UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of CALIFORNIA STATE UNIVERSITY AND COLLEGES SYSTEM, Respondent	Review of Final Audit Determination Pursuant to 34 CFR Part 668, Subpart H

DECISION OF THE SECRETARY

The Financial Management Service (FMS), U.S. Department of Education (ED), has appealed the November 28, 1989, Initial Decision (ID) of Administrative Law Judge Paul Cross (ALJ) in the above-cited appeal. The matter before the ALJ concerned a 1988 final audit determination of the California State University and Colleges System (CSUCS) regarding its disbursement of Pell Grant Program statute funds under the statute as it existed during the audit period. The audit covered the period between July 1, 1983, and May 31, 1986.

The audit found that CSUCS was liable for $534,329 in interest earned on Pell Grant Program funds by 14 of its 19 institutions during the period between the institutions' receipt of those funds from ED and the final disbursement of such funds to eligible students. Because the ALJ found that the CSUCS institutions qualified as "States" and that Pell Grant Program funds were "grants" under the Intergovernmental Cooperation Act (ICA) definitions of those terms, the ALJ found that USUCS was insulated from liability on the interest accrued under the ICA. FMS appeals these findings.

Since the 1920's, it has been axiomatic that interest gained on grant money prior to its disbursement must be repaid to the Federal Government. See, e.g., 64 Comp. Gen. 96 (1984); 42 Comp. Gen 289 (1962); 1 Comp. Gen. 652 (1922). In 1968, Congress granted States some limited relief from such liability with the Intergovernmental Cooperation Act (ICA). 31 U.S.C. 6501 et seq. Section 6503(a) of the ICA states that ". . . (a) State is not accountable for interest earned on grant money pending its disbursement for program purposes." "Grant" money is defined at

31 U.S.C. 6501(4)(A) as:

> money that is paid or provided by the U.S. Government under a fixed annual or total authorization to a State, to a local government, or to a beneficiary under a plan or program administered by a State or a local government that is subject to approval by an executive agency, if the authorization . . . . (ii) specifies directly, or establishes by means of a formula, the amount to be allotted for use in each State by the State, local government, and beneficiaries.
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Although "money paid or provided by the U.S. under a fixed annual or total authorization" clearly describes Pell Grant Program funds, such funds fail to meet all of the remaining criteria of the definition. Under the ICA, grant money is to be paid or provided ". . . to a State, to a local government, or to a beneficiary under a plan or program administered by a State or local government." Because the ALJ found that CSUCS may be deemed a "State," he found that such money was paid to such an entity for the purposes of meeting the ICA definition.

This characterization may be correct, but such a qualification is merely incidental. Pell Grant funds are direct grants from the Federal Government to students and are not grants to States or educational institutions. See 20 U.S.C. 1070(a)(1)(A). Under the Pell Grant Program, an educational facility merely serves as a conduit through which public funds flow to eligible students. Payment to a State or institutions is purely a practice of convenience.

It is arguable that such students, as beneficiaries, may, in the alternative, satisfy this portion of the ICA definition of "grant" money. I find such argument unpersuasive. Although student-recipients may be deemed to be beneficiaries under the ICA, neither a State nor a local government administers the Pell Grant Program for such "beneficiaries." Again, the institution merely serves as a logical conduit through which Pell Grant Program funds flow to eligible students.

Moreover, the ICA definition concludes with descriptions of the funds' authorization. The first section is neither argued, nor applicable. 31 U.S.C. 6501(4)(A)(i). The latter states that such money is a "grant" if the authorization ". . . specifies directly, or established by means of a formula the amount that may be provided to the State or local government or the amount to be allotted for use in each State by the State, local government, and beneficiaries." 31 U.S.C. 6501(4)(A)(ii).

Protection under the ICA clearly fails upon consideration of the final criteria set forth under the definition of "grant" money. During the audit period, section 411(a)(1)(A) of the HEA, 20 U.S.C. 1070a(a)(1)(A), provided that "(t)he Secretary shall . . . pay to each eligible student . . . a basic grant in the amount for which the student is eligible, as determined by paragraph (2)." The Pell Grant Program authorizing statute, however, neither specified directly, nor established by means of a formula, an amount that may be provided to a State or local government. Moreover, the statute did not specify directly, nor establish by means of a formula, an amount to be allotted for use in each State by the State, local government, and beneficiaries. Indeed, neither the State, nor an institution, was addressed as a recipient of such funds.

