



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

APPLICATION OF PITTSBURG

PRE-SCHOOL AND COMMUNITY

COUNCIL, INC.,

Applicant.

Docket No. 09-20-R

Recovery of Funds Proceeding

ACN: ED-OIG/A09-F0010

Appearances: John Diaz Coker, Esq. for the Pittsburg Pre-School and Community Council, Inc.

Rachel G. Peternith, Esq. and Richard B. Mellman, Esq., Office of General Counsel, United States Department of Education, for the Office of the Chief Financial Officer

Before: Chief Administrative Law Judge Allan C. Lewis

INITIAL DECISION

This is an appeal by the Pittsburg Pre-School and Community Council, Inc. (PPCC) of a preliminary departmental decision issued by the Office of the Chief Financial Officer (ED). The preliminary departmental decision determined that various expenditures by PPCC were not allowable costs under the Early Reading First (ERF) grant and the 2000 and 2004 Migrant Education Even Start (MEES) grants and that PPCC failed to comply with its maintenance of effort requirement under the 2000 and 2004 MEES grants. As a result, ED sought a recovery of \$526,272 in Federal funds. Based upon the findings of fact and conclusions of law, *infra*, ED may recover \$422,966.

I. Opinion

A. Background

PPCC is a nonprofit organization located in Pittsburg, California. During the period in question, PPCC operated pre-school programs and provided other services to low-income and no-income families in Contra Costa County, California. These services included pre-school programs, youth services, senior services, job training, and health education. Most of the

services were offered at centrally located PPCC facilities, frequently in shared classrooms. PPCC's services were funded primarily by various Federal and State programs.¹

In the early 2000s, PPCC applied for and became a recipient of three grants awarded pursuant to competitive processes overseen by the Department. The ERF grant was a three-year grant beginning October 1, 2003. This program was designed to prepare pre-school aged children to enter kindergarten with the language, cognitive, and early reading skills necessary for reading success. PPCC voluntarily terminated this grant on August 12, 2005.

The second and third grants were made under the MEES program, each for four years. The MEES program was designed to break the cycle of poverty and improve the literacy levels of migrant families through an integrated program of family literacy services. The program provided daily family literacy activities including computer-based adult basic education classes, beginning and advanced computer technology classes, enriched child care, school-age tutoring, and intergenerational education that engaged parents and their children in computer-based learning activities. PDL Ex. 5 at 20 of 58.

PPCC's initial grant in issue began on November 1, 2000 (2000 MEES grant), and the succeeding grant began on November 1, 2004 (2004 MEES grant). Participants in the MEES program were required to provide matching funds from non-MEES sources each year in increasing amounts over the four-year grant period. On May 11, 2005, the Department placed PPCC on "high risk" status for the 2004 MEES grant due to concerns raised by an audit initiated by the Department's Office of the Inspector General (OIG). Subsequently, the 2004 MEES grant was terminated, effective October 1, 2005. PDL Ex. 3 at 3 of 34.

The OIG audited PPCC's programs for the period of October 1, 2003 through February 28, 2005. The audit report was issued in March, 2006 and disallowed a total of \$889,171 in expenditures across the three grants as follows:

<u>Grant</u>	<u>Disallowed</u>
ERF	\$553,473
2000 MEES	\$258,973
2004 MEES	\$ 76,725

After the report was issued, PPCC provided additional information to ED, which modified some findings and increased disallowed costs in other findings based on expenditures not previously

¹ PPCC was a member of a consortium of eleven public and non-profit organizations that sought to address the various needs of impoverished families living in one of the poorest urban areas of the State of California. The consortium was named Project PALABRA, an acronym for Partnership Accelerates Language Acquisition and Beginning Reading Achievement.

considered by the OIG. Ultimately, ED issued a program determination with its findings on March 19, 2009, that sought the recovery of \$526,272 as follows:

<u>Grant</u>	<u>Disallowed</u>
ERF	\$123,655
2000 MEES	\$206,771
2004 MEES	\$195,846

On March 25, 2009, PPCC received the above program determination letter. Thereafter, it filed an appeal with the Office of Administrative Law Judges on April 17, 2009. As such, the appeal was filed within the 60-day period prescribed by 20 U.S.C. § 1234a(b)(1) (2008). Accordingly, the tribunal has jurisdiction in this matter.

B. Resolution of the Program Issues

In its PDL, ED segregated its findings across the three grants at issue into four general categories and then further into subcategories where the issues pertinent to each grant were addressed. The four general categories are as follows:

1. Charges that ED deemed not necessary, unapproved or unrelated to grant activities.
2. Personnel costs charged to the grants that lacked the required documentation.
3. Other non-personnel costs charged to the grants that lacked adequate documentation.
4. PPCC's failure to satisfy its matching cost requirement for the MEES grants.²

Finding 1(a)(1)(b) ERF Grant Issue: Testing/Data Collection Amount: \$42,000

Under the ERF grant, PPCC was responsible for collecting certain data about its program activities and producing an annual evaluation report. As described in its grant application, PPCC was to have a full-time employee perform the function of a data collection administrator. The employee named in the application, Mr. Brad Marsh, would have overseen the assessment of the treatment and control of the child participants and their families. PPCC estimated the cost of Mr.

² This decision addresses all the issues presented by the PDL. The potential recoveries under Findings 1, 2, and 3 pertaining to the 2000 and 2004 MEES grants are subsumed within the recoveries sought under Finding 4, the matching requirement. The potential recoveries under Finding 4 represent all of the Federal funds distributed to PPCC for the pertinent period. The tribunal addressed these findings in order to provide a complete record.

Marsh's services at \$42,000. PPCC's grant application also described a contractual arrangement for the "evaluation" of its program by the Center for Evaluation and Research (CER), which was estimated to cost \$44,000. PDL Ex. 4 at 15 and 19.

After the grant was awarded, PPCC entered into not one, but two contracts with CER during the start-up stage of the grant program in September/October, 2003. One contract in the amount of \$44,000 per year required CER to perform the evaluation of PPCC's ERF project as described in the grant application and included functions such as the creation of a data collection process, on-site evaluation visits, and the production of a yearly comprehensive evaluation report. This expenditure is not contested by ED. The second contract, which is at issue, was apparently an oral contract that paid \$42,000 per year to CER for it to collect the data and information necessary for the evaluation of the program. CER, in turn, hired Mr. John Greene to perform this task.

ED disallowed this \$42,000 expenditure to CER on two grounds. In ED's view, this arrangement with CER violated two "prior approval" requirements of 34 C.F.R § 75.25 (2003), specifically, approval by the Secretary was required prior to contracting out any work originally designated to be performed by the grantee in the grant award, and approval by the Secretary was also required prior to replacing a key person specified in the application or award document. In addition, ED viewed this expenditure as duplicative, arguing that the function of testing and collection of data was included within the evaluation agreement with CER.

In response, PPCC argues that the \$42,000 expenditure paid to CER for the collection of testing results and other data was an economical and appropriate expense because PPCC was contractually required to submit to ED a yearly evaluation of the program which included testing and data gathering.

Section 74.25 of 34 C.F.R. sets forth the rules regarding revisions of budget and program plans and requires prior approval from the Secretary before implementing a change in a key person specified in the application or the contracting out of previously designated in-house work--

(a) The budget plan is the financial expression of the project or program as approved during the award process.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget, and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from ED for one or more of the following program or budget related reasons:

(2) Change in a key person specified in the application or award document.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment, or general support services.

It is clear that PPCC's grant application designated the data collection administrator as an internal staff position. However, during the performance of the grant, PPCC outsourced the data collection duties to CER under an oral agreement. The record shows that the transfer of these duties was undertaken without seeking prior approval by the Secretary. As such, this action violated 34 CFR § 75.25(c)(8).³ Therefore, it is the tribunal's determination that the \$42,000 payment to CER constitutes an unallowable expenditure.⁴ In this instance, the amount of the unallowable expenditure as a potential recovery by ED must be reduced from \$42,000 to \$21,350 due to the effect of the statute of limitations.⁵

Finding 1(a)(1)(d)(1) ERF Grant Issue: Conference/Travel – Payton Amount: \$3,431

ED disallowed \$3,431 of expenditures made on behalf of Ms. Kimberly Payton and incurred for fees, travel, and other expenses to attend a conference related to the ERF grant program.⁶ At the time, Ms. Payton was the project director for the MEES grant, the other Federal program overseen by PPCC, and did not work on matters affecting the ERF program.

³ ED's ancillary argument regarding the key person prohibition of 34 CFR § 74.25(c)(2) is inapposite. This subsection applies to changes in personnel within the organization, not the outsourcing of those duties, as is the case here. Even if the key person provision were construed as ED urges, ED's argument still fails because the data collector was not a key person. The key personnel in PPCC's ERF grant were the project director and the education specialists, individuals who provided the essential services that carried out the objectives of the program. The data collector gathered information that was, in turn, included in PPCC's annual report. Hence, these services were a minor aspect of the grant.

⁴ ED's third argument in disallowing this expenditure -- that the duties of the data collector are included within the duties of the evaluator -- is without merit. It has no factual basis and is contrary to the evidence in the record.

⁵ Under 20 U.S.C. § 1234a(k) (2000), ED is barred from recovering any expenditures that were misspent more than five years prior to the grant recipient's receipt of a preliminary departmental letter seeking the return of those funds. In this case, ED's demand was received by PPCC on March 25, 2009. As a consequence, any ERF grant funds improperly spent prior to March 25, 2004, are barred from recovery. Here, the statute of limitations precludes the potential recovery of \$69,997 in ERF grant funds. Appropriate adjustments are noted in the opinion.

⁶ PDL at 28–30.

PPCC argues that these expenditures were appropriate and properly charged to the ERF grant because Ms. Payton gained important cross-training on the ERF program through her attendance. According to PPCC's executive director, Ms. Frances Greene, cross-training was necessary so that the directors and staffs of the ERF and the MEES programs could work together and perform tasks related to the other program, if required.

ED responds that Ms. Payton was not an employee assigned to the ERF grant; therefore, cross-training for her did not accrue a benefit to the grant, and, hence, this expense could not be charged against it. ED adds that PPCC's ERF grant application did not include any reference to cross-training or coordination between the ERF and the MEES programs. Under these circumstances, ED maintains that these expenditures were properly disallowed.

