APPLICATION OF THE COLORADO DEPARTMENT OF SOCIAL SERVICES, Applicant.

Docket No. 92-117-R
Recovery of Funds Proceeding

DECISION

Appearances: Joyce K. Herr, Esq., Senior Asst. Atty. General, Gale A. Norton, Esq., Attorney General,
Timothy M. Tymokovich, Esq., Solicitor General, Paul Farley, Esq., Deputy Attorney General, and Wade Livingston, Esq., First Asst. Atty. General, for the Colorado Department of Social Services.

Sergio Kapfer, Esq., Office of the General Counsel, U.S. Department of Education, for the Regional Commissioner, Denver Regional Office of the Rehabilitation Services Administration.

Before: Thomas W. Reilly, Administrative Law Judge

BACKGROUND

The Colorado Department of Social Services (Applicant or CDSS) has appealed a Notice of Disallowance Decision (NDD) issued on September 30, 1992, by the Regional Commissioner (RC) of the Denver Regional Office (Region VIII) of the Rehabilitation Services Administration (RSA) of the U.S. Department of Education (ED). The NDD ordered the return of $767,787.87 of Federal funds which had been received by CDSS See footnote 1 1/ in Federal fiscal years (FFY) 1988, 1989, 1990, and 1991 under Part A of Title VII See footnote 2 2/ of the

Rehabilitation Act of 1973 (Act), as amended, 29 U.S.C. §§ 701- 796i, and as in effect before the Rehabilitation Act Amendments of 1992 ('92 Amendments), Pub. L. 102-569, enacted on October 29, 1992. The basis for the Regional Commissioner ordering the refund was CDSS' alleged failure to comply with the matching funds requirements of 29 U.S.C. § 769c(b) and 34 CFR 365.45 of the applicable regulations, as well as alleged record-keeping violations.

ISSUES

Whether CDSS failed to meet the matching requirement of the Act and regulations to qualify for the 90% "Federal share" under the State's Independent Living Rehabilitation Services program authorized by Part A of Title VII of the Act, and therefore should be required to refund $767,787.87 in Federal funds as demanded by the RSA Regional Commissioner.

Whether cash contributions may be or were required from individuals receiving services under the Part A program; whether cash contributions from individuals receiving services from sub-grantees of CDSS may be used to meet the Part A matching requirement; and whether the total of such alleged "consumer" contributions made any significant impact upon the alleged shortfall in required State matching funds.

Whether CDSS complied with the general record-keeping requirements applicable to both cash and in-kind contributions set forth in the pertinent regulations (34 CFR 74.61, 76.730, 76.731 and 80.20). (In-kind contributions, 34 CFR 80.24(b)(6).)

Whether CDSS may use expenditures made under the State's Rehabilitation Home Teachers program (RHT) as an alternative to meet the Part A matching requirement, or as an "offset" against any alleged shortfall in the matching figures originally claimed by CDSS at the time of the subject State Plan Assurance Review (SPAR) and NDD.

SUMMARIZED CONCLUSION

For the reasons set forth below, I conclude that the Applicant should not be required to return any of the disputed funds, and that the Disallowance Decision and the Regional Commissioner's demand for refund are unwarranted and unjustified. Among other things discussed below, I find that the Regional Commissioner has misapplied or misapprehended the concept of "donor" as used in the pertinent regulation (34 CFR 361.76(b)) and, thereby, improperly eliminated appropriate "matching funds" that were sufficient to cover the required "State or local share."

I also conclude that cash contributions from disabled recipients (beneficiaries) receiving services under the Part A program may

not be used as part of the Part A matching requirement, but in this particular case, even though there was some initial confusion by the subgrantees on this point, it was subsequently cleared up and no claim was made by CDSS for credit for such funds under the "matching" requirements. (The evidence indicates that there were only insignificant amounts involved in such collected "client" funds.)

I find that even if all the contested "client/recipient contributions" were to be disallowed in accordance with the Regional Commissioner's theory, the balance remaining was sufficient to make the required "match".

I further find that CDSS' adequately complied with the general record-keeping requirements of the Part A Title VII program.

I also find there were other State funds that had been expended in the same rehabilitation services program area in the subject years that could have been (but were not) claimed as State matching funds to support and justify the Federal funds for the Federal fiscal years in question, i.e., funds expended by the State in its Rehabilitation Home Teachers program (RHT). Those RHT funds were more than adequate to supply the entire 10% State or local match for the subject

years. Whether treated as the "match" itself, or simply as an offset, such State expenditures render the R.C.'s calculations of shortfall invalid and unjustified.

CHRONOLOGY

During the weeks of September 24-28, 1990, and May 28-30, 1991, RSA conducted a review of CDSS Part A program case files, as part of a SPAR review that had started October 11, 1989. A letter from James Dixon, RC of RSA, informed Anthony Francavilla, manager of CRS in CDSS, that RSA's September 24-28 Part A program case file review had disclosed that CDSS might not be in compliance with the matching requirements of 29 U.S.C. § 796c(b) and 34 CFR 365.45, and requested more information on the "exact amount of funds used for matching purposes for each year the program had been in operation in (Colorado)" and "total information (on) the source(s) of these matching funds." (Letter, January 25, 1991, ED Ex.G.) See footnote 3 3/

Mr. Francavilla's response (May 23, 1991, ED Ex.H) stated, inter alia:

1. Prior to Federal Fiscal Year 1990, all matching funds were provided to CRS by the independent living centers and other sub-grantees. With few exceptions (noted below), each sub-grantee was reimbursed in the amount of 90% of the approved, eligible expenditures under the grant, with the sub-grantee being responsible to secure and expend eligible matching funds.

