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May 5, 2010

MAY 10 2010

FCC Mail Room

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W., Washington, D.C. 20554

**RE: APPEAL CC Docket 02-6; Durham Public School District Appeal,
Request for Expedited Relief and STAY of the Audit Commitment Adjustment
Letters**

This is an appeal from a decision by the USAC.

Enclosed are the original (not stapled) and four copies of the Appeal. An extra copy is also enclosed. Please time stamp the extra copy and return it to me in the enclosed self addressed-stamped envelope.

Respectfully submitted,



Nathaniel Hawthorne

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e-mail: nhawthorne@telecomlawyer.net

Attorney for
Spring Cove School District

Cc: Durham Public School District

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MAY 10 2010

FCC Mail Room

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the)
) File No. SLD -
)
Appeal of the Decision of the) CC Docket No. 02-6
)
Universal Service Administrator by)
the)
)
Durham Public School District)

Appeal
and
Request for Expedited Relief
and

STAY of the Audit Commitment Adjustment Letters

May 5, 2010
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W. Suite TW-A325
Washington, D.C. 20554

This is an appeal from a decision by the Schools and Libraries Division of the USAC.

1. Post Audit Commitment Adjustment Letter Appealed

Form 471 Application Numbers:

(a) 2005:
474948
468411

(b) 2006:
511551
511389
510116
520711
511450

Funding Year : 2005/2006
Billed Entity Number for district: 126878
Date of Commitment Adjustment Letter: March 11, 2010/March 12, 2010
Date of Appeal: May 5, 2010

(2) **SLD Contact Information**

Currie Sutton
Durham Public School District
27600 Chagrin Blvd., Ste 260
Cleveland OH 44122
(216)514.3336

(3) **Funding Request Numbers Appealed**

(a) **FY 2005**

1291358

1310175

(FRN 1291358 is for an adjustment to the free and reduced discount; FRN 1291358 results from an adjustment to the lower discount rate due to a lower free and reduced amount.)

(b) **FY 2006**

1406880

1404228

1310175

1433277

1433429

1433214

(4) **USAC's Reason for Post Audit Commitment Adjustment Letter**

(a) **FY 2005**

1291358 "****the funding commitment for this request must be reduced by \$35,574.72. On the original Form 471 the applicant was approved at a 71 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the "survey method". ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools****". Funds to be recovered:
\$34,004.91 **Exhibit A**

1310175 ****\$2,385.50 in funds was improperly disbursed for this funding request. ****it was determined that funding was provided for ****ineligible items****. **Exhibit B**

(b) FY 2006

1406880 ****the funding commitment for this request must be reduced by \$7,747.20. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the "survey method". ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools****. -0- funds to be recovered since Durham did not use the committed amount. **Exhibit C**

1404228 ****the funding commitment for this request must be reduced by \$21,462.48. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the "survey method". ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools****. -0- funds to be recovered since Durham did not use the committed amount. **Exhibit D**

1433429“***the funding commitment for this request must be reduced by \$5,040.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible t receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the “survey method”. ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools***”. **Exhibit E**

1433429“***\$739.99 in funds was improperly disbursed for this funding request. ***it was determined that funding was provided for ***ineligible items***. **Exhibit F**

1310175 “***the funding commitment for this request must be reduced by \$15,012.48. On the original Form 471 the applicant was approved at a 71 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible t receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student . For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the “survey method”. ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools***”. **Exhibit G**

1433277 “***the funding commitment for this request must be reduced by \$7,920.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price

lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the "survey method". ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools***". -0- funds to be recovered Exhibit G since Durham did not use the committed amount. **Exhibit H**

1433429 "***the funding commitment for this request must be reduced by \$5,040.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the "survey method". ***results were used to project a percentage of students eligible for free or reduced price lunch by computing a percentage applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, *i.e.* survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply for the Free and Reduced Price Lunch Program responded to the applications sent from the schools***". **Exhibit I**

1433214"***the funding commitment for this request must be reduced by \$11,736.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally -approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. ***Durham ***used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate termed the "survey method". ***results were used to project a percentage of

survey. Actually, the Form used by Durham attempts to discern an actual count of students eligible for free/reduced meals as required by the FCC in *DA 01-588, Rel March 6, 2001*.

