

ZUNI PUBLIC SCHOOL DISTRICT VERSUS THE DEPARTMENT OF EDUCATION: THE IMPACT ON FISCAL EQUITY

Abstract

In the fifty years since Congress assumed the provision of financial assistance to schools in which students had “federal connection,” such as American Indian students living on reservations or in public housing, this federal assistance came to be regarded as a replacement for state funding, not as supplemental funding. This study contends that the 2007 U.S. Supreme Court decision in Zuni v. Department of Education misinterpreted the statistical test imposed by Congress in 1976, and furthermore, that the test is minimally equitable and does not reflect any measure of fiscal adequacy. Effectively, the statistical measures used by the U.S. Department of Education allow state legislatures, by way of a misinterpretation of education finance statistical analysis, to ignore the real needs of impoverished children attending public schools.

In 1950, Congress assumed a degree of responsibility for providing financial assistance to certain local school districts under what is referred to as Federal Impact Aid (Impact Aid Act, 2002). This specific fiscal responsibility reflected federal properties that were within school districts that were statutorily ineligible to pay local property taxes for the support of local education. In numerous instances, children living on these federal properties were educated in local schools, which compounded the financial needs of these school districts. Within this Federal Impact Aid plan, payments were distributed to school districts based on the number of students who could demonstrate a “federal connection.” Federally connected students were defined as those who:

Had a parent in the United States military, were American Indian, lived on federal property, including Indian reservations or in public housing, or had a parent who worked on federal property (New America Foundation Program, 2005).

Federal Impact Aid was designed to financially assist school districts with children who resided on Indian lands, military bases, and other federal properties. Given that the federal government had removed these properties from the local tax base, this fiscal aid was designed to extend directly to school districts to fund public elementary and secondary education.

Over the next fifty years, state legislatures started to utilize this specific federal fiscal aid as a replacement of the overall state financial aid to school districts. Thus, over time, the concept of a financial en-

hancement was diminished. That is to say, Federal Impact Aid was no longer being used as supplemental funding; it was being utilized as replacement funding for state aid. In some instances, state legislatures incorporated federal impact aid as state revenue in the funding formula for school districts prior to the final allocation. These legislative actions essentially nullified the intent of the federal program as it converted impact aid into general aid to the state system of public education rather than aid to particular school districts serving American Indian students on federal Indian reservations. Over the years, Congress noted that state legislatures were using this specific fiscal aid as part of the overall public elementary and secondary education funding. As a result, Congress revised the Federal Impact Aid program, prohibiting its use as general state revenue except with provisions.

In 1976 Congress changed the statute by instituting an equalization formula with the Office of the Secretary of Education specifically regarding a state's eligibility to receive Impact Aid. The provisions allowed state legislatures to apply for Federal Impact Aid if state legislatures were judged to have an equalized funding formula for public elementary and secondary education. However, the U.S. Department of Education did allow state legislatures to take into consideration Federal Impact Aid if the state education finance distribution formula could meet one of the three prescribed standards, i.e., the disparity test¹; the wealth neutrality test²; and the exceptional circumstances test³ (Impact Aid Act, 2002).

At that time there were two formulas utilized to determine if equalization of funding had been met. Equalization was determined using the disparity test, which consisted of the Federal Range Ratio or applying the Secretary's formula, which was an adjusted version of the Federal Range Ratio. The Federal Range Ratio consists of using a restricted range and dividing by the lower extreme to create a ratio. The Federal Range Ratio uses the range of school districts' expenditures, ranks them according to expenditure per student, drops the 5th and 95th percentiles and then calculated the difference and divides by the 5th percentile. If the difference was no more than 25%, the funding was considered equalized. The second test allowed the same guidelines, but prior to ranking the school districts' expenditures, the expenditures were spread among the population of students in that district and then ranked. Then the 95th and 5th percentiles were dropped.

U.S. Department of Education Commissioned Study

In 1992, the U.S. Department of Education commissioned a study to collect research and make specific recommendations. Researchers were charged with suggesting policy to better guide Congress in making a more equitable disparity test for distributing Fed-

eral Impact Aid. The researchers discussed a multi-method disparity test that included more complex computations than the existing Federal Range Ratio. Additionally, the majority of the researchers endorsed the use of a disparity analysis based on vertical equity⁴. Vertical equity would require a weighting system, but not a system similar to the weighting used by the Secretary of Education (Salmon, 1992).