2. Part A sub-grants took two forms - grants for direct purchase of case services to individual consumers (shown as "ILAC" funds)[Independent Living Local Allocations Committees], and cost-reimbursement grants for administration and delivery of services by the sub-grant agency. The latter category of sub-grants represent approximately half of the total Part A funds expended, and do not have the potential for the misinterpretation of consumer participation which has been identified in some "ILAC" cases. . . .

* * * *

3. As we previously agreed, matching funds for all FFY 1990 "ILAC" activities were provided through cash funds available to CRS, and the questioned funds raised by the ILC's (Independent Living Centers) were waived in their entirety. For non-ILAC "administrative" sub-grants, the sub-grantees have continued to provide the matching funds. Again, no direct client services are funded through these grants and, therefore, no issue of misinterpretation or misapplication of "client participation" funds arises.

* * * *

While examination of State Agency records allows for certain general conclusions as to whether a sub-grantee may have claimed funds expended by consumers as participation in the cost of services as a portion of the ILC's "applicant (matching) share" of the cost of case services, our own records only document with certainty the total amount contributed by the sub-grantees. We cannot, therefore, provide from our records a detailed breakdown of the multiple sources from which the sub-grantees themselves received the funds used for their share of eligible expenditures.

The majority of Part A funds expended during the period... were in fact awarded to IL Centers for administrative expenditures (..."project grants", and

were not subject to
the possibility of erroneous application of consumer funds). * * * *
(W)hile erroneous reporting of consumer participation
as local "matching" funds may have occurred,See footnote 4 4/ there is no evidence that any consumer was ever denied services for failure to participate in the cost of services, or that there was ever intent by the State or the sub-grantees to violate regulations.

We regret that neither State agency (n)or Federal review disclosed this problem prior to 1990. We have, subsequent to your identification of this problem,
acted aggressively to assure that current-year matching
funds (FFY 1990) were provided from sources other than
the IL Centers, so that there was no possibility of any
funds from consumer participation being included in the state share of ILAC service costs....

We have sought and...received legislative approval for continued use of cash funds available directly to CRS
to match all IL Part A case service (ILAC) funds in the future. This will totally eliminate the potential for
future problems resulting from sub-grantee confusion
about eligibility of various funds for Part A "match"....

(Francavilla letter, May 23, 1991, ED Ex.H, emphasis added.)

A series of letters between RSA Regional Commissioner James Dixon and Anthony Francavilla, Manager of CRS, led to the eventual issuance of the Notice of Disallowance Decision (NDD) on September 30, 1992. Mr. Francavilla appeared to be genuinely attempting to comply with the requests for further information and further documentation, but Mr. Dixon apparently was dissatisfied with the forthcoming results, notwithstanding CRS's changes in its "matching funds" arrangements, the funds to be used therefor, and the newer methods of reporting and accounting to more exactly fit what RSA wanted.

RC Dixon sent another letter to Mr. Francavilla on July 2, 1991, transmitting a draft report of the Part A program SPAR of CDSS conducted September 24-28, 1990. (ED Exhs.I & F.) This included a tentative finding that CDSS had allowed its subgrantees to require clients to make contributions toward the cost of their services. On July 22, 1991, Mr. Francavilla replied (ED Ex.J), stating that on November 13, 1990, CDSS already had notified all of its subgrantees that consumer participation in the costs of services under the Part A program could not be required under any circumstances, either as a condition of eligibility or for approval of purchasing services, and that consumer participation must be strictly voluntary. Mr. Francavilla also pointed out that CDSS "has identified other sources of cash matching funds for all Title VII Part A case service ('ILAC') sub-grants made from FFY 1990 and subsequent Federal grants." (Emphasis added.)

The final SPAR report on the Part A program was sent by the RC on July 26, 1991, advising CDSS that its methods for ensuring that appropriate sources of State funds are used to match Federal funds were being investigated, together with the fiscal administration of the State match. (ED Ex.K.) On April 28, 1992, the RC sent another letter to Mr. Francavilla again requesting information about the source of the State's share of expenditures under the Part A program, and requesting supporting documentation. (ED Ex.N.) The letter, inter alia, stated that the cost sharing or matching requirement "must be verifiable from your records and your subgrantees' records" and that "(t)hese records must show how the value placed on third party in-kind contributions was derived."

Mr. Francavilla replied by letter of June 3, 1992 (ED Ex.P), stating in part:

> Most of the local share of project costs reported by the subgrantees came from "Other Contributions". In many cases, subgrantees did not list specific donors for these funds, because funds contributed to a non-profit agency that are not "earmarked" for specific purposes are ordinarily placed in an account for general or "unrestricted" contributions. Funds from such an account cannot subsequently be identified by donor's name.
>
> ... CRS has obtained legislative authority to begin using its own cash funds in lieu of funds provided by subgrantees as the State share of Title VII A expenditures. We have subsequently utilized these cash funds, along with eligible funds contributed by the Centers, to meet State participation requirement for FFY 1990 and 1991.
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> * * * *
>
> Funds have not been received for deposit from any party other than the subgrantees, and then only under limited and infrequent circumstances where the Center was unable to carry the cash-flow for a purchase. In those instances, the Center sent CRS a check for the subgrantee share of a purchase along with an invoice, and the State issued a warrant for the full amount. We have been able to identify a total of $997 in funds deposited for this purpose.
>
> There is no indication that any Center utilized fees charged to consumers of Title VII services for matching purposes.

(Emphasis added.)