The seminal FCC Report is *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Rel: May 8, 1997, Para 510* states, in relevant part:

*** a school may use either an actual count¹ of students eligible for the national school lunch program or federally-approved alternative mechanisms to determine the level of poverty for purposes of the universal service discount program. Alternative mechanisms may prove useful for schools that do not participate in the national school lunch program or schools that participate in the lunch program but experience a problem with undercounting eligible students (e.g., high schools, rural schools, and urban schools with highly transient populations). Schools that choose not to use an actual count of students eligible for the national school lunch program may use only the federally-approved alternative mechanisms contained in Title I of the Improving America's Schools Act, which equate one measure of poverty with another. These alternative mechanisms permit schools to choose from among existing sources of poverty data a surrogate for determining the number of students who would be eligible for the national school lunch program.² The *Federal-State Joint Board* stated in *Para 567*

*** we seek to minimize the administrative burden on school districts." The FCC stated "[a]lternative mechanisms may prove useful for schools that do not participate in the national school lunch program or schools that participate in the

¹ The actual count issue is not a simple concept as seen from a draft "SA 9-1, Policy 210.18-03", issued by the USDA. It states, *in part*, "[t]he "Actual" column only differs from the "Estimate" column in that the "Actual" column takes into account the days in the review month when students were not yet enrolled in school or had withdrawn. To arrive at this number, the reviewer would have to add the calendar days each student was enrolled to arrive at the total maximum number of lunches reported in line 3. The "Estimate" column estimates this number by simply multiplying the number of students by the number of serving days, ignoring the fact that some students may not have been enrolled all month. The "Estimate, column was provided to lessen calculations done by the reviewer." **Exhibit L**

² 34 C.F.R. § 200.28(a)(2)(i)(B) . Under this regulation, enacted pursuant to Title I of the Improving America's Schools Act of 1994, private schools that do not have access to the same poverty data that public schools use to count children from low-income families may use comparable data "(1) [c]ollected through alternative means such as a survey" or "(2) [f]rom existing sources such as AFDC or tuition scholarship programs." 34 C.F.R. § 200.28(a)(2)(i)(B)(1) and (2). ***

lunch program but experience a problem with undercounting eligible students (e.g., high schools, rural schools, and urban schools with highly transient populations).

FCC Report is *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Rel: May 8, 1997, Para 510* The objective appears to not administratively burden schools and to promote E-rate, that is getting funds to needy schools, while having an actual count of eligible students.

Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Rel, May 8, 1997, does not state that NSLP can not be used as a survey.

In *DA 01-588, Rel March 6, 2001*, “*** the [FCC] clearly held that schools that do not use a count of students eligible for the national school lunch program could use only the federally-approved alternative mechanisms contained in Title I of the Improving America’s Schools Act, and that all of these mechanisms, while looking to other indices of poverty such as participation in tuition scholarship programs, still rely on ‘actual counts of low-income children.’”

The method used by Durham produces results within the parameters established by the FCC for eligible low-income children. This is demonstrated by Durham’s NSNP, or survey, sent to all household’s within its school district.

The survey must be sent to all families whose children attend the school. The survey must, at a minimum, contain the following information:

- Name of the family and students
- Size of the family
- Income level of the family

Following is the actual Forms sent by Durham to all families in the district whose children attend Durham.

These Durham Forms generate an “actual count.” Please note that income data is demanded and provided. Durham’s Forms are no different than the NSLP Form which is used for an actual count. To expect that All forms will be returned, no matter how labeled, is unreasonable.

Below is an NSLP Form for 2005-2006.

2004/2005
DURHAM PUBLIC SCHOOLS

For CNS Use ONLY
Application# 73-6
1200

FAMILY APPLICATION FOR FREE AND REDUCED MEALS

To apply for free and reduced price meals, complete this application, sign your name and return the application to school or Child Nutrition Services (CNS), 808 Becon Street, Durham, NC 27703. If you need help, call your child's school or CNS Office at 919.860.2371. I DO NOT WISH TO APPLY (Please check)

1. Print STUDENT INFORMATION

NAME	GRADE	SOCIAL SECURITY NO.	NAME OF SCHOOL	FOOD STAMP NO.	TANF NO.
[Redacted]	[Redacted]	[Redacted]	Lackwood E.		

2. List Each Child's FOOD STAMP or TANF CASE NUMBER, IF ANY.

3. FOSTER CHILD: YES NO List the child's monthly personal use income, if none write "0"

4. Household Members & Monthly Income: If you give a Food Stamp or TANF Case Number for each Child, skip to Part 6.

Name of Household Member	Social Security Number	Gross Monthly Earnings (Before Deduction)		Monthly Welfare Payments/Child Support/Alimony	Monthly Payments From Federal, State, or Local Gov.	All Other Monthly Income
		JOB 1	JOB 2			
[Redacted]	[Redacted]	\$ 1200	\$ 0	\$ 0	\$ 0	\$ 0

For additional household members, attach a separate application with information.

