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

APPLICATION OF

THE NEW YORK STATE
DEPARTMENT OF EDUCATION,

Applicant.

Docket No. 90-70-R

Recovery of Funds Proceeding

CN:02-83152

DECISION

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

Lynette A. Charboneau, Esq., and Ronald Petracca, Esq., Office of the General Counsel, for the Assistant Secretary for Special Education and Rehabilitative Services and the Assistant Secretary for Vocational and Adult Education, U.S. Department of Education.

Before:
John F. Cook, Chief Administrative Law Judge

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I. PROCEDURAL BACKGROUND.

On August 27, 1990, a notice of preliminary departmental decision (PDD) was issued by the Assistant Secretary for Vocational and Adult Education and the Assistant Secretary for Special Education and Rehabilitative Services (hereinafter, the "Assistant Secretaries") to the New York State Education Department (NYSED).

On September 25, 1990, an Application for Review was received from NYSED. On October 12, 1990, a Notice of Acceptance of Jurisdiction was issued by the tribunal. On October 22, 1990, NYSED filed a Motion for Waiver of the requirements of 20 U.S.C. 1234a(c) and 34 C.F.R. § 81.39 (1) as to the scheduling of the submission of evidence to occur within 90 days of the receipt of the Application for Review and a Request for Mediation. On October 23, 1990, the Assistant Secretaries filed a Response agreeing to the Waiver of the 90-Day Rule and to the request for Mediation.

The proceedings were stayed for mediation in November of 1990. About six months later the parties agreed to terminate the mediation process. An order was issued amending the briefing schedule.

Briefs, proposed exhibits, and a joint stipulation were filed by the parties. NYSED requested an evidentiary hearing; however, the Assistant Secretaries took the position that such a hearing was unnecessary. It was then necessary that the tribunal make a determination pursuant to § 81.6 as to whether an evidentiary hearing was needed to resolve a material factual issue in dispute. A Joint Statement as to Issues of Fact and Law was filed on April 13, 1992. NYSED submitted a Statement of Proposed Findings of Fact, on May 15, 1992, and filed an Amended Statement of Proposed Findings on June 16, 1992. On June 19, 1992, the parties filed a Stipulation as to the Authenticity and Admissibility of Exhibits. The Assistant Secretaries filed a response to NYSED's Amended Statement of Proposed Findings of Fact on July 16, 1992. A Statement of the Proposed Findings of Fact was filed by the Assistant Secretaries on July 20, 1992. On August 6, 1992, NYSED filed a response to the Assistant Secretaries' Proposed Findings of Fact.

After the Proposed Findings of Fact were filed by each party it became clear that a material factual dispute required an evidentiary hearing. In November of 1992, the tribunal suggested to

the parties that a hearing be scheduled for January 1993; however, counsel for the parties were not available during that period. Thereafter, on January 4, 1993, the parties filed a Joint Scheduling Motion with the tribunal requesting that the hearing begin on Martb 9, 1993. The judge granted the motion on January 6, 1993.

An evidentiary hearing was held in Albany, New York, from March 9-10, 1993.

An oral argument was held in Washington, D.C., on August 18, 1993.

During the course of the oral argument, it became evident that some issues in regard to the application of the doctrine of equitable offset to the vocational education portion of this proceeding warranted supplemental research and discussion by the parties. Therefore, a procedural schedule was agreed upon. Thereafter, counsel for both parties requested extensions of time, and the last memorandum was filed by NYSED on December 30, 1993.

II. ISSUES.

A.Has NYSED met its burden of proof by proving the allowability of the disallowed Vocational Education Act (VEA) and Education of the Handicapped Act, Part B (EHA-B) personnel costs in dispute?

1. Is New York's Program Accountability Reporting (PAR) System an appropriate system of time and accounting for charging personnel costs to Federal Programs?

2. As to each individual disallowed personnel cost has :liere been adequate proof as to specific applicable PAR codes alone, or in combination with other PAR codes, or other external evidence sufficient to demonstrate that each disputed salary cost is allowable?

B. Does the doctrine of equitable offset apply in this instance?

1. Is NYSED correct in asserting that since the issue of New York's PAR system and the doctrine of equitable offset have been decided in prior, identical cases with the same parties, the doctrine of collateral estoppel applies here since NYSED claims that the Assistant Secretaries are relitigating the issue?

2. Can NYSED offset any of the disallowed vocational education costs by the amount of salaries previously paid from State funds for vocational education costs in order to reduce its audit liability? 3.How much of the offset which was allowed in the PDD should NYSED receive for EHA-B costs in view of the reduced period of time in dispute following the Stipulation of the Parties?

4. What additional costs, if any, may be used to offset the disallowed EHA-B costs?

III. LIST OF EXHIBITS.

A. THE ASSISTANT SECRETARIES' EXHIBITS. 2

Exhibit [Ex.] E-1. State of New York, Statewide Compliance Audit of Federal Programs Under Provisions of the Single Audit Act of 1984, For the Period of April 1, 1985 through March 31, 1986, issued March 2, 1987 (audit control number 02-83152).

Ex. E-2. Stipulation, Application of the New York State Department of Education, Dkt. No. 90-70-R, U.S. Dep't of Educ.) (July 22, 1991).

Ex. E-3. Computation of Amounts of EHA-B Funds Remaining in Dispute.

Ex. E-4. Application of Escambia County Board of Education, Dkt. No. 89-9-R, U.S. Dep't of Educ., (Dec. 29, 1989).

Ex. E-5. Appeal of Fort Valley State college, Dkt. No. 21- (196)-85, U.S. Dep't of Educ. (June 5, 1987).

Ex. E-6. Appeal of Government of Guam, Dkt. No. 30-(162)- 84, U.S. Dep't of Educ. (Decision of the Secretary), (Nov. 21, 1986).

Ex. E-7. Response of Thomas E. Sheldon, New York Executive Deputy Commissioner of Education, to the Assistant Secretaries' Request for More Information, May 7, 1990.

Ex. E-8. Grant Awards under the EHA-B Program and under the Chapter 1 Handicapped Program, to the New York State Education Department for Fiscal Years 1985 and 1986.

Ex. E-9. Summary of Questions and Answers, Appendix B to Notice of Final Rulemaking, Carl D. Perkins Vocational Education Act, 50 Fed. Reg. 33295 (Aug. 16, 1985).

Ex. E-10. Appeal of the State of Wyoming, Dkt. No. 16- (191)-85, U.S. Dep't of Educ. (Dec. 14, 1987), appeal filed, No. 88-1419 (10th Cir. Feb. 16, 1988).

Ex. E-11. Letter from Assistant Secretaries Betsy Brand and Robert Davila to Thomas Sobol of NYSED, dated April 9, 1990.

Ex. E-12. Letter from Thomas Sheldon of NYSED to Assistant Secretaries Betsy Brand and Robert Davila.

Ex. E-13. Appeal of the State of Wyoming, Dkt. No. 16-(191)- 85, U.S. Dep't of Educ. (Dec. 14, 1987), appeal filed, No. 88- 1419 (10th Cir. Feb. 16, 1988).

Ex. E-14. Appeals of State of West Virginia, Dkt. No. 13- (28)-76, U.S. Dep't of Health, Education and Welfare, Title I Audit Hearing Board (Decision) (Feb. 21, 1978); aff'd sub nom. West Virgina v. Commissioner of Education, No. 79-1338, slip op. at 3 (4th Cir. Nov. 4, 1980) (per curiam).

B. NYSED'S EXHIBITS.

Ex. A-1. Preliminary Departmental Decision dated August 27, 1990.

Ex. A-2. Appeal letter of the New York State Education Department dated September 24, 1990.

Ex. A-3. Appeal of New York Initial Decision, Dkt. No. 26- 226-86.

Ex. A-4. Appeal of New York Supplemental Decision After Remand, Dkt. No. 26-226-86.

Ex. A-5. PAR codes Manual (relevant year codes and complete 1981 manual).

Ex. A-6. Consolidated Appeals of the Florida Department of Education, Dkt. Nos. 29-293-88 and 33-297-88.

Ex. A-7. Program Accountability Reporting System Managers Handbook.

Ex. A-8. Employee Time Sheet.

Ex. A-9. Organizational Chart.

Ex. A-10. NYSED Vocational Education State Plan.

Ex. A-11. Affidavit of James Kadamus.

Ex. A-12. Performance Evaluation of Carolyn Barbuto.

Ex. A-13. Performance Evaluation of Virginia Kirby.

Ex. A-14. Performance Evaluation of Judith Corman.

Ex. A-15. Performance Evaluation of George Kawas.

Ex. A-16. Performance Evaluation of Robert DeFabio.

Ex. A-17. Performance Evaluation of Frances Collins.

Ex. A-18. Performance Evaluation of Corinne Wells.

Ex. A-19. Performance Evaluation of Iona Mirsky. Ex.A-20.Performance Evaluation of Doreen Jones Ryan.

Ex. A-21. Affidavit of Doreen Jones Ryan. Ex.A-22.Affidavit of James Stratton. Ex.A-23.Performance Evaluation of James Stratton. Ex. A-23a. Performance Evaluation of Suzanne Spear.

Ex. A-24. Performance Evaluation of Christine Brooks.

Ex. A-25. The New York State Plan - "Helping Children with Handicapping Conditions in New York State." Ex. A-26. Contemporaneous Memorandum from Ann Getman regarding use of PAR codes 203 and 054.

Ex. A-27. Affidavit of Gabriel Coppola.

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Ex. A-32. Performance Evaluation of Gabriel Coppola.

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Ex. A-35. Performance Evaluation of Jacquelyn King.

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Ex. A-41. Performance Evaluation of Carol Kendall.

Ex. A-42. Performance Evaluation of Janice Pecora.

Ex. A-43. Performance Evaluation of Joseph Zabinski.

Ex. A-44. Performance Evaluation of Evelyn Vido.

Ex. A-45. Performance Evaluation of Ruth Strait.

Ex. A-46. Affidavit and Performance Evaluation of Christine Kuzmak.

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Ex. A-49. Employees' Performance Evaluations far Rate- setting Unit.

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Ex. A-55. PAR Effort Report.

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Ex. A-60. Response letter of June 15, 1990 from Judy A. Schrag to Thomas B. Neveldine.

Ex. A-61. Performance evaluation of Iona Mirsky.

Ex. A-62. Employee activity record form of Iona Mirsky.

Ex. A-63. Employee activity record form of Judith Corman.

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Ex. A-65. Appendix E, summarizing amount of effort allocable to VEA for non-VEA line item employees.

Ex. A-66. Appendix documenting amount of offset for individual NYSED employees.

Ex. A-67. Affidavit of Michael DiVirgilia with attachments.

Ex. A-68. Notification of Grant Award.

Ex. A-69. Financial Status Report.

IV. <u>FINDINGS OF FACT AND OPINION</u>.

A. STIPULATIONS OF FACT. 3

1. On August 27, 1990, the Assistant Secretaries issued a program determination letter (PDL), demanding repayment of $1,472,620 of funds awarded to the NYSED pursuant to Part B of the Education of the Handicapped Act, 20 U.S.C. §§ 1401, 1411- 1420 (1982) (hereinafter ("EHA-B"); the Vocational Education Act, 20 U.S.C. § 2301 et seq. (1982) (hereinafter "VEA") ; and the Carl D.Perkins Vocational Education Act, 20 U.S.C. § 2301 et seq. (1988) (hereinafter "Perkins Act").

2. The Assistant Secretaries' demand of $1,472,620 was based on the claim (Findings 5(a) and (b), Attachment A, of the audit report (audit control number 02-83152)] that the NYSED charged to the EHA-B, VEA, and Perkins Act grants unallowable salaries, benefits, and indirect costs of State employees (consisting of $943,716 of EHA-B funds, and $528,904 of VEA and Perkins Act funds). The $943,716 recovery sought for unallowable EHA-B charges reflected a credit of $218,705 for salaries of employees who worked on EHA-B activities during the period in dispute and whose effort reports were coded to the EHA-B program but whose salaries were not charged to the EHA-B grant.

3. Evidence submitted by the NYSED after the commencement of this appeal demonstrates that:

a. $292,298.15 of the claim for refund for EHA-B salary costs under Findings 5(a) and (b), plus $147,084.43 in fringe benefits and indirect costs, is barred from recovery by the statute of limitations set forth in section 452(k) of the General Education Provisions Act, as amended, 20 U.S.C. § 1234a(k) (1988) (GEPA). The salaries of Ralph Costanzo, Maurice Olsen, Rosalyn Reich, and Inderjit Barone are entirely removed from dispute by the application of the statute of limitations .

b. The disallowed salaries of the following employees charged to the EHA-B are allowable: Carol Weiss, Fred DeMay, Michael Plotzker, Ray L'Heureaux, Waverlyn Peters, Ralph Giordano, Laura Sahr, Marie Cianca.

c. The amount of EHA-B funds disallowed for the salary of William Brenton should be reduced from $57,925 to $1,708.

4. Evidence submitted by the NYSED after the commencement of this appeal demonstrates that:

a. $264,716.71 of the claim for refund of VEA and Perkins Act costs under Findings 5 (a) and (b), including salaries, indirect costs, and fringe benefits, is barred from recovery by the statute of limitations set forth in section 452(k) of the GEPA. The salaries of Marilyn Graham, Richard Haner, Linda Greenberg, and Suzanne Levin are entirely removed from dispute by the application of the statute of limitations.

b. The disallowed salary of Willard Daggett charged to the VEA and the Perkins Act grants ($24,339.13 after the application of the statute of limitations) is allowable, plus related benefits and indirect costs.

c. The amount of VEA and Perkins Act funds disallowed for the salary of Ruth Milczarek should be reduced from $9,578.80 (after application of the statute of limitations) to $852 (plus benefits and indirect costs) .

5. The Assistant Secretary for Vocational and Adult Education's claim for recovery is reduced to a new total of $214,482.51 of VEA and Perkins Act funds based on the application of the statute of limitations and the NYSED's documentation. The parties agree that the $214,482.51 remaining in dispute for VEA and Perkins Act funds is not barred from recovery by the statute of limitations.

6. The original claim for recovery by the Assistant Secretary for Special Education and Rehabilitative Services in the PDL was $943,716. Of this amount, $619,888.35 has been removed from dispute by application of the statute of limitations and NYSED's documentation. The parties agree that the amount remaining in dispute for EHA-B funds is not barred from recovery by the statute of limitations.

7. The appendices to this Stipulation indicate, employee by employee, the amount of EHA-B funds (Appendix A) and VEA and Perkins Act funds (Appendix B) remaining in dispute after the NYSED is given full credit for: 1) the salaries of those employees the Assistant Secretaries find were fully or partially allowable, and 2) the salaries barred from recovery by the statute of limitations, but before consideration of the offset credited in the PDL in reference to the EHA-B portion of the disallowance.

APPENDIX A

EHA-B Funds Remaining in Dispute.

EMPLOYEE	SALARY REMAINING AT ISSUE
Shoddy	$6,108.40
Birdsell	$28,620.87
McNamara	$26,138.22
Harrison	$1,061.00
Pecora	$3,619.00
Kuzmak	$8,393.36
Denault	$27,469.14
Woods	$2,014.85
Brenton	$1,708.00
Norfleet	$24,380.45
Godfrey	$4,356.00
Coppola	$27,353.56
Kurtz	$26,269.41

Trippi	$24,558.60
King	$21,422.16
MacDonald	$26,239.31
Rios	$23,792.53
Hargis	$23,105.67
Ess	$10,072.90
Scott	$8,085.31
Herman	$24,182.27
Kendall	$27,699.94
Zabinski	$6,968.75
Smith	$3,938.00
Vido	$1,404.03
Decere	$29,481.08
Strait	$9,833.31
Ames	$5,854.00

TOTAL SALARIES	$434,130.12
19.4% Indirect Cost Rate	$84,221.24
30.92% Fringe Benefit Rate	$134,233.03
TOTAL AMOUNT REMAINING IN DISPUTE	$652,584.39 (4)

APPENDIX B

VEA and Perkins Act Funds Remaining in Dispute

EMPLOYEE	SALARY REMAINING AT ISSUE
Ruth Milczarek	$852.00
Iona Mirsky	$1,501.00
Judith Corman	$676.00
Robert DeFabio	$22,677.77
Virginia Kirby	$606.00
Frances Collins	$510.00
Carolyn Barbuto	$364.00
Corinne Wells	$445.00
Doreen Jones	$8,046.57
Carol Jabonaski	$16,647.42

Peter Rourke	$2,932.00
George Kawas	$3,416.00
Mary Gurney	$7,491.09
Elizabeth Coughtry	$3,663.62
Suzanne Spear	$18,857.13
Richard Connell	$9,889.96
Margaret Hopkins	$6,434.89
Christine Brooks	$58.00
Dorcas Arocho	$14,736.59
James Stratton	$11,983.91
Nancy Taylor	$10,168.00
David Martire	$527.00

TOTAL SALARIES	$142,683.95
19.4% Indirect Cost Rate	$27,680.68
30.92% Fringe Benefit Rate	$44,117.88
TOTAL AMOUNT REMAINING IN DISPUTE	$214,482.51

B. FINDINGS OF FACT AS TO CERTAIN GENERAL ISSUES BASED ON THE PARTIES' PROPOSED FINDINGS AND RESPONSES. 5

1. NYSED's Program Accountability Reporting (PAR) System produces an equitable distribution of time and effort in accordance with the EDGAR cost principles.

2. James Kadamus is the Assistant Commissioner for the Office at Occupational and Continuing Education.

3. Lawrence Gloeckler is the Assistant Commissioner for the Office for Education of Children with Handicapping Conditions.

4. The New York State Education Department (NYSED) appealed a Preliminary Departmental Determination (PDD) pursuant to section 452 of the General Education Provisions Act. Applicant's Exhibit 2 (A-2).

a. The PDD is contained in the August 27, 1990 program determination to Thomas Sobol, New York State Commissioner of Education from Betsy Brand, Assistant Secretary for Vocational and Adult Education, and Robert R. Davila, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education (Assistant Secretaries). A-1.

b. The PDD demanded a recovery of the salaries of NYSED employees that were charged to grants awarded under the Vocational Education Act of 1963, as amended (VEA), 20 U.S.C. § 2301 et seg. (1982), and the Carl D. Perkins Vocational Education Act (Perkins Act), 20 U.S.C. § 2301 et seg. (1988), and to a grant awarded under the Education of the Handicapped Act (EHA-B), 20 U.S.C. §§ 1411-1420. A-1 and A-2.

c. The PDD demand for recovery was based on a audit finding that NYSED charged the VEA, Perkins Act, and EHA-B grants for unsupported payroll cost. A-1-1.

d. The PDD disallowed a total of $1,472,620, consisting of $528,904 of VEA and Perkins Act funds, and $943,716 of EHA-B funds. A-1-10.

e. The alleged amount of unsupported EHA-B salaries (before the fringe benefits and indirect costs were added) requested in recovery was reduced by $218,705 to reflect the salaries during the period of the audit for employees who worked on activities which could have been, but were not, charged to the EHA-B as State administrative expenses. A-1-9 to 10.

f. The following table, which is set out on page 10 of the PDD (A-1-10) summarizes the amount of disallowed costs (including applicable fringe benefits and indirect costs):

Program	Salary Costs	Fringe Benefits	Indirect Costs	Total
VEA and Perkins	$351,852	$108,793	$68,259	$528,904
EHA-B	$627,805	$194,117	$121,794	$943,716
TOTAL	$979,657	$302,910	$190,053	$1,472,620

g. Budgetary data was the primary basis for charging salaries to the VEA, Perkins Act, and EHA-B grants at issue. A-1-2.

5. NYSED's Program Accountability Reporting (PAR) system produces the most reliable and contemporaneous evidence of the amount of time that NYSED employees spent working on various cost objectives and grant programs during the period at issue in this case. A-3-4.

a. The PAR systein generates two types of reports, the PAR Fund Report and the PAR Effort Report. Assistant Secretaries' Exhibit 1 at page 27 (E-1-27). The PAR system also produces a broad range of reports including fund and effort reports broken down by divisions or bureaus as well as by varying time periods.

b. The PAR Fund Report indicates the source of funds used to pay an employee.

c. The PAR Effort Report indicates the amount of time employees spent working on various programs or cost objectives. E-1-27.

6. The PAR Effort Report constitutes at least the primary element of NYSED's time distribution system. A-3-4.

a. The PAR Effort Report for the period at issue in the PDD is contained in A-55.

b. Generally, the PAR Effort Report is a summary of the Employee Activity Record Forms completed by individual employees. A-5-14; A-7-1 and 2.

i. Generally, the Employee Activity Record Forms were maintained by each of NYSED's employees other than certain high level supervisors. A-5-16.

ii. Generally, the Employee Activity Record Forms cover two two-week pay periods, which consist of 10 working days that last 7.5 hours each. A-5-19; A-7-8 .

iii. Generally, each employee whose salary remains in dispute was required to accurately complete Employee Activity Record Forms for the entire period in dispute in the PDD and sign them. A-5-16.

iv. Generally, each employee's supervisor was required to review, approve, and sign the completed Employee Activity Record Forms. A-5-15, 16, 19, and 21; A-7-l (original page number of the document).

v. Generally, each supervisor was responsible for ensuring that his employees used the correct PAR codes on the completed Employee Activity Forms. A-5-15.

7. On January 31, 1991, NYSED generated the "PAR Effort Report for employees in Question Divided by Pay Period" contained in A-56. A-56-1 and the summary page on top.

a. Because of differences in rounding or for other reasons, the amounts in the final column labeled "cost of effort" in A-56 do not agree exactly with the amounts for each PAR code that the Assistant Secretaries disallowed based on the PAR Effort Report contained in A-55. A-1-5 through 10.

b. The parties prorated the cost of effort amounts in A-55 based on the codes and hours in A-56 to determine the amounts in dispute after the statute of limitations is applied. E-2-6 and generally. Compare generally A-55 and A-56.

i. The parties relied on the "cost of effort" amounts in A-55 to determine the amounts in dispute after the statute of limitations is considered. E-2-6 and generally. Compare generally A-55 and A-56.

ii. The parties relied on the codes and hours in A-56 to determine the amounts in dispute after the statute of limitations is considered. E-2-6 and generally. Compare generally A-55 and A-56.

c. The differences in the "cost of effort" amounts between A-55 and A-56 are not significant for purposes of applying the statute of limitations to the salaries of employees charged to the EHA-B grant. E-2-5 and generally. Compare generally A-55 and A-56.

d. NYSED employees used three-digit codes to describe the grant programs upon which they were working. A-7-2.

e. The PAR system has two types of three-digit codes: (1) program codes; and (2) general codes. A-5-15.

f. General codes are used for employee activities which cannot be assigned to a specific program area. A-5-15.

i. Codes 949 through 951 and 953 are general codes for use by supervisors and are restricted to administrative direction relating to more than one program. A-5-26.

ii. Code 952 is a general code related to clerical support and is restricted to staff working on so many different programs that specific identification of each is not reasonable. A-5-26.

iii. Code 997 is a general code that has been created to keep track of hours of employee effort for which no documentation has been received, or is received too late or with too many errors for timely keypunching. A-7-9.

iv. Code 999 is a general code restricted to time charged to the following activities: leave accruals, other authorized duties (civil service training, exams, etc.) performed during normal working hours, holidays, all on-the-job training. A-5-26.

g. Proqram codes are used by NYSED employees when they are working in a specific program area. A-5-15

8. Subsequent to NYSED's filing its application for review, the parties, by stipulation, agreed to reduce the amount of funds in dispute in this case: the amount of VEA and Perkins Act program funds in dispute was reduced to $214,482.51. Later, as a result of a partial withdrawal of claim this was reduced to $209,347.58.

9. The amount of VEA and Perkins Act salaries in dispute is $139,267.95.

a. To this amount, an indirect cost rate of 19.4 percent, or $27,017.98, and a fringe benefit rate of 30.92 percent, or $43,061.65, must be added. E-2-6; E-1-28.

b. Consequently, a total of $209,347.58 of salaries, including indirect costs and fringe benefits, is in dispute for the VEA and Perkins Act program. E-2-6.

10. The PAR Fund and Effort Reports maintained by NYSED show that NYSED charged a total of $433,616.79 of salaries to the EHA- B grant in dispute. E-3.

a. To this amount, an indirect cost rate of 19.4 percent, $56,330.81, and a fringe benefit rate of 30.92 percent, $89,780.86, must be added. E-3; E-1-28.

b. Consequently, a total of $436,476.69 of salaries, indirect costs, and fringe benefits, charged to the EHA-B program are in dispute. E-3.

11. The program codes for the VEA and the Perkins Act are 180- 190. A-5-2 and 8.

12.Program codes 160, 281-285, 400, 407, and 415-417 are allowable program codes to charge to the VEA or Perkins Act grant in limited circumstances. A-3-6 at paragraphs 8 and 11; A-5-2, 3 7, 8, 11, 23, and 24; A-1-7.

a. Program codes 160, 281-285, 400, 407, and 415-417 are allowable program codes to charge to the VEA or Perkins Act grant when they are used to indicate activities necessary to meet the requirement of the VEA or the Perkins Act to coordinate the VEA or Perkins Act grant programs with other programs. A-3-6 at paragraphs 8 and 11; A-1-7.

b. Program codes 160, 281-285, 400, 407, and 415-417 are allowable program codes to charge to the VEA or Perkins Act grant if they are used in conjunction with codes 180-190. A-3-6 at paragraphs 8 and 11; A-1-7.

c. Program codes 160, 281-285, 400, 407, and 415-417 are allowable program codes to charge to the VEA or Perkins Act grant if they are used by an employee who performs authorized programmatic activities to coordinate the VEA or Perkins Act grant programs with other programs. A-3-6 at paragraphs 8 and 11; A-1-7.

d. Program codes 281-285 are program codes used to designate activities related to separate sections of the Appalachian Regional Commission (ARC) Act. A-5-10.

i. Only activities necessary to coordinate the VEA and Perkins Act programs with those conducted under the ARC may be funded from a Perkins Act grant. See A-3-6 at paragraphs 8 and 11.

ii. The cost of an employee's effort attributed to implementing the ARC, rather than coordinating the VEA and Perkins Act programs with the ARC program, is not an allowable cost to fund from the Perkins Act grant. See A-3-6 at Paragraphs 8 and 11; A-1-7.

e. Program code 400 is a program code used to designate activities related to a program under the Comprehensive Employment and Training Act (CETA). A-5-9.

i. The VEA authorized coordination of the VEA program and the programs conducted under the CETA. 20 U.S.C.§ 2307(b) (5) (1982). A-3-6 at paragraphs 8 and 11.

ii. Only activities necessary to coordinate the VEA program with those conducted under the CETA may funded from a VEA grant. A-3-6 at paragraphs 8 and 11; A-1-7. 20 U.S.C. 2307(b) (5) (1988).

iii. The cost of an employee's effort attributed to implementing the CETA, rather than coordinating the VEA program with the CETA program, is not an allowable cost to fund from the VEA grant. A-3-6 at paragraphs 8 and 11; A-1-7. 20 U.S.C. § 2307(b) (5) (1988).

f. Program code 407 is a program code used to designate activities related to the State Occupational Information Coordinating Committee (SOICC). A-3-5.

i. The VEA and Perkins Act authorized the National Occupational Information Coordinating Committee (NOICC). 20 U.S.C. § 2391(b) (1982); 20 U.S.C. § 2422(b) (1988). A-3-6 at paragraphs 8 and 11.

ii. The VEA and Perkins Act required each State to establish a State occupational information coordinating committe with funds awarded by NOICC. 20 U.S.C. § 2391 (b) (1982); 20 U.S.C. § 2422 (b) (1988). A-3-6 at Paragraphs 8 and 11.

iii. Only activities necessary to coordinate the VEA and Perkins Act programs with the activities funded under the grant award from NOICC may be funded from a Perkins Act grant. A-3-6 at paragraphs 8 and 11; A-1-7. 20 U.S.C. § 2391(b) (1982); 20 U.S.C. § 2422(b) (1988).

iv. The cost of an employee's effort attributed to implementing the SOICC requirements, rather than coordinating the VEA and Perkins Act programs with the SOICC activities, is not an allowable cost to fund from the Perkins Act grant. A-3-6 at paragraphs 8 and 11; 20 U.S.C. § 2422(b) (1988).

g. Program codes 415-417 are program codes used to designate activities related to separate titles of the Job Training Partnership Act (JTPA). A-5-3. Program codes 415 and 417 also are used to designate activities related to the New York State Occupational Retraining and Reemployment Act (ORRA). A-5-3.

i. The Perkins Act authorized joint planning and coordination of the Perkins Act program and the programs conducted under the JTPA. 20 U.S.C. § 2323(b) (10) (1988). A-3-6 at paragraphs 8 and 11.

ii. Only activities necessary to coordinate the Perkins Act program with those conducted under the JTPA may be funded from a Perkins Act grant. A-3-6 at paragraphs 8 and 11; A-1-7. 20 U.S.C. § 2323(b) (10) (1988).

iii. The cost of an employee's effort attributed to implernenting the JTPA, rather than coordinating the Perkins Act program with the JTPA program, is not an allowable cost to fund from the Perkins Act grant. A- 3-6 at paragraphs 8 and 11; A-1-7. 20 U.S.C. § 2323(b) (10) (1988).

h. Code 160 designates activities related to the Adult Education Act (AEA) . The Perkins Act authorized joint planning and coordination of the Perkins Act program and the programs conducted under the AEA.