It should be noted at this point that in all the above correspon- dence, the Judge does NOT consider the term "subgrantee" to be synonymous with either "consumer" or the ultimate disabled recip- ient/client of rehabilitation services. Rather, a subgrantee is understood to refer to the local individual nonprofit, community- based Center for Independent Living ("ILC" or

"Center"). Under the system used by CDSS and its organizational unit, CRS, the local Centers were responsible for obtaining and supplying the 10% "State match" that was necessary to utilize the Part A, Title VII Federal funds here at issue. (The State or local "match" could consist of either cash or in-kind contributions, or a combination of both, and may include funds from private non- profit agencies, such as United Way, or individual contributing donors.)

The forms submitted by CDSS to RSA (ED Exh.Q, R, S & T) summarized the sources of funds used to satisfy the State's 10% match requirement for FFY's 1988, 1989, 1990 and 1991, showing the amounts received by CDSS from its subgrantees:

FFY 1988 -- $35,096.77
FFY 1989 -- $36,248.43
FFY 1990 -- $59,174.30
FFY 1991 -- $84,699.50

_____

TOTAL: $215,219.00

RSA's brief (at 8) states that the forms showed no "in-kind"

contributions received by CDSS from any of its subgrantees, and that Mr. Francavilla provided no supporting documentation with this information. "Therefore, RSA could not verify the figures provided" on those forms (RSA Brief, at 8). But CDSS points out (Brief, 14-15) that the primary source supporting information was "voluminous" and, therefore, could not simply be handed over by Mr. Francavilla; it was, however, maintained by CDSS personnel and the Centers, and was always available for review or audit by RSA. Consequently, the accuracy of RSA's claim that it "could not verify the figures provided" is seriously questioned. Furthermore, CDSS asserts that "the documentation of in-kind contributions had not been maintained by CDSS fiscal personnel because they believed that the 10 percent match provided by the Centers was sufficient and therefore the reporting of in-kind contributions as match was not necessary." CDSS also points out that at no time has RSA attempted to perform any audit of these records. (CDSS Brief, at 15.)

On July 27, 1992, the RC sent the draft monitoring report to CDSS. CDSS replied through Mr. Francavilla's September 10, 1992 letter (ED Ex.W) which pointed out, among other things, that CDSS' earlier June 3, 1992 letter was intended to address what CDSS believed were RSA's "concerns about the sources of funds or in-kind contributions to the subgrantees." (Emphasis added.) CDSS also said that costs incurred by its subgrantees that were funded by cash contributions to its subgrantees "constitute in- kind contributions as defined in 34 C.F.R. 80.24(a)...(and) are not subject to the deposit requirements of 34 C.F.R. 361.76." Id. CDSS also informed the RC that "the balance of required State or local participation in Title VII Part A expenditures for Federal fiscal years 1988, 1989, 1990 and 1991 appears to be fully met through the in-kind contributions of the subgrantees supported by cash contributions to the subgrantees...." Id. CDSS also identified other amounts of in-kind contributions to its subgrantees from local volunteers for FFY 1990 totalling $1,187.

On September 30, 1992, the RC sent the final monitoring report to CDSS (ED Ex.X) and it questioned $767,787.87 of the allotments received by CDSS for the four FFY's in issue under Part A of Title VII. The report alleged a failure of the State to meet the Part A matching requirement. On the same date the RC sent the NDD to CDSS disallowing the above amount for, inter alia, an alleged failure of the State to meet its matching requirement for the State's independent living program that had been authorized under Part A of the Act.

CDSS filed its Application for Review on October 30, 1992, and jurisdiction of the case was accepted by the Office of Administrative Law Judges, U.S. Department of Education, on November 11, 1992.

ANALYSIS OF ARGUMENTS

Regulations relating to the Independent Living program appear in 34 C.F.R. Part 365 (1990). A section entitled "State and local funds", 34 C.F.R. 361.76 (relating to Title I) is referenced by 34 C.F.R. 365.15 (1990). In 34 C.F.R. 365.1, the provisions of the Education Department General Administrative Regulations (EDGAR) are made applicable. In March 1988 EDGAR regulations in 34 C.F.R. Part 80 were adopted establishing uniform rules for grants to States. (Appl.Ex.17) There is nothing in Part 365 which defines, clarifies, interprets or prescribes standards for the "non-Federal share" required by statute. In its brief, RSA characterizes the non-Federal match as "State funds", but that terminology is inaccurate and misleading. RSA appears to rely on 29 U.S.C. §796c(3)(1990) to support its contention that "non- Federal share" is whatever the Commissioner says it is in the regulations. The statute, however, does not quite say that. It merely allows expenditures of counties and other political subdivisions to (also) count toward the State share. It does not otherwise limit or define the nature of expenditures includable under "State share". This is consistent with 29 U.S.C. §706(7)(C)(1990), which provides a similar definition for the Vocational Rehabilitation program generally, i.e., that expenditures of political subdivisions and local agencies also shall be regarded as expenditures by the State. But neither provision defines "expenditure."