5. SIGNATURE AND SOCIAL SECURITY NUMBER: I certify that all of the above information is true and correct and that all income is reported. I understand that this information is being given for the receipt of Federal funds that school officials may verify the information on the application and that deliberate misrepresentation of the information may subject me to prosecution under applicable State and Federal laws.

Signature of Adult Household Member: [Redacted]
 Social Security Number: [Redacted]
 Printed Name of Adult: [Redacted]
 Home Telephone Number: [Redacted]
 Work Telephone: [Redacted]
 Address (Street/Apt. No.): [Redacted]
 City/State/Zip: [Redacted]
 Date: [Redacted]

6. RACE: Please check the racial identity of your children. You are not required to answer this question.
 White, not Hispanic Black, not Hispanic Hispanic Asian/Pacific Islander American Indian/Alaska Native Other

7. SPECIAL SERVICES/OTHER BENEFITS: Special Services and Health Benefits are available to students enrolled in vocational education who qualify for benefits under the National School Lunch Program and whose parents/guardians sign to release the information. You do not have to complete this part to get free and reduced priced meals. Check appropriate lines for the appropriate program in which you want your child to participate.
 SCHOOL HEALTH FUND (Dental, Medical, Prescription and Vision Benefits) - YES THE DURHAM COUNTY HEALTH DEPARTMENT may use the information provided on this application to determine my child's eligibility for health benefits.
 VOCATIONAL EDUCATION - YES SCHOOL OFFICIALS may use the information provided on the application to determine eligibility for special services and assistance under the Carl D. Perkins Vocational and Technical Education Act of 1990.
 CHAPTER ONE - YES SCHOOL OFFICIALS may use the information provided on the application to determine eligibility for Chapter 1 benefits and services.
 I understand that I am releasing information that will show that I applied for free and reduced price meal benefits under the National School Lunch Program and am giving up my rights of confidentiality. I certify that I am the parent/guardian of the child for whom this application is being made.

SIGNATURE Parent/Guardian: [Redacted] Date: [Redacted]

TRICITY ACT (SECTION 5 OF THE NATIONAL SCHOOL LUNCH ACT) PROVIDES THAT, UNLESS YOUR CHILD'S FOOD STAMP OR TANF CASE NUMBER IS PROVIDED, YOU MUST INCLUDE THE SOCIAL SECURITY NUMBER OF THE ADULT HOUSEHOLD MEMBER SIGNING THE APPLICATION OR INDICATE THAT THE HOUSEHOLD MEMBER DOES NOT HAVE A SOCIAL SECURITY NUMBER. INCLUSION OF A SOCIAL SECURITY NUMBER IS NOT MANDATORY, BUT IF A SOCIAL SECURITY NUMBER IS NOT GIVEN ON AN APPLICATION, IT MAY BE NECESSARY FOR THE SCHOOL TO VERIFY THE CORRECTNESS OF INFORMATION SUPPLIED ON THE APPLICATION. THESE VERIFICATION EFFORTS MAY BE CARRIED OUT THROUGH PROGRAM PERSONNEL, ALIEN INVESTIGATORS AND MAY INCLUDE CONTACTING EMPLOYERS TO DETERMINE STATUS, CONTACTING A FOOD STAMP OR WELFARE OFFICE TO DETERMINE CURRENT REGISTRATION FOR BENEFIT OF FOOD STAMPS OR WELFARE BENEFITS, CONTACTING THE STATE EMPLOYMENT SECURITY OFFICE TO DETERMINE THE AVAILABILITY OF BENEFITS RECEIVED AND CHECKING THE REGISTRATION PROVIDED BY HOUSEHOLD MEMBERS TO VERIFY THE AMOUNT OF INCOME RECEIVED. THESE EFFORTS MAY RESULT IN A LOSS OR REDUCTION OF BENEFIT, ADMINISTRATIVE CLAIMS OR LEGAL ACTION IF INCORRECT INFORMATION IS REPORTED.