In 1994, Congress incorporated the Impact Aid concept into the reauthorization of the Elementary and Secondary Education Act (20 U.S.C. § 7701). Congress removed authority from the Secretary and established a legislative formula with most components of the previous Impact Aid unchanged. The Federal Range Ratio was the formula adopted by Congress to establish the disparity test and the previous formula, designed by the Secretary of Education, which included a calculation based on student population, was relocated to an appendix. The Office of the Secretary of Education continued to use the appended text to calculate the disparity test (*Zuni v. Department of Education*, 2007a). Additionally, Congress did not supplement the disparity test with any recommendations given by the education finance researchers that the U.S. Department of Education commissioned.

Zuni v. Department of Education

The Zuni Public School District and the Gallup-McKinley County Public School District (collectively referred to as Zuni) appealed the procedure to the Department of Education's Administrative Law Judge and were rejected. The Secretary of Education rejected the complaint as well. Zuni appealed to the Court of Appeals for the Tenth Circuit, (*Zuni & Gallup-McKinley v. Department of Education*, 2004) which ruled two to one on behalf of the Department of Education. The full Court of Appeals vacated the panel's decision and heard the matter *en banc*. The *en banc* hearing affirmed the prior decisions as a result of a six to six vote (*Zuni & Gallup-McKinley v. Department of Education*, 2006). Zuni sought *certiorari* and the Supreme Court agreed to hear the issue.

The United States Supreme Court issued its opinion on April 17, 2007, in the matter of *Zuni Public School District No. 89, et al. v. Department of Education* (*Zuni v. Department of Education*, 2007b). *Zuni's* five to four judgment manifested a deep philosophical division between the members of the Court. In this case, it specifically involved the construction of the Federal Impact Aid Act and the intent of Congress (20 U.S.C. § 7701). Additionally, this paper contends that the Court misinterpreted the statistical test by virtue of the philosophical construct the five-member majority of the Court imposed upon itself. Further, the authors argue that the test actually imposed via the statute is minimally equitable and does not reflect any measure of fiscal adequacy, nor does the statute reflect contemporary public policy standards addressed in education finance in cur-

rent litigation throughout the nation. The researchers further argue that the Court's interpretation disadvantaged numerous children living in poverty specifically in the state of New Mexico and potentially other impoverished children living in other states.

The issue before the Supreme Court was the validity of the statutory interpretation of the Federal Impact Aid Act by the U.S. Secretary of Education. The Secretary of the U.S. Department of Education utilized a procedure to assess state funding distribution formulas for financing public education. If a state legislature's funding distribution formula were "equitable" per the Secretary's calculations, the state legislature would then be able to reduce its fiscal aid to school districts. Specifically, Federal Impact Aid provides financial assistance to local school districts that are adversely affected by some form of a federal presence (20 U.S.C. § 7701). That is, it is assumed the presence of certain federal properties has a negative effect regarding the assessed valuation of school districts, i.e., the presence of a reservation would be tax exempt from local property tax levys while also generating school children who would live on the reservation and be educated, in many instances, within the local school districts.

Petitioners specifically noted, "[t]he Zuni Public School District is located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State School Districts" (*Zuni v. Department of Education*, 2007a, 2).

The statute prevents a state legislature from using federal revenues to reduce state aid to the affected local school districts. However, the statute contains a significant exception to the concept. Under certain circumstances, a state legislature is permitted to compensate for federal impact aid if the "Secretary [of Education] determine[s] and certifies...that the State has in effect a program of State aid that equalizes expenditures for free public education among local [school districts] in the State" (20 U.S.C. § 7709). The critical point of this federal statute as it applies to American Indian children living on reservations is that if a state legislature's education finance distribution formula were certified to be "equalized," then the state legislature may reduce its total state fiscal aid to those school districts that were eligible to receive Federal Impact Aid moneys.

The intent of the Federal Impact Aid statute was unambiguous; the statistical procedures utilized to reach the goal of the statute were in controversy. The Zuni School District argued that the actual procedures utilized by the U.S. Department of Education were not found within the statute and were, in fact, an unlawful delegation of Congressional intent. The statute clearly instructed the Secretary to evaluate the equity of a state legislature's education finance distribution formula. However, the Secretary's mathematical methodology underlying this evaluation was not in accordance with the statute's plain language. The issue thus became one of the Department of Education's implementation based upon the presumed

Congressional intent. The intended methodology was prominently placed within the statute:

[i]n the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by [the local school district] with the highest such per-pupil expenditures...did not exceed the amount of such per-pupil expenditure made by [local school district] with the lowest such expenditures...by more than 25 percent (20 U.S.C. § 7709(b)(2)(A)).

