

UNITED STATES DEPARTMENT OF EDUCATION  
WASHINGTON, D.C. 20202

Application of ESCAMBIA COUNTY  
BOARD OF EDUCATION (AL),

Applicant.

Docket No. 89-9-R

Recovery of Funds Proceeding

ACN: 04-93113

DECISION

Appearances:

Curtis Ray Parker for the Applicant, the Escambia County Board of Education.

Mark W. Smith, Esq. for the Authorized Departmental Official, the Acting Assistant Secretary for Elementary and Secondary Education.

Before:

Judge John F. Cook

I. Procedural Background

On May 25, 1989, the Acting Assistant Secretary for Elementary and Secondary Education issued a preliminary departmental decision (PDD) (Disallowance Decision) (DD) to the Escambia county Board of Education (Applicant) requiring the refund of \$8,387.95. The applicant filed an Application for Review (AFR) which was received by the Office of Administrative Law Judges (OALJ) on June 19, 1989.

Jurisdiction of the case was accepted by the OALJ on June 26, 1989, and a briefing schedule as well as a tentative hearing date of September 15, 1989, was arranged by a Notice of Hearing, dated June 26, 1989.

A telephone prehearing conference took place with the parties and the Judge on July 12, 1989.

Thereafter the parties filed a joint motion for a new briefing schedule as well as a new hearing date in event a hearing was desired. An order granting the motion was thereafter issued and the parties filed their briefs in accordance with the schedule. Neither party requested an evidentiary hearing or oral argument. The procedural record has now been completed and the case is ready for decision.

## II. Applicable Law

The authorizing statute governing this proceeding is the General Education Provisions Act (GEPA) Part E. Section 452 of GEPA, as set forth in 20 U.S.C. 1234a (1988), contains language which relates to recovery of funds proceedings as follows:

(a) (1) Whenever the Secretary determines that a recipient of a grant or cooperative agreement under an applicable program must return funds because the recipient has made an expenditure of funds that is not allowable under that grant or cooperative agreement, or has otherwise failed to discharge its obligation to account properly for funds under the grant or cooperative agreement, the Secretary shall give the recipient written notice of a preliminary departmental decision and notify the recipient of its right to have that decision reviewed by the Office [OALJ] and of its right to request mediation.

(2) In a preliminary departmental decision, the Secretary shall have the burden of stating a prima facie case for the recovery of funds. The facts to serve as the basis of the preliminary departmental decision may come from an audit report, an investigative report, a monitoring report, or other evidence. The amount of funds to be recovered shall be determined on the basis of section 453.

(3) For the purpose of paragraph (2), failure by a recipient to maintain records required by law, or to allow the Secretary access to such records, shall constitute a prima facie case.

(b) (1) A recipient that has received written notice of a preliminary departmental decision and that desires to have such decision reviewed by the Office shall submit to the Office an application for review not later than 30 days after receipt of notice of the preliminary departmental decision. The application shall be in the form and contain the information specified h,, the Office. As expeditiously as possible, the Office shall return to the Secretary for such action as the Secretary considers appropriate any preliminary departmental decision which the Office determines does not meet the requirements of subsection (a) (2).

As to the burden of proof in these proceedings, Section 452 (b) (3) of GEPA as set forth in 20 U.S.C. 1234a (b) (3) (1988), provides as follows:

(3) In any proceeding before the Office under this section, the burden shall be upon the recipient to demonstrate that it should not be required to return the amount of funds for which recovery is sought in the preliminary departmental decision under subsection (a).

Regulations as to recovery of funds proceedings are contained in 34 C.F.R. 81.20 thru 81.35.

34 C.F.R. 81.30 provides as follows:

Section 81.30 Burden of proof.

If the OALJ accepts jurisdiction of a case under Section 81.28, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because--

- (a) An expenditure identified in the disallowance decision as unallowable was allowable;
- (b) The recipient discharged its obligation to account properly for the funds;
- (c) The amount required to be returned does not meet the standards for proportionality in Section 81.22;
- (d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in Section 81.23; or
- (e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(3), 1234b (b) (1), 3474 (a)) .