FOR SCHOOL USE ONLY

MONTHLY INCOME COMPARISON: MONTHLY T 4.18, OTHER 1, WELFARE 2, S 1.1, TWICE A MONTH 3.1

Total Household Size: 3, Monthly Income: 1200.00, Total Student: [Redacted]

CLASSIFICATION: [Redacted] Free, [Redacted] Reduced Price, [Redacted] Temporary Free, [Redacted] Other

Signature of School Official: [Redacted] Date: 12-19-04

VERIFICATION: [Redacted]

Reason for Eligibility Change: [Redacted]

Reason for Ineligibility Change: [Redacted]

Other: [Redacted]

Ref: "Notice of Change" Sent to Parent/Guardian: [Redacted] Signature of Verifier (School): [Redacted] Date: [Redacted]

Below is an NSLP Form for 2006-2007.

The federally-approved alternative mechanisms specifically outlined in the Code of Federal Regulations is Title 34- Education in Subpart A - Improving Basic Programs Operated by Local Educational Agencies - under section 200.28 Allocation of funds to school attendance areas and schools.

This is the text that actually outlines alternative mechanisms [(1) ...**alternative means, such as a survey**; or (2) for existing sources such as AFDC or tuition scholarship programs...] emphasis added.

NSLP can be used as a survey! The NSLP is a survey³!

Durham's NSLP "application" meets the "survey guidelines."

Survey Guidelines

If a school chooses to do a survey, the following guidelines apply:

- a. The survey must be sent to all families whose children attend the school.
- b. The survey must attain a return rate of at least 50%.
- c. The survey must, at a minimum, contain the following Information: Address of family Grade level of each child Size of the family Income level of the parents
- d. The survey must assure confidentiality. (The names of the families are not required.) <http://www.sl.universalservice.or1!/reference/alt.asp> 11/8/2005⁴

USAC guidelines permit "projections" based on Durham's survey "application".

The guidelines provide:

7. Projections based on surveys

³Survey means a formal or official examination of the particulars of something, made in order to ascertain condition, character, etc.; a sampling, or partial collection, of facts, figures, or opinions taken and used to approximate or indicate what a complete collection and analysis might reveal****Dictionary.Com*

⁴ **The USAC Fact Sheet was subsequently modified on June 21, 2007 to state that NSLP could not be used as a survey.** [Emphases added] First, Durham's FCC 471 applications are governed by the USAC Fact Sheet 2005 posting, and second, adding the NSLP application prohibition to the June 21, 1997 Fact Sheet is meaningless since it is not an FCC regulation.

If a school has sent a questionnaire to all of its families, and if it receives a return rate of at least 50 percent of those questionnaires, it may use that data to project the percentage of eligibility for E-rate purposes for all students in the school. For example, a school with 100 students sent a questionnaire to the 100 homes of those students, and 75 of those families returned the questionnaire. The school finds that the incomes of 25 of those 75 families are at or below the IEG for NSLP. Consequently, 33 percent of the students from those families are eligible for E-rate purposes. The school may then project from that sample to conclude that 33 percent of the total enrollment, or 33 of the 100 students in the school, are eligible for E-rate purposes. *Alternative Discount Mechanisms Fact Sheet - Schools & Libraries (USAC)*, <http://www.sl.universalservice.org/reference/alt.asp>, 11/8/2005

Both the NSLP Application and survey methods are “projections,” *i.e.*, how many students are eligible for free and reduced meals, or who meet the Income Eligibility Guidelines of the National School Lunch Program, or “actual count.”

Income Eligibility Guidelines of the National School Lunch Program (NSLP) Application (Actual Count) versus Survey Issues

The Federal-State Joint Board Universal Service on CC Docket No. 96-45, Recommended Decision, Adopted: Nov 7, 1996 Rel: Nov 8, 1996, stated, in relevant part that:

564. To minimize any additional recordkeeping or data gathering obligations, we seek the least burdensome manner to determine the degree to which a school or library is economically disadvantaged. ****We recognize that poverty data is also an***accurate gauge of economic disadvantage, and that EDLINC's proposal for calculating the level of discount for schools and libraries takes affordability into consideration. ***we remain open to the approaches that may also prove to be both minimally burdensome for schools *** and accurate measures of economic disadvantage. ***

567. *** we seek to minimize the administrative burden on school districts. That is, we do not seek to impose unduly burden some reporting and accounting requirements on school districts, but we also seek to ensure that the individual schools with the highest percentages of economically disadvantaged students may receive the steepest discounts. *** Therefore, we recommend that the district office certify to the administrator and to the service provider the number of students in each of its schools who are eligible for the national school lunch program. We recommend that the district office may decide to compute the discounts on an individual school basis or it may decide to compute an average discount. We further recommend that the school district assure that each school receive the full benefit of the discount to which it is entitled. [Emphases added]

See also , CC Docket 96-45, Rel, May 8,1997, Para 510, adopting the Federal-State Joint Board Recommendation regarding number of students eligible for NSLP discounts.

