



Bureau Brief

Memorandum

TO : Senator Johnny Key and Representative James McLean
FROM : Nell Smith
DATE : July 19, 2013
SUBJECT : Intent of NSL Funding

This document examines the language of the General Assembly, its consultants and the courts to help determine the original intent of the NSL funding. This document quotes reports, legislation and court opinions that help answer the following questions:

- Is the NSL funding intended specifically for low income students? Or is the funding's free and reduced-price lunch eligibility used as a proxy for "struggling students"? Or is it intended to benefit all students?
- What was the purpose of the funding? To compensate for low income students' lack of educational resources? To ensure educational opportunities for low income students? To raise the performance of students who are not proficient? To raise the achievement of the entire student body?

This document is organized chronologically, starting with early legal rulings in the Lake View lawsuit and ending with the Arkansas Supreme Court's 2007 order releasing the state from court oversight.

1994 Chancery Court Opinion in the Lake View Lawsuit

Judge Annabelle Imber's 1994 opinion in the Lake View lawsuit noted in the findings of fact the level of poverty of the Lake View School District.

"79. In the 1992-93 school year, 36% of the population in the Lake View school district lived below the poverty level and Lake View ranked 312 out of 319 school districts meaning seven school districts have a higher poverty level."

"80. In the 1992-93 school year, 94% of the students in Lake View qualified for free or reduced lunches and Lake View ranked 7 out of 319 school districts, meaning only six districts have a higher percentage of students qualifying for free or reduced lunches."

She further noted:

"130. Money is not the only factor which affects the quality of a student's education...Factors other than money which affect the quality of education include 1.) the **education level of the family**, 2) the **socio-economic level of the community**, 3) the curriculum, 4) the teachers, 5) the percentage of money going into the classroom as

compared to other costs, such as administration and capital expenditures, and 6) the course-taken patterns of the students.”

“133. Equality does not necessarily mean equal dollars spent per student because some students have greater needs and require more money to educate. **Equality means equal access to programs. Differences in money should depend on the cost and the need. High cost students should receive more money.**”

“136. There are needs that are not being met in Arkansas’ school finance structure: 1) a weighting for primary schools for smaller class size; 2) remediation;...3) bilingual education in northwest Arkansas; 4) **at-risk children**; and 5) capital outlay.”

“137. There are ways to **identify at-risk children within a district: 1) low test scores, 2) the number of children receiving free or reduced lunches within a district, and 3) the number of households below the poverty level within a district.**”

“139. There is a correlation between the ability of a community to attract industry and the **education level in that community**...Property poor school districts lack the ability to raise significant local funds to improve the education offered in the district. With poor educational opportunities within a community, the likelihood of industry locating within the community is significantly reduced. Without industry the ability of a community to increase its property base is severely limited. Without an increased property base the district lacks the ability to raise additional local funds to improve the education offered in the district.”

Poverty Index Funding

Before the passage of the Public School Funding Act of 2003, state law provided “Poverty Index” funding specifically for low-income kindergarten and first grade students (Act 1549 of 1999, A.C.A. § 6-20-323).

“Funding for students with low socio-economic status shall be based **on students in kindergarten through grade one (K-1) living in areas with high concentrations of low income families or from low income families as indicated by eligibility for the free or reduced price lunch** program under the National School Lunch Act or any other act of Congress. These funds **shall be used only for early intervention strategies** sanctioned by the department in reading and writing literacy or mathematics for students in pre-kindergarten through grade one (preK-1).”

According to the Department of Education (ADE) rules governing this statute’s implementation, eligibility for the funding was based on a school’s concentration of poverty, but once a school was eligible, the funding was distributed based on total student enrollment, not just low-income students. The rules required ADE to determine what percentage of each elementary school’s K-1 population was eligible for free or reduced-price lunch. Those schools with more than the ADE-determined minimum level—72% in some years—received “poverty index” funding, while those with a smaller percentage received no funding. Eligible schools received a per-student funding amount for every student they enrolled in kindergarten or first grade. The

per-student amount was determined based on the total appropriation. For example, in 2001, the per-student amount was \$598.17.

The legislature appropriated \$13 million annually for FY2000 and FY2001 and \$8.5 million annually for FY2002 through FY2005. This funding stopped after the creation of NSL categorical funding in the Second Extraordinary Session of 2003.

Schools that received the funding were required to use it “for activities designed to increase student achievement in reading, writing, and mathematics in Pre-Kindergarten through Grade 1.” Examples of such activities included in the rules mirror some of the currently allowable uses for NSL funding, including hiring math and literacy specialists, providing professional development, establishing before- and after-school instructional activities, extending the school year instructional activities, and providing programs for pre-K and first grade students.