13. Program codes 180-190 and 160, 281-285, 400, 407, and 415- 417 are allowable program codes to charge to the VEA or Perkins Act grant.

a. Code 091 is a program code used to designate activities related to the State leadership program under section 224, title II-B of the Elementary and Secondary Education Act (ESEA). A-5-7.

b.Code 106 is a program code used to designate activities related to the career education program under section 406, title IV of the ESEA. A-5-22.

c. Code 152 is a program code used to designate sex desegregation activities under title IV of the Civil Rights Act (CRA). A-5-2.

d.Code 176 is a program code used to designate activities related to the Indochina Refugee Children Act. A-5-23.

e. Code 203 is a program code used to designate activities related to administration of the EHA-B. A-5-3.

f. Code 216 is a program code used to designate activities related to the mathematics and science program (higher and professional education) under title II of the Education for Economic Security Act (EESA). A-5-3.

g. Code 261 is a program code used to designate activities related to the Puerto Rican Cultural Service under the Emergency School Aid Act (ESAA). A-5-23.

h. Code 265 is a program code used to designate activities related to title VI of the Higher Education Act (HEA). A-5-23.

i. Code 306 is a program code used to designate activities related to the breakfast program and sections 7 and 11 of National School Lunch Act (NSLA). A-5-3.

14 .The program codes for the EHA-B are 202-210. A-5-3.

15. a. Code 001 is a program code used to designate activities related to the National Telecommunications and Information Administration (RRF) program. A-5-2.

b. Code 051 is a program code used to designate activities related to administration of Chapter I of the Education Consolidation and Itnprovement Act (ECIA or Chapter 1) program. A-5-2.

c. Code 052 is a program code used to designate activities related to the Chapter 1 LEA program. A-5-2.

d. Code is 054 is a program code used to designate the Chapter 1 Handicapped program. A-5-2.

e. Code 055 is a program code used to designate activities related to the Chapter 1 Migrant program. A-5-2.

f. Code 102 is a program code used to designate activities related to the ESEA IV-B program. A-5-7.

g. Code 160 is a program code used to designate activities related to the AKA XIII program. A-5-2.

h. Code 165 is a program code used to designate activities related to the Library Services and Construction Act (LSCA) I program. A-5-2.

i. Code 167 is a program code used to designate activities related to the LSCA III program. A-5-2.

j. Code! 180 is a program code used to designate the VEA Section 102d, Subpart I program. A-5-8.

k. Code 183 is a program code used to designate the VEA Part C Research program. A-5-8.

l. Code 184 is a program code used to designate the VEA Subpart IV program code. A-5-8.

m. Code 186 is a program code used to designate the VEA Title II-A Basic Grant program. A-5-8.

n. Code 214 does not appear in the list of PAR program codes .

o. Code 413 is a program code used to designate the CETA Title II One Per Cent Linkage program. A-5-9.

16. Code 000 was officially designated as the code for "all other State programs."

a. Code 000 is technically a program code, rather than a general code. A-5-2.

b. Code 000 does not assign employee effort to a specific Federal or State program. A-3-6 at paragraph 12; A-5-2 and 15.

c. Code 000 is allowable as a charge to the EHA-B program and the VEA and Perkins Act program if the employee has not used any codes which are unallowable as charges to the EHA-B program and the VEA and Perkins Act program. A-1-7 and 8; A-3-6 at paragraphs 5 and 12.

C. OPINION AND ADDITIONAL FINDINGS OF FACT.

1. New York's PAR System and Time Distribution Records.

The Assistant Secretaries argue that NYSED charged to the federal grants at issue employees' salaries that were not supported by the required time distribution records. The Assistant Secretaries contend that NYSED was required to maintain time distribution records to support the salaries of employees who worked on activities chargeable to different grant programs, and

that NYSED's records do not support the salaries of employees charged to the federal grant at issue. Assistant Secretaries' Brief at 16-28.

NYSED asserts that the amounts charged for employee salaries, indirect costs, and fringe benefits were properly allocated to the federal grant programs through the PAR system. NYSED claims that the PAR system satisfies all relevant regulations as has been previously determined by the Secretary of Education. Moreover, according to NYSED, the doctrine of collateral estoppel precludes the recovery of funds because the Secretary has explicitly ruled that New York's PAR system for charging salaries of State administrative employees satisfies the Education Department General Administrative Regulations (EDGAR). NYSED Initial Brief at 10-18. NYSED insists that its employees' salaries were supported by the required time distribution records. NYSED Reply Brief at 20-22.

The Education Department General Administrative Regulations (EDGAR) include 34 C.F.R. Part 74, Appendix C, entitled "Principles for Determining Costs Applicable to Grants and Contracts With State and Local Governments". Appendix C "sets forth principles for determining the allowable costs of programs administered by State and local governments under grants from and contracts with the Federal Government. . . ." 34 C.F.R. Part 74, Appendix C, Part I, A, 1 (1985). Appendix C further states that "[t]hese principles will be applied in determining costs incurred by State and local governments under Federal grants and cost reimbursement type contracts (including subgrants and subcontracts) except those with publicly financed educational institutions subject to Appendix D to this part." 34 C.F.R. Part 74, Appendix C, Part I, B, 1 (1985). Accordingly, these regulations apply to the instant case.

EDGAR states that to be allowable under a grant program, these costs must "[b] e necessary and reasonable for proper and efficient administration of the grant program, be allocable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of State or local governments." 34 C.F.R.Part 74, Appendix C, Part I, C, 2, a (1985).

As NYSED points out, "A cost is allocable to a particular cost objective to the extent of benefits received by such objective." 34 C.F.R. Part 74, Appendix C, Part I, C, 2, a (1985). "Where an allocation of joint cost will ultimately result in charges to a grant program, an allocation plan will be required as prescribed in section J." 34 C.F.R. Part 74, Appendix C, Part I, C, 2, C (1985). Section J states that the allocation plan should contain the following:

a. The nature and extent of services provided and their relevance to the federally sponsored programs.

b. The items of expense to be included.

c. The methods to be used in distributing cost.

34 C.F.R. Part 74, Appendix C, Part I, J, 2 (1985).

Regarding the ability of State and local governments to charge these costs to federal grant programs, 34 C.F.R. Part 74, Appendix C, Part II, B, 10, b (1985) states as follows:

Payroll and distribution of time. Amounts charged to grant programs for personal services, regardless 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).

This regulation requires amounts charged to grant programs for personal services to be based on documented and approved payrolls. These payrolls must be supported by time and attendance or equivalent records for individual employees. The regulation also requires that salaries of employees chargeable to more than one grant program must be supported by "appropriate time distribution records". Finally, the method of time distribution records used should produce an equitable distribution of time and effort. In addition, the regulation implies that salaries of employees that are chargeable to only one grant program do not need to be supported by time distribution records. These important principles must be borne in mind when examining NYSED's salary charges and related time distribution ion records.

As the Assistant Secretaries note, Section 435(b) (5) of the General Education Provisions Act (GEPA) requires that "the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State under each program."

20 U.S.C. § 1232d(b) (5). This requirement is codified at § 76.702(1985).

The Assistant Secretaries further direct this tribunal to section 437(a) of GEPA, which requires recipients of federal funds to "keep records which fully disclose the amount and disposition by the recipient of those funds, the total cost of the activity for which the funds are used, the share of that cost provided from other sources, and such other records as will facilitate an effective audit." 20 U.S.C. § 1232f(a). Other financial management requirements are set forth in § 74.61 (1985).

Furthermore, § 76.700 requires a State that receives federal funds to comply with the State plan and applicable statutes, regulations, and approved applications. The State must use federal funds in accordance with those statutes, regulations, plan, and applications. § 76.700 (1985).

GEPA states that in any proceeding before the Office of Administionrationive Law Judges (OALJ) the burden shall be upon the grant 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 (PDD). 20 U.S.C § 1234a(b) (3) (1993). This requirement is contained in the regulations

at § 81.30 (1992), which also requires the recipient to present its case first. Accordingly, in the instant case, NYSED bears both the burden of production and the burden of persuasion.

Both the OALJ and the predecessor to OALJ, the Education Appeals Board (KAB), have held that time distribution records are mandatory when employees have responsibility for more than one program.

In Application of Escambia County Board of Education, Dkt. No. 89-9-R, U.S. Dep't of Educ. (December 29, 1989), the tribunal held that six pages of after-the-faction 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." Escambia at 13.

The judge went on to state:

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 (FLD). 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 Vallev College, No. 21(190)85, upheld in Fort Vallev College v. Bennett 853 F. 2d 862 (11th Cir. 1988); [sic] 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.

Escambia at 13.

NYSED used the Program Accountability Reporting (PAR) system, which performed several functions, including the following:

1. collecting "effort" information for each employee by specific program areas and work activities;

2. collecting payroll information for each employee by source of funding;

3. combining this information with information on employee organizational unit assignments;

4. producing a series of reports which summarize employee funding and "effort" at the different management levels of the New York State Education Department;

5. serving administrative staff and program managers as a basic tool in their budgeting, managing and accounting for NYSED staff resources.

Ex. A-7.

Under the PAR system, employees were required to record daily on an "Employee Activity Record" the amount of time they spent on various work activities. The PAR system used three digit codes to identify these work activities. PAR codes 001 to 798 were program codes that were used to identify all of the specific program activities performed by NYSED personnel. Although technically a program code, code 000 ("all other State programs") was used to report time spent on any State program that had not been assigned its own unique program code. Ex. A-5- 2.The PAR system also contained general codes 949-953 and 999. PAR code 999 ("Miscellaneous") was restricted to four categories: 1)time charged to leave accruals; 2) time used for other authorized duties (such as Civil Service training, exams, etc.) during normal working hours; 3) holidays; and 4) all on-the-job training and continuing education during normal working hours. Ex. A-5-6. Code 997 is a general code that was created to keep track of hours of employee effort for which no documentation has been received, or is received too late or with too many errors for timely keypunching. Ex. A-7-9.

Based upon these records compiled by State employees, the PAR system created two types of reports. The PAR Fund Report, contained in Ex. A-54, listed each NYSED employee by organizational unit, along with PAR codes identifying the source of that employee's funding. The PAR Fund Report also identified the amount paid from each funding source for each employee. The PAR Effort Report, contained in Ex. A-55, listed each NYSED employee by organizational unit, along with PAR codes identifying the program activities worked on by that employee. The PAR Effort Report also identified the cost of the effort allocated to each code by each employee.

As to the issue of whether or notion NYSED has provided appropriate time distribution records, the Department of Education (ED) has previously issued two decisions addressing New York's PAR system. In Appeal of the State of New York, Dkt. No. 26(226)86, U.S. Dep't of Education (EAB Decision) (January 14, 1988), and the Final Decision of the Secretary on (March 27, 1988) , 6 the EAB found the following:

3. This EAB Panel finds that New York's Performance Accountability Reporting (PAR) system is a useful and informative personnel accounting system which satisfactorily meets the EDGAR requirements and provides both a suitable method of cost allocation and (where required) a time distribution record. . . .

Initial New York at 4.

Despite conceding that the EAB found that the PAR system provided a suitable method of cost allocation, 7 the Assistant Secretaries argue that the EAB did not accept NYSED's argument that the PAR system constituted a "cost allocation plan", as described in 34 C.F.R. Part 74, Appendix C, Part I, J, 1 (1985), such that all salaries documented by the PAR Effort Report are by that fact alone allowable costs of the federal grant to which they were charged. While the tribunal agrees that the EAB did notion hold that all salaries documented by the PAR Effort Report are by that fact alone allowable costs of the federal grant to which they were chargedf the tribunal disagrees with the Assistant Secretaries' claim that the EAB did not accept New York's argument that the PAR system constituted a "cost allocation plan" as described in 34 C.F.R. Part 74, Appendix C,

Part I, J, 1 (1985). Finding 3 of the Initial New York decision states clearly that the EAB Panel found that the PAR system "provides . . . a suitable method of cost allocation". Initial New York at 4.

In Appeal of the State of New York, Dkt. No. 26(226)86, U.S. Dep't of Educ. (EAB Supplemental Decision After Remand) (June 27, 1989), and the Final Decision of the Secretary (August 29, 1989) , 8 the EAB stated the following:

This EAB Panel believes that the chief purpose of the EDGAR cost accounting regulation is to assure that federal educational grant funds are spent for the purposed intended by Congress, in frugal or reasonable amounts and in a manner that permits a subsequent, effective audit of the expenditures. We have already ruled that New York's PAR accounting system satisfactorily meets EDGAR requirements and provides an appropriate method of cost allocation and (where required) a time distribution system for personnel involved in VEA program activities. (See Paragraph 3 of the Secretary's Final Decision of May 27, 1988.) Using New York's approved PAR accounting system, ED's auditors in this action determined that certain "non- line-item" New York employees . . . performed services allocable to the VEA grant during F.Y. '82 in the amount of $530,195.

It is our opinion that EDGAR regulations provide for the allocation and obligation of federal educational grant funds when the services are performed for VEA intended purposes, NOT upon the initial charging or budgeting of such costs. . . .

New York Remand at 3-4 (emphasis added).

While the tribunal considers the PAR Effort Report generally to be the best evidence of how the employees spent their time, it is not the only evidence, nor is it always the most reliable. At the hearing, Michael DiVirgiho, the Chief of the Bureau of Fiscal Management for NYSED, testified that there were many opportunities for mistakes to be introduced into the PAR reports, including employees writing down incorrect codes, transposition, and data entry mistakes. Mr. DiVirgilio testified that in fact mistakes were made. Hearing Tr. at 30-31, 39. Therefore, the tribunal will accept other evidence in addition to the PAR Effort Report.

In addition, in Consolidated Appeals of the Florida Department of Education, Docket Nos. 29(293)88 & 33(297)88, U.S. Dep't of Education (EAB Decision) (June 26, 1990), and the Final Decision of the Secretary (Sept. 10, 1990), the EAB and the Secretary held that Florida's documentary evidence was relevant to the issue of work performed by various State employees. Florida at 7-14. This evidence, accepted by the EAB, included the following:

1. the official position descriptions detailing the responsibilities and duties

2. time and attendance records

3. "Position Fiiriding Report for Quarterly Certification", reflecting the employee's name, position number, funding source, percentage of time paid by funding source, and time period covered

4. the Supervisor's certification of the time distribution

5. the official organizational placement of the employee in the State bureaucracy

Florida at 8. See also Id. at 31, 39.

The official position descriptions accepted in the Florida case correspond to the official position descriptions and performance evaluations submitted by NYSED in the instant case. The time and attendance records accepted in the Florida decision correspond to the PA' Effort Report, the Employee Activity Record Forms, and the payroU registers and summaries submitted by NYSED here. The "Position Funding Report for Quarterly Certification" accepted in Florida corresponds to the PAR Fund Report submitted in the present case. The supervisors' certifications accepted in Florida correspond to the after-the-fact affidavits executed by supervisors and submitted by NYSED here. The official organizational placement charts accepted in Florida correspond to the organizational placement charts offered by NYSED in the instant case.

In addressing the Assistant Secretaries' objection to after- the-fact affidavits executed by supervisors in the Florida case, the EAB stated:

The use of later affidavits, however, is not categorically precluded in all circumstances . . . . The fact that the affidavits were not given until years later goes to their weight as evidence rather than to their admissibility. . . .

Florida at 31. The EAB found that the affidavits in the Florida case were credible and useful evidence. This tribunal will also accept the after-the-tact affidavits executed by supervisors and submitted by NYSED in the case at bar.

Here, NYSED has also submitted the PAR Codes Manual (Ex. A- 5), and the Program Accountability Reporting System Managers Handbook (Ex. A-7). The PAR Codes Manual describes New York's PAR system and lists the specific programs identified by three- digit codes. The Program Accountability Reporting System Managers Handbook further explains the PAR system. Both of these exhibits explain the PAR Fund and Effort Reports, the three-digit PAR codes used by NYSED employees, and other aspects of the PAR system used by New York. Both of these exhibits address the issue as to which federal grant programs the NYSED employees whose salaries are in dispute actually worked on. Accordingly, the tribunal finds that both of these exhibits are relevant evidence.

Exhibit A-10 contains the NYSED Vocational Education State Plan. Exhibit A-25 contains the Helping Children with Handicapping Conditions in New York State Plan. Each of these State plans further clarifies the meaning of the organizational placement charts and elucidates the duties and responsibilities of the NYSED employees whose salaries are in issue. Therefore, the tribunal finds that both of these exhibits are relevant evidence.

Relating to the admissibility and weight of this evidence, the EAB concluded as follows:

This Panel concludes that the documentation provided by Appellant herein is relevant to prove the actual performance of duties by the etnployees in question. The documentation and other relevant evidence will be discussed and evaluated in Part VI of this decision with respect to each position. At this point we merely conclude that Appellant's documentation is relevant evidence, not only of work assigned but also of work performed.

Florida at 13-14.

In the instant case, the tribunal adopts the ruling in Florida. Specifically, this tribunal finds that the position descriptions and performance evaluations, the PAR Reports, the Employee Activity Record Forms, the payroll registers and summaries, the after-the-fact affidavits executed by supervisors, the organizational placement charts, the PAR Codes Manual, the Program Accountability Reporting System Managers Handbook, the NYSED Vocational Education State Plan, the Helping Children with Handicapping Conditions in New York State Plan, and the testimony elicited at the hearing are relevant evidence as to the issue of whether NYSED employees actually worked on the federal grant programs (VEA, Perkins, or EHA-B) to which their salaries were charged. The documentation and other relevant evidence will be discussed and evaluated throughout this decision with respect to each position.

Finally, NYSED contends, at pages 14-18 of its initial brief, that the doctrine of collateral estionoppel, also known as issue preclusion, 9 applies to the current proceeding. In In the Matter of Career Education. Inc., Docket No. 91-17-ST, U.S. Dep't of Education (August28, 1992), this tribunal held the following:

Under the doctrine of issue preclusion, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in a subsequent proceeding based on a different cause of action involving a party to the prior litigation.

Career at 25-26. 10

While this is a subsequent proceeding based on a different cause of action, both the U.S. Department of Education and NYSED were parties to the prior litigation in the Initial New York decision and the New York Remand. Therefore, issues that were actually and necessarily decided by the EAB Panel and the Secretary in those two cases are binding upon both the U.S. Department of Education and NYSED in the present case.

Furthermore, under the doctrine of issue preclusion, findings from Consolidated Appeals of the Florida Department of Education, Dkt. Nos. 29-293-88 & 33-297-88, U.S. Dep't of Educ. (EAB Decision) (June 26, 1990), and the Final Decision of the Secretary (September 10, 1390) are binding on the Assistant Secretaries, as representatives of the U.S. Department of Education.

The findings of the EAB and the Secretary in the Initial New York, New York Remand, and Florida cases will be discussed throughout this decision with respect to each position.

2. VEA and Perkins F'mded Employees in Dispute.

The Assistant Secretaries claim that the salary costs in dispute charged to the VEA and Perkins Act grants are unallowable because the salaries of employees attributed to PAR codes 160, 106, 306, 152, 400, 407, 416, 417, and 000 are not allowable. Assistant Secretaries' Brief at 28-46.

NYSED contends that the ernployee charges to the VEA grant were proper, based upon the codes charged to the VEA grant and an employee-by-employee analysis of VEA allocations. NYSED Initial Brief at 18-27; NYSED Reply Brief at 22-27.

a. Salaries of employees conceded bv NYSED.

Initially, the tribunal notes that NYSED, both in its briefs (see Appendix C to NYSED's Initial Brief) and through its proposed findings of fact as well as its response to the Assistant Secretaries' proposed findings of fact, has apparently conceded that all or part of the salaries of twelve of the VEA and Perkins funded employees in dispute are not properly allocable to the VEA These salaries and the amounts are as follows:

EMPLOYEE	Amount Conceded
Dorcas Arocho	14,736.59
Richard Connell	9,889.96
Elizabeth Coughtry	3,663.62
Mary Gurney	7,491.09
Margaret Hopkins	6,434.89
Carol Jabonaski	16,647.42
David Martire	527.00
Ruth Milczarek	852.00
Peter Rourke	2,932.00
Suzanne Spear	9,719.31
James Stratton	3,301.45
Nancy Taylor	10,168.00
SUBTOTAL	86,363.33
Indirect Costs (.194)	16,754.49
Fringe Benefits (.3092)	26,703.54
TOTAL	129,821.36

Accordingly, the tribunal finds that these salaries were not properly allocable by NYSED to the VEA and therefore should be refunded to the Department. See Initial New York at 8 (findings 15 and 16).

b. Salaries of employees attributed to PAR code 160.

NYSED claims that the charges to PAR code 160 (Adult Education Act) made by Carolyn Barbuto, Corinne Wells, Virginia Kirby, and Frances Collins were properly allocable to the VEA because these employees were responsible for vocational and adult education coordination. NYSED Initial Brief at 23; NYSED Reply Brief at 23-25. The Assistant Secretaries contend, that the salaries of these employees attributed to PAR code 160 are not allowable. Assistant Secretaries' Brief at 29-34.

The PDD disallowed $364.00 of the salary costs of Carolyn Barbuto that were charged to the VEA and Perkins Act grants. Ex. A-1-7.The stipulation filed by the.parties indicated that none of the $364.00 disallowed in the PDD for Ms. Barbuto's salary is barred from recovery by the statute of limitations. Ex. E-2-4, 6. NYSED's PAR Effort Report attributes the effort for this $364.00 to program code 160. Ex. A-55-284; A-56-75. PAR code 160 denotes the Adult Education Act. Ex. A-5-2.

The PDD disallowed $445.00 of the salary costs of Corinne Wells that were charged to the VEA and Perkins Act grants. Ex. A-1-7.The stipulation filed by the parties with the OALJ indicated that none of the $445.00 disallowed in the PDD for Ms. Wells' salary is barred from recovery by the statute of limitations. Ex. E-2-6. NYSED's PAR Effort Report attributes the effort for this $445.00 to program code 160. Ex. A-55-284; A-56-77.

The PDD disallowed $606.00 of the salary costs of Virginia Kirby that were charged to the VEA and Perkins Act grants. Ex. A-1-7.The stipulation filed by the parties with the OALJ indicated that none of the $606.00 disallowed in the PDD for Ms. Kirby's salary is barred from recovery by the statute of limitations. Ex. E-2-4, 6. NYSED's PAR Effort Report attributes the effort for this $606.00 to program code 160. Ex. A-55-283; A-56-72.

The PDD disallowed $510.00 of the salary costs of Frances Collins that were charged to the VEA and Perkins Act grants. Ex. A-1-7.The stipulation filed by the parties with the OALJ indicated that; none of the $510.00 disallowed in the PDD for Ms. Collins' salary is barred from recovery by the statute of limitations. Ex. E-2-4, 6. NYSED's PAR Effort Report attributes the effort for this $510.00 to program code 160. Ex. A-55-283; A-56-72 .

As NYSED points out, the Adult Education Act (AEA) requires the State educational agency to coordinate the AEA with activities under the VEA 20 U.S.C. § 1203a(a) (3) (1988). Both parties, through their respective proposed findings of fact and responses, acknowledge that program code 160 is an allowable program code to charge to the VEA or Perkins Act grant when it is used to indicate activities necessary to meet the requirement of the VEA or the Perkins Act to coordinate the VEA or Perkins Act grant programs with other programs, if it is used in conjunction with codes 180-190, and if it is used by an employee who performs authorized programmatic activities to coordinate the VEA or Perkins Act grant programs with other programs. The parties have also acknowledged that the Perkins Act authorized joint planning and coordination of the Perkins Act program and the programs conducted under the AEA.

The issue is whether in fact these employees were engaged in efforts to coordinate the AEA with the VEA The evidence on this issue consists of the PAR Effort Report, the affidavit of James

Kadamus, the performance evaluations of these employees, and the testimony of James Kadamus and Kenneth DeCerce at the hearing.

Virginia Kirby, Frances Collins, Carolyn Barbuto, and Corinne Wells worked in the information processing unit of the Office of accupational and Continuing Education (OOCE). Hearing Tr. at 148. The performance evaluations for these employees are contained in Exhibits A-12 (Carolyn Barbuto), A-13 (Virginia Kirby), A-17 (Frances Collins), and A-18 (Corinne Wells). The performance evaluations for Ms. Barbuto, Ms. Collins and Ms. Wells are virtually identical. The "performance program" sections of these evaluations describe various word processing tasks and do not indicate that these employees were required to coordinate the AEA with the VEA The performance evaluation for .Ms. Kirby indicates that she was required to supervise employees in the information processing center. Again, Ms. Kirby's evaluation does not indicate that either she or her subordinates were required to coordinate the AEA with the VEA.

James Kadamus, in his affidavit contained in Ex. A-li, states that during fiscal year 1985-86 he was the Assistant Commissioner for the Office of Occupational and Continuing Education and State Director for Vocational Education. Mr. Kadamus then states that through that position he has personal knowledge that a number of employees, including Carolyn Barbuto, Virginia Kirby, Frances Collins, and Corinne Wells, worked exclusively on vocational education activities. Mr. Kadamus then states that any PAR code reflected in the final PAR report for these employees that did not reflect vocational activities was used in error.

This affidavit was signed on December 13, 1990, more than four years after the close of the 1985-86 fiscal year. The time lapse between the events described and the signing of the affidavit raises some question as to the reliability of the affidavit. This is especially true because NYSED is attempting to use this affidavit to prove that these employees worked exclusively on vocational education, even though these employees used some PAR codes that are not directly related to vocational education.

In addition, the parties, through their respective proposed findings of fact and responses, have acknowledged that Mr. Kadamus was a third-line supervisor above these word processing employees. However, at the hearing, Mr. Kadamus testified that he had a very acute knowledge of what his staff did on a daily basis. He stated that he met with people and would sometimes stop by the word processing unit and talk with the employees. Mr. Kadamus testified that about 100-120 employees under his jurisdiction within the OOCE were located on a single floor. Mr. Kadamus testified that he had regular meetings within the office and talked to employees often. Mr. Kadamus testified that he saw most people on a daily basis and that he travelled about 20% of the time, with members of his staff accompanying him. Hearing Tr. at 130, 152-155. Based upon Mr. Kadamus' testimQny, the tribunal is convinced that Mr. Kadamus had personal knowledge of the time and effort of the employees who worked in the information processing unit.

At the hearing, Mr. Kadamus testified that the OOCE had responsibility for the ABA, including coordination between the AEA and the VEA Hearing Tr. at 149. He further testified that these four word processors would have charged AEA codes only to reflect work that they did on documents related to the coordination between the AEA and the VEA, because the AEA work

was done almost exclusively by the Division staff of Garrett Murphy, who had his own secretaries to do clerical work. Hearing Tr. at 148-152.

While the tribunal finds Mr. Kadamus' testimony to be credible, a few key words are telling. When asked if Garrett Murphy took advantage of the word processors in the information processing unit, Mr. Kadamus responded "Very little, if any . . . ." Hearing Tr. at 150. When asked if he could explain why these four employees in the information processing unit would have used codes related to the ABA, Mr. Kadamus stated as follows:

The only thing I can think of is they did spend some time doing documents that related to the connection between the Vocational Education Act and the Adult Education Act, may have done a little bit of word processing.

But I would say that it was a very small amount of time that they might have spent on any Adult Education programs. It would have only been in relation to the coordination of work.

Almost exclusively, the Adult Education work was done by the Division staff of Garrett Murphy.

Hearing Tr. at 152 (emphasis added) .

While Mr. Kadamus presents a quite plausible theory, he is not testifying that he had direct knowledge that these employees were performing coordination activities between the VEA and the AEA. His speculation as to that theory is not enough to carry NYSED's burden of proof.