The tribunal agrees with ED. These expenditures were paid for the training of Ms. Payton, the project coordinator of the MEES program. She had no responsibilities for providing services under the ERF grant program. Further, the concept of cross-training was not part of PPCC's ERF program as set forth in its application. As such, the tribunal finds that these expenditures were not incurred for the benefit of the ERF grant program and are not allowable costs. While \$3,431 was improperly expended, the amount of disallowance is \$2,219, a figure that reflects the exclusion of \$1,212 due to the effect of the statute of limitations. ED. Ex. 2 at 2 and 3 of 8.

Finding 1(a)(1)(d)(2) ERF Grant Issue: Conference charges Amount: \$570

ED is precluded by operation of the statute of limitations from recovering \$570 of expenditures relating to a conference that is sought under this finding. ED Ex. 2 at 3 of 8. Hence, no discussion regarding this issue is warranted.

Finding 1(a)(1)(d)(3) ERF Grant Issue: Greene/Girardelli Travel Charges Amount: \$483

ED disallowed three expenditures related to a conference in Reno, Nevada incurred by Ms. Dawn Girardelli, the project director of ERF program.⁷ The expenses disallowed were an airfare charge of \$363, an airline ticket change charge of \$100, and an excess per diem charge of \$20.⁸

⁷ ED also disallowed an expenditure of \$171 for an airline ticket for Ms. Greene. The statute of limitations bars the recovery of this expenditure.

⁸ PDL at 32–34.

In February, 2004, PPCC purchased a round-trip airline ticket for Ms. Girardelli to fly from San Francisco to Reno leaving on Saturday, May 1st and returning on Thursday, May 6th. The cost of the ticket was \$171, and this cost has been allowed as an appropriate expenditure.

On Friday, April 30th, one day before she was to fly to Reno, Ms. Girardelli purchased a second airline ticket -- a one-way ticket to Reno for \$363 that left San Francisco at 8:15 pm that night. She used this ticket to fly to Reno. This expenditure is at issue.

Two days later, on Sunday, May 2nd, Ms. Girardelli cancelled the Thursday return flight to San Francisco, originally booked in February, and changed her return flight to a date that is not in the record, incurring a \$100 rebooking fee which is at issue.

PPCC argues that these fees were the result of unforeseen circumstances. According to Ms. Greene, the executive director of PPCC, the “[c]hanges were made . . . [to the] airline tickets and per diem for travel to Reno, Nevada, because of the sudden illness of her child. [Ms. Girardelli] . . . was able to secure a babysitter for the child only after the changes were made.” PPCC Ex. 7 Greene Affid. at 2.

ED argues that the sudden illness of Ms. Girardelli’s child is not a plausible explanation for the ticket changes. The illness of a child cannot explain why Ms. Girardelli would have to leave one day earlier than her existing ticketed flight.

The tribunal agrees. PPCC’s explanation defies logic. The sudden illness of a child cannot explain an earlier departure. Sudden illness might explain a ticket change fee incurred while at the Reno conference in order to schedule an earlier return home to a child taken ill, but that is not the explanation offered here. Here, the record is devoid of any reasonable explanations that would support a finding that expenditures were allowable costs. Accordingly, the tribunal finds that PPCC has not carried its burden of proof, and, therefore, the expenditures for the airfare and ticket change charge are not allowable costs.

Lastly, ED disallowed \$20 of the total amount of per diem claimed by Ms. Girardelli for the conference. This amount represents a disallowance of \$10 per day of the \$40 per diem for the first and last days of her travel. Inasmuch as PPCC did not have a written travel policy, the Federal per diem rates apply. OMB Circular A-122, Appendix B, paragraph 51.a and b. Section § 301-11.101 of 41 C.F.R. limits the per diem rate for the first and last days of travel to 75% of the per diem rate. As such, the tribunal finds that \$20 of her per diem is not an allowable expenditure.

In summary, the tribunal disallows a total of \$483 of expenditures by PPCC.

Finding 1(a)(1)(e) *ERF Grant* *Issue: Books & Supplies* *Amount: \$138*

The recovery of \$138 expended for books and supplies is barred by the statute of limitations. ED Ex. 2 at 4 of 8.

Finding 1(a)(1) *ERF Grant* *Issue: Other Disallowed Costs* *Amount: \$3,036*

ED disallowed \$3,036 in expenditures incurred by members of the teaching staff of the ERF program for airfare, per diem, and hotel charges, apparently to attend conferences relating to early reading matters.⁹ ED's theory of disallowance is that the individuals sent were not qualified to be employed as early reading specialists and, therefore, their salaries were not allowable expenses. Like their salaries, any expenses incidental to their positions were also not allowable.

The tribunal agrees that the allowance of the incidental expenses is governed by the resolution of the salary issue in Finding 2(a), *infra*. There, the tribunal determined that the salaries of the teaching staff personnel are not allowable costs. Accordingly, the tribunal finds that the expenditure of \$3,036 for incidental, travel-related items is also not an allowable cost.

Finding 1(b) *2000 MEES Grant* *Issue: Flyer* *Amount: \$433*

ED disallowed an expenditure of \$433 paid to Gaptrio Designs for the purchase of 500 two-sided Neuestra color flyers on the theory that this expense was incurred for another MEES project operating in Costa Contra County, California near Pittsburg.¹⁰ PPCC did not address this item in its submission. As such, this item is considered conceded by PPCC. Therefore, the tribunal finds that PPCC incurred an unallowable expenditure in the amount of \$433.

Finding 1(c)a *2004 MEES Grant* *Issue: Spa Fee* *Amount: \$25*

ED seeks to recover a spa charge of \$25 that was incurred by an employee while attending a conference.¹¹ PPCC agrees that such an expenditure is improper. In July 2007, PPCC asserted that the posting of the spa fee was in error and that credit was given to the account before it paid the bill. PPCC also attached a receipt that purportedly confirmed the credit. However, the receipt submitted to ED was the original bill which included the spa charge and therefore, did not confirm a credit. PPCC's submission did not include a revised bill or any other

⁹ PDL at 37-38.

¹⁰ PDL at 38-39.

¹¹ PDL at 39.

documentation that showed that this charge was paid by anything other than MEES funds. As PPCC concedes, such a charge is not permissible. Accordingly, the spa charge is disallowed.

Finding 1(c)b 2004 MEES Grant Issue: Excessive Per Diem Amount: \$40

ED seeks to recover \$40, an overcharge of \$10 in per diem for the first and last days of travel for two PPCC employees who attended a conference in Washington, D.C.¹² PPCC did not have a written travel policy that established per diem rates. In the absence of a policy, the Federal per diem rates apply. OMB Circular A-122, Appendix B, paragraph 51.a and b. In this instance, a travel allowance of 75% of the per diem rate is permitted for the day of departure and the last day of travel. 41 C.F.R. § 301-11.101. Hence, a per diem rate of \$40 is reduced by \$10 to \$30 per day per person for the first and last days of travel. The expenditure of \$40 was properly disallowed by ED.

Finding 1(c)c 2004 MEES Grant Issue: Evaluation Contract Amount: \$11,090

ED seeks to recover \$11,090 paid in June 2005 by PPCC to Mr. Pablo Stansbery for his services to prepare a report that summarized the effectiveness of PPCC's program performance under the MEES grant during its 2004-05 fiscal year.¹³ The report was prepared in June 2005 for submission to ED. ED's theory of disallowance is that this expenditure was not obligated within the period prescribed by law. ED asserts that the obligation of MEES funds occurred in February 2006 based upon a February 2006 contract. Since the period to obligate 2004 MEES grant funds expired prior to the date of this contract, this expenditure was not an allowable cost.

ED based its finding on the first page of a purported February 2006 contract and a one-page proposal by Mr. Stansbery. The contract that ED examined indicates that PPCC and Mr. Stansbery entered into an agreement as of February 6, 2006, for the latter's services to prepare the MEES report at a cost of \$11,040. PDL at 41; PDL Ex. 18, at 9 and 10 of 13. The record does not reflect whether this agreement was signed.

Subsequently, in its submission to the tribunal, PPCC provided an unsigned three-page agreement with Mr. Stansbery. The agreement was effective as of June 1, 2005, for Mr. Stansbery's services to prepare and complete the MEES report by July 1, 2005, at a cost of \$11,090. The agreement provided for the same services as described in the February 2006 contract previously submitted to ED. PPCC Ex. 1B.

¹² PDL at 40.

¹³ PDL at 41.

Thus, the tribunal has before it two contracts between the same parties for the same services but with different dates and contract amounts. I find that the June 2005 contract, not the February 2006 contract, is the relevant agreement. My finding is based on two facts: the contracted amount and dates of service for the June 2005 agreement. Both are consistent with an expenditure made by PPCC in June, 2005.

However, the introduction of the unsigned June 2005 contract at this stage in the proceeding is problematic because it is not the same contract that ED relied upon in formulating its finding on this matter in the PDL. If the June 2005 contract, as opposed to the February 2006 contract, is the relevant instrument, then ED's theory of recovery is without foundation. This is so because the expenditure was, in fact, obligated within the appropriate period in issue.¹⁴

In response to PPCC's submission of the second contract, ED fashioned three new, different grounds for recovery. ED argued that this expenditure of \$11,090 was unallowable as it was—

- (1) not a lawful obligation of MEES funds under 34 CFR § 75.707 as the payment was based on an unsigned agreement and not a "binding written commitment to obtain the work";
- (2) incurred in violation of a special condition imposed on PPCC's 2004 MEES award by ED's letter of May 11, 2005 that required prior ED approval of further 2004 MEES grant expenditures, and alternatively;
- (3) not supported by documentation that confirms that Mr. Stansbery provided legitimate services to the MEES program valued at \$11,090. ED Response to PPCC's Requested Findings of Fact at 3-4.

ED's first argument, the "lawful obligation argument", is based upon the premise that non-employee personal service can be rendered to an organization only pursuant to a written contract. As support, ED cites 34 C.F.R. § 75.707. This regulation, in conjunction with 34 C.F.R. § 75.703, provides guidance to a grantee regarding the timing of obligations. The initial rule, as set forth by 34 C.F.R. § 75.703 states that a grantee may use grant funds only for obligations that it makes during the grant period. Regulations Section 75.707 provides guidelines defining when the obligation of funds occurs, *i.e.*, the date of a binding written agreement or upon the performance of the subject matter.