The statute had a second provision that is referred to as the “disregard” provision. The disregard provision stated: “when ‘making’ this ‘determination,’” the “Secretary shall...disregard [school districts] with per pupil expenditures...above the 95th percentile or below the 5th percentile of such expenditures” (20 U.S.C. § 7709 (b)(2)(B)(i)). Additionally, the statute states that the Secretary of Education shall:

[t]ake into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities. (20 U.S.C. § 7709 (b)(2)(B)(ii)).

With this statutory language before the Court, the question was one of whether the Secretary’s interpretation of the statute was correct. The majority opinion succinctly summarized the Secretary’s procedure in the following regulatory subsumption:

When determining whether a state aid program ‘equalizes expenditures’ (thereby permitting the State to reduce its own local funding on account of federal impact aid), the Secretary will first create a list of school districts ranked in order of per-pupil expenditure. The Secretary will then identify the relevant percentile cutoff point on that list on the basis of a specific (95th or 5th) percentile of *student population*—essentially identifying those districts whose students account for the 5 percent of the State’s total student population that lies at both the high and low ends of the spending distribution. Finally, the Secretary will compare the highest spending and lowest spending school districts of those that remain to see whether they satisfy the statute’s requirement that the disparity between them not exceed 25 percent (*Zuni v. Department of Education*, 2007b, 1539).

In this instance, the United States Department of Education examined the eighty-nine school districts in New Mexico for the applicable fiscal year. After ranking the school districts, seventeen school districts were above the 95th percentile because these seventeen school districts cumulatively contained less than 5% of the student population; six school districts were excluded below the 5th percentile of the list for the same reason. The remaining school districts constituted approximately 90% of the student population of the state.

Of those, the highest ranked district spent \$3,259 per student; the lowest ranked district spent \$2,848 per student. The difference, \$411, was less than 25 percent of the lowest per-pupil figure, namely \$2,848. Hence, the officials found that New Mexico's local aid program qualifies as a program that 'equalizes expenditures.' New Mexico was therefore free to offset federal impact aid to individual districts by reducing state aid to those districts (*Zuni v. Department of Education*, 2007b, 1540).

Plaintiffs, the Zuni Public School District and the Gallup-McKinley County Public School District, agreed that the calculations were correct in terms of the Department of Education self-created regulations; but were inconsistent with the authorizing statute (*Zuni v. Department of Education*, 2007b). The plaintiffs argued that the statute was silent regarding the factor of student populations within the calculation. The plaintiffs further contended that the authorizing statute instructed the Department of Education to calculate the "95th and 5th percentile cutoffs solely on the basis of the number of school districts (ranked by per pupil expenditures) without any consideration of the number of pupils in those districts" (*Zuni v. Department of Education*, 2007b, 1540). The majority opinion summarized the *Zuni* argument as:

If calculated as *Zuni* urges, only 10 districts (accounting for less than 2 percent of all students) would have been identified as the outliers that the statute instructs the Secretary to disregard. The difference, as a result, between the highest and lowest per-pupil expenditures of the remaining districts (26.9 percent) would exceed 25 percent. Consequently, the statute would forbid New Mexico to take account of federal impact aid as it decides how to equalize school funding across the State (*Zuni v. Department of Education*, 2007b, 1540).

The Court had to interpret the powers that the Secretary could assume under the statute. Plaintiffs argued that the language literally forbade the use of a weighted student methodology in that it was not mentioned within the statute. The majority opinion noted that if the language were clear and unambiguously expressed it would be rather apparent as to the meaning and intent of the legislation. The essential point is one of determining the basis of the 95th and the 5th percentile.

The question then is whether the phrase "above the 95th percentile...of [per pupil] expenditures" permits the Secretary to calculate percentiles by (1) ranking local districts, (2) noting the student population of each district, and (3) determining the cutoff point on the basis of districts containing 95 percent (or 5 percent) of the State's students (*Zuni v. Department of Education*, 2007b, 1543).

