

February 23, 2006

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ZUNI PUBLIC SCHOOL DISTRICT
NO. 89; GALLUP-MCKINLEY
COUNTY PUBLIC SCHOOL
DISTRICT NO. 1,

Petitioners,

vs.

UNITED STATES DEPARTMENT
OF EDUCATION,

Respondent.

No. 01-9541

NEW MEXICO STATE
DEPARTMENT OF EDUCATION,

Intervenor.

**ON REHEARING EN BANC FROM A DECISION OF THE
SECRETARY OF THE UNITED STATES DEPARTMENT OF
EDUCATION**

(Docket No. 99-81-I)

Ronald J. VanAmberg of Roth, VanAmberg, Rogers, Ortiz, Fairbanks & Yepa, L.L.P., Santa Fe, New Mexico (George W. Kozeliski of Gallup, New Mexico, with him on the brief), for Petitioners.

Michael Robinson, Attorney, U.S. Department of Justice (Peter D. Keisler, Assistant Attorney General; Robert S. Greenspan and Peter R. Maier, Attorneys,

U.S. Department of Justice; and Stephen H. Freid and Mark W. Smith, Attorneys, U.S. Department of Education, with him on the brief), Washington, D.C., for Respondent.

Leigh M. Manasevit, Special Assistant Attorney General for the State of New Mexico, of Brustein & Manasevit, Washington, D.C., for Intervenor.

Before **TACHA**, Chief Judge, **SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL**, and **TYMKOVICH**, Circuit Judges.

PER CURIAM.

Two local educational agencies (LEAs) (Zuni Public School District No. 89 and Gallup-McKinley Public School District No. 1) filed a petition for review from the Secretary of Education's decision that the State of New Mexico was equalized pursuant to 20 U.S.C. § 7709(b) and the corresponding regulations at 34 C.F.R. § 222.162(a). See also id. pt. 222, subpt. K, app. A divided panel of this court denied the petition for review. Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 393 F.3d 1158, 1169 (10th Cir. 2004). We granted rehearing en banc, and in accordance with our local rule, the judgment was vacated, the mandate stayed and the case was restored as a pending appeal. 10th Cir. R. 35.6. On rehearing en banc, the decision of the Secretary is affirmed by an equally divided court. The panel decision is hereby vacated. See id.