Also at the hearing, Kenneth DeCerce, who in 1986 was a supervisor of Occupational Education, testified that the information processing center, where these four individuals worked, was under his supervision. Mr. DeCerce testified that these four word processors did not have any substantive responsibility for implementing the Adult Education Act. In addition, Mr. DeCerce agreed that an effort was made to try to get everybody on the floor to utilize the services of the word processing unit, because it had state-of-the-art word processing equipment. He stated that he would go to various supervisors and ask them to delegate some of their word processing work to the word processing unit, and that this campaign was directed especially toward the work that Garrett Murphy's staff was doing. Both Mr. DeCerce and Mr. Kadamus had testified that Garrett Murphy's staff performed work related to the AEA. Tr. at 187- 199.

Mr. DeCerce's testimony establishes only that these four word processors were seeking out work from other units, particularly from Garrett Murphy's unit, which performed work related to the AEA. This testimony does not establish with any certainty that the word processors were performing exclusively vocational education-related work. In fact, it raises the possibility that they were performing some word processing for the AEA, without demonstrating that this was merely coordination between the AEA and the VEA.

It follows that based upon all of the evidence, the tribunal finds that NYSED has failed to justify the following charges to PAR code 160 as being related to the VEA $364 of the salary of Carolyn Barbuto, $510 of the salary of Frances Collins, $606 of the salary of Virginia Kirby, and $445 of the salary of Corinne Wells. These amounts must be refunded to the Department.

c. Salaries of employees attributed to PAR codes 106, 306. and 152.

NYSED argues that Judith Corman rnistakenly entered the number 106 on her PAR sheet because she transposed the number 160 and that she was responsible for vocational and adult education coordination. NYSED Initial Brief at 23. The Assistant Secretaries respond that Ms. Corman's perf ormance evaluation supports her use of a nonvocational education codeg especially one relating to elementary education.

The Assistant Secretaries concede, at page 35 of their brief, that "the PAR Manual does not specifically list a PAR code 106 . . . ." Nonetheless, they argue that because the PAR codes around 106 (such as codes 102-104, 108, and 110-113) relate to elementary education, this indicates that Ms. Corman had worked on elementary education and was attempting to enter one of these elementary education codes. While this theory is plausible, it is no more plausible than NYSED's theory that Ms. Corman transposed 106 for 160, a theory that the Assistant Secretaries attack.

However, while it is true that the PAR Manual for October 15, 1985, did not specifically list a PAR code 106, the PAR Codes Manual for August 1, 1981 did specifically list a PAR code 106, which identified ESEA (Elementary and Secondary Education Act) IV Section 406 (Career Education). Ex. A-5-22. Therefore, it is also possible that Ms. Corman continued to use PAR code 106 in 1985-86 after it had been deleted from the PAR Codes Manual, because at one time it had been a vajid code.

Moreover, Ms. Corman's performance evaluation does include as one her tasKs the following: "Review proposals for selecting the NASA teacher in space, the outstanding elementary school in NYS, and the FY86 mini grant recipients." Ex. A-14-6. Under "Summary of Actual Performance", her evaluation states:

Mrs Corman [sic] has also been involved in a wide range of topics in support of Bureau and Education Department work. Among these assignments was the review of applications for New York State's teacher for the Teacher In Space Project, and the review of schools nominated for designation as outstanding elementary schools. Mrs. Corman reviewed approximately 20 proposals submitted by agencies desiring to obtain program improvement grants. . . .

Ex. A-14-8. This "Summary of Actual Performance", included in an evaluation that covered the period September 22, 1985, through September 22, 1986, is strong evidence that Ms. Corman did in fact work on some elementary education projects, including "review of schools nominated for designation as outstanding elementary schools."

Both in his affidavit, Ex. A-il, and at the hearing, James Kadamus asserted that Ms. Corman worked exclusively on vocational education activities. See Ex. A-il; Hearing Tr. at 142-144. In addition, at the hearing, Judith Corman testified that during the period of time in question, her responsibilities related 100 percent to vocational education. Ms. Corman also testified that on her employee activity record form for weeks 23 and 24, she actually wrote in code 166, instead of 106. Hearing Tr. at 183185; see also Ex. A-63. The number "8" in the 186 in period 23 does appear very similar to a "0". This code has the letters "VEAC" in the box next to it under the

label "Program Name". "VEACI' also appears in the boxes next to the other 186 codes. Ms. Corman further testified that her intent was to write in an "8" instead of a "0" because 186 was always her code and because she worked 100 percent on vocational education. She testified that she never had any responsibilities for career education or elementary education. Hearing Tr. at 184-185.

Concerning the references in her performance evaluation to the Teacher In Space project and proposals for outstanding New York State Elementary School and project improvement grants, Ms. Corman testified on re-direct as follows:

Q: Could you please explain why your performance evaluation might make references to Teacher In Space and Elementary Education?

A: Yes. At that time New York State had received proposals from teachers all over New York State to be a participant in the space shuttle, and they were teachers from K through 12.

And I was asked to review the Vocational Education teachers' proposals.

Q: So you did it from a Voc. Ed. perspective?

A: That's correct.

Q: Was that because of your Voc. Ed. background?

A: That's correct.

Hearing Tr. at 186-187.

The tribunal finds this testimony to be persuasive and to satisfactorily explain the charges to PAR code 106, which had actually been written on the Employee Activity Record Form as 186.Accordingly, the tribunal finds that Ms. Corman's charge of $676.00 to PAR code 106 is justified and should be allowed.

NYSED claims that Iona Mirsky's charge to code 306, a school lunch code, was a simple error and that she worked exclusively on vocational education matters. NYSED Initial Brief at 24. The Assistant Secretaries point qut that neither of the two performance evaluations for Ms. Mirsky that were submitted by NYSED covers the audit period in question. Assistant Secretaries' Brief at 36-37.

The PDD disallowed $2,849.00 of the salary costs of Ms. Mirsky that were charged to the VEA and Perkins Act grants. Ex. A-1-7.The stipulation filed by the parties with the OALJ reduced the amount in dispute for Ms. Mirsky to $1,501.00 because of the effect of the statute of limitations. Ex. E-2-6. Ms. Mirsky's PAR report shows a $1,500.00 charge to code 000 and a $1,348.00 charge to code 306. Ex. A-55-264. PAR code 306 is a program code used to designate activities related to the breakfast program and sections 7 and 11 of the National School Lunch Act (NSLA). Ex. A-5-3.

It is true, as the Assistant Secretaries note, that neither of the two performance evaluations for Ms. Mirsky contained in Ex. A-19 covers the audit period in question. The first performance evaluation covers the period October 1, 1983, to March 30, 1984. This evaluation describes effort related to the VEA and does not mention any effort related to the NSLA. The second performance evaluation covers the period April 1, 1987 to April 1, 1988. This evaluation also describes effort related to vocational education and does not mention any effort related to the NSLA. Nonetheless, while these performance evaluations demonstrate that Ms. Mirsky worked on vocational education matters and apparently did not perform much work, if any, on the NSLA during the 1983-84 and 1987-88 periods, they are not particularly probative for the 1985-86 period.

However, at the hearing, Ex. A-61 was introduced by NYSED and accepted by the tribunal without objection. Hearing Tr. at 133.This exhibit consists of a performance evaluation for Ms. Mirsky covering the audit period in question, namely April 1, 1985, to March 30, 1986. This evaluation contains numerous references to effort related to vocational education generally and to the VEA and the Perkins Act specifically. This evaluation does not mention any effort related to the NSLA.

Again, NYSED also offers the affidavit of James Kadamus, who was Ms. Mirsky's supervisor. In the affidavit, Mr. Kadamus states that he has personal knowledge that Ms. Mirsky worked exclusively on vocational education activities and that any PAR code reflected in the final PAR report for Ms. Mirsky that did not reflect vocational education activities was used in error. Ex. A-11. As discussed supra, this affidavit by itself is not particularly probative, because of the time lapse involved.

At the hearing, Exhibit A-62 was introduced by NYSED and accepted by the tribunal without objection. Hearing Tr. at 166. This exhibit consists of Ms. Mirsky's Employee Activity Record Form for period number 13. This form indicates that 26.5 hours were charged to miscellaneous code 999 and 48.5 hours were charged to code 306. Next to code 306, under the heading "Program Name", are written in the words "VEA Sub I Sec 102d". At the hearing, Ms. Mirsky testified that she wrote in these words and that they stood for the administrative section of the VEA. She further testified that she did not write in the number "306" and that someone else must have filled it in. She noted that she sometimes forgot to write in the code numbers on her Employee Activity Record Forms. In addition, Ms. Mirsky testified that she has never worked on the NSLA and that during the time period in question, she worked exclusively on vocational education activities. Hearing Tr. at 164-168.

At the oral argument held in Washington, D.C., counsel for the Assistant Secretaries attacked the reliability of this undated Employee Activity Record Form. Oral Argument Tr. at 170- 171. It is true that this form does not contain reference to the year or even the month during which it was completed. It merely identifies a period beginning on Thursday, the 13th and ending on Wednesday, the 26th. The tribunal takes official notice of the fact that this sequence of dates and days of the week occurred during June 1985, which is approximately when pay period 13 occurred during the audit period of April 1, 1985, through March 31, 1986. 11 However, as a result of the statute of limitations, the parties agreed to remove from dispute all salaries except those occurring during pay periods 1-7, 19-26, and half of 18. Since this form refers to pay

period 13, it reflects charges that occurred during a pay period that has been removed from dispute. Nonetheless, it is relevant for the purpose of determining why PAR code 306 was entered on Ms. Mirsky's Employee Activity Record Forms during the time periods that remain in dispute and whether the effort under PAR code 000 may be charged against the VEA grant.

At the evidentiary hearing, counsel for the Assistant Secretaries also brought out the fact that Ms. Mirsky's supervisor was required to review the PAR reports for accuracy, legibility, and completeness. Hearing Tr. at 169. Ms. Mirsky's supervisor was James Kadamus. Ms. Mirsky was his personal assistant. Hearing Tr. at 131, 164-5. Mr. Kadamus testified that Ms. Mirsky worked exclusively on vocational education and that she had no contact with the School Lunch program. He testified that he believed code 306 was entered by error.

The tribunal finds the testimony and other evidence to be persuasive and to satisfactorily explain the charges to PAR code 306.Accordingly, the tribunal finds that Ms. Mirsky's charge of $1,348.00 to PAR code 306 is justified and should be allowed. Therefore, NYSED will not be required to refund the $1,501.00 in charges to code 000.

NYSED contends that Christine Brooks' charge to code 152, a sex desegregation code, was an error, and that even if it was not an error, her activities relating to sex desegregation issues were properly charged to the VEA to the extent that they pertained to vocational education. NYSED Initial Brief at 26. The Assistant Secretaries contend that Ms. Brooks' performance evaluation does not indicate that she worked on vocational education. Assistant Secretaries' Brief at 38-39.

The PDD disallowed $58.00 of the salary costs of Christine Brooks that were charged to the VEA and Perkins Act grants. Ex. A-1-8. The stipulation filed by the parties with the OALJ indicated that none of the $58.00 disallowed in the PDD for Ms. Brooks' salary is barred from recovery by the statute of limitations. Ex. E-2-4, 6. NYSED's PAR Effort Report attributes the effort for this $58.00 to program code 152. Ex. A-55-469.

Ex. A-24 contains a performance evaluation for Ms. Brooks covering the period November 21, 1985, to November 21, 1986. This evaluation identifies Ms. Brooks as working in the Division of Civil Rights and Intercultural Relations, in the section for Occupational Education CIvil Rights. The evaluation indicates that Ms. Brooks' supervisor was Karl S. Wittman. Otherwise, the evaluation does not identify any specific vocational education activities or any sex desegregation activities. The performance evaluation is very general in its description. See Ex. A-24.

At the hearing, Karl S. Wittman, Ms. Brooks' supervisor during the period in question, testified that he had personal knowledge that Ms. Brooks worked exclusively on vocational education matters. Hearing Tr. at 209-210. He further testified that Ms. Brooks charged $58.00 to PAR code 152 because her responsibilities included matters:

related to Title IX of the Education Amendments of 1972, as it relates to the access of students or discrimination of students on the basis of sex and occupational education programs.

So to the extent that it was related to sex equity, and a sex equity effort, it was directly related to the responsibility in Occupational Education programming .

Hearing Tr. at 210. Mr. Wittrnan also stated that there was a separate desegregation unit in the New York City Education Department and that Ms. Brooks did not work in that unit because she worked solely in the Occupation Education part. Mr. Wittman also testified that he worked exclusively on vocational education matters as well. Hearing Tr. at 210-211.

The tribunal finds this testimony to be persuasive and to satisfactorily explain the charges to PAR code 152. The Assistant Secretaries have acknowledged that "Ms. Brooks' salary related to sex desegregation activities would be allowable onlv to the extent it related to a vocational education program." Assistant Secretaries' Brief at 38-39 (emphasis in original). Accordingly, the tribunal finds that Ms. Brooks' charge of $58.00 to PAR code 152 is justified and should be allowed. Therefore, NYSED will not be required to refund the $58.00 in charges to code 152.

d. Salaries of employees attributed to PAR codes 400. 407, 416, and 417.

NYSED argues that the salary of Robert DeFabio charged to a PAR code for the State Occupational Information Coordinating Committee (SOICC) is an allowable vocational education cost because part of VEA administration covered implementation and coordination of activities with the SOICC. NYSED Initial Brief at 19, 23. The Assistant Secretaries urge the tribunal to disallow Mr. DeFabio's charges to PAR code 407 because he used only code 407 and did not attribute any of his time to vocational education codes. Assistant Secretaries' Brief at 39-41.

The PDD disallowed $37,808.00 of the salary costs of Mr. DeFabio that were charged to the VEA and Perkins Act grants. Ex. A-1-7.The stipulation filed by the parties with the OALJ reduced the amount in dispute for Mr. DeFabio to $22,877.77 because of the effect of the statute of limitations. Ex. E-2-6. NYSED's PAR Effort Report attributes the effort for this $22,877.77 to program code 407. Ex. A-55-269, 341.

Program code 407 is a program code used to designate activities related to the SOICC. Ex. A-5-3. The VEA and Perkins Act authorized the National Occupational Information Coordinating Committee (NOICC). 20 U.S.C. § 2391(b) (1982); 20 U.S.C. § 2422(b) (1988). The VEA and Perkins Act required each State to establish a State occupational information coordinating committee with funds awarded by NOICC. 20 U.S.C. § 2391(b) (1982); 20 U.S.C. 2422(b) (1988).

In the Initial New York decision, the EAB held that employees who worked on VEA programs and also charged some of their time to PAR codes 000, 951, 406, and 407 are justified as liaison activities to CETA and should be allowed. Initial New York at 6 (finding 8). The EAB further held, however, that employees who charged time to PAR codes 400-412 are not justified if there is no evidence that they also worked on VEA programs that required liaison efforts with the listed CETA programs. The EAB required New York to refund these amounts. Initial New York at 6 (finding 11).

The EAB in Florida stated: "While the evidence in the case herein is not so precise or systematic as the evidence in New York, the key inquiry in both cases is whether the evidence shows that the VEA services were "actually performed." Florida at 25- 26 (emphasis added).

Therefore, the issue here is whether there is sufficient evidence that Mr. DeFabio worked on VEA programs that required liaison efforts with the SOICC so as to justify his charges to code 407.

The PAR Effort Report indicates that of the $37,808.00 originally in dispute, Mr. DeFabio charged $32,671 to PAR code 407 and $5,134 to PAR code 999. 12 In the Initial New York decision, the EAB held that employees who charged time to PAR code 999 ("Miscellaneous") were justified if their other PAR code charges were for VEA activities because such miscellaneous charges are then found to be attributable to VEA programs and should be allowed. Initial New York at 6 (finding 9). Therefore, Mr. DeFabio's charges to PAR code 999 will be allowed if his other charges (to code 407) are found to have been made for VEA activities. Again, the issue remains whether there is sufficient evidence that Mr. DeFabio worked on VEA programs that required liaison efforts with the SOICC so as to justify his charges to code 407. See Initial New York at 6 (finding 8).

Mr. DeFabio's performance evaluation for the period April 1, 1985, to March 31, 1986, contains several references to the VEA and describes various coordination efforts, but it is unclear from the performance evaluation alone whether Mr. DeFabio worked exclusively on vocational education related matters. Ex. A-16.

The affidavit of James Kadamus states that Mr. Kadamus has personal knowledge that Mr. DeFabio worked exclusively on vocational education activities, but again, this affidavit, executed several years later, is not particularly probative. Ex. A-11.

At the hearing, Mr. Kadamus testified that the SOICC responsibilities in his office were related exclusively to the administration of the Vocational Education State Plan. Mr. Kadamus read the following section from the State Plan:

The State Education Department through the State Occupational Information Coordinating Committee, SOICC, will coordinate development of occupational supply- demand data, and labor market information for vocational education planning, as legislated under the Job Training Partnership Act.

Hearing Tr. at 137; see also Ex. A-10-15.

Mr. Kadamus further testified that he had personal knowledge that Mr. DeFabio spent 100 percent of his time on vocational education during the period in question. Hearing Tr. at 138.

Mr. Kadamus acknowledged that SOICC is a distinct grant from the vocational education grant, even though the State was required to coordinate between the SOICC and the VEA Hearing Tr. at 156-158. He also testified that the State could use vocational education administrative funds to

pay for people working on SOICC activity and that the separate monies received for SOICC would not have been sufficient to support the State's coordination efforts. Hearing Tr. at 162-3.

Mr. DeFabio, himself, also testified at the hearing. He stated that 100 percent of his responsibilities during the period in question were related to the Vocational Education program. Hearing Tr. at 172-174. Mr. DeFabio further testified that he is still currently performing the same kind of work and that he now charges it to one of the VEA codes (180-190) because code 407 was deleted from the PAR code list. Hearing Tr. at 174-177.

The tribunal finds this testimony to be persuasive and to satisfactorily explain the charges to PAR codes 407 and 999. Accordingly, the tribunal finds that the $22,877.77 of Mr. DeFabio's salary in dispute is justified and should be allowed. Therefore, NYSED will not be required to refund such $22,877.77.

NYSED argues that the salary of George Kawas charged to a PAR code for the Jobs Training Partnership Act (JTPA) is an allowable vocational education cost because part of VEA administration covered implementation and coordination of activities with the JTPA. NYSED Initial Brief at 19, 23. The Assistant Secretaries originally requested the tribunal to disallow Mr. Kawas' charges to PAR code 417 because he used only code 417 for line item no. 67832 and did not attribute any of his tirne to vocational education codes. Assistant Secretaries' Brief at 41-43.

The PDD disallowed $4,011.00 and $3,416.00 of the salary of George Kawas. Ex. A-1-8. The stipulation filed by the parties with the OALJ reduced the amount in dispute for Mr. Kawas to the $3,416.00 under line item 67832 because of the effect of the statute of limitations. Ex. E-2-6; Ex. A-55-324. NYSED's PAR Effort Report attributes the effort for this $3,416.00 under line item 67832 to program code 417. Ex. A-55-323 and 324; Ex. A-56-87 and 88.

Mr. Kawas was assigned to two different budget line items during at least part of the period covered by the PDD: line item 67782 and line item 67832. Ex. A-55-323 and 324. Both line items were for positions in the Bureau of Adult and Continuing Education Programs Development for at least part of the period covered by the PDD. Ex. A-55-323 and 324. Mr. Kawas attributed all of his time under line item 67832 to program code 417 and did not charge any effort under this line item to codes 180-190. Ex. A-55-324.

As discussed supra in the analysis for Robert DeFabio, this tribunal has found, based upon the EAB's decision in the Initial New York case, that the salaries of New York employees who charge time to PAR codes 400-412 are justified if there is sufficient evidence that these employees worked on VEA programs that required liaison efforts with the listed CETA programs. See Initial New York at 6 (findings 8 and 11).

Therefore, the issue here would be whether there was sufficient evidence that Mr. Kawas worked on VEA programs that required liaison efforts with the JTPA so as to justify his charges to code 417.

Mr. Kawas' performance evaluation does not specifically mention coordination activities between the VEA and the JTPA. The evaluation does make numerous references to the Occupational Retraining and Reemployment Act Section #7 (ORRA #7). Ex. A-15.

At the hearing, James Kadamus testified that he had personal knowledge that Mr. Kawas worked exclusively on vocational education matters. Hearing Tr. at 139-142. Mr. Kadamus also made the same statement in his affidavit. Ex. A-11.

Also at the hearing, Gary Gardner, who is currently the Senior Budget Analyst with NYSED's Budget Coordination Unit, testified that under line item 67832, Mr. Kawas was supported with JTPA Title III funding, instead of VEA funding. He therefore testified that the $3,416.00 of Mr. Kawas' salary in question was not funded under VEA, but under JTPA. Hearing Tr. at 120-126; see also A-54-180; Ex. A-55-324.

As a result of this testimony, counsel for the Assistant Secretaries agreed to discuss this evidence with co-counsel and to either acknowledge or dispute this evidence at a later date. Hearinq Tr. at 220-221. On July 16, 1993, the Assistant Secretaries submitted a Partial Withdrawal of Claim in which they discussed Mr. Gardner's testimony and formally withdrew their claim for $5,134.93 of salary charges for Mr. Kawas, which included $3,416.00 of his salary plus 19.4 percent for indirect costs ($662.70) and 30.92 percent for fringe benefits ($1,056.23).

Accordingly, the tribunal finds, based upon Ex. A-54-180 and Ex. A-55-324, that under line item 67832, the line item in dispute, Mr. Kawas was supported with JTPA Title III funding, instead of VEA funding. Therefore, the $3,416.00 of Mr. Kawas' salary in dispute was not improperly charged to the VEA and is allowable. Accordingly, the tribunal finds that the $3,416.00 of Mr. Kawas' salary in dispute is justified and should be allowed. Therefore, NYSED will not be required to refund such $3,416.00.

NYSED claims that Doreen Jones Ryan charged most of her time to JTPA and that any non-allocable codes were used in error because she worked exclusively on vocational education activities. NYSED Initial Brief at 23-24. The Assistant Secretaries respond that the evidence does not indicate that all of her activities were vocational education related or that she used non-allocable codes in error. Assistant Secretaries' Brief at 43-44.

The PDD disallowed $15,800.00 of the salary costs of Doreen Jones Ryan that were charged to the VEA and Perkins Act grants. Ex. A-1-7. The stipulation filed by the parties with the OALJ reduced the amount in dispute for Ms. Ryan to $8,046.57 because of the effect of the statute of limitations. Ex. E-2-6. The time and effort reported by Ms. Ryan is contained in Ex. A-55-294 and 350. Ms. Ryan charged effort to PAR codes 281 and 284 in the amount of $1,017.00 and to PAR code 416 in the amount of $2,840.00. Ex. A-55-294. Ms. Ryan reported effort on PAR code 261 in the amount of $517.00, on code 265 in the amount of $346.00, on codes 281, 284, and 285 in the amount of $2,880.00, and on codes 400 and 416 in the amount of $8,194.00. Ex. A-5S- 350.

PAR codes 281-285 represent effort on the Appalachian Regional Commission (ARC) program. Ex. A-5-3 and 8. PAR code 416 refers to the JTPA. Code 400 refers to the Comprehensive

Employment & Training Act (CETA), the predecessor to the JTPA. PAR code 261 is an old PAR code referring to the ESAA Puerto Rican Cultural Service program. Code 265 is an old PAR code referring to the Higher Education Act (HEA) program. Ex. A-5-3, 8, 9, 23.

As discussed supra, the key inquiry here is whether there is sufficient evidence "that the VEA services were 'actually performed." See Florida at 25-26; see also Initial New York at 6 (findings 8 and 11).

Again, NYSED offers the affidavit of James Kadamus, who states that he has personal knowledge that Ms. Ryan worked exclusively on vocational education activities and that any PAR code reflected in the final PAR report for Ms. Ryan that did not reflect vocational education activities was used in error. Ex. A-11. As discussed above, the Kadamus affidavit by itself is not particularly probative of this issue.

Doreen Jones Ryan also signed an affidavit in which she states that her responsibilities were 100 percent vocational education related and that her responsibilities have never included Puerto Rican cultural services or higher education. She further attests that any PAR codes listed for those activities must have been clerical or transmission errors. Ex. A-21.

The performance evaluation for Ms. Ryan for the period February 21, 1985, to February 21, 1986 identifies her as a Senior Stenographer. Ex. A-20. The evaluation describes mostly secretarial and clerical duties, such as typing, screening of telephone calls, and completing and maintaining files. These duties do not relate to any one particular program and in fact, appear to be consistent with the duties of a secretary who assists people working on many different programs.

At the hearing, James Kadamus testified that Ms. Ryan worked in the Office of Occupational and Continuing Education and that her supervisors were Dave Gillette and Bob Possek. Mr. Kadamus testified that their responsibilities were related 100 percent to vocational education. Mr. Kadamus stated that they coordinated the JTPA and the Appalachian Regional Commission (ARC) with the VEA According to Mr. Kadamus, Ms. Ryan provided clerical support for Mr. Gillette. Mr. Kadamus further testified that neither Ms. Ryan or anyone else in the Office of Occupational and Continuing Education had responsibility for the ESAA Puerto Rican Cultural Service, the ESAA State Education Agency, or the Higher Education Act, Title VI. Mr. Kadamus attested that he believed Ms. Ryan used the PAR codes for those programs in error. Finally, he testified that Ms. Ryan did perform clerical work on coordinating CETA and JTPA with the VEA, and that she worked on vocational education programs during the period in question. Hearing Tr. at 144-148.

Ms. Ryan also testified at the hearing. Hearing Tr. at 200- 207. She testified that her responsibilities during the time period in question were related exclusively to vocational education .

At the hearing, Ex. A-64 was introduced and accepted into evidence without objection. Hearing Tr. at 201. This Employee Activity Record Form for Ms. Ryan contains references to pay periods 1, 2, 21, 22, 23, and 24. It also contains references to dates, such as Thursday, October 3 through

Wednesday, October 16 for pay period 21. However, it does not identify the year during which these dates occurred. At the oral argument held in Washington, D.C., counsel for the Assistant Secretaries attacked the credibility of Ex. A-64 for this reason. Oral Argument Tr. at 174.

Nonetheless, the tribunal takes official notice of the fact that in 1985, October 3 fell on a Thursday (as it does in pay period 21 of Ex. A-64), October 17 fell on a Thursday (as it does in pay period 22 of Ex. A-64), October 31 fell on a Thursday (as it does in pay period 23 of Ex. A-64), November 14 fell on a Thursday (as it does in pay period 24 of Ex. A-64), and December 26 fell on a Thursday (as it does in pay period 1 of Ex. A-64). The tribunal also takes official notice of the fact that in 1986, January 9 fell on a Thursday (as it does in pay period 2 of Ex. A-64). 13

The next previous time period before the 1985-86 period when these dates would fall upon the same days of the week is the period from October 1974 to January 1975. Ms. Ryan stated in her affidavit that she has been employed by NYSED since 1979. Ex. A 21. The next subsequent time period after the 1985-86 period when these dates would fall upon the same days of the week is the oeriod from October 1991 to January 1992. Ms. Ryan testified at the hearing that this employee activity record for these pay periods (1, 2, 21, 22, 23, and 24) covered the period in 1986. Hearing Tr. at 201.

Therefore, based upon the evidence, the tribunal finds that Ex. A-64 and pay periods 1, 2, 21, 22, 23, and 24 as discussed therein relate to the time period from October 1985 to January 1986.

Ms. Ryan testified that during pay period 21, she wrote in PAR code 261, with the letters "ARC 211A" next to that code. She testified that she did not work on Puerto Rico ESAA during this time period, and worked on ARC coordination. She claimed that she wrote down code 261 by mistake. Hearing Tr. at 202-203.

Ms. Ryan further testified that during pay period 22, she also put down code 261, and that during this time period, she worked on ARC coordination and did not work on Puerto Rico ESAA. Similarly, she stated that during time period 23, she put down ARC, using PAR code 261, and that she worked on ARC coordination and did not work on Puerto Rico ESAA. She offered the same testimony as to time period 24. She further testified that during time period 24, she put down "ARC 211B" and used PAR code 264, which refers to the Emergency School Aid Act program. She stated that she did not work on the ESAA and that she worked on ARC coordination. She claimed that her use of code 264 was a mistake. Hearing Tr. at 203-204.

Ms. Ryan claimed that her use of PAR code 265 during time period 1, while writing "ARC 211A" next to it, was a mistake because she worked on ARC coordination and did not work on the ESAA program, which code 265 represents. She again testified that her use of code 265 during time period 2 was a mistake because she worked on ARC coordination. She testified that she did have responsibilities to coordinate the VEA with JTPA and CETA and that all of her support activities and clerical responsibilities were related to vocational education. In summary, Ms. Ryan stated that all of the codes that appear in Ex. 64 relating to the ESAA were used in error. Hearing Tr. at 204-205.