2001 Chancery Court Opinion in the Lake View Lawsuit

Judge Collins Kilgore’s 2001 opinion in the Lake View lawsuit addressed the educational issues that arise for students in poverty and the way the poverty index funding addresses those issues.

“56. The poverty index is derived from the number of students who qualify for the federal free and reduced lunch program. Generally, children who qualify for free and reduced lunches **come from homes that cannot provide opportunities such as internet access, ample reading and writing supplies, and parents who emphasize the importance of education and reading at an early age. A heavy concentration of free and reduced lunch students placed in one classroom over-taxes the teacher and puts a strain on available resources. These students typically require extraordinary resources to help them achieve proficiency.** The poverty index funds in Arkansas assist only those children in kindergarten and first grade.”

Judge Kilgore further noted:

“The school districts that are most fortunately endowed with resources continue to have inherent advantages, namely property wealth, that allow them to improve. Many of the schools on the bottom lack these inherent advantages as they struggle to achieve equality. Under the present funding system, by the time the poorer districts reach the level of the more prosperous districts, *if they can*, they will still find themselves at or near the bottom. **Providing equal funding to all school districts will not cure the inequities.**”

Lawrence O. Picus and Associates September 1, 2003 Report

In 2002, the Arkansas Supreme Court issued its decision in the Lakeview lawsuit, declaring the state’s school funding system unconstitutional. The Legislature hired education finance experts Lawrence O. Picus and Associates to review the state’s public school funding system and make recommendations to the Joint Committee on Education Adequacy.

The 2003 Picus report, which led to the creation of NSL funding, intertwines the consultants’ recommendations with the Committee’s, making it difficult, at times, to distinguish the consultant’s opinions from the Committee’s.

The report uses the term “struggling students” to mean those “who must work harder and who need more time to achieve proficiency levels.” However the report specifies that these students include low-income students, English Language Learners and special education students.

“Every school should have a powerful and effective strategy for **struggling students, i.e., students who must work harder and who need more time to achieve to proficiency levels. Such students generally include those from lower income backgrounds, those struggling to learn English, and those with learning and other mild disabilities.** The most powerful and effective strategy is individual one-to-one tutoring provided by licensed teachers. The standard of many comprehensive school designs is a ratio of one fully licensed teacher tutor for every 20 percent of students in poverty, with a minimum of one for every school. Thus school units of 500 students should have from one to five professional teacher tutor positions. Schools could deploy these resources in ways other than individual tutoring, though considerable research suggests tutoring is the most effective strategy.”

The Picus report notes that for students who are “both from a low-income background and Limited-English proficient, some additional assistance is needed beyond that just for poverty.” The Committee recommended that districts should receive an additional 1.4 teacher for every 100 students that are both ELL and low income. The Committee also recommended that districts receive funding for 2.9 positions for every 500 students to provide services for students with mild to moderate disabilities. These 2.9 positions are built into the matrix, which serves as the basis for foundation funding.

The report noted that “Schools should be free to use these resources for struggling students for whatever strategy they select, but they should be held accountable for having these students learn to state proficiency levels.”

In addition, the report noted a need for student support and family outreach.

“Schools also need a student support and family outreach strategy. Various comprehensive school designs have suggested different ways to provide such a program strategy. In terms of ingredients, **the more disadvantaged the student body, the more comprehensive the strategy needs to be.** The general standard is one licensed professional for every 20-25 percent of students from a low-income background, with a minimum of one for each school.”

The Picus report suggested that parent outreach activities be focused on efforts that “address what parents can do to help their children learn.” The report also recommends one guidance counselor for every 500 middle school students and two for every 500 high school students.

School Funding Legislation in the Second Extraordinary Session of 2003

Two types of NSL funding were created in the Second Extraordinary Session of 2003. The first “National School Lunch Act Students” funding was created by Act 27 of the Second Extraordinary Session of 2003. That act replaced the \$8.5 million annual appropriation for “Poverty Index” funding with \$21.5 million in “NSLA Students” funding. According to special language listed in the bill, that funding was “for students eligible for the free or reduce lunch

program. These funds shall be used only for early intervention strategies sanctioned by the Department of Education in reading and writing literacy or mathematics for students in pre-kindergarten through grade one.”

Later in the session, Act 59 established the National School Lunch funding that is in place today. Act 77 appropriated \$132,146,400 for that NSL funding, beginning in 2004-05. Besides defining how this funding would be distributed and how it could be used, neither Act 59 nor Act 77 provided additional information on legislative intent.

With the passage of Act 59, the funding in \$21.5 million in Act 27 was no longer needed. Act 79 therefore eliminated the “NSLA Students” funding and restored the Poverty Index funding for its final two years.