Section 361.76 simply defines "State or local funds" for the purposes of Part 361 (see introductory statement in the regulation). No other provision in Part 361 or Part 365 refers to the term. Ergo, the regulation itself does not define or clarify or set forth requirements or limitations for the statutory term "non-Federal share". It cannot be maintained that "State or local funds" is equivalent to "non-Federal share" because 34 C.F.R. 361.76 makes no provision at all for the "in-kind" contributions clearly allowed by the statute. The basic rule for "cost sharing or matching" in 34 C.F.R. 80.24 (1990) is that matching requirements are satisfied either by allowable costs incurred by a grantee or subgrantee including "allowable costs borne by cash donations from non-Federal third parties" or by "the value of third-party in-kind contributions...." For example, under §80.24 there are two ways to satisfy a cost- sharing requirement -- allowable costs paid with funds from non- Federal sources and "in-kind" contributions. Section 361.76 establishes a third acceptable form of non-Federal match, cash deposited in State or local government bank accounts. However, neither statute nor regulation requires that only "State funds" can be considered the only permissible manner by which the State can fulfill the cost-sharing required

by the Federal program, or that the cost-sharing "allowable costs" must be State funds. RSA's insistence that "allowable costs" also must be "State

funds" appears to be beyond the statutory authority of the agency.

The Rehabilitation Services Manual, Chapter 3010, states in 3010.25 (Appl.Ex.18), that "the State share of the costs in the establishment of a rehabilitation facility may be cash or in-kind in accordance with 34 C.F.R. 80.24." Then, RSA appears to make an unjustified leap over its authority by asserting that 3010.09 of its Manual applies to cash contributions by private agencies. Paragraph 3010.09 refers back to 34 C.F.R. 361.76 which defines "State and local funds," but there is no reference to "State and local funds" in Part 80. Most of the costs claimed by CDSS as its share in this case ("cost sharing") were allowable costs borne by third parties. Some were identified as "in-kind" contributions (Appl.Ex.19), including the value of such items as general office work and donated goods. In Colorado, the system used by CDSS to establish and comply with cost-sharing requirements (ED Ex.H) was, in most cases, by reimbursement to each subgrantee from the State for 90% of approved, eligible expenditures, and the subgrantee was responsible for obtaining and spending 10% of the costs as matching funds.

RSA is mistaken in asserting that CDSS did not have "sole discretion" to direct how the cash contributions could be spent by the individual Centers. The amounts became contributions for matching purposes only when expended by the Centers for allowable costs of the program, as approved by CDSS. CDSS always maintained control over how, when and on what such money was to be spent. RSA also argues that the State's match was faulty because the funds contributed by the Centers were not appropriated by the State. Those amounts were identified, considered and appropriated by the Colorado legislature. (See Appl.Ex.10.) RSA admits that expenditures made with appropriated State funds "would clearly qualify" as State match. (ED Brief, at 12.)

One of the arguments of RSA is that none of the contributions to CDSS from its subgrantees could properly be used to meet the Part A matching requirement because this would allegedly violate 34 CFR 361.76(b), which expressly prohibits "expenditures that revert to the donor's use or facility," as CDSS, in essence, was sending 100% of the cost of the eligible expenditure back to the subgrantees (ILC's) in exchange for the 10% initially transmitted to CDSS by the subgrantees. But this appears to be clearly misinterpreting the meaning of "donor" in that regulation. The real "donor" was the original individual charitable contributor to the independent living center (ILC) or to CDSS - not CDSS itself or the ILC. In other words, if an initial individual donor were to be reimbursed the amount of his initial contribution (to ILC or CDSS) after going through the charade of initially paying the alleged "10% match" (or any part thereof), then, of course, that would violate the 361.76(b) prohibition

against reversion "to the donor's use or facility." Such funds could not then be used as any part of the required "match". But CRS or an ILC in using its own collected funds to transmit up the line to CDSS or the State does not transform the ILC, CRS, or CDSS into a "donor" within the meaning of that regulation. Also, there is no requirement that only State funds be used for the 10% match share. County, local, and private nonprofit agencies or individual local contributors can certainly supply funds toward the "State share" or match. Here it was clearly the State's plan and system that the local agency come up with the 10% share, and so long as the source of those

funds was not the disabled consumers themselves, the State was entitled to count those funds as part or all of its 10% "match". The very section itself envisions funds coming from "contributions by private organizations or individuals" to be deposited in the account of the State or local agency. (See first sentence of 361.76(b).) To repeat the obvious, the "private organization or individual" making the initial contribution is the "donor" for purposes of that section -- not the local ILC, CRS, or CDSS which transmits some or all of those funds up to the State as part or all of the "State's" match. Thus, in the absence of any evidence that individual contributing "donors" received their donation money back again, the "reversion" prohibition of 361.76(b) has no applicability here. See footnote 5 5/ The money "coming back" from a higher state agency never came back to the original "donors", but rather went to purchase goods or services for the disabled clients and intended beneficiaries, i.e., "consumers" of rehabilitative services in the ILC's.

There is an apparent additional argument that "none of the cash contributions received by CDSS from any of its subgrantees were received with the understanding that CDSS had 'sole discretion' for how those cash contributions could be spent," since those funds were transmitted with the expectation that a 100% payment would be sent back by CDSS for the rehabilitation item requested at the same time the 10% matching "donation" from the local ILC was sent. But this argument is inextricably tied in with improperly treating an ILC (or CDSS) as a mere charitable "donor" or "contributor" for purposes of the earlier "prohibited reversion" argument, instead of as the quasi sub-agency of the State that it is (albeit by contract). The fact that there is transmission of funds representing the "State's" 10% share from one local sub-agency (ILC) of the State to a larger State agency (CDSS) does not thereby taint those funds and make them unavailable for matching purposes, nor does it inhibit the discretionary re-use of those funds in the rehabilitation services area by the receiving state agency (CDSS or CRS). They were initially collected as private charitable contributions by the local agency (Independent Living Center) without restrictions on how to be used, they thereby became "State or local funds," and thereafter were utilized by the State agencies as part of their required 10% "match." I see nothing reprehensible or devious about this, nor does it in any way defeat the purposes of the Federal requirement that States come up with their 10% match in State or local funds before being eligible to spend the Federal share.