The USAC seeks to increase the administrative burden on Durham by its arbitrary, unreasonable, and unlawful imposition of an additional burdensome requirement. That is, the USAC's method does not allow Durham to use the NSLP as a survey when in fact it is a survey. If a comparison is made between NSLP Application and Durham's methodology, the requested data arrives at the same destination that is actual count.

Assuming, *arguendo*, the USAC is correct in stating that NSLP Applications cannot be used as a survey, this is unreasonable since the FCC is the only administrative body that can issue such a regulation with the effect of law. The policy behind USF for schools is to "assure that each school receive(s) the full benefit of the discount to which it is entitled." *Federal-State Joint Board Universal Service on CC Docket No. 96-45, Recommended Decision, Adopted: Nov 7, 1996 Rel: Nov 8, 1996, Para 567* The USAC,

by its unilateral policy which has evolved into a rule, seeks not only minimize that entitlement, but to create an additional administrative burden.

If the issue is E-rate waste, fraud and abuse, there is no evidence that it exist at Durham. If the issue is, as the FCC has stated, to calculate the greater discounts on telecommunications and other covered services for economically disadvantaged schools, then Durham's funding should be approved at the higher discount rate. If the issue is extrapolation, Durham has demonstrated that its methodology resulted in an "actual count." *Alternative Discount Mechanisms Fact Sheet - Schools & Libraries (USAC)*, <http://www.sl.universalservice.or1/reference/alt.asp>, 11/8/2005

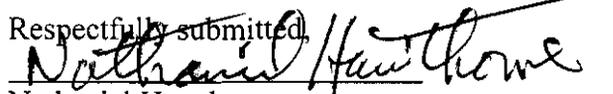
The **second aspect** of this appeal involves "ineligible services". Since the discount rate was improperly reduced, the FRNs that were adjusted due to ineligible services were disallowed at the lower, improperly reduced, discount rate. Applicant's data substantiated at HIGHER Discount Rate. Therefore, the ineligible services should be disallowed at the higher discount rate.

Conclusion:

Durham is Requesting the Following Action by the FCC:

Within 90 days or less Order funding for the higher discount rate for 2005/2006 set forth herein, and until this matter is resolved, the Applicant is requesting a STAY of all attempts to recovered funds under the Post Audit Commitment Adjustment Letters.

Respectfully submitted,



Nathaniel Hawthorne

District of Columbia Bar No. : 237693

27600 Chagrin Blvd., Ste. 265

Cleveland, OH 44122

tel.: 216/514.4798

e-mail: nhawthorne@telecomlawyer.net

Attorney for
Durham School District

Cc: Durham School District

Funding Commitment Adjustment Report for
Form 471 Application Number: 468411

Funding Request Number: 1291358
Services Ordered: INTERNET ACCESS
SPIN: 143027380
Service Provider Name: Time Warner Cable Information Services
Contract Number: 0006572
Billing Account Number:
Site Identifier: 126878
Original Funding Commitment: \$315,725.64
Commitment Adjustment Amount: \$35,574.72
Adjusted Funding Commitment: \$280,150.92
Funds Disbursed to Date \$314,155.83
Funds to be Recovered from Applicant: \$34,004.91

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$35,574.72. On the original Form 471 the applicant was approved at a 71 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$35,574.72 (\$444,684.00* (71% - 63%)) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit B

**Funding Disbursement Recovery Report
for Form 471 Application Number: 474948**

Funding Request Number: 1310175
Services Ordered: TELCOMM SERVICES
SPIN: 143004771
Service Provider Name: Verizon South Inc.
Contract Number: N/A
Billing Account Number:
Site Identifier: 126878
Funding Commitment: \$118,223.28
Funds Disbursed to Date: \$133,235.76
Funds to be Recovered from Applicant: \$2,385.50

Disbursed Funds Recovery Explanation:

After a thorough review, it was determined that \$2,385.50 in funds was improperly disbursed for this funding request. During the course of an audit it was determined that funding was provided for the following ineligible items: equipment, premium Access downloads, service visits and directory advertising. The pre-discount ineligible costs associated with these items are \$3,786.50. At the applicants 63 percent discount rate this resulted in an improper disbursement of \$2,385.50. FCC rules provide that funding may be approved only for eligible products and/or services. The USAC web site contains a list of eligible products and/or services. See the web site, www.universalservice.org/sl/about/eligible-services-list.aspx for the Eligible Services List. In this situation, the applicant made the certifications on the BEAR Form listed below indicating that the services and/or equipment provided to the applicant were eligible for funding. On the BEAR Form, the authorized person certifies at Block 3, Item A that discount amounts for which reimbursement is sought represent charges for eligible services delivered to and used by eligible entities. Therefore, USAC has determined that the applicant is responsible for the rule violation. Accordingly, USAC is seeking recovery of \$2,385.50 from the applicant.

Exhibit C

Funding Commitment Adjustment Report for
Form 471 Application Number: 511389

Funding Request Number: 1406880
Services Ordered: TELCOMM SERVICES
SPIN: 143004771
Service Provider Name: Verizon South Inc.
Contract Number: NA
Billing Account Number:
Site Identifier: 126878
Original Funding Commitment: \$89,092.80
Commitment Adjustment Amount: \$7,747.20
Adjusted Funding Commitment: \$81,345.60
Funds Disbursed to Date \$13,485.60
Funds to be Recovered from Applicant: \$0.00

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$7,747.20. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$7,747.20 (\$129,120.00* (69% - 63%)) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit D

Funding Commitment Adjustment Report for
Form 471 Application Number: 510116

Funding Request Number: 1404228
Services Ordered: TELCOMM SERVICES
SPIN: 143027380
Service Provider Name: Time Warner Cable Information Services
Contract Number: 0006572
Billing Account Number:
Site Identifier: 126878
Original Funding Commitment: \$246,818.52
Commitment Adjustment Amount: \$21,462.48
Adjusted Funding Commitment: \$225,356.04
Funds Disbursed to Date \$212,818.62
Funds to be Recovered from Applicant: \$0.00

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$21,462.48. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$21,462.48 (\$357,708.00* (69% - 63%)) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit E

Funding Commitment Adjustment Report for
Form 471 Application Number: 520711

Funding Request Number:	1433429
Services Ordered:	TELCOMM SERVICES
SPIN:	143008900
Service Provider Name:	AllTel Communications
Contract Number:	MTM
Billing Account Number:	RAK5739
Site Identifier:	126878
Original Funding Commitment:	\$57,960.00
Commitment Adjustment Amount:	\$5,040.00
Adjusted Funding Commitment:	\$52,920.00
Funds Disbursed to Date	\$19,810.17
Funds to be Recovered from Applicant:	\$0.00

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$5,040.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$5,040.00 ($\$84,000.00 \times (69\% - 63\%)$) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit F

Funding Disbursement Recovery Report
for Form 471 Application Number: 520711

Funding Request Number: 1433429
Services Ordered: TELCOMM SERVICES
SPIN: 143008900
Service Provider Name: AllTel Communications
Contract Number: MTM
Billing Account Number: RAK5739
Site Identifier: 126878
Funding Commitment: \$52,920.00
Funds Disbursed to Date: \$19,810.17
Funds to be Recovered from Applicant: \$739.99

Disbursed Funds Recovery Explanation:

After a thorough review, it was determined that \$739.99 in funds was improperly disbursed for this funding request. During the course of an audit it was determined that funding was provided for the following ineligible items: equipment, premium Access downloads, service visits and directory advertising. The pre-discount ineligible costs associated with these items are \$1,174.58. At the applicants 63 percent discount rate this resulted in an improper disbursement of \$739.99. FCC rules provide that funding may be approved only for eligible products and/or services. The USAC web site contains a list of eligible products and/or services. See the web site, www.universalservice.org/sl/about/eligible-services-list.aspx for the Eligible Services List. In this situation, the applicant made the certifications on the BEAR Form listed below indicating that the services and/or equipment provided to the applicant were eligible for funding. On the BEAR Form, the authorized person certifies at Block 3, Item A that discount amounts for which reimbursement is sought represent charges for eligible services delivered to and used by eligible entities. Therefore, USAC has determined that the applicant is responsible for the rule violation. Accordingly, USAC is seeking recovery of \$739.99 from the applicant.