Section 453 of GEPA, as set forth in 20 U.S.C. 1234b (1988), relates to the measure of recovery in the subject proceedings. It provides in part as follows:

(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 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. Such amount shall be reduced in whole or in part by an amount that is proportionate to the extent the mitigating circumstances caused the violation.

(2) For the purpose of paragraph (1), an identifiable Federal interest 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-aside, 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.

(b) (1) When a State or local educational agency is determined to have made an unallowable expenditure, or to have otherwise failed to discharge its responsibility to account properly for funds, and mitigating circumstances exist, as described in paragraph (2), the judge shall reduce such amount by an amount that is proportionate to the extent the mitigating circumstances caused the violation. Furthermore, the judge is authorized to determine that no recovery is justified when mitigating circumstances warrant. The burden of demonstrating the existence of mitigating circumstances shall be upon the State or local educational agency.

The Applicant received grant funds under Part A of the Indian Education Act (Part A, 20 U.S.C. Sections 241aa-241ff).

Part A was re-authorized and amended by Part C of Title V of P. L. 100-297 (25 U.S.C. Section 2601-2606; Indian Education Act of 1988), enacted April 28, 1988. The Act subsequently was amended by P.L. 100-427. References in this decision are to the Act as in effect for the period at issue in this proceeding .

The program regulations relating to Indian Education are contained in 34 C.F.R. Part 250 (General Provisions) and Part 251 (Formula Grants). The Department of Education (ED) general administrative regulations which are relevant to this proceeding are contained in 34 C.F.R. Part 74 (Administration of Grants) and Part 75 (Direct Grant Programs) . 34 C.F.R. Section 250.3 (1985) specifically states that 34 C.F.R. Parts 74 and 75 apply to the Part A program.

### III. Issues

A. Whether the applicant discharged its obligation to account properly for funds under the subject grant agreement

1. Whether the applicant maintained or has produced records enabling it to substantiate the salary received by the project director connected with the subject grant during the years ending September 30, 1985 and September 30, 1986.

2. Whether applicant was required to maintain time distribution records for a project director of a grant program who divides his time between program and non-program activities.

3. Whether the records maintained or produced by the applicant in connection with the salary received by the project director for the subject grant program constituted time distribution records as required by the law and subject grant agreement.

B. Whether the applicant must refund to the United States Department of Education 58,387.95 which constitutes a portion of the funds received by the applicant under the formula grant program of Part A of the Indian Education Act.

### IV. Findings of Fact.

The applicant's school system has operated a program under Title IV, Part A of the Indian Education Act (Part A, 20 U.S.C. Section 241aa - 241ff) since 1974-75. (Applicant's Brief received on July 26, 1989.)

A continuation application by the applicant's school system for Federal assistance under the Indian Education Act of 1972, Title IV, Part A, applicable to the subject period, is contained in Exhibit 4, pp. E 17-E 18, as attached to the Responsive Brief of the Authorized Departmental Official (ADO), dated August 21, 1989.

In the application for the grant, the applicant agreed, among other things, that:

9. It will comply with all requirements imposed by the Federal sponsoring agency concerning special requirements of law, program requirements, and other administrative requirements.

\* \* \* \* \*

14. It will insure that it will make and (sic) annual report and any other reports in the form and containing the information that the Secretary may require to (a) carry out the functions of the Secretary under this program; and (b) determine the extent to which funds provided under the program have been effective in improving the educational opportunities of Indian students in the area served. (Section 251.22(b) (3) (ii))

\* \* \* \* \*

15. It will insure that it will keep records and will afford the Secretary access to these records as the Secretary may find necessary to assure the correctness and verification of reports made by the applicant. (Section 251.22(b) (3)(iii)).

\* \* \* \* \*

21. It will insure that it has fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, funds it receives under this program. (Section 251.22(b) (3) (viii)).