RSA also has argued that CDSS failed to meet the record-keeping requirements of the pertinent regulations (34 CFR 74.61, 76.730, 76.731, 80.20 and 80.24(b)(6)). The Single Audit Act of 1984, 31 U.S.C. §§7501-7507, Appendix to Part 80 of EDGAR, mandates audit requirements for State and local governments that receive Federal funds. Each governmental unit receiving over $100,000 annually in Federal funds must have an audit performed annually by an independent auditor using generally accepted government auditing standards covering financial and compliance audits, 34 C.F.R. Part 80, Appx.4 (1990), with the oversight of a "cognizant agency", 34 C.F.R. Part 80, Appx.3(a)(1990). The Single Audit Act also requires State or local governments receiving Federal funds to enforce similar audit requirements on their sub-recipients. Colorado's Department of Health and Human Services is the "cognizant agency." This cognizant agency has given no notice to the State of any irregularity in the accounting system being used by state agencies and sub-agencies in the rehabilitation services programs. The Office of the State Auditor has performed regular state audits of the program and agencies involved and found no significant irregularities in the accounting systems used (Appl.Ex.22).

The regulation found at 34 C.F.R. 76.730 requires records kept by

the State and subgrantees to show the amount of funds and how used. Section 76.731 requires records kept by the State and subgrantee "to show its compliance with program requirements." Section 80.20(a) requires the State to account for funds "in accordance with State laws and procedures" sufficient to prepare required Federal reports and allow tracing of funds. A review of the two volumes of CDSS exhibits indicate that the State's fiscal controls and accounting procedures comply with those mandates. Section 80.20(b) prescribes subgrantees' reporting standards, including accurate reports required by the grant or subgrant, and records which identify "the source and application of funds". The evidence indicates that CDSS' subgrantees keep such records. 34 C.F.R. Part 74 Subpart G (74.53(d)) of EDGAR (re: FFY'88) and 34 C.F.R. Part 80 Subpart C (80.24(b)(6) (re: FFYs'89,'90,'91) See footnote 6 6/ specified that cost-sharing or matching costs and third party in- kind contributions "must be verifiable from the records of recipients or cost-type contractors"(FFY'88) or "from the records of grantees and subgrantees or cost-type contractors" (FFYs '89,'90,'91).

Independent audits of the Independent Living Centers have been performed. CDSS maintains in its own records the cancelled checks and other back-up material relating to all costs incurred as "match". One RSA official (from Washington,D.C.) "questioned the detail and magnitude of client files" See footnote 7 7/ in a Colorado Center, believing such detail to be "excessive and contrary to Independent Living philosophy."

In its brief (at 21), RSA complained that "CDSS has failed to supply adequate accounting records and supporting documentation." But the statute and regulations only require the maintenance of

records and designated reports. They do not require that a State comply with an unreasonable, unlimited or unfeasible request for voluminous documentation by a Federal agency, when such voluminous records and documentation are freely available to Federal audit or inspection. Nor does Federal law require additional audits in violation of the Single Audit Act, which provides that the single audit "shall be in lieu of any financial or financial and compliance audit of an individual Federal assistance program which a State or local government is required to conduct under any other Federal law or regulation." 31 U.S.C. §7503(a)(1990).

What Regional Commissioner Dixon appeared to be driving at here (judging by his extensive and lengthy correspondence with Mr. Francavilla) was a rather extensive re-audit of the voluminous documentation available at CDSS and the individual Centers. For example, see Mr. Dixon's January 25, 1991, letter wherein he asked for "total information about the source(s)" of funds used for matching purposes. CDSS, attempting to cooperate and believing that RSA's primary concern was consumer or individual contributions, replied by letter of May 23, 1991, supplying additional information as to how the match was determined along with several pages of detail. (ED Ex.G, reply ED Ex.H.) Mr. Dixon's second letter (ED Ex.N) demanded even more information, even transmitting an ad hoc form for the State's "convenience" in providing large amounts of additional information, which was to be returned to RSA with "supporting information." The letter provided only the most general description of the additional documentation desired by the Regional Commissioner: "T)he information and supporting

documentation ... must be sufficient to permit the tracing of the Title VII, Part A funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes." (Not a helpfully narrowing description.)

On June 3,1992, CDSS provided the completed forms requested by RSA (ED.Exs.P-T). The information supplied still did not satisfy RSA. The Regional Commissioner asserts in his brief (p.8) that the ad hoc forms completed and returned by CDSS "showed no in- kind contributions received by CDSS from any of its subgrantees." But the documentation from each Center clearly identifies such contributions which were included in RSA's spreadsheet attached to its Final Monitoring Report (ED Ex.27).

After the lengthy series of letters and repeated attempts to supply additional information and additional documentation, RSA's allegation of "insufficient record-keeping" seems disingenuous at best, particularly when further voluminous records and documentation still existed at CDSS and the IL Centers, scrupulously maintained for RSA's inspection, should it care to go to the trouble. Thus, the issue of records "maintenance" appears to be not a valid allegation, one created by RSA from a

position wherein it was adamantly committed to remain unsatisfied with whatever was produced by CDSS (and Mr. Francavilla).

It is true that the individual Centers did not always identify the specific donor of some of the funds because it was unable to do so. Funds included in the category of "Other Contributions" were "unrestricted" from sources that did not "earmark" the funds for any particular purpose. It was the usual practice in such organizations that all such funds were combined and thus lose their individual character. If all such funds were eligible for use, the identity of the donor was irrelevant. However,
the Centers were generally able to identify the sources of funds in unrestricted accounts as shown by examples in Applicant's Exhibit 25.