Exhibit G

Funding Commitment Adjustment Report for
Form 471 Application Number: 474948

Funding Request Number:	1310175
Services Ordered:	TELCOMM SERVICES
SPIN:	143004771
Service Provider Name:	Verizon South Inc.
Contract Number:	N/A
Billing Account Number:	
Site Identifier:	126878
Original Funding Commitment:	\$133,235.76
Commitment Adjustment Amount:	\$15,012.48
Adjusted Funding Commitment:	\$118,223.28
Funds Disbursed to Date	\$133,235.76
Funds to be Recovered from Applicant:	\$15,012.48

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$15,012.48. On the original Form 471 the applicant was approved at a 71 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$15,012.48 (\$187,656.00 *(71% - 63%)) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit H

Funding Commitment Adjustment Report for
Form 471 Application Number: 511551

Funding Request Number: 1433277
Services Ordered: TELCOMM SERVICES
SPIN: 143000892
Service Provider Name: Nextel South Corp.
Contract Number: MTM
Billing Account Number:
Site Identifier: 126878
Original Funding Commitment: \$91,080.00
Commitment Adjustment Amount: \$7,920.00
Adjusted Funding Commitment: \$83,160.00
Funds Disbursed to Date \$27,430.89
Funds to be Recovered from Applicant: \$0.00

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$ 7,920.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$ 7,920.00 (\$132,000.00* (69% - 63%)) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit I

Funding Commitment Adjustment Report for
Form 471 Application Number: 520711

Funding Request Number:	1433429
Services Ordered:	TELCOMM SERVICES
SPIN:	143008900
Service Provider Name:	AllTel Communications
Contract Number:	MTM
Billing Account Number:	RAK5739
Site Identifier:	126878
Original Funding Commitment:	\$57,960.00
Commitment Adjustment Amount:	\$5,040.00
Adjusted Funding Commitment:	\$52,920.00
Funds Disbursed to Date	\$19,810.17
Funds to be Recovered from Applicant:	\$0.00

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$5,040.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$5,040.00 ($\$84,000.00 * (69\% - 63\%)$) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit J

Funding Commitment Adjustment Report for
Form 471 Application Number: 511450

Funding Request Number: 1433214
Services Ordered: TELCOMM SERVICES
SPIN: 143004771
Service Provider Name: Verizon South Inc.
Contract Number: MTM
Billing Account Number: 919-560-2000
Site Identifier: 126878
Original Funding Commitment: \$134,964.00
Commitment Adjustment Amount: \$11,736.00
Adjusted Funding Commitment: \$123,228.00
Funds Disbursed to Date \$58,944.41
Funds to be Recovered from Applicant: \$0.00

Funding Commitment Adjustment Explanation:

After a thorough review, it was determined that the funding commitment for this request must be reduced by \$ 11,736.00. On the original Form 471 the applicant was approved at a 69 percent discount. FCC rules indicate that the level of poverty shall be measured by the percentage of the student enrollment that is eligible for a free or reduced price lunch under the national school lunch program or a federally-approved alternative mechanism. During the course of an audit it was determined that the applicant is only eligible to receive a 63 percent discount. The Durham Public School District used the NSLP data for determining poverty level. Lunch program applications were provided to each student. For schools that had over 50 percent of the lunch program applications returned, the school treated these under what the e-rate coordinator termed the "survey method". The results were used to project the percentage of students eligible for free or reduced price lunch by computing a percentage of approved applications to total applications received and applying that percentage to the total enrolled students. Aside from being an incorrect application of the alternative mechanism, i.e. survey, for determining poverty levels, the calculation used by the school skewed the results to achieve a higher poverty level as only families wishing to apply to the Free and Reduced Price Lunch program responded to the applications sent from the schools. Accordingly, the commitment has been reduced by \$11,736.00 ($\$195,600.00 * (69\% - 63\%)$) and if recovery is required, USAC will seek recovery from the applicant.

Exhibit K

Funding Disbursement Recovery Report
for Form 471 Application Number: 511450

Funding Request Number: 1433214
Services Ordered: TELCOMM SERVICES
SPIN: 143004771
Service Provider Name: Verizon South Inc.
Contract Number: MTM
Billing Account Number: 919-560-2000
Site Identifier: 126878
Funding Commitment: \$123,228.00
Funds Disbursed to Date: \$58,944.41
Funds to be Recovered from Applicant: \$843.89

Disbursed Funds Recovery Explanation:

After a thorough review, it was determined that \$843.89 in funds was improperly disbursed for this funding request. During the course of an audit it was determined that funding was provided for the following ineligible items: equipment, premium Axxess downloads, service visits and directory advertising. The pre-discount ineligible costs associated with these items are \$1,339.50. At the applicants 63 percent discount rate this resulted in an improper disbursement of \$843.89. FCC rules provide that funding may be approved only for eligible products and/or services. The USAC web site contains a list of eligible products and/or services. See the web site, www.universalservice.org/sl/about/eligible-services-list.aspx for the Eligible Services List. In this situation, the applicant made the certifications on the BEAR Form listed below indicating that the services and/or equipment provided to the applicant were eligible for funding. On the BEAR Form, the authorized person certifies at Block 3, Item A that discount amounts for which reimbursement is sought represent charges for eligible services delivered to and used by eligible entities. Therefore, USAC has determined that the applicant is responsible for the rule violation. Accordingly, USAC is seeking recovery of \$843.89 from the applicant.

Exhibit L



United States Department of Agriculture
Food and Nutrition Service

Southeast Region

Reply to
Attn. of: SA 9-1

Subject: Policy 210.18-03: Coordinated Review (CRE) Issues and Supplemental Guidance

To: All State NSLP Directors
Southeast Region

This policy letter is to reissue Coordinated Review (CRE) policy issues previously distributed in policy letters NSLP 94-1 and NSLP 95-13. Any changes made to the original memorandum are in bold.

The purpose of this memo is to address operational issues that have been raised during CRE reviews, to highlight areas in which the reviews showed common or continuous problems with implementation of program requirements, and to address questions and issues related to the CRE review form and procedures.

S-1 COUNTING THE NUMBER OF STUDENTS ELIGIBLE FOR BENEFITS

The eligible count must be determined by the reviewer independent of the school or SFA total eligible counts. Because this data is used to test the meal count system, students are to be counted in the category that the determining official has assigned, not the correct category if there is a difference. (The purpose of this rule is to allow the reviewer to compare total meal counts by category to the number students the school, e.g. roster, indicated where eligible by category.)

The count at the beginning or end of a month, the monthly average, and the highest count in the month are all acceptable methods for the SFA to obtain their eligible count. The CRE count should be higher, as CRE counts all students who were eligible during the month, even for only one day. This higher count is beneficial to the SFA, not detrimental.

S-2 CERTIFICATION (APPLICATIONS)

SFA's in the Southeast Region do not appear to have major problems with application approval. However, several questions related to determining eligibility required clarification as follows:

All State NSLP Directors

Page 2

Estimate Versus Actual Column

The S-6 provides two methods for computing the number of meals in error. The reviewer can choose to use the "Estimate" or "Actual" column. Some misunderstanding exists as to the differences and purposes of these two columns. First, it is helpful to remember that BOTH columns result in an ESTIMATE of the number of meals in error. The "Actual" column only differs from the "Estimate" column in that the "Actual" column takes into account the days in the review month when students were not yet enrolled in school or had withdrawn. To arrive at this number, the reviewer would have to add the calendar days each student was enrolled to arrive at the total maximum number of lunches reported in line 3. The "Estimate" column estimates this number by simply multiplying the number of students by the number of serving days, ignoring the fact that some students may not have been enrolled all month. The "Estimate" column was provided to lessen calculations done by the reviewer.

CRE recommends that reviewers use the easier "Estimate" column first. If the percentage of meals in error is close to 10 percent, the "Actual" column, which may reflect fewer days in error, should be completed to ensure that the SFA indeed has a PS 1 violation.

Note that both the "Estimate" and "Actual" column apply free and reduced priced ADP factors to the maximum number of meals in error to account for the fact that enrolled students do not eat meals every day. If an SFA's meal count system provides data on ACTUAL meals eaten by the students cited on the S-5, this data should be entered on the S-6 after the ADP factor is applied, i.e., line 5.

The number of meals in error calculated on the S-6 for the review period are intended to be used solely for determining if there is a PS 1 violation. This data should not be used as part of fiscal action.

GENERAL

Claims Review

As required by 7 CFR 210.8(a)(2), "at a minimum, the SFA shall compare each school's daily counts of free, reduced price and paid lunches against the product of the number of children in that school currently eligible for free, reduced price and paid lunches, respectively, times an attendance factor." Full implementation of these edit checks is important because they help ensure that monthly claims include only the number of free, reduced price and paid lunches served on any day of operation to children currently eligible for such lunches. The completion of the edit check must be coupled with follow-up activity and corrective action, as necessary, to determine the causes for edit checks which clearly indicate excessive meal counts. See 7 CFR 210.8 (a) (4).