APPLICATION OF THE NEW YORK STATE EDUCATION DEPARTMENT,
Applicant.

Docket No. 92-116-R
Recovery of Funds Proceeding

ACN: NDD-NY-G-9208

DECISION ON REMAND

Appearances: Michael Brustein, Esq., and Kristin E. Hazlitt, Esq., of Brustein & Manasevit, for the New York State Education Department.

Ronald B. Petracca, Esq., of the Office of the General Counsel, United States Department of Education, for the Regional Commissioner, Rehabilitation Services Administration, Region II.

Before: Allan C. Lewis, Chief Administrative Law Judge

This matter comes before this tribunal as a result of an Order of Remand issued by the Secretary of the United States Department of Education dated July 15, 1994, relating to an Initial Decision issued by Chief Administrative Law Judge John F. Cook on May 13, 1994. In re New York State Education Department, Dkt. No. 92- 116-R, U.S. Dep't of Education (July 15, 1994) (Order of Remand). The remand raises the issue of the effect, if any, on the 1986 grant reduction formula by the subsequent 1988 change in the formula. Thus, the remand ordered further consideration--

[i]n order to provide clarity to a complicated set of legislative circumstances, and in light of the far-reaching consequences of the decision in this matter . . . [and requested] further consideration and clarification of the narrow question of the meaning and effect of the 1988 Technical Amendments of the Rehabilitation Act of 1973 [as they relate to interpreting the 1986 Amendments of that Act.]

Id. at 1. Due to the retirement of Chief Administrative Law Judge John F. Cook, this matter was referred to the undersigned for reconsideration.

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355

(1973) [hereinafter 1973 Act] authorized Federal grants to States to assist them in the vocational training of individuals with disabilities. In order to receive Federal funds, a State was required to submit an approved State plan to what is now the United States Department of Education (ED). Id. at § 101(a) (to be codified at 29 U.S.C. § 721(a) (1973)). Under the 1973 Act, a State was required to match certain Federal funds allotted thereunder pursuant to the maintenance of effort requirement. Id. at § 111(a) (to be codified at 29 U.S.C. § 731(a) (1973)).

The 1973 Act also contained a grant reduction provision as part of the State's maintenance of effort requirement. In general, the purpose of a grant reduction provision is to determine the amount of a grant which must be withheld because the recipient failed to expend sufficient non-Federal funds to satisfy the Federally mandated maintenance of effort requirement. Typically, a grant reduction formula employs a bench mark year or period whose expenditures or average of expenditures are then compared to those incurred in a comparison year. The comparison year may be the year preceding the year in which the grant is reduced or may be the same year in which the grant is reduced. The difference, or a percentage thereof, between the average expenditures in the bench mark period and the comparison year becomes the amount of the grant reduction.

The 1973 Act employed a grant reduction provision which utilized a single bench mark year. The bench mark year selected was fiscal year 1972. Thus, the Federal share was to be reduced in the year of the grant if, and to the extent that, the amount by which expenditures from non-Federal sources in that year were less than the non-Federal expenditures under the State plan for the fiscal year ending June 30, 1972. Hence, Section 111(a) of the 1973 Act (to be codified at 29 U.S.C. § 731(a) (1973)) provided in pertinent part--

(a) . . . the amount otherwise payable to such State for such year under this section shall be reduced by the amount (if any) by which expenditures from non-Federal sources during such year under this title are less than expenditures under the State plan for the fiscal year ending June 30, 1972, under the Vocational Rehabilitation Act.

In 1986 and, again, in 1988, Congress changed the grant reduction formula. In the instant matter, the parties dispute whether the change in the formula by the 1986 legislation affected grant reductions in the fiscal year 1987, as contended by ED, or affected grant reductions in the fiscal year 1990, as urged by the New York State Education Department (NYSED). In addition, NYSED argues that its position is supported by the 1988 change in the grant reduction formula.

In order to more fully understand the changes made by Congress in

the 1986 and 1988 legislation, the following diagram precedes an explanation of the 1986 and 1988 Amendments and illustrates the features of the grant reduction formulas under the original 1972 legislation, the 1986 legislation, and the 1988 legislation. Year 5 in the illustration is both the grant year and the year of the grant reduction.

Year of Legislation	Bench Mark Period	Comparison Year	Grant Reduction Year
1972	1972	Yr 5	Yr 5
1986	Yr 2 Yr 3 Yr 4	Yr 5	Yr 5
1988	Yr 1 Yr 2 Yr 3	Yr 4	Yr 5

In 1986, Congress became concerned about the decreasing levels of non-Federal expenditures by States and amended the maintenance of effort requirement. H.R. Rep. No. 571, 99th Cong., 2d

Sess. 23 (1986), reprinted in 1986 U.S.C.C.A.N. 3471, 3493. Congress continued the year of the grant as the reduction year and the comparison year; however, it changed from a bench mark year, namely 1972, to a floating three year bench mark period which used the average total of non-Federal expenditures for the three fiscal years preceding the year of the grant and its reduction. Thus, Congress adopted a four year scenario when it amended the 1973 Act by adding Section 111(a)(2)(B) as follows--

(B) The amount otherwise payable to a State for a fiscal year under this section shall be reduced by any amount by which expenditures from non-Federal sources under the State plan during such year under this title are less than the average of the total of such expenditures for the three preceding fiscal years.

