et seq.] and in no case to *supplant* such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

20 USCS § 1412(a)(19)(C)(ii) Waivers for exceptional or uncontrollable circumstances. The Secretary may waive the requirement of subparagraph (A) for a State, for one fiscal year at a time, if the Secretary determines that – the State meets the standard in paragraph (18)(C) of this section for a waiver of the requirement to supplement, and not to supplant, funds received under this part [20 USCS §§ 1411 et seq.].

20 USCS § 1412(a)(18)(E)(i) The Secretary shall, by regulation, establish procedures (including objective criteria and consideration of the results of compliance reviews of the State conducted by the Secretary) for determining whether to grant a waiver under subparagraph (C)(ii).

- Title 20, United States Code, Education, Chapter 44 ---Vocational Education, SubChapter III, Part A (Perkins Act, Vocational Education)

20 USCS § 2391(a) Supplement not supplant. Funds made available under this chapter for vocational and technical education activities shall supplement, and shall not supplant, non-Federal funds expended to carry out vocational and technical education activities and tech-prep activities.

- Title 20, United States Code, Chapter 70, Enhancing Education Through Technology (Title II-D, Educational Technology)

20 USCS § 6763(b)(6) An assurance that financial assistance provided under this subpart [20 USCS §§ 6761 et seq.], will supplement, and not supplant, State and local funds. (Same as Title II-B above)

The languages in the federal citations were precise in their intentions of the use of Federal funds. Nowhere in any of the aforementioned legislation was it stated the funds were discretionary and could be moved in or out of particular categories at the will of the state.

Initial Case Law Addressing the Non-Supplant Issue

Until the current budget crisis, the deduction of Federal funds from the Basic Aid formula had never been an issue and was not recognized in the 2000 JLARC study. The primary reason due to the 1968 federal division court decision in *Shepherd v. Godwin*⁶⁶ on *supplement versus supplant* in which Virginia was the defendant. The *Shepherd* decision stated,

⁶⁶ 280 F. Supp.869 at 882, (E.D. Va., 1968), Appendix C.

the state formula wrenches from the impacted localities the very benefaction the act was intended to bestow. The State plan must fall violative of the supremacy clause of the constitution. Our decision rests entirely on the terms, pattern and policy of the act... (1) the federal funds are exclusively for supplementation of the local sources of revenues for school purposes; and (2) the act was not intended to lessen the efforts of the State.

Under the Supremacy Clause, all inconsistencies between federal and state law are to be resolved in favor of the federal law.⁶⁷ Since the *Shepherd* decision, there have been other challenges to state school finance systems in regard to the *supplement versus supplant* issue. These challenges will be reviewed in more detail in the body of this law review. However, one federal case must be alluded to as a possible justification for the Governor's decision to allow the deduction of federal revenues from the Basic Aid allocations to local school divisions.

In the 1977 *Middletown School Committee v. Board of Regents For Education Of The State Of Rhode Island*,⁶⁸ a federal district court said that,

the Rhode Island formula does not "take into consideration"⁶⁹ payments under this subchapter [Pub. L. 81-874] in determining the eligibility of any local educational agency in [Rhode Island] ... or the amount of that aid." The formula applies the share ratio (derived without consideration of Pub. L. 81-874 funds) directly to the local effort figure (which by definition and logic

⁶⁷ Supra. note 6, p.17.

⁶⁸ 439 F.Supp. 1122, (D.C.R.I., 1978). Appendix C.

⁶⁹ The language, *take into consideration*, is used in Federal Impact Aid legislation and regulation, Title 20, Chapter 20, 20 USCS 20 § 77 and 34 CFR 11 § 222.61(a) pursuant to the issue of supplement versus supplant.

cannot include impacted aid funds, and only “considers” those funds as an arithmetical device to calculate local effort, a “consideration” which is not what § 240(d)(1) proscribes.)⁷⁰

The Rhode Island system of school finance, referred to as an expenditure plan, based the current costs for the school divisions on the amount of local effort, total expenditures less federal aid (a computation yielding local property taxation for education), from the previous two years. The Rhode Island plan allowed for school divisions to produce local revenues in order to obtain more state revenues. The expenditure formula excluded the federal funds in order to prevent them from generating state funds. Rhode Island’s plan encouraged greater local effort regardless of the availability of federal resources.⁷¹

Summary

How has the current federal supplement/supplant issue in Virginia historically evolved? The previous section of the document answers this question by identifying the current problem in the Commonwealth of the deduction of federal funds from the Basic Aid calculation. The section provided background information by identifying the JLARC report’s recommendation to re-base the *Standards of Quality* and the need for additional funding without a substantial tax increase. Superintendent of Public Instruction DeMary’s memo that included the *Technical Update* addressing the federal revenue deduction identified the federal grants targeted for deduction. These grants were

⁷⁰ The definition of local effort in the Rhode Island statute could have been simply stated as school expenditure raised by local property tax. This clear definition does not entail any “consideration” of Pub. L. 81-874 funds.

⁷¹ *Supra.*, note 65.

described in detail later in the section to distinguish the specificity of the *non-supplant* language. The description of the Basic Aid calculation provided evidence of how the deductions impacted local school divisions. Finally, case law was introduced with *Shepherd* and *Middletown* to provide justification from both realms on the legality of the *non-supplant* issue. As mentioned earlier, the deduction of federal revenues had never before been an issue due primarily to the *Shepherd* decision.

Addressing the Issue

The role of the federal government in funding education has remained primarily an indirect one. Although states and localities are provided with targeted federal assistance the federal government has remained for the most part silent on the issue of non-supplant. As stated by Swift in 1922,

It is impossible to contemplate the conditions which such data⁷² bespeak without asking whether the states in our Union ought not be held responsible to some authority outside themselves for the discharge of their educational responsibilities.⁷³

The inclusion of the non-supplant provisions in the targeted federal support to public education is intended to address Swift's concern of monitoring how states use the funds appropriated to them. Again, the reason the federal government placed the non-supplant provision in the federal legislation was to ensure the funds provided were spent on what the grants intended.

The importance of this study to public education, specifically public education in

⁷² Refers to inequities in average expenditure per child in 1917-18.

⁷³ *Supra.*, note 33.

Virginia, is to assist with the determination of the legality of the new policy adopted by the Commonwealth of deducting federal revenues from the Basic Aid formula. Part of the study will be to establish a legal framework that is developed by case law on the federal issue through which I will analyze the current Virginia policy at issue. The study provides a detailed review of the case law pertaining to the non-supplant issue. A fiscal analysis of the funding models of each state involved in the litigation will be analyzed to determine similarities and differences with the foundation model utilized in Virginia. A comparison of the case law with the current problem in the Commonwealth could provide insight into what legal recourse an entity may have in regard to the current policy of deducting federal revenues from the Basic Aid formula.

As mentioned earlier in the document the following review of case law and overview of funding formulas will seek to provide answers to the final two research questions: 2) How does the current supplanting issue in Virginia relate to similar issues in other states? 3) Does the current Virginia policy regarding the federal supplement/supplant issue violate federal non-supplant provisions of federal aid programs?

The case law⁷⁴ reviewed will include:

State Statute Impeding Intent of Federal Statute Violates Supremacy Clause

Shepherd v. Godwin

United States District Court of Eastern Virginia, 1968.

280 F.Supp.869

⁷⁴ The list of case law is not inclusive. Approximately 50 cases involve supplanting issues. This list is provided as a sampling of such cases. See Appendix D.

Challenge to State Funding Formula Invalid Under the Supremacy Clause

Middletown v. Rhode Island

United States District Court for the District of Rhode Island, 1977.

439 F. Supp. 1122

State is Obligated to Repay Misspent Federal Vocational Funds

State of Wyoming v. Alexander

United States Court of Appeals for the Tenth Circuit 1992

971 F.2d 531

State and City Obligated to Repay Supplanted Chapter 1 Funds

City and State of New York v. United States Department of Education

United States Court of Appeals for Second Circuit 1990

903 F.2d 930

State Is Obligated to Refund Allegedly Misspent Title I Funds

Bennett v. Kentucky Department of Education

Supreme Court of the United States 1985

105 S.Ct. 1544

State Must Repay Funds Used In Violation of Provisions of Title I Act

Hawaii Department of Education v. Bell

United States Court of Appeals for the Ninth Circuit 1985

770 F.2d 1409

*Funds Collected and Allocated for a Particular Public Purpose Cannot be Lawfully
Diverted for Another Purpose*

San Benito Independent School District v. Farmer's State Bank

Texas Court of Civil Appeals, 1935

78 S.W..2d 741

The following sections of this document are dedicated to the description of case law related to the supplant issue. First a brief description of the funding formulas of each of the states involved in the litigation will be provided. Secondly, a chronological review of cases involving the non-supplant issue in regard to diversion of federal funds for other purposes, misappropriation of federal funds and control by local governments, pooling of federal funds, and repayment of misused federal funds among other issues will be presented. Next, a more in depth case law review of state appropriations of federal funds will be provided. The final portion of the document will address commonalities between the cases reviewed and the specific non-supplant issue confronting Virginia will be addressed. Justification for the federal revenue deductions by the Virginia Department of Education officials and recommendations by finance and legal experts for the resolution of the current dilemma will be provided.

State Systems of School Finance

Federal resources are provided for local school programs. Since the responsibility of public education is delegated to the states by the Constitution of the United States, an examination of the available state aid programs is necessary to understand how federal resources may affect local school divisions. The redistribution of the fiscal resources of the state through its taxing authority allows for the support of

public education through state aid programs. The discussion of state aid programs for public education should begin with the explanation of the difference between the two major classifications of grant types, general aid grants and categorical aid grants. General aid grants are allocated with a wider range of application; they can be used for current operating expenditures and have fewer limitations for their usage. Categorical aid grants on the other hand are allocated for specific purposes with much stricter provisions for their appropriation, requiring specific documentation of their usage.

In an ideal world, all states and the localities situated therein would share equally in the responsibility of funding education. All localities would be fiscally equal and state aid would be distributed on an equitable basis, however, this is not the case. Most state aid programs fall on a continuum that ranges from the utilization of non-equalization grant programs that promote categorical aid, to equalization grants that are designed to equalize state funding between low and high fiscal capacity school divisions, to full state funding programs that require no local support for public education.⁷⁵

Non-Equalization

Non-equalization grants were not intended to widen the disparity between high and low fiscal capacity school divisions, however due to the nature of the grants high fiscal capacity school divisions tend to receive comparable per-pupil state revenues as the low fiscal capacity school divisions. For such programs, states allocate resources to local school division regardless of their ability to generate local revenues. The utilization of non-equalization grants as the sole means of state aid, unless the grants provide a high percentage of total support, fails to address the inequity of funding between high

⁷⁵ Full state support systems actually prohibit or severely limit local school districts from levying local taxes, thus avoiding the problems associated with pupil equity, taxpayer equity, etc...

and low fiscal capacity school divisions, due to the inability of low fiscal capacity school divisions to raise significant additional funding. Matching grants are considered non-equalization grants and require specified amounts or percentages from the school divisions in order to qualify for the grants, forcing low fiscal capacity school divisions to exert greater tax effort than high fiscal capacity school divisions. Non-equalization grants could be structured as general aid, however the vast majority is administered as categorical aid and is intended to be used for specific purposes.⁷⁶

Flat grants, again utilized primarily by states to distribute categorical aid to local school divisions, are designed to appropriate a fixed amount per student or other unit of measure, per school division regardless of its fiscal capacity.⁷⁷ Although flat grants ensure that all local divisions receive identical amounts of state aid per unit it only provides equalization between high and low fiscal capacity school divisions when the flat grant represents a preponderance of the combined state and local revenue. The general consensus is that flat grant programs are better suited for funding relatively small categorical aid programs that are superimposed on a large sophisticated equalization program as the major state aid program.

Equalization Programs

Equalization programs as the name implies are designed to allocate state revenue to local school divisions on an inverse relationship to their fiscal capacities. That is, on a per pupil basis, a school division considered to have low fiscal capacity will receive from the state greater per pupil amounts of state aid that comparable school

⁷⁶ *Supra.*, note 7., p. 197.

⁷⁷ *Ibid.*, 199. The “unit of measure” could be either unweighted or weighted, i.e. special population students are considered more expensive to educate than a regular education student therefore requiring additional resources or funding in comparison to a student without special needs.

divisions considered to have high fiscal capacity. Equalization grants due to differences in their structure can be classified into the five following equalization formulas: (1) foundation program; (2) guaranteed tax yield/base program; (3) percentage-equalization program; (4) district-power-equalization program; and (5) tier program.⁷⁸

For a better understanding of the relationship between grant provisions and state finance formulas, a brief description of each program will be provided.

Foundation Program

The concept behind the foundation program in public school finance was that all students throughout each state be entitled to receive a minimal amount of educational services. Otherwise known as a *minimum foundation program*, many states focus on the minimal efforts thereby not providing adequate effort toward fiscal equalization.

As mentioned earlier, the foundation program features include; a guaranteed per-pupil minimum amount of funding under which no district may drop, uniform minimum local tax effort, and the ability of school districts to generate leeway funds.⁷⁹

The level of the adequacy of the foundation program in providing for fiscal equalization depends on the percentage of state funds provided for the state as a whole and the magnitude of the local effort required.⁸⁰ The majority of states in the allocation of state aid primarily utilize the foundation program. Although the foundation program has achieved higher levels of fiscal equalization than flat grants, it is still not recommended by many public school finance authorities as the sole method of distributing state aid to local school divisions.

⁷⁸ Ibid., 200.

⁷⁹ Ibid., 201.

⁸⁰ Ibid., 201. An increase of the local required effort without increasing the state guaranteed level of funding results in a *leveling down* approach to achieve fiscal equalization.

Guaranteed Tax Yield/Base Programs

Guaranteed tax yield and tax base programs provide constant unit yield/tax base per unit of tax effort, dependent upon which of the two conceptually identical programs are utilized, to local school divisions. The guaranteed tax yield/tax base programs allow local governments to determine the levels of state and local funds for their school divisions, whereas foundation programs require a minimum local effort. Most states that utilize the guaranteed tax yield/base program establish limitations to the amount of local effort that may qualify for state equalization aid. Although the guaranteed tax yield/ tax base programs may provide a higher level of taxpayer equity, fiscal equalization among local school divisions is rarely achieved.⁸¹

Percentage-Equalization Plan

The percentage-equalization program and the guaranteed tax yield/base programs are conceptually identical to the percentage-equalization program focused on expenditure per unit as opposed to units of tax effort. The percentage-equalization program as does the guaranteed tax yield/base program relies on equalization of local effort by the state and does not set minimum levels of funding, as does the foundation program. The percentage-equalization formula can equalize all local tax revenues up to the highest capacity school divisions, however states commonly limit the amount of state-equalization aid to specified expenditure levels permitting schools to generate leeway funds above those limits. The state limitations, usually set due to budgetary

⁸¹ Ibid., 205. Although taxpayer equity is both helpful and desirable the necessity for a high level of pupil equity is of the utmost importance.

constraints, alter the conceptual basis of the percentage-equalization and the guaranteed tax yield/base programs making them similar to the foundation program.⁸²

District-Power Equalization Program

A similar program to the guaranteed tax yield/base program and the percentage-equalization program, the district-power equalization program also attempts to equalize local fiscal tax resources. The major difference between the district power-equalization program and the other equalization programs with the exception of the guaranteed tax yield/base program, is the recapture provision that requires high fiscal capacity school divisions, above a specified level, to collect a minimum local tax in which a portion is to be returned to the state for redistribution to low capacity school divisions. The recapture provision for both required and optional local fiscal efforts would neutralize fiscal capacities among school divisions. The downside to the recapture provision is that high capacity divisions that see specific amounts of their local revenues returned to the states for redistribution could reduce their local fiscal effort.⁸³

Tier Program

The tier or stacked program utilizes the foundation program as the base in which all divisions are provided a guaranteed minimum program. The guaranteed tax yield program is utilized to neutralize the fiscal capacities of school divisions that wish to exceed the required local effort of the foundation program. The tier program can be modified at the second tier to provide additional equalization of state finance programs.

⁸² Ibid., 206-207. As indicated in Alexander and Salmon's text, an extremely large amount of state revenue would have to be generated to bring absolute equalization of the lowest capacity districts to the level of the highest capacity districts in a percentage-equalization program.

⁸³ Ibid., 208-209.

The tier programs have allowed states to improve both student and taxpayer equity and approach absolute fiscal equalization.⁸⁴

Full State Funding

Full state funding requires state governments to assume responsibility for the funding and support of public schools. Local divisions would have no taxing authority to generate revenues to supplement state funds. Several states including Hawaii, Washington, and California now have funding systems that have the features of a full state funding program. Full state funding obviously will help reduce the variance in per pupil expenditures due to the ranges in local fiscal capacity and fiscal effort (horizontal equity) it does not necessarily address the differences between students and their different needs (vertical equity).⁸⁵

Summary

The brief descriptions of the aforementioned programs of state aid were provided to give the reader an overview of the programs intertwined with the federal supplanting legislation at issue. State financial programs range from minimal levels of financial assistance to programs that fully fund public education. To understand the interaction between state funding formulae and their provisions, with the federal programs and their provisions and the legislative constraints in which the two operate, a condensed review into the funding programs is provided.

Supplanting of Funds and Case Law – A Historical Perspective

As mentioned earlier in the document, federal aid to public education and the provisions that specify how the grants are to be distributed by the states is well

⁸⁴ Ibid., 209.

⁸⁵ Ibid., 210-211.

documented. This portion of the document will provide a history of the case law involved with the supplant provisions of educational funding policy. The discussion will then progress to the specific topic of the case law involved in the supplant issue in federal appropriations to state agencies and the interpretations of the courts.

The Early Years – Charting the Course

With the first mention of misuse of federal funds with the “three per centum” legislation and the Morrill Act, federal policy was established concerning the provisions and conditions that came with federal aid. Challenges to the provisions of the federal statutes and issues involving supplanting were waiting in the future. In *Long and Long v. Brown*⁸⁶ the possession of title from the sale of a portion of the “sixteenth section” of land purchased by the defendant from the inhabitants of a township in Alabama was challenged. The plaintiffs sought injunctive relief claiming that the inhabitants of the township did not have the authority to sell Brown a parcel of land containing a portion of the “sixteenth section”; therefore, making his title to the land void. The Chancellor denied the injunction upholding,

that the grant of sixteenth sections is in perpetuity to the inhabitants of the respective townships—that the legal title to the land is in the State, in trust for the inhabitants of the respective townships, in which the land is situated—and that a sale of the land, pursuant to the act of the Legislature is valid and binding on the inhabitants of the township. Sale of the land to Brown was legal and binding.⁸⁷

⁸⁶ *Long and Long v. Brown*, 4 Ala. 622, (Ala., 1843).

⁸⁷ Plaintiffs purchased the parcel from Brown and were afraid he would not be able to make title to the portion of land containing the sixteenth section. The plaintiffs brought suit just before the first payment on the note was due.

Although the case did not directly involve the supplant provision, it does involve direct interpretation by the courts of the early language of federal legislation in regard to transfer of federal resources.

Attention was focused on legislative provisions to federal acts at the turn of the century when the federal government began providing support to states for the imposition of federal property and activities in states in which such property was situated. The Act of Congress of May 23, 1908, required that one-fourth of all receipts from federal forest reserves be paid at the end of each fiscal year, to the states in which the forest reserve was situated, for the benefit of public schools and roads.⁸⁸ In *King County, Washington v. Seattle School District No. 1*,⁸⁹ an appeal was filed by the county with the U.S. Supreme Court to reverse a suit in equity decision in favor of the school district from the U.S. Circuit Court of Appeals for the Ninth Circuit. At issue was one half of the entitlement each year of the federal reimbursements for forest revenues provided to the county to be disbursed solely to the school districts.⁹⁰ The U.S. Supreme Court reversed the decision of the Appeals Court declaring that the language in the provisions of the Act did not specify equal district of the money between schools and roads. The grant funds became the assets of the state and could be distributed between the two funds, as the state deemed appropriate.

The issue of interchangeability of state funds was raised in *San Benito Independent School District v. Farmer's State Bank*.⁹¹ The school district filed an appeal

⁸⁸ *Supra.*, note 50.

⁸⁹ 263 U.S. 361, 44 S.Ct. 127, (1923).

⁹⁰ The county commissioners over a 6 year period directed that all apportionments be assigned to the road and bridge fund with no funds going to the public school fund.

⁹¹ 78 S.W. 2d 741, (Tex. Civ. App., 1935).

to the Court of Civil Appeals of Texas from the judgment of the Circuit Court of Cameron County concerning school district warrants held by an insolvent bank and the manipulation of exhausted fund accounts and other separate fund accounts. The school district had four accounts of specific public funds of which one account had unpaid warrant funds and the other three had a balance of funds. The state banking commissioner had closed the bank and began settling its affairs. The issue of contention by the school district was that the amounts held in the state available warrant fund accounts should be allowed as an offset against the judgments of the exhausted account. The circuit court ruled and the appeal court affirmed that the “corporate school district is but trustee or guardian of public funds coming into its possession, and may disburse them only in manner and for purposes prescribed by law.”⁹² The funds having been appropriated for specific purposes to specific accounts were not interchangeable and could not be disbursed for the use of the other by the trustee.

Another Texas case during the same time period, *Madley v. Conroe Independent School District*⁹³ appealed the decision of the District Court of Montgomery County to deny injunctive to prevent the trustees of the school district from using maintenance fund surplus and the levy and collection of an ad valorem tax to construct new buildings. The plaintiffs claimed that it was an “unlawful diversion” of maintenance funds to use the surplus to construct new buildings and that the surplus should be used for maintaining schools for the upcoming school year without levying and collecting an ad valorem tax for that year. The Court of Civil Appeals of Texas upheld the District Court’s decision and reasoned that,

⁹² Ibid.

⁹³ 130 S.W. 2d 929, (Tex. Civ. App., 1939).

Allocation to the maintenance fund was by legislative edict for the purpose of supporting and maintaining the public free school. When that purpose has been effectuated, the fund is no longer subject to control of the statutes, for the purpose of the statute has been fully effectuated. If and when the statutes cease to control the fund, then it becomes a constitutional fund and not a statutory fund, and may be used by the trustees for the constitutional purposes; one of the constitutional purposes is “the erection and equipment of school buildings” within the district.⁹⁴

The language of the statute allowed that the levy of taxes could be utilized for other educational purposes if the purpose of the statute had been met.

Federal forest funds and the method in which they were appropriated were again the issue in *State ex rel. Arrington v. Board of Supervisors of Perry County*⁹⁵ and *Trinity Independent School District v. Walker County*.⁹⁶ In *Arrington*, a bill of complaint, filed on behalf of several school districts against the county’s board of supervisors, was dismissed by the Chancery Court of Perry County. The complaint challenged the method in which the board of supervisors allocated the federal forest funds for public roads in each of the school districts within the county. Noting that the federal forest funds were allocated for the purpose of public schools and public roads⁹⁷ and were to be disbursed in a manner determined by the state, the Supreme Court of Mississippi affirmed the decision of the lower court. The State Supreme Court reasoned that the funds were expended in accordance with state law with fifty percent of the funds

⁹⁴ *Ibid.*, 9.

⁹⁵ 221 Miss. 548, 73 So.2d 169, (Miss., 1954).

⁹⁶ 287 S.W.2d 717, (Tex. Civ. App., 1956).

⁹⁷ *Supra.*, note 50.

allocated for public schools and fifty percent for public roads. The method in which the board of supervisors chose to administer the funds among the several school and road districts was left to their discretion.⁹⁸

In *Trinity* the District Court of El Paso County dismissed a suit by the school district against the county and other school districts to recover a percentage of the money allocated to the state for federal forest reserve funds. In reversing the decision of the lower court, the Court of Civil Appeals of Texas relied on the language of the state statute that required fifty per cent of the funds be appropriated to the school districts in proportion to the area of forest land in the district. According to the interpretation of the court, all school districts in each county were entitled to federal forest reserve money allocated by the state. The statute did not restrict allocations of the forest reserve funds to only school districts containing federal forest land.⁹⁹

The meaning of the design format for school district budgets and the administrative and accounting responsibilities associated with the provisions of the state statute addressing it were at issue in *Isley v. School District No. 2 of Maricopa County*.¹⁰⁰ A declaratory judgment by the school district and its officials for clarification of the statute in which the restrictions on expenditures of a forty-one sub item budget under six major categories in the "Operating Expenses" district was requested. The primary question was whether the budgeted amounts were restricted to sub items or the six major categories. If the budgeted amounts were restricted to the sub items, then a transfer of funds between sub items under the major categories would result in illegal

⁹⁸ *Supra.*, note 95.

⁹⁹ *Supra.*, note 96.

¹⁰⁰ 81 Ariz. 280, (Ariz., 1956).

misappropriation of funds. The Supreme Court of Maricopa County granted a summary judgment for the school district and the Supreme Court of Arizona affirmed, reasoning that the forty-one line item budget would be “impractical, unduly restrictive, and lead to absurd results”.¹⁰¹ The utilization of broad categories for operating expenses would provide less opportunity for misapplication of school funds.

The reimbursement of funds utilized for unauthorized purposes under the Federal Emergency Defense Program Act was at issue in *Utah State Board For Vocational Education v. United States*.¹⁰² Under the Act, federal funds were made available to Utah for specific categories that included funding for rental space that the Provo City School Board utilized to lease two buildings from the county. The county lessor refunded the lease payments to the school board; the school board placed the funds in a ‘Vocational Fund Account’, and in turn, utilized the funds for repair of one of the leased buildings and to conduct vocational classes that were not authorized by the Act. The U.S. District Court for the District of Utah held that the federal funds had been utilized for unauthorized purposes. The U.S. Court of Appeals, Tenth Circuit, affirmed the decision, reasoning that the state utilized the money provided for lease payments as a shell to receive federal funds and then channel them to other “vocational” accounts to be used for purposes unauthorized by the Federal Emergency Defense Training Program Act.¹⁰³

Request for declaratory judgment against a town management system for misappropriation of funds into a separate school fund account under their control was at issue in *Board of Education v. Town of Ellington*.¹⁰⁴ The Town Board of Finance, instead

¹⁰¹ Ibid.

¹⁰² 287 F.2d 713, (10th Cir., 1961).

¹⁰³ Ibid.

¹⁰⁴ 151 Conn. 1, (Conn., 1963).

of approving the budget request of the board of education, revised the budget placing a specific amount of money into a contingency fund and a capital account. The money from the accounts could be appropriated by the town board of finance to the schools, only if the money was spent as they so directed. The Superior Court of Tolland County ruled in judgment for the plaintiff and on appeal, the judgment was affirmed by the Supreme Court of Errors of Connecticut. The supreme court in its reasoning held that the placement of funds for school purposes into general government accounts constituted illegal restrictions on the appropriation and violated state statute.^{105 106} The decision supported the fact that local school districts were agencies of the state and had broad powers granted to it by legislation not controlled by the local government.