The "Other Cash Funds" to which Mr. Francavilla referred in his June 3, 1992 letter (ED Ex.P), were cash funds unrelated to the contributions from the Centers. CRS had intended to use these funds in lieu of claiming funds from the subgrantees for the ILAC grants. However, when CRS determined that the language of the State legislative appropriation precluded use of such funds at that time, it did not include them in the category of funds described in Mr. Francavilla's letter (ED Ex.P) thus: "funds have not been received for deposit from any source other than the subgrantees." At that time the statement that CDSS was not aware of any Centers charging fees to clients was correct.

In the preliminary departmental decision to disallow funds, "the Secretary shall have the burden of stating a prima facie case for the recovery of funds."See footnote 8 8/ 20 U.S.C. §1234a(a)(2). A State does not have the burden or proving the allowability of expenditures disallowed in a final audit if the notice "lacked sufficient detail." State of California Dept. of Education v. Bennett, 849 F.2d 1227 (9th Cir. 1988). The court determined in that case that summary conclusions do not supply "sufficient detail" required in the statute if the conclusions are based upon a tiny sample too small to be relied upon to give a fair picture of operations across-the-board. In this

case RSA's NDD referred to the final monitoring report issued September 30, 1992. That report repeated the State's claim for the non-Federal share as reported on the Federal forms and RSA asserted that Colorado deposited only "miniscule" amounts in its bank accounts. The report concluded that "(b)ased on responses from CRS, CRS used cash funds contributed by the Centers ... not deposited in a State account...." The report further concluded that CDSS "did not provide documentation to support" in-kind contributions, and

then argued that because CDSS failed to provide the documentation RSA wanted "RSA must conclude that CRS and its subgrantees did not maintain adequate records...." There is no assertion that RSA ever looked at the records the Centers did have, nor evidence as to what those records actually showed. There is not even an assertion that any attempt was ever made to look at such records. RSA merely asked questions in its ad hoc forms, received answers, additional information and additional documentation, and then RSA made a sweeping conclusion ("inadequate records") without checking the readily available records for the further information it apparently desired.

It is apparent now that RSA was looking for something very specific in its continuous rejections of whatever was supplied, but RSA never did specify exactly what it was looking for. The generality about supplying "information and supporting documentation...sufficient to permit the tracing of...funds to a level of expenditures adequate to establish that such funds have not been used in violation of (law)" is so vague as to be useless, instead of being helpful and specific. It is insufficient for RSA to simply say that some instances have been found in which clients "illegally" contributed to costs of services, and then use that as a basis to disallow CDSS' entire non-Federal share. The burden is on RSA to show illegality, that the State's and Centers' audits, reports and records were inaccurate or insufficient (in some specific way) to comply with applicable law and regulations. From the exhibits in this record, the State's records appear to be adequate to comply with the requirements of the law and regulations. Without ever auditing or at least reviewing the records described by Mr. Francavilla in his letters, particularly at the Centers, RSA failed to meet its burden of establishing a prima facie case with regard to alleged "inadequacy" of record-keeping. RSA's suspicions do not substitute for proof.

Not only is RSA's disallowance of the State's entire Federal share of Part A Title VII disproportional to any harm to the Federal interest, but I see no harm to the Federal interest in the facts and circumstances existing here. The State did a commendable job in executing the Part A program,See footnote 9 9/ and exceeded the required 10% match from several standpoints.

COLORADO'S REHABILITATION HOME TEACHERS PROGRAM

During the same four-year period for which the disallowance was issued, CDSS also operated a Rehabilitation Home Teachers Program for persons who are visually impaired. Funded entirely by appropriation of State general funds, the RHT Program serves clients, 53% of whom have been recipients of services through Title I (§110), 29 U.S.C. §720, the basic support grant, and 47% of whom may not be eligible for Title I assistance because of their severe disability. The program provides training in Braille and mobility, use of low-vision aids, cooking, housekeeping, and shopping. (Appl.Ex.12) The teachers' job descriptions specifically describe their functions. Examples of case records (Appl.Ex.11) show that these clients were eligible for

Title VII, and that services rendered were eligible services under Part A Title VII and the RSA-approved State plan.

For documents relating to the Rehabilitation Home Teachers Program (RHT), a review of Applicant's Exhibits 11 thru 14 and 37 thru 42 is essential. Not only is the applicability of that program's State expenditures for use as "matching funds" quite evident, but the amount of expenditures not otherwise used as Federal match is calculated in those exhibits. (Appl.Ex.14.)

In its brief, RSA bases its contention that CDSS may not claim previously unreported expenditures as an offset against a disallowance of Part A funds on two old RSA program instructions (RSA-PI-77-7, December 8, 1976, ED Ex.A; RSA-PI-77-33, September 26, 1977, ED Ex.B). They were issued long before Title VII was enacted, and apparently those old program instructions related only to Title I of the Act, not Title VII. (See Appl.Ex.26 and Policy Directive RSA-PD-91-04.) Thus it appears that the first of the six conditions described in RSA's brief as prerequisites to accepting the RHT Program expenses for "match" is inapplicable. The remaining five conditions (ED Brief, at 24-25) clearly have been met.