The tribunal finds this testimony to be persuasive and to satisfactorily explain the charges to PAR codes 261 and 265. During the period in question, code 285 identified work on ARC Technical Assistance. In previous years, code 281 represented work on ARC 211A, and code 284 represented work on ARC 211B. Based upon the testimony and other evidence submitted, the tribunal finds that, during the audit period in question, Ms. Ryan worked on ARC coordination when using codes 261, 265, 281, 284, and 285.

In the Initial New York decision, the EAB held that certain codes representing programs that were required to be coordinated with the VEA were allowable charges to the VEA grant under limited circumstances. As discussed supra, this tribunal has held that codes representing programs that were required to be coordinated with the VEA are allowable charges to the VEA grant when there is sufficient evidence that these employees worked on VEA programs that required liaison efforts with the listed programs. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

At the hearing, Mr. Kadamus testified that:

It was a requirement under the Vocational Education Act that the States that were involved in the Appalachian Regional Commission, which I think are all of the States that have the Appalachian Mountains run through them, those States had to coordinate the Appalachian Regional Commission funding with the Vocational Education Act funding.

That was a requirement of the law.

Hearing Tr. at 145.

In this connection, the Assistant Secretaries submitted Proposed Findings of Fact, which included the following statements:

9. Program codes 281-285 are program codes used to designate activities related to separate sections of the Appalacbian Regional Commission (ARC) Act. A-5-10.

i. Only activities necessary to coordinate the VEA and Perkins Act programs with those conducted under the ARC may be funded from a Perkins Act grant. See A-3-6 at paragraphs 8 and 11.

ii. The cost of an employee's effort attributed to implementing the ARC, rather than coordinatinq the VEA and Perkins Act programs with the ARC program, is not an allowable cost to fund from the Perkins Act grant. See A-3-6 at paragraphs 8 and 11; A-1-7. In its response to the Assistant Secretaries' proposed findings of fact, NYSED agreed with these statements, adding only that other evidence may demonstrate that the employee at issue worked on activities that are allocable to VEA or Perkins.

In as much as both parties have agreed to the principle that activities necessary to coordinate the VEA and Perkins Act programs with those conducted under the ARC may be funded from a Perkins Act grant, the tribunal finds, based upon the hearing testimony and other evidence

discussed above, that Ms. Ryan's charges to PAR codes 281, 284, and 285 are allowable because there is sufficient evidence that she worked on VEA programs that required liaison efforts with the listed ARC program. See Initial New York at 6 (findings B and 11); see also Florida at 25-26.

As discussed supra, the EAB held that code 400 could properly be charged against the VEA program if there is sufficient evidence that these employees worked on VEA programs that required liaison efforts with the listed programs. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.Therefore, based upon the testimony at the hearing, the tribunal finds that Ms. Ryan's charges to PAR code 400 were allowable charges against the VEA.

Based upon the testimony at the hearing, the tribunal finds that the charges to code 416 also represented coordination efforts between the VEA and the JTPA. See 20 U.S.C. § 2373. The EAB allowed charges to PAR codes representing CETA programs (CETA was the predecessor to the JTPA) when the employee performed liaison efforts between the VEA and those CETA programs. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.Therefore, based upon the testimony at the hearing, the tribunal finds that Ms. Ryan's charges to PAR code 416 were allowable charges against the VEA.

In conclusion, the $8,046.57 of Ms. Ryan's salary in dispute was not improperly charged to the VEA and is allowable. Accordingly, the tribunal finds that the $8,046.57 of Ms. Ryan's salary in dispute is justified and should be allowed. Therefore, NYSED will not be required to refund such $8,046.57.

e. Salaries of employees attributed to PAR code 000.

NYSED claims that James Stratton worked mostly on vocational education, and that all but 10 percent of his charges to code 000 should be allowed. Similarly, NYSED argues that 50 percent of Suzanne Spear's charges to general code 000 could properly be charged to VEA. NYSED Initial Brief at 24-26. The Assistant Secretaries contend that the EAB specifically rejected this argument in finding 12 of the Initial New York decision. Assistant Secretaries' Brief at 44-46.

The PDD disallowed $21,927.00 of the salary costs of James Stratton that were charged to the VEA and Perkins Act grants. Ex. A-i-B. The stipulation filed by the parties with the OALJ reduced the amount in dispute for Mr. Stratton to $11,983.91 because of the effect of the statute of limitations. Ex. E-2-6. NYSED's PAR Effort Report attributes the effort for this $11,983.91 to program codes 216 and 000. Ex. A-55-528; Ex. A-56-118-120.

NYSED has conceded that none of the cost of Mr. Stratton's effort attributed to PAR code 216 is allocable to the VEA and Perkins Act grants. NYSED Initial Brief at 25, 70. The salary cost of the 86 hours of Mr. Stratton's effort that was attributed to PAR code 216 is $2,307.66. Ex. A-55-528; Ex. A-56-120.

NYSED has conceded that 10 percent of Mr. Stratton's effort attributed to PAR code 000 is not allocable to the VEA and Perkins Act grants. NYSED Initial Brief at 25, 70. The Assistant Secretaries disallowed all of Mr. Stratton's charges to general code 000. The salary cost of Mr.

Stratton's effort attributed to PAR code 000 is $9,937.86. Ex. A-55-528; Ex. A-56-118-120. NYSED does not dispute 10 percent of this amount, or $993.79.

Therefore, by taking the $2,307.66 of charges to code 216 and the $993.79 of charges to code 000 that are conceded by NYSED, the total amount conceded by NYSED becomes $3,301.45. This amount was listed in section (a). By taking the $11,983.91 remaining in dispute after the effect of the statute of limitations and subtracting the $3,301.45 conceded by NYSED and listed in section (a), the amount remaining in dispute to be decided here is $8,682.46, all of which was charged to PAR code 000.

NYSED has submitted an affidavit by Mr. Stratton in which he states that his responsibilities included several VEA matters and that he expended no more than 10 percent of his time and effort on activities that were not related to vocational education. Ex. A-22.

NYSED has also submitted a performance evaluation for Mr. Stratton for the period April 1, 1985, to March 31, 1986. This evaluation does include various duties related to vocational education. It also includes duties related to the Title II ESAA program that is identified by PAR code 216. Ex. A-23; Ex. A-5-3.

In the Initial New York decision, the EAB held that in the circumstances where New York employees split their work time between VEA programs and non-vocational activities and charged time to PAR code 000, NYSED could not justify a charge against VEA funds because this code does not provide a separation or allocation of costs between VEA and non-vocational activities. The EAB reauired New York to refund these amounts. Initial New York at 6 (finding 12).

The EAB's ruling is applicable to the present case. Just as in the Initial New York decision, a NYSED employee, James Stratton, has split his work time between VEA programs and non-vocational activities (the Title II ESAA program) and charged time to PAR code 000. This code does not provide a separation or allocation of costs between VEA and non-vocational activities. The affidavit and performance evaluation offered by NYSED do not adequately provide a separation or allocation of costs between VEA and non-vocational activities. Therefore, NYSED must refund not only the $3,301.45 listed in section (a), but also the $8,682.46 of Mr. Stratton's salary involved here.

The PDD disallowed $43,060.00 of the salary costs of Suzanne Spear that were charged to the VEA and Perkins Act grants. Ex. A-1-8.The stipulation filed by the parties with the OALJ reduced the amount in dispute for Ms. Spear to $18,857.13 because of the effect of the statute of limitations. Ex. E-2-6. The disallowed amount includes charges to PAR codes 203 and 000. Ex. A-55-369.

NYSED has conceded that none of the cost of Ms. Spear's effort attributed to code 203 is allocable to the VEA and Perkins Act grants. NYSED Initial Brief at 25, 69. NYSED has conceded that 50 percent of Ms. spear's effort attributed to program code 000 is not allocable to the VEA and Perkins Act grants. NYSED Initial Brief at 25, 69. The total amount conceded by

NYSED, and listed in section (a), is $9,719.31. Thus the amount in dispute to be decided here is $9,137.82, derived by subtracting $9,719.31 from $18,857.13.

NYSED has submitted two performance evaluations for Ms. Spear. One covers the period August 13, 1984, to August 13, 1985. The other covers the period August 13, 1986, to August 13, 1987. Ex. A-23a. Neither one of these evaluations covers the period in dispute after application of the statute of limitations, namely August 29, 1985, to March 31, 1986. Thus, these evaluations are of very limited value in that they indicate what Ms. Spear was doing before and after the period in dispute, but do not directly apply to the period in dispute. The evaluation covering the period August 13, 1984, to August 13, 1985, does indicate that Ms. Spear performed work on the BOCES program. The second evaluation does not. Ex. A-23a.

Even if these evaluations did have more probative value, Ms. Spear's charges to PAR code 000 would not be justified. NYSED makes the statement in its initial brief that The [BOCES] program is considered to be 50% vocational education related and 50% special education related. " Other than to point to its own State Plan (see Ex. A-10-55, 107), NYSED offers no support for this statement.

Moreover, the same analysis that applied to Mr. Stratton's charges to PAR code 000 applies to Ms. Spear's charges to PAR code 000. In the Initial New York decision, the EAB held that in the circumstances where New York employees split their work time between VEA programs and nan-vocational activities and charged time to PAR code 000, NYSED could not justify a charge against VEA funds because this code does not provide a separation or allocation of costs between VEA and non-vocational activities. The EAB required New York to refund these amounts. Initial New York at 6 (finding 12).

The EAB's ruling is applicable to the present case. Just as in the Initial New York decision, a NYSED employee, Suzanne Spear, has split her work time between VEA programs and non-vocational activities 14 and charged time to PAR code 000. This code does not provide a separation or allocation of costs between VEA and non-vocational activities. The affidavit and performance evaluation offered by NYSED do not adequately provide a separation or allocation of costs between VEA and non-vocational activities. Therefore, NYSED must refund not only the $9,719.31 conceded by NYSED and listed in section (a), but also the $9,137.82 of Ms. Spear's salary that is involved here.

f. Conclusions as to VEA funded employees in dispute.

To summarize, prior to considering NYSED's request for equitable offset, the tribunal finds that NYSED must refund $106,108.61 of the $142,683.95 that the parties originally stipulated to as being in dispute for VEA-funded employees in this proceeding. When this $106,108.61 is added to the indirect cost rate of 19.4 percent ($20,585.07) and the fringe benefit rate of 30.92 percent ($32,808.78), NYSED's total liability becomes $159,502.46.

3. EHA-B Funded Employees in Dispute.

The Assistant Secretaries assert that employee effort allocated by the PAR system to the Chapter 1 Handicapped program cannot be charged to the EHA-B program. Because they are separate programs, according to the Assistant Secretaries, with distinct allowable costs, employee effort attributed by the PAR Ef fort Report to the Chapter 1 Handicapped program is not allocable to the EHA-B program. The Assistant Secretaries insist that because there are allowable costs that can only be charged to either the EHA-B or Chapter 1 Handicapped program, but not both of these programs, NYSED's assumption that allowable costs under the two programs completely overlap is wrong. The Assistant Secretaries urge that NYSED's analysis fails to establish that the EHA-B and Chapter 1 Handicapped programs are the same. Moreover, according to the Assistant Secretaries, the evidence presented by NYSED indicates that there is no basis for reallocating to the EHA-B employee effort originally attributed to the Chapter 1 Handicapped program. Therefore, the Assistant Secretaries state that NYSED must refund the full amount of funds remaining in dispute, which is proportionate to the federal harm caused by its violation. Assistant Secretaries' Brief at 46-68.

NYSED asserts that the employee charges to the EHA-B grant were proper, based upon NYSED's State Plan for Education of the Handicapped and an employee-by-employee analysis of EHA-B disallowed costs. NYSED further claims that PAR code 054 was properly allocable to EHA-B NYSED Initial Brief at 27-39. NYSED also claims that employees who charged time to Chapter 1 Handicapped activities could properly be allocated to EHA-B and that other EHA-B employee charges also were properly allocated. NYSED Reply Brief at 27-29.

a. Salaries of employees conceded bv NYSED.

Initially, the tribunal notes that NYSED, both in its briefs (see Appendix D to NYSED's Initial Brief) and through its proposed findings of fact as well as its response to the Assistant Secretaries' proposed findings of fact, has apparently conceded that all or part of the salaries of twelve of the EHA-B funded employees in dispute are not properly allocable to the EHA-B These salaries and the amounts conceded are as follows:

EMPLOYEE	Amount Conceded
Deborah Ames	5,256.81
William Brenton	1,708.00
Kenneth DeCerce	29,481.08
Leo Denault	27,469.14
James Harrison	795.92
Christine Kuzmak	1,418.73
Elwin McNamera	13,100.23
Sandra Norfleet	24,380.45
Janice Pecora	2,420.60
Nancy Shoddy	6,108.40
Ruth Strait	67.80
Harrison Woods	2,014.85

SUBTOTAL	114,222.01
Indirect Costs (.194)	22,159.07
Fringe Benefits (.3092)	35,317.45
TOTAL	171,698.53

Accordingly, the tribunal finds that these salaries were not properly allocable by NYSED to the EHA-B and therefore should be refunded to the Department. See Initial New York at 8 (findings 15 and 16).

b. EHA-B and the Chapter 1 Handicapped program

NYSED argues that "allowable activities under the ECIA Chapter 1 Handicapped program cannot be distinguished from allowable activities under EHA-B" and that as a result, PAR code 054 (which identified activity on the Chapter 1 program) was also properly chargeable to the EHA-B grant. NYSED Initial Brief at 28-29; see also Ex. A-5-2. The Assistant Secretaries contend that the EHA-B and Chapter 1 programs are separate programs with distinct allowable costs, such that code 054 was not properly allocable to the EHA-B grant. Assistant Secretaries' Brief at 46-56.

During the period in issue, the Chapter 1 Handicapped program, also known as the Pub. L. 89-313 program, was authorized by 20 U.S.C. § 2771 et seg. (1982). The implementing regulations for the Chapter 1 Handicapped program are contained in 34 C.F.R. Part 302 (1985). During the period in issue, the EHA-B program was authorized by 20 U.S.C. §§ 1401, 1411-1420 (1982). The implementing regulations for the EHA-B program are contained in 34 C.F.R. Part 300 (1985).

As the Assistant Secretaries point out, the EHA-B requires recipient States to have in effect a policy that insures that all handicapped children have the right to a free appropriat& public education. § 300.121 (1985). The Chapter 1 Handicapped program provides that:

A State agency may use funds under this part only for programs and projects . . . which are designed to meet the special educational needs of handicapped children for whom the State agency is directly responsible for providing free public education.

§ 302.24 (1985). Alternatively, a local educational agency (LEA) may receive funds to serve a handicapped child under the Chapter 1 Handicapped program if the handicapped child left an educational program for handicapped children operated or supported by a State agency in order to participate in a program operated or supported by the LEA. § 300.31 (1985).

Therefore, while the EHA-B program applies to all handicapped children within a State, the Chapter 1 Handicapped program applies only to those handicapped children for whom the State agency is directly responsible for providing free public education.

The EHA-B and Chapter 1 Handicapped programs also have different funding formulas. Under the EHA-B, a State's entitlement to funds is based upon the number of handicapped children in that State who are receiving special education and related services. 2 20 U.S.C. § 1411 (a) (1) (A). In determining this number, the State may not count handicapped children who are counted under the Chapter 1 Handicapped program. 20 U.S.C. § 1411 (a) (5) (A) (iii).

Conversely, under the Chapter 1 Handicapped program, the State may count "the number of such handicapped children in average daily attendancef as determined by the Secretary, at schools for handicapped children operated or supported by the State agency . . . ." 20 U.S.C. § 2771(b). The State may not count, for Chapter 1 Handicapped program purposes, a handicapped child who was counted in the EHA-B child count. § 302.46 (1985). 15

New York State received separate grant awards for the EHA-B and Chapter 1 Handicapped programs during fiscal year 1986 (July 1, 1985 through September 30, 1986), which includes the period remaining in dispute after the effect of the statute of limitations. See Ex. E-8.

Moreover, under the EHA-B program, at least 75 percent of the funds a State receives must be subgranted to LEAs within that State. 20 U.S.C. § 1411(c) (1) (B). Under 20 U.S.C. § 1411(d), each LEA may receive these subgrants in an amount proportionate to the number of handicapped children receiving special education and related services within that LEA as a percentage of the total number of such handicapped children within that State. In order to receive payments under the EHA-B, the LEA must submit an application to the State educational agency. ? 300.180 (1985). The State educational agency may not distribute funds to a LEA if the LEA does not submit an application that meets the requirements of § § 300.220-300.240. § 300.360(a) (2) (1985).

Under the Chapter 1 Handicapped program, in order to receive a grant, a State agency must submit a project application to the State educational agency. § 302.21 (1985). A State agency may use these funds only for programs and projects that are designed to meet the special educational needs of handicapped children for whom the State agency is directly responsible for providing free public education. § 302.24 (1985). Alternatively, a LEA may receive funds under the Chapter 1 Handicapped program to serve a handicapped child if that child left an educational program for handicapped children operated or supported by a State agency in order to participate in a program operated or supported by the LEA. § 302.31 (1985).

The above analysis demonstrates that the EHA-B and the Chapter 1 Handicapped programs are indeed separate and distinct programs. They each contain separate authorizing statutes, implementing regulations, target populations, child count and funding requir requirements, grant awards, and grant application requirements.

Moreover, even NYSED's PAR Codes Manual listed separate codes for the ECIA Chapter 1 Handicapped program and the EHA-B program. Effort on the Chapter 1 Handicapped program was identified by PAR code 054. Ex. A-5-2. Effort on the EHA-B program was identified by PAR codes 202-210. Ex. A-5-3. The fact that NYSED maintained separate codes for these two programs indicates that they were not identical, and that in fact they were separate programs with distinct allowable costs. If "allowable activities under the ECIA Chapter 1 Handicapped program

cannot be distinguished from allowable activities under EHA-B", as NYSED asserts, then New York would not need separate PAR codes for these programs. The fact that it does maintain separate PAR codes tends to disprove NYSED's assertion that allowable costs under the two programs are indistinguishable.

Despite all of the evidence that these two programs are separate programs, NYSED points out that the Department has asked Congress to phase out the Chapter 1 program by combining it with the Individuals with Disabilities Education Act (the successor to EHA-B). NYSED points to the Bush Administration's 1992 budget submission to Congress and the Department's Justifications of Appropriation Estimates for Committees on Appropriations for Fiscal Year 1992. NYSED states that the Department has attempted to fold the ECIA Chapter 1 Handicapped program into the EHA-B program since the adoption of P.L. 94-142 in 1976.

Nonetheless, while the Department may have sought to combine the EHA-B and the Chapter 1 Handicapped programs, this does not mean that they are identical. As analyzed above, they remained separate programs during the audit period in question.

NYSED also notes that federal law requires all educational programs for handicapped children within the State to be under one general administration. See 20 U.S.C. § 1412(6); § 300.600; S. Rep. No. 168, 94th Cong., 2nd Sess. 24 (1975). NYSED further contends that the Education of the Handicapped Act requires procedures to be in place to assure that funds received for federal programs that provide assistance for the education of the handicapped, including the Chapter 1 Handicapped program, are used in a manner consistent with the goal of providing a free appropriate public education for all handicapped children. 20 U.S.C. § 1413 (a) (2), 34 C.F.R. § 300.138. According to NYSED, the Office of Education of Children with Handicapping Conditions had overall responsibility for providing educational programs for handicapped children. See Ex. A-25-91.

However, this requirement that the State educational agency be the responsible agency was intended "to assure a single line of responsibility with regard to the education of handicapped children . . . ." 34 C.F.R. § 300.600, quoting S. Rep. No. 168, 94th Cong., 2nd Sess. 24 (1975). That same Senate Report acknowledged that "different agencies, may, in fact, deliver services . . . " Therefore, while the State educational agency may have the ultimate responsibility for assuring the education of handicapped children, the State still receives separate grants, different agencies may deliver services, and therefore the State must account separately for each of these grants. Otherwise, the State could deliver one set of services and charge several different federal grants for these same services.

Moreover, as the Assistant Secretaries note, § 300.138 requires coordination not only between the EHA-B program and the Chapter 1 Handicapped program, but also between the EHA-B program and the VEA. This does not mean, however, that expenses allocable to the VEA can automatically be charged to the EHA-B program. In addition, § 300.138 states that "nothing in this section limits the specific requirements of the laws governing those Federal programs." Finally, the implementing regulations for the Chapter 1 Handicapped program state as follows:

(a)Section 613 (a) (2) of the Education of the Handicapped Act requires each State to insure that funds provided under this part to assist in the education of handicapped children are used only in a manner consistent with a goal of providing a free appropriate public education for all handicapped children.

(b) Paragraph (a) of this section does not limit the requirements of this part or of section 121 of the Act.

§ 302.72 (1985) (emphasis added). These requirements of the Chapter 1 Handicapped program include the separate child count, funding, and accounting requirements discussed earlier.

Therefore, based upon the foregoing analysis, the tribunal finds that PAR code charges made against the Chapter 1 Handicapped program cannot, per se, be charged to the EHA-B program. However, as discussed in the section on VEA funded employees, charges by specific employees to the Chapter 1 Handicapped program may be allowable charges to the EHA-B program if there is sufficient evidence that these employees in fact worked on the EHA-B program. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

c. Employees in Division of Program Monitoring

NYSED argues that the salaries of employees in the Upstate New York Division of Program Monitoring who used PAR code 054 should be allowed. NYSED contends, as discussed in the previous section, that PAR code 054, ECIA I Handicapped, is also properly allocable to the EHA-B program. In the alternative, NYSED claims that these employees were actually working on EHA-B activities and were using code 054 because of a misunderstanding by their supervisors as to the distinction between allowable activities under the two programs. NYSED Initial Brief at 31-33.

The Assistant Secretaries assert that most of these employees were Regional Associates, whose performance evaluations indicate that they were responsible for both the EHA-B and the Chapter 1 Handicapped programs. Therefore, the Assistant Secretaries state, time distribution records were required to support charges to either program. The Assistant Secretaries note that the available time distribution records, the FAR Effort Reports, indicate that these employees worked on the Chapter 1 Handicapped program, making charges to the EHA-B program unallowable. Assistant Secretaries' Brief at 56-58.

The employees and the amounts in dispute are as follows:

EMPLOYEE	Amount in Dispute
Gabriel Coppola	$27,353.56
Theodore Kurtz	26,269.41
Peter Trippi	24,558.60
Jacquelyn King	21,422.16
Edward MacDonald	26,239.31
Noel Rios	23,792.53

Kathryn Hargis	23,105.67
Mary Ess	10,072.90
Susan Scott	8,085.31
Frank Hermon	24,182.27
Carol Kendall	27,699.94
TOTAL	$242,781.66

See Ex. A-1-8-9; E-2-5; A-55-229-233, 238-239, 341-342.

As discussed in the previous section, PAR code 054, ECIA I Handicapped, is not, per se, allocable to the EHA-B program. Nevertheless, as discussed above, charges by specific employees to the Chapter 1 Handicapped program may be allowable charges to the EHA-B program if there is sufficient evidence that these employees in fact worked on the EHA-B program. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

Here, the evidence consists of the PAR Effort Report, the performance evaluations and position descriptions for these employees, various affidavits, and the testimony at the hearing.

All of these employees, except for Gabriel Coppola, Susan Scott, and Mary Ess, were Regional Associates. Ex. A-27, A-32- 41.The position description for the Regional Associates is contained in Ex. A-33-2-4, A-34-2-4, A-35-2-4, A-36-2-4, A-37-2- 4, A-40-2-4, and A-41-2-4. This position description lists various responsibilities, including "disseminating accurate information regarding federal and state laws, Commissioner's Regulations, and State Education Department policies pertaining to the education of children with handicapping conditions [.]" NYSED in its initial brief also states that "these employees worked exclusively on handicapped education activities which would be allowable under EHA-B." Nonetheless, the phrases "handicapped education activities" and "the education of children with handicapping conditions" are vague and do not adequately distinguish between the EHA-B and Chapter 1 Handicapped programs, which are distinct programs.

The position description further states as follows:

IV. Regional Associates shall review 89-313 and EHA-B projects and shall;

1. maintain timelines established for reviews;

2. apply federal and state guidelines concerning the priorities and use of such funds:

3. apply knowledge of generally accepted assessment and instructional methods and materials, and an understanding of the effective use of personnel and materials as well as other aspects of program development;

4. make judgments regarding the priority and/or practicality of any given project considering the stated goals of the project and the structure of services provided by the school or school district;

5. provide technical assistance and appropriate follow-up to a review in a timely manner.

Ex. A-33-3, A-34-3, A-35-3, A-36-3, A-37-3, A-40-3, A-41-3 (emphasis added).

This language indicates that Regional Associates had responsibility for both the Chapter 1 Handicapped (89-313) and EHA-B programs, including applying federal and state guidelines concerning the priorities and use of such funds. This could include application of the separate child count and funding requirements, grant awards, and grant application requirements of the two programs discussed supra. Such application would require the Regional Associates to maintain time distribution records to document charges to each program.

However, the position description also emphasizes flexibility. It requires Regional Associates to "contribute to the smooth and efficient operation of the office by . . . being flexible in accepting assignments relating to emergency situations or Departmental priorities which might involve . . . the temporary suspension of other planned activities[.]" Ex. A- 36-4.Therefore, the position descriptions alone are not sufficient to demonstrate which programs these employees actually worked on during the time period in question.

The performance evaluations for some of the employees indicate that they did in fact perform work on both the EHA-B and Chapter 1 Handicapped programs. For example, the performance evaluation for Peter Trippi states that "89-313 and EHA-B projects are reviewed appropriately and within established time lines." Ex. A-34-7. The performance evaluation for Noel Rios states that "EHA-B and 89-313 projects are reviewed and analyzed in concert with established guidelines." Ex. A-36-7. The performance evaluation for Kathryn Hargis states that "EHA-B and 89-313 projects are reviewed in light of Ms. Hargis' knowledge of specific LEA/agency needs. Modifications of applications are appropriately requested relevant to compliance and programmatic issues." Ex. A-37-7.

The performance evaluations of other employees refer only to "federal grant applications". For example, the performance evaluation for Theodore Kurtz states that "Federal grant applications are analyzed and responded to in a timely and appropriate manner." Ex. A-33-7. The performance evaluations for Jacquelyn King, Frank Hermon, and Carol Kendall use similar language. Ex. A-35-7; A-40-9; A-41-9. 16

The position description and performance evaluation for Gabriel Coppola indicate that he supervised the Regional Associates, but do not specifically mention either the EHA-B or the Chapter 1 Handicapped programs. Ex. A-32.

The performance evaluation for Mary Ess indicates that she was a senior stenographer within the OECHC, but does not specifically mention either the EHA-B or the Chapter 1 Handicapped programs.

Similarly, the performance evaluation for Susan Scott indicates that she was a stenographer within the OECHC, but does not specifically mention either the EHA-B or the Chapter 1 Handicapped programs .

The PAR Effort Report also indicates that Regional Associates had responsibility for both the Chapter 1 Handicapped (89-313) and EHA-B programs.

The PAR Effort Report indicates that Kathryn Hargis charged time to codes 054, 203, and 999. Ex. A-55-231-232, 238. Thus, Ms. Hargis not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Edward MacDonald charged codes 054, 203, 186, and 999. Ex. A-55-230, 238, 341- 342.Thus, Mr. MacDonald not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Gabriel Coppola charged codes 054, 997, and 999. Ex. A-55-229.

The PAR Effort Report indicates that Theodore Kurtz charged codes 054, 203, 997, and 999. Ex. A-55-229. Thus, Mr. Kurtz not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Peter Trippi charged codes 054, 203, and 999. Ex. A-55-229-230. Thus, Mr. Trippi not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Jacquelyn King charged codes 054, 203, 997, and 999. Ex. A-55-230. Thus, Ms. King not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Noel Rios charged codes 054, 203, and 999. Ex. A-55-230-231. Thus, Ms. Rios not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA- B program.

The PAR Effort Report indicates that Mary Ess charged codes 054, 203, and 999. Ex. A-55-231, 239. Thus, Ms. Ess not only charged the amount in dispute to code 054, indicating work on the

Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA- B program.

The PAR Effort Report indicates that Susan Scott charged codes 054, 203, and 999. Ex. A-55-231, 239. Thus, Ms. Scott not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Frank Hermon charged codes 054, 203, and 999. Ex. A-55-232-233. Thus, Mr. Hermon not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The PAR Effort Report indicates that Carol Kendall charged codes 054, 203, 997, and 999. Ex. A-55-233. Thus, Ms. Kendall not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The fact that all of these employees (except for Mr. Coppola) separately charged some of their work to an EHA-B code indicates that they were in fact working on both the EHA-B and the Chapter 1 Handicapped programs and were separately charging both of these programs on their Employee Activity Record Forms. This makes it more likely that effort listed on the PAR Effort Report as being charged to code 054 actually did represent effort on the Chapter 1 Handicapped program, since these employees were separately charging EHA-B code 203 for at least some of their effort on the EHA-B program.