The fact that the Pell Grant Program statute contained neither a section which specified directly an amount that may be provided to a State or local government, nor a section which specified directly any amount to be allotted for use in each State, local government, and beneficiaries is obvious. The ALJ found, however, that a viable alternative to a specific directive existed in the form of a formula. I disagree.

Although a general formula may be gleaned from the general conditions contained in the statute, such conditions do not support the conclusion that such a formula satisfies the ICA. The Pell Grant Program statute failed to establish by means of a formula the amount of funds provided to a State, or the amount of Pell Grant Program funds to be allotted for use in each State. Examples of programs which did establish such formulae were available during the audit period by reference to Title IV of the HEA. See, e.g., Supplemental Educational Opportunity Grant (SEOG), the College Work Study (CWS), and the Perkins Loan Programs. See 20 U.S.C. 1070b-3 (1985) and 34 CFR 676.3, 676.4, and 676.6 (1985); 42 U.S.C. 2751 and 2756 (1985), 34 CFR 675.3, 675.4 and 675.6; and 20 U.S.C. 1087bb (1985) and 34 CFR 674.3, 674.4, 674.6, respectively. The Pell Grant Program statute, however, centered on the amounts available for disbursement to eligible students.

Moreover, a Pell Grant Program statutory formula which would satisfy 31 U.S.C. 6501(4)(A)(ii) would have to produce a sum certain or predictable amount of Pell Grant Program funds to a State, or a similar amount to be allotted for use in a State. Such schemes existed under the SEOG, CWS, and Perkins Loan Programs, but were lacking in the Pell Grant Program statute. The Pell Grant Program statute, however, established the amount of a student's award, not a stipulated sum for the State or CSUCS as a State. Furthermore, the very nature of the Pell Grant Program's scheme and the method employed to execute the program would confound any attempt to devise a formula which could have provided a sum certain or a predictable amount of funds to, or for use in,

a State. The ALJ's formula, based on the aggregate individual Pell Grant Program entitlements of students at CSUC institutions over the span of a given year, however, is not the type of formula which can produce a sum certain or a predictable amount for distribution to, or use in, a State, nor the type contemplated in the ICA.

In conclusion, I find that because Pell Grant Program funds do not satisfy the ICA definition of "grant" money, the protective umbrella of the ICA cannot be extended to CSUCS.

There remains the question of the amount of CSUCS's liability. CSUCS argues that had the auditors studied the daily balances of CSUCS instead of the month-end balances, that a more accurate calculation of the amount of interest in controversy would be revealed. This may be true. Supporting documents for this assertion, however, were first submitted with CSUCS' December 30, 1988, brief, and not with CSUCS' September 21, 1988, request for review. Under 34 CFR 668.116(e)(1)(ii), such records must be provided by the institution "no later than the date by which it was required to file its request for review." The fact that they may have been available during the audit is irrelevant. Moreover, the ALJ mischaracterized this section. This rule is not merely an internal procedure "presumably designed to 'weed out' tardy arguments that lack merit." ID at 14. It is a rule governing the submission of evidence in such hearings. Therefore, such evidence may not be properly considered.

Moreover, although the audit found that CSUCS accrued $534,329 in interest over the 35 month period during which Pell Grant Program funds were found to have been prematurely drawn down from ED, the ALJ disagreed. The ALJ found that FMS improperly failed to take into account negative cash balances in calculating the interest in controversy and that CSUCS lost $22,000 in interest due to negative cash balances caused by ED over a thirteen month period. Noting that the negative cash balances in controversy were allegedly due to "a flawed electronic process occasioned by (ED) inadvertence, the ALJ found that ED should reimburse CSUCS $22,000 in lost interest for that period. ID at 16.

Although this could provide a basis for ED to credit CSUCS' negative cash balances against the interest accrued, the ALJ cites nothing from the record to support this contention. Too, the record does not reveal any admissible evidence to bolster this assertion. Therefore, such a credit or offset cannot now be employed.

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In sum, I find that Pell Grant Program funds do not qualify as "grant" money under the ICA and, therefore, that CSUCS may not be insulated from liability under that Act. Moreover, the record

does not contain any admissible evidence which would permit a credit, reduction, or offset. Therefore, I REVERSE the decision below and find CSUCS liable in the amount of $534,329.

This decision signed this 22nd day of June, 1990.

Raul F. Cavazos