¹⁴ Under ordinary circumstances, a new ground for recovery raised during a proceeding will be rejected if it is at variance with the PDL. This case presents an exception, and the arguments will be heard. Here, PPCC represented to ED that the February 2006 contract was the governing instrument. This was an error on the institution's part. PPCC cannot be allowed to gain an advantage from its error to the potential detriment of the Department. As such, ED's new grounds for recovery will be considered.

ED's argument misconstrues this regulation and attempts to transform a timing regulation into a substantive regulation.¹⁵ As applied here, absent a written agreement, the obligation of funds occurred when the services were performed. Accordingly, the funds were obligated when Mr. Stansbery prepared the MEES report in June, 2005, which was within the grant year.

Next, ED argues that the \$11,090 spent on the evaluation contract with Mr. Stansbery was properly disallowed because PPCC failed to obtain ED's approval of this expenditure as was required by its Reimbursement/Special Conditions letter of May 11, 2005. ED Response to PPCC's Requested Findings of Fact at 4.

ED's argument lacks merit. Upon examination of OME's Reimbursement/Special Conditions letter, it is clear that the condition imposed extended only to expenditures or obligations to be paid from future draw-downs of MEES funds—

[t]he Department will allow PPCC to draw down grant funds on the PALABRA II MEES grant only after PPCC first documents and justifies to the Department's satisfaction each expenditure for which the drawdown is requested. PPCC may not draw down funds to pay for an expenditure or obligation of MEES funds until it has obtained from the Department specific approval to do so. PDL Ex. 5 at 36-37 of 58.

The letter does not specifically address and cannot be interpreted as restricting the expenditure of current cash on hand. ED agrees that this expenditure was paid by PPCC from \$64,275.53 in MEES funds that PPCC had on hand as of May 11, 2005, the date when the special condition was imposed.¹⁶ Hence, there is no violation of the special condition set forth in the letter of May 11, 2005.

Lastly, ED argues that the \$11,090 disallowance is appropriate because it is "not supported by documentation that confirms that Mr. Stansbery provided legitimate services to the MEES program valued at \$11,090." In its post-audit request for information, ED indicated that its concerns about this expenditure would be satisfied "specifically by providing a copy of the contract with Pablo Stansbery." PDL at 41. The unsigned June 2005 contract outlines the nature of the work as it pertained to the 2004 MEES grant. The cost of the work was established at

¹⁵ If ED's interpretation were correct, it would lead to absurd results. For example, the office copy machine requires repair. Under ED's interpretation, if the repair were made by the serviceman pursuant to a binding written contract, then the cost of the repair would constitute an allowable cost. On the other hand, a repair made pursuant to a request made by telephone would be a non-allowable cost since there was no binding written contract. This latter conclusion would be unreasonable.

¹⁶ PPCC apparently drew down funds on a *pro rata* monthly basis rather than an as-needed basis and thereby had accumulated excess funds. These funds are the subject matter of Finding 5 of the PDL.

arm's length. Hence, the contract satisfies ED's criteria. The expenditure was reasonable, necessary and allocable to the MEES grant. There is nothing in the record to suggest otherwise.

Based on the above, the tribunal concludes that ED may not recover \$11,090 paid for an evaluation contract with Mr. Stansbery under the 2004 MEES grant.

Finding 1(c)d 2004 MEES Grant Issue: Window Blinds Amount: \$791

ED disallowed an expenditure of \$791 for window blinds.¹⁷ According to the receipt in the record, the blinds were to be delivered to an address designated as "c/o 4235 Century Blvd. in Pittsburg" and were measured for windows designated as den/office, kitchen, and bedroom. The OIG auditors maintained that the above address was a "home address", the implication of which is that the blinds were bought for personal use, not a legitimate expense under the grant. PDL Ex. 9, at 22 of 23.

During the post-audit exchange of information, ED questioned whether this expenditure was for a private residence. In response, PPCC denied this was the case and invited ED to view the blinds in the classroom as evidence that they were not purchased for a private residence. ED chose not to inspect the classroom. Thus, the primary issue is a factual question, namely, whether the window blinds were purchased for use in a residential house and, therefore unrelated to the grant, or for a classroom located in one of PPCC's facilities.

PPCC's program director for the grant testified that the blinds were acquired to reduce the glare in a classroom used for grant activities so that the children could see the monitors of the recently installed computers. PPCC Ex. 1, Payton Affid. at 2.

ED's rebuttal to this information takes the form of a question – why did the testimony of PPCC's program director not include an explanation as to why the receipt for the blinds states that three sets of blinds were to be installed in rooms normally found in a residence?

The tribunal notes, first, that the receipt was for six blinds of varying sizes for rooms designated as a bedroom, kitchen, and den/office. Based on the number of the blinds and their unusual dimensions, it is possible though unlikely that the blinds were made for a personal residence, despite the rooms designated on the order forms. By the same token, the variety of dimensions would also be unusual for a typical commercial facility or school. Thus, the description on the receipt alone does not establish conclusively the purpose for which the blinds were purchased.

¹⁷ PDL at 41-42.

Second, the designated delivery address for the blinds was an “in care of” location, and that location is the address for the 3 Day Blinds’ store. Thus, the address on the receipt does not support ED’s argument, nor does it indicate whether the blinds were purchased for a private residence or for a classroom.

In short, the record consists of a receipt and a sworn statement that the blinds were used in connection with activities related to the grant. The receipt is ambiguous and offers no assistance in resolving the factual question. Under these circumstances, PPCC met its burden of proof with its sworn statement -- the blinds were necessary for the grant program and the cost thereof was reasonable.

ED raises a second issue regarding this expenditure and argues that, because the classroom was used for activities under multiple grants, the cost of the blinds should be allocated among the different Federal or state grant programs, and non-grant programs that use the classroom. Hence, only a proportional and lesser but undetermined amount of the cost of the blinds should be an allowable cost.

ED’s argument is without merit. While the room was used apparently for multiple purposes, it was the addition of the computers for the MEES program that drove the need for the installation of the blinds. There was little or no benefit derived from the blinds by the other grant programs. Accordingly, there is no need to allocate a cost incurred for a specific program across several, especially where, as here, the amount in controversy is minimal. The cost of the blinds is an allowable expenditure. ED may not recover the \$791 spent on window blinds.

<i>Finding 1(d)</i>	<i>2000 MEES Grant</i>	<i>Issue: Indirect Costs</i>	<i>Amount: \$12,736</i>
	<i>2004 MEES Grant</i>	<i>Issue: Indirect Costs</i>	<i>Amount: \$26,120</i>

In the PDL at 38-45, ED disallowed indirect costs charged to the 2000 MEES grant account in the amount of \$12,736.¹⁸ In addition, indirect costs were also disallowed for charges against the 2004 MEES grant in the total amount of \$26,120.¹⁹ The theory of disallowance is that indirect costs are not permissible under MEES grants. The MEES grants were awarded under a special set-aside authorized in the Even Start statute, Section 1232(a)(1)(A) of the Elementary and Secondary Education Act (ESEA), as amended, (20 U.S.C. § 6381a(a)(1)(A)). Under the Even Start statute, program funds “may not be used for the indirect costs of a program assisted under [the Even Start statute]”. Section 1234(b)(3) of ESEA (20 U.S.C. § 6381c(b)(3)).

¹⁸The effect of the statute of limitations limits the potential recovery to \$9,384. ED Ex. 2 at 1-2 of 6.

¹⁹This figure represents charges for the period October 1, 2004 through February 29, 2005 (\$8,310), for March/April 2005 (\$8,532), and for May/July 2005 (\$9,278).

PPCC did not address this issue in its submission. As such, the tribunal considers it as conceded by PPCC. Therefore, the tribunal concludes that PPCC incurred unallowable expenditures in the amounts of \$9,384 and \$26,120 for indirect costs under the 2000 MEES and 2004 MEES grant programs, respectively.

Finding 2(a) ERF Grant Issue: Salaries/Benefits Amount: \$124,913

ED disallowed a total of \$124,913 in salary and fringe benefits²⁰ paid to ten PPCC employees as follows:

<u>Name</u>	<u>Position</u>	<u>Pay periods</u>	<u>Disallowed Sal. Amt.</u>	<u>As Adjusted for S/L</u>
<i>A. Inadequate documentation:</i>				
Fortes, Angel	Fam. Lit. Spec.	7/28/04	\$813.80	
<i>B. Not reasonable/necessary:</i>				
Fortes, Angel	Coach	10/19/04 – 1/27/05	\$3,255.20	
Golden, Maryetta	ERS	4/14/04	\$473.04	
Hameen, Yusef	Coach	3/12/04 – 2/25/05	\$10,007.90	
Lawson, Marsha	ERS; Coach	10/15/03 – 7/28/04; 7/28/04 – 9/28/04	\$28,406.00	14,246.40
Tarango, Mary	ERS; Coach	4/27/04 – 7/14/04; 7/28/04 – 2/25/05	\$16,900.00	
<i>C. Inadeq. doc. and not reas/nec:</i>				
Berry, Marva	ERS	10/15/03 – 7/28/04	\$21,739.25	8,984.04
Erwin, Pennie	Maint.	5/26/04	\$824.00	
Golden, Maryetta	ERS	11/25/03 – 3/30/04	\$7,621.76	170.83
Page, Donald	Maint.	5/26/04	\$960.00	
Rocole, Rick	Maint.	5/12/04	\$1,327.20	
Rodriguez, Anatilda	Recep- tionist	10/19/04 – 10/27/04	<u>\$539.50</u>	
Total Salary			\$92,867.65	\$58,501.91
Total Fringe Benefits			\$32,045.24	\$20,188.50
Total Salary and Fringe Benefits			\$124,912.90	\$78,690.41

The theory of disallowance was that the salaries of these employees were inadequately documented and/or were not reasonable and necessary to the grant program.

²⁰ PDL at 47-59.

Split-funded Employees

Most of the salaries that were deemed to be inadequately documented were paid to “split-funded employees,” that is, employees who provided services to more than one program operated by PPCC. According to ED, the inadequacy was due to PPCC’s failure to maintain bi-weekly time distribution records and daily activity logs that reflected the amount of actual time spent on the various programs by each individual, as required by OMB A-122, Attachment B, para. 8.m.(2)(a) and (c). Without this information, ED cannot verify whether the amount of each individual’s salary paid with ERF funds was correct.