Senator David Bisbee 2004 Testimony

In 2004, the court appointed Special Masters to review the Legislature’s progress in bringing the state’s education finance system into constitutional compliance. Sen. David Bisbee, one of the architects of the state’s new funding system, testified about the changes in 2004. His testimony indicates that the Legislature opted to provide NSL funding for “children who reside in higher density poverty areas.”

The testimony also indicates that the funding was designed to provide additional resources to overcome “impediments to learning.” Bisbee noted that the funding was based on the consultants’ recommendation that the funding be provided to pay for an additional teacher for students eligible for free or reduced-price lunch.

“The court, the adequacy experts and the Joint Committee on Educational Adequacy recognize that there are **certain students that will require additional resources to overcome other impediments to learning**. For example, the adequacy experts recommended an additional teacher for each 100 students eligible for the National School Lunch Program. Thus the calculation would require \$488 for each student. Although not recommended by the adequacy experts, testimony received by various committees of the Legislature indicated that **children who reside in higher density poverty areas require an even greater commitment of resources**. Thus Act 59 contains a sliding scale that increases funding for those children living in areas where the density is 90% or greater. Each of those children receives \$1,440.00. For students living in areas that are between 70% and 90% free or reduced lunch, each of those students receives \$960.00. Every student living in poverty areas with less than a 70% density receives \$480 in additional funds. The adequacy experts recommended that 4/10ths of a teacher be allocated for each 100 ELL students that also qualified for the National School Lunch Program. Thus 4/10ths of an average teacher’s salary is \$19,500.00, which is then divided by 100 students. The funding per student then becomes \$195.00.”

Special Masters Report, 2005

The Special Masters report addressed only a few NSL funding issues, most of which concerned funding reductions. Issues addressed include a change in the treatment of Provision 2 districts which resulted in NSL funding reductions for those districts and the General Assembly’s

decision against increasing the NSL rate for 2005-06 and 2006-07. The Special Masters also mentioned the difficulty in collecting accurate data on student eligibility for free or reduced-price lunch.

The Special Masters report does not comment on the legislative intent of the NSL funding. However, it does note that in years past, NSL funding has been spent on the development of remedial and mentoring programs; recruitment of literacy and math coaches, counselors, school nurses, and teachers; and homework hotlines. The Special Masters appeared concerned that NSL funding cuts could impact remedial programs, noting superintendents' testimony that reductions in NSL funding would result in cuts to remedial programs.

The Arkansas Supreme Court's 2005 Order

Based on the Special Masters report, the Arkansas Supreme Court, in December 2005, held that Arkansas's school funding system remained inadequate. Like the Special Masters report, the Arkansas Supreme Court's discussion of NSL funding was limited.

“... because of changes in counting National School Lunch Act qualifying students and decreasing enrollments in some school districts with a high number of NSLA qualifying students, NSLA funding will be reduced. This has a direct impact on remedial and mentoring programs, literacy and math coaches, counselors, school nurses, teachers, and homework hotlines since NSLA funding has been used to support these programs.”

Lawrence O. Picus and Associates August 30, 2006 Report

The Legislature hired Picus and Associates again in 2006 to adjust its education funding system. Unlike the 2003 Picus report, the 2006 report provided only the consultants' own research and recommendations. Legislative recommendations based on Picus's work appeared in the 2006 adequacy report described below. The consultants again recommended providing funding for two full-time employees for every 100 NSL students: one teacher tutor and one pupil support employee (counselor, nurse, family outreach, etc.). One section of the report deals with pupil support services, while another addresses “resources for struggling students.”

- Pupil support services

“Our professional judgment is that pupil support services should vary with the needs of the school and that schools with **higher percentages of students from lower income backgrounds need more pupil support services.**”

(Arkansas provides funding for 2.5 pupil support services positions through the matrix for every 500 students.)

- Resources for Struggling Students

Picus and Associates reiterate their definition of “struggling students” as being those “who must work harder and need more assistance to achieve to proficiency levels (i.e., students who are ELL, low income, or have minor disabilities).”

The report indicated that while the NSL funding is based on low income students, it is intended to be used to help all struggling students: “This report also recommended a 1.0

FTE position for every 100 NSL students to enable school districts to provide tutoring **for students struggling to learn to academic standards.**"

2006 Adequacy Report

The Adequacy Study Oversight Subcommittee's 2006 report indicates that NSLA funding is intended to help "at-risk students" and "struggling learners." The Subcommittee appeared to view skeptically districts' use of NSL funding for teacher salary raises, instead of "focused instructional strategies." However, the Subcommittee recognized that districts need "flexibility...to implement their programs for struggling students."

