

November 25, 1997

Elizabeth M. Twomey, Commissioner
Department of Education
101 Pleasant Street
Concord, New Hampshire 03301

Stanley R. Arnold, Commissioner
Department of Revenue Administration
61 South Spring Street
Concord, New Hampshire 03301

Re: Foundation Aid Distribution

Dear Commissioners Twomey and Arnold:

The Department of Education (hereinafter "DOE") and the Department of Revenue Administration (hereinafter "DRA") have requested an opinion from the Attorney General concerning whether the DRA must treat "excess foundation aid" as an available revenue in the year received for the purpose of setting the local tax rate. As used in this opinion, the term "excess foundation aid" means that portion of foundation aid which exceeds the estimates provided by the DOE to local school districts and which is transferred to the Department of Education after the closing of Sweepstakes books each fiscal year. We conclude that "excess foundation aid" payments should not be treated as revenues to offset the prior annual appropriation in setting the local tax rate.

Our conclusion that excess foundation aid should not be included as an offsetting revenue in computing the tax rate is based on the specific language of Chapter 414:3 (Laws of 1989). This uncodified law states, "Notwithstanding any other provision of law, the department of revenue administration shall not consider such excess in setting the tax rate or for any other purpose until such approval is made." Were this uncodified law not in effect, and were your question limited solely to the issue of whether the DRA should include all available revenues from foundation aid in setting the tax rate, including that amount of foundation aid which was not presented to the voters during the budgeting process, the answer would be that such additional revenue would be included in the tax rate calculation. See, RSA 32, RSA 21-J:34, III, and RSA 21-J:35, II (c).

The specific language in Chapter 414:3 which prevents the DRA from treating excess foundation aid payments as offsetting revenues to a school district's prior annual appropriation furthers the stated legislative purpose of foundation aid by allowing the legislative body of a district to consider the increased revenue in conjunction with a budgeting and appropriation process. As originally proposed SB 154-FN-A did not prevent excess foundation aid from being applied to offset the district's annual appropriation. The House added this prohibitory language in Chapter 414:3 as an amendment. House Journal, May 9, 1989, p.1009. The amended analysis of Chapter 414:3 describes the purpose of the amendment as that of requiring that a legislative body of a school district be given an opportunity to determine how the excess foundation funds should be used before the excess foundation aid funds are applied as revenues in setting a tax rate.

Statutory construction requires that specific statutes control over statutes of general applicability. *State v. Farrow*, 140 N.H. 473 (1995) A more recently enacted statute will control over an older

enactment. *Bd. of Selectmen of Town of Merrimack v. Planning B. of Town of Merrimack*, 118 N.H. 150 (1978). Use of the word "shall" acts as a command. *Appeal of Concord Natural Gas*, 121 N.H. 685 (1981). The specific statutory language, as well as rules of statutory construction, require that the DRA not include excess foundation aid in the tax rate calculation until the legislative body of the school district has acted either by adopting its next annual budget at a meeting held under RSA 197:1 or by holding a special town meeting pursuant to RSA 197:2 and RSA 197:3.

Our conclusion should not be interpreted as implying that a local school district must increase its budget by the amount of excess foundation aid received. If a district which receives excess foundation aid does not hold a special meeting to obtain authority to increase its prior appropriation by the amount of excess foundation aid, the excess foundation aid will be treated as an unreserved fund balance and will be applied as offsetting revenues against the appropriation in the year following receipt of the funds. The application of these funds as revenues to offset the appropriation in the year following receipt gives the legislative body of the school district the opportunity to consider the revenues available to it in both the budgeting and appropriation processes. Whether the receipt of excess foundation aid funds results in increasing or decreasing the tax rate depends upon the appropriation decisions which are made by the legislative body of the district at either a special or an annual meeting.

Question #2:

What is the meaning of "unanticipated money" as used in RSA 198:20-b? If a school district has adopted a warrant article pursuant to RSA 198:20-b, does this action give the school board the authority to expend such funds following proper posting and holding a public hearing?

Essentially this question asks whether excess foundation aid is "unanticipated money" which can be expended using the procedure provide in RSA 198:20-b or whether expenditure requires action at a special or annual school meeting.

It has been suggested that in order to allow school districts the opportunity to use excess foundation aid as "unanticipated revenue," without petitioning the superior court for a special meeting, the Legislature, in 1993, amended RSA 198:20-b by adding the word "unanticipated" before the phrase "money from a state, federal or other governmental unit or a private source which becomes available during the fiscal year." Previously, the DRA has interpreted RSA 31:95-b and RSA 198:20-b to require that the "source" of the money be unanticipated at the time of the annual meeting, not that the final dollar amount of the revenue be unanticipated. An example of unanticipated funds would be Community Development Block Grant money, funded through the Office of State Planning. In the case of Block Grant funds, there is an application process to request the money for a specific purpose and an acceptance process (contract approval through Governor and Council) agreeing to the terms of the grant. Unlike block grant funds, Foundation Aid requires neither an application nor a formal acceptance of the money. The school district's right to receive foundation aid is known at the time of its annual meeting.

The purpose of the 1993 addition of the word "unanticipated" to RSA 198:20-b was to standardize the treatment of unanticipated revenue with respect to towns and school districts. There is no indication in the legislative history that inclusion of the word "unanticipated" was intended to authorize a school district to increase its appropriations by the amount of excess foundation aid received without the need for a meeting. Neither the specific statutory language nor the legislative

history of RSA 198:20-b support the application of RSA 198:20-b to excess foundation aid as those funds are not within the meaning of "unanticipated."

Questions No. 3-5:

Our analysis of Question Nos. 1 and 2 is dispositive as to Question Nos. 3 and 4. Because neither increased amounts of Special Education Catastrophic Aid nor Kindergarten Aid can be characterized as unanticipated revenues, increased aid from these programs may not be expended without a special meeting. Increased aid from these programs must be applied as offsetting revenues to the prior annual appropriation.

In response to Question No. 5, the implementation of this statutory scheme ensures compliance with the requirement in part 2, article 6-b of the New Hampshire Constitution that foundation aid be paid to the local school districts, for "the purpose of state aid to education." Because excess foundation aid funds may not be used to offset a prior appropriation without a meeting of the school districts' legislative body, the use of these funds is integrally linked to budgeting for education.

We hope that this addresses all of your questions. If you wish to discuss this matter further, we will be happy to meet with you to do so.

Very truly yours,

Nancy J. Smith
Assistant Attorney General Civil Bureau

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