During the period involved in this proceeding, the applicant's project director for the subject grants was Mr. Eugene Madison, who, at that time was an assistant principal and a member of the Indian Council, <Applicant's Brief received on July 26, 1989). Mr. Madison divided his time between the subject Indian Education program and non-program activities. It can be calculated from the applicant's application of November 11, 1984 that the project director 's salary was to be approximately 23% of the total budget for the program (Exhibit 4, attached to ADO's Brief of August 21, 1989).

During the year ending September 30, 1985, 9% of Mr. Madison's salary (or \$2,930.80) was paid out of Indian program funds and during the year ending September 30, 1986 14% (or \$5,457.15) of Mr. Madison's salary was paid out of Indian program funds. Mr. Madison was on a 10 month <200 days) contract for both of the years in question.

The auditors of the State of Alabama Department of Examiners of Public Accounts found that no time distribution records were on file for Mr. Madison for the years ending September 30, 1985, and September 30, 1986. (Exhibit 5 attached to ADO's Brief of August 21, 1989).

As a result of this deficiency, the auditors questioned costs totalling \$8,387.95 - \$2,930.80 for the period ending September 30, 1985, and \$5,457.15 for the period ending September 30, 1986.

The State of Alabama Department of Examiners of Public Accounts issued that Audit Report (A.R.) on November 18, 1988 and the report was received by the Office of Inspector General of ED on November 22, 1988. (Enclosure attached to ADO letter of July 19, 1989.)

On January 12, 1989 a copy of the audit report was transmitted to the applicant by the Director of the Management Improvement Service (Exhibit 1, attached to ADO's brief of August 21,

1989.) The applicant was requested to submit comments or additional information within 35 days. On February 14, 1989, the then Superintendent of Education for the applicant school district, Mr. David Brantley, advised the Director of the Grants and Contracts Service of ED, that although prior to the audit, it was unaware of the requirement to maintain time distribution sheets for the years of the audit, it was now doing so. (Exhibit 2, attached to ADO brief of August 21, 1989). No additional documentary evidence as to the subject director's salary was provided to ED by the applicant then or at any time prior to the issuance of the DD. In an earlier letter, dated April 6, 1988, to the Examiner of Public Accounts, State of Alabama, the applicant, acting through Mr. Jim Staff, Chairman of the County Board of Education, addressed a number of the findings in the audit report. With regard to the finding concerning time distribution records, he stated that time sheets for the 1986-1987 school year were kept for the Director of the Indian Education Program and that salaries earned prior to June 30 were paid during the summer months. (Exhibit 3, p.2, items 7 and 8, attached to ADO's brief of August 21, 1989.)

On May 25, 1989, the ADO issued the DD requiring the reimbursement by the applicant of \$8,387.95 on the basics that the applicant was in violation of regulatory requirements to maintain time distribution records. The determination that the applicant violated specified regulations in failing to maintain time distribution records was the sole determination in the DD.

The applicant thereafter filed an application for Review (AFR) which was received in the Office of Administrative Law Judges (OALJ) on June 19, 1989. In the AFR the applicant stated that the project director indicated that he was "unaware of time and effort requirement with respect to part-time personnel."

The applicant went on to state:

During the two years in question, the director visited schools, attended meetings (in state and out of state) and made application accounting for his time. During 1984-85, he was paid 9% of his salary from project funds amounting to 14 days (9% of 200 days) and during 1985-86 he was paid 14% from project funds for 28 days (14% x 200 days) .

The applicant also stated that it was:

Submitting copies of the director's travel report for the two years which show an excess of the number of required days vs. salary percentage. For 1984-85, 17 days were spent in travel and project activities when 14 days were required, and for 1985-86, 79 days were spent in project activities while only 28 days were required to meet salary percentage.

The applicant took the position that the approved travel reports should be accepted as evidence that time spent in project activities would meet the program requirement .