In post-audit situations, ED permits grantees like PPCC to utilize Departmental forms as a means to comply with the requirement under OMB A-122 for time distribution records. The grantee completes the form by entering the name of the employee, the pay periods, and the number of hours or percentage of time worked per program and has the employee or responsible supervisor sign the certification.

After the audit, PPCC sought to provide the time distribution information on the Departmental forms for four employees (three maintenance personnel and the receptionist). On each of the four forms, Ms. Greene, the executive director of PPCC, affirmed the name and pay periods; however, she failed to insert the number of hours or percentage of time that the employees spent on ERF-related activities and other grant and non-grant activities. PDL Ex. 21 at 6, 9-11 of 35. This omission led to the disallowance of the salaries of the three maintenance personnel and the receptionist at issue.

Before this tribunal, PPCC submits another affidavit by Ms. Greene. This affidavit provides the activity information previously omitted from the certifications, namely, that the three maintenance personnel spent more than 20% of their time on ERF-related activities while the ERF grant paid less than 20% of their salaries.²¹ PPCC Ex. 8, Greene Affid. paras. 8-10.

In reply, ED argues two points. First, it asserts PPCC provided neither the “time distribution” records nor the “personnel activity reports” to confirm the amount of time that each individual worked on ERF activities, as required by OMB Circular A-122, or any other contemporaneous records with this information.

²¹ While Ms. Greene mentioned the receptionist, Ms. Anatilda Rodriguez, in her affidavit, Ms. Greene did not address the amount or cost of Ms. Rodriguez’s services allocable to the ERF-related activities. Ms. Greene also did not provide this information for three other split-funded employees: Ms. Angel Fortes, Ms. Maryetta Golden, and Ms. Marva Berry. Hence, the actual activities of these four individuals remain undocumented and, therefore, their salaries are not allowable costs.

The tribunal accepts Ms. Greene's affidavit and her prior certifications and finds that these items satisfy the requirement for contemporaneous records, consistent with ED's existing policy as employed elsewhere in this case.²² The tribunal also finds that the salaries of the maintenance personnel at issue are reasonable and appropriate.

ED's second argument is that the ERF program statute requires that Federal program funds must be used for activities that specifically enhance the literacy and learning environments of the underlying program. ED asserts that the services of the maintenance personnel do not meet this criterion and are therefore impermissible expenditures. The tribunal disagrees. Reasonable custodial and maintenance expenses are a necessary component of any program for pre-school aged children. Accordingly, the tribunal concludes that the maintenance personnel salary costs for Ms. Pennie Erwin (\$824.00), Mr. Donald Page (\$960.00), and Mr. Rick Rocolo (\$1,327.20) are allowable costs. However, the \$539.50 salary cost of the receptionist, Ms. Anatilda Rodriguez, is not sufficiently documented for the tribunal to determine the extent to which her services were related to the ERF program. For this reason, the salary expenditure of \$539.50 is disallowed.

Employees without Requisite Qualifications

ED determined that the following salaries paid to the five professionals who comprised the core, teaching staff of the ERF program were unreasonable and unnecessary²³--

<u>Name</u>	<u>Position</u>	<u>Salary</u>
Fortes, Angel	Coach	\$ 3,255.20
Golden, Maryetta	ERS	\$ 473.04
Hameen, Yusef	Coach	\$10,007.90
Lawson, Marsha	ERS; Coach	\$28,406.00
Tarango, Mary	ERS; Coach	\$16,900.00

Per its grant application, PPCC's program was required to be staffed by experienced, early reading specialists (ERS).²⁴ However, the individuals hired by PPCC lacked the requisite credentials and experience. Thus, ED disallowed the salaries because PPCC failed to spend the grant funds in accordance with its approved application, as required by 34 C.F.R. § 75.700.²⁵

²² See, e.g., PDL at 53-54, 60-61 and 63-64.

²³ PDL at 56-58.

²⁴ PPCC's application required reading specialists with the following credentials and experience: a BA in Early Childhood Education, certification as a reading specialist through the California State Department of Education, five years of experience working in early childhood programs, and three years of experience working with low-income minority students.

²⁵ This discussion is equally applicable to Ms. Marva Berry whose position was an ERS.

On appeal, PPCC argues that, despite its best efforts to recruit qualified individuals²⁶, it was not able to fill the positions. Unable to find qualified reading specialists, PPCC employed less-qualified individuals as reading coaches with the intent of training them to become reading specialists, following a model used by local school districts.²⁷

In July 2004, ED became aware that PPCC had made the change of using reading coaches instead of reading specialists and its perceived reasons therefor. ED invited PPCC to apply in writing for a modification of its program, substituting reading coaches for the reading specialist positions identified in the grant. Subsequently, at a date not in the record, PPCC submitted its request but failed to attach the resumes of the individuals identified for the proposed positions of reading coaches. As a consequence, ED had insufficient information to review and act on the request. Ultimately, ED rejected the proposed changes because ED determined that PPCC had not expended sufficient effort to recruit qualified staff, and for that reason, a material change to the grant was not warranted.

PPCC's reading specialist position, as described under the grant, required specific academic credentials and experience. Upon review of the record, it is clear that none of the five employees at issue meet the criteria set forth in the grant as approved. Indeed, none of these individuals possess a reading specialist credential²⁸ issued by the State of California. Although three have completed coursework or an advanced degree related to education or early childhood education, none have specialized training in reading. Only three of the five hold an undergraduate degree, but none are in Early Childhood Education. Three have five years' experience working with early childhood programs, and another three have the requisite experience working with low-income minority students. Thus, while several of the PPCC's staff may have experience relevant to the position of reading specialist, none have the specific training as described in the grant application.²⁹

Under 34 C.F.R. § 75.700, a grantee "shall comply . . . [with its] approved

²⁶ The extent of PPCC's initial efforts, according to the record, was six weeks of ads placed in a local newspaper over a four-month period between January 2004 and April 2004.

²⁷ PPCC Ex. 8, Second Declaration, Greene Affid. at 2, para. 3.

²⁸ An approved reading specialist program is considered to be advanced degree program for those who already possess an undergraduate degree and a teaching credential. This program is offered by approximately 20 colleges and universities around the State of California and requires substantial coursework related to reading theory, literacy, diagnostics, curriculum development and leadership, among others.

²⁹ The self-imposed requirements of the key personnel in a proposed grant program are not taken lightly by ED. It is an important factor that defines the nature of the program. It is also among the factors weighed by ED in evaluating merits of each grant application in a competition for the award of a limited number of grants. Here, PPCC was one of 30 applicants awarded a grant from a group of 125 applicants.

application . . . and shall use Federal funds in accordance with . . . [its] application.” In this instance, PPCC’s action to employ and pay the salaries and benefits of these individuals was not in accordance with the grant application and therefore improper on its face.

PPCC argues that using reading coaches rather than reading specialists was a reasonable accommodation in light of its inability to recruit credentialed reading specialists, despite several efforts to do so. Because the program could not function at all without personnel in these key positions, PPCC hired the most qualified individuals that it could. For these reasons, PPCC contends that these salary and benefit expenditures should be allowed.

PPCC is correct that changes to the job requirements for key personnel which affect the objective of a program as specified by an approved application are permissible in certain circumstances. However, such changes may not be made unilaterally by the grantee. Section 74.25(b) of 34 C.F.R. provides specifically that “recipients are required to report deviations from . . . program plans, and request prior approvals for . . . program plans revisions” before they are implemented.

Here, PPCC did not submit a request to ED to approve the changes until well after it had implemented them and, even then, only after ED had been apprised of its actions. The request, as submitted, failed to include the resumes of the reading coaches and thus provided ED with no basis on which to evaluate the merits of the proposal. Accordingly, the tribunal concludes that the salaries and fringe benefits paid to six members of the teaching staff (Ms. Fortes, Ms. Golden, Mr. Hameen, Ms. Lawson, Ms. Tarango, and Ms. Berry) are not allowable costs.

In conclusion, the tribunal finds that PPCC paid a total of \$55,391 in salary and \$19,110 in benefits that are not allowable costs.

Finding 2(b) 2000 MEES Grant Issue: Payton Salary Disallowance Amount: \$55,100
Finding 2(c) 2004 MEES Grant Issue: Payton Salary Disallowance Amount: \$48,900

ED disallowed the salary and related fringe benefits paid to Ms. Kimberly Payton, the program director for the 2000 and 2004 MEES grants.³⁰ This action resulted in the disallowance of \$55,100 under the 2000 MEES grant (salary of \$40,912 and fringe benefits of \$14,118) and \$48,900 under the 2004 MEES grant (salary of \$34,571 and fringe benefits of \$14,329). Ms. Payton was a split-funded employee, that is, she divided her time, purportedly equally, between the MEES program as its director and PPCC’s California State Even Start program as its director. Her annual salary for her part-time work under the MEES grant was approximately \$41,000. PDL at 60 and 63.

³⁰ PDL at 59-68.

ED articulated two bases for the disallowance. One, PPCC did not maintain time and effort documentation for Ms. Payton, as required by OMB Circular A-122, that reflected her total activity spent on PPCC-related matters and the amount or percentage of her activity devoted to MEES related matters. Two, though PPCC was offered an opportunity to submit an after-the-fact certification form regarding these two items, its subsequent submission in June 2008 failed to include this information. PDL Ex. 24 at 8-19 of 19.

Before this tribunal, PPCC's submission did not include any time and effort documentation to substantiate the amount of Ms. Payton's activities devoted to the 2000 MEES grant and the 2004 MEES grant. PPCC submitted an affidavit by Ms. Greene, the Executive Director of PPCC who avers that Ms. Payton was well qualified for the position of program director and split her time between the MEES program and PPCC's California State's Even Start program. Ms. Payton was a last-minute replacement for the MEES program position because the designated program director left. According to Ms. Greene, Ms. Payton agreed to work some weekends and evenings on the MEES program.

In view of the absence of the time and effort documentation required by OMB Circular A-122, Attachment B, paras. 8.m(1) and 8.m(2), the tribunal concludes that the salary and fringe benefits paid to Ms. Payton are not allowable expenditures. Due to the statute of limitations, the potential recovery by ED for the 2000 MEES grant is limited to \$21,089 in salary and \$7,314 in fringe benefits. ED Ex. 2 at 3 of 6. The potential recovery under the 2004 MEES grant remains at \$34,571 in salary and \$14,329 in fringe benefits.