During each of the four years in question, the State expended only State general funds for the RHT Program and to the extent of over $400,000 per year, of which $200,000 or more (each year) was NOT used to match Title I or any other Federal funds. Thus, over $200,000 per year was available to meet the State's share of Title VII Part A costs (Appl.Ex.14, see also Appl.Exs.11,12,13 and 37-42). (Compare the amount available per year with the much less than $100,000 per year needed for the "match".) All expenditures in the RHT program offered as non-Federal match were for personal services, staff travel and operating expenses for CDSS personnel engaged in delivery of services to persons who were eligible for services under Title VII Part A, and were within the scope of the State plan for Independent Living. Accordingly, these funds more than meet the requirements for

match even utilizing RSA's own criteria for "State and local funds." See footnote 10 10/

Applicant's Exhibit 36 summarizes appropriated expenditures for the RHT Program for each year covered by the disallowance (NDD), indicating amounts reimbursed under Title I and amounts remaining available for match of Title VII funds. (Each of the years in issue have an amount of RHT expenditures available for match in the Part A Title VII program far greater than needed.) Applicant's Exhibit 34 itemizes all Title I expenditures, by grant extract report, including the RHT Program, in FFY 1991. That supports the amount of $287,790.39 claimed on the RSA-269 form (Appl.Ex.35) submitted to RSA for Title I for that year, and the amounts summarized in Applicant's Exhibit 36.

The combined effect of the Supplemental Documentation See footnote 11 11/ submitted by Colorado on March 6, 1995 (in response to my February 13th Order requesting such additional information) is to clearly establish in sufficient detail that CDSS did, in fact, have more than adequate RHT expenditures to qualify for the "non- Federal share" in each of the years in issue standing alone without credit for any of the already-claimed Independent Living Center expenses. Within these documents there are calculations and deductions of those RHT expenditures already claimed as match under Title I programs. I decline to accord to Standard

Form 269 the exalted shibboleth status that ED counsel apparently would, when similar information is contained in the copious additional

documentation submitted by Colorado. See footnote 12 12/

FINDINGS AND CONCLUSIONS

After due consideration of the entire record in this proceeding including all documentary evidence and the briefs of the parties,
the tribunal has arrived at the following findings of fact and conclusions of law:

1. The Applicant has carried its burden of proving that the funds covered by the RSA's Disallowance Decision should not be returned, and that the expenditures disallowed by that DD were allowable under the Rehabilitation Act of 1973, Part A Title VII program for required "State and local funds" matching purposes.

2. The Applicant carried its burden of proof in establishing that the State of Colorado (through CDSS) has supplied more than the required matching funds in the four Federal Fiscal Years in issue, consistent with the requirements of §704(b)(1) of the Act with regard to the State's Independent Living Rehabilitation program.

3. The Applicant met its burden of proving that it maintained adequate records and met the general record-keeping requirements for the Part A Title VII program and, specifically with regard to the documentation of "matching funds" expended, as required by the Act and its implementing regulations.

4. CDSS met the Part A Title VII matching funds requirements of the statute and regulations for the four FFY's in issue.

5. Cost participation by individual clients/recipients of services, who were able to pay for part of their services, does not violate the law or regulations relating to the Part A Title VII program, so long as such funds are not claimed as part of the State's required "match".

6. Such "client" cost participation was miniscule in amount, did not affect the claimed "non-Federal share", was not claimed by CDSS to be part of its "matching funds" expenditures, and was not mandatory or a prerequisite to receiving rehabilitative services or equipment.

7. CDSS substantially met the record-keeping requirements of RSA in accordance with the mandates of the Part A Title VII program, and during and since the subject audit has upgraded the quality of its record-keeping system in its continuing quest to conform to whatever detail RSA requires.

8. RSA gave insufficient guidance before, during, and after the subject records review (SPAR) to enable CDSS to supply the more specific documentation RSA apparently desired for "matching funds" records. Furthermore, RSA never went to the sites of the Individual Living Centers to view the voluminous additional documentation that was always freely available and accessible to

RSA for whatever further detailed records it sought to support the "matching funds" calculations submitted by CDSS.

9. For years prior to the subject audit and review RSA never indicated that CDSS' records system was inadequate for RSA's purposes, nor gave any suggestions on how to improve it to satisfy RSA.

10. The Applicant met its burden of proving that the State fully discharged its obligations to account properly for both the Federal funds expended in this program and for the "matching funds" ("non-Federal share") required by the Act and the pertinent regulations.

11. The funds used as "non-Federal share" need not be solely governmental in nature (i.e., State, county or local government units), but they may originate with private individual contributors (organizations or private individuals), so long as contributed for State or local use in the rehabilitation services area. Nothing in the statute or regulations expressly prohibits this nor explicitly defines or limits what may constitute the funds or expenditures used for the "non-Federal share."

12. There was NO harm to the "Federal interest" by the manner in which Colorado and CDSS calculated and recorded funds and expenditures made on the local level for the State's Independent Living Rehabilitation Program.

13. The State's expenditures in the Rehabilitation Home Teachers Program, standing alone, and emanating from the State's legislatively appropriated general funds, alternatively, more than satisfies the matching funds requirements of the Part A Title VII program. Such funds (solely those NOT used for any other Federal "match") amounted to over $200,000 per year for each of the four years in issue, and the amount of "match" required for each of those four years was far less than $100,000 per year. There is no Federal regulation now in effect that would prohibit use of those RHT funds as "match" simply because other State or local expenditures had been submitted earlier for that same purpose.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, the demand by the Regional Commissioner of the Denver Regional Office (Region VIII), of the Rehabilitation Services Administration, to recover funds from the Colorado Department of Social Services is HEREBY ORDERED DENIED AND REVERSED, and the subject Disallowance Decision covering Federal Fiscal Years 1988 through 1991 is hereby VACATED.

_____

Thomas W. Reilly
Administrative Law Judge

Issued: March 31, 1995.
Washington, D.C.