Although the ADO made only one finding in the May 25, 1989 DD, the applicant in its application for review and opening brief filed July 25, 1989, asserts that there are two legal issues in this proceeding, time distribution sheets and salaries paid after the close of the project period. In fact, however, the ADO made no finding of violation based on the latter matter; he merely responded to the applicant's assertions in its April 6, 1988 letter to the Alabama Examiner

of Public Accounts regarding payments after the close of the project year . The applicant apparently believes that the ADO's discussion on the point sets forth an independent issue. However, the ADO's DD determination rests entirely upon the applicant's alleged failure to maintain time distribution records. This decision will address only this issue. It is unnecessary for this tribunal to reach the applicant's arguments about the payment of salaries in twelve monthly installments. What is at issue in this case is the alleged failure of the applicant to account for the distribution of staff time among programs and activities, not how salaries are paid over a period of time.

In presenting its case, the applicant attached to its brief, filed July 26, 1989, copies of the travel reimbursement forms which had been attached to the AFR, however as to these copies the signature of the Superintendent, David Brantley, appeared on all six of the forms whereas that signature appeared on only the first of the six travel report forms which were attached to the AFR.

Also attached to the brief was a copy of a letter of March 14, 1986 to the applicants' superintendent from the Acting Director of ED's Indian Education Program referring to a program audit of the 1985-86 Title W-A Indian education project conducted by Ms. Ethel F. Jackson of the ED Indian Education Program staff. This audit included a review of student eligibility records, project management and the project's progress in meeting the educational needs of Indian students in the school district. No mention of an audit or accounting requirements was contained in the letter.

#### V. Opinion.

##### A. The applicant has not discharged its obligation to account properly for of funds received pursuant to a formula grant program under Part A of the Indian Education Act.

The applicant has not maintained or produced records enabling it to substantiate charging, against the subject grant program funds, a portion of the salary received by a project director during the years ending September 30, 1965, and September 30, 1986.

Under Part A of the Indian Education Act, in effect for the period at issue in this proceeding, the Department of Education (ED) awarded formula grant funds for projects specifically designed to meet the special educational and culturally related academic needs of Indian children. (20 U.S.C. Section 241aa(a)).

In its opening brief applicant stated that it operated a program under Title IV, Part A - Indian Education Act since 1974-75. Up until the 1984-85 school term, the program had been primarily concerned with improving attendance and improved self-esteem of the target children who were members of the Creek Indian tribe of South Alabama. The personnel employed were one counselor and an aide/secretary who were both full-time employees and paid fully with project funds. The director was one of the Central Office administrators .

The applicant went on to state that during the 1984-85 term, 9% of the director's salary was paid from project Federal funds while during 1985-86, 14% of his salary was paid from Federal

funds. The director was on a 10 month (200 days) contract for both of the years in question. These were the first two years of his service in this position and Up to this time, no part-time personnel were used in this program.

The statute (20 U.S.C. Section 241dd(a)) and regulations (34 C.F.R. 251.22 (1985)) relating to Indian Education required that an applicant for Part A funds include in its application, among other things, assurances that it would administer, or supervise the administration of, the activities and services for which it seeks assistance, that it would provide for methods of administration as are necessary for the proper and efficient operation of the project, and that the applicant had fiscal control and fund accounting procedures as were necessary to assure proper disbursement of, and accounting for, funds the applicant received under the program and that applicant would keep records that the Secretary may find necessary to assure the correctness and verification of reports made by the applicant. In accepting a grant, a grantee obligates itself to comply with all applicable statutes, regulations and special grant conditions. (34 C.F.R. 75.110, 75.700). In addition, a grantee is required to use procedures to insure the proper disbursement of and accounting for Federal funds. (34 C.F.R. 74.61(c), 75.702).

In light of the foregoing, the applicant's grant applications for the two grants it received during the period of the audit, made on Standard Form 424, included a number of mandatory assurances for grant applicants. Insofar as is relevant here, the applicant specifically undertook to do the following as a condition to its grants:

\* \* \* \* \*

9. It will comply with all requirements imposed by the Federal sponsoring agency concerning special requirements of law, program requirements, and other administrative requirements.