"NSL funding is provided to assist schools with services, primarily tutoring, for at-risk students. The funding is based on a student-teacher ratio using a school district's count for students qualifying for the National School Lunch Act program. The state currently provides NSL categorical funding for one (1) full time equivalent (or \$480 per pupil) for school districts with an NSL student population of less than 70%, two (2) full time equivalents (or \$960 per pupil) for a school district with between 70% and 90% NSL student population, and three (3) full time equivalents (or \$1,440 per pupil) for a school district with an NSL student population greater than 90%.

"The committees recommend that the funding be increased by 3.28%. During the committee hearings, the committees received testimony that school districts at the two extreme ends of the spectrum for NSL funding might be adversely affected by a sudden change in funding when the district's NSL count either drops below the 70% to 90% level or rises above the 70% to 90% level. Therefore, beginning with the 2007-2008 school year, the committees recommend that a change in funding level should be phased out in equal amounts over a three-year period for school districts that drop below the 70% to 90% thresholds and be phased in with equal amounts over a period of three (3) years for school districts that exceed the 70% to 90% threshold.

"The subcommittee received testimony that for 2005-2006, there were significant fund balances for state categorical NSL funds provided to districts. In addition, based on the evidence obtained in site visits conducted by Picus and the Bureau of Legislative Research, the subcommittee finds that **many school districts use categorical NSL funds to raise teacher salaries, instead of providing focused instructional strategies for these at-risk students.** Therefore, the subcommittee further finds that more study of actual practices is needed, but until those studies can be conducted, an inflationary adjustment should be applied to the current funding level. Picus recommends in the 2006 Picus Report that Arkansas further restrict the use of NSL categorical funds to pay for tutors—only—and that the tutors be certified teachers licensed as tutors.

"Although the subcommittee agrees with Picus that the use of tutors is one of the best methods of improving academic performance for struggling students, it finds that **additional restrictions on NSL funds would remove the flexibility that school districts need to implement their programs for struggling students.** In fact, there are additional programs that the Department of Education may need to consider adding to the list of eligible programs, such as the Jump Start Bridge Program. Also, the subcommittee finds

that it is premature to create a licensure category for tutors, as additional monitoring through APSCN and ACSIP needs to be conducted by the Department of Education. The subcommittee also recommends that the Department of Education study the strategies being used with NSL categorical funds, both currently and prospectively, and report its findings to the committees by May 1, 2008.”

Special Masters Report, 2007

In their 2007 report, the Special Masters commended the General Assembly for establishing a “framework for a much improved Arkansas public education system.” Among the improvements the Special Masters mentioned was the increase in NSL funding.

“Beginning in 2007-2008, additional state funding for students who qualify under national school-lunch assistance (NSL) rules is increased by Act 272, over that of the previous year. The per-student amount for districts in which 90% or more of students are qualified is raised from \$1,440 to \$1,488. For districts having less than 90% but at least 70% NSL students, the amount is raised from \$960 to \$992, and for districts in which less than 70% are NSL qualified, the amount is raised from \$480 to \$496. The Act provides that the additional ELL per-student funding is to be supplemental to NSL funding.”

The Special Masters also noted legislation that allows districts the ability to use NSL funds for classroom teacher salaries.

“In our Interim Report, we noted the Movants’ position that the teacher-salary amounts would meet constitutional requirements if the provisions of Act 30 of the First Extraordinary Session of 2006 and Act 101 of the Second Extraordinary Session of 2003 were reenacted. Act 30 allowed **use of NSL funds to supplement teacher salaries that otherwise met the minimum salary requirement**, and Act 101 provided **financial incentives to teachers in “high priority” districts**.

“We find that Act 1590 of 2007 permits **flexibility in the use of NSL funds for classroom teachers whose basic salaries meet the minimum salary requirements and who are used as tutors, teachers’ aides, counselors, social workers, nurses, and curriculum specialists**. A district having NSL funds in excess of those needed for the purposes spelled out by the Arkansas Department of Education may **use the funds for all teachers under certain conditions**.”

Arkansas Supreme Court Order, 2007

In 2007, the Supreme Court declared that Arkansas’s public school finance system in constitutional compliance. In its opinion, the Supreme Court noted the increase in NSL funding (“State funding for students qualifying for national school lunch assistance was increased based on the percentage of qualified students.”) and the General Assembly’s permitting districts to continue using excess NSL funding to supplement certain teacher salaries.

“The Masters further noted that Act 1590 of 2007 **permits the continuation of using excess national school lunch money to supplement certain teacher salaries**, which was first enacted by Act 30 of the First Extraordinary Session of 2006. In addition, they found

that Act 1044 of 2007 allows for a continuation of incentives, first enacted by Act 101 of the Second Extraordinary Session of 2003, to **attract and retain teachers who teach in high-priority districts**. It provides annual bonuses of \$4,000, \$3,000, and \$2,000 for such teachers.”