Footnote: 1 *1/ The NDD issued September 30, 1992, referred to "Colorado Rehabilitation Services" with the acronym "CRS". CRS is a unit within CDSS, which is the designated State agency under Titles I and VII of the Rehabilitation Act of 1973 (Act). CRS is the designated State unit under Titles I and VII. CDSS filed the application for review, thus all references to CDSS herein will refer to both CDSS and CRS.*

Footnote: 2 *2/ Part A of Title VII authorizes grants to support State independent living rehabilitation services programs.*

Footnote: 3 *3/ The Regional Commissioner's exhibits run from "A" to "Z" plus "AA" and "BB". The Applicant's exhibits are numbered from "1" to "42", the last six of which were submitted as part of Supplemental Documentation requested by the Judge in Prehearing Conference Order (February 13, 1995).*

Footnote: 4 *4/ The reporting of individual contributions as "matching" funds largely was restricted to one Center in FFY'88 ($635), and four Centers for FFY'89. Of these, one included a small amount in amounts deposited with CRS for FFY '90, but reported United Way funds as the bulk of its "match" funds for 1990. With this exception, no such funds were reported to any subgrantee subsequent to CRS' November 1990 notification to the Centers to discontinue the practice. Appl.Ex.15; Appl.Brief, at 25. Thus, any "consumer participation" in contributing to*

the originally proffered "match" was an insignif- icant percentage of Colorado's match, and when deducted entirely is entirely made up by other properly available State matching funds. (See Appl.Ex.30 which provides an analysis of the sources of Colorado's program funds.) RSA's own document (Draft Monitoring Report, 7/27/92, ED Ex.V) shows that for FFY '88 only $685.35, and in FFY 1988 only $5,191.55, was attributed to "client contribution." There are no such funds in FFY '90 and '91. Furthermore, in '88 only $21,119.61 was needed for "match" and $35,158.12 was reported, and in '89 only $20,750.79 was required for "match" and $37,336 was reported. So even with the total elimination of "client contributions" Colorado would more than exceed its State matching requirements for all those years. (Appl.Ex.20; Appl.Brief, at 5.)

Footnote: 5 *5/ The fact that in a few isolated cases some disabled beneficiaries ("consumers") paid a small part of the actual cost of their "adaptive equipment" does not alter the above analysis and conclusion. That situation was clarified and corrected by CDSS (Appl.Ex.15), and the insignificant amounts involved in such misunderstandings were waived and not included in any "matching" funds totals. (See many references in ED Exs.H, J & P to "consumer participation" and the confusion related thereto, as well as the statement in ED Ex.P that: "There is no indication that any Center utilized fees charged to consumers of Title VII services for matching purposes.") It should also be noted that such recipient participation is expressly envisioned in 34 CFR 361.47(a)(2), and was provided for in the State Plan approved by RSA, although eligibility cannot be conditioned upon the recipient's participation in cost-sharing, which is based on a financial need assessment. (See 34 CFR 365.31(b), as in effect during the periods covering the FFY's in issue.)*

Footnote: 6 *6/ For FFY'88 Part 74 of EDGAR applied to the Part A program. Part 74 was revised on Oct.1,1988. Those provisions in old Part 74 relating to State and local governments were placed in a new Part 80.*

Footnote: 7 *7/ See Appl.Ex.24: "During the course of the review, Mr. Don Thayer of RSA in Washington, D.C., questioned the detail and magnitude of documentation of client files at the Atlantis Community. It was suggested...that detailed Independent Living Plans were excessive and contrary to Independent Living philosophy. The Atlantis Community staff questioned the record keeping requirements enjoined by the Designated State Unit. I advised the Independent Living Center that until the end of the current fiscal year, they were under contract with the Designated State Unit and the case documentation should continue at the level we require."*

(Federal Program Review for the '91 grant year, memo- randum Roderfeld to Francavilla, 7/12/93.)

Footnote: 8 *8/ However, in a recovery of funds proceeding such as this, the burden of proof is on the recipient to prove that he is not required to return the funds in issue. 20 U.S.C. §1234a(b)(3); 34 C.F.R. 81.30.*

Footnote: 9 *9/ Colorado has a laudable, aggressive history of participation in rehabilitation programs under Titles I, VI and VII of the Act going back many years. (See history outlined in Applicant's Brief, at 10-11.) Colorado has shown a high level of commitment to the Independent Living Program. As of January 1990, there were 14 Independent Living Centers in*

the State. Only six other states (with much larger populations than Colorado) had more. (Appl.Ex.10.)

Footnote: 10 *10/ It is interesting to note that there is a new proposed regulation that would allow RSA to disregard properly expended alternative funds once RSA has disallowed the original amounts previously reported by the State (34 C.F.R. 364.5, NPRM in Appl.Ex.29), unless the alternative funds had been reported prior to the start of the audit forming the basis for the DD. (See discussion in Applicant's Reply Brief, at 3-4.) Clearly, this newly proposed regulation has no applicability to the present case. Without such a regulation, RSA appears to be without authority to now summarily disallow RHT Program expenditures as non- Federal share simply because other matching funds were identified by the State earlier.*

Footnote: 11 *11/ Appl.Exs.37 thru 42, with brief descriptive index attached to the covering letter explaining what each document shows.*

Footnote: 12 *12/ Counsel for the Regional Commissioner in his response to Colorado's "Supplemental Documentation" criticizes the fact that "CDSS has failed to provide to the OALJ the Standard Forms (SF) 269 for FY's 1988, 1989, and 1990 that would show how much of its RHT expenditures was used to meet its Title I matching requirement."*