The Age of Federal Impact Aid and the Sixties and Seventies

The Act of September 30, 1950¹⁰⁷ was signed into law to reimburse local school districts for payments in lieu of taxes due to federal presence or activity within the district. Federal Impact Aid (P.L. 81-874)¹⁰⁸ was the subject of much litigation concerning the supplant issue. At the heart of the legislation were the provisions that federal funds were to be used exclusively to supplement local sources of revenue and that neither states nor localities were not to utilize the federal funds to supplant their own efforts in funding public schools.

*Shepherd v. Godwin*¹⁰⁹ was the first and most cited in a long list of challenges resulting from the supplanting provision in the Federal Impact Aid legislation. Cases that

¹⁰⁵ C.G.S.A. §§ 7-348, 10-222.

¹⁰⁶ Supra., note 104.

¹⁰⁷ Supra., note 51.

¹⁰⁸ P.L. 81-874 has been amended on many occasions and is now referred to as P.L 107-110, Title VIII.

¹⁰⁹ Supra., note 66.

immediately followed included *Hergenreter v. Hayden*,¹¹⁰ *Douglas Independent School District #3 v. Jorgenson*,¹¹¹ and *Triplett v. Tieman*.¹¹² Each of these cases, as did *Shepherd*, dealt with the issue of appropriation of the federal funds and will be discussed at greater length later in the paper.

In a case dealing with the repayment of withheld state aid funds due to local districts receipt of Federal Impact Aid payments, *Carlsbad Union School District of San Diego County v. Rafferty*,¹¹³ a group of local school districts brought a class action suit against California State Superintendent of Public Instruction, Rafferty, seeking: (1) to declare invalid certain state statutes that allowed for withholding state aid; (2) a judgment to forbid the withholding of those funds and; (3) repayment of those funds by the state to the local districts. The U.S. District Court for Southern California found that the state statutes violated the Supremacy Clause of Article VI of the Constitution¹¹⁴ and that the state must repay the districts for the money withheld. The U.S. Court of Appeals, Ninth Circuit affirmed the decision reasoning that the subsection of the federal legislation that prescribed effective dates for state legislatures to change laws to eliminate conflicting language only postponed effective dates of penalty and did not alleviate them of the responsibility of repayment of the funds.¹¹⁵

In an action seeking declaratory relief, the *School Board of Okaloosa County v. Richardson*¹¹⁶ a Florida school district challenged the provisions of the Federal Impact Aid law. The plaintiff in their challenge alleged that some of the provisions of Title 20

¹¹⁰ 295 F. Supp. 251, (D.D. Kan., 1968).

¹¹¹ 293 F. Supp. 849, (D.D. S.D., 1969).

¹¹² 302 F. Supp. 1244. (D.D. Neb., 1969).

¹¹³ 429 F.2d 337, (9th Cir. Cal., 1970).

¹¹⁴ U.S.C.A. Const. Art. 6, cl.2.

¹¹⁵ *Supra.*, note 113.

¹¹⁶ 332 F. Supp. 1263, (D.C. Fla., 1971). Richardson was the State Superintendent of Public Education.

U.S.C. § 236 of the Federal Impact Aid law discriminated against the children of their district and those districts similarly situated in the “ambiguous, vague and uncertain methods” in which the funds were distributed.¹¹⁷ The district court withheld its judgment for ten days in order to afford the plaintiffs an opportunity to produce affidavits to support their claims and provide the courts a reason why they should deny summary judgment for the defendants. The affidavits were not produced and summary judgment was granted to the defendants. The decision in this case reasoned that factual matter must be provided in order to challenge the validity of a federal statute.

Federal Impact Aid was not the only source for litigation during this time period. In *Carroll v. Bruno*¹¹⁸ the method of allocation of federal forest fund were again challenged. The Superintendent of Public Instruction for the State of Washington included 85 percent of the national forest revenues in the state’s equalization formula before determining the amount of local required effort of the individual school districts. The plaintiffs contended that the inclusion of the federal funds in the state equalization formula deprived the impacted school districts of the federal funds they were entitled. The Superior Court of Thurston County found for the defendant and the Supreme Court of Washington affirmed that the Superintendent of Public Instruction’s method of distribution of equalization funds was constitutional. The court reasoned that there was no equal protection violation under the Fourteenth Amendment and there was no issue with the Supremacy Clause because the state funding statutes did not conflict with the federal statute.¹¹⁹

¹¹⁷ Ibid.

¹¹⁸ 81 Wash. 2d 82, 499 P.2d 876, (Wash. 1972). Bruno was the Superintendent for Public Instruction of the State of Washington.

¹¹⁹ Ibid.

Title I of the Elementary and Secondary Education Act¹²⁰ would be the subject of controversy for many of the legislative challenges during the seventies and eighties. The first such challenge occurred in *Natonabah v. Board of Education of Gallup-McKinley City School District*,¹²¹ and included Johnson-O'Malley¹²² funds as well. The class action suit, seeking both declaratory and injunctive relief, claimed both racial discrimination and diversion of federal funds allocated specifically for the benefit of Native American school children within the district. In regard to the diversion of federal funds, the plaintiffs alleged the school district utilized the aforementioned federal funds rather than operational funds to pay for basic educational services instead of the supplemental services in which they were intended. The U. S. District Court of New Mexico held that the evidence supported the claim that federal funds had been used improperly to pay for basic services and ordered the local defendants to submit a comprehensive plan to correct the disparities and provided an injunction forbidding the diversion of federal funds in the future. No relief was granted against the state and federal defendants; however, the federal defendants were required to provide both investigatory and educational expertise to the district and the court in determining a strategy to prevent future occurrences.¹²³

In *Nicholson v. Pittinger*,¹²⁴ plaintiffs sought a temporary injunction against the Pennsylvania Secretary of Education from approving future applications for Title I projects from the School District of Philadelphia for violations of Title I provisions

¹²⁰ Supra., note 53.

¹²¹ 355 F. Supp. 716, (D.D.N.M., 1973) .

¹²² 25 U.S.C.A. § 452. Johnson-O'Malley funds were to be used for the education of Indian children.

¹²³ Supra. note 121.

¹²⁴ 364 F. Supp. 669, (E.D. Penn., 1973).

including the non-supplant provision. The plaintiff's complaint included allegations that the defendant had approved school district Title I applications without insuring that various statutory provisions had been met. In regard to the supplanting issue, evidence was provided that art, music, and reading programs provided by Title I funds in Title I schools were also provided in non-Title I schools with state and local funds. The U.S. District Court, Eastern District of Pennsylvania ruled that the defendant had violated statutory and regulatory requirements and that evaluation methods and procedures be adopted by the state for approving Title I projects.¹²⁵

The appropriation of Emergency School Assistance Program (ESAP)¹²⁶ funds were the focus in *School Board of Broward County, Florida v. Department of Health, Education and Welfare, U.S. Office of Education*.¹²⁷ The U.S. Commissioner of Education determined that the Broward County School Board made sales of equipment to schools that were racially discriminatory and directly conflicted with the provisions of the ESAP grant thereby terminating the grant and requiring repayment of the funds. The District Court for the Southern District of Florida reversed the decision that ordered termination of the grant. On appeal the U.S. Court of Appeals, Fifth Circuit, rejected the reasoning of the Circuit Court finding there was sufficient evidence to uphold the administrative finding by the Commissioner.¹²⁸ The significance of this decision was in the fact that although no direct misuse of funds occurred, the unapproved sale of equipment to districts that violated provisions of the grant resulted in the termination of the grant.

¹²⁵ Ibid.

¹²⁶ P.L. 91-380. Federal funding to aid in the process of desegregation.

¹²⁷ 525 F.2d 900, (5th Cir. Fla., 1976).

¹²⁸ Ibid.

Pooling of state funds for the educationally disadvantaged with federal Title I funds was the subject of *Alexander v. Califano*¹²⁹ in which plaintiffs sought declaratory judgment against local and state defendants. In order to provide a minimum level of state funds for educationally disadvantaged students to local schools within their district, Richmond Unified School District (RUSD) had to pool Title I funds in order to allocate relatively small amounts of funds to eligible schools so that the combined amount reached an acceptable standard. In their decision the U. S. District Court, Northern District California found that the method in which RUSD allocated and disbursed their state aid for the educationally disadvantaged to Title I project area schools reduced the amount of state funds that Title I project area schools would receive and declared that the method violated the federal grant. In upholding the non-supplant provision of Title I, the U.S. District Court reasoned that children eligible for Title I services could not receive less aid under any state or local program.¹³⁰

A challenge to the federal supremacy clause was at issue in *Los Alamos v. Wugalter*,¹³¹ where a local school district brought action against state authorities including the Chief Financial Officer for State Department of Education, claiming conflict between the New Mexico School Finance Act¹³² and the federal Atomic Energy Community Act of 1955 (AECA).¹³³ A subsection of the state finance legislation allowed the state to provide less funding to Los Alamos than to other school districts in the state because of the federal funds provided Los Alamos through AECA. The U.S. District

¹²⁹ 432 F. Supp.1182, (N.D. Cal., 1977). Califano was the U.S. Secretary of Health, Education and Welfare.

¹³⁰ Ibid.

¹³¹ 557 F.2d 709, (10th Cir. N.M., 1977).

¹³² Referred to as an "equalization funding formula".

¹³³ 42 U.S.C. §§ 2301-94, (1955).

Court for the District of New Mexico found the statute unconstitutional under the supremacy clause and ordered the state to fund Los Alamos under the state's general funding formula. The state defendants appealed to the U.S. Court of Appeals, Tenth Circuit which reversed the decision and held that the subsection of the state school finance legislation did not "frustrate the full effectiveness of the AECA",¹³⁴ therefore, nullifying the constitutional violation claim.

The Eighties – Title I – The Subject of Controversy

The interpretation of the subsection of the Developmentally Disabled Assistance and Bill of Rights Act¹³⁵ referencing the Patient's Bill of Rights and the Fourteenth Amendment¹³⁶ was at issue in *Pennhurst State School and Hospital v. Halderman*¹³⁷. The reason for inclusion of the case was the interpretation of the provisions of the Act and the necessity for unambiguous language in its provisions. The case is cited several times in the cases reviewed in the determination of supplanting violations and should be referenced before the cases that utilized the decision. After both the District Court and the U.S. Court of Appeals found that violations of the Fourteenth Amendment had occurred and that the state was responsible for funding certain services to the mentally retarded citizens, the U.S. Supreme Court reversed and remanded the decision. On remand the Court of Appeals affirmed their prior judgment. Certiorari was granted. The Supreme Court again reversed and remanded the judgment of the Court of Appeals. The interpretation of the Supreme Court was that while Congress created rights for the developmentally disabled under the Act, there were no obligations placed on the States

¹³⁴ Supra., note 131. p.8.

¹³⁵ 42 U.S.C. §§ 6010.

¹³⁶ U.S. Const. Amend. XIV.

¹³⁷ 465 U.S. 89, 104 S.Ct. 900, (1983).

to fund the high cost of treatment for its retarded citizens.¹³⁸ The difference in the decisions between the three courts was attributed to the ambiguity of the language of the Act and its interpretation by the individual courts.

Violations of the non-supplant provision of Title I of the Elementary and Secondary Education Act (ESEA)¹³⁹ continued to be the focus of challenges during the eighties. *San Miguel Joint Union School District v. Ross*,¹⁴⁰ which will be discussed in detail later in the document, dealt with the misappropriation of P.L. 81-874 funds by California. Repayment of misapplied Title I funds were the subject of several appeals during the 1980's including *State of New Jersey, Department of Education v. Hufstедler*,¹⁴¹ ¹⁴² *Bell v. New Jersey and Pennsylvania*,¹⁴³ *Bennett v. New Jersey*,¹⁴⁴ and *Bennett v. Kentucky Department of Education*.¹⁴⁵

The major point of the four aforementioned cases was the repayment of the Title I funds that were misspent before the implementation of the 1978 Amendments that rewrote the entire Act.¹⁴⁶ The first three cases involve the same plaintiffs and defendants and provided a history of the repayment of the misused funds. In each case the Education Appeal Board found that violations had occurred and assessed deficiencies against the plaintiffs with the U.S. Secretary of Education reviewing and modifying the amount of repayment or upholding the full amount due. In *New Jersey* the

¹³⁸ Ibid.

¹³⁹ Supra., note 52.

¹⁴⁰ 118 Cal. App. 3d 82, (3rd Dist. Cal., 1981).

¹⁴¹ 662 F.2d 208, (3rd Cir., 1981).

¹⁴² 724 F. 2d 34, (3rd Cir., 1983).

¹⁴³ 461 U.S. 773, 103 S.Ct. 2187, (1983).

¹⁴⁴ 470 U.S. 632, 105 S.Ct. 1555, (1985).

¹⁴⁵ 470 U.S. 656, S.Ct. 1544, (1985).

¹⁴⁶ 20 U.S.C. s 2835. Section 185 of the Act provides that when an audit identifies misapplication of Title I funds the Secretary of Education is to take action to resolve the issue and is directed to seek repayment of funds that have been misspent or misapplied.

U.S. Court of Appeals, Third Circuit, granted the petition for review, reversed the orders of the Secretary of Education and remanded with instructions to vacate the repayment of Title I funds.¹⁴⁷ The U.S. Supreme Court in the *Bell* decision in turn reversed and remanded the Appeal Courts decision reasoning that the government has the right to recover misused funds under the ESEA. The Supreme Court refused at that time to address the retroactive effects of the 1978 Amendments, that relaxed and simplified the provisions concerning the implementation of Title I, remanding it back to the U.S. Court of Appeals.¹⁴⁸ In the second *New Jersey* case, the U.S. Court of Appeals, Third Circuit, held that the standards of the 1978 Amendments were retroactive and should apply to determine if prior years funding were spent inappropriately.¹⁴⁹ The Supreme Court granted certiorari. The Supreme Court ruled in *Bennett* that the provisions provided under the 1978 Amendments did not apply retroactively to determining if Title I funds were misused in previous years and did not affect obligations made under prior Title I grants. The state had failed to comply with the assurances provided at the time the Title I grant was authorized, and the federal government was entitled to repayment of the misspent funds.¹⁵⁰

In the *Bennett v. Kentucky* case the EAB determined that supplanting of Title I funds had occurred in the implementation of “readiness programs” with the reduction in per pupil amount of state and local funds provided. The U.S. Secretary ordered repayment of the misused funds and the Commonwealth of Kentucky appealed the decision. The U.S. Court of Appeals, Sixth Circuit, reversed the decision of the U.S.

¹⁴⁷ Supra., note 141.

¹⁴⁸ Supra., note 143.

¹⁴⁹ Supra., note 142.

¹⁵⁰ Supra., note 144.

Secretary of Education citing the *Pennhurst* decision in that Congress must make clear the conditions of a federal grant so that states can make informed decisions on the acceptance of such grants.¹⁵¹ Secretary of Education Bennett appealed the U.S. Court of Appeals decision and the U.S. Supreme Court reversed and remanded the decision reasoning that Kentucky misused federal funds by paying for basic education costs with Title I funds and that absence of bad faith does not forgive states from liability of misapplication of funds.

In three other cases involving the repayment of supplanted funds, *State of Indiana Department of Public Instruction v. Bell*,¹⁵² *Department of Education, State of Hawaii v. Bell*,¹⁵³ and *State of California, Department of Education v. Bennett*¹⁵⁴ the three states sought review of the EAB's decision to refund Title I funds. In *Indiana* school districts misused Title I funds to fund programs that were paid with state and local funds in non-Title I schools and for a teacher aide program that served all students. The U.S. Court of Appeals, Seventh Circuit, upheld the EAB and the U.S. Secretary of Education's decision that supplanting had occurred and a refund of Title I grant funds was appropriate. The Court of Appeals reasoned that substantial evidence was presented that proved a non-supplant violation had occurred and that Title I funds were used to provide programs that in the absence of Title I funds would have been provided by either state or local funds.¹⁵⁵

In *Hawaii* the state conceded that programs they developed for students at risk of

¹⁵¹ Supra., note 145.

¹⁵² 728 F.2d 938, (7th Cir., (1984).

¹⁵³ 770 F.2d 1409, (9th Cir., (1985).

¹⁵⁴ 833 F.2d 827, (9th Cir., 1987).

¹⁵⁵ Supra., note 152.

“dropping out” were funded with Title I money and contends that the students indirectly received state money through the opportunity provided them to attend state funded classes. The state also claims the EAB and the U.S. Secretary of Education misinterpreted and misapplied the provisions of the grant in determining the validity of the federal audit. The U.S. Court of Appeals, Ninth Circuit, upheld the EAB and U.S. Secretary of Education’s decision that both the non-supplant and comparability provisions of the Title I grant had been violated. The U.S. Court of Appeals found that substantial evidence existed that proved violations occurred and ordered repayment of the supplanted funds.¹⁵⁶

In *California*, the misappropriation of funds charged to Title I for conference charges was appealed to the U.S. Court of Appeals, Ninth Circuit. The plaintiffs contended that the U.S. Secretary of Education applied an improper legal standard in determining that conference costs were unauthorized charges under Title I statutes and petitioned for review. The U.S. Court of Appeals denied the petition holding that substantial evidence existed supporting the U.S. Secretary’s position and that funding was restricted to conferences that were specific to Title I goals and was not education in general.¹⁵⁷

Federal forest reserve funds were at issue again in *Eminence R-1 School District v. J.D. Hodge*.¹⁵⁸ A Missouri school district brought suit for declaratory and injunctive relief for entitlement to forest reserve funds from forest reserve land located within the county and adjacent to the school district. The Circuit Court of Shannon County found and the Supreme Court of Missouri, Division Two, affirmed that the school

¹⁵⁶ Supra., note 153.

¹⁵⁷ Ibid.

¹⁵⁸ 635 S.W. 2d 10, (Mo., 1982).

district could be excluded from receiving federal forest reserve funds in direct opposition to the *Trinity* decision. The Supreme Court of Missouri reasoned that the intentional “legislative silence” in both the state and federal legislation on the issue allowed discretion to the county in how the funds were distributed to the eligible counties.¹⁵⁹

Repayment of misused funds was also the subject of *Pierce County v. U.S. by and through the Department of Labor*¹⁶⁰ that involved federal funds other than those allotted for public schools. Title VI of the Comprehensive Employment and Training Act¹⁶¹ provided funds for public service employment in areas with a high rate of unemployment. A Department of Labor grant officer determined that the county had misused some of the funds and ordered repayment. An Administrative Law Judge (ALJ) heard the case at the county’s request and concurred in part and remanded in part. An appeal was made to the U.S. Court of Appeals, Ninth Circuit, which affirmed in part and reversed in part and remanded to the ALJ for determination of repayment amount, reasoning the portion of misused funds must be repaid under the provisions of Title VI.¹⁶²

At issue in *Lawrence County v. Lead-Deadwood School District No. 40-1* was the mandamus complaint filed by a South Dakota school district to compel the county government to appropriate federal funds under the Payment In Lieu of Taxes Act¹⁶³ in accordance with the South Dakota statute¹⁶⁴ that required the funds to be distributed in

¹⁵⁹ Ibid.

¹⁶⁰ 699 F.2d 1001, (9th Cir., 1983).

¹⁶¹ 29 U.S.C. § 801.

¹⁶² Supra., note 160.

¹⁶³ 31 U.S.C.A. § 6902.

¹⁶⁴ S.D. Codified Laws § 5-11-6. The 1980 statute reads, “The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.”

the same manner as general tax revenues.¹⁶⁵ The 1982 Amendment that reimbursed local governments for the costs of national forests, wilderness areas, and their costs, required that the locality use the payments for governmental purposes. The county allocated sixty percent of general tax revenues for public education. In accordance with the state statute, the Payment in Lieu of Taxes reimbursements would have to be spent in the same manner.

The Eighth Judicial Circuit Court of South Dakota decided that the state statute conflicted with federal law thereby violating the supremacy clause of the U.S. Constitution. On appeal by the school district the South Dakota Supreme Court reversed the decision, holding that the only restriction to the § 6902 funds was that they were to be used for governmental purposes in which funding for public education was considered a valid purpose. The local government of Lawrence County appealed the decision to the U.S. Supreme Court who in turn reversed the decision of the South Dakota Supreme Court. The U.S. Supreme Court reasoned that the,

South Dakota statute attempts to limit the manner in which federal in lieu of tax funds are used. The obstruction of the congressional purpose of the act violates the Supremacy Clause. Congress intended that the local governments be the managers of the funds, not merely the State's cashier.¹⁶⁶

The U.S. Supreme Court agreed with the previous decision of the Circuit Court that the statute violated the Supremacy Clause.

¹⁶⁵ 469 U.S. 256, 105 S.Ct. 695, (1985).

¹⁶⁶ *Ibid.*, 10.

In another case involving Title I funds and repayment, *Riles v. Bennett*,¹⁶⁷ the California Department of Education sought declaratory and injunctive relief challenging the U.S. Secretary of Education's decision that Title I funds had been misspent. The Secretary counterclaimed for the amount misspent plus two and one-half years of interest on the delinquent payment. The Secretary had threatened to withhold current year grant funds to offset the amount of the grant that was misspent. The U.S. District Court for the Eastern District of California upheld the Secretary's decision for repayment of the misused funds but denied interest payment. The Secretary appealed to the U.S. Court of Appeals, Ninth Circuit, who reversed the judgment and remanded the case to the district court to determine the amount of interest due. The appeals court held that pre-judgment interest would fully compensate the United States for funds unlawfully withheld by the State.¹⁶⁸

Non-compliance with Title VII of the Elementary and Secondary Education Act¹⁶⁹ was at issue in *Tangipahoa Parish School Board v. U.S. Department of Education*.¹⁷⁰ The EAB and U.S. Secretary of Education determined from a criminal investigation by the Office of Investigations that four Louisiana Parish School boards had utilized a broader standard for determining student eligibility than required by Title VII and ordered repayment of all Title VII grant funds. The plaintiffs appealed with three of the plaintiffs contending that a final audit determination could not occur without an audit. The defendants argued that an audit was unnecessary since the regulations required only written notification. The U.S. Court of Appeals, Fifth Circuit granted the petition for

¹⁶⁷ 831 F.2d 875., (9th Cir., 1987).

¹⁶⁸ *Ibid.*

¹⁶⁹ 20 U.S.C. §§ 3221-3262. Also known as the Bilingual Education Act.

¹⁷⁰ 821 F. 2d 1022, (5th Cir. 1987).

review holding (1) that a criminal investigation did not suffice as an audit, (2) that an audit must be performed where school officials would be afforded an opportunity to explain the concerns and, (3) the school parish that was found to be in non-compliance had to only repay the amount of Title VII funds misused.¹⁷¹

The Nineties Until Present – New Challenges To Revised Statutes

Federal statutes that were changed or reauthorized during the 1980's became the source of violations of the supplant provisions during the nineties. In 1981, Title I of the Elementary and Secondary Education Act was reauthorized as Chapter I of the Education and Consolidation and Improvement Act.¹⁷² In *State of New York and the City of New York v. U.S. Department of Education*,¹⁷³ the Inspector General determined, with the Assistant Secretary of Education and the EAB agreeing, that New York City had utilized Chapter I funds to continue a state required program that would have otherwise been funded without federal funds. In the appeal to the U.S. Court of Appeals, Second Circuit, the appellants contended that Chapter I funds supplemented and did not supplant non-federal funds because the remedial program would have been eliminated without the funds and that the supplant provision did not apply to "special programs". In the Court of Appeals denial of the petition for review, the court held that (1) the supplant provision applied to the "special programs" subsection of the Act, and that non-federal funds could be supplanted only if the funds freed were used to fund another program for "educationally deprived children".¹⁷⁴

¹⁷¹ Ibid.

¹⁷² 20 U.S.C. §§ 2701-3386.

¹⁷³ 903 F. 2d 930, (2nd Cir., 1990).

¹⁷⁴ Ibid.

Constitutional challenges for establishment clause violations of the First Amendment¹⁷⁵ and Chapter I allocations were the subject of *Pulido v. Cavazos*,¹⁷⁶ *Walker v. San Francisco Unified School District*¹⁷⁷ and *Barnes v. Cavazos*.¹⁷⁸ In regard to the misuse of federal funds, the challenge was to the “off the top” method of allocation of bypass funds that is required by the legislation. The bypass provision¹⁷⁹ authorizes payment to independent contractors to provide services in parochial schools where public education authorities either cannot or will not administer funds to religious schools to provide service to educationally deprived children. In each case the District Court or the Court of Appeals final ruling was that the method of allocation was constitutional.

Violation of the Education of the Handicapped Act’s non–supplant provision was at issue in *Spokane School District No. 81 v. U.S. Department of Education*.¹⁸⁰ In *Spokane* the school district appealed the EAB’s decision that it had supplanted federal funds for state and local funds in violation of the Education of the Handicapped Act.¹⁸¹ The U.S. Court of Appeals, Ninth Circuit affirmed in part and remanded in part the decision. The U.S. Appeals Court ruled that the provision of the statute not only prohibited supplanting but required funds be used to “supplement and to the extent

¹⁷⁵ U.S. Const. Amend. I.

¹⁷⁶ 934 F.2d 912. (8th Cir., 1991). Cavazos was the Secretary of the U.S. Department of Education.

¹⁷⁷ 761 F. Supp. 1463, (Cal., 1991).

¹⁷⁸ 966 F.2d 1056, (6th Cir., 1991).

¹⁷⁹ 20 U.S.C. § 3806 b.

¹⁸⁰ 905 F.2d 274, (9th Cir., 1990). In response to a challenge that the school district was in violation of the “least restrictive environment” Spokane adopted a policy that all children with the exception of the most severely disabled would be educated in the regular classroom. This overhaul of the system led to a one-time expense of \$250,000 for 1980-81. The reduction of transportation and time spent in self-contained classrooms led to a significant amount less of local spending the following year. Federal funds were provided at the same level.

¹⁸¹ *Supra.*, note 54.

possible increase” state and local spending. The funds could have been reallocated for new programs while maintaining state and local funding at the same level. The U.S. Appeals Court remanded the EAB’s decision for non-allowance of a one-time expense for failure to disclose finding or fact. The Court also ruled that relief from equitable repayment was improper.¹⁸²

California’s inclusion of funding for the Child Care and Development Services Act, within the guarantee of funding for Proposition 98 (Classroom Instructional Improvement and Accountability Act),¹⁸³ was the subject of litigation in *California Teachers Association v. Hayes*.¹⁸⁴ The California Superintendent of Public Education appealed the decision of the Superior Court of Sacramento County to issue a writ of mandamus prohibiting the state from including any funds allocated to any agency other than a school district within the Proposition 98 guarantees. The Court of Appeals, Third District, California, reversed the decision of the Superior Court holding that any program that advanced the educational mission of public schools could be constitutionally included in Proposition 98 funding.¹⁸⁵

The supplanting of funds granted pursuant to the Vocational Education Act (VEA) Amendments of 1976¹⁸⁶ was at issue in *State of Wyoming v. Alexander*.¹⁸⁷ Wyoming contested the EAB’s decision that the state had supplanted VEA funds by failing to adequately comply with the “set aside”¹⁸⁸ requirements of the legislation and other VEA

¹⁸² Supra. note 180.