\* \* \* \* \*

14. It will insure that it will make and (sic) annual report and any other reports in the form and containing the information that the Secretary may require to (a) carry out the functions of the Secretary under this program; and (b) determine the extent to which funds provided under the program have been effective in improving the educational opportunities of Indian students in the area served. (Section 251.22(b) (3) (ii))

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15. It will insure that it will keep records and will afford the Secretary access to these records as the Secretary may find necessary to assure the correctness and verification of reports made by the applicant. (Section 251.22(b) (3) (iii))

\* \* \* \* \*

21. It will insure that it has fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, funds it receives under this program. (Section 251.22 (b) (3) (viii)).

The auditors of the State of Alabama Department of Examiners of Public Accounts found that no time distribution records were on file for Mr. Eugene Madison who was then project director. As a result of this deficiency, the auditors questioned costs totalling \$8,387.95 - \$2,930.80 for the period ending September 30, 1985 and \$5,457.15 for the period ending September 30, 1986.

The failure to maintain time distribution records violated Education Department General Administrative Regulations (EDGAR) provisions regarding direct grant programs (EDGAR, for the purposes of this decision, includes 34 C.F.R. Parts 74, 75, 76, 77, and 78.). The following provisions of EDGAR support that determination:

Section 75.700 Compliance with statutes, regulations, and applications. A Grantee shall comply with applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations and applications.

Section 75.702 Fiscal Control and fund accounting procedures. A Grantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

Id.

The applicant maintained no records enabling it to substantiate the salary received by the program's director, who appears to have been the highest paid program staff member and, according to applicant's opening brief was the only member of the program staff who divided his time between program and non-program activities. It can be calculated from the applicant's application of November 11, 1984, that the program director's salary was to be approximately 23% of the total budget for the program. The applicant thus had no effective control over a significant portion of the budget of its Indian education program.

This violated Section 75.702 and the assurances the applicant made to ED in its application.

In addition to EDGAR, the DD cited provisions of applicable program regulations with which the applicant failed to comply when it failed to maintain time distribution records. The applicant's failure to maintain time distribution records violated 34 C.F.R. 251.22(b) (3) (iii) (1985) which was in effect for the years at issue here. That provision states:

(iii) The applicant will keep records and will afford the Secretary access to these records as the Secretary may find necessary to assure the correctness and verification of reports made by the applicant.

34 C.F.R. 251.22(b) (3) (iii) (1985).

1. Where the project director for a grant program divides his time between program and non-program activities the applicant has a further regulatory requirement, to maintain time distribution records as to that director.

The violation described in the previous paragraph is alone a sufficient basis for concluding that the applicant violated Section 75.700 since the district failed to comply with applicable regulations, i.e., Section 75.702. However, applicant also violated another provision of FAGAR which requires time distribution records in cases such as this one. The DD stated that the finding of violation also was supported by a provision of Appendix C of EDGAR Part 74 which is made applicable to governments by operation of 34 C.F.R. 74.171. Specifically, Part II.B.10.b(1987) of Appendix C provides:

b. Payroll and Distribution of Time. Amounts charged to grant programs for personal services, regard less of whether treated as direct or indirect costs, will be based on payrolls documented and approved in accordance with generally accepted practice of the State or local agency. Payrolls must be supported by time and attendance or equivalent records for individual employees. Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort. (Emphasis added)

The applicant did not maintain records meeting this requirement. Because the employee in question admittedly devoted time to more than one program, he was required by this regulation to keep time distribution records.

In its opening brief the applicant points out that the DD's citation for Appendix C was to the 1967 Code of Federal Regulations and the years at issue in this DD are earlier. However, the identical provision appeared in Appendix C in the 1985 and 1986 editions of the Code of Federal Regulations See, 34 C.F.R. Part 74, Appendix C (1985) and 34 C.F.R. Part 74, Appendix C (1986).

2. The records maintained or produced by the applicant in connection with the salary of the project director which was charged against the subject grant program fund did not constitute time distribution records as required by the law and subject grant agreement or alternative, equivalent, or contemporaneous documentation that the expenditure was appropriate.

The records proffered as evidence of the time spent by Mr. Madison on Indian program matters are inappropriate to prove what they are asserted to prove. The Applicant has submitted 6 pages of travel reports for Mr. Eugene Madison in the hopes that those approved travel reports would be adequate to fulfill the requirement that there be time distribution records as to Mr. Madison's time spent in project activities. Applicant's Travel Reports entries include the following: Date, From, To, Purpose of Trip, Number of Miles/Round Trip. Purpose of trip entries are cryptic, including references generally to "Indian Education."