Finding 3(a)(3)(a) ERF Grant Issue: Gift Cards Amount: \$4,008

As part of its ERF program, PPCC conducted an occasional study or evaluation of the impact and efficacy of its program.³¹ As an incentive or reward for participating in these surveys and evaluation studies, PPCC gave gift cards to teachers and parents and charged \$9,308 to its ERF grant for their purchase. This amount represents three transactions: 65 gift cards purchased in February 2004 from Target at a value of \$20 per card (\$1,300), 100 gift cards purchased in July 2004 from Wal-Mart at \$40 per card plus an \$8 transaction fee (\$4,008), and 100 gift cards purchased in December 2004 from Wal-Mart at \$40 per card (\$4,000). Although PPCC had inventory control logs to track the individual cards, the OIG auditors disallowed the entire charge on the basis that PPCC had no evidence that the intended recipients of the cards had, in fact, received the cards.

In the post-audit process, ED withdrew its claims regarding the December 2004 Wal-Mart and February 2004 Target purchases (totaling \$5,300). The December 2004 Wal-Mart claim was withdrawn because ED determined this gift card acquisition was not made with ERF funds. ED

³¹ PDL at 74-75.

withdrew its claim for the February 2004 Target purchase because PPCC provided six pages of gift card log records that evidenced the receipt of gift cards by parents of children participating in the ERF program. Accordingly, the only claim that remains outstanding is the recovery of \$4,008 representing the July 2004 purchase of 100 gift cards to Wal-Mart. PDL at 74-75.

In its submission, PPCC supplied an affidavit by Ms. Greene, the Executive Director of PPCC, wherein she described the reward program. Additionally, she provided seven pages of log records that evidenced the receipt of gift cards by parents of children who participated in the ERF program. PPCC Ex. 9A.

ED maintains that the receipt logs accompanying the affidavit of Ms. Greene are the same receipt logs presented to ED during the post-audit process when it considered and then withdrew the claim for the purchase of the 65 Target gift cards bought in February 2004. Therefore, in ED’s view, these receipt logs have already been accepted and are not relevant regarding to the Wal-Mart gift card claim at issue.

The receipt logs in question constitute seven pages of acknowledgements by parents of gift cards. With the possible exception of one page, there are no indications as to whether the gift cards distributed were for Wal-Mart or Target and, if for Wal-Mart, whether they were purchased in July 2004 or December 2004. Accordingly, there is insufficient evidence to conclude that the Wal-Mart gift cards purchased in July 2004 were, in fact, distributed to participants of a study or evaluation. Accordingly, the tribunal finds that PPCC incurred \$4,008 to purchase gift cards that is not an allowable expenditure of ERF funds.

Finding 3(a)(3)(c) ERF Grant Issue: Other Costs Amount: \$1,692

ED disallowed a total of \$2,703 of expenditures established by invoices and credit card statements for reasons relating to the documentation of those expenses and/or their nexus to the grant program³² Excluding those items conceded by ED due to the statute of limitations, the following expenditures remain at issue—

<u>PDL Para.</u>	<u>Amount</u>	<u>Description</u>
3(a)(3)(c)(2)	\$297.58	Conference travel (re: Ms. Marva Berry)
3(a)(3)(c)(9)	\$105.00	Program materials (re: freight charge)
3(a)(3)(c)(24)	\$754.50	Travel (re: Ms. Jeanine Malone)
3(a)(3)(c)(39)	\$395.00	International Reading Association charge
3(a)(3)(c)(40)	\$ 20.00	International Reading Association charge
(1)(d)(1)(x)	<u>\$ 98.91</u>	Gasoline charges
Total Costs	\$1,691.99	

³² PDL at 75-81.

Conference travel

In Finding 3(a)(3)(c)(2), ED seeks to recover \$297.58 of travel costs incurred for Ms. Marva Berry to attend a conference which was designed to teach techniques for leadership and team bonding. ED determined that this expenditure was unreasonable on two grounds. One, Ms. Berry was employed as an early reading specialist but lacked the required qualifications for that position. Therefore, in ED's view, she did not have the necessary background and training to benefit from the conference or apply its teachings to the program. Accordingly, these expenditures produced no benefit to PPCC's ERF grant program and were disallowed. Two, PPCC presented no documentation to support a need for or nexus between this training and its ERF grant program. Ms. Berry was not in a leadership position in the ERF program, and the training had little or no relevance to the ERF program, which is designed to improve the language and literacy environment in the pre-school classrooms. ED's Response to PPCC's Requested Findings of Fact at 27.

PPCC argues that Ms. Berry learned various techniques in team building and leadership development and taught these concepts to the ERF staff and the parents of children participating in the ERF program, to the overall benefit of the program. PPCC Ex. 9, Greene Affid. at 2.

As stated in Finding 1(a)(1), *supra*, this issue is governed by the resolution of the salary issue under Finding 2(a), *supra*.³³ Further, the tribunal finds no nexus between the subject matter of the conference and Ms. Berry's duties under the ERF program. Regardless of Ms. Berry's qualifications, her duties did not require training in team bonding and leadership techniques. Hence, travel to the conference is not a reasonable expenditure under the grant and, therefore, the expense of \$297.58 is not an allowable cost.

Program materials

In Finding 3(a)(3)(c)(9), ED disallowed a \$105 freight charge incurred to return book towers purchased from Childcraft. ED disallowed this charge because it believed that Childcraft would reimburse PPCC for this expenditure. Because PPCC had not received the reimbursement and entered it into its general ledger as a credit, ED would not allow the charge to be made against the grant. In ED's view, PPCC was not entitled to a debit until it had received and entered the offsetting credit.

On brief, ED abandoned this position. Now it argues simply that the cost to return the unsuitable furniture was not a reasonable or necessary expense. ED's Response to PPCC's Requested Findings at 27-28.

³³ See also, footnote 25.

The tribunal disagrees. The record shows that PPCC decided to return the furniture after it discovered that the book towers did not fit the room properly. After consultation with the vendor, it was agreed that PPCC would bear the cost of returning the furniture and would receive a credit for the purchase price. Childcraft paid the return freight cost and then billed PPCC for that amount, which PPCC paid.

In this context, the \$105 freight charge constitutes a reasonable cost under the grant as it was incurred in order to recoup the purchase price of the book towers, which was significantly greater than the freight charge. This resulted in a net accretion of funds that became available for other program uses. As such, the tribunal finds that the freight charge was a necessary and reasonable expenditure and constitutes an allowable expenditure.

Travel

In Finding 3(a)(3)(c)(24),³⁴ ED disallowed \$754.50 of a total lodging expenditure of \$1,429 paid to the Sheraton Wild Horse, Phoenix, Arizona. This expenditure was incurred by two PPCC employees who attended a five-day meeting for new ERF awardees. Since PPCC could only produce a lodging receipt for one employee, Ms. Dorcas Duffy, in the amount of \$674.50, ED allowed this amount and disallowed the remaining lodging cost of \$754.50. The disallowance is due to insufficient documentation.

Regarding this second employee, ED also questions the nexus of the expenditure to the grant, asking why it was appropriate to send an overall site supervisor, who was not paid under the ERF grant, to the training rather than an ERF program staffer.

On brief, Ms. Greene, PPCC's executive director, explained that the other employee who attended was Ms. Jeanine Malone, PPCC's overall site supervisor and the ERF project director's immediate supervisor. One of Ms. Malone's responsibilities was to take over the duties of the ERF project director as necessary. Therefore, Ms. Malone needed to be familiar with all aspects of the ERF program.

The tribunal agrees with PPCC. As the supervisor of the ERF project director and the individual who would assume the responsibilities of the project director if required, Ms. Malone is clearly an appropriate individual to send to a five-day conference for new ERF grantees. The nexus between her responsibilities and the ERF grant is evident. The lodging expenditure was necessary for her attendance. Hence, the tribunal finds that a lodging expenditure is a necessary and reasonable expense and constitutes an allowable cost.

As to the documentation of the expenditure, PPCC did not provide a receipt which detailed Ms. Malone's hotel stay. ED's management analyst wrote PPCC in March 2007, that

³⁴ PDL at 77.

acceptable documentation to determine Ms. Malone's portion of the total lodging bill, *i.e.*, \$754.50, could be—

3. a hotel receipt supporting that expenditure or, if unavailable or unobtainable, other equivalent supporting documentation. PDL Ex. 10 at 18 of 26.

Although PPCC did not submit a hotel receipt for Ms. Malone, the record contains a reasonable proxy that would qualify as "other equivalent supporting documentation" and requires a majority of Ms. Malone's lodging bill to be charged against the grant. The lodging bill for both participants was \$1,429 and was paid by check number 8132. PDL Ex. 14 at 19 of 37, ln. 2. The receipt for Ms. Duffy establishes the cost of her five-day stay at \$664.50 for the hotel room, including an occupancy tax and a mandatory housekeeping service gratuity. PDL Ex. 11 at 9 of 29. The remaining \$754.50 is attributable to Ms. Malone. Thus, there is sufficient equivalent supporting documentation to establish, within reason, an approximate cost of the hotel for Ms. Malone, *i.e.*, Ms. Duffy's receipt. With this equivalent supporting documentation, the tribunal finds that \$664.50 of the \$754.50 disallowed is an allowable cost for Ms. Malone's lodging. The difference, or \$90 of this expenditure, is disallowed.

International Reading Association charges

In Findings 3(a)(3)(c)(39) and (40),³⁵ ED disallowed two expenditures in the amounts of \$395 and \$20, respectively for two credit card charges made on April 21, 2004 for purchases from the International Reading of Newark, Delaware. There is a handwritten notation on the face of the credit card statement next to the two charges that reads "Marva." Ms. Greene states in her affidavit that these charges were incurred for Ms. Marva Berry, whom she sent to an international reading conference because she believed that Ms. Berry would benefit from the program. PPCC Ex. 9, Greene Affid. at 2-3.

In this case, the documentation provided is insufficient to explain how these charges relate to the ERF program. The credit card statement establishes that two charges were made for some goods or services provided by the International Reading Association. The notation "Marva" indicates that the expenditures were related to this staff member. This information, together with Ms. Greene's affidavit, is sufficient documentation of the expenditures themselves. However, nothing in the record demonstrates how the charges relate to the ERF grant. There is no information about the content of the conference or how the training would benefit the ERF program. For this reason, the tribunal finds that the expenditures in the amount of \$415 are not reasonable and, therefore, are disallowed.