¹⁸³ Cal. Const., art. XVI, § 8.

¹⁸⁴ 7 Cal Rptr. 2d 699, (Cal. App. Dist 3, 1992).

¹⁸⁵ Ibid.

¹⁸⁶ Supra., note 52.

¹⁸⁷ 971 F.2d 531, (10th Cir., 1992)..

¹⁸⁸ VEA funds that must be “set aside” for certain target groups such as special populations, economically disadvantaged and limited English proficient students.

grant funds misused by local school districts. The U.S District Court of Appeals, Tenth Circuit upheld the refund determination amount by the EAB but remanded the case back to the EAB for clarification on their decision to disallow the *set aside* benefits. The Appeal Court also held that the EAB violated the Administrative Procedures Act by failing to give adequate notice to the state that it must present evidence of cost approach used in the challenged program.¹⁸⁹

Alleged mishandling of federal funds, including Individuals with Disabilities Education Act,¹⁹⁰ Carl D. Perkins Vocational Education Act,¹⁹¹ National School Lunch Act,¹⁹² and Child Nutrition Act¹⁹³ funds, was the topic of controversy in *Board of Education of Township High School District No. 205 v. Leninger*.¹⁹⁴ The plaintiffs sought declaratory and injunctive relief claiming the failure of the regional superintendent and other state officials to disburse federal funds immediately, placing them instead in short term investments for their own use, thus violating federal funding statutes. The U.S. District Court, N.D. Illinois, Eastern Division, adopting the report of the U.S. Magistrate Judge, held that the section of the Intergovernmental Cooperation Act¹⁹⁵ did not provide individual school districts a cause of action against state officials for failure to promptly distribute or pay interest on expended federal funds to local school districts.¹⁹⁶

A challenge by parents and a community advocacy group involving the right to bring action for the manner in which the City of Chicago and the Illinois State Board of

¹⁸⁹ Supra., note 187.

¹⁹⁰ Supra., note 54.

¹⁹¹ Supra., note 52.

¹⁹² 42 U.S.C.A. § 1751.

¹⁹³ 42 U.S.C.A. § 1771.

¹⁹⁴ 822 F. Supp. 516, (N.D. Ill., 1993).

¹⁹⁵ 42 U.S.C.A. § 1983.

¹⁹⁶ Supra., note 194.

Education allocated Chapter I funds was at issue in *Noyola v. Board of Education of the City of Chicago*.¹⁹⁷ In reversing the decision of the Circuit Court, Cook County, the Appellate Court of Illinois, First District, Fourth Division, opined and the State Supreme Court upheld, that the plaintiffs do have a private right of action to force the boards to comply with the provisions for the allocation of Chapter I funds under the applicable section of the School Code.¹⁹⁸ As parents and an advocacy group, the plaintiffs were the appropriate party to seek a writ of mandamus to compel the public officials to comply with the non-supplant provisions of the statute. The State Supreme Court also ruled that sovereign immunity did not bar action against the State Board of Education in its obligation to act in accordance with the statute.¹⁹⁹

Finally, in *Mitchell v. Helms*,²⁰⁰ a case indirectly related to the supplanting of federal funds, a constitutional challenge was brought forth for violations of the Establishment Clause in regard to Chapter 2²⁰¹ aid provided to parochial schools in Jefferson Parish, Louisiana. In regard to the mention of the *non-supplant* issue in *Mitchell*, the respondents argued that Chapter 2 aid *supplants*, rather than supplements, provisions for the primary educational purpose of parochial schools. The U.S. District Court for the Eastern District of Louisiana found Establishment Clause violations, however, in granting motions for reconsideration the District Court supported the Chapter 2 program. On appeal, the Court of Appeals, Fifth Circuit reversed the decision. The U.S. Supreme Court granted certiorari and in turn found that Chapter 2 did not

¹⁹⁷ 688 N.E. 2d 81, (Ill., 1997).

¹⁹⁸ 105 ILCS 5/18-8(A)(5)(i)(1)(a).

¹⁹⁹ *Supra.*, note 197.

²⁰⁰ 530 U.S. 793, 120 S.Ct. (2000).

²⁰¹ 20 U.S.C.A. §§ 7301-7373. Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 provides federal funds to state and local agencies which in turn lends educational materials and equipment to public and private schools.

violate the Establishment Clause of the First Amendment, holding that a review of the provisions of Chapter 2 at the federal, state, and local level were sufficient under the U.S. Constitution. In regard to the non-supplant issue the Supreme Court determined there was no evidence of actual diversion of federal funds and that the aid was supplemental and did not supplant federal funds.²⁰²

Summary

Beginning with the *Long* decision, the judgment of the courts depended upon their interpretation of the language in federal legislation. As noted in *King County*, *Arrington*, *Trinity*, and *Carroll* the provisions in the Federal Forest Fund legislation were not specific as to how the federal revenues were to be allocated. In each of these cases the state defendants prevailed due to the purposely-ambiguous language of the legislation.

The specific language of the federal acts regarding the *non-supplant* issue and the evidence provided, supporting the issues in *Utah*, *Natonabah*, *Nicholson*, *Broward County*, *Alexander*, and *Lawrence County*, was relied heavily upon by the courts in determining violations of the *non-supplant* provision. As in the cases involving repayment of Title I funds in *New Jersey*, *Kentucky*, *Indiana*, *Hawaii*, *California*, and *State of New York* the language of the provisions provided specific directions as to *supplement v. supplant*. In each of the cases as well as *Spokane*, *Pierce County*, *Wyoming*, and *Carlsbad* involving other federal funds, Supremacy Clause violations occurred and repayment was due.

²⁰² Supra., note 200. Based on prior SEA review and the lack of evidence presented by respondents.

State Appropriations and the Non-Supplant Provisions

The preceding cases provided a historical perspective of violations to the non-supplant issue in reference to misapplication, misuse, misspending and repayment of funds by state and local educational agencies. The following section will provide a more in-depth perspective of cases involving the non-supplant issue and appropriations by the state of federal grants. At the end of this section of the document, evidence should be provided by previous case law decisions that could be of assistance in arriving at a decision on the current issue in Virginia.

Violations of the Non-Supplant Provisions in State Appropriations

As mentioned earlier in the document, the *Shepherd* decision in the late sixties was the first in a series of cases challenging the deduction of Federal Impact Aid funds from local school district funding. In *Shepherd*, real estate owners and taxpayers in the cities of Norfolk and Fairfax challenged the legislation containing the appropriations formula that allowed the deduction of Federal Impact Aid (P.L. 874) funds from the shares normally received by the school division. The plaintiffs claimed the deduction and an alternative provision violated the intent of the Act and transgressed the equal protection clause of the Fourteenth Amendment.

The Federal Impact Aid Act affords that financial aid be provided for local school districts whose school populations have been significantly increased by the attendance of federal employee's children and/or suffer from the loss of tax revenue due to the federal government's exemption from real property tax revenue resulting from the presence of government activities. The act also provides that the aid is for

supplementation of local sources of revenue and is not intended to lessen the fiscal effort of the state.²⁰³ The Virginia legislation in question allowed the provision that,

In the event the availability of Federal funds for local operating expenses is conditioned upon their exclusion from a State apportionment formula, the State Board of Education shall exclude both such Federal funds and the average daily attendance for the people involved from the application of this item.²⁰⁴

The plaintiffs complained that any deduction of the federal supplement encumbered them as taxpayers and was prohibited by the provisions of the Act.

Virginia operated under a Minimum Foundation Program that provided a necessary minimum education to every child in the state. The program's cost was provided by a Basic State School Aid Fund that provided a minimum program cost for each city, town and county in the state. The minimum program cost that was to be spent by every political subdivision in the state each year was determined by the aggregate of the following two factors; a formula for instructional salaries for each teaching position and the Average Daily Attendance multiplied by a fixed amount.²⁰⁵

The state's contribution of a basic state share of 60 percent of instructional salaries and a supplementary state share was included in the calculations. The state supplementary share was reached by subtracting the following items from the minimum program cost: (1) the basic State share; (2) a local taxable real and public service corporation property tax valuation and; (3) a percentage of the Federal Impact Aid funds

²⁰³ Educational Agencies Financial Aid Act, §§ 1 et seq., 2,3(a)(b) as amended 20 U.S.C.A. §§ 236 et seq. 237, 238(a)(b).

²⁰⁴ Va. Acts of Assembly, ch. 719, Item 459(c)(8), (1966).

²⁰⁵ \$100 in 1966-68 and \$80 in 1964-66.

received by the political subdivision from the federal government for operating costs.²⁰⁶ Virginia's reasoning for deducting the Federal Impact Aid was the immunity from taxes of the federal property. In determining the state supplementary aid, the state charged the locality for the money that would have otherwise been collected from taxes on the property owned by the federal government. The plaintiffs grieved that any deduction in the apportionment of state aid "pro tanto" burdened them as taxpayers leaving them to make up for the void created by the deduction.

The defendants held that the Federal Impact Aid students were counted in the computation for the minimum program costs for the district and that the deduction of a commensurate share in the state's supplementary aid to the district was justifiable. In their justification for the deduction for the money otherwise collected from taxes for the federal property, the state claimed that when calculating the districts share of the supplementary aid the value of the federal land was not considered. Therefore, it was reasonable to subtract the amount of Federal Impact Aid funds in place of the real estate tax on the federal property. The court in rejecting both of these claims reasoned that: (1) the federal students were paying their own way as far as the state was concerned through sales, gasoline, and income taxes paid by their parents and; (2) that the federal aid was to supplement not substitute for local revenues.²⁰⁷

The U.S. District Court, Eastern District Virginia, held that the intention of the provisions of the legislation were clear that: "(1) the federal funds are exclusively for supplementation of the local sources of revenues for school purposes; and (2) the act

²⁰⁶ Supra., note 204. Certain years different percentages were deducted and other years the entire amount was deducted.

²⁰⁷ Supra., note 65.

was not intended to lessen the efforts of the State.”²⁰⁸ The court ruled that the Federal Impact Aid money was to be utilized by the state in providing supplementary aid to the divisions and that the commandeering of federal funds by the state did not provide the relief to the local taxpayers for whom it was intended. The court reemphasized that the Federal Impact Aid funds were for local use and not to compensate the state. The defendant state school authorities were restrained and enjoined from enforcing the Virginia Acts of Assembly, Chapter 719, Item 459,²⁰⁹ insofar as it conflicted with Public Law 81-874 and was violative of the supremacy clause of the U.S. Constitution. The court also ruled that the provision contained in the Virginia Apportionment Act was violative of the equal protection clause of the Fourteenth Amendment due to the fact it discriminated against federal children in apportionment of state funds.²¹⁰

In *Hergenreter*, residents and taxpayers of a school district adjacent to Federal Impact Aid areas challenged the constitutionality of the deduction of twenty-five percent of Federal Impact Aid received by the local districts from the state aid formula. As in *Shepherd*, the plaintiffs held that the deduction of the Federal Impact Aid funds was prohibited by the provisions of P.L. 81-874 and the deduction of such funds were unconstitutional under the Supremacy Clause. The plaintiffs sought injunctive relief from the Kansas state school officials to enjoin them from the distribution of the state funds under the State School Foundation Act.²¹¹

At the time of litigation, Kansas operated under a foundation program that provided supplementary state aid to local school districts for the provision of uniform

²⁰⁸ Ibid.

²⁰⁹ Supra., note 205.

²¹⁰ Supra., note 66.

²¹¹ K.S.A. § 72-7001 et seq.

educational opportunities for all children. The Act contained an equalization formula that was utilized to determine a “state-shared guarantee”. To adjust for fiscal capacity of each locality an amount was deducted from the *state-shared guarantee* based upon the “economic index” of the county. The *economic index* utilized the factors of property valuation and income of the county residents to compute the percent of each county of the state total. Once the percentage was calculated and divided by two, *the economic index* was determined for each county. The *economic index* was then multiplied by the total amount of taxes produced in the state based on a 10-mill tax levy in each county. That figure was divided by the number of certificated employees in all of the districts in the county on a specific date with the quotient multiplied by the number of certificated employees in the district on that same date. The figure derived from the *economic index* was added to the “non-district revenues”, which included the 25 percent of the funds received by districts under P.L. 81-874, and then subtracted from the *state-shared guarantee* with the remainder being the amount received by the district under the state foundation program.²¹²

The defendants claimed that the foundation program equalized tax burdens for the cost of education across the state and provided each district with adequate facilities. The defendants reasoned that the deduction of the twenty-five percent of federal impact funds ensured,

a balancing between the potential wealth of the land removed from the tax rolls, with its resultant increase in students, and the additional state aid, which the

²¹² Supra., note 110.

district receives by virtue of its lower economic index and increased student attendance.²¹³

The defendants claimed that if no deduction were made for federal impact aid under the state equalization formula, then the districts receiving the aid would receive the funds twice, once from the state and once from the federal government. The defendant's final contention was that the intent of the federal act did not prohibit state legislation such as K.S.A. § 72-7001 et seq.

In its decision to grant injunctive relief, the U.S. District Court D Kansas, reasoned that no matter how commendable their motives for doing so, that "substituting state judgments for federal judgments as reflected in state and federal statutes" was in violation of the Supremacy Clause.²¹⁴ The decision in *Shepherd*, that the federal impact aid legislation was utilized by the District Court in their reasoning. In regard to the intent issue of the federal legislation, the District Court relied again on the *Shepherd* decision. The District Court utilized its own research and that of the Virginia Federal Court on a House of Representatives Committee Report No. 1814 that proposed an amendment to P.L. 81-874 clarifying the prohibition of the state's manipulation of the federal funds.²¹⁵ The District Court refused to decide on the plaintiff's contention of violation of the Fourteenth Amendment reasoning that *Shepherd* had an entirely different premise and there was insufficient evidence to establish such a point in the case at hand. The U.S. District Court D. Kansas granted

²¹³ Ibid., 5.

²¹⁴ Ibid.

²¹⁵ House of Representatives Committee Report No. 1814, August 5, 1966. The committee report reads as follows: "Fifteen States offset the amount of Public Law 874 funds received by their school districts by reducing part of their State aid to those districts. This is in direct contravention to congressional intent. Impact aid funds are intended to compensate districts for loss of tax revenue due to Federal connection, not to substitute for State funds the districts would otherwise receive."

the order of injunction restraining and enjoining the defendants from enforcing the Kansas School Foundation Act of 1965 insofar as the deduction from the state aid any part of payments to public schools by the federal government under P.L. 81-874.²¹⁶

The constitutionality of the state funding formula that allowed for a deduction of a percentage of federal impact aid received by eligible school districts from their share of state aid from South Dakota was the topic at issue in *Douglas Independent School District No. 3 v. Jorgenson*.²¹⁷ As in *Shepherd* and *Hergenreter*, the plaintiffs claimed that the deduction of the federal impact funds was prohibited by the provisions of P.L. 81-874 and the authorization of deduction of such funds through state statute was unconstitutional under the Supremacy Clause. The plaintiffs also claimed that because of the state statutes, they were being denied equal protection of the law under the Fourteenth Amendment. The plaintiffs sought injunctive relief to permanently enjoin the State defendants from utilizing two South Dakota statutes in the computation of the South Dakota Foundation Program Formula.

South Dakota during the time period at issue operated under the South Dakota Foundation Program.²¹⁸ The South Dakota legislation was similar to the Virginia legislation at issue in *Shepherd* with the major exception being the manner in which the federal impact aid funds saved by the state legislation were utilized. In the Virginia legislation, the state returned the money to the State's general fund while in South Dakota the funds saved were distributed to all of the school districts within the state.

²¹⁶ *Supra.*, note 110.

²¹⁷ *Supra.*, note 111.

²¹⁸ Laws S.D.1961, c. 78.

The South Dakota statute was amended in 1967 and 1968 to include percentages of P.L. 81-874 funds as part of the income received by each school district as part of their allotment under the State's foundation program.²¹⁹

The State defendants had three primary contentions: (1) there was a discernible difference between the Virginia and the South Dakota funding statutes in the fact that Virginia retains the federal funds not distributed to the federal impacted school districts and South Dakota distributes the retained funds to all school districts using a pro rata formula; (2) had the federal funds not been withheld during the time period at issue the defendant school districts would have received double payment and; (3) Congress had not pre-empted legislation in the field of education. The defendants conceded that the lawsuit would be judged on the applicability of the *Shepherd* decision and whether the opinion was correctly decided based on the law.²²⁰

In its decision to grant injunctive relief, the U.S. District Court D. South Dakota, Central Division, held that it was immaterial what the State did with the undistributed impact funds withheld, since they were withheld in the first place made it violative of the plaintiff's constitutional rights. The District Court utilized *Hergenreter* in its decision, "that a similar law in Kansas which was founded upon similar reasoning was in effect an attempt of the State to substitute its judgment of what amount of money was appropriate to compensate a federal impacted area",²²¹ to invalidate the defendant's claim of double payment to federally impacted school districts. The District Court also ruled that

²¹⁹ Chapter 53 (H.B. 877) of the 1967 South Dakota Session Laws required that 50 percent of the funds received under P.L. 81-874 be included as part of the foundation program income received by each school district. Senate Bill 104, Chapter 44 of the 1968 South Dakota Session Laws increased the amount to 75 percent of the Impact Aid funds.

²²⁰ *Supra.*, note 111.

²²¹ *Ibid.*, 4.

although Congress had not pre-empted legislation in education there was little doubt that it meant to do so in regard to federal aid for the benefit of federally impacted districts. The District Court again utilized the *Shepherd and Hergenreter* decisions to determine that the allowance of states through legislation to alter the effect of federal aid was in violation of the supremacy clause of the Constitution. The District Court found that the enforcement of the South Dakota statutes would penalize children and their parents that either live or work on federal lands within the state and would violate their rights granted under the equal protection clause of the Fourteenth Amendment.²²² The defendants were restrained and enjoined from thereafter enforcing the statutes²²³ requiring a deduction of P.L.81-874 funds from the computation of state aid to local school districts.

The last of the series of cases in the late sixties involving the supplanting provisions of P.L.81-874 and the misappropriation of the federal impact funds was *Triplett v. Tiemann*.²²⁴ In *Triplett*, Nebraska school districts and their taxpayers sought injunctive relief from the provision in the Nebraska School Foundation and Equalization Act²²⁵ that made use of the funds received under the Educational Agencies Financial Aid Act²²⁶ to be declared unconstitutional as violative of the supremacy clause of the Constitution. The plaintiffs also sought relief under the equal protection clause of the Fourteenth Amendment. The Chief Judge of the U.S. District Court D. Nebraska was relegated to hear the Supremacy Clause claim due to the fact the three-judge court

²²² Ibid.

²²³ Supra., note 219.

²²⁴ Supra., note 112.

²²⁵ N.R.S. Supp. 1967, §§79-1330 - §§79-1344.

²²⁶ Supra., note 203.

could not find a substantial question in respect to the Equal Protection Clause claim.²²⁷

This entitled the three-judge court to make disposition of the Supremacy Clause claim to the single-judge court.

At the time of litigation Nebraska operated under a small foundation type—equalization program that based its allocations to school districts on the Average Daily Membership of the district from the preceding year. The Nebraska funding statute required the deduction of federal funds and sought to insure that the State would receive the benefit of the P.L. 81-874 funds. The statute required deduction of the funds from the local district's state aid regardless of whether the impacted district made application for the funds or not. The aid was not used for relief for the federally impacted school district as it was intended, but used instead as a means for Nebraska to meet its obligations of general aid to the local school districts. The State defendant's motion for dismissal, claiming that the case could be decided in the State courts and that relief could not be granted by federal court, was denied.²²⁸

Chief Judge Robinson, in his decision to grant injunctive relief, reasoned that the school districts intended to receive the benefit of the federal impact aid payments received no more benefit of the federal aid than a school district that had not been impacted by the presence of federal activities. The Chief Judge on having the districts make application for the funds and then deducting them from the district's state aid provided the following comment,

²²⁷ D.C., 302 F.Supp. 1239. The three-judge court ruled that the plaintiff school districts were not legally subject to injury under the Equal Protection Clause. Although the plaintiff taxpayers were subject to injury under the Equal Protection Clause the court ruled they could not claim any discrimination in position from that of any other taxpayers in the school districts throughout the state.

²²⁸ Ibid.

This constituted in effect an absorption of the federal funds in the scheme of state aid; made these funds have the status or equivalence of the general aid payments which were being provided to all school districts; and hence deprived the funds of their federal purpose and significance as special local assistance payments for federal impact.²²⁹

The Chief Judge determined that the Federal Impact Aid funds were utilized for financial purposes other than what Congress had intended constituting an “interference with operation” of the federal statute, therefore, making it violative of the Supremacy Clause. The defendants were enjoined from utilizing the federal payments to the plaintiff school districts and 43 similarly situated districts in the State as a basis for reduction of state-aid under the Nebraska School Foundation and Equalization Act.

Retaining the Supplementary Character of Federal Impact Aid

In *Middletown*²³⁰ school committee and local taxpayers challenged under the Supremacy Clause the manner in which Rhode Island considered federal impact aid payments in computing state aid. The plaintiffs sought declaratory and injunctive relief claiming the Rhode Island statute²³¹ for distributing state-aid to local school districts was unconstitutional. The plaintiffs contended that its state- aid was calculated on total actual expenditures reduced by the total amount of actual expenditures from the P.L. 81-874 funds the district received. The plaintiffs held that the deduction of the Federal Impact Aid funds from the calculation resulted in a reduction of their entitlement of state-aid. The plaintiffs also argued that the Rhode Island calculation of state-aid was based on

²²⁹ Supra., note 112, p. 2.

²³⁰ Supra., note 68.

data from two years prior while the P.L. 81-874 funds were based on current enrollment figures. Due to the declining P.L. 81-874 funds received by the district, the deduction of Federal Impact Aid funds received two years prior from the current budget, would result in less state-aid than deducting the current smaller amount of Federal Impact Aid funds.²³²

The Rhode Island system of school finance, as mentioned earlier in the document, was considered an expenditure plan that based the current costs for the school districts on the amount of local effort, total expenditures less federal aid (a computation yielding local property taxation for education), from the previous two years. Rhode Island, in its attempt to equalize the ability of the high and low fiscal capacity school districts to provide educational services, utilized a percentage equalization formula that provided a share ratio for reimbursement of locally raised expenditures. The equalization formula distributed state aid in an inverse proportion of the district's ability to pay.²³³ However, the Rhode Island formula has a dual purpose, not only does its formula equalize, it is designed to reward for increased local tax effort and penalize for reduced local effort. In districts with the same fiscal capacity, the district that provided more local effort received more state aid, therefore, encouraging greater local effort to receive a greater amount of state aid. Middletown, which had less property valuation per pupil due to the presence of the federal property, received more state aid because of the expenditure formula that rewarded greater effort by lower capacity school districts.

²³¹ R.I.G.L. § 16-7-20.

²³² Ibid.

In reaching its decision that Rhode Island's formula for determining state aid did not violate the Supremacy Clause, the U.S. District Court D. Rhode Island, held that the State formula retained the supplementary intent of the P.L.81-874 funds. As mentioned earlier in this document, the District Court determined the Rhode Island formula did not take into consideration Federal Impact Aid funds in the determination of local school district eligibility to receive state aid or in the amount of aid they would receive. The formula utilized the share ratio and the local effort to determine the amount of aid received. The local effort could not have been defined by the inclusion of federal aid.²³⁴ The District Court in its comparison of *Middletown* with *Shepherd* and *Hergenreter* stated, "Shepherd and its progeny are inapposite because Rhode Island seeks not simply to assist school districts, as did the state in those cases, but also to induce increased local effort by rewarding the effort with increased aid."²³⁵

In regard to the second complaint of the plaintiffs of the deduction of the "current smaller amount of impact aid funds", the District Court ruled that since the deduction did not supplant federal funds for state funds, Rhode Island was within its rights to utilize expenditures from the previous two years in the calculation of its state aid. To summarize the case, as mentioned earlier in the document, the expenditure formula excluded the federal funds in order to prevent them from generating state funds. Rhode Island's plan encouraged greater local effort regardless of the availability of federal resources.²³⁶

²³³ Lower fiscal capacity school districts that utilized the same property tax rate as a higher fiscal capacity school district would be reimbursed for a greater share of its locally raised expenditures than the high capacity district.

²³⁴ Supra., note 70.

²³⁵ Supra., note 68. p.5.

²³⁶ Supra., note 65.

In *San Miguel Joint Union School District v. Ross*,²³⁷ state officials appealed the decision of the Superior Court of Sacramento County, that the reduction in state aid that included Federal Impact Aid, violated the provisions of the federal statute. In its effort to reduce the impact of Proposition 13,²³⁸ California instituted a “bail out” legislation that revised the method of providing aid to school districts.²³⁹ The legislation provided supplementary aid to school districts to compensate for the loss of revenue due to the implementation of Proposition 13. In the legislation was a provision that established a “revenue limit” derived by formula that determined the amount of state aid provided to school districts. The central point at issue in *San Miguel* was one of the factors utilized in the formula that required,

the reduction of the revenue limit by one-third of the District’s general fund and special reserve fund balances to the extent that they were unreserved, unrestricted, and exceeded \$50,000 or 5 percent of the District’s total revenue.²⁴⁰

San Miguel during the time at question deposited the P.L. 81-874 funds it received in its general fund account. California’s formula did not specifically require reduction of the Federal Impact Aid received by the school district; however, the state did not “remove from consideration” the Federal Impact Aid received by the school district during that fiscal year.

²³⁷ *Supra.*, note 140.

²³⁸ West’s Ann.Const. Art. 13 A, § 4. California’s Proposition 13 limited the taxing power of local agencies and in turn limited the property taxes to one percent (10 mill) of the assessed value of a property in 1975-76. Increases in assessed value were limited to no more than two percent annually. Property could be reassessed at market value when sold.

²³⁹ West’s Ann.Educ.Code §§ 1400 et seq., 41603.

²⁴⁰ *Supra.*, note 140, p. 2.

The landmark ruling of California's *Serrano v. Priest*,²⁴¹ that declared the state's funding formula for education unconstitutional, generated the need for the comprehensive state-funding program utilized during the time of litigation. Under the funding formula, each district received a flat grant amount per pupil as well as supplementary aid provided by the "bail out" legislation to fully fund the foundation program. In establishing their defense, the state officials in *San Miguel* conceded the one-third reduction resulted in less state aid for the district; however, they contended that the reduction was valid due to the financial constraints caused by the limitations on taxing power created by Proposition 13. The defendants also argued that the language of the "bail out" legislation did not specifically require the reduction of Federal Impact Aid and that the exception created by *Middletown* should hold true in *San Miguel*.²⁴²

The Court of Appeals, Third District, California affirmed the decision of the Superior Court that the reduction in federal aid directed to local school districts violated the provisions of the Act²⁴³ that prohibited the states from taking into consideration federal impact money when allocating state aid. The Appeals Court reasoned that by applying the factor to calculate the reduction of state aid to local tax revenues, that included Federal Impact Aid, held in ending general fund balance; the state was depriving the district of that percentage of Federal Impact Aid funds. The Appeals Court also held that the *Middletown* decision did not apply in that the Rhode Island statute promoted increased local funding efforts while the California statutes denied the local districts any power to "increase school aid locally".²⁴⁴ The Appeals Court mandated that

²⁴¹ 5 Cal.3d 584, 487 P.2d 1241, (Cal., 1971).