These records do not constitute time distribution records as required of a part-time employee working on more than one project.

Applicant's after-the-fact travel reports are sketchy records at best and fall short of what is called for by Part II. B.10.b of Appendix C of Part 74.

Further these records do not constitute alternative, equivalent, or contemporaneous documentation that the expenditures were appropriate.

The Education Appeal Board (EAB) and the Secretary of Education have indicated that after-the-fact evidence can be considered to substantiate costs disallowed in a Final Letter of Determination (E'LD). However, the EAB has rejected after-the-fact affidavits that are highly conclusory, vague and that do not provide specific information on time distribution. Appeal of Fort Valley College, No. 21(190)85, upheld in Fort Valley College v. Bennett 853 F. 2d 862 11th Cir. 1988); Appeal of the Board of School Commissioners of Mobile County, No. 1(176)85, (Education Appeal Board February 17, 1987). After-the-fact records must be credible and relate specifically to the time spent by the employees. Appeal of Guam, No. 30(162)84, (Sec. Decision, Nov. 21, 1986).

In the Fort Valley case, it was held that an institution that fails to comply with the regulatory payroll requirements may retain its Title III funds if it can demonstrate by alternative, equivalent, or contemporaneous documentation that the expenditures were appropriate.

The travel records do not reflect how much of Mr. Madison's time was devoted to the Indian program on a day in which travel was undertaken for the Indian program. Thus, for the 17 travel days listed for 1984-1985 there were only three days for which round trip mileage of more than 100 miles is reflected. Similarly, for the 79 travel days listed for 1985-1986, only 5 involved travel of more 100 miles round trip. The applicant's argument would required ED to assume that trips of this distance and the Indian program business conducted at the destination would uniformly consume a full eight-hour work day. However, with today's transportation systems, it is quite possible to travel approximately 50 miles conduct some business and travel 50 miles back to one's office in a matter of several hours.

But even if ED were willing to make such an unsupported assumption for the longer trips, for both years for which travel records were provided, the majority of travel days involved round trips of very low mileage. Excluding the trips over 100 miles, the average trip in 1984-85 was 33 miles. For 1985-1986 the same figure was approximately 20 miles. It is not logical that each of these brief trips, some of them as short as 4 miles round trip, and the Indian program business conducted at the destination consumed eight full hours.

A further limitation on the probity of this evidence is the fact that the records provide no indication of the mode of travel Mr. Madison employed. Obviously, a trip by automobile of 100 miles consumes far more time than a trip of 100 miles by airplane.

Although the travel report forms provide space for a listing of the purpose of each trip, they were completed with only cryptic descriptions that do not provide a basis for estimating the time required for the described purpose. Therefore, these records provide no reliable evidence as to how much of Mr. Madison's time on a given day, on which some travel occurred, was devoted to Indian program matters.

In Fort Valley State College v. Bennett, *supra*, the Panel considered voluminous, alternative, after-the-fact proof, for the payroll system which was not maintained as it should have been, but

found the same to be lacking. In the present case there is not even that kind of after-the-fact or alter- native documentation. There are no supportive affidavits by the applicant's project director, to elaborate on the duties and time spent on Indian Education Project activities for which he was paid as a part-time employee.

The cryptic, non-narrative travel reports attached to the applicant's brief, with no breakdown of activities or hours spent in those activities, simply do not carry it's burden of proof on this issue.

### 3. Additional Arguments By Applicant

Amongst other things the applicant argues that it should not be required to return the funds at issue here because: 1. the application and financial instructions accompanying it did not explicitly address the time distribution record requirement, and 2. the matter of time distribution records was not raised in the course of a 1986 program review of the Escambia Indian education program.