Gasoline charges

³⁵ PDL at 78-79.

In Finding 3(a)(1)(d)(x),³⁶ ED disallowed two purchases of gasoline in the amounts of \$45.66 and \$53.15 made by credit card on May 31, 2004 and June 1, 2004, respectively. According to ED, there was inadequate documentation to conclude that the charges were reasonable or necessary costs.

In its submission, PPCC adds that the charges were incurred for transportation to and from the Reno airport and between various locations for the International Reading Conference attended by Ms. Marva Berry.

ED responds that Ms. Berry was not a qualified reading specialist and, as such, should not have been working on the ERF grant. Like her salary, any expenses related to the improvement of her job skills were not incurred in furtherance of the ERF grant and, therefore, are not allowable costs. ED also adds that there is no evidence that establishes a nexus between the conference and any benefit to the PPCC's ERF program. ED's Response to PPCC's Req. Findings of Fact at 28.

The tribunal held, *supra*, that Ms. Berry was not qualified to serve as a reading specialist under PPCC's program and that her salary is not an allowable cost of the grant. In a similar fashion, any expenditures incurred to develop or further enhance her skills as such are also unallowable costs. Accordingly, the tribunal finds that the expenditure in the total amount of \$98.91 for gasoline associated with attending the International Reading Conference is not an allowable cost.

In summary, the tribunal finds that, of the \$1,691.99 at issue which reflects a reduction due to the effect of the statute of limitations, PPCC incurred expenditures of \$901.49 that are not allowable costs.

Finding 3(b)(2) 2000 MEES Grant Issue: Adequacy of Documentation Amount: \$4,767

ED disallowed a total of \$4,767 of non-personnel costs charged to the 2000 MEES grant for which PPCC provided insufficient or no information.³⁷ The disallowed costs included a range of items from groceries, gasoline, and hotel charges to airfare and telephone calls to Kenya.

PPCC did not address these items in its submission. As such, these items are considered conceded by PPCC. However, the effect of the statute of limitations limits the potential recovery to \$1,711. ED Ex. 2 at 3 of 6.

³⁶ PDL at 80-81.

³⁷ PDL at 81-87.

Finding 3(c) 2004 MEES Grant Issues: Non-personnel Costs Amount: \$14,321

ED disallowed a total of \$14,321³⁸ of non-personnel costs charged to the 2004 MEES grant as follows—

<u>PDL</u>	<u>Amount</u>	<u>Description</u>
3(c)	\$ 110	transportation & printing
3(c)	\$ 511	telephone costs
3(c) para 1	\$2,027	travel, NESAs conference
3(c) para 2	\$9,743	food for family gatherings & parents meetings
3(c) para 3	\$1,500	data system software
3(c) para 4	<u>\$ 430</u>	rental car
Total	\$14,321	

In January 2005, PPCC charged its 2004 MEES grant \$58.00 for “client transportation”, and in February 2005, PPCC charged the same grant \$51.80 for “printing”. PDL Ex. 28 at 1 of 64. ED disallowed these charges for two reasons: PPCC presented no supporting documentation of the expenditures and also failed to demonstrate how they were relevant to the grant program.

PPCC proffers an affidavit by Ms. Payton, the program director of the 2004 MEES grant program. Ms. Payton testified that both expenses arose from PPCC’s participation in the PALABRA Even Start “Back to School Fair” held on September 11, 2004. PPCC provided transportation to the fair, at which PPCC’s “English As A Second Language” program had a booth, for families who lacked the means to attend. Ms. Payton also stated that the \$51.80 printing cost was incurred to print recruitment flyers that were left at business locations and on bulletin boards, to advertise the “Back to School Fair.”

ED responds that Ms. Payton’s testimony is insufficient to link these printing and transportation charges to the Back to School Fair and PPCC’s grant.³⁹ In ED’s view, linkage can only be accomplished through some form of supporting documentation, other than an affidavit.

ED’s view that linkage cannot be accomplished by an affidavit deviates from its apparent practice. The Department accepts affidavits in lieu of contemporaneous, supporting documentation in many instances. For example, in Finding 2 of the PDL, the absence of contemporaneous activity reporting records (that resulted in disallowed salaries by the OIG) may be cured by after-the-fact affidavits that provide this information. For this reason, the tribunal believes that the nexus between the expenditure and the grant may be established through a sworn statement that provides the necessary information. Here, the issue with the printing and

³⁸ PDL at 87-91.

³⁹ ED’s Response to PPCC’s Requested Findings at 7.

transportation expenditures is whether Ms. Payton's affidavit provides reliable and sufficient detail regarding the nature of each expenditure and its relationship to the grant program.

According to the OIG's work papers, the client transportation charge expenditure was a \$58.20 charge at Pittsburg Shell, apparently on January 1, 2005. Ms. Payton's affidavit adds that PPCC incurred this expense to provide transportation for potential clients to the PALABRA fair held in September 2004.

The tribunal finds that the affidavit is insufficient to establish a nexus between the Pittsburg Shell charge and any transportation provided to the fair. It is unlikely that Ms. Payton would remember such a common transaction as a gasoline charge and then be able to connect that specific charge with an event some four months prior. Further, the four-month period between the fair and the gasoline charge render the nexus between the two highly doubtful, especially given that gasoline is a commodity used frequently and paid for at the time of use. Accordingly, the tribunal finds that the client transportation expenditure in the amount of \$58 is not an allowable cost.

As to the printing charge, according to the OIG work papers, PPCC paid \$51.80 to Ready Print on February 28, 2005. Ms. Payton testified, by affidavit, that the expense was incurred to print recruitment flyers for the September 2004 fair which were placed in locations frequented by potential MEES clients.

The tribunal finds that the expenditure to print recruitment flyers was a distinct and unusual expense, infrequently incurred given the nature of the MEES program. In this circumstance, the tribunal finds Ms. Payton's testimony on this item to be credible. Furthermore, it is entirely plausible that an invoice for a printing expense might be presented and paid several months after the event. For these reasons, PPCC carried its burden of proof and established that the printing expense was incurred to produce recruitment posters for the September fair. The \$52 spent on printing constitutes an allowable cost.

On brief, ED concedes that the telephone costs of \$511 in issue constitute allowable costs.⁴⁰ Accordingly, there is no need to review this matter.

With regard to the remaining four disallowed charges for travel (\$2,027), food (\$9,743), data system software (\$1,500), and rental car (\$430), PPCC did not address these items in its submission. As such, these items are considered as conceded by PPCC.

In sum, the tribunal concludes that PPCC incurred a total of \$13,758 of unallowable expenses related to the 2004 MEES grant.

⁴⁰ ED's Response to PPCC's Requested Findings at 8.

<i>Finding 4(b)</i>	<i>2000 MEES Grant</i>	<i>Issue: Matching Cost</i>	<i>Amount: \$206,771⁴¹</i>
<i>Finding 4(c)</i>	<i>2004 MEES Grant</i>	<i>Issue: Matching Cost</i>	<i>Amount: \$195,846</i>

ED seeks to recover \$206,771 of 2000 MEES grant funds and \$195,846 of 2004 MEES funds on the basis that PPCC failed to provide its statutorily-mandated financial contributions to the MEES grant program.⁴²

Section 1234(b) of the ESEA (20 U.S.C. § 6381c(b)) requires a recipient of a grant made under the Even Start programs, which encompass the MEES grant, to contribute a matching share of the program costs at an increasing proportion each year. A grantee's share begins at 10% of the program costs in the first year and increases annually until the ninth year, when the grantee's share is capped at 65% of the program costs. *Ibid.*

A matching contribution by a grant recipient "may be provided in cash or in kind, fairly valued, from any source including other Federal funds under the [ESEA]". *Ibid.* Grantee contributions as well as third party in-kind contributions "must be verifiable from the records of the grantee" and such records shall be "supported by source documentation." 34 C.F.R. §§ 80.24(b)(6) and 73.21(b)(7).

In addition, the contributed items must constitute allowable costs and are subject to the same qualifying rules as expenditures of Federal funds. 34 C.F.R §§ 74.27 and 80.24(a). For example, salaries and wages of employees of the grantee used to meet a matching requirement must be "supported in the same manner as salaries and wages claimed for reimbursement from awarding agencies." OMB Circular A-122, Attachment B, Para. 8.m.(4). For volunteers, their services "to the extent feasible . . . will be supported by the same methods that the organization uses to support the allocability of regular personnel costs. 34 C.F.R. § 80.24(b)(6).

For the fiscal year 2004, the last year under the 2000 MEES grant, PPCC's matching share of the total project cost of \$344,618 was a minimum of 40% (\$137,847), and ED's contribution was \$206,771.

For the fiscal year 2005, the first year under the 2004 MEES grant, PPCC's share of the total project cost of \$671,490 was 50% (\$335,745), and ED's share was \$335,745. However, PPCC's participation in the MEES grant was terminated that year. As a consequence, PPCC drew down only \$195,846 in grant funds and was responsible for a matching contribution of at least \$195,846.

⁴¹ In the PDL, ED incorrectly listed the total in the heading as \$206,711. In the narrative discussing the finding, however, ED properly calculated that the amount at issue was \$206,771.

⁴² PDL at 92-101.

In PPCC's 2000 MEES application, which contained proposed budgets for the fiscal years 2001 through 2004, PPCC itemized \$309,033 of proposed contributions for the fiscal year 2004 in the form of personnel salaries, fringe benefits, supplies (instructional materials), computers, printers, and software, and various other items. During the audit for fiscal year 2004, however, PPCC failed to provide any information and no documents to support its purported contribution, as requested by the auditors. PDL at 92. Similarly, it failed to submit any information or supporting documentation post-audit, prior to ED's determination. Under these circumstances, ED concluded that PPCC failed to substantiate its full matching contribution or any part thereof for the 2000 MEES program. Accordingly, ED ordered PPCC to return the entire Federal contribution for fiscal year 2004 in the amount of \$206,771.

In its submission to the tribunal, PPCC sought to cure the lack of documentation and support its \$137,847 matching requirement for the fiscal year 2004 by submitting the affidavit of Ms. Frances Greene and several accompanying documents as evidence that PPCC met or exceeded the matching requirement.