²⁴² *Supra.*, note 140.

²⁴³ *Supra.*, note 203.

²⁴⁴ *Supra.*, note 140.

the State school aid legislation be modified to exclude the Federal Impact Aid from its calculations in reduction of state aid.

In *Gwinn Area Community Schools v. State of Michigan*,²⁴⁵ action was brought against the State of Michigan and federal defendants by a local school district and its taxpayers for the manner in which Federal Impact Aid was administered in conjunction with state aid laws. The plaintiffs charged that the Michigan Department of Education lacked the authority to deduct Federal Impact Aid in the calculation of state aid to public education since the Michigan system of school finance does not provide an “equalized formula” as required in § 240(d)(2)(A). The complaint also charged the defendants with violating the equal protection and due process guarantees of both the United States and Michigan Constitutions. The plaintiffs sought declaratory and injunctive relief claiming that the state defendants violated various constitutional provisions pursuant to the administration of state aid laws in conjunction with Federal Impact Aid, and that the federal defendants breached “congressionally imposed obligations” by allowing the State of Michigan to deduct the Federal Impact Aid from its state aid formula.²⁴⁶

Michigan, beginning in 1980, had applied a formula that reduced state aid by a percentage of the Federal Impact Aid a state received. A 1974 provision to the Federal Impact Aid Act permitted states to make this determination and stated, in part:

If a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local school educational agencies of that State, payments under this

²⁴⁵ 741 F.2d 840, (6th Cir., 1984).

²⁴⁶ *Ibid.*

subchapter for any fiscal year may be taken into consideration by such State in determining the relative—

- (i) financial resources available to local educational agencies in that state;
- (ii) financial need of such agencies for the provision of free public education for children served by such agency, provided that a State may consider as local resource funds received under this subchapter only in proportion to the share that local revenues covered under a State equalization program are of total local revenues.²⁴⁷

Michigan, during the time at issue, utilized a guaranteed tax yield formula that neutralized the variance in fiscal capacity among local school districts and allowed local school districts to determine their levels of fiscal effort and within certain limits, their local efforts that were equalized by the state.²⁴⁸ The guaranteed tax yield (GTY) formula implemented in 1973 was utilized until 1994 when the state of Michigan underwent a significant school finance reform that shifted the majority of the funding burden back to the state. More importantly, it shifted the responsibility to the state for establishing minimum local funding levels for public schools.²⁴⁹

The U.S. District Court found and the U.S. Court of Appeals, Sixth Circuit, upheld that the action against the federal defendants be dismissed due to the failure of the plaintiffs to follow specific administrative procedures provided by federal regulations of

²⁴⁷ 20 U.S.C. § 240(d)(2)(A), (1982).

²⁴⁸ *Supra.*, note 6, p. 208.

²⁴⁹ National Center for Educational Statistics, *Public School Finance Programs of the U.S. and Canada*, retrieved October 4, 2004 from <http://nces.ed.gov/edfin/pdf/StFinance/Michigan.pdf>

the Federal Impact Aid Act.²⁵⁰ The U.S. Court of Appeals concluded that the federal court was barred by the Eleventh Amendment from entertaining claims against the state defendants for constitutional violations and remanded those claims from the U.S. District Court to the state circuit court from which the case was removed. As a political subdivision of the state the school district could not challenge state action; however, the individual plaintiffs had standing to challenge the state aid formula. In regard to the federal equal protection claim, the U.S. Appeals Court upheld that the U.S. District Court correctly relied on the *San Antonio Independent School District v. Rodriguez*,²⁵¹ decision in concluding that the Michigan Act did not violate the rights guaranteed by the Fourteenth Amendment. Further, the court found that there were no material facts that substantiated whether the continuation of the policy would result in “absolute denial of educational opportunities”.

Finally, the Appeals Court held that the District Court correctly ruled that that the state had wide discretion in the allocation of its tax burden. Due process claims were unfounded due to the fact the state did not arbitrarily deny the district, its taxpayers, or its students the benefits of compensation allocated by Congress to the district for Federal Impact Aid. The *Shepherd v. Godwin* decision that declared the Virginia State aid formula unconstitutional and relied upon by the plaintiffs to support their claim, could not be upheld due to the 1974 amendments of the Federal Impact Aid Act, that allowed for the deduction of Federal Impact Aid prior to the allocation to local school districts, for

²⁵⁰ Supra., note 51. Whenever a State educational agency or local educational will be adversely affected by the operation of this subsection, such agency shall be afforded notice and an opportunity for a hearing prior to the reduction or determination of payments pursuant to this subsection. No submission of evidence of the controversy was presented to the Secretary of Education.

²⁵¹ 411 U.S. 1, 93 S. Ct. 1278, (1973).

states utilizing an equalization formula.

Several school districts and their citizens took issue with the manner in which the Arizona Secretary of Education reduced state school aid to the districts that received Federal Impact Aid in *Chinle Unified School District No. 24 of Apache County v. Bishop*.²⁵² The plaintiffs appealed the U.S. District Court for the District of Arizona's decision not to grant injunctive and declaratory relief and dismissal on Eleventh Amendment²⁵³ grounds of their claim that the Secretary's decision to reduce state aid payments violated the provisions of the Federal Impact Aid legislation. The exception to the prohibition that federal funds were to "supplement and not supplant" state aid was allowed in 20 U.S.C. § 240(5d)(2)²⁵⁴ that specified a state may reduce its aid in a year that the Secretary of Education certifies the state funding formula qualifies as one that equalizes expenditures. The school districts claimed that the defendant reduced state aid prior to receiving federal approval of the state's funding program.²⁵⁵

The funding program utilized in Arizona during the time at issue was a foundation program that attempted to equalize funds available to local school districts. The foundation program included state funding for maintenance and operation, transportation, capital outlay, and "soft capital". The major portion of the funds allocated to local school districts was through block grants. School districts were not required to spend specific amounts of funds categorically. Although Arizona did not have a limit on

²⁵² 980 F.2d 736, (9th Cir., 1992).

²⁵³ U.S. Const. Amend. XI. The principle of sovereign immunity that prevents suits by private individuals against states.

²⁵⁴ Implemented in regulation 34 C.F.R. § 222.60 et seq.

²⁵⁵ For the years 1983-1988 the Department of Education certified Arizona's funding program as one that equalized expenditures, however the Department did not certify the funding program for the years 1989-1990. The Department also advised Secretary Bishop that since the state's funding formula had apparently not changed she should not reduce state aid for 1991 and 1992. She nevertheless reduced the state aid.

the property tax rates charged by localities and equalizing assessment values of real property, it did limit the total spending by local school districts. The expenditure control program in the Arizona funding statute was considered one of the most stringent in the nation.²⁵⁶

The plaintiff school districts filed a concurrent action in the Arizona State Court claiming the same arguments relayed in the federal appeal. The reasoning of the appeal in the State Court was the decision of the U.S. District Court barring relief under the Eleventh Amendment. The State Court denied the interlocutory relief and granted summary judgment for the defendant. The State Secretary of Education moved to also dismiss the federal appeal on grounds that the summary judgment granted by the State Court stripped the federal court of their jurisdiction to hear the appeal. She also argued that the appeal was moot because the funding decisions addressed in the case were for the 1991-1992 fiscal year that had already passed.²⁵⁷

The school districts in their appeal argued that the Young doctrine²⁵⁸ provided an exception to the Eleventh amendment that provided individuals the opportunity to seek injunctive and declaratory relief against the State for violations of federal statutes. In their decision to deny injunctive relief to the plaintiffs, the U.S. Court of Appeals for the Ninth Circuit's decision was based on the determination of the relief to be impermissibly retrospective rather permissibly prospective.²⁵⁹ The decision agreed with the defendant that the reductions in state aid were moot since the reductions had already occurred.

²⁵⁶ Supra., note 249.

²⁵⁷ Supra., note 252.

²⁵⁸ 209 U.S. 123, (1908).

²⁵⁹ Prospective relief compels officials to conform future actions to federal law while retrospective relief is monetary in nature.

The U.S. Appeals Court in turn, reversed and remanded the U.S. District Court's decision and granted declaratory relief to the plaintiffs reasoning that neither the Eleventh Amendment nor the mootness principle barred declaratory relief. The declaratory judgment, in favor of the school districts, would prevent the State officials from reducing state aid to local school districts receiving Federal Impact Aid in the future.²⁶⁰

In another Arizona case heard four years later, two public school districts and several of their students appealed the U.S. District Court for the District of Arizona's dismissal of their challenge seeking declaratory and injunctive relief from State officials. The plaintiffs in *Indian Oasis-Baboquivari Unified School District of Pima County, Arizona v. Kirk*²⁶¹ challenged the state statute that attempted to equalize funding between high and low capacity school districts by requiring county treasurers to return a portion of the district's ending cash balance to the state. The plaintiffs challenged the supplemental statute²⁶² that included Federal Impact Aid in its calculation of funds returned to the state, violated the provisions of the P.L. 81-874 and was unconstitutional under the Supremacy Clause. The complaint by the students held that themselves and others in their respective school districts would be irreparably harmed if the federal funds were transferred to the equalization fund.²⁶³

As mentioned in *Chinle*, Arizona utilized a foundation program that attempted to equalize funding for public education throughout the state. The Arizona program contained a complicated process for equalizing funding among its school districts. The

²⁶⁰ Supra., note 25.

²⁶¹ 91 F.3d 1240, (9th Cir, 1996).

²⁶² A.R.S. § 15-991.02

²⁶³ Supra., note 261.

supplemental statute that “required county treasurers to remit a portion of the ending cash balance in the school district’s maintenance and operation funds”²⁶⁴ back to the state was added to the equalization assistance legislation in 1992. The state defendants moved that the plaintiff’s appeal to the U.S. District Court’s decision on the challenge to the supplemental statute be dismissed due to lack of standing.

The U.S. District Court held that under *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*²⁶⁵ the school districts as state agencies did not have the independent identity to bring suit against the state in federal court. The court also held that the student’s claim of irreparable harm was deficient and dismissed the charge with leave to amend. In their appeal, the school districts contended that *South Lake Tahoe* no longer held precedence since constitutional challenges to state statutes by political subdivisions had been upheld more recently in *Lawrence County and Washington v. Seattle School District*.²⁶⁶ In their decision to affirm the decision of the lower court, the U.S. District Court of Appeals, Ninth Circuit reasoned,

Given the fact that we have explicit precedent on the point of political subdivision standing, and that the Supreme Court has never directly considered the issue, we cannot say that the weight of its implicit exercise of jurisdiction is sufficiently powerful to undermine the law by which we are bound. We therefore remain obliged to follow *South Lake Tahoe*.²⁶⁷

²⁶⁴ *Ibid.*, 3.

²⁶⁵ 449 U.S. 1039, 101 S.Ct. 619, (1980).

²⁶⁶ 458 U.S. 457, 102 S.Ct. 3187, (1985). Prevention of busing for desegregation purposes violated the equal protection clause of the Fourteenth Amendment.

²⁶⁷ *Supra.*, note 261, p. 4.

The U.S. Court of Appeals also upheld the U.S. District Court's decision to dismiss the students' complaint of irreparable harm for failure to prove that they as individuals "suffered a concrete and particularized injury".^{268 269}

A Washington school district and the parents of children enrolled in the district sought appeal of the U.S. District Court for the Western District of Washington's decision dismissing its challenge to the state's funding practice involving National Forest Management Act²⁷⁰ funds. In *Okanogan School District No. 105 v. Superintendent of Public Instruction for the State of Washington*²⁷¹ at issue was the state's practice of crediting the school district's basic education allocation (BEA) by the amount of federal forest money it received. The plaintiffs contended that Okanogan schools were being deprived of the federal money intended to help them offset the loss of taxable income due to the presence of the national forest land. The plaintiffs sought an order preventing the State Superintendent of Public Instruction from reducing the BEA by the amount of federal forest funds that it received.

Washington utilized a full state funding program²⁷² in support of basic education. The allocation formula utilized the school district's full time equivalent student enrollment to calculate the basic education certificated instructional, administrative, and

²⁶⁸ The court found that the students did not provide proof that they would be affected directly by the transfer of funds to the Equalization Fund. They did not provide evidence that any program that affected them as individuals would be eliminated as a result of the transfer. The Appeals Court and the District Court recognized that the students were in a position to suffer harm from the removal of federal funds, however they chose to follow the school district's appeal and did not update their appeal and provide specific information on how they would be injured.

²⁶⁹ In his dissent of the majority of the Court of Appeals decision, Circuit Judge Reinhardt reasoned that the majority went too far when it barred on jurisdictional grounds all federal suits against the state by local government entities and political subdivisions of the state. The judge was of the opinion that there was no legal reason to prevent the school districts from seeking relief under the Supremacy Clause. He asserted that the court erroneously applied standing doctrine.

²⁷⁰ *Supra.*, note 50.

²⁷¹ 291, F.3d 1161, (9th Cir., 2002).

²⁷² Wash. Rev. Code §§ 28A.150, 28A.510.

classified staff formula units. This formula was used to determine the district's allotment for basic education staff formula unit salaries and also to allocate funds to the school districts for non-employee related costs and substitute teachers. The minimum funding program, provided through the general apportionment entitlement, allowed for various adjustments that included the deduction of federal forest funds from the state aid. For school districts that contained forestlands, the superintendent appropriated under the minimum funding program the difference between the federal forest funds to which the district was entitled and the BEA. The state allowed school districts to levy local property taxes to fund programs that were not funded under the state education funding program. The state also provided a local effort assistance program that provided a guaranteed yield for local school districts whose tax efforts exceeded the state average.²⁷³

The District Court in its decision to dismiss the school district's suit relied on the *South Lake Tahoe* decision to justify that a political subdivision of the state may not challenge a state statute in federal court under the provisions of the Fourteenth Amendment. The District Court also dismissed the parent's charges on the grounds that their claim of injury was generalized and not specific in relation to how the forest funds were factored into the school finance program. The District Court also rejected the contention that the Washington funding statute conflicted with the federal legislation and was subject to Supremacy Clause interpretation.²⁷⁴

In affirming the District Court's decision, the U.S. Court of Appeals, Ninth Circuit agreed that the *South Lake Tahoe* decision controlled and that the state statute's

²⁷³ Supra., note 249.

²⁷⁴ Supra., note 271.

validity could not be challenged in federal court on constitutional grounds by an office of the state. The plaintiff parents in their appeal claimed that if the federal revenues were provided in addition to the BEA, their children would benefit directly by the additional revenue provided to the school district for better services and facilities.²⁷⁵ The Appeals Court ruled that the parents must show that they,

have suffered an invasion of a legally protected interest that is concrete and particularized; that their injury is fairly traceable to how the Superintendent of Public Instruction treats forest funds and not to the independent action of some third party not before the court; and that it is likely, as opposed to speculative, that the injury will be redressed by invalidating the state's practices.²⁷⁶

The Appeals Court ruled that although the plaintiff parents showed that their children had received disadvantages in programs, activities, and the facilities they utilized, it was undeterminable that these deficiencies were caused by the deduction of forest fund payments from the BEA or if they were caused by the minimal amount of funding in general. Redress of the issue would not correct the problem.

The Appeals Court opined that the §500 funds differed from other federally funded programs²⁷⁷ that supported public education in there was *no supplement versus supplant* language included in the statute. The Appeals Court ruled that the federal forest funds were not paid to school districts as a direct benefit, but to the states to

²⁷⁵ In the complaint to the district court the plaintiff parents pursued a taxpayer standing theory, however in their appeal they failed to do so. The Appeals Court deemed the taxpayer standing theory abandoned.

²⁷⁶ *Supra.*, note 271, p. 5.

²⁷⁷ Individuals with Disabilities Act, Carl D. Perkins Vocational and Technical Education Act, etc...

spend as their legislature stipulates.²⁷⁸ The Appeals Court ruled that, “§500 does not constrain how the state allocates its own money, or how school districts spend theirs”.²⁷⁹

The most recent and final challenge discussed in this section of the paper involving the supplanting issue of federal funds occurred in the neighboring state of North Carolina. The primary issue in *Hoke County Board of Education v. State of North Carolina*²⁸⁰ was the state constitutional violation claim by school districts and individuals residing in those districts of denial of equal educational opportunities through the funding program provided by the state legislature. The State Supreme Court recognized *Hoke County* as being a continuation of the *Leandro v. State*²⁸¹ decision in which the court concluded the State had failed its constitutional duty to provide all students with a quality basic education. In *Hoke County* the plaintiffs sought declaratory relief from the state and State Board of Education for: (1) failure to provide all students, specifically “at risk” students, with equal educational opportunities; (2) failure to provide preparatory remediation to pre-kindergarten students identified as “at-risk” and; (3) the additional issue in which this paper addresses, and the enjoined plaintiff-intervenors’ contended, that Title I funds were being supplanted by including them in the state’s formula for distribution of state aid.

The North Carolina Public School Fund (PSF) was and continues to be, an equalized foundation program that requires no local contribution for its basic program

²⁷⁸ For the benefit of public roads or schools of forestland counties. The state could choose to divide the funds as they saw fit. The funds could be divided 50/50 between roads and schools as was the current practice or all §500 disbursements could be for roads, or for schools, or the entire amount given to counties in which federal forestlands resided.

²⁷⁹ *Supra.*, note 271, p. 7.

²⁸⁰ 358 N.C. 605, 599 S.E.2d 365, (N.C., 2003).

²⁸¹ 346 N.C. 336, 488 S.E.2d 249, (N.C., 1997).

support. The funds are allocated based on average daily membership and are adjusted based on ability to pay and the tax effort of the locality. The funds are provided through the collection of sales tax and appropriated each year mainly as position, dollar, and categorical allotments out of the state General Fund. There are no state limitations on local supplementation of funding.²⁸²

In the initial ruling of *Leandro*, the state defendant's motion to dismiss on the grounds that the issues were non-justiciable, and the lack of personal and subject matter jurisdiction of the trial court over the defendants was denied. However, the Superior Court of Halifax County granted the state's alternative petition for a writ of certiorari. The state defendants appealed and the North Carolina Court of Appeals reversed the decision based on the fact that the "North Carolina Constitution did not embrace a qualitative standard of education".²⁸³ The plaintiffs and plaintiff-intervenors appealed the decision on grounds that their claim raised constitutional questions and also requested discretionary review. The Supreme Court of North Carolina affirmed in part, reversed in part and remanded to the Superior Court of Wake County for further review. The trial court ruled that the case be divided into two separate actions, one addressing the claims of the rural school district plaintiffs represented by Hoke County and one addressing the claims of the urban school district plaintiff-intervenors.²⁸⁴

In regard to the first issue, the Supreme Court of North Carolina agreed with the trial court and concluded that the state had failed to uphold its constitutional duty to provide certain students with equal educational opportunities and a *Leandro* conforming

²⁸² Supra., note 249.

²⁸³ Supra., note 281.

²⁸⁴ Supra., note 280, p.18.

education.²⁸⁵ The State Supreme Court disagreed with the trial court in its conclusion that the executive and legislative branches of the state government mandate pre-kindergarten remedial programs for identified “at-risk students”.²⁸⁶ The State Supreme Court allowed certiorari for review of the plaintiff-intervenors concern with the State’s use of federal funds in providing state aid even though the trial court had not heard their case. The Supreme Court allowed the motion reasoning that the plaintiff-intervenors had rights as participants to address errors committed during the plaintiff’s trial and that the issue could affect the scope of the plaintiff-intervenors upcoming trial.²⁸⁷

The plaintiff-intervenors contended that the trial court erroneously included federal funds in its determination of whether or not the State had met its obligations to provide equal opportunities for all children to receive a basic education under the North Carolina Constitution. The Supreme Court of North Carolina had to determine whether the trial court erred in condoning the use of Title I funds by the State in its educational aid distribution program in violation of the provisions of the federal statute,²⁸⁸ and if the trial court improperly acknowledged the State’s use of the same funds in violation of the North Carolina Constitution.²⁸⁹

The North Carolina Supreme Court concluded that the trial court’s consideration

²⁸⁵ Based upon the concrete evidence of failing test scores, lower graduation rates, job readiness skills, poor preparation for college, etc... students in the plaintiff school districts were failing to obtain a quality education at a disturbing rate. The trial court determined in Hoke County that the State had failed to identify “at-risk” students and in turn provide them with the opportunity for a quality education. The trial court also ruled that the State failed to adequately supervise how educational funds were being utilized in Hoke County Schools. The trial court ordered the State to reassess its “educational obligations” and to correct any educational deficiencies that prevented any students from obtaining a sound education.

²⁸⁶ The State Supreme Court agreed that intervention was necessary for the success of identified “at-risk” enrollees, however, it also recognized that a legislative mandate to provide a singular means of intervention was premature.

²⁸⁷ Supra., note 280.

²⁸⁸ Supra., note 4.

²⁸⁹ Supra., note 280.

of Title I funds in the State's funding formula did not violate the provisions of the federal statute or the state's Constitution. The Supreme Court reasoned that in its relevant provisions, the North Carolina Constitution did not forbid the inclusion of federal funds in its formula for providing basic education services and held that,

While the State has a duty to provide the means for such educational opportunity, no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding.²⁹⁰

In regard to the supplement vs. supplant issue of federal funds, the North Carolina Supreme Court refused to rule. The court noted that federal funds were controlled by federal law and that the U.S. Secretary of Education held the authority to determine how the funds were distributed. The court also emphasized there was no instance in the facts where the U.S. Secretary had withdrawn or refused to release funds in violation of the non-supplant provision.²⁹¹

Summary -Relevant Common Issues

A more in-depth description of the cases involving the supplant issue was provided in this section of the document that focused on the issues raised by the plaintiffs and defendants and the reasoning of the courts for their decisions. The following summary will address the similarities and differences between the current issue in Virginia and the aforementioned cases. Issues in regard to constitutional grounds upon which a suit may be filed and which entity may seek relief will also be discussed.

²⁹⁰ Ibid., 37.

²⁹¹ Ibid.

The aforementioned cases on state apportionment and supplanting have much in common with the current issue in Virginia. Regardless of whether the rulings were in favor of the plaintiffs or the defendants, someone sought clarification on the use of federal funds for purposes other than what they were specifically intended. Whether the court ruled that federal funds had been absorbed into the state funding scheme or that federal funds were excluded to prevent them from generating additional state funds, local school divisions and their citizens needed answers. Those school divisions and their attorneys that could provide relevant court decisions that shared commonalities and supported their claims stood a much better chance of winning their challenge. The formidable task for the plaintiffs was to provide supporting evidence to the courts in order to show that a constitutional violation had indeed occurred.

Supremacy Clause

The current policy in Virginia of deducting federal revenues from the SOQ model shares several commonalities with the other cases involving the non-supplant issue. Beginning with *Shepherd* and continuing with *Hergenreter*, *Douglas*, *Triplett*, *Middletown*, *Los Alamos* and *Carlsbad* among others, the violations or non-violations of the Supremacy Clause were the topic of concern. The exact language of the supremacy clause of the U.S. Constitution states,

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the

judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.²⁹²

The language utilized in the Supremacy Clause is precise as it was intended. The judgments in the aforementioned cases were precise as well in determining whether or not the Supremacy Clause had been violated. If the plaintiffs could provide proof that state statutes in regard to funding public education conflicted with federal statutes governing public education, then judgment was rendered on their behalf, if they could not, then judgment was denied. The 1974 amendment²⁹³ to the Federal Impact Aid law that allowed the states that provided equalization formulae to make reductions in the amount of state aid for divisions receiving Federal Impact Aid removed much of the standing that plaintiffs challenging such deductions possessed. The burden of proof was on the plaintiffs and the amendment to the federal policy had changed the rules of the game for divisions like *Gwinn*, *Los Alamos*, and *Carlsbad*.

Although P.L. 81-874 was amended to allow reductions in federal aid if the reductions passed a rigorous three-part test,²⁹⁴ other federal funding policies have not been amended. The language of Title I, Title II-B, Title II-D, and the Perkins legislation are specific in their focus on the non-supplant issue. Title VI-B does however, allow the Secretary of Education to waive for one fiscal year at a time the non-supplant regulations for states that provide evidence that certain conditions exist that require their

²⁹² U.S. Const. Art. 6, cl.2.

²⁹³ *Supra.*, note 247.

²⁹⁴ Federal Range Ratio test.

consideration.²⁹⁵ Regardless of waivers or amendments to policies, supplanting of federal funds in disregard to federal policy by states is in violation of the supremacy clause of the Constitution.

Fourteenth Amendment

Violations of the Fourteenth Amendment were issues cited by plaintiff school divisions and their citizens in *Shepherd*, *Douglas*, *Triplett*, *Gwinn*, *Indian Oasis* and *Okanogan* among others. Section one of the Fourteenth Amendment states in part,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁹⁶

In the early challenges of *Shepherd*, *Douglas*, and *Triplett* the courts ruled that the individual students had indeed been denied their equal protection rights under the Fourteenth Amendment. However, in *Gwinn*, *Indian Oasis*, and *Okanogan* the courts ruled there was no proof that citizens or students of the school divisions were denied their equal protection rights. The courts in the later cases called for concrete evidence²⁹⁷ that proved that their equal protection rights had been violated. The courts in *Indian Oasis* and *Okanogon*, although reasoning that the plaintiffs in their complaints

²⁹⁵ 20 USCS § 1412(a)(19)(C)(ii) Waivers for exceptional or uncontrollable circumstances. The Secretary may waive the requirement of subparagraph (A) for a State, for one fiscal year at a time, if the Secretary determines that – the State meets the standard in paragraph (18)(C) of this section for a waiver of the requirement to supplement, and not to supplant, funds received under this part [20 USCS §§ 1411 et seq.].

²⁹⁶ U.S. Const. Amend. XIV.