The majority opinion further noted that the statute in question did not limit the Secretary from utilizing a concept of best interest: in this case, a calculation involving student population. In fact, it did not prevent the

secretary from utilizing a number of different methodologies. “Nor does it rule out the present formula, which distributes districts in accordance with per-pupil expenditures, while essentially weighting each district to reflect the number of pupils it contains” (*Zuni v. Department of Education*, 2007b, 1543). The Court noted that in order to conduct the relevant percentile cut-offs, the “Secretary must construct a distribution of values” (*Zuni v. Department of Education*, 2007b, 1544). The majority opinion reasoned that the statute’s instruction to identify the 95th and the 5th ‘percentile of such expenditures’ makes clear that the relevant *characteristic* for ranking purposes is per-pupil expenditure during a particular year. But the statute does not specify precisely what population is to be ‘distributed’ (i.e., ranked according to the population’s corresponding values for the relevant characteristic). Nor does it set forth various details as to how precisely the distribution is to be constructed (as long as it is ranked according to the specified characteristic) [Emphasis in original] (*Zuni v. Department of Education*, 2007b, 1544).

As Justice Scalia noted in his dissenting opinion, “...we are informed how the statute’s plain text does not unambiguously preclude the interpretation the Court thinks best” (*Zuni v. Department of Education*, 2007b, 1551). Justice Scalia further observed that the Court is constantly called upon to interpret technical concepts from the Internal Revenue Code and a host of other agencies. In an insight that offers an overview of the varying judicial philosophies of the members of the Court, Justice Scalia noted that the Court “confronts technical language all the time, but we never see fit to pronounce upon what we think Congress meant a statute to say, and what we think sound policy would counsel it to say, before considering what it does say” (*Zuni v. Department of Education*, 2007b, 1552). Justice Scalia clearly noted that per pupil expenditures were only reached by examining expenditures within school districts. If students were arrayed based on expenditures, they are, in fact, arrayed based on expenditures per school district. The state of New Mexico stated that for the period in question there were 317,777 students and thus 317,777 per pupil expenditures in the state (*Zuni v. Department of Education*, 2007b, 1553).

The authors of this paper note that while it is true that each of these students reflect a per pupil expenditure, from an education finance data examination it is not measured in this manner, and given the availability of state and local data, cannot be measured in this manner. Even if such data were available, e.g., on a school-by-school basis, the placement of the per pupil expenditures must be within a school district and once again, is reflective of a composite basis, albeit on a smaller scale that then must be averaged in some manner on a school district basis. Per pupil expenditures are an average figure reflecting the composite of which are individual students. Notwithstanding these issues, the only unit mentioned in the statute is that of the local educational agency (LEA).

If the Court were to interpret best interest beyond the statute, then additional consideration should have been addressed regarding the other characteristic of education funding, i.e., the concept of adequacy, particularly in regard to American Indian children (Wood, 2005).

In 1992 Salmon observed the lack of adequacy in the Federal Impact Aid concept:

Another troublesome aspect of the current alternatives available for those states seeking to take into consideration Federal Impact Aid payments through Section 5(d)(2) is the total absence of any standard that addresses adequacy of educational services provided pupils. Currently, states may qualify...without regard to the quality and adequacy of the educational services provided by their local school districts (Salmon, 1992, p. 22).

Additionally, Zuni encompasses the historical relationship between American Indians and the Federal government. Salmon specifically noted this concern as early as 1992, when he observed that

[w]hile it can be argued by qualified states pursuant to Section 5(d)(2) that Federal Impact Aid recipients who are state residents should not be afforded greater Federal protection than other pupils, Native Americans have a unique and historical legal relationship with the Federal government. Certainly, an interesting legal question could be framed to answer whether the historical legal relationship that exists between Native Americans and the Federal government heightens their protection regarding the allocation of Federal Impact Aid (Salmon, 1992, p. 22–23).

The Court did not address the additional factor of American Indian land other than its lack of a tax base. There was no mention of adequacy regarding the student populations of these two school districts, nor of the large enrollments of American Indian children in relationship to the lack of a tax base.

The Federal Range Ratio as a Fiscal Measure

The Secretary's formula excluded more than approximately a quarter of New Mexico's LEAs from the calculations. "The Secretary's formula as applied to New Mexico for fiscal year 2000 (July 1, 1999–June 30, 2000) eliminated 23 of the State's 89 LEAs (26%) before applying the 25% disparity standard. The statutory formula eliminates 10 of the LEAs (11%)" (*Zuni v. Department of Education*, 2007a).