The affidavit of Ms. Greene outlines approximately \$252,000 of matching contributions made by PPCC or third parties that represent, *inter alia*, educational services, services of volunteers, and in-kind computer and software contributions.⁴³ PPCC Ex. 5. The only accounting record submitted by PPCC, however, was a schedule of costs for the services of an adult education teacher, several early childhood educators and several early childhood aides. This schedule details by month, the salaries paid by PPCC for these individuals. PPCC Ex. 5D.

In order to satisfy the MEES grant matching requirement, OMB Circular A-122, *supra*, requires a report signed by each employee or a supervisor that reflects the amount of time the employee devoted to MEES and non-MEES grant activities. The schedule submitted by PPCC fails to do this and is therefore insufficient documentation. Further, Ms. Greene's affidavit, attesting to in-kind computer and software contributions by PPCC as well as a staff development contribution by a local school, is not supported by any records or other source documentation, as required by the regulations and is therefore insufficient to verify these contributions. For these reasons, the tribunal concludes that these items were properly disallowed. As such, the various contributions by PPCC and the third parties cannot qualify as matching costs. Accordingly, ED may recover the Federal contribution of \$206,771 attributable to the fiscal year 2004.

⁴³ More specifically, PPCC identified and valued its contributions and the third party contributions as follows: the services of an adult education teacher provided by the Pittsburg Unified School District (\$69,120); services of home educators and child care assistants contributed by Pittsburg Pre-school (\$134,584); time donated by volunteers from the Chevron Corporation, Columbia Park Manor, and the Pittsburg Library as well as parents of children in the program (\$9,000); staff development training provided by St. Mary's College (\$6,400); and computer and software contributions by PPCC (\$47,000). PPCC Ex. 5, Greene Affid. at 1-4.

In its 2004 MEES application, which contained proposed budgets for fiscal years 2005 through 2008, PPCC specified that it would contribute \$941,551 of personnel salaries, fringe benefits, supplies (instructional materials), instructional software, and various utilities and rent for fiscal year 2005. However, by midyear, ED placed PPCC on a reimbursement payment system that ultimately led to PPCC's withdrawal from the grant program. Due to these circumstances, ED concluded that PPCC was obligated to provide a matching contribution of only \$129,398 for the five-month period from October 2004 through February 2005. PDL at 93.

During the audit, PPCC provided the auditors with pertinent salary and benefit records and semi-monthly timesheets for those employees whom it claimed had provided matching services in the MEES program during this short period. The time sheets showed, *inter alia*, the arrival and departure times for the employees. These records reveal that PPCC contributed at least \$129,398 in salaries and fringe benefits for 13 employees – one adult education teacher, seven early childhood educators, and five early childhood aides – for the months of October 2004 through February 2005. PDL at 99; ED Ex. 29.

Unlike ED's acceptance of non-contemporaneous certifications by PPCC's supervisors pertaining to employees who were budgeted to work full-time in the MEES program in Finding 2 (PDL at 59-60), ED rejected a similar certification for the non-MEES paid employees in the context of a matching contribution for the following reasons:

1. The Assistant Secretary did not know what responsibilities these individuals had working for PPCC and its various other Federal and non-Federal funded programs.
2. The Assistant Secretary lacked information such as the amount of time they devoted to teaching MEES students (or parents), as contrasted with non-MEES children and parents.
3. The Assistant Secretary lacked information whether any of the claimed salaries and fringe benefits was claimed as a match in other Federal programs. PDL at 99.

The concerns outlined by ED affect whether or to what extent these salaries and fringe benefits constitute allowable expenditures and may be properly claimed as a matching contribution. For example, information regarding the responsibilities of these employees for the MEES program and other Federal or non-Federal programs affects the proportion of their services that may qualify as allowable expenditures for purposes of the matching contribution. In the same manner, a determination regarding the proportion of their efforts devoted toward services affecting MEES program students or parents (as contrasted with non-MEES program children and their parents) affects the dollar amount of their services that would qualify as allowable expenditures for purposes of the matching contribution. Finally, a certification or documentary information that establishes that the salaries and fringe benefits were not claimed as a match in other Federal programs provides assurance that the grantee is not receiving a double benefit for the claimed expenditures and that they are indeed eligible as matching contributions.

On appeal, PPCC did not address ED's concerns and failed to submit any of the information sought by ED. PPCC's failure to provide this information precludes any means to review or ascertain whether these expenditures qualify as matching contributions for the period October, 2004 through February, 2005. Accordingly, PPCC's claimed expenditures for the services of these employees do not qualify as matching contributions.

In its appeal, it appears that PPCC may be arguing that the various in-kind contributions by third parties in the total amount of \$99,072 qualify as matching contributions for the five month period October 2004 through February, 2005.⁴⁴ PPCC's submission contains, *inter alia*, a Financial Status Report for fiscal year 2005 filed with ED that reports third party in-kind contributions in the amount of \$99,072. The exhibit also includes a series of internal schedules and sub-schedules that indicate the source of the items reflected in the \$99,072 contribution figure.

The third party in-kind contributions consisted primarily of free rent and maintenance costs attributable to the Housing Authority of Contra Costa County (\$60,972), volunteer story teller services from the Contra Costa library (\$10,000), the services of volunteers from the Baptist church (\$3,500), and CLIO materials (\$24,600). The various schedules list the contributions on the basis of the fiscal year and do not provide any information on the actual date or dates of these contributions. As such, these schedules do not provide any details regarding the five month period in issue, *i.e.*, from October 2004 through February 2005. Thus, this documentation is insufficient to establish these in-kind items as qualifying matching contributions.

In view of the foregoing, the tribunal concludes that PPCC failed to establish any matching contributions for the period October 2004 through February 2005 and, therefore must return to ED the Federal contribution attributable to this period in the amount of \$195,846.

C. Proportionality

Having made factual determinations on the disallowed expenditures, this tribunal must address how the disallowed expenditures are affected by the doctrine of proportionality. It applies to cases reviewed under the General Education Provisions Act and is an important consideration in determining the amount that ED may recover in such proceedings. The concept of proportionality governs the measure of recovery by ED and is set forth by Section 453(a)(1) of General Education Provisions Act (GEPA), as amended, (20 U.S.C. § 1234b(a)(1))—

[a] recipient determined to have made an unallowable expenditure or to have otherwise failed to discharge its responsibility to account properly for funds, shall be required to

⁴⁴ PPCC Ex. 5E.

return funds in an amount that is proportionate to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which the recipient received the award.

As used in the above provision, an identifiable Federal interest that may be harmed by an unallowable expenditure or improperly spent funds—

includes but is not limited to, serving only eligible beneficiaries; providing only authorized services or benefits; complying with expenditure requirements and conditions (such as set-asides, excess cost, maintenance of effort, comparability, supplement-not-supplant; and matching requirements); preserving the integrity of planning, application, recordkeeping, and reporting requirements; and maintaining accountability for the use of funds. Section 453(a)(2) of GEPA (20 U.S.C. § 1234b(a)(2)).

In this case, most of the expenditures disallowed by the tribunal were due to the absence of records, the inadequacy of records, or the failure of PPCC to establish the reasonableness and/or necessity of the expenditures. The Federal interests harmed by these disallowed expenditures included preserving the integrity of the application and recordkeeping requirements and/or maintaining accountability for the use of funds.

In the PDL, ED applied the concept of proportionality to measure the amount of its recovery. In examining the disallowed expenditures, ED argued repeatedly that “the determination of harm [to the Federal interest] must include an analysis of the value of the program services actually obtained” from the disallowed charges. PDL at 46 and 101. In all instances, ED concluded that there was no value obtained from the disallowed expenditures, and, hence, ED sought a recovery of the full amount of the disallowed charges.

The tribunal agrees with ED’s approach. A review of the various disallowed expenditures and PPCC’s failure to document its maintenance of effort convinces the tribunal that the ERF grant and the 2000 and 2004 MEES grants did not receive any measurable value of program services from the disallowed expenditures, with one exception addressed below. As such and excluding this exception, the tribunal concludes that ED may recover the full amount of the disallowed expenditures or, in the case of the maintenance of effort, the amount of MEES grant funds distributed to PPCC for the fiscal year 2004 and the partial fiscal year 2005.

Above, the tribunal addressed PPCC’s obligation to provide the Department with an annual report of its ERF activities and whether a \$42,000 expenditure paid to CER for testing and data collection services that were necessary for the report was an allowable expense.⁴⁵ The tribunal disallowed the expenditure because PPCC failed to obtain the approval of the Department, as required by 34 C.F.R. §74.25, before it transferred this task from an in-house

⁴⁵ See, Finding 1(a)(1)(b).

function as originally designated in its application to an out-of-house function performed under contract by CER.

PPCC implemented its grant program in a manner that deviated from its application and thereby harmed a Federal interest, that is, PPCC failed to preserve the integrity of the application. Although it is clear that this Federal interest was harmed, the concept of proportionality requires that any recovery of the \$42,000 expenditure be reduced by the value of the program services actually obtained from the disallowed charge.

In this case, the application designated a prospective employee, Mr. Marsh, to perform the testing and data collection; however, Mr. Marsh was unavailable when PPCC was funded with the grant and began the program. In light of this development, PPCC contracted out this function to CER, the organization that was previously hired to evaluate and prepare the annual report under the grant. As the evaluator and report writer, CER had the knowledge and resources to oversee the testing/data collection function. CER was paid \$42,000 for these services, an amount determined by two unrelated parties. In these circumstances, the tribunal finds that the ERF grant received program services equal to the amount paid, *i.e.*, \$42,000. Thus, the harm to the Federal interest by the disallowed expenditure is negligible.

As discussed in Finding 1(a)(1)(b), *supra*, the statute of limitations reduced the amount in controversy from \$42,000 to \$21,350. Next, applying the doctrine of proportionality and given that the harm to the Federal interest has been determined to be negligible, so too is the amount of funds that must be returned to ED. Accordingly, the tribunal finds that the doctrine of proportionality precludes ED from recovering the \$21,350 expenditure previously disallowed under this finding.

D. Equitable Offset

Just as the doctrine of proportionality must be applied to the disallowed expenditures in this case, so too must be the doctrine of equitable offset. In its reply brief, PPCC asserts that it is entitled to an equitable offset that reduces ED's recovery under the ERF grant. Subject to a few exceptions not pertinent here, the doctrine of equitable offset permits a grantee to reduce any recovery due ED by the amount of any expenditures made by the grantee for grant purposes that were incurred/paid by the grantee. In effect, an equitable offset permits the substitution of any costs paid under the grant that are subsequently disallowed with otherwise allowable expenditures paid by the grantee, and thereby reduces or eliminates a liability due to ED.