²⁹⁷ Concrete evidence was identified in Hoke County as being test scores, graduation rates, etc...

showed no specific evidence, seemed to suggest that if concrete evidence had been provided their decision might have been different. In *Hoke County* the concrete evidence was provided and the courts ruled that certain individual students had been denied equal educational opportunities. The state in turn was ordered to reassess its educational allocation to the county and to correct any deficiencies. However, the courts, in determining how this was to be done, provided little guidance.²⁹⁸

Individual interests under the Fourteenth Amendment were the only ones that would seem feasible since school divisions were not allowed to seek redress against their parent state in federal court. The decision to disallow a political subdivision of the state from challenging a state statute in federal court under the provisions of the Fourteenth Amendment in *South Lake Tahoe*²⁹⁹ held precedence in *Indian Oasis* and *Okanagon* despite the more recent ruling in *Lawrence County* that allowed the school division to sue the state for Supremacy Clause violations in the federal court. Due to the *Noyola* and *Chinle* decisions as well as the *Young* doctrine, the Eleventh Amendment ostensibly would not bar individuals from challenging state statutes that are in conflict with federal statutes and seeking declaratory relief under the Fourteenth Amendment. The principle of sovereign immunity that prevented suits by private individuals against states in federal court and upheld in *Gwinn*, was overturned in *Noyola* and *Chinle* relying on the *Young* doctrine. The *Young* doctrine in one section quotes Chief Justice Marshall in *Cohen v. Virginia* as stating,

It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the

²⁹⁸ This seems to have removed some of the impact of the court's decision in this portion of the *Hoke* case.

²⁹⁹ *Supra.*, note 266.

legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.³⁰⁰

The statement by Justice Marshall utilized in *Young*, provided a common sense approach in deciding not to bar individual actions against the state in federal court. It is this type reasoning that allows individuals an opportunity to seek declaratory relief from discriminatory acts and permits the courts to do what it considers to be morally right.

How does the current supplanting issue in Virginia relate to similar issues in other states? The common denominators between the Virginia issue and the non-supplant issue involved in the reviewed case law are: 1) the determination of non-supplant based upon the language of the legislation and the evidence provided; 2) the question of whether a Supremacy Clause violation has occurred and; 3) the guarantee of equal protection under the Fourteenth Amendment.

Justification for Deductions

As mentioned earlier in the document, the federal revenue deduction was initially proposed by the Governor to reduce the costs of the Standards of Quality (SOQ). The deduction was based on the lower of the division per pupil amount or the statewide

³⁰⁰ Supra., note 258.

prevailing amount of federal revenues per child. The deduction was also designed so no division received a per-pupil reduction in the amount of funding they received greater than the amount of federal revenue actually received by the division. The justification for this deduction was “to eliminate any expenditures from the base that were attributable to or supported by locally generated or federal revenues before calculating the total cost of the SOQ.”³⁰¹

Through telephone conversations and e-mail correspondence with Daniel Timberlake, Assistant Superintendent for Finance at the Virginia Department of Education, I was able to glean a more detailed justification for the actual 29.22 percent deduction of federal revenue was obtained. Timberlake explained the federal deduction according to the following:

The 30.00% (actual was 29.22%) of the federal revenue that was deducted was because approximately 29.22% of the total cost of the SOQ was for support costs that were determined by actual expenditures made by local school divisions. Consequently, 29.22% of the federal revenue was assumed to have been spent to support those costs. In other words, that portion of the actual support costs that was estimated to have been driven by federal revenue was deducted from the calculation of the SOQ support costs. The remaining amount of support costs is then split between the state and local governments because it is assumed that the actual costs from which they were determined came from state and local funds. In the end, the state and local governments will continue to pay for those support costs that they originally supported and the federal government will

³⁰¹ Supra., note 63.

continue to support that portion of the support costs that we believe they originally supported.³⁰²

Mr. Timberlake provided a much more detailed explanation than that postulated in the Technical Update in State Superintendent DeMary's memorandum³⁰³ and in the Virginia Department of Education Briefing.³⁰⁴

Challenging The Justification

The justification that the deduction of the 29.22% of federal revenues in proportion to the actual 29.22% of local expenditures for support costs of the total SOQ cost is of course the position that the state will present to the court if challenged. However, those who would challenge the policy of deducting the federal revenues would contend that the purpose of these federal funds is to specifically assist local school divisions in the provision of educational opportunities for targeted students, not to assist the state in re-basing its funding obligations. Senator John Chichester, as chair of the 2004 Subcommittee on Education, provided the following statements in regard to the initial local and federal revenue deductions and the "catch up" costs for the SOQ proposed in SB30,

The effect of these subtractions is to shift over \$200 million per year in education costs from the state to localities. While there may be some valid rationale for this shift in a purely technical sense, it is nonetheless a shift of costs to the localities. Given the thrust of the Virginia Investment Act to reduce pressure on local real estate taxes, we do not believe that we can in good faith change the way we

³⁰² Dan Timberlake, Virginia Department of Education, e-mail correspondence, December 22, 2004.

³⁰³ Supra., note 59.

³⁰⁴ Supra., note 64.

calculate education costs and shift this cost back on localities. To do so would essentially negate the effort we are taking to update the Standards of Quality and properly fund them. Therefore, the Education Subcommittee report recommends that \$418 million be provided to reverse the action in SB30, which deducted out federal revenues and locally generated revenues.³⁰⁵

The Education Subcommittee was successful in reversing the deduction of the local revenues and in reducing the federal deduction to 29.22 percent. This, however, was not their recommendation as they fell short of the goal of an updated Standards of Quality without an increased burden on the localities.

The deduction of the 55.1 million dollars in fiscal year 2005 and 55.6 million dollars in fiscal year 2006 reduced both state and local contributions to Basic Aid. The deduction based upon the estimated portion of federal revenues of the prevailing support costs further extends the disparity between low and high capacity school divisions.

In the Superintendent's Memo addressing the approval of the biennial budget, in regard to the institution of the federal deduction, the General Assembly encouraged the localities to continue to increase teacher's salaries as in recent years.³⁰⁶ This encouragement may motivate the high fiscal effort school divisions as they will continue to pick up the additional support costs lost by the deduction, however, for the low effort school divisions those words of encouragement likely will fall on deaf ears. The students of these low effort and low capacity school divisions will suffer because of the

³⁰⁵ Senate Finance Committee-Virginia General Assembly, Report of the Subcommittee on Education (Senate Bills 29 and 30, as Introduced), February 22, 2004.

³⁰⁶ Supra., note 60.

deduction. An equal protection clause claim on their behalf might possibly prevent the deduction in the future.

Finally, when choosing to re-base the SOQ model, the choice of no deduction of federal or local funds from the model could have eliminated the current dilemma. However, if a decision had to be made between which of the revenues to deduct, federal or local, choose the local deduction.³⁰⁷ The local deduction of textbook sales, rebates, tuition and insurance payments among other items, would not have had the far reaching national policy implications. Local governments most likely would not have complained since local tax revenues would not have been included in the deduction. The issue of supplanting and violations of the federal constitution also would become a non-issue.

Future Implications

The long-term consequences of ignoring the non-supplant issue in Virginia could lead to tighter regulatory control of federal grants, the loss of future targeted federal revenue for the state, and the repayment of funds that were misappropriated, if the courts ruled that supplanting did occur. The more severe consequence, if the courts ruled in favor of the state, ultimately could end federal support for public education. Since the majority of federal grants have provisions in their language that dictate how and what the federal funds are to be expended, any deviation from those provisions represents a possible supplant issue. If the states continued to ignore the supplant provisions of federal legislation and appeal the Secretary of Education's rulings on such matters involving the provisions, the courts, over time, would continually have their

³⁰⁷ Supra., note 59.

dockets laden with challenges. In turn, if the courts were to uphold the state's decision to use appropriated federal funds as they wish, the federal government as a response and in retaliation, could phase out federal grants to public education on the pretense that the funds are not being utilized for what they were intended. The result could have catastrophic consequences. The possibility of the federal government refusing to continue programs because the funds are not being used for their intended purpose is a realistic cause for concern. For the state to use the federal deduction as tax relief instead of for what it was intended, support for targeted student populations, it is dubious fiscal policy and based on the results of legal analysis, it is vulnerable to federal challenge.

Questioning of the decision of the General Assembly to choose the federal deduction instead of the local deduction would be an excellent opportunity for research on this topic. A qualitative study into the decision making process to not utilize the local deduction would provide insight to the thought process of state policy makers.

Another possible study would be to research the policies of other states in regard to the appropriation of federal revenues. The identification of other states that may be violating the *non-supplant* provisions of federal grant programs could open the door to additional studies involving the policies of the particular state.

Conclusion

The issue of non-supplant is not new to public education. It has evolved historically and touched every level of government from local to state to federal. The research provided in this document provides answers to the three basic questions identified earlier in the document. A review of the first two questions and condensed

version of the answers, as well as an answer to the third question is provided by the research as follows:

1. How has the current federal supplement/supplant issue in Virginia historically evolved?

The supplement/supplant issue was addressed in this document by: 1) providing a historical analysis of the involvement of the federal government in public education funding and the first language of the *non-supplant* issue; 2) the identification of the federal revenue deduction; 3) the identification of the non-supplant language in the affected federal grants; 4) the description of the basic aid formula and; 5) the introduction of the initial case law involving the *non-supplant* issue.

2. How does the current supplanting issue in Virginia relate to similar issues in other states?

The current issue in Virginia is related to similar issues in other states by: 1) the determination of non-supplant based upon the language of the legislation and the evidence provided; 2) the question of whether a Supremacy Clause violation has occurred and; 3) the guarantee of equal protection under the Fourteenth Amendment.

3. Does the current Virginia policy regarding the federal supplement/supplant issue violate federal non-supplant provisions of federal aid programs?

The majority of the case law reviewed and the evidence supporting the decisions of the courts would indicate in the opinion of the researcher that in fact a *non-supplant* violation has occurred with the Virginia policy of deducting federal revenues from the Basic Aid formula. However, decisions have been rendered on behalf of plaintiff school divisions and their constituents and on behalf of state governmental agencies and

boards of education. As long as policies are developed by state and local agencies that are not congruent with federal legislative provisions of public education funding sources, challenges to those policies will continue. Regardless of whether or not the current issue in Virginia of deducting federal revenues from the state funding formula appears to violate of the federal Constitution and provisions of federal funding statutes, it is questionable policy. The final answer to the question of whether a *non-supplant* violation has occurred is not a decision that can be easily answered. The research provided leads one to believe that *supplanting* has occurred with the federal revenue deduction, however, it is a decision to be made by either the U.S. Secretary of Education or the courts. The final portion of the conclusion of this document provides a roadmap for a challenge to the federal policy and a plan for seeking recourse on the *non-supplant* violation.

Seeking Recourse

Where does one go from here? The appropriate course of action discussed by parties concerned about the current issue would be to first approach key senators and delegates in the General Assembly and acquaint them with the potential consequences of the continued use of the deduction of federal revenues. The Governor should also be contacted and informed of the possible consequences of continuing with the federal deduction seeking his assistance in remedying this issue. These preliminary steps would occur first to try and handle the supplanting issue within the confines of the state government.³⁰⁸

³⁰⁸ As determined in a meeting between Richard Salmon, Finance Professor at Virginia Polytechnic Institute, Andrew Block, Attorney, Legal Aide Justice Center, and the writer on January 18, 2005.

The next step would be to appeal to the U.S. Secretary of Education for an administrative ruling on the issue. As identified in *Hoke*, the funds in question are under federal control and the U.S. Secretary of Education has the authority to determine how federal funds are disbursed. However, the current political climate in Washington, D.C. may not bode well for this course of action. Currently, President George W. Bush has proposed a High School Intervention Initiative that will dismantle several dedicated individual funding streams such as the Perkins grant and to consolidate them into a high school “block grant” that is structured in the same fashion as *No Child Left Behind*.³⁰⁹

This “block grant” could lead to a reduction in federal spending to education by making local school divisions compete for federal “reform” funding and setting the standard to qualify for such funds at a point that would be unobtainable for most school divisions. There are those who believe that the current national administration would like nothing better than to reduce or eliminate federal aid to public education. With this in mind, and the battle raging between supporters of dedicated federal funding streams and block grants, there are few in Congress who would support additional or continued funding to federal programs if they knew the funds were going to be deducted by the state.³¹⁰ A decision by the U.S. Secretary of Education in favor of a local public school division over the State would provide additional justification for the federal government to eliminate the Perkins grant as well as other grants³¹¹ provided to the States for targeted assistance.

³⁰⁹ ACTE Wire, *Legislative alert: Bush Budget Proposes To Dismantle Perkins*, (Alexandria, 2005), retrieved February 7, 2005 from <http://www.acteonline.org>

³¹⁰ *Supra.*, note 65.

³¹¹ *Supra.*, note 309. The Legislative Alert identifies 48 educational programs targeted for elimination to reduce the overall education budget by approximately one percent.

If the U.S. Secretary of Education were to rule on behalf of the Commonwealth pursuant to the current supplanting issue, the next step for the school division, and the affected citizens of that division, would be to file an appeal seeking declaratory relief in both the State Circuit Court and U.S. District Court for constitutional violations.³¹² The reason for the concurrent appeal in both courts would be to cover all bases in case the *Gwinn* decision held precedence and relief was barred in federal court by the Eleventh Amendment. The concurrent appeals as sought in *Chinle* provided recourse for the school division in case the *Gwinn* decision was upheld.

In respect to constitutional violations and who should seek relief for the transgressions of the non-supplant provisions of federal acts, it would seem reasonable that suits should be filed on behalf of both school divisions and individual citizens. The majority of the complaints contained within this document were filed on behalf of both of the two groups. For such plaintiffs in a case against the State in which federal funds had already been supplanted, it would seem that declaratory relief would be a most appropriate course to follow since the funds had already been deducted and used for other purposes. As noted in *Chinle*, the mootness principle³¹³ would prevent injunctive relief.

Final Comments

From the research I have performed, my conclusion is that supplanting has occurred with the state appropriations of federal funding for public education in the Commonwealth of Virginia. The majority of the case law I reviewed supports this conclusion. The deduction of the federal funds from the Basic Aid calculations of the

³¹² Supremacy Clause and Fourteenth Amendment violations.

³¹³ *Supra.*, note 259.

Standards of Quality model may be subject to challenge in courts since it is in direct violation of the non-supplant provisions of federal legislations targeted to specific student populations. The funds are being utilized to replace state money intended for local school divisions to assist students in targeted groups to obtain a sound public education. The goal of Governor Warner and state legislators to re-base the SOQ model was an admirable and necessary objective. The decision to deduct the federal revenues from the Basic Aid formula in order to achieve this goal is one that needs reconsideration. As stated earlier, the possibility of the federal government refusing to fund valuable programs because the earmarked funds are not being utilized for the purpose for which they were intended is a realistic cause for concern.

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Appendix A

COMMONWEALTH OF VIRGINIA
 DEPARTMENT OF EDUCATION
 P.O. BOX 2120
 RICHMOND, VIRGINIA 23218-2120

SUPTS. MEMO NO. 223

December 19, 2003

INFORMATIONAL

TO: Division Superintendents

FROM: Jo Lynne DeMary
 Superintendent of Public Instruction

SUBJECT: 2004-2006 Biennial Budget as Introduced
 by Governor Warner

Governor Warner presented his 2004-2006 biennial budget on Wednesday, December 17, 2003, before a joint session of the Senate Finance, the House Appropriations, and the House Finance committees. This budget will be considered by the 2004 Session of the General Assembly, which is scheduled to convene on January 14, 2004. The Governor's recommendations for the 2004-2006 Direct Aid to Public Education budget include technical updates to the Standards of Quality (SOQ), incentive, and categorical accounts, and funding for new and existing initiatives. Attachment A to this memorandum provides detailed descriptions of the funding proposed by the Governor for the 2004-2006 Direct Aid budget. Budget proposals for the department's Central Office budget that pertain to school divisions are also summarized in Attachment A.

Major proposals in the 2004-2006 introduced budget include:

Updating costs of the SOQ, incentive, and categorical accounts;
 Adopting the Board of Education's proposed new program for prevention, intervention, and remediation, which replaces the existing SOQ remediation program and provides additional funding to school divisions;

- Instituting a "No Loss" funding provision;
- Continuing the SOL Web-based Technology Initiative funded through Virginia Public School Authority (VPSA) note proceeds;
- Continuing the interest rate subsidy program to support school construction in both years of the biennium;
- Continuing funding for the direct grants to school divisions; and,

- Providing additional funding to continue the department's SOL testing program, and to comply with the federal No Child Left Behind (NCLB) Act.

Beyond these initiatives, Governor Warner has proposed increased funding for four additional initiatives, all of which are contingent on a series of actions outlined in his introduced budget, including a number of tax reform proposals. A fifth adjustment includes an additional reduction in the employer share of retirement rates paid to the Virginia Retirement System (VRS). To accommodate these contingent initiatives in our estimates of payments to school divisions, we have prepared two scenarios for calculating division entitlements. These two scenarios are described below and in Attachment A of this memorandum.

Funding Scenario One – With No Contingent Amendments

VRS Rate at 8.41 percent – The VRS employer contribution rate will be set at 8.41 percent (with the VRS retirement rate at 7.82 percent and the retiree health care credit at 0.59 percent). This scenario does not include the contingent initiatives that are listed under the second funding scenario discussed below. (See Attachment B for estimated entitlement information by school division under this scenario.)

Funding Scenario Two – With Contingent Amendments

VRS Rate at 7.15 percent - The VRS employer contribution rate will be reduced to 7.15 percent (with the VRS retirement rate at 6.56 percent and the retiree health care credit rate at 0.59 percent). (See Attachment C for estimated entitlement information by school division under this scenario.)

Salary Increase in Fiscal Year 2006 - A salary increase of three percent, effective December 1, 2005, would be provided for SOQ instructional and support positions. State funding for the salary increase is estimated at \$50.1 million in fiscal year 2006. (See Attachment C for estimated entitlement information by school division under this scenario.)

Fully Fund the Support Cost of Competing Adjustment at 24.61 Percent – Funding will be included for the state share of cost of the cost of competing factor at 24.61 percent for all SOQ funded support positions in the nine school divisions that comprise Planning District Eight. (See Attachment C for estimated entitlement information by school division under this scenario.)

Increase the Number of Teachers for English as a Second Language (ESL) – Funding will be provided to increase the ESL staffing standard from ten teachers for every one thousand limited English proficient students to seventeen teachers for every one thousand limited English proficient students. (See Attachment C for estimated entitlement information by school division under this scenario.)

Expand the At-Risk Four-Year-Old Program – This program will be expanded to serve a greater number of at-risk four-year-olds through reducing the number of Title I students deducted from the number of unserved students. (See Attachment C for estimated entitlement information by school division under this scenario.)

For planning purposes, school divisions should prepare their local budgets based upon both of these funding scenarios until more information is available concerning the final budget passed by the 2004 General Assembly. Information on the final 2004-2006 budget should be available by March 2004.

Attachments B and C to this memorandum list the estimated school division entitlements for fiscal years 2005 and 2006 for the SOQ, incentive, and categorical accounts based on the Governor's introduced 2004-2006 budget. Please note that the entitlements shown in Attachment B are based on the Governor's introduced budget without contingencies. The entitlements shown in Attachment C are based on the Governor's introduced budget with the contingent initiatives included. The entitlements shown in Attachments B and C are based on the Department of Education's latest projections of March 31 average daily membership (ADM). The entitlements shown in Attachments B and C do not include the direct grants (Group IV accounts) authorized by the General Assembly that are unique to certain school divisions.

Several of the categorical account entitlements (Group III accounts) shown in Attachments B and C are funded on a reimbursement basis; therefore, the amounts listed are calculated based on the department's latest projected entitlements. Final payments on these accounts in fiscal years 2005 and 2006 will be based on actual reimbursements.

In addition to the entitlement information contained in Attachments B and C, two downloadable Excel files have been created to assist school divisions in calculating projected state entitlements and local matches for fiscal years 2005 and 2006 for SOQ, incentive, and categorical Direct Aid programs. One Excel file contains entitlement information based on the Governor's introduced budget without contingencies. Another Excel file contains entitlement information based on the Governor's introduced budget including the contingent initiatives.

These files give divisions the opportunity to change ADM to test the effect on state funding and projected local matches using the department's projected ADM or a local projection of ADM. Attachment D to this memorandum provides detailed instructions for accessing the Excel files from the Department of Education's Web site. The Excel files may be downloaded from the following address:

<http://www.pen.k12.va.us/VDOE/Finance/Budget/calctools.html>

Although we have confidence in the accuracy of our ADM projections on a statewide basis, experience has shown that the accuracy of our projections for individual localities may vary. When localities believe that they have more accurate projections of their March 31 ADM, they are encouraged to substitute their estimates for those provided in this memorandum when using the Excel calculation files. Also, please note that changing the ADM in these files only changes the estimated funding for accounts that are funded on the basis of ADM. The funding for all other accounts remains the same.

It is important to remember that the information provided in Attachments B and C and in the Excel calculation templates relates to the Governor's 2004-2006 budget as introduced. The House of Delegates and the Senate will have the opportunity to amend the Governor's budget proposals during the 2004 General Assembly session. The General Assembly will adopt a final 2004-2006 biennial budget before the end of the session, which is scheduled for March 13, 2004; therefore, the entitlements contained in Attachments B and C and in the Excel calculation templates are projections only and are subject to change throughout the session. The department will provide additional information during the General Assembly session as changes to Direct Aid entitlements occur.

Attachments E and F summarize several of the major data inputs that are updated in the calculation of Direct Aid accounts for the 2004-2006 biennium. Attachment E lists the sources of various input data updated for 2004-2006; Attachment F shows the SOQ funded instructional salaries used for 2004-2006.

Finally, Attachments G and H contain information on the potential local share of savings for SOQ funded positions resulting from the reduced VRS retirement rates (reduced from the VRS Board certified rate of 8.1 percent for the employer share of retirement and 0.59 percent for the retiree health care credit) and the continuation of the group life premium holiday (0.00 percent versus the VRS Board certified rate of 0.46 percent). Please note that actual local savings will vary based upon local salary rates and the actual number of employees enrolled in VRS.

Questions regarding the introduced 2004-2006 budget and projected fiscal years 2005 and 2006 Direct Aid entitlements may be directed to Dan Timberlake, assistant superintendent for finance, or budget office staff at (804) 225-2025.

JLD/mmv

Attachments

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223a.pdf>

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223b.pdf>

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223c.pdf>

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223d.pdf>

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223e.pdf>

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223f.pdf>

<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223g.pdf>
<http://www.pen.k12.va.us/VDOE/suptsmemos/2003/inf223h.pdf>

Attachment A to Inf. Supts. Memo No. 223

Governor Warner's Introduced Budget for the 2004-2006 Biennium Summary of Budget Proposals Affecting the Direct Aid to Public Education and Department of Education Central Office Budgets DIRECT AID

Technical Updates

Rebase Standards of Quality (SOQ) Costs for 2004-2006 – The Governor's introduced budget includes \$396.0 million in fiscal year 2005 and \$440.0 million in fiscal year 2006 to fund the state's share of routine rebasing costs for the Standards of Quality programs. These technical adjustments include updates for factors such as funded salaries, Annual School Report data used to calculate prevailing cost estimates, inflation, test score updates, and enrollment updates. These adjustments reflect the cost of continuing current programs with the required data updates used in the funding formulas but do not reflect any changes in policy.

Update ADM and Fall Membership Projections (as of November 2003) - The proposed budget reflects funding necessary to cover increases and decreases in projections of March 31, 2005, and March 31, 2006, average daily membership (ADM). The projected ADM used in the introduced budget was forecast by the Department of Education based upon September 30, 2003, fall membership. All accounts that use projected fall membership in their calculations have been updated. For fiscal year 2005, these adjustments result in a decrease of \$3.3 million. For fiscal year 2006, the decrease is \$2.3 million.

Update Incentive Accounts – Funding increases are included in each year of the 2004-2006 biennium for the Early Reading Intervention Initiative and for the Standards of Learning (SOL) Algebra Readiness program. Funding for both of these programs is based on test score data and fall membership. Payments for the Early Reading Intervention Initiative are based upon the number of students in need of services determined by fall membership and test score data from the Phonological Awareness Literacy Screening (PALS) diagnostic instrument. Funding for the Algebra Readiness program is based on the number of students in grades seven and eight multiplied by the percent of students in each division who failed the eighth grade math SOL test. Funding for the At-Risk program is also increased in both years of the 2004-2006 biennium. This program is funded through the use of an add-on weight to the Basic Aid per pupil amount. Consequently, all technical rebasing changes to Basic Aid also affect funding for this program. Other accounts affected by technical updates include the K-3 Primary Class Size Reduction initiative and the At-Risk Four year-old program. Technical updates to the incentive accounts total \$26.0 million in fiscal year 2005 and \$26.6 million in fiscal year 2006.

Update Categorical Programs - For the 2004-2006 biennium, the proposed budget contains increased funding for special education programs related to regional program

tuition reimbursements, state-operated programs, and homebound education services. Funding for the special education foster care reimbursement program also increases in the 2004-2006 biennium. The additional funding for these programs is required due to projected increases in service levels for the 2004-2006 biennium.

Funding for the academic year Governor's Schools program is projected to increase in the 2004-2006 biennium to reflect new enrollment projections. Funding for the Alternative Education program also increases due to an increase in the per pupil amount used to fund the program in 2004-2006. Technical updates to the categorical accounts total \$10.9 million in fiscal year 2005 and \$19.5 million in fiscal year 2006.

Change Virginia Retirement System (VRS) Employer Contribution

Rates for Professional Positions - The Governor's introduced budget adopts a lower employer contribution rate for retirement benefits than was certified by the VRS Board (7.82 percent versus 8.1 percent). This lower rate is applied to positions in the VRS professional group based on the actuarial valuation of assets and liabilities over 30 years (as opposed to over 23 years as originally calculated by the VRS actuary). For the retirement contribution, the rates proposed for 2004- 2006 reflect the actuarial effect of the rate increase from fiscal year 2004 (3.77 percent to 7.82 percent). For the retiree health care credit, the rates proposed for 2004-2006 reflect the actuarial effect of a rate decrease from fiscal year 2004 (0.67 percent to 0.59 percent). These new rates are the same in both fiscal years. Please note that there is no employer contribution for Group Life in fiscal years 2005 or 2006 reflecting the proposed continuation of the premium holiday in both years. The result of these rate changes increases funding by \$80.7 million in fiscal year 2005 and \$87.3 million in fiscal year 2006. *(Note: Please see the contingent appropriation section of this attachment for more information about additional rate reductions.)*

Update Sales Tax Projections – The projected sales tax entitlements reflect the most recent estimate of the one percent sales tax, as computed by the Virginia Department of Taxation. The Department of Taxation projects one percent sales tax revenues of \$884.0 million in fiscal year 2005 and \$926.0 million in fiscal year 2006. After applying the Basic Aid offset, the net increase in state funding is estimated to be \$23.8 million in fiscal year 2005 and \$42.4 million in fiscal year 2006.

Update Lottery Proceeds – Total Lottery proceeds are projected to increase to \$395.0 million in fiscal year 2005 and \$402.0 million in fiscal year 2006. Of this amount, \$20.5 million in fiscal year 2005 and \$20.7 million in fiscal year 2006 is dedicated to fund the additional cost of the proposed SOQ prevention, intervention, and remediation program. The local portion of Lottery proceeds are projected to be distributed based on a state share of \$218.26 per pupil in adjusted ADM in fiscal year 2005 and \$219.73 per pupil in adjusted ADM in fiscal year 2006. The net effect of these increases and offsets is an increase of \$1.2 million in fiscal year 2005 and \$3.9 million in fiscal year 2006.