The intent to disregard the 5th and 95th percentile removes outliers from influencing these data. This is a common statistical practice in education finance, but its intention is to allow the calculations to describe the truest nature of the state without the pull of exceptionally high and low expenditures. The restricted range is defined as the difference between the observations at the 95th and 5th percentiles of the distribution. Removing

around a quarter of these data from the calculations is no longer in harmony with the concept behind the 95th and 5th percentile usage.

Conclusions and Observations

The *Zuni* decision is problematic. The statute states that under the previously discussed disregard clause, "...the secretary is to 'disregard school districts' with per-pupil expenditures...above the 95th percentile or below the 5th percentile of such expenditures...in the state" (20 U.S.C. § 7709). The reading of the statute reveals that the standard is measured by analyzing an array of districts and not pupils. If Congress had intended to have a weighted distribution by population it would have stated so. This is not to say that the Secretary's calculations were not well intentioned. Essentially, the Secretary of Education created an artificial weighted system as the measure of equity. Thus, the Secretary's calculation was a statistical array based on the number of students within the school districts of the state and not on school districts at the specified percentiles of expenditures. The fact that this is the methodology utilized by a number of Secretaries over the years does not make this procedure in alignment with the statute. One can easily argue that any weighted system will statistically be more sophisticated than a non-weighted system and thus more equitable.

However, the Secretary had no means to determine the exact expenditure per student. There is an assumption that all students in a district are the same expenditure. This is not true and not possible for the Secretary to determine within this current school finance context. Creating an artificial assumption can create conflict between the true and assumed student expenditures. This is why the formula uses average school district expenditures. The school district expenditures are a recorded data source. There is no assumption regarding the moneys given to each school district as well as the number of students enrolled in the school district.

The majority opinion of the Court spent considerable time discussing the population to be studied and concluded that students were the population as opposed to the school districts. While seemingly reasonable, basic education finance concepts are not accounted for in the majority opinion. When the selected percentiles are made based on student expenditures, it is, in fact, the average expenditure of all students within the selected school district. Districts are composed of student populations with funding needs that vary by student. The mean expenditure for the district is pulled by the extremes. Since there is a basic funding allocation per student the mean for the district is pulled up by students requiring special services (i.e., special need services). These data are skewed, as there is a floor (basic student allocation) to the state funding distribution; however, the ceiling is very high due to special services allocation. The Secretary's formula influences the disparity calculation by assuming all students have the same influence on the mean of the district. Thus the Secretary's use of the

formula is based on assumptions and non-factual data. As the Secretary's formula incorporates the student population as placeholders to determine the 5th and 95th percentile cutoffs, these data then become weighted with artificial weights that do not reflect the "population to be studied."

The Court's decision to allow for interpretation of the equalization formula by the Secretary of Education may have created unintentional consequences. When Congress does write statutes ambiguously it allows for greater individual agency interpretations. Congress, of course, may rewrite the legislation if it so desires, in order to direct the Department of Education to determine equity, and perhaps adequacy, in a different manner.

Zuni reflects a deeply divided Court in terms of philosophy as to its role of justiciability, i.e. the intent of Congress. *Zuni* reflects public policy being decided, at least in this instance, with considerable uncertainty regarding whether the majority of the Court actually understood the statistical measures utilized by the U.S. Department of Education and whether these statistical procedures, truly reflected a degree of fiscal equity that was the intent of Congress. *Zuni* effectively allows the state legislature to ignore the real educational needs of impoverished children attending public schools by way of a misinterpretation of education finance statistical analysis. *Zuni* presented an opportunity for the Court to increase financial equity, at least in a few states. Given the current federal government increase in federal monies to public education, under the guise of stimulus spending, greater equity considerations, as represented in *Zuni*, will not be forthcoming in the distribution of current federal stimulus spending.

Endnotes

¹Test used to measure the disparity of funding within districts based on average student expenditure.

²Test based on per pupil expenditures and property tax rates.

³Test based on equalized property valuation per pupil. State must equalize property values in order to qualify for Federal Impact Aid.

⁴A funding approach based on weighted funding for individuals in need of additional services.

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