However, NYSED has also submitted a memorandum dated August 5, 1986, from Ann Getman to Gabriel Coppola. The memorandum states:

This is a reminder that you should be reporting effort using program code 203 rather than 054 on the green Employee Activity Record Form as part of your timesheet. If your assignment or item number changes, please contact me for any necessary change in PAR code.

Ex. A-26. This contemporaneous memorandum indicates that Gabriel Coppola, and possibly the employees that he supervised, was using code 054 in error and was in fact performing EHA-B program work that required the use of PAR code 203.

Moreover, Mr. Coppola stated in his affidavit that he had direct supervisory authority over Edward MacDonald, Jacquelyn King, Peter Trippi, Noel Rios, Kathryn Hargis, Theodore Kurtz, Susan Scott, and Mary Ess. He also stated that all of these employees worked exclusively on special education activities. Ex. A-27. This by itself is insufficient to document that their activities could properly be charged to the EHA-B program because "special education activities" could relate to either the EHA-B or the Chapter 1 Handicapped programs.

However, Mr. Coppola further stated as follows:

During fiscal year 1985-86 many of the employees in my office used PAR code 054 to reflect their effort on handicap activities. It was my belief that this was the proper code to reflect activities related to education of the handicapped. However, on August 12, 1986 I received a memorandum from Ann Getman of the Albany OECHC Office advising me that we should use Code 203 in lieu of Code 054. Since that time my staff has used exclusively PAR Code 203. The activities of the staff did not change.

Ex. A-27.

Additionally, NYSED has submitted the affidavit of Hannah Flegenheimer, who states that during fiscal year 1985-86 her position was Director of the Division of Program Monitoring for the OECHC. She attests that she had supervisory responsibility for Gabriel Coppola, Kathryn Hargis, Frank Hermon, Jacquelyn King, Peter Trippi, Mary Ess, Carol Kendall, Theodore Kurtz, and Noel Rios. She states that "Each of these employees worked 100% on activities related to Education of the Handicap." [sic] Ex. A-28. It is not clear whether she meant the "Education of the Handicapped Act, Part B" or whether she meant simply that these employees worked on activities related to the education of the handicapped, which could indicate effort spent on either the EHA-B or the Chapter 1 Handicapped programs.

In Lawrence Gloeckler's affidavit, submitted by NYSED, Mr. Gloeckler states that during the time period in issue, he was the Assistant Commissioner for the OECHC. He attests that he had personal knowledge that Kathryn Hargis, Carol Kendall, Jacquelyn King, Theodore Kurtz, Susan Scott, Edward MacDonald, Frank Hermon, Gabriel Coppola, Mary Ess, Peter Trippi, and Noel Rios worked exclusively on "activities related to education of children with handicapping conditions[.]" Ex. A-29. Again, the phrase "education of children with handicapping conditions" could refer to effort on either the EHA-B or the Chapter 1 Handicapped programs.

At the hearing, Mr. Gloeckler testified that these employees occupied the positions described in New York's State Plan under the heading "Use of EHA, Part B Funds For State Administrative and Support Service Personnel". Hearing Tr. at 236-241. See also Ex. A-25-163. He also testified that the major responsibility of the Regional Associates was to determine compliance with EHA-B requirements. Mr. Gloeckler also stated:

They might look at the 89-313 [Chapter 1 Handicapped] project as part of one of hundreds and hundreds of things they might look at when they go into the district.

Hearing Tr. at 244. Mr. Gloeckler further testified that he believed that these employees used PAR code 054 in error and that the responsibility of these employees was to monitor the EHA-B. Hearing Tr. at 244-248, 256-257.

Gabriel Coppola testified that his office was responsible for the EHA-B. Hearing Tr. at 270-273. When asked if the Regional Associates had any separate responsibilities under the Chapter 1 Handicapped program, he stated:

The only responsibilities that they have, which are very minimal, is to approve the grant applications which arrive at our office on a yearly basis.

And then during a program review or a site visit, where we ask somewhere in the neighborhood of 340 questions of a district during a full program review, there are two questions which are asked regarding 89-313 fund [sic] out of the 340 some that are asked.

Hearing Tr. at 273.

Mr. Coppola later testified as follows:

A huge percentage, an overwhelming percentage of their time, is spent on EHA-B activity.

And a small, but relatively important amount of time, on 89-313.

And I would, on a percentage basis I would say more than 99 percent on EHA-B issues, and less than one percent on EHA -- or on 89-313 issues.

Hearing Tr. at 274-275.

Mr. Coppola testified that employees in his office used PAR code 054 because they had been directed by the central office to use that code, until the memorandum from Ann Getman was received in August 1986. Hearing Tr. at 275-276.

Hannah Flegenheimer testified that these employees were engaged in implementing the EHA-B Hearing Tr. at 283-287. She testified that they had minimal responsibilities for monitoring the Chapter 1 Handicapped program. She also testified that the central administrative office had directed these employees to use PAR code 054, up until Ann Getman's August 1986 memorandum. Finally, she agreed that these employees spent 99 percent of their time on EHA-B and one percent on the Chapter 1 Handicapped program. Hearing Tr. at 287-296.

Based upon all of the evidence, the tribunal finds that the employees in the Division of Program Monitoring who charged PAR code 054 were actually engaged in EHA-B activities. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

In the Initial New York decision, the EAB held that employees who charged time to PAR code 999 ("Miscellaneous") were justified if their other PAR code charges were for VEA activities because such miscellaneous charges are then found to be attributable to VEA programs and should be allowed. Initial New York at 6 (finding 9). similarly, the charges by these employees to PAR code 999 will be allowed because their other charges are found to have been made for EHA-B activities.

As to PAR code 997, the EAB in Initial New York disallowed the salaries of employees who charged their time to PAR code 997 "since no such PAR code exists[.]" Initial New York at 6 (finding 10). However, here, the Assistant Secretaries proposed, and NYSED agreed to, the following finding of fact:

Code 997 is a general code that has been created to keep track of hours of employee effort for which no documentation has been received, or is received too late or with too many errors for timely keypunching.

See Ex. A-7-9. Moreover, in their response to NYSED's proposed findings of fact, the Assistant Secretaries agreed with NYSED's assertion that code 997 is a general code that is prorated across the employee's or the unit's effort and is not in dispute in this proceeding except to the extent that is prorated to otherwise disallowed codes.

Therefore, the tribunal finds that PAR code 997 is a general code that has been created to keep track of hours of employee effort for which no documentation has been received, or is received too late or with too many errors for timely keypunching. Ex. A-7-9. The tribunal will treat code 997 in the same manner that it treats code 999. Thus, employees who charged time to PAR code 997 are justified if their other PAR code charges were for EHA-B activities because such miscellaneous charges are then found to be attributable to EHA-B programs and should be allowed.

Therefore, the salaries in dispute should be allowed. Accordingly, NYSED will not be required to refund the $242,781.66 in dispute.

d. Ben Birdsell, Janice Pecora, Joseph Zabinski, Theresa Smith. Evelyn Vido, Ruth Strait. and Deborah Ames

NYSED argues that Ben Birdsell, Janice Pecora, Joseph Zabinski, Theresa Smith, Evelyn Vido, Ruth Strait, and Deborah Ames; who charged PAR code 054, performed EHA-B activities. NYSED Initial Brief at 34-35.

The Assistant Secretaries reply that many of the activities of these employees could be charged only to the Chapter 1 Handicapped program. Assistant Secretaries' Brief at 58-62.

The employees and amounts in dispute are as follows:

EMPLOYEE	Amount Remaining in Dispute [17]
Ben Birdsell	$28,620.87
Janice Pecora	1,198.40
Joseph Zabinski	6,968.75
Theresa Smith	3,938.00
Evelyn Vido	1,404.03
Ruth Strait	9,765.51
Deborah Ames	597.19
TOTAL	52,492.75

Ex. A-1-8-9; E-2-5; A-55-11, 12, 39, 236, 242, 251-252, 261, 376- 377, 383, 400, 435. See also NYSED Initial Brief at 35, note 24, and Appendix D.

As discussed supra, PAR code 054, ECIA I Handicapped, is not per se allocable to the EHA-B program. Nevertheless, as discussed above, charges by specific employees to the Chapter 1 Handicapped program may be allowable charges to the EHA-B program if there is sufficient evidence that these employees in fact worked on the EHA-B program. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

Here, the evidence consists of the PAR Effort Report, the performance evaluations and position descriptions for these employees, various affidavits, and the testimony at the hearing.

The PAR Effort Report indicates that Ben Birdsell charged time to codes 000, 054, and 999. Ex. A-55-11, 12, 236.

The PAR Effort Report indicates that Janice Pecora charged time to codes 000, 053, 054, 204, 997, 18 and 999. 19 Ex. A-55- 29.Thus, Ms. Pecora not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 204, indicating work on the EHA-B program.

The PAR Effort Report Indicates that Joseph Zabinski charged time to codes 000, 054, 203, 204, 997, and 999. Ex. A-55-251. Thus, Mr. Zabinski not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but -also separately charged other amounts, not in dispute, to codes 203 and 204, indicating work on the EHA-B program.

The PAR Effort Report indicates that Theresa Smith charged time to codes 054 and 999. Ex. A-55-252.

The PAR Effort Report indicates that Evelyn Vido charged time to codes 054, 202, and 999. Ex. A-55-242, 261. Thus, Ms. Vido not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to code 202, indicating work on the EHA-B program.

The PAR Effort Report indicates that Ruth Strait charged time to codes 054, 167, 202, 203, 204, 205, 210, 457, and 999. Ex. A-55-400. Thus, Ms. Strait not only charged the amount in dispute to code 054, indicating work on the Chapter 1 Handicapped program, but also separately charged other amounts, not in dispute, to codes 202, 203, 204, 205, and 210, indicating work on the EHA-B program.

The PAR Effort Report indicates that Deborah Ames charged time to codes 052, 054, 055, 102, 160, 165, 183, 186, 203, 416, 457, 952, 999. Ex. A-55-376-377, 383, 400-401, 435. Thus, Ms. Ames not only charged the amount in dispute to code 054, indicating work on the Chapter 1

Handicapped program, but also separately charged other amounts, not in dispute, to code 203, indicating work on the EHA-B program.

The performance evaluation for Janice Pecora mentions P.L. 89-313(Chapter 1 Handicapped) several times in the "Tasks and Objectives" section. Ex. A-42-2-3. In the "Accomplishments and Actions" section, the evaluation states that Ms. Pecora " [p] articipated in one workshop on how to complete evaluation report forms for PL89-313." Ex. A-42-6. It also mentions P.L. 89-313in the "Summary of Actual Performance" section. Ex. A-42- 8.

The performance evaluation for Joseph Zabinski indicates that one of his duties was the coding of child count data. Ex. A-43-1. It does not mention whether this coding of child count data was performed for the EHA-B or the Chapter 1 Handicapped programs, or both. Therefore, the evaluation alone is inconclusive on this issue.

The performance evaluation for Evelyn Vido indicates that one of her duties was "providing technical assistance and monitoring the collection of child count data". Ex. A-44-1. The appraisal states that she "provid[ed] answers to questions about the child count data collection". Again, this evaluation does not mention whether this effort relating to child count data was performed for the EHA-B or the Chapter 1 Handicapped programs, or both. Therefore, the evaluation alone is inconclusive on this issue .

The performance evaluation for Ruth Strait indicates that one of her duties was assisting "in the preparation of fiscal reports required by Federal and State agencies" and "monitoring the fiscal status of programs, and projects administered by the State Education Department". Ex. A-45-2. While the Assistant Secretaries point out that this activity may have been devoted to the Chapter 1 Handicapped program, the evaluation does not mention either the EHA-B or the Chapter 1 Handicapped programs. Therefore, the evaluation alone is inconclusive on this issue.

NYSED notes in its initial brief at page 34 that it could not locate performance evaluations for Ben Birdsell, Theresa Smith, and Deborah Ames. Nor did the Assistant Secretaries mention the existence of a performance evaluation for Ms. Ames in their brief. Yet, contained in Ex. A-45-5 is a performance evaluation for Ms. Ames. In any case, the evaluation does not mention either the EHA-B or the Chapter 1 Handicapped programs and is inconclusive on this issue.

In his affidavit, Lawrence Gloeckler, states that he had personal knowledge that Ben Birdsell, Theresa Smith, and Evelyn Vido worked exclusively on "activities related to education of children with handicapping conditions". Ex. A-29. As discussed supra, the phrase "education of children with handicapping conditions" is vague and does not adequately distinguish between the EHA-B and the Chapter 1 Handicapped programs.

Mr. Gloeckler further attests the following:

There is no separate State program for education of children with handicapping conditions operated out of OECHC. Therefore, any charges to the 000 PAR Code charged by these employees would have to be for activities under the State Plan which is administered under the federal Education of the Handicapped Act.

Ex. A-29.

As discussed supra, New York's State Plan demonstrates that the OECHC had responsibility for administration of both the EHA-B and the Chapter 1 Handicapped programs. See Ex. A-25-91.

At the hearing, Michael Plotzker, who in 1986 was a supervisor for Education of Children with Handicapping Conditions, within the OECHC, testified as to Evelyn Vido's responsibilities as follows:

She -- her responsibilities were to assist us in reviewing individual applications for students under the State's Family Court Act, which was designed, which was a funding mechanism designed to provide services for children below the age of five with handicapping conditions, consistent with EHA, Part B, in terms of students with handicapping conditions.

Hearing Tr. at 330-331. Mr. Plotzker testified that none of these responsibilities related to the Chapter 1 program and that they related exclusively to the EHA-B program.

He further testified that she had been transferred to his unit from the Division of Interagency Cooperation and Support Services, but could not state the specific date that she was transferred. He claimed that she had been working for him for "several months before" February 10, 1986, the date on which he interviewed her for a promotion. He testified that because Ms. Vido was blind, someone else generally filled out her time sheets, which she then signed. Hearing Tr. at 331-332.

On cross-examination, Mr. Plotzker acknowledged that the PAR Effort Report reveals that Ms. Vido charged time to code 054, and that her performance evaluation mentions duties relating to monitoring the collection of child count data. Hearing Tr. at 332-334.

On re-direct examination, Mr. Plotzker stated that the performance evaluation for Ms. Vido contained in Ex. A-44 was the evaluation for her efforts when she worked for the Division of Interagency Cooperation and Support Services, not for when she worked for Mr. Plotzker. However, counsel for the Assistant Secretaries noted that the evaluation covered the period April 2, 1985 to October 1, 1985, which includes part of the audit period in issue. On further questioning from the judge, Mr. Plotzker stated that he did not have any documentable evidence as to when Ms. Vido was transferred to his office. Hearing Tr. at 335-338.

Overall, this testimony is too vague and indefinite to be of much help in determining whether Ms. Vido's duties during the period in issue related solely to the EHA-B program. That claim is put in serious doubt by both the PAR Effort Report and her performance evaluation, which indicate work relating to the chapter I Handicapped program. Mr. Plotzker was unable to state when Ms. Vido was transferred to his supervision, and the performance evaluation, which described effort relating to monitoring the collection of child count data, covers at least part of the period in issue. Therefore, NYSED has not satisfied its burden of proof with respect to this employee, or any of the others discussed in this section.

Accordingly, based upon all of the evidence, the tribunal finds that there is insufficient evidence that Ben Birdsell, Janice Pecora, Joseph Zabinski, Theresa Smith, Evelyn Vido, Ruth Strait, and Deborah Ames were actually engaged in EHA-B activities, as relates to their charges to PAR code 054. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26. Therefore, the salaries in dispute should be refunded. Accordingly, NYSED will be required to refund the $52,492.75 remaining in dispute for these employees.

e. Doris Godfrey

NYSED claims Doris Godfrey's charge to code 214 was an error and that she meant to charge EHA-B code 204. NYSED Initial Brief at 36. The Assistant Secretaries respond that there is no evidence to support this theory. Assistant Secretaries' Brief at 62.

The amount of Ms. Godfrey's salary in dispute is $4,356.00. Ex. A-1-8; E-2-5; A-55-208.

Ms. Godfrey's charges to code 214 may be allowable charges to the EHA-B program if there is sufficient evidence that these charges in fact represent work on the EHA-B program. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

Here, the evidence consists of the PAR Effort Report, an affidavit, and the testimony at the hearing.

The PAR Effort Report indicates that Ms. Godfrey charged time to codes 204, 214, 997, and 999. Ex. A-55-208. Code 204 is an allowable EHA-B code that is not in dispute in this proceeding. Ex. A-5-3. Code 214 did not exist in the PAR system during the period in question or in earlier periods. Ex. A-5-3, 8, 23. However, codes 215 and 216 represented effort on the EESA program. Ex. A-5-3.

NYSED could not locate the performance evaluation for Ms. Godfrey. NYSED Initial Brief at 36, note 25.

NYSED did submit the affidavit of Lawrence Gloeckler. Ex. A-29.Mr. Gloeckler states that he has personal knowledge that Ms. Godfrey worked exclusively on "activities related to education of children with handicapping conditions." As discussed supra, the phrase "education of children with handicapping conditions" is vague and inconclusive.

At the hearing, Mr. Gloeckler testified that PAR code 214 was a code that was assigned to new programs, and that NYSED had temporarily assigned it to the EHA, Part C. He testified that it was appropriate to use EHA administrative funds to pay for Ms. Godfrey's effort related to this new program. Hearing Tr. at 252-253, 261-264. Michael DiVirgilio also testified as to code 214.He explained that code 214 "was assigned to an EHA evaluation of referral program." Hearing Tr. at 265-267.

Based upon all of the evidence, the tribunal finds that Doris Godfrey was actually engaged in EHA-B activities. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-

26.Therefore, the amount of her salary in dispute should be allowed. Accordingly, NYSED will not be required to refund the $4,356.00 in dispute.

f. Christine Kuzmak

NYSED claims that, during the period in issue, Ms. Kuzmak spent at least 50 percent of her time and effort designing standardized tests in braille and large type for handicapped students, and that as a result, 50 percent of her charges to PAR code 000 should be allowable as charges to the EHA-B program. NYSED Initial Brief at 36.

The Assistant Secretaries reply that because the PAR Effort Report does not attribute any of Ms. Kuzmak's time to an EHA-B code, none of her charges to code 000 are allowable EHA-B charges. Assistant Secretaries' Brief at 63.

The PDD disallowed $16,020.00 of the salary costs of Christine Kuzmak that were charged to the VEA and Perkins Act grants. Ex. A-1-8. The stipulation filed by the parties with the OALJ reduced the amount in dispute for Ms. Kuzmak to $8,393.36 because of the effect of the statute of limitations. Ex. E-2-5.

NYSED's PAR Effort Report attributes the effort for this $8,393.36 to program codes 000, 186, 997, and 999. Ex. A-55-53. Although technically a program code, code 000 ("all other State programs") was used to report time spent on any State program that had not been assigned its own unique program code. Ex. A-5-2. PAR code 186 is a VEA code. Ex. A-5-2. Code 997 is a general code created to keep track of hours of employee effort for which no documentation was received or was received too late or with too many errors for timely keypunching. Ex. A-7-9. Charges to code 997 are allowed if the employee's other charges are found to be for EHA-B activities because such general charges are then found to be attributable to EHA-B programs. 20 PAR Code 999 is a miscellaneous code to which charges are allowed if the employee's other charges are found to be for EHA-B activities because such miscellaneous charges are then found to be attributable to VEA programs and should be allowed. Initial New York at 6 (finding 9).

NYSED has conceded that none of the cost of Ms. Kuzmak's effort attributed to PAR code 186 is allocable to the EHA-B NYSED Initial Brief at 36, 73. The salary cost of the 116.5 hours of Ms. Kuzmak's effort that was attributed to PAR code 186 is $1,419.00. Ex. A-55-53.

The Assistant Secretaries disallowed all of Ms. Kuzmak's charges to general code 000. After the application of the statute of limitations, the salary cost of Ms. Kuzmak's effort attributed to PAR code 000 is $6,974.63. See NYSED Initial Brief at 36, 73; Ex. A-55-53. In the text at page 36 of its initial brief, NYSED apparently concedes that 50 percent of Ms. Kuzmak's effort attributed to PAR code 000 during the statutory period is not allocable to the EHA-B grant: However, NYSED then states that $6,974.63, which is the full amount of Ms. Kuzmak's charges to general code 000 during the period remaining after the effect of the statute of limitations, was improperly disallowed. In addition, NYSED still included this full amount under the column "Amount Allocable to EHA-B" in Appendix D to its initial brief at page 73. Therefore, the amount remaining in dispute is $6,974.63, all of which was charged to PAR code 000.

NYSED has submitted an affidavit by Ms. Kuzmak in which she states that during 1985-1986, at least 50 percent of her time and effort was devoted to designing standardized tests in braille and large type for handicapped students. Ex. A-46.

NYSED has also submitted a performance evaluation for Ms. Kuzmak for the period April 21, 1985 to April 21, 1986. This evaluation does include various duties related to braille and large type examinations. It also includes various clerical and editing duties. Ex. A-46.

At the hearing, Gretchen Maresco, NYSED's Supervising Examinations Editor, testified that at least 50 percent of Ms. Kuzmak's time was spent on the preparation and overseeing of the production of braille and large type examinations for students in New York with visual impairments. Hearing Tr. at 319-327.

In the Initial New York decision, the EAB held that NYSED employees who split their work tIme between VEA programs and non- vocational activities and charged time to PAR code 000 were not justified because this code does not provide a separation or allocation of costs between VEA and non-vocational activities. The EAB required New York to refund these amounts. Initial New York at 6 (finding 12).

Similarly, Christine Kuzmak split her time between EHA-B programs and non-special education activities and charged time to PAR code 000. This code does not provide a separation or allocation of costs between EHA-B and non-EHA activities. The affidavit, performance evaluation, and testimony offered by NYSED do not adequately provide a separation or allocation of costs between EHA-B and non-EHA activities. The evidence offered by NYSED establishes only that Ms. Kuzmak spent some of her time preparing and overseeing the production of braille and large type examinations for students with visual impairments. While this evidence purports to establish that at least 50 percent of Ms. Kuzmak's time was spent on these activities, it does not establish with any certainty the proportion of her time spent on these activities.

However, there is an even greater problem that NYSED must overcome, since, even if the evidence had provided a separation or allocation of costs, NYSED has not proven that these activities were properly allocable to the EHA-B grant, other than to argue that the nature of the braille and large type tests benefitted handicapped students. Such argument is inadequate because both the EHA-B and the Chapter 1 Handicapped programs had the goal of "benefitting handicapped students". Therefore, NYSED must refund the full $6,974.63 of Ms. Kuzmak's salary that remains in dispute.

g. Elwin McNamera

NYSED claims that 50% of Elwin McNamera's charges to PAR code 000 could properly be charged to the EHA-B because Mr. McNamera worked on the BOCES program, which is "considered to be 50% vocational education related and 50% special education related." NYSED Initial Brief at 37.

The Assistant Secretaries respond that there is no support for the proposition that the BOCES program is 50 percent vocational education related and 50 percent special education related. Assistant Secretaries' Brief at 64-65.

The PDD issued by the Assistant Secretaries disallowed $44,000.00 of the salary costs of Elwin McNamera that were charged to the EHA-B program. Ex. A-1-8. The stipulation filed by the parties with the OALJ reduced the amount in dispute for Mr. McNamera to $26,138.22 because of the effect of the statute of limitations. Ex. E-2-5.

In the text at page 37 of itS initial brief, NYSED claims tnat "the charges to proper EHA-B codes and 50% of Mr. McNamera's charges to general code 000 during the statutory period could properly be charged to EHA-B The improper disallowance for Mr. McNamera's salary totals $13,037.99. [footnote omitted] Appl. Ex. C at 6-7." 21 Thus, NYSED apparently concedes that 50 percent of Mr. McNamera's effort attributed to PAR code 000 during the statutory period ($12,752.75), as well as his charges of $122.25, $20.37, and $204.05 to VEA codes 180, 184, and 186, respectively, are not allocable to the EHA-B grant. See NYSED Initial Brief at 37, note 26; Id. at 74. Although these amounts total $13,099.42, because of rounding differences between Ex. A-55 and Ex. A-56, 22 the amount conceded by NYSED in its initial brief equals $13,100.23, which is derived by taking the original $26,138.22 in dispute and subtracting the $13,037.99 that NYSED claims was improperly disallowed. Since this $13,100.23 was listed in section (a) along with the other amounts that NYSED has conceded, this leaves the amount remaining in dispute to be decided here as $13,037.99.

In their brief, at page 64, the Assistant Secretaries agreed that all of Mr. McNamera's salary had been disallowed even though some of his effort was attributed to the EHA-B program by the PAR Effort Report. The Assistant Secretaries then reduced their claim for improper charges to Mr. McNamera's salary from $26,138.22 to $25,852.97 because of the $40.75 of effort attributed by the PAR Effort Report to EHA-B code 202 and the $244.50 of effort attributed to EHA-B code 203. Assistant Secretaries' Brief at 64, D. 38; see also NYSED Initial Brief at 37, n. 26. Therefore, the Assistant Secretaries have conceded that NYSED will not be required to repay $285.25 of the $13,037.99 to be decided here. As a result, the only amount remaining in dispute is the $12,752.74 that constitutes half of Mr. McNamera's charges to code 000 during the period not barred by the statute of limitations.

The PAR Effort Report attributes the employee effort paid for with Mr. McNamera's salary to program codes 000, 180, 184, 186, 202, 203, and 204. Ex. A-55-15, 16. Codes 180, 184, and 186 denote VEA activities. Ex. A-5-2, 8. Codes 202, 203, and 204 denote EHA-B activitites. Ex. A-S-B, 9. Although technically a program code, code 000 ("all other State programs") was used to report time spent on any State program that had not been assigned its own unique program code. Ex. A-5-2.

NYSED has submitted a performance evaluation for Mr. McNamera for the period from August 23, 1985 to August 22, 1986. Ex. A-47. This evaluation contains numerous references to Mr. McNamera's duties relating to BOCES (Board Of Cooperative Educational Services). A-47-2, 3. NYSED contends that the BOCES program "is considered to be 50% vocational education related and 50% special education related." NYSED Initial Brief at 37. New York's State Plan

indicates that "[e]ach BOCES serves a number of school districts, and provides programs for children with handicapping conditions who cannot be served by a local school district." Ex. A-25-78-79.

In the Initial New York decision, the EAB held that NYSED employees who split their work time between VEA programs and non- vocational activities and charged time to PAR code 000 were not justified because this code does not provide a separation or allocation of costs between VEA and non-vocational activities. The EAB required New York to refund these amounts. Initial New York at 6 (finding 12).

Similarly, Elwin McNamera split his time between EHA-B programs and non-special education activities and charged time to PAR code 000. This code does not provide a separation or allocation of costs between EHA-B and non-EHA activities. The evidence offered by NYSED does not adequately provide a separation or allocation of costs between EHA-B and non-EHA activities. The performance evaluation indicates only that Mr. McNamera had responsibilities relating to BOCES. The evidence does not establish with any certainty the proportion of his time spent on these activities.

Again, even if the evidence had provided a separation or allocation of costs, NYSED has not proven that these activities were properly allocable to the EHA-B grant. NYSED's assertion that the BOCES program is considered 50 percent vocational education related and 50 percent special education related is unsupported. NYSED does not identify by whom the BOCES program is considered SO percent vocational education related and 50 percent special education related. As a result, the tribunal is unable to concur in such a designation.

Therefore, NYSED must refund $12,752.74 of the $13,037.99 of Mr. McNamera's salary to be decided here, as well as the amount conceded and listed in section (a). NYSED will not be required to refund $285.25 of the $13,037.99 to be decided here.

h. James Harrison

NYSED asserts that the Assistant Secretaries improperly disallowed $37.00 of the salary of James Harrison that was charged to PAR code 054. NYSED Initial Brief at 37-38. The Assistant Secretaries claim that the effort attributed to the Chapter 1 Handicapped program cannot be charged to the EHA-B program. Assistant Secretaries' Brief at 65.

The PDD issued by the Assistant Secretaries disallowed $1, 061.00 of the salary costs of Mr. Harrison that were charged to the EHA-B program. Ex. A-1-8. This amount was not affected by the statute of limitations. Ex. E-2.

NYSED's PAR Effort Report attributes the employee effort paid for with this $1,061.00 to program codes 000, 053, 054, and 413.Ex. A-55-36, 39, 138.