Recalculate Direct Aid Accounts Using 2004-2006 Composite

Index - The projected entitlements listed in Attachment B were calculated using the 2004-2006 composite indices communicated in Informational Superintendent's Memorandum Number 208, dated December 5, 2003. The data elements used to calculate the composite index for 2004-2006 are based on data from 2001.

For fiscal year 2005, changes in the composite index result in an increase of \$27.0 million. For fiscal year 2006, the increase is \$26.5 million.

Adjust Summer School and Academic Year Governor's School Per Pupil Amounts – As has been the practice in prior biennia, the per pupil funding for these two programs has been adjusted based on revisions to the calculated per pupil amounts in Basic Aid (for Governor's Schools) and the SOQ basic and remedial position salaries (for Remedial Summer School) to reflect the rebased cost estimates for the 2004-2006 biennium. The additional cost from the change in these per pupil amounts is an increase of \$1.9 million in fiscal year 2005 and \$2.0 million in fiscal year 2006.

Direct Aid Policy Changes

Re-institute Local Revenue Deduction – The proposed budget reinstates the deduction of prevailing locally generated revenues from the Basic Aid cost calculation. This amendment reduces Direct Aid funding by \$55.1 million in fiscal year 2005 and by \$55.6 million in fiscal year 2006.

Continue VPSA Technology Distribution and Do Not Switch to SOQ Prevailing Technology Per Pupil Amount – The current policy of funding non-personal technology costs through the Virginia Public School Authority equipment notes program is maintained in the 2004-2006 biennium. Consequently, no funding is included in the Basic Aid per pupil amount for non-personal technology costs. These costs will be funded from note proceeds resulting in a savings to the general fund of the Commonwealth. The debt service on these notes will be paid from the Literary Fund. For fiscal year 2005, this initiative results in a savings of \$54.6 million. For fiscal year 2006, the savings is \$55.2 million.

Fund the K-3 Class Size Reduction Initiative at the Lower of Statewide Average Per Pupil Amount or Division Per Pupil Amount – The funding formula used for the K-3 initiative is modified for the 2004-2006 biennium. The new formula provides state funding to participating school divisions using a per pupil amount that is the lower of the division per pupil amount or the statewide average per pupil amount. The practice in the 2002-2004 biennium had been to fund this initiative using the higher of the division per pupil amount or the statewide average per pupil amount. In both years of the biennium, this change results in a savings of \$6.0 million.

Institute Federal Revenue Deduction in Basic Aid Formula – Beginning in the 2004-2006 biennium, certain federal revenues will be deducted from the Basic Aid calculation, a practice that is similar to the local revenue deduction noted above. This deduction is based upon a per pupil amount for each division that is the lower of the school division's actual federal receipts per pupil or the prevailing federal revenues per pupil on a statewide basis. To calculate the federal deduction amount on a per pupil basis, federal revenues received by all school divisions related to Title I, Title IIB, Special Education (Title VI-B), Vocational Education (Perkins Act), and Educational Technology (Title II-D) were totaled and divided by a base Average Daily Membership (ADM) figure. Please note that federal revenues used for capital outlay are not part of the deduction because school divisions do not use these revenues as operating funds. This action results in a Basic Aid decrease of \$153.2 million in fiscal year 2005 and \$154.2 million in fiscal year 2006.

Adopt Board of Education's Proposed Prevention, Intervention,

and Remediation Program – A new Standards of Quality prevention, intervention, and remediation program is proposed for the 2004-2006 biennium to assist students who need additional instruction. This new program would replace the current SOQ remediation program. The new program provides funding for one hour of additional instruction per day for identified students. Funding is calculated using the percent of students eligible for the federal Free Lunch program as a proxy for the number of eligible students. A pupil-teacher ratio is then applied to the pool of “identified” students using a range between 18:1 and 10:1, depending upon a school division’s combined failure rate on the English and math Standards of Learning tests. Higher combined failure rates are assigned lower pupil-teacher ratios. Localities must match the state funds based on the composite index of local ability-to-pay.

This initiative, which was approved by the Board of Education in June 2003 as part of its revisions to the SOQ, is funded at \$64.6 million in fiscal year 2005 and \$65.0 million in fiscal year 2006. This funding represents an increase of \$20.5 million in fiscal year 2005 and \$20.7 million in fiscal year 2006 over the amount that would have been funded for the current SOQ remediation program. The additional funding is supported by increased Lottery proceeds.

Institute a “No Loss” funding provision – For those school divisions receiving a projected state funding allocation in fiscal year 2005 or fiscal year 2006 that is less than their projected fiscal year 2004 state funding allocation in the Governor’s proposed amendments to Direct Aid for fiscal year 2004 (the “Caboose Bill”), an additional state payment will be provided to ensure that the affected school divisions receive a total state allocation in fiscal years 2005 and 2006 that is at least equal to the total amount to be received in fiscal year 2004 under the “Caboose Bill.” For fiscal year 2005, an additional \$1.4 million is provided for this no loss provision. For fiscal year 2006, an additional \$2.2 million is provided.

The proposed No Loss funding is calculated on the basis that three contingent appropriation items will be included in the final fiscal year 2005 and fiscal year 2006 base of funding. These contingent items are: support cost of competing at 24.61 percent; increased ESL funding; and increased At-risk Four year-old funding. Please note that the level of No Loss funding in fiscal year 2005 and fiscal year 2006 will not change if any or all of these three items are not funded in the final 2004-2006 budget.

Continue Implementation of the Standards of Learning Web-based Technology Initiative – This initiative continues the educational technology notes program in 2004-2006 with debt service paid through the Literary Fund. Approximately \$59.0 million in Virginia Public School Authority (VPSA) equipment notes is expected to be issued in the spring of 2005 and 2006. Continuation of this initiative is intended to increase school divisions’ capability for web-based instruction, remediation, and testing of the Standards of Learning.

Grant amounts are maintained at \$26,000 per school (for schools reporting fall membership and for various division and regional programs) and \$50,000 per school division. A required local match is maintained at 20 percent of the state grant amount, and 25 percent of the required local match must be used for teacher training. The goals of the program continue to focus on lowering student-to-computer ratios and increasing high speed Internet access in high schools and to establish computer-based instructional, remedial, and testing systems for the Standards of Learning.

The proposed budget also updates the number of schools eligible for funding under the VPSA technology grants. Funding to school divisions for the VPSA technology grant program has been increased by \$468,000 in fiscal year 2005 and by \$780,000 in fiscal year 2006 based on an increase in the number of reported schools.

Continue Interest Rate Subsidy Program – Requires the VPSA to provide interest rate subsidy programs in the fall of 2004 and in the fall of 2005 for Literary Fund projects on the First Priority Waiting List. Five million in subsidy grants would be provided in each year of the biennium.

Change Funding Source for VRS Retirement – The proposed budget uses \$131.9 million in Literary Fund revenues in fiscal year 2005 and \$135.9 million in Literary Fund revenues in fiscal year 2006 in lieu of general funds for VRS retirement. This represents an increase of \$13.4 million in fiscal year 2005 and \$17.4 million in fiscal year 2006 over the current level in fiscal year 2004. This action only affects the source of funding for VRS retirement payments and will not affect school divisions' allocations for VRS retirement in the 2004-2006 biennium.

Continue Project Graduation – Additional funding of \$2.8 million in both years of the biennium is provided for administrative and contractual services in support of this initiative. Governor Warner began Project Graduation in 2002- 2003 to provide additional opportunities for students to earn the verified units of credit required to receive a high school diploma. Funding will provide for continuation academies for students who do not graduate with their class, regional academies to help students who are preparing for graduation, and for on-line tutorials for students who need help preparing for their Standards of Learning tests.

Increase Support for No Child Left Behind Act – Additional funding is provided to help the Department of Education develop programs to assist school divisions with meeting the requirements of the No Child Left Behind Act. For fiscal year 2005, an additional \$4.4 million is provided. For fiscal year 2006, an additional \$5.1 million is provided.

Contingent Appropriations

Please note that funding for the following initiatives will only be provided if a series of actions are approved by the General Assembly including the Governor's proposed tax reform package. For more information regarding the Governor's proposed tax reform, visit his Web site located at:

<http://www.governor.virginia.gov/Initiatives/TaxReform/index.htm>

Compensation Supplement in Fiscal Year 2006 – The Governor's introduced budget provides funding for a compensation supplement of three percent, effective December 1, 2005, covering SOQ instructional and support positions and affected incentive accounts. Funding for the salary increase is contained in the Central Appropriations section of the introduced budget and is estimated at \$50.1 million in fiscal year 2006.

VRS Rate Change – In addition to the three percent compensation supplement in fiscal year 2006, there would be an employer contribution rate adjustment for VRS retirement, with a new rate set at 6.56 percent in both years of the biennium, which is a reduction of 1.26 percent from the rate of 7.82 percent discussed earlier in this memorandum. This further rate reduction is based on "pooling" the liabilities and

assets of the teacher and state employee retirement pools. No change is proposed to the retiree health care credit rate of 0.59 percent.

Fully Fund Support Cost of Competing at 24.61 Percent –

Funding would be included to increase the cost of competing factor for SOQ support positions from 20.92 percent to 24.61 percent in the nine school divisions in Planning District Eight. This support cost of competing rate of 24.61 percent is the rate recommended by the Joint Legislative Audit and Review Commission (JLARC) in its most recent study of the cost of competing adjustment. This action results in an increase of \$3.4 million in fiscal year 2005 and \$3.5 million in fiscal year 2006.

Increase the Number of Teachers in the English as a Second Language (ESL) Program – In prior biennia, ESL funding was based on ten teachers for every one thousand limited English proficient (LEP) students. In the 2004-2006 biennium, ESL funding would be based on an increase to seventeen teachers per one thousand LEP students. This proposal increases funding by \$9.0 million in fiscal year 2005 and \$10.6 million in fiscal year 2006.

Expand the At-Risk Four-Year-Old Program – In prior biennia, funding for this program was determined by calculating an unserved population of eligible children, which was derived by deducting those served by federal Title I or Head Start programs from the total number of estimated at-risk four-year-olds. Under this initiative, the deduction for the Title I program will be reduced by one third, which in turn expands the pool of students eligible for state funding. This initiative results in an increase of \$2.2 million in each year.

CENTRAL OFFICE INITIATIVES

Maintain Current Standards of Learning (SOL) Testing Program –

This initiative continues the existing SOL testing program required by the Standards of Quality and the Standards of Accreditation. Additional funding supports: (1) annual price escalators required by the SOL testing contract; (2) SOL test administration and scoring cost increases due to greater student enrollment; (3) expansion of the SOL history test program; (4) test development activities; and (5) federal grants related to federal No Child Left Behind (NCLB) Act. For fiscal year 2005, general fund appropriations increase by \$1.8 million and federal funds increase by \$400,000. For fiscal year 2006, general fund appropriations increase by \$4.5 million and federal funds increase by \$400,000.

Increase Funding for the National Board Certification Program

– This proposal updates the projected number of classroom teachers with National Board Certification who are eligible to receive the initial or continuation bonus in the 2004-2006 biennium. This proposal also reduces the initial bonus from \$5,000 to \$3,000 and the continuation bonus from \$2,500 to \$1,000 for teachers initially awarded National Board Certification on or after July 1, 2004. For fiscal year 2005, these actions result in additional funding of \$627,500. For fiscal year 2006, these actions result in additional funding of \$849,000.

Continue Implementation of the Web-based Standards of Learning (SOL) Technology Initiative – This initiative funds the costs of: (1) renewing the existing Web-based testing contract in and implementation of the initiative. Additional funding of \$1.5 million is provided in fiscal year 2005. Additional funding of \$2.1 million is provided in fiscal year 2006.

Increase Support for Implementation of No Child Left Behind

(NCLB) Act – In order to comply with the requirements of NCLB, the central office budget is increased by \$1.0 million in both years of the 2004-2006 biennium.

Implement Statewide Student Information System – NCLB requires states to report an increased amount of student-level information. In response to this requirement, an additional \$798,948 in general funds and \$2.7 million in federal funds is added in fiscal year 2005 for the development and implementation of a statewide student information system. For fiscal year 2006, an additional \$3.6 million in general funds is added to the central office budget for the development and implementation of this system.

Continue Project Graduation – Additional funding of \$356,512 in both years of the biennium is provided for administrative and contractual services in support of this initiative.

Transfer Veterans Education to the Department of Veterans

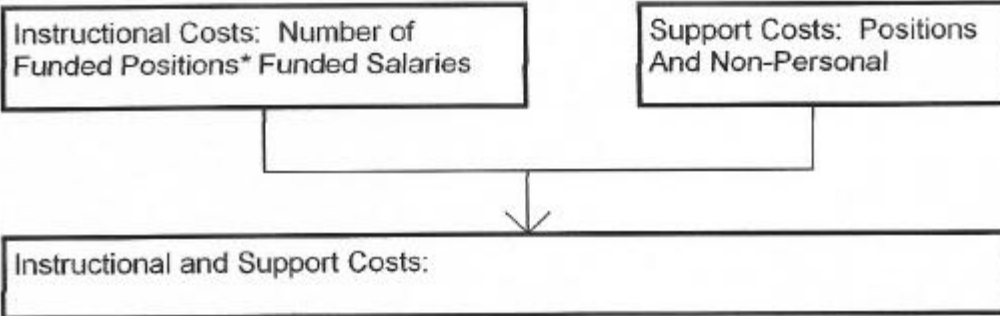
Services – This initiative transfers veterans educational and training programs to the Virginia Department of Veterans Services. Federal funds of \$287,267 are transferred in each year of the biennium, along with three full-time equivalent positions.

Appendix B

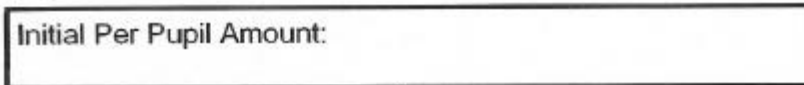
SOQ Funding Process

SOQ Funding Process: Basic Aid

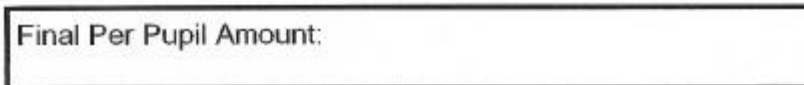
STEP 1 - Determine Instructional and Support Costs



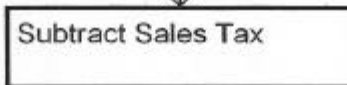
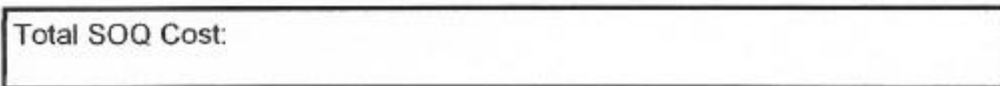
STEP 2(A) - Convert to Per Pupil Amount



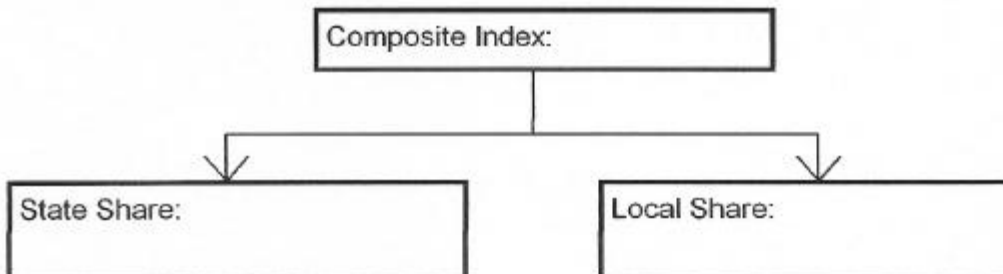
STEP 2(B) - Proposed Deduct of Federal & Local Revenues Per Pupil



STEP 3 - Multiply by Number of Students (ADM)



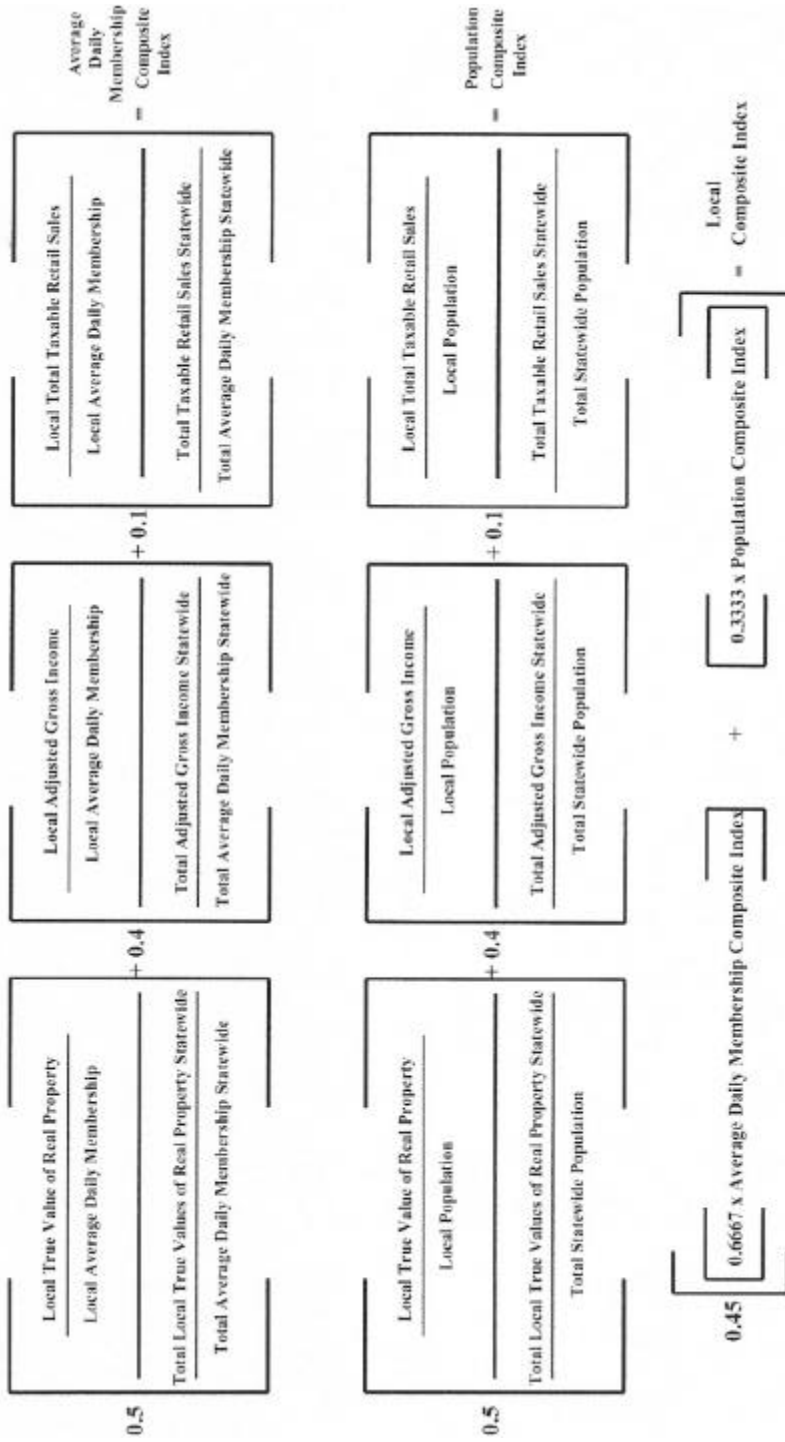
STEP 4 - Apply Composite Index to Determine State and Local Shares



Appendix B

Local Composite Index

APPENDIX B:
CALCULATION OF THE LOCAL COMPOSITE INDEX



Appendix C

280 F.Supp. 869

United States District Court,
E.D. Virginia,
at Norfolk.

William L. SHEPHEARD, Sr., et al., Plaintiffs,

v.

Mills E. GODWIN, Jr., et al., Defendants.

Civ. A. No. 6249.

Argued Dec. 19, 1967.

Decided Feb. 6, 1968.

Opinion on Motions Argued

Feb. 15, 1968.

Decided Feb. 16, 1968.

Action by real estate owners and taxpayers against state school officials. The three-judge District Court, Albert V. Bryan, Circuit Judge, held that formula whereby state, in providing assistance to local school districts, deducted from share otherwise allocable to district a sum equal to substantial percentage of any federal 'impact' funds received by district under federal program for aiding school areas whose population had been substantially enlarged by attendance of federal employees' children was unconstitutional as violative of supremacy clause of the Constitution. Order accordingly.

West Headnotes

Formula whereby state, in providing assistance to local school districts, deducted from share otherwise allocable to district a sum equal to substantial percentage of any federal "impact" funds received by district under federal program for aiding school areas whose population had been substantially enlarged by attendance of federal employees' children was unconstitutional as violative of supremacy clause of the Constitution. Educational Agencies Financial Aid Act, §§ 1 et seq., 2, 3(a, b) as amended [20 U.S.C.A. §§ 236](#) et seq., [237](#), [238\(a, b\)](#); [U.S.C.A.Const. Amend. 14](#); Acts Va.1966, c. 719, Item 459(c) (5).

Under act by which federal government provides financial aid for operation of local educational facilities in areas whose school populations have been substantially enlarged by attendance of federal employees' children, federal funds are exclusively for supplementation of local sources of revenue and there is no intention to lessen efforts of state. Educational Agencies Financial Aid Act, §§ 1 et seq., 2, 3(a, b) as amended [20 U.S.C.A. §§ 236](#) et seq., [237](#), [238\(a, b\)](#).

Amendment providing that amount which a local educational agency is otherwise entitled to receive, under federal program to aid areas whose school population has been substantially enlarged by attendance of federal employees' children, shall be reduced if state has reduced its aggregate expenditure per pupil below level of such expenditures in second preceding fiscal year provides only an administrative remedy for government and does not deprive local taxpayers of standing to prevent future state infringement of their constitutional rights to benefits of the federal aid. Educational Agencies Financial Aid Act, § 5(d) as amended [20 U.S.C.A. § 240\(d\)](#).

Virginia statute providing that in the event availability of federal funds for local operating expenses is conditioned upon their exclusion from a state apportionment formula, the state board of education shall exclude both such federal funds and daily average attendance for pupils involved from the application of that item is unconstitutional as implementing discrimination without justification. Acts Va.1966, c. 719, Item 459(c) (8).

Federal district court could not, in action by taxpayers against state school officials, order the officials to restore amounts of state aid withheld in prior years on account of federal impact funds since that restoration would require an appropriation by state Legislature and would be an order to state to take affirmative political action which order would convert suit into one against commonwealth, as prohibited by the Eleventh Amendment.

Suit involving state appropriation act which directed omission of children of federal employees from provision of state for school help to localities and involving prayers for recovery of past deductions of school aid made by state in proportion to federal school aid required convening of three-judge federal district court. [28 U.S.C.A. §§ 2281, 2284](#).

Governor of Virginia was not a necessary party to taxpayers' action attacking scheme whereby state deducted from share of state assistance otherwise allocable to local school districts a sum equal to substantial percentage of any federal impact funds received by the district.

Effective date of injunction issued on February 6, 1968 prohibiting use by state of scheme whereby state deducted from share of state assistance otherwise allocable to local school districts a sum equal to a substantial percentage of any federal impact funds received by the district was postponed until July 1, 1968 in view of practical difficulties that would be caused by immediate effectiveness.

*871 Henry E. Howell, Jr., Howell, Anninos & Daugherty, Norfolk, Va., for plaintiffs. Clive L. DuVal, II, Willaim R. Durland, Springfield, Va., E. A. Prichard, Fairfax, Va., and Harriett F. Bradley for plaintiffs-intervenors.

Robert Y. Button, Atty. Gen. of Virginia, Robert D. McIlwaine, III, Richard N. Harris, Asst. Attys. Gen., and Henry T. Wickham, Special Counsel, for defendants.

Before BRYAN and BUTZNER, Circuit Judges, and HOFFMAN, District Judge.

OPINION

ALBERT V. BRYAN, Circuit Judge:

'Impacted' school areas are those whose school populations have been substantially enlarged by the attendance of Federal employees' children, but at the same time are losing school tax revenues because of the United States government's immunity from land taxes, both factors arising from increased Federal activities in the area. These conditions prompted Congress to provide financial aid for operation of the local educational facilities, P.L. 874. [\[FN1\]](#)

[FN1. 20 U.S.C. § 236 et seq. \(Supp.1967\). Section 237](#) of the Act, which establishes the basic structure of the aid program, reads as follows:

'(a) Where the Commissioner (of Education), after consultation with any local educational agency and with the appropriate State educational agency, determines for any fiscal year ending prior to July 1, 1968--

'(1) that the United States owns Federal property in the school district of such local educational agency, * * *; and

'(2) that such acquisition has placed a substantial and continuing financial burden on such agency; and

'(3) that such agency is not being substantially compensated for the loss in revenue resulting from such acquisition (of land by the United States) * * * then the local educational agency shall be entitled to receive for such fiscal year such amount as, in the judgment of the Commissioner, is equal to the continuing Federal responsibility for the additional financial burden with respect to current expenditures placed on such agency by such acquisition of property, to the extent such agency is not compensated for such burden by other Federal payments with respect to the property so acquired. Such amount shall not exceed the amount which, in the judgment of the Commissioner, such agency would have derived in such year, and would have had available for current expenditures, from the

property acquired by the United States * * *.'

For determination of the Federal contribution the 'Federal' children are, as pertinent here, divided by [§ 238\(a\) and \(b\)](#) into two classifications. The first embraces, by 238(a), those residing on Federal property with a parent employed on Federal property or on active duty in the uniformed services; and the second classification, by 238(b), consists of those children who either resided on Federal property or resided with a parent employed on Federal property.

The amount of the entitlement of each locality is computed in the manner prescribed by [§ 238\(c\)](#) as follows:

'(c) (1) The amount to which a local educational agency is entitled under this section for any fiscal year shall be an amount equal to (A) the local contribution rate (determined under subsection (d) of this section) multiplied by (B) the sum of the number of children determined under subsection (a) and one-half of the number determined under subsection (b) of this section.

'(d) The local contribution rate for a local educational agency * * * for any fiscal year shall be computed by the Commissioner of Education, after consultation with the State educational agency, in the following manner:

'(1) he shall place each school district within the State into a group of generally comparable school districts; and

'(2) he shall then divide (A) the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which he is making the computation, which all of the local educational agencies within any such group of comparable school districts made from revenues derived from local sources, by (B) the aggregate number of children in average daily attendance to whom such agencies provided free public education during such second preceding fiscal year.

'The local contribution rate shall be an amount equal to the quotient obtained under clause (2) of this subsection.'

*872 In applying a State formula for State assistance to local school districts, [\[FN2\]](#) Virginia has deducted from the share otherwise allocable to the district a sum equal to a substantial percentage of any Federal 'impact' funds receivable by the district.