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 208, 100 Stat. 1807, 1818 (1986) (to be codified at 29 U.S.C. § 731(a)(2)(B) (1986)).

This grant reduction formula was, however, not practical. The exact amount of the grant reduction could not be determined until after the close of the grant year because the grant year also served as the comparison year in the grant reduction formula.

In 1988, Congress again changed the maintenance of effort requirement and corrected this deficiency. It adopted a five year scenario. The comparison year was moved from the year of the grant to the first year preceding the year of the grant. The floating bench mark period was then moved back by one year so that the three year bench mark period was the three years preceding the newly designated comparison year. It was now

possible to determine the amount of the grant reduction in the year of the grant. This amended provision was effective on October 1, 1989, and, thus, it was effective for fiscal year 1990. Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, § 202(e)(2)(B), 102 Stat. 3289, 3306 (1988). Thus, Section 111(a)(2)(B) of the 1973 Act, as amended, was further amended by the 1988 Amendments as follows--

(B) For fiscal year 1990 and each fiscal year thereafter, the amount otherwise payable to a State for a fiscal year under this section shall be reduced by the amount by which expenditures from non-Federal sources under the State plan under this title for the previous fiscal year are less than the average of the total of such expenditures for the three fiscal years preceding that previous fiscal year.

Id. at § 202(e)(2)(A) (to be codified at 29 U.S.C. § 731(a)(2)(B) (1988)).

In his Order of Remand, the Secretary noted that NYSED argues that the Initial Decision of the Administrative Law Judge "'gives no meaning and accords no effect to the 1988 Technical Amendments' and that the ALJ failed to address the question of whether the 1988 Amendments in fact make technical and conforming amendments to the Rehabilitation Act of 1973." Order of Remand at 1 (quoting in part Petition for Secretarial Review at 4). The issue raised by the Secretary concerns which aspect of the grant reduction provision, as modified by the 1986 legislation, became operational upon the effective date of the pertinent 1986 Amendment, i.e. the

grant reduction aspect as argued by ED or the bench mark period aspect as urged by NYSED. The effective date of the pertinent 1986 Amendment was October 21, 1986, the date of its enactment, which was 21 days into the 1987 Federal fiscal year.

According to ED, the grant reduction aspect was implemented as of the effective date. Therefore, the first reduction in a grant under the revised formula occurred initially in Federal fiscal year 1987. It follows, under this view, that fiscal year 1987 was also the comparison year and that the initial three year bench mark period was fiscal years 1984, 1985, and 1986.

Under NYSED's view, the bench mark period aspect was implemented upon the enactment of the 1986 modified formula in Federal fiscal year 1987. Thus, Federal fiscal year 1987 became the first year of a three year bench mark period representing fiscal years 1987 through 1989. As such, fiscal year 1990 became the comparison year and the year of the grant reduction. Therefore, NYSED concludes that the first fiscal year affected by a grant reduction under the 1986 legislation was Federal fiscal year 1990.

According to NYSED, the 1986 legislation was "unclear" as to which aspect of the legislation was effective as of the enactment date in early fiscal year 1987. NYSED feels its approach is more reasonable because statutes are generally presumed to operate prospectively and fiscal year 1987 had already begun. In addition, NYSED asserts, in effect, that Congress sought to clarify which aspect of the 1986 legislation was effective in its 1988 legislation. NYSED maintains that the 1988 legislation was designed to correct only technical errors in the 1986 legislation and to clarify that the first grant year affected by the change in the formula was fiscal year 1990. In this regard, it cites as support the prospective implementation language of the 1988 legislation, i.e. the 1988 formula for grant reductions was applicable "[f]or fiscal year 1990 and each fiscal year thereafter," and the sparse legislative history of the revised formula in the 1988 legislation which provided that--

> Section 202(e) of the bill amends section 111 [of the Rehabilitation Act of 1973, as amended] by deleting a repetitive phrase; improving the readability of the reduction of the maintenance of effort section; incorporating the effective date into the compilation; and correcting a punctuation error.

134 Cong. Rec. 24,708 (1988).

For the reasons stated below, the tribunal agrees with ED's position.

Initially, the effective date of 1986 legislation was set forth in Section 1006 of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807, 1846 (1986) which provided that--

> Except as otherwise provided in this Act, this Act shall take effect on the date of its enactment.

The 1986 legislation was passed by Congress on October 21, 1986, and, therefore, the effective date of this law was October 21, 1986.

The parties question which aspect of Section 111(a)(2)(B) of the 1973 Act, as amended (to be codified at 29 U.S.C. § 731(a)(2)(B) (1986)), was in effect as of October 21, 1986. The answer lies in what the law commanded and directed to be done.