In its brief, NYSED conceded that $795.92 of the $1,061 in dispute was properly disallowed. NYSED Initial Brief at 38, 73. Since this amount was listed in section (a), the amount remaining in dispute to be decided here is $265.08.

For their part, the Assistant Secretaries conceded that they had made a mathematical error in calculating the disallowance. As a result, they reduced the amount of the disallowance for Mr. Harrison from $1,061 to $832.92. Assistant Secretaries' Brief at 65.This amounts to a reduction of $228.08.

After deducting this $228.08 from the $265.08 to be decided here, only the $37 that Mr. McNamera charged to PAR code 054 remains in dispute.

As discussed supra, PAR code 054, ECIA I Handicapped, is not per se allocable to the EHA-B program. Nevertheless, as discussed above, charges by specific employees to the Chapter 1 Handicapped program may be allowable charges to the EHA-B program if there is sufficient evidence that these employees in fact worked on the EHA-B program. See Initial New York at 6 (findings 8 and 11); see also Florida at 25-26.

NYSED has not provided any specific evidence that Mr. Harrison in fact worked on the EHA-B program. Thus, NYSED has failed to satisfy its burden of proof with respect to this employee. Therefore, of the $265.08 to be decided here, NYSED must refund $37.00 of Mr. Harrison's salary. NYSED will not be required to refund $228.08 of the $265.08 of Mr. Harrison's salary that is in dispute here.

i. Conclusions as to EHA-B funded employees in dispute.

To summarize, prior to considering NYSED's request for equitable offset, the tribunal finds that NYSED must refund $186,479.13 of the $434,130.12 that the parties originally stipulated to as being in dispute for EHA-B funded employees in this proceeding. When this $186,479.13 is added to the indirect cost rate of 19.4 percent ($36,176.95) and the fringe benefit rate of 30.92 percent ($57,659.35), NYSED's total liability becomes $280,315.42.

4. Equitable Offset.

a. VEA and Perkins Act.

The Assistant Secretaries argue that NYSED cannot offset any of the disallowed vocational education costs at issue in this case with other costs not charged to the federal grants in order to reduce its audit liability for three reasons: 1) the Florida decision does not provide authority for allowing an offset as a matter of right; 2) amendments to the General Education Provisions Act require the recovery of funds to the extent a violation has caused harm to an identifiable federal interest; and 3) permitting NYSED to offset the disallowed federal vocational education funds in order to avoid repayment would harm the federal interest in ensuring compliance with the supplement- not-supplant requirement, and furthermore, is not required to achieve the aims of the governing statute and regulations. Assistant Secretaries' Brief at 68-78.

NYSED claims that it is entitled to an equitable offset for the amount of State expenditures on activities chargeable to the federal grant programs. NYSED argues that the Secretary has adopted the application of equitable offset in the Appeal of New York and that the Secretary expanded the doctrine of equitable offset in the Consolidated Appeals of Florida. In addition, according to

NYSED, judicial interpretation favors the application of equitable offset. Therefore, NYSED contends that it is entitled to a credit for any amount of effort allocable to the VEA that was not charged to the VEA. NYSED Initial Brief at 39-53.NYSED asserts that the disallowance for employee charges to the VEA program is almost completely extinguished by the doctrine of equitable offset. According to NYSED, the precedent derived from the prior New York PAR case is directly relevant in its application of equitable offset to the VEA program. Moreover, NYSED claims that the arguments of the Assistant Secretary for Vocational and Adult Education (OVAE) are inconsistent with Department policy. NYSED Reply Brief at 5-13.

In the New York Remand, which was adopted by the Secretary, the EAB declared:

It is our opinion that EDGAR regulations provide for the allocation and obligation of federal educational grant funds when the services are performed for VEA intended purposes NOT upon the initial charging or budgeting of such costs. ED's own auditors found that the "non-line-item" personnel expenditures in question were, in fact, devoted to suitable VEA purposes and should be allowed. Thus, we find that EDGAR regulations do not constitute a barrier to the equitable offset of $530,195 recommended by ED's auditors simply because the "non-line-item" expenditures were not charged to the VEA grant.

ED also suggested other legislative or regulatory barriers to the allocation to the VEA grant of the $530,195 expended for the services of "non-line-item" employees. The issue of a Tydings Amendment (20 U.S.C. Sec. 1225(b)) violation was raised in the original audit report in this case. But, that question was resolved by application of the Secretary's own decision in Appeal of the State of California, Docket No. 12(122)83, published on May 6, 1986, which held that the relevant question in such matters is when the transaction took place, not when or where it was originally recorded. ED also argues that allowance of the equitable offset recommended by the auditors would result in a violation of the matching funds requirements of Section 111 (a) (2) of the Vocational Education Act or the supplanting prohibition set forth in Section 106(a) (6) of said Act. The original audit report found no violation of either the matching funds statutory requirement or the legislative prohibition against supplanting. We find no evidence that offsetting allocable "non-line-item" personnel expenditures against disallowed employee expenditures would create new violations where none existed before.

New York Remand at 4-5 (emphasis in original) .

Thus, in the prior New York case, the EAB and the Secretary considered and rejected the Assistant Secretaries' arguments that allowing an equitable offset of VEA funds would violate the Tydings Amendment. Similarly, the EAB and the Secretary also found no evidence that allowing an equitable offset of VEA funds would cause a violation of the matching funds requirements or the supplanting prohibition.

After analyzing the Supreme Court's decision in Bennett v. Kentucky Dep't of Education, 470 U.S. 656 (1985), the Fifth Circuit's ruling in Tangipahoa Parish School Bd. v. U.S. Dep't of Education, 821 F.2d 1022 (1987), and the Ninth Circuit's holding in California Dep't of Education v. Bennett, 849 F.2d 1227 (1988) , the EAB further stated:

This EAB Panel is persuaded that it is the intention of federal appellate courts reviewing the Secretary's decisions to inject the doctrine of fairness, including application of equitable offset or credit, where state educational services which support the legislative intent are actually performed, even though they were not originally charged to the appropriate federal grant.

New York Remand at 6.

Again, this ruling became the final decision of the Department on August 29, 1989. As a result, regardless of whether or not the federal court decisions relied upon by the EAB actually did "inject the doctrine of fairness, including application of equitable offset", this tribunal is bound to follow the Secretary's ruling. 23

In Florida, the EAB again discussed whether the allowance of an equitable offset would give rise to Tydings Amendment, matching, or supplanting violations. The EAB stated as follows:

The EAB panel in New York noted that the allowance of the offset involved no violation of the Tydings Amendment, of the statutory matching funds requirement or of the prohibition of supplanting. [citation omitted] In the case herein the audits found no Tydings, matching funds or supplanting violations and this panel concludes that the allowance of the offset with respect to position 03187 would create no such violation. Nor would any such violation be created by this panel's resolution of the issues raised with respect to any of the other positions or expenditures involved herein and discussed below.

Florida at 26.

At pages 42-59 of its decision, the EAB discussed whether Florida was entitled to an equitable offset for overmatching State administrative costs. The EAB prefaced this discussion with the following statement:

This issue of offset arising from overmatching will become material to the resolution of this case only if the foregoing analyses and determinations are not accepted. This issue is discussed here as a contingent and alternate ground of decision.

Florida at 43.

The Assistant Secretaries argue, at pages 69-70 of their brief, that this statement means that the portions of the Florida decision as to the allowance of an equitable offset are merely dicta. The tribunal must disagree. In that decision, the EAB addressed specific arguments of the State and did not go beyond facts before the Panel. Furthermore, in Florida, the EAB reaffirmed the New York Panel's allowance of the equitable offset doctrine. Florida at 24-26. The sustaining of that decision by the Florida Panel cannot reasonably be interpreted as dicta. Dicta is an expression of a judge's opinion that goes beyond the facts before the court and therefore contains individual views of the author that are not binding in subsequent cases. See BLACK'S LAW DICTIONARY 408 (5th ed. 1979). 24 The language in the Florida case relating to the allowance of an equitable offset was a pivotal part of that decision and later became the decision of the

Secretary. Accordingly, contrary to the Assistant Secretaries' position, this language cannot reasonably be interpreted as dicta. 25

The EAB further stated as follows at page 44:

The first inquiry here is whether the governing precedents permit the sort of offset Appellant claims. Appelant relies (Appellant's Brief, 28-34) on the supplemental decision after remand of the EAB panel in Appeal of the State of New York, Docket No. 26(226)86. In accord with the discussion of the New York case above, at VI A (1) (c) of this decision, this Panel interprets that case to authorize the sort of offset claimed herein. . . . [emphasis added]

The EAB in Florida then discussed the New York Remand, California v. Bennett, Bennett v. Kentucky Dep't of Education, Tanqipahoa Parish Bd. v. U.S. Dep't of Education, and Bennett v. New Jersey. The EAB concluded by stating:

The issue herein is whether this Panel has authority to allow an equitable offset if the evidence justifies it. Appellant is not entitled to such an offset as a matter of right. But it is entitled to have this Panel consider an offset if the evidence, in the Panel's view, justifies such consideration. If the Panel further concludes that an offset is required to achieve the aims of the governing statutes and regulations, it will be within the authority of this Panel to order such an offset, especially in light of the precedent of Appeal of the State of New York.

This Panel concludes that the precedents support the concept of equitable offset asserted by Appellant. It remains to be determined, however, whether the expenditures claimed as an offset were actually made for VE purposes and, if so, what amount of expenditures may properly be so claimed.

Florida at 50. This ruling became the final decision of the Department on September 10, 1990.

The net effect of the New York Remand and the Florida cases is to establish the following points:

1) New York is not entitled to an equitable offset as a matter of right.

2) This tribunal, however, can allow an equitable offset if the evidence, in the tribunal's view, justifies such consideration.

3) If the tribunal further concludes that an offset is required to achieve the aims of the governing statutes and regulations, it will be within the authority of this tribunal to order such an offset.

4) The allowance of such an offset would involve no violation of the EDGAR regulations, the Tydings Amendment, the statutory matching funds requirement, or the prohibition against supplanting.

The Assistant Secretaries argue, however, that the Florida and New York decisions were decided under GEPA as it existed before the 1988 amendments, which they claim require a recipient that

misspends federal funds to return those funds in proportion to the harm that the recipient's violation caused to an identifiable federal interest. The Assistant Secretaries contend that the tribunal now must consider whether harm would accrue to an identifiable federal interest in determining whether to permit an equitable offset to avoid repayment of disallowed costs, the Florida and New York decisions notwithstanding. Assistant Secretaries' Br. at 71-73.

The language in GEPA upon which the Assistant Secretaries rely states as follows:

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. . . .

20 U.S.C. § 1234b(a) (1).

Essentially similar language is found in the regulations at § 81.22 (a) (1992). This regulation states as follows:

(a) (1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

(2) An identifiable Federal interest under paragraph

(a) (1) of this section includes, but is not limited to, the following:

(i) Serving only eligible beneficiaries.

(ii) Providing only authorized services or benefits.

(iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.

(iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.

(v) Maintaining accountability for the use of funds.

The tribunal agrees with NYSED's argument that this regulation and the 1988 amendments to GEPA do not limit the availability of equitable offset in any way. Neither the statute nor the regulation even mentions equitable offset. The amendment requires a recipient to return "an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest". The concept of proportionality is not in unavoidable conflict with the principle of equitable offset.

Indeed, the concept of proporti9nality is quite harmonious with the principle of equitable offset. If a recipient received X dollars from the VEA grant for the effort of an employee who did not in fact work on the VEA program, the amount of harm that recipient's violation caused to an identifiable Federal interest (the VEA program) is X dollars. As a result, GEPA would require that recipient to return X dollars. If that same recipient had also paid Y dollars from other State (non-VEA) funds for the effort of an employee who did in fact work on the VEA program, then an identifiable federal interest (the VEA program) has received a benefit of Y dollars. In sum, the extent of harm that the recipient's violation caused to an identifiable federal interest (the VEA program) would be equal to X minus Y dollars. Under GEPA, the recipient would be required to return "an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest" or X minus Y dollars. 26

Moreover, the legislative history to the amendments to GEPA cited by NYSED also indicates that Congress intended to create an equitable process for the review of audit findings by the Department. Congress stated as follows:

While the Committee recognizes the importance of audits in ensuring that Federal programs serve their intended purposes, the Department's audit and appeal process has sometimes adversely affected intended program beneficiaries. The Committee intends to create an effective, economical. and equitable process for the review of audit findings by the Department and for appeals of those findings by auditees. It is the Committee's view that the amendments strike the necessary balance between giving auditees the means to defend themselves against adverse audit findings and retaining the Department's ability to recover misspent funds and ensure overall program accountability.

House Report No. 95, 100th Cong. 1st Sess., May is, 1987 (emphasis added). This language indicates that Congress intended to create an equitable process for the review of audit findings by the Department. The language demonstrates that Congress, in fact, was attempting to avoid the adverse effects to intended program beneficiaries by strengthening their rights and by ensuring that they return to the Department only an amount that is proportional to the overall harm to the federal interest caused by these beneficiaries. The language notes the Department's goal of "ensur[ing] overall program accountability." In furtherance of this goal, the amendments to GEPA added several procedural safeguards for applicants. These include giving the administrative law judge the power to issue subpoenas and to order discovery (20 U.S.C. § 1234(g)), establishing a process for .voluntary mediation of disputes (20 U.S.C. § 1234(h)), and authorizing applicants to recover attorney fees and other litigation expenses from the Department in GEPA cases (20 U.S.C. § 1234(f); see also 5 U.S.C. § 504).

Nor does the tribunal find persuasive the Assistant Secretaries' contention that under GEPA before the 1988 amendments, the EAB in the New York Remand and Florida cases could not look beyond the four corners of the audit report in order to determine whether a matching or supplantinq violation would occur by allowing an equitable offset, but that the 1988 amendments to GEPA authorize this tribunal to look at other evidence. While the EAB in the New York Remand and Florida cases did rely upon the fact that the audit report in each of those cases did not find any Tydings Amendment, matching funds, or supplanting violations, the EAB did not state in those cases that it was limited to the audit report. To the contrary, in the very language

quoted by the Assistant Secretaries at pages 72-73 of their brief in support of their argument that the EAB was limited to the audit report, the EAB stated:

In the case herein the audits found no Tydings Amendment, matching funds or supplanting violations and this panel concludes that the allowance of the offset with respect to position 03187 would create no such violation. Nor would any such violation be created bv this Panel's resolution of the issues raised with respect to anv of the other positions or expenditures involved herein and discussed below.

Florida at 26 (emphasis added). This language, such as "and this panel concludes that the allowance of the offset with respect to position 03187 would create no such violation," does not indicate that the EAB panel was limiting itself solely to the findings of the audIt report. Moreover, the subsequent statement as to the other positions indicates that the EAB panel was not at all restricting itself to the findings of the audit report. In any event, the language does not support the Assistant Secretaries' contention that the EAB expressly limited itself to the findings of the audit report.

Moreover, the tribunal finds nothing in the previous GEPA provisions that limited the EAB panel to the findings of the audit report to an extent greater than the extent that this tribunal is limited to the audit report. Under the former § 1234a, the EAB reviewed the final audit determination, not simply the audit report. Similarly, under the current § 1234a, the administrative law judge reviews the preliminary departmental decision (PDD), not simply the audit report. While the current § 1234a states that "[t]he 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 former § 1234a did not in any way limit the facts to serve as the basis of the final audit determination or require them to come from the audit report. Instead, the former provision merely stated that:

Whenever the Secretary determines that an expenditure not allowable under [various programs] has been made by a State or by a local educational agency, or that a State or local educational agency has otherwise failed to discharge its obligation to account for funds under any such program, the Secretary shall give such State or local educational agency written notice of a final audit determination . . . .

20 U.S.C. § 1234a(a). Similar language appears in the current GEPA at 20 U.S.C. § 1234a(a) (1).

Therefore, neither the former nor the present provisions of GEPA required the facts that serve as the basis of the final audit determination or the PDD to come solely from the audit report. It follows that neither the EAB nor the Office of Administrative Law Judges were limited in their review to looking solely at the audit report.

Finally, a recent interlocutory decision has addressed this very same issue. In North Carolina Department of Public Instruction, Docket No. 91-86-R, U.S. Dep't of Education (Interlocutory Decision) (Oct. 13, 1993), the judge discussed the State's request for an equitable offset and the Department's opposition based on its argument that the 1988 amendments to GEPA removed the

availability of equitable offset. After discussing the New York Remand, Florida, and other cases discussed herein, the administrative law judge stated as follows:

Neither this provision [the newly enacted 20 U.S.C. § 1234b(a) (1)] nor its legislative history reflect that Congress intended to preclude the application of the doctrine of equitable offset in ascertaining the ultimate amount of any recovery by the Secretary. H.R. 95, 100th Cong., 1st Sess., at 94-95, 138 (1987). Moreover, equitable offsets reflect generally funds which were expended by the state and not claimed in connection with the grant although they constitute allowable expenditures. Under appropriate circumstances, these allowable expenditures are permitted to offset, in effect, expenditures disallowed under the audit and appeal process. Section 1234b(a) (l) (1988), like its predecessor Section 1234a(d) (1987), addresses only the measure of recovery attributable to the disallowed expenditures. Therefore, the doctrine of equitable offset is not precluded under Section 1234b(a) (1) (1988).

In addition, this issue was also addressed and resolved against the Department in In re Col. State Bd. for Community Colleges and Occupational Educ., Dkt. Nos. 89-41-R and 90-35-R, U.S. Dept. of Education (Interlocutory Order July 31, 1992). The tribunal agrees with the rationale of this Interlocutory Order and notes, in particular, that the equitable offset "remedy exists apart from the [revised] statute and there is nothing in the statute which can be construed to remove any applicable equitable remedies. Id. at 6. Therefore, as a matter of law, the doctrine of equitable offset is applicable in the review of audit determinations before the Office of Administrative Law Judges.

North Carolina at 9 (emphasis added). See also Application of Colorado State Board for Community Colleges and Occupational Education, Docket Nos. 89-41-R and 90-35-R, U.S. Dep't of Education (Interlocutory Decision) (July 31, 1992).

Consequently, the tribunal finds that the 1988 amendments to GEPA do not limit the availability of equitable offset in any way. As a matter of law, the doctrine of equitable offset is applicable in the review of audit determinations before the Office of Administrative Law Judges.

The Assistant Secretaries also argue that allowing NYSED to use salary costs previously paid from State funds to offset the disallowed costs would violate the VEA and the Perkins Act as relates to the supplement-not-supplant requirement. 27 In the New York Remand decision, the EAB found no evidence that offsetting allocable "non-line-item" personnel expenditures against disallowed employee expenditures would create new violations where none existed before. New York Remand at 5. The Florida EAB Panel, reaffirming the New York Remand Panel's decision, expressly held that allowance of offset would not give rise to matching funds or supplanting violations. Florida at 26. This tribunal, recognizing the similarities between the Florida case and the instant case, similarly finds that the application of an offset, in general, will not in itself result in the creation of a supplanting violation. Equitable offset is an equitable remedy. As discussed above, nothing in the amendments to GEPA authorizes this tribunal to delve into the law of supplanting more than the EAB did.

Nevertheless, in support of their supplanting violation argument, the Assistant Secretaries cite State of Wyoming v. Alexander, 971 F.2d 531 (lath Cir. 1992), which partially affirmed Appeal

of the State of Wyoming, EAB, Docket No. 16(191)85 (December 14, 1987). In Wyoming, the EAB held that a $6,807 grant was improperly used to supplant local funds with federal funds. The federal funds had been previously authorized, but were not used during the project "because no one in the district knew that they were available. Consequently, state money was spent." EAB Decision at 6. The EAB determined that the federal funds were discovered sometime later, at which time the costs were charged to these federal funds. The Tenth Circuit held that these EAB findings of fact were supported by substantial evidence and should not be overturned. Wyoming at 539-540.That court stated as follows:

when federal money was later used to partially reimburse the district, these federal funds supplanted, rather than supplemented, the local funds already expended in violation of [20 U.S.C.] § 2306 (a) (6). See, e.g., Bennett v. Kentucky, 470 U.S. at 670-71, 105 S. Ct. at 1553 (use of federal funds where local funds were intended constitutes supplanting). Thus, the EAB's decision is supported by substantial evidence and reflects an application of the proper legal standard. See id. at 666, 105 S. Ct. at 1550. The challenged ruling on this issue cannot be disturbed.

Wyoming at 540.

The Assistant Secretaries' reliance on Wyoming is misplaced because Wyoming did not involve the issue of equitable offset. The Tenth Circuit was merely affirming the EAB's ruling that under the facts of that case, Wyoming had supplanted local funds with federal funds. The underlying EAB ruling was issued on December 14, 1987, before the New York Remand and Florida decisions, which differed from Wyoming in that they did involve the issue of equitable offset. In addition, Wyoming differed from the New York Remand and the Florida cases, as well as the instant case because in Wyoming, the State had changed its accounting records so that charges that originally had been charged to the State were now charged to the federal grant. Here, NYSED did not change its accounting records after-the-fact.

The Tenth Circuit cited Bennett v. Kentucky, 470 U.S. 656, 670-71 (1985) for the proposition that "use of federal funds where local funds were intended constitutes supplanting". Wyominq at 540. Notably, in the instant case, NYSED is not seeking to use federal funds where local funds were intended. Instead, NYSED is seeking to use federal funds where federal funds were intended all along. Both NYSED and the Department contemplated that the State would be authorized a specific amount of federal funds. Substituting a proper charge for an improper charge does not create a supplanting problem because NYSED is still charging the federal grant no more than the amount of money zhat had been contemplated all along.

Moreover, the Assistant Secretaries appeared to argue at the oral argument that a supplanting violation would occur anytime that a state is permitted to offset disallowed federal VEA expenditures with other state VEA expenditures. See Oral Argument Tr. at 91-93, 109-121. 28 To follow such logic would negate the Secretary's decisions in the New York and Florida cases, which allowed the States involved to substitute other state VEA expenditures for disallowed federal VEA expenditures. The tribunal declines to do so.

Therefore, the Secretary's decisions in Florida and New York are still controlling here. Accordingly, the tribunal finds that the allowance of an equitable offset would generally involve no violation of the EDGAR regulations, the Tydings Amendment, the statutory matching funds requirement, or the prohibition against supplanting. See New York Remand at 4-5; Florida at 26. In light of NYSED's request for an equitable offset against disallowed VEA and Perkins grant expenditures, the tribunal will allow such an offset if the evidence, in the tribunal's view, justifies such consideration.

That evidence consists of the PAR Fund and PAR Effort Reports, contained in Ex. A-54 and A-55 respectively, as well as the PAR Effort Report for Employees in Question Divided by Pay Period (Ex. A-56). NYSED has also submitted the PAR Effort Report for Period Not Barred by the Statute of Limitations (Ex. A-57), the PAR Effort and Fund Source Report Limited to Employees Using Codes 180-190 (Ex. A-58), Appendix E to NYSED's initial brief (Ex. A-65), and a computer printout containing employee effort by organizational unit (Ex. A-66). At the hearing, the tribunal admitted all of these exhibits into evidence without objection. Hearing Tr. at 54, 68-69.

Appendix E to NYSED's initial brief, contained at Ex. A-65, lists the 20 employees that NYSED alleges worked on the VEA program as reported by the PAR Effort Report but who were not paid with VEA funds. In its initial brief, NYSED claimed that the amounts listed for these employees were allocable to VEA and should be allowed as an equitable offset. NYSED Initial Br. at 51-53.

At the evidentiary hearing held in Albany, New York, Michael DiVirgilio testified that Ex. A-65 was based upon the reports contained in Ex. A-57 and A-58. He acknowledged that there were discrepancies between Ex. A-65, and Ex. A-57 and A-58. Mr. DiVirgilio explained that the discrepancies occurred because proratings for certain codes, such as general codes, were supposed to have been done for an entire year. With the abbreviated report for the period not barred by the statute of limitations, these proratings included only the prorated codes that occurred during this more limited time period. Thus, as Mr. DiVirgilio explained, if an employee took a two week vacation during a period that was not included in the abbreviated report, the general code for that vacation time would not have been prorated in the abbreviated report, even though it was prorated and included in the report covering the entire year. Hearing Tr. at 45-48.

According to Mr. DiVirgilio, further discrepancies also occurred because of a change in the prorating system that occurred between the time that the full PAR reports were generated and the time that the abbreviated reports were printed. When the full PAR reports were printed, general codes were prorated across an entire bureau, whereas when the abbreviated reports were printed, general codes were prorated for each employee. Hearing Tr. at 48-49.

Mr. DiVirgilio testified that because of these discrepancies, NYSED generate&a new report that would show the effort reported for each period. This new report, contained in Ex. A-66, included not only effort reported on PAR codes 180-190, the VEA codes, but also effort reported on State general code 000 for employees whose only other reported codes were VEA codes. The new amount requested in VEA offset totalled $313,507.84. Mr. DiVirgilio testified that this new, larger amount was more accurate than the approximately $210,000 in offset contained in Ex. A-

65. He also stated that the difference between these two amounts was due largely to the addition of effort reported on code 000, and was not primarily due to the differences in prorating. Hearing Tr. at 49-51, 106.

Upon cross-examination, Mr. DiVirgilio acknowledged that for NYSED employee K. Hoefer, the total cost of effort for the year under the new calculations is $12,631.43 (Ex. A-66-44), while the total cost of effort for the year under the old calculations was $11,931 (Ex. A-55-525). Hearing Tr. at 72-74.

At the oral argument held in Washington, D.C., counsel for the Assistant Secretaries again pointed out that for K. Hoefer, the cast of effort attributed to Ms. Hoefer's 1153.5 hours had increased from $11,931 in Ex. A-55 to $12,631.43 in Ex. A-66. In response, counsel for NYSED admitted that there were still some discrepancies between Ex. A-66 and A-55 because A-66 was run in 1992, whereas Ex. A-55 was generated in November 1986. Counsel again explained that in 1986, general codes were prorated over entire units, whereas in 1992, general codes were prorated for each employee. The Assistant Secretaries argued that Ex. A-66 is not accurate enough and that because of the changes in the prorating system, NYSED is now seeking more in offset for some employees than it actually paid these employees. Oral Argument Tr. at 93-108. At the request of the tribunal, counsel for NYSED agreed to submit new documentation explaining these discrepancies, as well as evidence as to whether or not New York would still satisfy its matching requirement if an equitable offset was allowed. Oral Argument Tr. at 146-154. As a result, NYSED submitted its supplemental memorandum, which also contained Ex. A-67, A-68, and A-69. In their response, the Assistant Secretaries did not object to the admissibility Ofn these exhibits. Ex. A-67 contains the affidavit of Michael DiVirgilio with attachments. Ex. A-68 consists of a notification of grant award. Ex. A-69 includes a financial status report.

In its supplemental memorandum, NYSED contends that Ex. A-66 accurately reflects the amount of funds available for offset of any disallowance of VEA costs. According to NYSED, the affidavit of Michael DiVirgilio and the attachments contained in Ex. A-67 demonstrate that for 10 of the 19 employees for whose salaries NYSED requests an offset, there are no substantial discrepancies among the PAR reports. Of the other nine employees, NYSED claims that the discrepancies for eight of these employees resulted from either bonuses, vacation awards, or the fact that some pages had been omitted from Ex. A-55. NYSED could not fully explain the discrepancy for one employee, Deborah Ames. NYSED Supplemental Memorandum at 2-6.

In addition to noting that NYSED has the burden of proving every element of its affirmative defense that it is entitled to an equitable offset, the Assistant Secretaries respond that NYSED has failed to resolve the discrepancies between its documents that purport to show the amount of allowable salaries that could be used in an equitable offset. According to the Assistant Secretaries, NYSED has admitted that discrepancies exist between Ex. A-55 and Ex. A-57 and A-66 because the amounts of particular salaries reflected in Ex. A-57 and A-66 are higher tban those shown in Ex. A-55 for the same individuals for the same time period. Response of the Assistant Secretaries at 2-4, 12-14. The tribunal has created a chart, attached as Appendix A to this decision, that lists the nineteen employees for whose salaries NYSED requests an equitable offset. In addition, the chart lists the line numbers, the page of Ex. A-54 on which these line numbers are found, the funding source PAR code identified in Ex. A-54, the funding amount

contained in Ex. A-54, the page of Ex. A-55 on which these line numbers are found, and the effort amount contained in Ex. A-55. The chart also lists the page of Ex. A-66 on which these line numbers are found; the total effort amount listed in Ex. A-66; the effort amount during the period not barred by the statute of limitations 29 in Ex. A-66 on VEA codes 180-190; and the effort amount during the period not barred by the statute of limitations in Ex. A-66 on code 000 if no codes other than 000, VEA codes, or general codes 949, 997, and 999 were used. 30 In the column entitled "Total of Previous 2 Columns", the nchart lists the combined effort amount during the period not barred by the statute of limitations in Ex. A-66 on VEA codes 180-190 and on code 000 if no codes other than 000, VEA codes, or general codes 949, 997, and 999 were used. Finally, the chart identifies the amount of discrepancy between the total effort amounts contained in Ex. A-55 and Ex. A-66, the explanation offered by NYSED for this discrepancy, and the exhibits that explain this discrepancy.

