Opinion No. 70-20

February 14, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Honorable Paris C. Derizotis State Representative Legislative-Executive Bldg. Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The current session of the legislature is considering two bills, both of which amend Section 77-6-29 of the Public School Code. Section 8 A of House Appropriations and Finance Committee Substitute for House Bill 147 proposes to amend Section 77-6-29 of the Public School Code to provide in relevant part as follows:

A. The chief shall distribute supplemental funds to school districts in the amount by which a percentage set by law of the total basic program cost determined by Section 77-6-18 through 77-6-18.5 N.M.S.A., 1953 exceeds the sum of the basic program distributions plus all local, county and noncategorical federal revenue."

More simply stated, the legislature proposes to reduce the state distribution of supplemental funds to school districts by adding local, county and non-categorical federal revenue to the basic program distribution. The larger the amount of local, county and non-categorical federal funds received by a school district, the smaller the supplemental fund distribution to the school district will be. By reducing the supplemental fund distribution by the amount of local, county and non-categorical federal funds received by a school district, the legislature will achieve greater uniformity. At the same time by using federal non-categorical money, the legislature will be able to attain a higher level of achievement with a smaller amount of state money than would be possible without including federal non-categorical funds in the formula.

The Legislative School Study Committee has evidently taken the position that funds received by a school district pursuant to Public Law 874 are non-categorical funds. For purposes of House Bill 147, categorical and non-categorical funds are defined as follows:

"Categorical -- means a fund or source of money, which is to be used for a specific purpose outside of the state basic program. These funds should not and may not be considered in our state's basic educational program.

Non-Categorical -- means a fund or source of money which is normally and presently used in the operation of the state basic program. These funds are now used in the state's basic educational program, and they should be considered as general support."

QUESTIONS

May funds received pursuant to Public 874 be considered as "non-categorical" funds as that term is used in House Bill 147, supra?

CONCLUSION

No.

OPINION

*{*32}* **ANALYSIS**

To decide what may be considered as "non-categorical funds" we must look to Public Law 874. In 1968, Congress amended Public Law 874 to provide that:

"No payments may be made during any fiscal year to any local educational agency in any State which has taken into consideration payments under this title in determining . . . the amount of [State] aid, with respect to free public education during that year or the preceding year . . . 82 Stat. 1097, 20 U.S.C. **§** 240 (d) (2)."

By a plain reading of this law, it appears to be quite clear that Public Law 874 funds are funds which are "to be used for a specific program or purpose outside of the state basic program." Thus we must conclude that Public Law 874 funds must be classified as categorical funds as that term has been defined above. The courts appear to be in complete agreement as will be seen below.

In **Shepheard v. Godwin,** 280 F. Supp. 869 (D.C.E.D. Va., 1968), the federal district court for the Eastern District of Virginia was faced with a Virginia statute which provided a formula for state assistance to local school districts deducting from the share otherwise allowable to the impacted school district a sum equal to a substantial percentage of any federal impact funds received in the district. Suit was brought by residents, real estate owners and taxpayers, contending that this statute violated the purpose and intent of Public Law 874. In holding the Virginia formula unconstitutionally, the court said:

"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 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." (Emphasis added.)

The Court enjoined the state school authorities from enforcing the provisions of Virginia's statute.

Next we find in **Douglas Independent School District No. 3 v. Jorgenson,** 293 F. Supp. 849 (D.C.S.D., 1968), a group of parents of school children challenged a South Dakota law making deductions in amount of state aid to impacted areas receiving federal aid pursuant to Public Law 874. South Dakota argued that the **Shepheard v. Godwin,** decision, supra, discussed above, was not controlling because Virginia was returning the moneys saved to its general fund while the funds saved in South Dakota were being disbursed to all school districts within the state. The District Court for the District of South Dakota held:

"it is the finding of this Court that what the State of South Dakota does with funds unconstitutionally withheld from impacted areas is immaterial and the fact that the money is withheld is sufficient to substantiate the plaintiffs' claim that their rights have been violated."

This court again emphasized that the federal impact funds received by a state pursuant to Public Law 874 are to be *{*33}* given to local school districts directly and are not meant to be in lieu of state aid. The defendants were enjoined and restrained from enforcing or implementing South Dakota legislation in question.

A third decision directly in point is the case tried in the District Court for the Southern District of California, **Carlsbad Union School District of San Diego County v. Rafferty,** 300 F. Supp. 434 (D.C.S.D. Cal., 1969). California law provided for the deduction of certain percentages of federal impact funds from the amount of state aid which would otherwise have been allocated by the state to impacted school districts. Suit was brought by the impacted school districts as well as by resident taxpayers of the districts affected. Again a permanent injunction was granted.

From the foregoing decisions and the clear language of Public Law 874, we must conclude that if Section 8 A of House Appropriations and Finance Committee Substitute for House Bill 147 were to be enacted into law, it would violate the supremacy clause of the federal constitution. This is assuming that Public Law 874 funds are to be defined as non-categorical under Section 8 A of House Bill 147.

Some members of the legislature are apparently aware of this problem. House Bill 135 would provide for an appropriation of $ 20,000 for use during the fifty-ninth fiscal year to pay necessary expenses of legal assistance required in connection with representing the state as a plaintiff in an action to determine the validity of restrictions on federal financial assistance to local school districts on which activities of the United States have placed a financial burden. We would suggest that House Bill 135 be amended to provide for a similar appropriation to defend the State in such an action as we have been personally informed that suit will be brought against the state if House Bill 147 passes in its present form. We wish to emphasize that House Bill 147 in itself is not unconstitutional, it is only the interpretation placed on the phrase non-categorical federal funds as used in House Bill 147 that results in an unconstitutional interpretation of House Bill 147.

In conclusion, a suit against the state would most probably result in an injunction being issued to prevent the State from implementing the provisions of House Bill 147 as interpreted by the Legislative School Study Committee. If this were to occur, it is very possible that a special session of the legislature would have to be called to correct the problem created by enactment of House Bill 147 in its present form.

By: Gary O'Dowd

Deputy Attorney General