The expenditures under review here are \$68,645 in salary for three PPCC employees. The dispute between the parties concerns whether the salaries were paid with non-ERF funds and whether the salaries were reasonable and necessary expenditures under the grant.

As of November 1, 2004, ED's ERF program office placed PPCC on the reimbursement system. Under this system, a grantee pays its monthly expenditures and, thereafter, submits a request for reimbursement of these expenditures to the ERF program office. The ERF program office reviews each item in the request and determines whether it qualifies as an allowable cost. The ERF program office then informs the grantee of the results of its review, authorizes the disbursement of the total amount of approved expenditures and remits the funds.

PPCC's initial reimbursement request was submitted for the month of November 2004. In this claim and subsequent claims through August 2005, PPCC requested reimbursement for the salaries paid to the three employees below--

<u>Name</u>	<u>Months</u>	<u>Total Amount</u>
Ms. Dorcas Duffy, Project Dir.	Jan '05 through Apr '05	\$14,000.00
Mr. Yussef Hameen, Coach	Nov'04 through Jun '05	\$27,345.10
Ms. Mary Tarango, Coach	Nov'04 through Aug'05	<u>\$27,300.00</u>
Total		\$68,645.10

According to the ERF program office's reimbursement documentation, it processed the claims but rejected the requests for reimbursement for the above salaries paid by PPCC. Hence, the ERF program office's disbursement of ERF funds to PPCC over the period from November 1, 2004 through August 2005, did not include any ERF funds designated to cover PPCC's expenditures for these salaries. ED Offset Exs. 2, 4, 6, 8, and 9.

PPCC argues that it paid a total of \$68,645.10 with non-ERF funds, for the salaries of these three employees who performed allowable grant-related services, and therefore, it is entitled to an equitable offset of \$68,645.10.

In response, ED asserts two arguments. One, it urges that a portion of these salaries was, in fact, paid with ERF funds and, therefore, that portion is not eligible for consideration as an equitable offset. Two, ED argues that the salary expenditures for the interim project director and the reading coaches were not reasonable and necessary and, therefore, do not constitute allowable costs. Therefore, as a result, no recovery is warranted under the equitable offset doctrine.

Whether the salaries of these three employees qualify as equitable offsets will be addressed individually. As to Ms. Duffy, she was paid \$3,500 per month for the months of January through April 2004 for a total salary of \$14,000. ED asserts that her salary as the interim project director was not an allowable cost for January because the ERF program office, for reasons not clear, rejected PPCC's reimbursement request. ED argues further that Ms. Duffy's salary was not an allowable cost for the months of February, March, and April because PPCC's application permitted only one project director and, during those months, this position was occupied by Mr. Phil Hopkins.

Initially, the tribunal agrees with ED's argument regarding Ms. Duffy's salary for March and April. PPCC's new project director took over the position on February 14, 2005. It is reasonable to conclude that Ms. Duffy's services became duplicative by March 2005, and, therefore, \$7,000 of the \$14,000 of salary at issue is not an allowable cost. Therefore, Ms. Duffy's salary for March and April cannot qualify as an equitable offset.

As to January and February 2005, the tribunal disagrees with ED's position. ED provides no definitive explanation as to why its ERF program office disallowed Ms. Duffy's salary for January. Absent any evidence to support this determination, the tribunal finds credible PPCC's statement that Ms. Duffy's service as interim director was a necessary cost. Indeed, the record shows that Ms. Duffy served as the interim director for January and the first two weeks of February, and the services of a director are clearly allowable under the grant. Regarding the last two weeks of February, Ms. Duffy undoubtedly provided significant service to the grant by assisting Mr. Hopkins during his initial period of transition and integration into PPCC's ERF program. Accordingly, the tribunal finds that Ms. Duffy's salary for the months of January and February is an allowable cost.

Satisfied that Ms. Duffy's January/February salary is an allowable expenditure under the grant, the tribunal now turns to the question of whether this expenditure was paid with grantee funds, rather than ERF funds. Here, ED asserts that "the auditors found that PPCC had, in fact, charged the salary of Ms. Duffy at \$3,500 per month for January and February 2005 to ERF funds." ED Offset Br. at 7. Based upon a footnote in ED's brief, it appears that the source of the purported finding by the auditors was an entry taken from Table 8 in the PDL at 53. This table lists various employees, including Ms. Duffy, whose salaries were initially questioned by the OIG auditors and whose salaries were, after the audit, determined to be allowable costs.

With respect to Ms. Duffy, the table indicates that the amount of her salary in question was \$17,500 for the period from October 29, 2004 through February 25, 2005. More importantly and the key to ED's argument is that her entire salary of \$17,500, including \$7,000 attributable to January and February 2005, was listed under the column headed "OIG Questioned Costs Found to be Allowable". ED finds this entry to be significant because the OIG was auditing the ERF program expenses; therefore, only charges that were paid by the grant were under scrutiny. ED concludes that if the OIG examined and determined Ms. Duffy's salary to be allowable, as indicated in Table 8, then it must have been paid with grant funds. Thus, ED surmises that PPCC used ERF funds to pay for Ms. Duffy's salary for the months of January and February and therefore, this salary is ineligible to claim as an equitable offset.

In contrast to ED's convoluted argument, the ERF program office's documentation provides explicit, direct evidence on this issue. The ERF office placed PPCC on the reimbursement system for the disbursement of ERF funds to PPCC beginning November 1, 2004. Under the reimbursement system, PPCC was required to pay the salary of Ms. Duffy from its own funds and then, on a monthly basis, request the ERF program office for reimbursement

through the grant. The ERF program office's documentation provides a month-by-month accounting from November 1, 2004 through August 2005 of PPCC's requests for reimbursement of the salaries paid to its employees, the ERF program office's subsequent approval or disapproval of the reimbursements requests, and the disbursement of the ERF funds thereafter. Thus, every payment of ERF grant funds after November 1, 2004 represented specific reimbursements of PPCC's expenditures as approved by the ERF program office. This documentation establishes quite clearly that the ERF program office did not disburse any ERF funds to reimburse PPCC for Ms. Duffy's salary for the months of January and February, 2005. ED Offset Exs. 2 and 4.

Based upon the above, the tribunal finds that PPCC paid Ms. Duffy's salary of \$7,000 for the months of January and February 2005 from its own funds. Therefore, because this expenditure was allowable and paid by the grantee, PPCC is entitled to an equitable offset of \$7,000.

Next, ED addresses the two claims for an equitable offset for the salaries paid to two reading coaches, Mr. Yusef Hameen and Ms. Mary Tarango. Of the \$27,345.10 of salary paid to Mr. Hameen for November 2004 through June 2005, ED asserts that "the auditors confirmed" that \$13,627.54 in salary for November through February had been approved by the ERF program office under the reimbursement system and disbursed to PPCC. Therefore, in ED's view, Federal funds had been used to pay this salary, and it must be excluded from any potential equitable offset figure, reducing it from \$27,345.10 to \$13,672.56.

The facts do not support ED's argument. According to the ERF program office's schedules of approved expenditures, PPCC's requests for reimbursement for the salary paid to Mr. Hameen for the November-to-February period were denied by the ERF program office. ED Offset Exs. 2 and 4. Hence, ED never disbursed funds to reimburse PPCC for Mr. Hameen's salary over the period in question.

ED makes the same argument regarding Ms. Tarango. It argues that the claim for her salary should be reduced by \$10,400 because ED's auditors confirmed that ERF funds in this amount were disbursed to PPCC during the November-to-February period. Once again, ERF program office's schedules of approved expenditures reflect the contrary. PPCC's claims for these expenditures were denied by the ERF program office. The ERF program office did not reimburse PPCC for Ms. Tarango's salary. ED Offset Exs. 2 and 4. ED's argument for a reduction in the amount of any potential equitable offset because it was paid with ERF funds is without merit.

Although ED's arguments above fail, the doctrine of equitable offset also requires that the expenditure qualify as an allowable cost. Here, the tribunal determined under Finding 2(a) above that salary payments made to the reading coaches including Mr. Hameen and Ms. Tarango did

not constitute allowable expenditures. Therefore, the salary payments to Mr. Hameen and Ms. Tarango cannot qualify as equitable offsets.

In summary, PPCC is entitled to an equitable offset in the amount of \$7,000 against any liability due under the ERF grant program.

E. Conclusion

Based on the above determinations, the tribunal finds that ED may recover \$20,349 in ERF funds. This amount reflects the difference between \$85,148 of disallowed costs⁴⁶ and \$64,799 of credits.⁴⁷ In addition, the tribunal determines that ED may recover \$206,771 and \$195,846 under the 2000 and 2004 MEES grants, respectively.⁴⁸

II. Order

On the basis of the foregoing findings of fact and conclusions of law and the proceeding herein, it is **HEREBY ORDERED** that Pittsburgh Pre-School and Community Council, Inc. immediately and in the manner prescribed by law, pay to the United States Department of Education the sum of \$422,966.

Allan C. Lewis
Chief Administrative Law Judge

Issued: May 16, 2012
Washington, D.C.

⁴⁶ Findings 1(a), 2(a), 3(a), and 1(d)(1)(x).

⁴⁷ An equitable offset of \$7,000 and a credit due to a \$57,799 under withdrawal of ERF funds by PPCC. PDL at 1-2.

⁴⁸ Because these two figure represents all of the MEES grant funds paid to PPCC for the 2000 and 2004 fiscal years, it also the maximum liability that could be assessed by ED. Therefore, by definition, this total necessarily includes the cumulative assessments for the individual findings related to the MEES grant awards. Although ED sought a determination for each finding as a distinct matter as alternate sources of liability, the liability assessment for each is a subset of the total amounts for the two MEES grant years and cannot be assessed and collected twice.

SERVICE

On May 4, 2012, a copy of the attached initial decision was sent by certified mail, return requested and, as a courtesy by email, to the following:

John D. Coker, Esq.
525 Marina Blvd.
Pittsburg, CA 94565
jdiazcoker@hotmail.com

Richard Mellman, Esq.
Rachel Peternith, Esq.
Office of the General Counsel
United States Department of Education
FOB-6, Room 6E314
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110
Richard.Mellman@ed.gov
Rachel.Peternith@ed.gov