The chart indicates that for ten of these employees, 31 the discrepancy between the total effort amounts contained in Ex. A- 55 and Ex. A-66 is $3.13 or less. NYSED attributes these differences to the rounding of some numbers. Unlike Ex. A-66, which calculates numbers to the penny, Ex. A-5S does not include computations in terms of cents, instead rounding everything to whole dollar amounts. For this reason, and because the discrepancies for these ten employees are so small, the tribunal considers these differences to be de minimis. For these ten employees, Ex. A-66 represents an accurate breakdown of their total effort by PAR codes for each pay period.

For six other employees, 32 NYSED asserts that the discrepancy is solely the result of bonuses or awards that were given to these employees. According to Michael DiVirgilio:

Although these bonuses were properly awarded to these employees pursuant to New York State policy, the information had not yet been loaded into the PAR system when the original PAR report, Appl. Ex. 55, was run. However, they should have been included in that report and are accurately a part of the cost of effort for those employees. . . . The cost of those bonuses was prorated across the employees cost of effort in the more recently run PAR report included at Appl. Ex. 66. Therefore, [these] employees show discrepancies between cost of effort reported in Appl. Ex. 55 and Appl. Ex. 66 . . . .

Ex. A-67-2 (para. 8-9).

The chartidentifies the type of bonus and the documentary support in the exhibits for each of these six employees. As NYSED notes, "[a]mounts charged to grant programs for personal services . . . will be based on payrolls documented and approved in accordance with generally accepted practice of the State or local agency." 34 C.F.R. Part 74, App. C, part II.B(10) (1986). Although the Assistant Secretaries attacked the discrepancies between Ex. A-SB and Ex. A-66, they did not challenge the evidentiary and legal bases for the awarding of these bonuses and awards. Upon review of the payroll bulletins setting forth New York State policy on this issue, contained at Ex. A-67-22-36, the tribunnnal is satisfied that NYSED in fact did award these bonuses and awards, and that it did so in accord with the relevant regulations. Moreover, the tribunal is satisfied that these bonuses and awards explain the discrepancies between Ex. A-55 and Ex. A-66 for five of these six employees. After including the various bonuses and awards, the remaining discrepancies are all less than $2.00. As discussed above, these amounts are de

mininis. Therefore, for NYSED employees Ira Certner, Joan Dedeo, Herbert Ranney, Janet Stout, and Conrad Wettergreen, Ex. A-66 represents an accurate breakdown of their total effort by PAR codes for each pay period.

However, for John Fabozzi, the vacation exchange award was $1,848.10, whereas the discrepancy was $929.23. In his affidavit, Michael DiVirgilio explains this difference as follows:

The difference of $929 represents half of a vacation exchange award. This amount is verified at attachment 4. The difference of the State line item offered for offset shows 50% of the vacation exchange award. The other 50% was most likely allocated over a separate Federal line item for Mr. Fabozzi, which is shown on page 175 of Appl. Ex. 54, the PAR fund source report.

Ex. A-67-2 (para. 9c).

This analysis is unsatisfactory for several reasons. First, Mr. DiVirgilio's theory that the other half was "most likely allocated" over a separate federal line item for Mr. Fabozzi, while plausible, is not proof. Ex. A-54-175 indicates that Mr. Fabozzi had a separate federal line item, but so did many other NYSED employees who had 000 funding codes, including many of the employees discussed supra in this decision. NYSED has not presented any proof indicating that the other half actually was allocated over that separate federal line item. Moreover, $929 is not half of $1,848; that amount is actually $924. While it is possible that this $929 does represent half of a vacation exchange award, and that the other half was allocated over a separate federa line item for Mr. Fabozzi, and that a mathematical error occurred in the dividing of this award between two separate federal and State line items, NYSED has not proven these claims, and there are many other possible explanations for the evidence as to Mr. Fabozzi. As a result, NYSED has not satisfied its burden of persuasion to satisfactorily explain the discrepancies between Ex. A-55 and A-66 for Mr. Fabozzi.

For Francis Hollon, NYSED argues that the $25,745.78 discrepancy is the result of missing pages in Ex. A-55 for higher education units that were not a part of the original disallowances in this proceeding. As Mr. DiVirgilio notes in his affidavit, Ex. A-55 is missing all of the pages from 475-507, except for pages 486-487. Claiming that a run of those units with a date that corresponds with Ex. A-5S is not currently available, NYSED created a more recent run of that effort, contained at Ex. A-67-13-21. Mr. DiVirgilio explains as follows:

[T] he full amount of effort for employee Hollon is not included on Appl. Ex. 55. Only $8,439 was reported on Appl. Ex. 55 although the totals on Appl. Ex. 54 and Appl. Ex. 66 correspond at $34,185 and $34,184 . . . . The difference of $25,744 is shown on page 373 of attachment 9 [67-19]. This was a division which was missing from the original PAR report included at Appl. Ex. 55.

Ex. A-67-3 (para. 12). Having examined the relevant exhibits as discussed by Mr. DiVirgilio and referenced in Appendix A to this decision, the tribunal finds that NYSED has satisfactorily explained the discrepancy between Ex. A-55 and Ex. A-66 for Francis Hollon. Again, the tribunal considers the $1.78 difference between the $25,744 identified in Ex. A-67-l9 and the $25,745.78 discrepancy identified in Appendix A to be de minimis.

For Karen Hoefer, Mr. DiVirgilio explained the discrepancy as follows:

As noted on attachment 1, the discrepancy between the effort listing in Appl. 55 and in Appl. Ex. 66 for Ms. Hoefer is $5,202. As noted above, $750 of that discrepancy represents a CSEA longevity award. This leaves a difference of $4,452 not accounted for. However, that effort was reported on the missing pages of Appl. Ex. 55. Attachment 9 to this affidavit represents a July 1990 run of this missing information. The entry on page 525 of Appl. Ex. 55 shows effort for line item 14925 at a cost of $11,931. This same effort is reported on page 395 of the 1990 run included here as attachment 9 [67-21]. The amounts before proration correspond except for a $2 variation. The difference in the cost of effort between Appl. Ex. 55 and attachment 9 of $701 reflects the portion of the bonus which had been loaded into the system by the time attachment 9 was run and was prorated over that effort. Page 369 of attachment 9 shows a separate entry for Ms. Hoefer for line item 14177 [67-15]. This entry shows a cost of effort of $4,502 which had been omitted from Appl. Ex. 55. This cost plus the remaining prorated $50 of the bonus clarify what had appeared to be a discrepancy between Appl. Ex. 55 and Appl. Ex. 66. Appl. Ex. 66 is fully accurate, it simply contained additional effort that had been omitted from Appl. Ex. 55.

Ex. A-67-3 (para. 11). Having examined the relevant exhibits as discussed by Mr. DiVirgilio and referenced in Appendix A to this decision, the tribunal finds that NYSED has satisfactorily explained the discrepancy between Ex. A-55 and Ex. A-66 for Karen Hoefer.

For Deborah Ames, NYSED acknowledges that it cannot fully explain the discrepancy between Ex. A-55 and Ex. A-66, but contends that the discrepancy probably arose because of changes in the prorating of PAR code 952 between the running of Ex. A-55 and A-66. Inasmuch as NYSED maintains the burden of persuasion as to the offset that it is seeking, the tribunal finds that NYSED has not satisfactorily explained the discrepancy between Ex. A-55 and Ex. A-66 for Deborah Ames. As a result, NYSED cannot offset the $707.23 of effort on VEA codes during the period not barred by the statute of limitations identified in Ex. A-66 for Ms. Ames.

To summarize, the tribunal will not allow an equitable offset for NYSED employees Deborah Ames and John Fabozzi. The tribunal will allow an equitable offset for the other seventeen of the nineteen employees for whom NYSED requests an equitable offset.

However, the Assistant Secretaries claim that because the amounts of particular salaries reflected in Ex. A-57 and A-66 are higher than those shown in Ex. A-55 for the same individuals for the same time period, the implication of NYSED's admission is that

the disallowed salary costs for which the Assistant Secretaries are seeking recovery should also be higher. The Assistant Secretaries conclude that NYSED is equitably estopped from claiming an offset based on the higher salary amounts in Ex. A-57 and A-66. Response of the Assistant Secretaries at 15-21.

In its reply at pages 8-13, NYSED argues that the Assistant Secretaries exaggerate the effect of bonuses and the prorating of PAR code 952 on the offset amount. NYSED contends that the Assistant Secretaries have not proven the elements of equitable estoppel, and that even if

estoppel did apply, it should remove only the bonuses from the offset amount, and not the entire claim for offset.

The cases cited by the parties provide the following points:

"Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 59 (1984). It is neither a claim nor a defense but is a means of precluding the assertion of a claim or defense against a party who has detrimentally relied on the conduct of the party asserting the claim or defense.

Olsen v. U.S., 952 F.2d 236, 241 (8th Cir. 1991).

The burden of proof is on the party claiming estoppel. See Lyng v. Payne, 476 U.S. 926, ---, 106 S. Ct. 2333, 2340, 90 L.Ed.2d 921, 932 (1986) (a party cannot prevail on an estoppel claim without at least demonstrating the traditional elements of estoppel); see also Heckler, 467 U.S. at 61, 104 S. Ct. at 2224. Therefore, to succeed on a traditional estoppel defense the litigant must prove (1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment.

U.S. v. Asmar, 827 F.2d 907, 912 (3rd Cir. 1987).

Therefore, in order for their equitable estoppel claim to succeed, the Assistant Secretaries must prove that NYSED misrepresented the nature of its effort charges when it submitted the PAR Effort Report contained in Ex. A-55, that the Assistant Secretaries reasonably relied upon this misrepresentation, and that they did so to their detriment. Since equitable estoppel is an equitable doctrine invoked to avoid injustice in particular cases, even if the Assistant Secretaries prove these elements, NYSED will be equitably estopped from claiming an offset only to the extent that its misrepresentations caused a detriment to the Assistant Secretaries.

Black's Law Dictionary defines "misrepresentation" as "[a] ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue stateuient of fact. An incorrect or false representation. . . ." BLACK'S LAW DICTIONARY 903 (5th ed. 1979). This language does not require the party making the statement to be aware of its untruth or to have intentionally misstated the facts. Thus a misrepresentation is simply "an untrue statement of fact."

NYSED has acknowledged that Ex. A-55 was not entirely accurate. At page 2 of its Supplemental Memorandum, NYSED states that "Appl. Ex. 66 is the most up-to-date, accurate reflection of effort." Furthermore, in his affidavit, Michael DiVirgilio stated as follows:

Based on my analysis of any discrepancies between Appl. Ex. 55 and Appl. Ex. 66, I have determined that the amount offered by NYSED for vocational education offset is accurate and that any discrepancies can be fully explained in all but one circumstance. In fact, Appl. Ex. 66 is the more accurate document because it includes the bonuses which had not yet been recorded in the PAR system as of the run date of Appl. Ex. 55, and because Appl. Ex. 55 is missing pages related to relevant units within NYSED.

Ex. A-67-3 (para. 13).

While the tribunal is unaware of any evidence indicating that NYSED intentionally misled the Assistant Secretaries when it submitted the PAR Effort Report contained in Ex. A-55, this exhibit was "an untrue statement of fact" and therefore constituted a misrepresentation, however innocent or unintentional.

The next element that the Assistant Secretaries need to prove is that they reasonably relied on this misrepresentation. Ex. E-1l contains an April 9, 1990 letter from the Assistant Secretaries to Thomas Sobol, the New York State Commissioner of Education. In this letter, the Assistant Secretaries request a number of items, including "evidence of the actual time devoted to vocational education activities by [NYSEDI employees . . . ." Ex. E-11-2. In response, Thomas E. Sheldon, NYSED's Executive Deputy Commissioner of Education, sent the Assistant Secretaries a letter dated May 7, 1990, in which he enclosed a number of items, including a copy of the PAR Effort Report. Ex. E-12-1. The first page of this report, page 2, lists a "run date" of November 10, 1986. Ex. E-12-4. 33 The first page of the PAR Effort Report contained at Ex. A-55 is identical in all respects, including the fact that it is also labelled npage 2" and also identifies a "run date" of November 10, 1986. For these reasons, it appears likely that the PAR Effort Report contained at Ex. A-55 is identical to the PAR Effort Report that was included with the May 7, 1990 letter from Mr. Sheldon of NYSED to the Assistant Secretaries, except for the possibility that the PAR Effort Report included with the May 7, 1990 letter may have included some divisions that were not included in Ex. A-55.

In any event, NYSED itself has acknowledged that Ex. A-55 did not include some bonuses that had been awarded to employees during the relevant time period but that "had not yet been recorded in the PAR system as of the run date of Appl. Ex. 55". Ex. A-67-3 (para. 13) (emphasis added). "The bonuses were later entered into the PAR system as part of the cost of effort for those employees." NYSED's Supplemental Memorandum at 2 (emphasis added); see also Ex. A-67-2 (para. 8). Given the identical run dates of the PAR Effort Report included with the May 7, 1990 letter and Ex. A-S5 (both list a run date of November 10, 1986), it appears certain that the PAR Effort Report included with the May 7, 1990 letter also did not include some bonuses that had been awarded to employees during the relevant time period.

In the August 27, 1990 notice of preliminary departmental decision (PDD) that is the basis of this proceeding, the Assistant Secretaries stated that their determination was based upon, among other things, the May 7, 1990 letter from Mr. Sheldon and "the complete PAR effort report" that was included with that letter. Ex. A-l-1; see also Ex. A-1-6. Based upon the foregoing evidence and analysis, the tribunal finds that the Assistant Secretaries reasonably relied upon a PAR Effort Report that they believed was complete but that in fact did not contain the bonuses and awards that are included in Ex. A-66.

The final element that the Assistant Secretaries need to prove is that they relied upon the representations contained in Ex. A-55 to their detriment. As previously discussed, the PAR Effort Report included with the May 7, 1990 letter, upon which the Assistant Secretaries relied in determining the amount of improper charges by NYSED's VEA funded employees, did not include certain bonuses and awards that are included in Ex. A-66. See Ex. E-11-2; Ex. E-12-1, 4;

Ex. A-i-i, 6; NYSED's Supplemental Memorandum at 2; Ex. A-67-2 (para. 8); Ex. A-67-3 (para. 13).

Given the evidence in this case, it is impossible for the Assistant Secretaries or the tribunal to determine whether or not, or to what extent, VEA-funded NYSED employees who had improper charges received bonuses and awards that had not yet been entered into the PAR system on November 10, 1986, and thus were not included in the PAR Effort Report included with the May 7, 1990 letter. Moreover, as NYSED itself points out at pages 8- 9 of its reply, even if this evidence was available, the Assistant Secretaries could no longer act upon it because the statute of limitations has run out. However, it is very unlikely that the PAR report omitted bonuses for only the 19 employees for whom NYSED seeks an equitable offset. In fact, in discussing a vacation exchange award given to NYSED employee John Fabozzi, Michael DiVirgilio states that 50% of this award was charged to a State funded line item, and that "[t]he other 50% was most likely allocated over a separate Federal line item for Mr. Fabozzi, which is shown on page 175 of Appl. Ex. 54, the PAR fund source report." Ex. A-67-2 (para. 9c). Given this admission by NYSED, and because NYSED's delay in entering these bonuses into the PAR system prevented the Assistant Secretaries from examining a fully accurate PAR Effort Report within the period not barred by the statute of limitations, the tribunal finds that the Assistant Secretaries relied upon the representations contained in the PAR Effort Report included with the May 7, 1990 letter to their detriment.

Therefore, because the Assistant Secretaries relied upon the misrepresentations contained in the PAR Effort Report submitted with the May 7, 1990 letter to their detriment, NYSED should be equitably estopped from recovering similar amounts in its offset request.

However, the tribunal rejects the Assistant Secretaries' argument that NYSED should be equitably estopped completely from offsetting the salaries of these employees. In Heckler, the Supreme Court stated the following:

Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear:

"If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act . . . the first person is not entitled

. . .

"(b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired. Restatement (Second) of Torts § 894(1) (1979).

Thus, the party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse, I' and that reliance must have been reasonable in

that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading. . . .

467 U.S. at 59 (footnotes omitted).

This language contains several key concepts, including the statement that "[e] stoppel is an equitable doctrine invoked to avoid injustice in particular cases." Therefore, the tribunal ashould use estoppel to avoid the injustice to the Assistant Secretaries created by their inability to ascertain all of the improper charges by VEA funded employees because some of these charges were not included in Ex. A-55. The appropriate way to do this is to similarly prevent NYSED from benefitting from the additional, proper charges to VEA programs by state funded employees contained in Ex. A-66 that were not included in Ex. A- 55 and would not have been even if those units or employees had been relevant at that time. However, the Assistant Secretaries were still able to ascertain most of the improper charges to VEA programs based upon Ex. A-55. Therefore, NYSED should also be able to claim an offset based upon the effort contained in Ex. A- 55, to the extent that this amount can be determined. If the tribunal were to disallow NYSED's offset claim altogether, this would create a new injustice, since estoppel applies only to "property or its value . . . acquired by the act." Here, the "act" is the omission of certain bonuses and awards from Ex. A- 55.

Therefore, equitable estoppel should remove only the additional amounts of effort contained in Ex. A-66 in the form of bonuses and awards 34 that were uot contained in Ex. A-55. 35 Equitable estoppel should not remove additional amounts of effort contained in Ex. A-66 that arose because of the missing pages in Ex. A-55, because those missing pages contained effort in units that were deemed irrelevant to the Assistant Secretaries' original claims, and therefore their omission created no injustice to the Assistant Secretaries that needs to be remedied by the use of estoppel. Moreover, as NYSED points out, the fact that these pages are missing from Ex. A-55 does not necessarily imply that these pages were missing from the PAR report that was supplied to the auditors.

In conclusion, the tribunal finds that the evidence justifies consideration of an equitable offset for the following employees in the following amounts:

Employee	A-66 Effort on VEA codes	Less Bonuses and Awards	Offset
Nancy Anderson	$619.43	0	619.43
Maureen Barton	4,295.77	0	4,295.77
Helen Branigan	27,460.46	0	27,460.46
Ira Certner	6,668.12	1,000	5,558.12
Joan Dedeo	10,809.13	750	10,059.13
Alice Dyer	1,635.83	0	1,635.83
Marianne Esposito	11,099.29	0	11,099.29
Karen Hoefer	10,024.05	750	9,274.05
Susan Holbrook	10,178.91	0	10,178.91

Francis Hollon	11,120.54	0	11,120.54
Richard Jones	31,314.30	0	31,314.30
George Palmer	22,219.17	0	22,219.17
Sterling Pierce	703.36	0	703.36
Herbert Ranney	1,226.58 (36)	1,000	226.58
Janet Stout	24,891.86	1,000	23,891.86
Gary Toth	326.57	0	326.57
Conrad Wettergreen	631.27	1,000	0.00
TOTALS	175,224.64	5,500	169,983.37
Fringe Benefits (total X .3092)			52,558.86
Indirect Costs (total X .194)			32,976.77
GRAND TOTAL			$255,519.00

Accordingly, the tribunal finds that the evidence justifies consideration of an equitable offset in the amount of $255,519.00 for VEA non-line item employees.

As noted above, during the oral argument held in Washington, D.C., the Assistant Secretaries indicated that they are not claiming that a matching violation would occur if the tribunal allowed an offset of VEA funds here. Oral Argument Tr. at 116. Nonetheless, in Florida, the Secretary and the EAB allowed the State an equitable offset because of its substantial overmatch of the VEA grant. Florida at 43, 51-54, 59. 37 For this reason, the tribunal has requested, and NYSED has supplied, evidence concerning the potential matching problem that might result from the allowance of an equitable offset here. Oral Argument Tr. at 146-154.

In its supplemental memorandum at pages 6-12, NYSED argues that the offset proposed by NYSED does not violate federal matching requirements. NYSED contends that the Department's precedents demonstrate that issues of matching and supplanting are not relevant to the application of equitable offset where those issues were not previously raised; that even if the issue of matching is considered, NYSED is still entitled to a substantial offset on the basis of the documentation previously submitted; and that NYSED is also entitled to an offset for its substantial overmatch of administrative funds. See also NYSED Reply at 2-8.

In response, the Assistant Secretaries assert that NYSED has failed to prove that it has a sufficient overmatch of the VEA funds in dispute to support its claim for an equitable offset without creating a matching violation under the Perkins Act. Response of the Assistant Secretaries at 4-12.

Both at the oral argument and in their briefs, the parties, as well as the tribunal, frequently discussed a hypothetical situation in which a State received $1,000,000 in federal funds and matched this with $1,000,000 of State funds. If $200,000 of the charges to the federal funds were then disallowed, the question arises as to what amount, if any, of the State funds the State can use to offset the disallowed federal funds. While NYSED argues that the New York and Florida

decisions held that the issues of matching and supplanting are not relevant to the application of equitable offset where those issues were not previously raised, NYSED contends that even if matching is held to be relevant, under the example given above, the State should be allowed to offset at least half of the $200,000 in disallowed charges to federal funds. NYSED describes this scenario as follows:

If an SEA receives one million dollars in Federal VEA funds, it must match that amount with one million dollars in State vocational education funds. If $200,000 in Federal funds is then disallowed, the State has in essence overmatched the allowable amount by $200,000. If 50% of that overmatch, or $100,000, is then moved to the Federal side of the equation, then the State has matched $900,000 in Federal funds with $900,000 in State funds, thus meeting all of its matching obligations.

NYSED Supplemental Memorandum at 9.

Although the Assistant Secretaries respond that "[i]n the scenario posed by New York, the State would fall short on both sides of the ledger", they do agree that:

Under the scenario posed by New York, it would be entitled at most to a partial offset. Although New York argues that shifting $100,000 from the State side of ledger to the Federal side creates a balance of $900,000 on both sides, New York still would be $100,000 short of the $1,000,000 of costs charged to the Federal grant and would have to return that amount.

Response of the Assistant Secretaries at 6 (note 3).

The tribunal agrees with the foregoing analysis. If a State received $1,000,000 in Federal funds for the VEA program, that State must match this with $1,000,000 in State funds. If $200,000 in federal funds are disallowed, the only way that the State can completely offset this amount is to find $200,000 in State funds spent on the VEA program from someplace other than the $1,000,000 of State matching funds. Otherwise, if the State transfers the $200,000 from the State matching funds to the federal side of the ledger, the State will have $1,000,000 in allowable federal costs, but only $800,000 in State matching funds, in violation of the matching requirement contained at 20 U.S.C. § 2462 (a) (1)a. Therefore, at most, the State could transfer $100,000 from the $1,000,000 in State matching funds to the federal side of the ledger. This raises the federal side to $900,000 ($800,000 after the disallowance plus the $100,000 from the State matching funds) and lowers the State matching funds to $900,000 (original $1,000,000 in State matching funds less the $100,000 transferred to the federal side). Since both the allowable federal costs and the State matching funds would now equal $900,000, the State will not be in violation of the matching requirement. Nonetheless, the State will still be required to return $100,000 in federal funds because only $900,000 of the $1,000,000 in federal funds that it received constitute allowable costs. See also Oral Argument Tr. at 129- 130.Therefore, absent an overmatch, the State can offset only half of the disallowed federal funds.

Here, the evidence submitted by NYSED does not demonstrate any overmatch. The Financial Status Report (FSR) found at Ex. A- 69-2 contains columns for "Programs/Functions/Activities," including a column entitled "State Administration." Corresponding to these columns are several

rows. One row lists "Non-Federal share of outlays," which identifies State expenditures on the corresponding program. Immediately beneath this row is a row listing "Federal share of outlays" for the corresponding program. In the State Administration column, the amount of State and federal expenditures are identical: $8,274,405. The final FSR for the 1985-86 program year contains these same amounts. Ex. A-69-8. Therefore, on its face, the FSR indicates that NYSED spent exactly the same amounts of State and federal funds on state adiinistration for the VEA.

Despite this, NYSED contends that it did in fact overmatch the federal expenditures on state administration because the column for "State Administration" on the FSR included not only expenses on state administration, but also expenses on "State leadership"; thus, the NState Administration" column constituted the twenty percent of the grant that the State could spend on statewide activities. 38 According to NYSED, this was a design flaw in the FSR, which NYSED contends was designed by the Assistant Secretary for the Office of Vocational and Adult Education (OVAE).

Nonetheless, assuming arguendo the truth of these assertions, NYSED has not pointed to any evidence indicating how much of the $8,274,405 of federal expenditures and the $8,274,405 of State expenditures in the State Administration column was actually spent on state administration versus how much was spent on state leadership. NYSED makes the assumption that because 20 U.S.C. § 2312 (a) (1) authorized NYSED to spend no more than seven percent of its federal basic grant allotment of $51,361,536 (39) (an amount equal to $3,595,306) on state administration, the State did not spend more than this amount of its federal grant on state administration, and spent the remainder of its federal grant on state leadership activities. While this theory is plausible, it is not proof, and in fact is contradicted by other evidence to be discussed infra.

Moreover, despite claiming that the federal funds were split between state administration and state leadership activities, NYSED also makes the unsupported assumption that it spent the entire $8,274,405 of State funds on state administration, even though NYSED has pointed to no evidence indicating that the entire $8,274,405 of State funds was spent exclusively on state administration. Based on these assumptions, NYSED then concludes that the State must have overmatched the federal funds spent on state administration by $4,679,097 ($8,274,405 less $3,595,308). In sum, because the evidence does not indicate how the $8,274,405 of State funds or the $8,274,405 in federal funds were spent, and in fact indicates simply that NYSED spent equal amounts of federal and State funds on "State Administration," 40 NYSED has not satisfied its burden of proving that it overmatched the federal funds spent on state administration.

Similarly, because the Assistant Secretaries have not demonstrated how much of the $8,274,405 of federal expenditures in the State Administration column was spent on state administration or state leadership, the tribunal cannot confirm the Assistant Secretaries' claim that NYSED violated the seven percent cap requirement contaizied in 20 U.S.C. § 2312 (a) (1) (1988).

Therefore, since NYSED maintains the burden of proving its claim for an equitable offset, the tribunal finds that NYSED did not overmatch the federal expenditures on state administration during the 1985-86 program year. As discussed supra, the available evidence indicates that the State exactly matched the federal expenditures on state administration. Therefore, NYSED can offset only half of the disallowed charges to federal funds by using a portion of its demonstrated

state expenditures on the VEA program to replace that one half of the disallowed expenditures of federal funds. The disallowed charges made against the federal VEA funds total $159,502.46. As a result, NYSED will be able to offset (or charge off) half of that amount, or $79,751.23, against a portion of the $255,519.00 in demonstrated State expenditures on the VEA program.

The tribunal concludes that an offset is required to achieve the aims of the governing statutes and regulations, as well as by the Secretary's decisions in Florida and New York. Therefore, NYSED will be credited with an equitable offset in the amount of $79,751.23 for non-line-item employees who worked on the VEA and Perkins grant programs.

b. EHA-B.

The Assistant Secretaries also allege that NYSED is only entitled to an EHA-B equitable offset of $143,251.77. They claim that NYSED should only receive an EHA-B equitable offset for employee effort incurred during the time period still at issue in this case, that NYSED is not entitled to an offset for employees who worked in the Rate Setting Unit, and that NYSED is not entitled to an equitable offset for employees who worked at the Rome and Batavia schools. Assistant Secretaries' Brief at 78-91.

NYSED argues that it is entitled to a credit for any amount of effort allocable to EHA-B that was not charged to EHA-B. NYSED Initial Brief at 53-58. NYSED claims that it is entitled to the full offset granted in the PDD, that employees who worked in the Rate-Setting Unit were not required to maintain time distribution records, and that employee salaries representing time and effort on administrative activities within the State schools for the Deaf and Blind in Rome and Batavia, New York may be used for offset. NYSED Reply Brief at 13-19.

In the PDD issued on August 27, 1990, the Assistant Secretaries disallowed $846,510 in EHA-B salaries. Ex. A-l-8-9. The Assistant Secretaries reduced their disallowance for EHA-B salaries by $218,705 in order to reflect the salaries during the period of the audit for employees who worked on activities that could have been, but were not, charged to the EHA-B as State administrative expenses. Ex. A-1-9-10. Thus, the remaining disallowance for EHA-B salaries was $627,805.