[FN2.](#) See Va. Acts of Assembly, ch. 719, Item 459, p. 1496 (1966).

Residents, real estate owners and taxpayers of the City of Norfolk, later joined by those of the County of Fairfax, Virginia, in behalf of themselves and others similarly situated, here attack this deduction and an alternative provision as violative of the purpose and intent of the act of Congress and as transgressing the Fourteenth Amendment. We uphold their contention.

Defendants are the State officials charged with the responsibility and duty of distributing the public moneys appropriated for schools by the legislature, the General Assembly of Virginia. There is no claim that these officers failed to follow the directions of the State law. The question here is the validity of that legislation.

Concededly, the amounts capturable in taxes on lands and buildings in Norfolk and Fairfax, respectively, if the property occupied by the Government were generally assessable or leviable for school support, would far exceed the Federal contribution in each place. Likewise it must be acknowledged that the influx of employees

accompanying the Government's operations has swelled the school populations enormously in this city and county, necessitating enlarged outlays both in operating and capital expenses.

As applied by the United States Commissioner of Education, the act of Congress provided for payments for the 1965-66 school year for operating costs of \$269.36 for each child in the Norfolk school system whose parent resided and worked upon Federal property, and the sum of \$134.68 for each child whose parent worked on the property but did not live there. Corresponding figures for Fairfax were \$311.19 and \$155.59, respectively. From 1951 to 1967, inclusive, the Federal assists under P.L. 874 to Norfolk amounted to. \$29,107,305.15, and to Fairfax \$49,636,235.31.

Commencing at the 1948-49 school term Virginia established the Minimum Education Program. As the title indicates, it represents a program which was determined necessary to provide each child in the State a minimum education. To take care of the program's cost a Basic State School Aid Fund was created. It fixed a minimum program cost for every political subdivision of the State, i.e. counties and cities.

The minimum program cost in each district was declared to be the aggregate of two items. The first was the amount of the instructional salaries when reckoned by a stated formula for each teacher position. The second item was the product of the average daily attendance (ADA) multiplied by \$100 in 1966- 68 (\$80 in 1964-66) per pupil. The subdivision must expend at least this total each year for its schools. See Va. Acts of Assembly, ch. 719, Item 459(c)(5) (1966).

A contribution to be made by the State to the cost in every political subdivision is spelled out also. It is comprised of (1) a basic State share and (2) a supplementary State share. The basic State share amounts to 60% of the instructional salaries. The supplementary State share is reached by subtracting from the minimum program cost (the gross instructional*873 salaries plus the total of the \$100 per pupil ADA) the following items: (1) the basic State share; (2) an amount equivalent to a uniform tax levy of 60 cents per \$100 of true values of local taxable real estate and public service corporation property in the subdivision; and (3) 50% (in 1966-68) of the impact funds receivable by the subdivision from the Federal government for operating costs. A maximum is fixed for the supplementary State share. Administration of the allocation of State money is put in the hands of the State board of Education.

Until the 1956-57 school session the State deducted nothing from its own assistance by reason of the impact moneys. In certain later years it deducted all of it. In the 1964-66 biennial it reduced the deductions to 2/3, and for the 1966-68 to 1/2, of the Federal funds.

The theory of the deduction in toto was that the Federal moneys were substituting for the taxes lost to the district by reason of the immunity of the Government property, and hence should be charged to the locality, just as the taxes would have been, in fixing the State supplementary aid. The 1/3 and 1/2 later allowed the affected community was permitted on the ground that the equation of impact money with taxes was not exact and entirely sound, since many of the parents would be living on Government property and would pay no local taxes. A further justification was that the community was entitled to reimbursement for the administrative expense of ascertaining and collecting the Federal allocations. No figures to prove the approximate correctness of the asserted equation were adduced.

The grievance of the plaintiffs is obvious: any deduction whatsoever of the Federal supplement in apportioning State aid, pro tanto burdens them as taxpayers, for they and the other property owners in Norfolk and Fairfax have to make up the unindemnified portion of the impact costs. They contend that any deduction is prohibited by the purpose and plan of the Federal act.

The rejoinder of the defendant officials is, first, that the impact pupils are counted by the State in computing the minimum program cost in the district, and in accounting with the district for the State's supplementary aid it is not inequitable to insist upon a deduction of a commensurate amount of the impact moneys. At first appealing, this argument ignores the fact that the Federal children are to a large extent paying their own way so far as the State is concerned. Quite soundly, the Congressional Committee on Education and Labor in recommending passage of P.L. 874, observed that the influx of Federal employees, and the withdrawal of real estate from taxes, did not diminish the tax sources of the State or otherwise burden the State. Its revenues are obtained from taxation to which the additional Federal employees are subject along with the other residents of the area. The Committee, in Report No. 2287, dated June 20, 1950, said: 'The reason for not providing in the bill for any payment paralleling the State share in the cost of educating children who reside on or whose parents are employed on Federal property is that the tax-exempt status of the property in question does not normally operate to reduce to any appreciable extent State revenues or otherwise to render the State less able to make its normal contribution with respect to such children. Through sales, gasoline, income, and other forms of taxation, State governments are realizing or could realize substantially as much revenue from the parents of these children as they realize in the case of anyone else in the State. * * * Besides, the State, because of the size and variety of its sources of taxation and of its tax methods, can realize benefits in indirect revenues from the carrying on of Federal activities within its borders which will offset what appears to be an immediate loss in its inability to tax directly the activities in question.'

Id. at 13.

*874 Secondly, say the defendant State officials, the calculation of the district's share-- the equivalent of 60-cent tax-- in computing the supplementary aid, omits consideration of the value of the Federal occupied property and hence, in place of this omitted deduction, it is only fair to subtract the amount of the impact funds which are intended to substitute for the Federal-occupied land taxes. But this argument is based on misconception of the Federal aid as substituting for rather than supplementing local revenues. As will appear when we later scrutinize the act, this is a mistaken understanding of the Federal act.

Our conclusion is that the State formula wrenches from the impacted localities the very benefaction the act was intended to bestow. The State plan must fall as violative of the Supremacy clause of the Constitution. Our decision rests entirely on the terms, pattern and policy of the act.

The act makes these propositions clear: (1) the Federal funds are exclusively for supplementation of the local sources of revenues for school purposes; and (2) the act was not intended to lessen the efforts of the State. Those postulates are manifested in the statute by these provisions, especially: that the Federal contribution be paid directly to the local school agency on reports of the local agency, and that the contribution be

computed by reference to the expenditures 'made from revenues derived from local sources' in comparable school districts.

But the State formula at once sets these precepts at naught. It uses the impact funds to account in part for fulfillment of the State's pledge of supplementary aid to the community; and the State moneys thus saved are available for State retention or such use as Virginia determines. Without the inclusion of the Federal sums the State's annual payments towards supplementary aid would be increased, it is estimated, by more than \$10,000,000.

This commandeering of credit for the Federal moneys severely injures both the community and the pupil. First and foremost, it does not relieve the local taxpayers to the extent Congress contemplated. Next, without the exclusive application of the funds to the areas where the need arose and remains, the result may be to lower the standard of education provided in an impacted district. Instead of maintaining the previous standards for the additional pupils, the impact money when thinned by the State would obviously be inadequate to continue that level for the increased school attendance, a result certainly thwarting the aim of the Federal law.

The construction and the implications we put upon the act find confirmation in its legislative history. In Report No. 2287, supra, of the Committee on Education and Labor, dated June 20, 1950, 81st Congress, 2d Session, the legislation, which became P.L. 874 is explained in detail. The exposition underscores the Congressional mandate that the impact payments are for local use and are not to be applied to compensate the State in any respect. Thus, at p. 13, it is stated:

'The effect of the payments provided for in this section is to compensate the local educational agency for loss in its local revenues. There is no compensation for any loss in State revenues. * * *'

In response the defendants urge this intent was impliedly nullified by the amendment of the act in 1965. 79 Stat. 27. The argument is that the amendment consisted of the reenactment of P.L. 874 without change save to designate it as Title I, and to attach legislation, to be known as Title II, relating to another subject of Federal aid. In Title II the following proviso was included:

'No payments shall be made under this subchapter for any fiscal year to a State which has taken into consideration payments under this subchapter in determining the eligibility of any local educational agency in that State for State aid, or the amount of that aid * * *.' [20 U.S.C. § 241g\(c\)\(1\) \(Supp.1967\)](#) *875 No such clause was put in the reenactment of P.L. 874, and therefore, the defendants conclude that Congress did not intend to foreclose a State from taking into consideration Federal impact payments to a locality in determining State aid to a local school agency.

However, this argument is refuted, first, by reference to the apparent reason the proviso was included in Title II. There the Federal moneys are paid directly to the State, and consequently there was need for a direct admonition against its use by the State. Under Title I, as we have already noted, the moneys are paid to the locality and not to the State, and there was no apparent reason to include any restriction upon the State. Moreover, this omission from P.L. 874 originally, or as reenacted, would seem to imply that no touch, direct or indirect, of the money by the State was even remotely permissible.

Since its explanation in 1950 when P.L. 874 was passed that no compensation was

intended for the State, congress has reiterated this intention. In this repetition it definitely disapproves the accounting use Virginia's formula makes of the impact moneys. The House of Representatives Committee Report No. 1814, dated August 5, 1966, in proposing an amendment to P.L. 874 stated:

'Fifteen States offset the amount of Public Law 874 funds received by their school districts by reducing part of their State aid to those districts. This is in direct contravention to congressional intent. Impact aid funds are intended to compensate districts for loss of tax revenues due to Federal connection, not to substitute for State funds the districts would otherwise receive.

'The committee understands that it is administratively unfeasible, if not impossible, to determine adjusted allotments to those States already following this practice. However, to prevent its occurrence in the future, we propose an amendment which would reduce Public Law 874 eligibility in proportion to any State reduction in aggregate per pupil expenditures.'

The amendment, [20 U.S.C. § 240\(d\) \(Supp.1967\)](#), reads as follows:

'(d) The amount which a local educational agency in any State is otherwise entitled to receive under [section 237](#), [238](#), or [239](#) of this title for any fiscal year shall be reduced in the same proportion (if any) that the State has reduced for that year its aggregate expenditure (from non-federal sources) per pupil for current expenditure purposes for free public education (as determined pursuant to regulations of the Commissioner) below the level of such expenditures per pupil in the second preceding fiscal year. The Commissioner may waive or reduce this reduction whenever in his judgment exceptional circumstances exist which would make its application inequitable and would defeat the purpose of this subchapter.'

The committee report and the amendment are cited merely as evidence of Congressional intent. The amendment provides only an administrative remedy of the Government and does not deprive the plaintiffs of standing to prevent future State infringement of their Constitutional right to the benefits of the aid purposed by Congress. Necessarily, then, the upshot is that the defendants must be enjoined from hereafter in any way denying to the impacted area the exclusive use and enjoyment of the impact funds.

Apparently foreseeing the possibility of such restraint, the Appropriation Act of 1966 of Virginia, ch. 719, Item 459(c)(8) included the following provision:

'8. In the event the availability of Federal funds for local operating expenses is conditioned upon their exclusion from a State apportionment formula, the State Board of Education shall exclude both such Federal funds and the average daily attendance for the people involved from the application of this item.'

The validity of this provision is attacked by the plaintiffs as illegal and *876 violative of the equal protection clause of the Constitution. Enforcement of it would mean that children of members of the armed services, or other employees of the United States, living in an impacted area on or off Federal property would not be counted, and no contribution by the State would be made for them, in determining the amount to be expended by the State for schools in the area of their residence. This is a discrimination without justification, and we must strike it down as unconstitutional.

The Norfolk plaintiffs have also prayed for an order directing the defendants to restore to the Norfolk schools the amounts of State aid which in prior years have been withheld

by the State on account of the Federal impact funds. To accomplish this restitution would require an appropriation by the legislature of Virginia. A decree to that effect would be an order to the State to take affirmative political action, and would convert this into a suit against the Commonwealth of Virginia, prohibited by the Eleventh Amendment. E.g., [Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 \(1945\)](#); [Hagood v. Southern, 117 U.S. 52, 6 S.Ct. 608, 29 L.Ed. 805 \(1886\)](#).

The structure of the present court has been a question in this suit. Doubtlessly, if the only issue were the asserted conflict between the State appropriation statute and the Federal act, a three-judge court may not be required. See [Kesler v. Department of Public Safety, 369 U.S. 153, 85 S.Ct. 807, 7 L.Ed.2d 641 \(1962\)](#). However, in addition to the conflict of statutes, substantial Constitutional points were made which remove the case from the jurisdiction of single judge. [28 U.S.C. §§ 2281, 2284, Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 84-85, 80 S.Ct. 568, 4 L.Ed.2d 568 \(1960\)](#).

These issues arise in connection with the stipulation in the appropriation act which directed the omission of the children of Federal employees from the provision of the State for school help to the localities and arise, too, in the prayers for recovery of past deductions by the State from Norfolk's school aid. [Mann v. Davis, 213 F.Supp. 577, 579 \(E.D.Va.1962\)](#), aff'd [377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 \(1964\)](#) (3-Judge Court).

The motion to drop the Governor of Virginia as a defendant should be granted. He is not a necessary party and his presence is not needed in the effectuation of the relief the court now decrees.

An order implementing this opinion is filed herewith.

ORDER ON OPINION

Upon consideration of the pleadings, the stipulations of counsel, the exhibits and the entire record in this action, as well as the arguments thereon of counsel orally and on Brief, the court for the reasons stated in its opinion filed herewith finds, adjudges and orders as follows:

1. That the Governor of Virginia be, and he is hereby, dropped as a party defendant herein;
2. That the motions of the defendants to dismiss this action be, and they are hereby, denied;
3. That the objection of the plaintiffs and intervenors to the convening of a three-judge court for the hearing and decision of this action pursuant to the provisions of [28 U.S.C. §§ 2281, 2284](#) be, and it is hereby, overruled;
4. That the defendants and their successors in office be, and each of them is hereby, restrained and enjoined from hereafter in any manner enforcing or effectuating the 1966 Acts of the General Assembly of Virginia, and particularly chapter 719, Item 459, p. 1496, insofar as this legislation directs or requires a deduction to be made in the computation of State aid to local public schools of Virginia based on, or in consideration of, any part of the moneys payable to, or for the benefit of, such local schools by the United States of America under and by virtue of Public Law 874, 81 Cong., 2d Session, approved September 30, 1950, 64 Stat 1100, [20 U.S.C. § 236](#) et seq., as amended, (Supp. II 1965-1966), and the *877 defendants and their successors in office be, and each of them is hereby, restrained and enjoined from in any manner enforcing or

effectuating so much of the provisions of the said 1966 Acts of the General Assembly of Virginia as are contained in Item 459c.8., chapter 719, p. 1498;

5. That the prayer of the plaintiffs for refund and restoration by the defendants of the amounts of the Federal impact funds heretofore deducted in the computation of the amounts payable to or on behalf of the public schools of the City of Norfolk as State supplementary aid, be, and it is hereby, dismissed for lack of jurisdiction thereof in this court; and

6. That this action be, and it is hereby, continued and jurisdiction thereof retained, with leave to any party to apply on notice for such further orders as may be deemed necessary or proper.

OPINION ON MOTIONS

The defendant State school authorities move us to defer until July 1, 1968 the effectiveness of the injunction issued in this action on February 6, 1968, and to stay the injunction pending their appeal to the Supreme Court against it.

Principally, they point to the difficulty of redistributing the unexpended appropriations of funds for public education made by the General Assembly of Virginia at its 1966 session for the fiscal biennium extending from July 1, 1966 to June 30, 1968. To recompute and redistribute these sums to each county and city in the State upon readjustment of them following omission of credit of the Federal moneys payable to the impacted areas, we are told, would necessitate the withdrawal of appropriations allocated since 1966 for schools throughout the State and for other agencies of the State, all of which have been accepted and acted upon since July 1, 1966. For instance, the local schools and State agencies have budgeted and incurred obligations on the strength of the 1966 allocations.

Upon further deliberation we recognize the complexities in an immediate compliance with our decision. We note, too, that the defendants acted in good faith, though mistaken, in their deduction of the Federal impact funds in fixing the State's supplementary aid in the impacted areas. In equity the State authorities should not, through an error in the interpretation of the Federal law, be put in the confusing and disrupting, if not inextricable, position of reallocating State appropriations at this late date in the fiscal year. Postponement of compliance would accord with the Congressional report of 1966, quoted in the opinion heretofore filed in this case. The report noted the administrative difficulties of correcting present misallocations, but moved to prevent reoccurrence in the future.

Therefore, we will amend our injunctive order to postpone its effectiveness until July 1, 1968, but it shall be then and thereafter in force against any provisions in enactments for subsequent periods which would violate the conclusions expressed in our first opinion. As this amendment will in effect award the stay prayed in the second motion to allow an appeal, we have no occasion to pass upon that motion.

D.C.Va. 1968

Shepherd v. Godwin

280 F.Supp. 869

Appendix C

439 F.Supp. 1122

United States District Court, D. Rhode Island.
MIDDLETOWN SCHOOL COMMITTEE et al.

v.

BOARD OF REGENTS FOR EDUCATION OF the STATE OF RHODE ISLAND et al.
Civ. A. No. 77-0226.
Oct. 14, 1977.

School committee and five resident taxpayers sought injunctive and declaratory relief challenging, under the supremacy clause, the manner in which Rhode Island considered federal educational aid funds in computing state aid for local district. The District Court, Pettine, Chief Judge, held that Rhode Island formula for determining state aid, which did not simply assess school districts but induced increased local effort by rewarding that effort with increased aid, and which would not result in less aid being received by district than such district would receive if it were not eligible for federal aid, was not invalid under the supremacy clause.

Judgment for defendants.

West Headnotes

Congress intended federal educational aid funds for certain school districts burdened with responsibility of providing education to children who attend schools because of nearby federal activity to supplement, not to substitute for, state aid to local districts. Educational Agencies Financial Aid Act, §§ 1 et seq., 5(d)(1) as amended [20 U.S.C.A. §§ 236](#) et seq., [240\(d\)\(1\)](#).

Rhode Island scheme for distributing state aid to local school districts, which as an arithmetical device to determine "local effort" required deduction of federal aid received by district from its total expenditures, under which Rhode Island did not substitute federal aid to "impacted districts" for state aid that would be otherwise received, and under which Rhode Island sought not simply to assist school district but also to induce increased local effort by rewarding that effort with increased aid, did not violate supremacy clause. [Gen.Laws R.I.1956, § 16-7-20](#); Educational Agencies Financial Aid Act, § 5(d)(1) as amended [20 U.S.C.A. § 240\(d\)\(1\)](#).

Rhode Island, which had chosen to aid local districts by reimbursing them according to effort of each community, two years previously, and had chosen to define local effort as total expenditure less federal aid granted in same school year as expenditure figure, could not be prohibited from basing state aid to local districts on basis of expenditures two years old or on basis of figures even older if it so chose where deduction did not have effect of substituting federal for state funds. Educational Agencies Financial Aid Act, § 1 et seq. as amended [20 U.S.C.A. § 236](#) et seq.; [Gen.Laws R.I.1956, § 16-7-20](#). *1122 Joseph B. Going, Newport, R.I., for plaintiffs.

J. Peter Doherty, Sp. Asst. Atty. Gen., Providence, R.I., Howard R. Haronian, Warwick, R.I., for defendants.
 Lincoln C. Almond, U. S. Atty., Providence, R.I. and Robert J. Faux, U. S. Dept. of HEW, Washington, D.C., for amicus curiae.

OPINION

PETTINE, Chief Judge.

Pursuant to Public Law 81-874, [\[FN1\]](#) the federal government makes educational aid funds available to certain school districts (sometimes called "impacted districts") burdened with the responsibility of providing education to children who attend their schools because of nearby federal activity. *1123 The Middletown School Committee and five resident taxpayers (hereinafter "Middletown"), seeking injunctive and declaratory relief, challenge under the Supremacy Clause the manner in which Rhode Island considers these payments in computing the state aid which Middletown receives. Jurisdiction is properly grounded on [28 U.S.C. § 1331](#). Plaintiffs' standing to prosecute this action is not controverted. The Court heard this matter in a merged hearing on June 9-10, 1977, and has been ably assisted by counsel and by the United States, which appeared as amicus curiae at the Court's suggestion and request.

[FN1](#). Public Law 81-874 (1950), as amended, is codified at [20 U.S.C. § 236 et seq. \(1977\)](#).

Like most states, Rhode Island assists local school districts by providing them with state funds. Disregarding certain complexities in the Rhode Island aid plan which have no effect on the issues here, it is fair to say that Rhode Island reimburses each local district, without ceiling, for a percentage of all the school expenditures imposed by district taxpayers on themselves thereby excluding PL 81-874 aid completely from the calculation. [\[FN2\]](#) The percentage, or share ratio, reimbursed by the state differs for each local district, and is determined by a percentage equalization formula through which Rhode Island seeks to equalize the ability of poor and wealthy districts to provide quality education. [\[FN3\]](#) The legislature has set the share ratio of the average district (in terms of assessed valuation of property per pupil) at 35%. The share ratio for any particular district is determined by a formula which, in essential respects, is as follows: [\[FN4\]](#)

$$\begin{aligned} & () \\ & (\text{ assessed valuation per pupil in the local district }) \\ \text{Share} & (0.65 \times \text{-----}) \\ \text{ratio} & = 1 - \\ & (\text{ assessed valuation per pupil in the state }) \\ & () \end{aligned}$$

[FN2](#). See Rhode Island General Laws ([R.I.G.L.](#)) [§ 16-7-15](#) et seq., and n. 7 infra; see generally Tr. at 83-119.

[FN3](#). The concept of taxing power equalization is discussed at length in J. Coons, W. Clure and S. Sugarman, *Private Wealth and Public Education* (1970). See also [Comment, State Constitutional Restrictions on School Finance Reform, 90 Harv.L.Rev. 1528-31](#) and authorities cited therein. Rhode Island's formula has been found to do a better job of equalizing the ability of districts to provide quality education than the formulas of 47 other states. Tr. at 85. A different equalization formula, which did not provide for reimbursement of local expenditures without limitation, was struck down as in conflict with the purposes of Pub.L. 81-874 in [Hergrenreter v. Hayden, 295 F.Supp. 251 \(D.Kan.1968\)](#).

[FN4](#). The formula is in reality a good deal more complex than is

stated here, but the parties are agreed that the simplification as described in the text is sufficient to display the operation of Pub.L. 81-874 funds on the state aid plan.

The formula dictates that a town of average wealth will be reimbursed for 35% of its locally raised school expenditures. Poorer districts will have a share ratio greater than 35%, and will be reimbursed for a greater proportion of locally raised expenditures than average districts. Wealthier districts will have a smaller share ratio, and will be reimbursed for somewhat less than 35% of locally raised school expenditures. [\[FN5\]](#) Rhode Island's formula thus distributes aid in inverse proportion to the ability of a district to raise revenues. Given two districts which impose on themselves the same property tax rate, the poorer district will be reimbursed a greater percentage of its locally raised expenditures than the wealthier district. In addition, because state aid is determined by applying the share ratio to the locally raised school expenditures without a ceiling, the formula distributes aid in direct proportion to the effort of a district to maintain quality schools through increased taxation rates. Thus, given two *1124 communities with approximately equal wealth (i. e., equal assessed valuation per pupil) the community which chooses to tax itself more to improve its schools will earn greater state aid. [\[FN6\]](#) A local district can therefore always increase its state aid by increasing its own effort. For Middletown, which has a sizeable amount of tax-exempt federal property and a significant number of pupils who are children of adults working on federal property, the Rhode Island formula has the effect of relatively increasing the state aid received because there is less assessed valuation per pupil than there would be if the federal property was included in the district wealth per pupil calculation.

[FN5.](#) The legislature has provided that the minimum share ratio, or reimbursement level, for any community is 30%.

[FN6.](#) See Tr. at 107-119 and Def. Ex. 9.

Nevertheless, because the formula for determining state aid set forth in [R.I.G.L. § 16-7-20](#) requires the share ratio to be applied to the school expenditures of each local district, [\[FN7\]](#) it is apparent that Middletown's aid would be increased if Pub.L. 81-874 funds were included in the state's definition of expenditures. Middletown claims that section 5(d)(2) of Pub.L. 81-874, [20 U.S.C. § 240\(d\)\(1\) \(1977\)](#), [\[FN8\]](#) requires Rhode Island to include Pub.L. 81-874 funds in its calculation, and that [R.I.G.L. § 16-7-20](#) is invalid under the Supremacy Clause for its failure so to provide. The Court agrees with amicus United States that Rhode Island's aid scheme is fully consonant with the letter and spirit of Pub.L. 81-874, as amended, and that the Rhode Island aid scheme is therefore not invalid under the Supremacy Clause.

[FN7. R.I.G.L. 16-7-20](#) provides in relevant part:

For each community the state's share shall be that percentage of one hundred per cent (100%) resulting from subtracting the yield of the standard local tax rate applied to adjusted equalized weighted assessed valuation divided by the reference year cost of the basic program; provided, however, that in no case shall the state's share be less than thirty per cent (30%) for the fiscal year 1964-1965 and year thereafter. This percentage shall be applied to one hundred and five per cent (105%) of (A) the cost of the basic program and (B) all expenditures approved by the state board of education in excess of the basic program; provided, however, that expenditures from federal moneys in lieu of taxes shall not be counted . . .

[FN8. 20 U.S.C. § 240\(d\)\(1\) \(1977\)](#) provides:

Except as provided in paragraph (2), no payments may be made under this subchapter for any fiscal year to any local educational agency in any State (A) if that State has taken into consideration payments under this

subchapter in determining--

(i) the eligibility of any local educational agency in that State for State aid for free public education of children; or

(ii) the amount of such aid with respect to any such agency; during that fiscal year or the preceding fiscal year, or (B) if such State makes such aid available to

local educational agencies in such a manner as to result in less State aid to any local educational agency which is eligible for payments under this subchapter than such agency would receive if such agency were not so eligible.

This section was first enacted in 1968, and was codified at [20 U.S.C. § 240\(d\) \(2\)](#) until this year. See Pub.L. 90-576, § 305(a), 82 Stat. 1097.

By amendments to Pub.L. 81-874 enacted in 1974 and 1976, Congress has established a new administrative mechanism to determine whether state aid equalization formulas which the Commissioner of the Office of Education determines violate the prohibitions of [20 U.S.C. § 240\(d\)\(1\) \(1977\)](#) should nevertheless be permitted without penalty. See [20 U.S.C. § 240\(d\)\(2\) \(1977\)](#). This lawsuit, however, concerns a period for which this administrative procedure cannot be utilized. See [20 U.S.C. § 240\(d\)\(2\)\(C\)](#) (forbidding administrative enforcement for any period prior to July 1, 1977). It is of some importance, nevertheless, that the Office of Education, which will be responsible for handling any disputes over Rhode

Island's formula in future years, has taken the position that Rhode Island's formula does not contravene the prohibitions of [20 U.S.C. § 240\(d\)\(1\) \(1977\)](#), and therefore that there is no need to inquire whether Rhode Island's equalization formula would be entitled to an exception under [§ 240\(d\)\(2\)](#). See Brief of the United States as Amicus Curiae at 21.