#### a. Grant Applications Need Not Recite Applicable Legal Requirements In Order for Such Requirements to be Binding on Grant Recipients

The applicant objects to the DD's citations to Section 251.22(b) (3) (iii) (1985) and Part II.B.10.b of Appendix C to Part 74 because "at no place in the application or financial instructions that accompanied the application, federal register <sic> included, do we find anything that addresses the time and effort documentation requirement" (Opening Brief at 2.) However, as the quotation indicates, a copy of the "federal register" and financial instruct- ions, were provided to the applicant with the application. But even if these regulations had not been provided, the general rule is that those who deal with the Government are expected to know the law, and, in particular, those who seek public funds must act with scrupulous regard for the requirements of law. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 at 63-64, (1984) (participant in the Medicare Program had the duty to familiarize itself with the program's legal requirements); Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 at 384-385 (1947) (published Wheat Crop Insurance regulations were binding on all those who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of published regulations). Cf. Lavin v. Marsh, 644 F.2d 1378 at 1383 (9th Cir. 1981) (serviceman had constructive notice of years of service limitation published in a Federal statute). In Lavin the court stated: "Persons dealing with the government are charge with knowing government statutes and regulations . . . ." 644 F.2d at 1383. Cf. United States v. Harvey, 661 F.2d 767, 775 n. 12 (9th Cir. 1981) <purchasers of property had constructive notice of government claim published in the Federal Register.

Moreover, 44 U.S.C. Section 1507 provides that members of the public are deemed to have constructive knowledge of documents published in the Federal Register. All of the Regulations cited in the DD were promulgated in accordance with law and published in the Federal Register.

It cannot be said that it would have been a hardship for the applicant, like other grant recipients, to learn of the legal requirements it pledged to obey in its application. All of the regulatory

provisions cited in the DD are published in the Code of Federal Regulations and have the full force and effect of law. See *Batterton v. Francis*, 432 U.S. 416, n.9 (1977).

It can be argued that to excuse the applicant's noncompliance on these grounds would amount to a waiver of the regulations cited in the DD. Waivers of regulations are expressly precluded by ED's Departmental regulations:

(a) No official, agent or employee of ED [the U. S. Department of Education] may waive any regulation that applies to a Departmental program, unless the regulation specifically provides that it may be waived.

34 C.F.R. Section 75.900(a).

None of the regulations upon which the Do is premised specifically provide for their waiver as required by Section 75.900(a).

b. The Effect of the 1986 Program Review Report Does Not Legitimize the Applicant's Failure to Maintain Required Records.

In its opening brief, the applicant makes an argument apparently to the effect that the ADO should be estopped from asserting this violation because it was not raised during a February 19, 1986 program audit of the applicant's Indian education program conducted by Ms. Ethel Jackson, an employee of the U. S. Department of Education. (Opening Brief p. 2.) In support of the argument, the applicant has attached to its opening brief a copy of a letter to Superintendent Brantley from Mr. Hakin Khan, a '3. S. Department of Education employee, then acting as director of the Indian Education Program. Mr. Khan's s letter summarized Ms. Jackson's findings and made no mention of time distribution records.

As a legal matter, the applicant's estoppel argument is without merit because, among other things, the applicant has not shown that it relied on representations of ED and changed its position to its detriment as a result. See *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Appeal of State of Kentucky, Title I ESEA*, No. 1 (31) 77 (Education Appeal Board June 23, 1981) at 12; *Appeal of the State of Illinois*, Nos. 7(62)80, 9(64)80, (Education Appeal Board March 31, 1986); *Appeal of Albany State College*, No. 41(73)84 (Education Appeal Board November 3, 1986) at 12. First, there is no affirmative statement in the letter upon which the applicant could rely to conclude that the School District's records were adequate as to accounting for an employee's time charged to the grant fund. In fact, there is nothing in the record to indicate that this aspect of the Board's program was reviewed. Second, the applicant's failure to maintain time distribution records was not caused by reliance on the Khan letter; no detrimental change of position regarding time distribution records resulted from the Khan letter.

In addition to case law, ED's Departmental regulations provide an independent basis for rejecting this argument. 34 C.F.R. 75.900(b) provides:

(b) No act or failure to act by an official, agent or employee of ED [the U. S. Department of Education] can affect the authority of the Secretary to enforce regulations.