Section 111(a)(2)(B) of the 1973 Act, as amended, is a provision which directs a reduction in grant monies in the year of the grant. This was the command of the law both before and after its amendment by Congress in 1986. Section 111(a)(2)(B) of the 1973 Act, as amended, was effective as of October 21, 1986, and, therefore, was immediately applicable as the law which governed

the reduction of grants during the fiscal year 1987 and the years thereafter.

The bench mark period facet of the provision is simply one aspect of a mechanism adopted to ascertain the amount of a grant reduction and nothing more. As such, it has no significance or effect on the grant reduction aspect of the legislation which was effective as of October 21, 1986.

NYSED urges that the 1988 Amendment supports its cause. Under NYSED's view, the 1988 legislation had the effect of nullifying the 1986 grant reduction formula before it could affect any grant recipients. This is apparent because, according to NYSED's theory, the first year in which a grant reduction occurred under the 1986 formula was fiscal 1990 and this is the same year in which the first reduction occurred under the 1988 formula.

There is, however, no indication in the 1988 legislative history that Congress sought to nullify the 1986 revised grant reduction formula -- an unusual and striking course of action which would typically warrant some mention in the legislative history. While Congress indicated it sought to improve the "readability" of this provision in the 1988 legislative history, this apparently refers to correcting the prior deficiency in the 1986 grant reduction formula by altering the format from four years to five years in order to establish separate years as the grant reduction year and the comparison year. Thus, the legislative history does not further NYSED's cause.See footnote 1 1/

NYSED argues that the phrase "[f]or fiscal year 1990 and each fiscal year thereafter . . . ." was expressly added to Section 111(a)(2)(B) of the 1973 Act, as amended, by the 1988 legislation in order to clarify the meaning of the 1986 legislation. The tribunal disagrees.

The 1988 change in the grant formula necessitated an effective date in order to terminate the 1986 grant reduction formula and to institute the operative effect of this revised grant reduction formula. In this regard, Congress provided in Section 202(e)(2)(B) of the Handicapped Programs Technical Amendments of 1988 that the 1988 revised grant reduction provision "shall take effect on October 1, 1989" which was the beginning of Federal fiscal year 1990. Consistent with this specific effective date, Congress amended the grant reduction provision, Section 111(a)(2)(B) of the 1973 Act, as amended, to provide that it

applied '[f]or fiscal year 1990 and each fiscal year
thereafter . . . ." Thus, Congress sought to make it easier for grant recipients to ascertain which, as between the 1986 and the 1988 formulas, was applicable in a given grant year. Hence, the

1986 grant reduction formula was applicable through the fiscal year 1989 and was replaced, thereafter, by the 1988 grant reduction formula.

NYSED also argues that ED's construction results in an impermissible retroactive application of the 1986 legislation while its construction of the 1986 legislation creates a prospective application. Therefore, NYSED concludes that its construction is preferable where there is ambiguity within the statute.

As noted above, there is no ambiguity within the 1986 revised grant reduction formula. NYSED simply seizes upon a passive aspect of the provision -- the bench mark period -- and attempts to promote it as the commanding piece of the law. As explained earlier, grant reduction, not the bench mark period, is the commanding aspect of the provision. In addition, the 1986 legislation is not applied to NYSED in a retroactive manner. This legislation was effective on October 21, 1986, which was one day before NYSED received the grant in question. Thus, the provision is applied in a prospective manner. NYSED's
complaints -- that it budgeted its expenditures some 15 months earlier and that it was seven months into the State's fiscal
year -- are of no avail. While Congressional actions may create inconveniences for States which freely accept Federal grants, these inconveniences do not alter or affect the prospective or retrospective nature of the Federal statutes.

Even if this provision was retroactive, it was retroactive only for a period of 21 days and represents only six percent of the fiscal year 1987. As such, this is only a modest period of retroactivity. United States v. Carlton, 114 S. Ct. 2018, 2023 (1994). NYSED had adequate notice and sufficient opportunity to comply with the maintenance of effort provision contained in the 1986 Amendments. Moreover, the allowance of such a short period of retroactive legislation is fully consistent with satisfying the desire of Congress to remedy immediately the decreasing levels of non-Federal expenditures by the States. See H.R. Rep. No. 571, 99th Cong., 2d Sess. 23 (1986), reprinted in 1986 U.S.C.C.A.N. 3471, 3493. As such, it is simply a de minimis retroactive application required by the "practicalities of

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producing national legislation" and, therefore, acceptable. Carlton, 114 S. Ct. at 2023 (quoting United States v. Darusmont, 449 U.S. 292, 296-97 (1981)).

In light of the above, the New York State Education Department is HEREBY ORDERED to repay the United States Department of Education the sum of $725,974.

Allan C. Lewis
Chief Administrative Law Judge

Issued: October 12, 1994
Washington, D.C.

Footnote: 1 *1/ In a similar fashion, the use of the term "technical amendments" in the title of the 1988 legislation is not particularly significant. It is a term which Congress has not defined and has been employed in many contexts. As such, it neither advances nor hinders NYSED's position.*