The parties are in agreement that Congress intended Pub.L. 81-874 funds to supplement, not to substitute for, state aid to local districts. See, e. g., [Shepherd v. Godwin, 280 F.Supp. 869, 875 \(E.D.Va.1968\)](#) (three-judge court); [Douglas Independent School District No. 3 v. Jorgenson, 293 F.Supp. 849, 852 \(D.S.D.1968\)](#); [Hergenreter v. Hayden, 295 F.Supp. 251 \(D.Kan.1968\)](#); *1125 [Carlsbad Union School District of San Diego County v. Rafferty, 300 F.Supp. 434 \(S.D.Cal.1969\)](#), aff'd [429 F.2d 337 \(9th Cir. 1970\)](#). Until 1968, the remedy for districts in states which had contravened the purposes of Pub.L. 81-874 by reducing aid to local districts in response to the receipt of federal funds was an injunction to stop the states from doing so. See, e. g., [Shepherd v. Godwin, 280 F.Supp. at 869](#); [Carlsbad Union School District v. Rafferty, 429 F.2d at 339. In 1968](#), to implement the Shepherd decision, which was the first case to decide that a state aid formula reducing state aid to an impacted district was invalid under the Supremacy Clause, Congress amended Pub.L. 81-874 to delineate more clearly the circumstances in which a state aid formula would run afoul of the purposes of Pub.L. 81- 874, [\[FN9\]](#) and to provide a more effective enforcement remedy. The amendment forbids federal impacted aid payments to any local district in any state which has:

[FN9](#). See Pub.L. 90-576, Title III, § 305 (October 16, 1968), 82 Stat. 1064 at 1097.

taken into consideration payments under this subchapter in determining the eligibility of any local educational agency in that State for State aid . . . , or the amount of such aid, . . . or if such State makes such aid available to local educational agencies in such a manner as to result in less State aid to any local educational agency which is eligible for payments under this subchapter than such (local educational) agency would receive if (it) were not so eligible.

[20 U.S.C. § 240\(d\)\(1\) \(1977\)](#).

Plaintiffs' central argument asserts that Rhode Island violates the general purposes of Pub.L. 81-874, and [20 U.S.C. § 240\(d\)\(1\)](#) in particular, as follows:

14. State aid provided to a Rhode Island municipality which does not receive P.L. 874 aid is effectively calculated on the basis of its total actual expenditures, which are multiplied by its state share ratio. Tr. 137.

15. In the case of Middletown or any other Rhode Island community which receives P.L. 874 funds, state aid is calculated on the basis of its total actual expenditures, reduced, however, pursuant to [G.L.1956, Section 16-7-20](#), by the amount of its actual expenditures from its P.L. 874 receipts. Tr. 26, 138-139.

16. Middletown would have received and would have been entitled to receive the sum of \$503,101.00 more in state aid for the 1976-1977 fiscal year if its actual expenditures had not been reduced by the amount of its expenditures from P.L. 874 funds.

Pl. Brief at 5-6.

However, this argument is without foundation in analysis, and is supported only by the wording, "however, that expenditures from federal moneys in lieu of taxes shall not be counted." [R.I.G.L. § 16-7-20](#). It may be that this is not a pellucid definition of "local effort." In terms of practical effect, it is apparent from the Rhode Island formula that Rhode Island does not substitute federal aid to impacted districts for state aid which would be otherwise received. Rhode Island does not compute its aid, and subsequently subtract from that aid Pub.L. 81-874 funds (or a portion of those funds). [\[FN10\]](#) Compare *1126 [Shepherd v. Godwin, 280 F.Supp. at 869](#). And because Rhode Island places no ceiling on the locally raised expenditures which it will reimburse, there is no possibility that Pub.L. 81-874 funds have a substitutional effect by removing the incentive from local districts to increase their effort. Compare *Hergenreter v. Hayden*, supra. In short, the Rhode Island formula retains the supplementary character of Pub.L. 81-874 funds precisely as Congress intended, and comports with the letter and spirit of Congressional intent. *Shepherd* and its progeny are inapposite because Rhode Island seeks not simply to assist school districts, as did the states in those cases, but also to induce increased local effort by rewarding that effort with increased aid. Given that purpose, certainly not contrary to anything in Pub.L. 81-874, Rhode Island must have a definition of local effort; and it would be odd, to say the least, to define local effort as including federal aid.

[FN10](#). The amicus in its brief at page 17, gives the following example:

For example, if the cost of the basic program for a Rhode Island LEA not receiving P.L. 81-874 payments were \$100,000 and its reimbursement ratio were

50%, then it would receive \$50,000 from State aid. If, however, the LEA had received and applied \$20,000 of P.L. 81-874 payments to that basic program cost, then it would receive only \$40,000 of State aid. Since

the State would have excluded \$20,000 from the reimbursement amount, it would only provide 50% of the \$80,000 remaining. In effect, the State has substituted \$10,000 of the P.L. 81-874 payments for \$10,000 of State aid and reduced the State effort. This is similar to the type of situation that the court in *Shepherd* faced. On the other hand, if the LEA were to have expended \$120,000, including the P.L. 81-874 payment, there would be no substitution for State funds that would otherwise have gone to the LEA. The State, though excluding \$20,000, would still pay its full share (50%) of the basic program cost and, thus, not effectuate a substitution. If the LEA expends more than its basic program cost, its own voluntary effort determines the amount of State aid that it will receive. At that point, the amount of P.L. 81-874 payments has no bearing on the amount of State aid allocated to the LEA.

In the instant case, it appears that Middletown is expending above its basic program cost from State and local sources, exclusive of P.L. 81-874 receipts. The 'mandated minimum program level' was \$500 per pupil in ADM (average daily membership) for the school year in issue--1976-1977. Plaintiffs' Exhibit # 10, Defendants' Exhibit B. There were approximately 3660 pupils in ADM in Middletown schools for the school year 1976-1977. Comparative Analysis of Critical Data for 1977-78, Plaintiffs' Exhibit # 2. Thus, the basic program cost was approximately \$1,830,000 plus

transportation costs. No specific testimony seems to have been offered as to what the transportation costs were for Middletown for the year in issue. However, the Department of Health, Education and Welfare believes on the basis of information kept by the Middletown School Committee, that they would approximate \$160,000 for 1976-1977. This would result in a "basic program" cost of approximately \$1,990,000. It appears that the general education expenditures from local or State sources for Middletown for school year 1976-1977 are approximately \$3,686,954 (total estimated expenditures less Federal payments less State categorical aid). Comparative Analysis of Critical Data for 1977-78, Plaintiffs' Exhibit # 2.

Since the expenditures from State and local funds would seem to clearly exceed the basic program cost, the P.L. 81-874 payments would not be required to be applied to meeting that mandatory minimum expenditure. Thus, Middletown received the full amount of State aid it otherwise would have received, i. e., if there had been no P.L. 81-874 payments. The fact that Middletown may have chosen to spend in excess of the mandated basic program expenditure was a matter of local choice, and, in fact, generated more State aid. Therefore, it appears that for school year 1976-1977, the State of Rhode Island did not take P.L. 81-874 payments into account in allocating State aid to Middletown in a

manner which contravenes the purpose of P.L. 81-874 or the prohibition of section 5(d)(1)

thereof. Whether the State might violate section 5(d)(1) in some other year is a question that would have to be decided on the facts pertinent to that year.

This conclusion is in accord with the position taken by USOE in ruling on the operation of the Rhode Island State aid statute in 1969. Defendants introduced at trial correspondence between USOE and the Rhode Island Department of Education relative to that determination. Defendants' Exhibit A.

In terms of the language Congress chose in [20 U.S.C. § 240\(d\)\(1\)](#) to define those circumstances in which the purpose behind aid to impacted districts would be violated by state aid formulas, the Rhode Island formula clearly passes muster. The Rhode Island formula does not "take into consideration payments under this subchapter (Pub.L. 81-874) in determining the eligibility of any local educational agency in (Rhode Island) . . . or the amount of that aid." The formula applies the share ratio (derived without consideration of Pub.L. 81-874 funds) directly to the local effort figure (which by definition and logic cannot include impacted aid funds, and only "considers" those funds as an arithmetical device to calculate local effort, a "consideration" which is not what [§ 240\(d\)\(1\)](#) proscribes.) [\[FN11\]](#)

[FN11.](#) Rhode Island could have defined local effort directly in the statute as school expenditure raised by the local property tax. A statute so worded clearly does not entail any "consideration" of Pub.L. 81-874 funds; and it would be bizarre to find such a statute permissible but to strike down the present statute, which is identical in practical effect.

*1127 Nor does the Rhode Island formula "result in less State aid to any local educational agency which is eligible for payments under this subchapter than such local educational agency would receive if it were not so eligible." [20 U.S.C. § 240\(d\)\(1\)](#). If federal impacted aid funds were withdrawn tomorrow, Rhode Island's formula would not result in any increased aid for Middletown, an observation which by itself conclusively demonstrates that Rhode Island has not substituted federal funds for state aid. This result should be contrasted with the facts in *Shepherd* and its progeny, where withdrawal of federal aid would have directly resulted in increased state aid. [\[FN12\]](#)

[FN12.](#) It can be argued that if federal aid were withdrawn, Middletown taxpayers would decide to increase their taxes to maintain equivalent total expenditure, thus generating an increase in state aid. However, as the United States observes, this would be a speculative increase in state aid, as opposed to the clear indication in *Shepherd*, for example, of what

would have happened if impacted aid payments were withdrawn. The inquiry mandated by [§ 240\(d\)\(1\)](#) into whether Rhode Island makes aid available to Middletown in a way as to result in less state aid than Middletown would receive if it were ineligible for impacted aid, was clearly intended to be a relatively simple inquiry; forecasting precisely what might have happened at the yearly town financial meeting under various hypothetical circumstances would be impossible, and a strange basis on which to strike down a state statute.

Middletown relies heavily on an August, 1965 study prepared by the Office of Education, United States Department of Health, Education, and Welfare for the Senate Committee on Labor and Public Welfare, Subcommittee on Education, entitled "Impacted Areas Legislation Report and Recommendations." The study cited Rhode Island in a footnote as one of fifteen states which improperly reduced state aid to local districts by taking Pub.L. 81-874 funds into consideration in their aid formulas. The conclusions of this study were repeated without further analysis in the Report of the House Committee on Education and Labor in 1966, which commented:

" 'Fifteen States offset the amount of Public Law 874 funds received by their school districts by reducing part of their State Aid to those districts. This is in direct contravention to congressional intent. Impact aid funds are intended to compensate districts for loss of tax revenues due to Federal connection, not to substitute for State funds the districts would otherwise receive.' "

1966 U.S.Code Cong. and Admin.News at 3878.

However, the Court agrees with the amicus United States that the Office of Education report is an inadequate base on which to predicate a Congressional finding as to the Rhode Island formula. There is no indication that Congress specifically focussed on the Rhode Island formula as offensive to the purposes of Pub.L. 81-874. Furthermore, the House committee cited the report at a time when the relationship between equalization formulas and Pub.L. 81-874 was not well understood. When the section at issue here, [20 U.S.C. § 240\(d\)\(1\) \(1977\)](#), was enacted in 1968 to help clarify Congressional intentions, no reference to the "fifteen states" was made. The legislative history presented here is simply not clear enough to support the conclusion urged by plaintiffs. [Philbrook v. Glodgett, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 \(1975\)](#).

Plaintiffs offer a second argument to show that the Rhode Island aid formula violates the intent of Pub.L. 81-874 or [20 U.S.C. § 240\(d\)\(1\)](#). Middletown points out that while Pub.L. 81-874 payments are compiled and distributed on the basis of current enrollment figures (payments in any year being dependent on federally-connected children in the district during that year), state aid in Rhode Island is computed on the basis of data from two years prior to the year in which state aid is granted. Because Middletown's Pub.L. 81-874 funds have been declining, Rhode Island's deduction of 1974-1975 Pub.L. 81-874 funds from 1974-1975 total expenditures in computing 1976-1977 state aid seems to result in less state aid than would result from deducting current (smaller) 1976-1977 Pub.L. 81-874 funds from 1974-1975 expenditures.

[\[3\]](#) Again, this argument misreads the thrust of the Rhode Island law. Impacted *1128 aid funds are deducted from total expenditures solely as an arithmetical device to

determine "local effort". Since the deduction does not have the effect of substituting federal funds for state funds which Middletown would otherwise receive, [\[FN13\]](#) Rhode Island cannot be prohibited from basing state aid to local districts on the basis of expenditures two years old, or on the basis of figures even older if it so chooses. See [San Antonio School District v. Rodriguez, 411 U.S. 1, 41, 93 S.Ct. 1278, 36 L.Ed.2d 16 \(1973\)](#); [Los Alamos School Board v. Wugalter, 557 F.2d 709 \(10th Cir. 1977\)](#). [\[FN14\]](#) Since Rhode Island has chosen to aid local districts by reimbursing them according to the effort of each community, two years previously, and has chosen to define local effort as total expenditure less federal aid (a computation yielding local property taxation for education), it is apparent that the federal aid figure deducted from total expenditure must pertain to the same school year as the expenditure figure.

[FN13.](#) No contention is made, nor would the record permit a finding, that Rhode Island's decision to use two-year old figures for computing current state aid to communities throughout the state is based in any way on considerations arising from Pub.L. 81-874.

[FN14.](#) As early as 1953, Congress emphasized that Pub.L. 81-874 was not intended to change or influence the American tradition "of local control of education patterned to local desires and resources." H.R.Rep.No.703, 83rd Cong., 1st Sess., 5-6 (1953).

The Court has carefully examined the cases cited by the defendants. While the Court agrees with the reasoning and holding of those decisions, the facts of the instant case compel a different result. The United States, which has an interest in ensuring that Pub.L. 81-874 funds supplement and do not substitute for state aid, agrees that the Rhode Island law here challenged is not invalid under the Supremacy Clause. In accordance with the findings of fact and conclusions of law recited herein, the defendants shall present an order for the entry of judgment against the plaintiffs within ten days.

D.C.R.I. 1977.

Middletown School Committee v. Board of Regents For Ed. of State of R. I.,
439 F.Supp. 1122

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Appendix D

Chronological List of Cases by State and Issue

1. Long & Long v. Brown et al., 4 Ala. 622, (1843). Alabama, sixteenth section of land. Injunctive relief denied.
2. King County, Washington v. Seattle School District No. 1, 263 U.S. 361, 44 S. Ct. 127, (1923). Washington, Forest Reserve funds. Circuit court of appeals decision reversed.
3. San Benito Independent School District v. Farmer's State Bank, 78 S.W.2d 741, (Tex.Civ.App., 1935). Texas, Public funds. District Court judgment affirmed.
4. Madley v. Conroe Independent School District, 130 S.W.2d 929, (Tex.Civ.App., 1939). Texas, maintenance fund. District court judgment affirmed.
5. State ex rel. Arrington v. Board of Supervisors of Perry County, 221 Miss. 548, 73 So.2d 169, (S.C. Miss., 1954). Mississippi, Federal forest funds. Chancery court judgment affirmed.
6. Isley v. School District No. 2 of Maricopa County, 81 Ariz. 280, (Ariz., 1956). Accounting and administrative responsibility with respect to school district funds. County superior court judgment affirmed.
7. Trinity Independent School District v. Walker County, 287 S.W.2d 717, (Tex. Civ. App., 1956). Texas, Federal Forest Reserve funds. District court judgment reversed and remanded.
8. Utah State Board For Vocational Education v. United States, 287 F.2d 713, (10th Cir., 1961). Utah, Federal Emergency Defense Program Act. U.S. District Court judgment affirmed.
9. Board of Education v. Town of Ellington, 151 Conn. 1, (Conn., 1963). Connecticut, Misappropriation of funds into separate school fund account controlled by town management system. Judgment affirmed by Conn. Supreme Court of Errors.
10. Shephard v. Godwin, 280 F.Supp. 869, (E.D. Va, 1968). Virginia, Federal Impact Aid (P.L. 81 - 874). Injunctive relief granted.
11. Hergenreter v. Hayden, 295 F.Supp. 251, (D.C. Kan., 1968). Kansas, Federal Impact Aid (P.L. 81- 874). Injunctive relief granted.
12. Douglas Independent School District No. 3 v. Jorgenson, 293 F.Supp. 849, (S.D., 1969). South Dakota, Federal Impact Aid (P.L. 81- 874). Injunctive relief granted.
13. Triplett v. Tiemann, 302 F. Supp. 1244, (D.C. Neb., 1969). Nebraska, Federal Impact Aid (P.L. 81 - 874). Injunctive relief granted.
14. Carlsbad Union School District of San Diego County v. Rafferty, 429 F.2d 337, (9th Cir., 1970). California, Federal Impact Aid (P.L. 81- 874). U.S. District Court judgment affirmed.
15. School Board of Okaloosa County v. Richardson, 332 F.Supp. 1263, (D.C. Fla., 1971). Florida, Federal Impact Aid (P.L. 81- 874). Summary judgment granted for defendant.
16. Carroll v. Bruno, 81 Wash. 2d 82, 499 P.2d 876, (Wash.,1972). Washington, Federal Forest funds. Superior court decision affirmed.

17. *Natonabah v. Board of Education of Gallup-McKinley City School District*, 355 F.Supp. 716, (D.C.N.M., 1973). New Mexico, Title I and Johnson – O'Malley funds. Injunctive relief granted.
18. *Nicholson v. Pittenger*, 364 F.Supp. 669, (D.C. Pa., 1973). Pennsylvania, Title I of Elementary and Secondary Education Act. Injunctive relief granted.
19. *School Board of Broward County, Florida v. Department of Health, Education and Welfare, U. S. Office of Education*, 525 F.2d 900, (5th Cir. Fla., 1976). Florida, The Emergency School Assistance Program, P.L 91-380. District court judgment reversed.
20. *Alexander v. Califano*, 432 F.Supp. 1182, (N.D. Cal., 1977). California, Title I of Elementary and Secondary Education Act. Declaratory judgment granted.
21. *Los Alamos School Board v. Wugalter*, 557 F.2d 709, (10th Cir., 1977). New Mexico, Atomic Energy Commission funds (AECA) U.S.C. ss 2391-94. U.S. District Court for New Mexico judgment reversed.
22. *Middletown School Committee v. Board of Regents For Education of State of Rhode Island*, 439 F.Supp. 1122, (D.C.R.I., 1978). Rhode Island, Federal Impact Aid funds. Judgment for defendants.
23. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, Pennsylvania (1981). Developmentally Disabled Assistance and Bill of Rights Acts 42 U.S.C. §§ 6010, (1) (2). Supreme Court reversed and remanded U.S. Appeals Court decision.
24. *San Miguel Joint Union School District v. Ross*, 118 Cal.App.3d 82, (Cal.App.3rd Dist., 1981). California, Federal Impact Aid (P.L. 81-874). Affirmed superior court's judgment that statute violated provision of P.L. 81-874.
25. *State of New Jersey, Department of Education. v. Hufstedler*, 662 F.2d 208, (3rd Cir., 1981). New Jersey, Pennsylvania, Title I of Elementary and Secondary Education Act. Petition granted for review.
26. *Eminence R-1 School District v. J.D. Hodge*, 635 S.W.2d 10, (Mo., 1982). Missouri, Forest Reserve Funds. Affirmed circuit court's judgment for defendant.
27. *Bell v. New Jersey and Pennsylvania*, 461 U.S. 773, 103 S.Ct. 2187, (1983). New Jersey and Pennsylvania, Title I of Elementary and Secondary Education Act. Reversed and remanded the U.S. Court of Appeals decision.
28. *State of New Jersey, Department of Education. v. Hufstedler*, 724 F.2d 34, (3rd Cir., 1983). New Jersey, Pennsylvania, Title I of Elementary and Secondary Education Act. Substantive standards apply, remanded. Supreme Court granted certiorari.
29. *Pierce County v. United States by and through Department of Labor*, 699 F.2d 1001, (9th Cir., 1983). Washington, Title VI of the Comprehensive Employment and Training Act 29 U.S.C. § 801. Reversed in part and remanded.
30. *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, (6th Cir., 1984). Michigan, Federal Impact Aid (P.L. 81 - 874). Judgment for state defendants.
31. *State of Indiana Department of Public Instruction v. Bell*, 728 F.2d 938, (7th Cir., 1984). Indiana, Title I of Elementary and Secondary Education Act. Affirmed EAB decision for repayment.
32. *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, (1985). New Jersey, Title I of Elementary and Secondary Education Act. Reversed and remanded court of appeals decision. Judgment for plaintiff, affirmed repayment.

33. *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 105 S.Ct. 1544, (1985). Kentucky, Title I of Elementary and Secondary Education Act. U.S. Court of Appeals decision reversed and remanded. Affirmed repayment of funds.
34. *Department of Education, State of Hawaii v. Bell*, 770 F.2d 1409 (9th Cir., 1985). Hawaii, Title I of Elementary and Secondary Education Act. Upheld EAB decision for repayment.
35. *Lawrence County v. Lead-Deadwood School District No.40-1*. 469 U.S. 256, 105 S.Ct. 695, (1985). South Dakota, Payment in lieu of taxes Act (National Forest funds), judgment for plaintiff, violation of Supremacy Clause.
36. *Riles v. Bennett*, 831 F.2d 875, (9th Cir., 1987). California, Title I of Elementary and Secondary Education Act. Upheld Secretary of Education's ruling of repayment plus interest.
37. *Tangipahoa Parish School Board. v. U.S. Department of Education*, 821 F.2d 1022, (5th Cir., 1987). Louisiana, Title VII of the Elementary and Secondary Education Act (Bilingual Education Act). Granted plaintiff's petition for review.
38. *State of California, Department of Education v. Bennett*, 833 F.2d 827, (9th Cir., 1987). California, Title I of Elementary and Secondary Education Act. Denied plaintiff's petition.
39. *Spokane School District No. 81 v. U.S Department of Education*, 905 F.2d 274, (9th Cir., 1990). Washington, Education of the Handicapped Act non-supplant provision. Proper application of § 1414 (a)(2)B. Affirmed in part and remanded in part EAB decision.
40. *State of New York v. United States Department of Education*, 903 F.2d 930 (2nd Cir., 1990). New York, Chapter I of the Education Consolidation and Improvement Act. Denied petition for review.
41. *Pulido v. Cavazos*, 934 F.2d 912, (8th Cir., 1991). Missouri, Chapter I of the Education Consolidation and Improvement Act. Circuit court ruling overturned. No constitutional violation.
42. *Walker v. San Francisco Unified School District*, 761 F.Supp. 1463 (Cal., 1991). California, Chapter I of the Education Consolidation and Improvement Act. No constitutional violation.
43. *Barnes v. Cavazos*, 966 F.2d 1056, (6th Cir., 1992). Kentucky, Chapter I of the Education Consolidation and Improvement Act. Circuit court ruling overturned. No constitutional violation.
44. *California Teachers Association v. Hayes (California Children's Lobby)*, 7 Cal Rptr. 2d 699, (Cal. App. Dist 3, 1992). California, Child Care and Development Services Act, Ed. Code § 8200. Reversed superior court decision.
45. *Chinle Unified School District No. 24 of Apache County v. Bishop*, 980 F.2d 736, (9th Cir., 1992). Arizona, Federal Impact Aid (P.L. 81 - 874). Injunctive relief denied. Declaratory relief granted.
46. *State of Wyoming v. Alexander*, 971 F.2d 531, (10th Cir., 1992). Wyoming, Vocational Education Act (VEA). Affirmed refund determination. Remanded to EAB for clarification.
47. *Board of Education of Township High School District No. 205 v. Leininger*, 822 F.Supp. 516, (N.D. Ill., 1993). Illinois, Individuals With Disabilities Education Act

- (IDEA), Vocational Education Act, National School Lunch Act, and Child Nutrition Act. Denied injunctive and declaratory relief.
48. Indian Oasis-Baboquivari Unified School Dist. No. 40 of Pima County, Arizona v. Kirk, 91 F.3d 1240, (9th Cir., 1996). Arizona, Federal Impact Aid. Affirmed district court judgment.
 49. Noyola v. Board of Education of the City of Chicago, 179 Ill.2d 121, (Ill., 1997). Illinois, Chapter I of the Education Consolidation and Improvement Act. Court ruled sovereign immunity did not bar action against state board.
 50. Mitchell v. Helms, 530 U.S. 793, 120 S.Ct., (2000). Louisiana, Chapter II of the Education Consolidation and Improvement Act of 1981. No evidence of diversion of funds.
 51. Okanogan School Dist. # 105 v. Superintendent of Public Instruction for State of Washington, 291 F.3d 1161 (9th Cir., 2002). Washington, National Forest Management Act funds, 16 U.S.C. § 500. Affirmed district court's decision.
 52. Hoke County Board of Education v. State of North Carolina, 599 S.E.2d 365, (N.C., 2003). North Carolina, Title I funds, 20 U.S.C. § 6321 (b)(1). Deferred judgment to Secretary of Education.

27 different states involved

8 cases involving Forest funds	1 case involving Emergency Defenses Act funds
11 cases involving Impact Aid	1 case involving Johnson-O'Malley funds
19 cases involving ESEA Title or Chapter I	1 case involving Emergency School Assistance funds
2 cases involving Vocational funds	1 case involving Chapter II funds
2 cases involving Special Education funds	1 case involving Atomic Energy funds
1 case involving School Lunch Act funds	1 case involving Child Care Act funds
1 case involving Bi-lingual Education Act funds	5 cases involving miscellaneous funding issues
1 case involving Developmentally Disabled Act funds	

VITA

Mark Allen Burnette was born in Carroll County on July 21, 1962. He attended public elementary and secondary school in Hillsville, Virginia and graduated from Carroll County High School in 1980. After a brief stint of military service, he attended Wytheville Community College from 1981-1984 receiving an Associate in Applied Science Degree in Civil Engineering Technology and Drafting Certification. In 1984 he began his professional career by working in industry as a draftsman. In 1988 he accepted a position as drafting instructor at Carroll County High School. While at Carroll County High School he served as an assistant football, wrestling, and track coach as well as department chairperson and VICA sponsor. In 1992 he received a Regents Bachelor of Arts degree from Bluefield State College and in 1994 received a Masters of Science degree in Educational Leadership from Radford University. In 1995 he moved to Galax Elementary School as an assistant principal and remained there until 1999 when he accepted a position in Grayson County as principal at Fries Middle School and later principal at Independence Elementary School. Mark returned to Carroll County in 2001 as principal at Woodlawn School and remained there until 2003 when he was appointed to his current position in the county as Supervisor of Career and Technical Education and Assessment. Mr. Burnette is married to the former Dana Hurst, an English teacher in Carroll County, and is the proud father of two sons. Brock, age 6, and Trenton, age 3.