As is apparent from the Khan letter, a program review is quite different from a financial audit. The former seeks to assess the educational merits of a program. The Khan letter reports that Ms. Jackson's audit was focussed on evaluating the educational merits - not the financial integrity - of the program. Hence, Ms. Jackson, according to the Khan letter, spent her time evaluating the tutorial assistance and cultural heritage programs, determining whether goals and objectives were being reached on schedule and in accordance with the application, and examining the functioning and concerns of the parent committee. Even if a program auditor were to scan a district's financial books in the course of a program audit, he or she would not go beyond those books to examine supporting records such as time distribution records.

Program officials are not certified public accountants; they are professionals with training and experience in the field of education. The performance of financial audits is not normally within their responsibility or professional competence. If financial audits were within the charge of program officials, there would be no need for audits by accounting professionals such as the one underlying this proceeding. That financial audits by accounting professionals are conducted as a routine matter, and at great expense to the Government, underscores the fact that program reviews are for an altogether different purpose.

The program letter that was completely silent on the matter of time distribution records does not foreclose the finding in the DD or have any effect upon the disposition of this case.

B. The applicant must refund to the United State Department of Education \$8,387.95 which constitutes a portion of the funds received by the applicant under the formula grant program of Part A of the Indian Education Act.

In the absence of the records which the law requires as outlined above, the applicant must refund any funds charged for the salary of the project director. See, e.g. Fort Valley State College v. Bennett, 853 F.2d 862 (11th Cir. 1988); In re Indiana, No. 6(36)77 (Education Appeal Board May 5, 1982); Appeal of Massachusetts Department of Education, No. 33(233)86 (Education Appeal Board January 3, 1989); 20 U.S.C. 1234b (1988).

Section 453 of GEPA [20 U.S.C. 1234b (1988)] relates to the measure of recovery in this type of proceeding. The ADO in the Disallowance Decision (DD) of May 25, 1989, addressed the subject by stating that: "The District's violation of these requirements represents a substantial harm to the Federal interest in preserving the integrity of planning, application, record keeping and reporting requirements and maintaining accountability for the use of funds."

In view of all of the circumstances a refund of 100% of the amount not accounted for is appropriate and is proportionate to the extent of the harm caused to the Federal interest as to maintenance of accountability for the use of funds and in preserving the integrity of planning, application, record keeping and reporting requirements. Fort Valley State College v. Bennett, 853 F. 2d 862 (11th Cir. 1988).

It should be mentioned that the applicant has not directly raised a question as to the measure of recovery. 34 C.F.R. 81.30 (c) provides that the applicant has the burden of proof as to this issue.

## VI. Conclusions of Law

A. When the project director of a grant program divides his time between program and non-program activities, the local educational agency has a legal requirement to maintain time distribution records or alternative, equivalent, or contemporaneous documentation that the expenditure was appropriate in order to properly account for that employee's time which is charged against a grant program fund.

B. The records produced by the applicant in connection with the salary of the project director which was charged against a formula grant program fund under Part A of the Indian Education Act for the years ending September 30, 1985 and September 30, 1986 did not constitute time distribution records as required by the law and the subject grant agreement or alternative, equivalent, or contemporaneous documentation that the expenditures were appropriate.

C. The Applicant has not discharged its obligation to account properly for funds received pursuant to a formula grant program under Part A of the Indian Education Act in that it has not maintained or produced, records enabling it to substantiate charging, against the above mentioned grant program funds, a portion of the salary received by a project director during the years ending September 30, 1985, and September 30, 1986.

D. The applicant has a legal obligation to refund to the United States Department of Education \$8,387.95 which constitutes funds received by the applicant under the formula grant program of Part A of the Indian Education Act.

## VII. Order

Based on the foregoing findings and conclusions of law, IT IS ORDERED that:

Applicant refund to the United States Department of Education the sum of \$8,387.95.

John F. Cook  
Administrative Law Judge

DATED: December 29, 1989  
Washington, D. C.