In the stipulation submitted by the parties, $292,298.15 of the claim for refund for EHA-B salary costs, plus $147,084.43 in fringe benefits and indirect costs, was removed from dispute because of the effect of the statute of limitations set forth at 20 U.S.C. § 1234a(k) (1988). Ex. E-2-2.

In their brief, the Assistant Secretaries argue that "because 34.5 percent of the improper salary charges identified in the PDD are barred from recovery, the equitable offset must be similarly reduced, from $218,705 to $143,251.77." Assistant Secretaries' Br. at 79. NYSED responds that "[t]he Assistant Secretary is not . . . within his authority to increase the amount of the disallowance without issuing a new PDD." NYSED Reply Br. at 14.

The Assistant Secretaries note that, under the doctrine of equity, " [a] party seeking equitable relief must be prepared to give in return that which is just and equitable." El Paso Natural Gas Co. v. Western Building Association, 675 F.2d 1135, 1142 (10th Cir. 1982). In addition, they

point out that in making its argument as to what the amount of the equitable offset should be for the VEA and Perkins Act employees in dispute, NYSED made the following statement:

New York generated through its PAR system a separate PAR effort report which incorporates only pay periods which were not barred by the statute of limitations. Appl. Ex. D. In the interest of fairness, New York referred to this limited amount of effort in calculating the amount available for equitable offset.

NYSED Initial Br. at 51.

Indeed, it is true that Ex. A-57 (formerly Appl. Ex. D), which was discussed in the section on non-line-item employees who worked on the VEA program, took into account only the pay periods that were not barred by the statute of limitations. Moreover, the tribunal agrees that in the interest of fairness, NYSED should be able to offset only the effort of employees during the pay periods remaining in dispute after the application of the statute of limitations.

Nonetheless, several factors prevent the tribunal from reducing the equitable offset granted in the PDD. First, the Assistant Secretaries themselves granted the offset for the entire audit period in the PDD. The regulations do not authorize the Assistant Secretaries to increase the amount demanded from the recipient in the PDD after the PDD has been issued, without issuing a new PDD. § 81.24(a) states as follows:

(a) If an authorized Departmental official decides that a recipient must return funds under § 81.20, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.

The remainder of § 81.24 requires the notice to state a prima facie case, explains what can constitute a prima facie case, and requires the notice to describe to and inform the recipient of specific information. The regulation lays out a specific process that must be followed, including written notice of the disallowance decision.

§ 81.25 provides for a reduction of the claim and states as follows:

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by--

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under ? 81.21, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR part 103; or

(c) Compromising the claim under ? 81.26, if applicable .

This regulation specifically provides for the Secretary or his designee to reduce the amount of a claim after the issuance of the PDD. It does not authorize the Departmental official to increase

the amount of the claim after the issuance of the PDD. Nor does any oather provision in the GEPA regulations authorize the Departmental official to increase the amount of the claim after the issuance of the PDD. Moreover, the reference to § 81.21 contained in § 81.25(a) authorizes the Departmental official to reduce the amount of the claim after the issuance of the PDD by "exclud[ing] any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under § 81.24." § 81.21(c). Therefore, while § 81.25 authorizes the Departmental official to reduce the amount of the claim after issuance of the PDD because of the effect of the statute of limitations, which the Assistant Secretaries have done in the instant case, neither § 81.25 nor any other GEPA regulation authorizes the Assistant Secretaries to increase the amount of the claim after issuance of the PDD, without issuing a new PDD.

Furthermore, as NYSED notes, § 81.27(d) authorizes the administrative law judge to permit the recipient to amend the application for review of a disallowance decision. The only regulation that authorizes the Departmental official to amend the PDD is § 81.28(b), and only after the administrative law judge has returned the PDD to the Departmental official after determining that the PDD does not meet the requirements of § 81.24.Such is not the case here.

The tribunal also notes the Order of the United States Court of Appeals for the Second Circuit in the prior New York case. In that case, New York appealed the EAB's ruling that New York had waived its claim for equitable offset through one of the stipulations in that case. The stipulation involved the effect of the statute of limitations on the case. The Second Circuit stated:

The statute of limitations was pertinent only to the "line-item" employees because these are the ones for which the Department of Education was asserting a claim against New York for a refund. The statute of limitations had no application whatever to the dispute concerning the "non-line-item" employees since these funds had never been charged to the Department of Education and could not be the subiect of a refund claim. The issue as to these funds was whether New York was entitled to recover them from the Department of Education by asserting them as an offset to the refund claim.

State of New York v. U.S. Dep't of Education, No. 88-4068, slip op.at 2-3 (2nd Cir. Nov. 21, 1988) (emphasis added). 41

For these reasons, the tribunal finds that NYSED is entitled to the full equitable offset that was granted in the PDD f9r non- line-item employees who worked on the EHA-B program, or $218,705. Ex. A-1-10. Since the PDD indicates that this amount was removed from the EHA-B liability before the indirect cost rate (.194) and fringe benefit rate (.3092) calculations were added, the total offset becomes $328,757.36.

NYSED also claims that it is entitled to an equitable offset for the salaries of employees who worked in the Rate Setting Unit and that those employees were not required to maintain time distribution records. The Assistant Secretaries contend that the salaries of these employees cannot be used for equitable offset because the PAR Effort Report did not allocate their effort to the EHA-B program.

As the Assistant Secretaries note, for a cost to be allowable under a grant program, it must be necessary and reasonable for proper and efficient administration of the grant program. 34 C.F.R. Part 74, Appendix C, Part I, C, 1, a (1985). The Assistant Secretaries also direct the tribunal to ? 76.731 (1985), which requires a State to keep records to show its compliance with program requirements.

The parties have acknowledged, through their respective proposed findings of fact and responses, as well as through their briefs, that the PAR Effort Report does not attribute any of the effort of any of the Rate Setting Unit employees to the EHA-B program codes 202-210. See Ex. A-55-254-255, 449; NYSED Reply Brief at 17; Assistant Secretaries' Brief at 83-84.

However, NYSED claims that these employees were not required to maintain time distribution records because such records are required only for employees who work on more than one grant activity. NYSED points to 34 C.F.R. Part 74, App. C, Part II, B, 10 (1986). The 1985 version of this regulation, which covers the audit period in issue, stated as follows:

Payroll and distribution of time. Amounts charged to grant programs for personal services, regardless 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 obiective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

34 C.F.R. Part 74, App. C, Part II, B, 10, b (1985) (emphasis added) .

The language states clearly that for employees whose salaries are chargeable to more than one grant program, appropriate time distribution records must be kept. The converse of this statement is that for employees whose salaries are chargeable to only one grant program, time distribution records do not need to be kept.

Therefore, if the salaries of the employees in the Rate- Setting Unit were chargeable to only one grant program, such as the EHA-B program, then NYSED did not have to keep time distribution records for these employees.

However, NYSED did in fact keep time distribution records for these employees. Ex. A-55-254-255, 449. The PAR Effort Report reveals that all of these employees, with the exception of Linda Wheat, charged the majority of their time to PAR code 000, with small charges to codes 997 and 999. All of Ms. Wheat's time was charged to code 997.

In the Initial New York decision, the EAB held that NYSED employees who worked on VEA programs and also charged their time to PAR codes 000, 950, 951, or 953 are justified and should be allowed. Initial New York at 4 (finding 4). Additionally, the EAB held that NYSED employees who worked on VEA programs and also charged their time to PAR codes 000 or 952 are justified and should be allowed. Initial New York at 5 (finding 5).

However, the EAB further held in the Initial New York decision that NYSED employees who split their work time between VEA programs and non-vocational activities and charged time to PAR code 000 were not justified because this code does not provide a separation or allocation of costs between VEA and non- vocational activities. The EAB required New York to refund these amounts. Initial New York at 6 (finding 12).

The net result of these findings in the Initial New York decision is that the salaries of NYSED employees who worked on VEA programs and charged their time to general codes (which include 000 and 949-952) are allowable. However, the salaries of NYSED employees who split their work time between VEA activities and non-vocational education activities and charged time to code 000 were not justified and had to be refunded.

As discussed supra in the discussion concerning equitable offset as it applied to the VEA and Perkins Act programs, NYSED is not entitled to an equitable offset as a matter of right. However, the tribunal can allow an equitable offset if the evidence, in the tribunal's view, justifies such consideration.

Therefore, the issue becomes whether the employees in the Rate-Setting Unit worked solely on the EHA-B program, in which case their salaries may be allowable as an equitable offset, or whether these employees split their work time between the EHA-B program and non-special education activities, in which case their salaries are not allowable as an equitable offset. The evidence consists of the PAR reports, NYSED's organization chart, the New York State Plan for the Education of the Handicapped, the performance evaluations for these employees, the payroll registers for these employees, and the testimony at the hearing.

As stated above, the PAR Effort Report reveals that all of these employees, with the exception of Linda Wheat, charged the majority of their time to PAR code 000, with small charges to codes 997 and 999. All of Ms. Wheat's time was charged to code 997. Ex. A-55-254-255, 449. Although technically a program code, code 000 ("all other State programs") was used to report time spent on any State program that had not been assigned its own unique program code. Ex. A-5-2. Charges to code 997 are allowed if the employee's other charges are found to be for EHA-B activities because such general charges are then found to be attributable to EHA-B programs. Code 999 is a miscellaneous code to which charges are allowed if the employee's other charges are found to be for EHA-B activities because such miscellaneous charges are then found to be attributable to EHA-B programs and should be allowed. Initial New York at 6 (finding 9).

The organizational chart contained in Ex. A-9 lists the Division of Interagency Cooperation and Support Services as a division within the Office for Education of Children with Handicapping Conditions (OECHC). The Rate Setting Unit is listed as an office within the Division of Interagency Cooperation and Support Services. The New York State Plan for the Education of the Handicapped is contained in Ex. A-25. The State Plan describes the Division of Interagency Cooperation and Support Services at page 91. The description identifies the division's various responsibilities. The final paragraph states as follows:

Fiscal responsibilities of the Division include budget reviews for all 4201 schools, reimbursement rate setting for in-state and out-of-state private schools for children with

handicapping conditions and administration of Federal funding programs under P.L. 89-313 and Education For All Handicapped Children Act, Part B.

Ex. A-25-91 (emphasis added) .

NYSED argues that this activity is consistent with ? 300.621(a) (4) (1985), which provides that the State educational agency may use EHA-B administrative funds for "Leadership services for the program supervision and management of special education activities for handicapped children[.]" The tribunal agrees that these duties appear consistent with the duties that are eligible for federal funding as listed in the cited regulation.

The performance evaluations for the employees in the Rate- Setting Unit are contained in Ex. A-49. These evaluations generally cover the audit period in question. The duties of these associate accountants, senior accountants, information processing specialists, and typists appear consistent with those of "reimbursement rate setting for in-state and out-of-state private schools for children with handicapping conditions", although they are not dispositive as to this issue.

At the hearing, NYSED submitted Exhibits A-59 and A-60, which were received by the tribunal without objection. Hearing Tr. at 54-55. Ex. A-59 consists of a letter from Thomas Neveldine of OECHC to William Tyrrell of the U.S. Department of Education, in which Mr. Neveldine requests that NYSED be allowed to make direct charges against its EHA-VIB 5% administrative funds for costs associated with the Rate Setting Unit and another office. Ex. A-60 consists of Mr. Tyrrell's response, in which he approves NYSED's request. While these two letters are dated May 1, 1990, and June 15, 1990, respectively, well after the audit period in issue, they nonetheless are indicative of the Department's treatment of costs associated with the Rate Setting Unit as allowable EHA-B administrative expenses.

Also at the hearing, Larry Gloeckler testified as follows:

The Rate Setting unit's job is to set rates for -- as part of the continuous services, we were required to have day programs and residential programs. In our State many of those were.operated by approved private programs, so that they would set rates for the amount of money that a school district could pay, if you would, or had to pay for a child who was placed by a school district in one of these settings through a publicly funded placement.

And their job was to assure that there was adequate funding available to carry out all the requirements, but that the money was spent within the requirements of EHA

Hearing Tr. at 232-233.

Mr. Gloeckler further testified that the Rate Setting unit was part of the administration of the State Plan. He testified that although some individuals in the Rate Setting unit assigned their effort to EHA-B codes (such as 203 or 204) while others assigned their effort to code 000, they were all carrying out the same responsibilities, and that these responsibilities related to the EHA-B. Mr. Gloeckler speculated that they used different codes according to the basis on which they

were paid; he stated that some employees were on State line items while others were on federal line items. Hearing Tr. at 234-236.

Thomas Hamel, who was the Chief of the Rate Setting unit, testified concerning the responsibilities of the unit as follows:

The Rate Setting unit received financial information from approved private schools, and we used that information to develop tuition rates for those private schools.

The tuition rates were the amount authorized for the school districts to place children in the private schools. It was the authorization to pay at that amount. Hearing Tr. at 297.

Mr. Hamel also testified that the responsibilities of the Rate Setting unit were related to administration of the State Plan for Education of the Handicapped Act. He further testified that he had supervisory authority over and personal knowledge of the responsibilities of all of the employees within the Rate Setting unit. He described the duties of the individual employees within the unit. According to Mr. Hamel, some employees used code 204 while others used code 000, depending on whether they were funded with State or federal money. Hearing Tr. at 297-306.

Furthermore, Michael Plotzker, who in 1986 was the supervisor of the Rate Setting unit, stated that the responsibilities of the unit related exclusively to the EHA-B. Hearing Tr. at 329-330.

Based upon all of the evidence, the tribunal finds that the employees within the Rate Setting Unit for whom NYSED seeks an equitable offset were engaged exclusively in EHA-B activities and that, therefore, their salaries should be allowed as an equitable offset to the disallowed EHA-B charges. The tribunal has verified the payroll registers contained in Ex. A-48 and finds that the amount of salaries for employees in the Rate Setting unit that NYSED may offset against disallowed EHA-B charges is $168,557.23. (42) When this amount is multiplied by the fringe benefit rate of 30.92 percent and the indirect cost rate of 19.4 percent, the total becomes $253,375.23.

Finally, NYSED claims that it should be allowed to use the salaries of administrative employees who worked at the State's schools for the blind and deaf as an equitable offset against other disallowed EHA-B salaries. The Assistant Secretaries assert that these schools were not engaged in administering the State's EHA-B plan, but were engaged in providing direct services to children with disabilities.

As discussed supra in the discussion concerning equitable offset as it applied to the VEA and Perkins Act programs, NYSED is not entitled to an equitable offset as a matter of right. However, the tribunal can allow an equitable offset if the evidence, in the tribunal's view, justifies such consideration.

The Assistant Secretaries argue, at pages 86-88 of their brief, that NYSED should not be allowed to offset employee effort for direct or support services, but only employee effort for EHA B administrative services. NYSED does not appear to dispute this, instead arguing that it is seeking

to offset only the salaries of employees who were in fact engaged in EHA-B administrative activities and is not seeking to offset the salaries of employees who were engaged in providing direct services.

According to 20 U.S.C. § 1411(c) (1), a State must distribute 75 percent of its EHA-B grant funds to local educational agencies (LEAs) and intermediate educational units in that State. The State may retain the other 25 percent of its EHA-B grant funds for administrative costs anda to provide support services and direct services. However, the State may use no more than five percent of its total EHA-B grant, or one-fifth of the 25 percent retained by the State, for administrative costs. The remaining 20 percent retained by the State must be used to provide support services and direct services. 20 U.S.C. § 1411(c) (2) (A) ; see also § 300.620 (1985).

§ 300.621 defines the allowable administrative costs as follows:

(a) The State educational agency may use funds under § 300.620 of this subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services .

(b) The State educational agency shall use the remainder of its funds under ? 300.620 in accordance with § 300.370 of Subpart C.

§ 300.621 (1985).

§ 300.621(b) requires the State to use the other 20 percent of the 25 percent of its EHA-B grant funds that it has retained for direct and support services as defined in § 300.370. That section states as follows:

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under § § 300.320-300.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 300.380-300.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

§ 300.370 (1985).

Therefore, the issue becomes whether the employees in the New York State Schools for the Blind and the Deaf were engaged solely in EHA-B administrative activities as defined in the quoted regulations, in which case their salaries may be allowable as an eq equitable offset, or whether these employees were in fact engaged in providing EHA-B direct or support services as defined in the quoted regulations, in which case their salaries are not allowable as an equitable offset. The evidence consists of the New York State Plan for the Education of the Handicapped, the performance evaluations for these employees, the payroll records, and the testimony at the hearing.

According to NYSED's organizational chart, contained in Ex. A-9, the Office for Education of Children with Handicapping Conditions contained several divisions, including the Division of State Operated Schools. This division contained two subdivisions, the New York State School for the Blind at Batavia and the New York State School for the Deaf at Rome.

The New York State Plan explains that the Office for Education of Children with Handicapping Conditions assists local public school districts by:

providing DIRECT SERVICES through the State-operated schools for the deaf at Rome, New York and for the blind at Batavia, New York, and through schools operated by other State agencies . . . .

Ex. A-25-17.

In its reply brief at page 19, NYSED contends as follows:

Although some employees at those Schools were clearly involved in direct services to students, those employees were not included in New York's calculation of allowable equitable offset. The employees whose salaries were included were involved with "Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children," 34 C.F.R. 300.621(a) (1), and with "Leadership services for the program supervision and management of special education activities for handicapped children." 34 C.F.R. 300.621(a) (4). Also included are employees who provide clerical support for those activities.

However, in its initial brief, NYSED had stated: "The New York State Plan for handicapped education makes it clear that the Rome and Batavia Schools are used by OECHC to provide direct services to districts[.]" NYSED Initial Br. at 56.

The performance evaluations for employees at the New York State School for the Blind at Batavia are contained in Ex. A-53. These employees occupied various positions, including superintendent, assistant superintendent, institution steward, payroll clerk, senior stenographer, senior account clerk, administrative aide, stenographer, stores clerk, telephone operator/typist, account clerk, and various department heads. These positions and the descriptions contained in the performance evaluations are mixed. Some appear consistent with the provision of direct or support services to handicapped children by the State, rather than administration of the annual program plan and for planning at the State level. For example, the descriptions for the various department heads denote significant direct and support services to handicapped students. However, other descriptions, such as those for the superintendent and the principal, denote primarily administrative duties. On balance, these performance evaluations are inconclusive.

The performance evaluations for employees at the New York State School for the Deaf at Rome are contained in Ex. A-51. These employees occupied various positions, including superintendent, senior stenographer, payroll clerk, senior account clerk, stenographer, tele-typist operator, stores clerk, principal, Alternative High School department head, elementary department head, and high school department head. Again, these positions and the descriptions contained in the performance evaluations are mixed. Some appear consistent with the provision of direct or support services to handicapped children by the State, rather than administration of the annual program plan and for planning at the State level. For example, the descriptions for the various department heads denote significant direct and support services to handicapped students. However, other descriptions, such as those for the superintendent and the principal, denote primarily administrative duties. On balance, these performance evaluations are inconclusive.

At the hearing, Lawrence Gloeckler testified that the Batavia and Rome schools had administrative responsibilities. When asked whether these administrative responsibilities could have been carried out in Albany, Mr. Gloeckler replied as follows:

A No.

Q And --

A Well, yes, they could have. The -- well, let's put it this way. Certain of the responsibilities involved people coming to Albany.

But generally no, I would say that it would have been impractical for them to have been in Albany, that they would need to be out there in those sites.

Q You are saying it would make more sense?

A Yes.

Q To keep the administrative functions closer to the school?

A Yes.

Hearing Tr. at 249-250. This testimony is not particularly convincing as to the issue of whether the administrative responsibilities of these two schools could have been carried out in Albany.

Mr. Gloeckler further testified that there was a division of responsibility between the administration and the direct delivery of services to individuals. Hearing Tr. at 250-251. Upon cross- examination, he did acknowledge that the primary mission of these two schools was the provision of direct services. Hearing Tr. at 260-261.

Michael DiVirgilio testified that individuals with administrative responsibilities at Batavia and Rome were not assigned PAR codes. Hearing Tr. at 267, 352.

Thomas Sawran, who both in 1986 and at the time of the hearing was the Assistant Superintendent for the State Operated Schools at Rome and Batavia, testified that his two offices were located in Rome and Batavia, New York, because it was "administratively and functionally more efficient and effective to have the offices located on site." Hearing Tr. at 341. He stated that he was familiar with all of the employees listed at pages 56-57 of NYSED's initial brief and that they carried out State administrative functions to implement the State Plan and that none of these employees provided direct services to handicapped students. Hearing Tr. at 342-3, 345. He also confirmed that, although these employees submitted biweekly timesheets, there are no records in the PAR system indicating how these employees spent their time. Hearing Tr. at 344. Mr. Sawran testified that these employees worked for the State Schools for the Blind and the Deaf, rather than for the State administration. He said that the schools worked for the State Education Department. Hearing Tr. at 345-347.

When asked what his job was, Mr. Sawran replied as follows:

A: Well, I oversee business operations services, which would include budgeting of finance, some personnel administration, labor relations activity.

And then I oversee institutional services, which would include the operation of the Food Service Department, the Laundry operation, the Housekeeping Staff.

In addition, I oversee the operation of physical plant, which consists of the Maintenance Department and the Stationary Engineers and Security function at both schools.

Q: And so these people, let us take Batavia, those people on that list, would they be working to accomplish some of these objectives that you just described that were your responsibilities?

A: Yes. Those and others, because they also supported other activities at the school.

Hearing Tr. at 348.

These employees appear to have been at least partially engaged in providing direct and support services to handicapped children, rather than exclusively engaged in "administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children," or "leadership services for the program supervision and management of special education activities for handicapped children," as NYSED alleges in its briefs.

The payroll records for the employees at the New York State School for the Blind are contained in Ex. A-52. At the oral argument held in Washington, D.C, counsel for the Assistant Secretaries stated that they do not dispute the numbers and the calculations contained in Ex. A-52. Oral Argument Tr. at 66-68.

The payroll records for the employees at the New York State School for the Deaf are contained in Ex. A-50. At the oral argument held in Washington, D.C, counsel for the Assistant Secretaries stated that they do not dispute the numbers and the calculations contained in Ex. A-50. Oral Argument Tr. at 66-68.

Based upon all of the evidence, the tribunal finds that the employees in the New York State Schools for the Blind and the Deaf for whom NYSED seeks an equitable offset were not engaged solely in EHA-B administrative activities as defined in the quoted regulations, but were in fact at least partially engaged in providing EHA-B direct cr support services as defined in the quoted regulations. Accordingly, their salaries are not allowable as an equitable offset.

c. Conclusion.

In conclusion, NYSED will receive an equitable offset of $79,751.23 against its liability of $159,502.46 for the VEA program, resulting in a net liability of $79,751.23.

For the EHA-B program, NYSED will receive an equitable offset of $582,132.59, consisting of a $328,757.36 offset for non-line-item employees who worked on the EHA-B program and a $253,375.23 offset for employees in the Rate Setting Unit who worked on the EHA-B program. Since the equitable offset of $582,132.59 is larger than NYSED's liability of $280,315.42, the offset completely extinguishes any liability on NYSED's part under this PDD for the EHA-B program.

V. CONCLUSIONS OF LAW.

A. NYSED has met its burden of proving the allowability of $54,980.05 of the $214,482.51 in disallowed VEA costs in dispute and $372,268.97 of the $652,584.39 in disallowed EHA-B personnel costs in dispute. However, NYSED has not met its burden of proof as to $159,502.46 of the disallowed VEA costs in dispute and $280,315.42 of the disallowed EHA-B personnel costs in dispute.

1. New York's Program Accountability Reporting (PAR) System is an appropriate system of time and accounting for charging personnel costs to Federal Programs.

2. As to each individual disallowed personnel cost, in some instances there has been adequate proof as to specific applicable PAR codes alone, or in combination with other PAR codes, or other external evidence sufficient to demonstrate that the disputed salary cost is allowable. However, in other instances, the total evidence available was not adequate to demonstrate that the disputed salary cost is allowable.

B. The doctrine of equitable offset will apply in this instance.

1. Since the issue of New York's PAR system and the doctrine of equitable offset have been decided in prior decisions of the EAB and the Secretary, the tribunal will follow those decisions to the extent that they are applicable to the present case.

2. NYSED can ofiset $79,751.23 of the disallowed vocational education costs by the amount of salaries previously paid from State fimds in order to reduce its audit liability.

3. NYSED should receive the full offset of $218,705 ($328,757.36 after including the indirect cost and fringe benefit rates) that was allowed in the PDD for EHA-B costs, despite the reduced period of time in dispute following the Stipulation oi the Parties.

4. NYSED should be credited with $253,375.23 for salaries in the Rate Setting Unit as an equitable offset against other disallowed EHA-B salaries. NYSED cannot use the salaries of administrative employees who worked at the State's schools for the blind and deaf as an equitable offset against other disallowed EHA-B salaries.

VI. DETERMINATIONS AS TO THE PROPOSED FINDINGS OF PACT AND CONCLUSIONS OF LAW.

NYSED and the Assistant Secretaries filed briefs and .proposed findings of fact and conclusions of law. Such proposed findings and conclusions have been considered fully and, except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. ORDER.

Based on the foregoing findings of fact and conclusions of law, NYSED is hereby ORDERED to repay the United States Department of Education the sum of $79,751.23.

John F. Cook
Chief Administative Law Judge

Issued:April 21, 1994
Washington, D.C.

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1 Unless indicated otherwise, all citations as to Code of Federal Regulations will be from 34 C.F.R.

2 The Assistant Secretaries' exhibits will be listed as Education exhibits (hereafter, Ex. E-#). Applicant has marked its exhibits as "Applicant's Exhibit #". For the purposes of this decision only, Applicant's exhibits will be referred to as "Ex. A-#".

In their June 19, 1992, Stipulation as to the Authenticity and Admissibility of Exhibits, both parties indicated that they had no objections to the authenticity or to the admission of Exhibits A-i through A-58 and Exhibits E-1 through E-10.

Additionally, Exhibits E-1 through E-10 were admitted at the evidentiary hearing without objection. Hearing Tr. at 77. Exhibits E-l1 through E-14 were submitted with the Response of the Assistant Secretaries to New York's Supplemental Memorandum. In its reply, NYSED stated that it had no objections to the acceptance of these exhibits. Reply of New York to the Assistant Secretaries' Response to Supplemental Memorandum at 2 (note 1). Therefore, Exhibits E-1l through E-14 will be accepted into evidence.

Exhibits A-I through A-66 were admitted at the evidentiary hearing without objection. Hearing Tr. at 54-55, 68-69, 133, 166, 184, 201. Exhibits A-67 through A-69 were submitted with NYSED's Supplemental Memorandum. In their response, the Assistant Secretaries did not indicate any objection to these exhibits. Therefore, Exhibits A-67 through A-69 will be accepted into evidence.

3 These findings of fact are based upon stipulations contained in the joint statement filed by the parties.

4 The base amount of disallowed salaries, $434,130.12 does not yet consider the credit to NYSED for the offset of $218,705 noted in the PDL.

5 These facts are true as to the period of time involved in this proceeding, which relates to fiscal year April 1, 1985 through March 31, 1986.

6 Hereinafter Initial New York.

7 The Assistant Secretaries, in their brief, concede that New York's PAR system satisfies the EDGAR requirements and provides both a suitable method of cost allocation and (where required) a time distribution record. See Assistant Secretaries' Brief at 21, note 15 ("the Assistant Secretaries agree that the Initial New York decision is controlling as to the allowability of the salaries of employees attributed to specific PAR codes . . .. ").

8 Hereinafter, New York Remand.

9 In Robi v. Five Platters. Inc., 838 F.2d 318 (9th Cir. 1988), at 321 n. 2, the Ninth Circuit instructs as follows:

We prefer to use these terms [claim preclusion and issue preclusion] rather than "merger," "bar," and "collateral estoppel." See Americana Fabrics. Inc. v. L & L Textiles. Inc., 754 F.2d 1524, 1529 (9th Cir. 1985). The Supreme Court has encouraged the use of claim preclusion and issue preclusion rather than res judicata (as merger or bar) and collateral estoppel, respectively. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1, (1984).

10 For a more complete discussion of issue preclusion, see Career at 24-25.

11 For a discussion of the ability of administrative agencies to take judicial or "official" notice, see 2 AM. JUR. 2d Administrative Law § 385 et seg. (1962).

12 Because some of the PAR Reports contain computations in terms of cents and others do not, some of the amounts in the PAR Effort Report may not add up exactly due to rounding errors.

13 For a discussion of the ability of administrative agencies to take judicial or "official" notice, see 2 AM. JUR. 2d Administrative Law § 385 et seg. (1962).

14 This assumes, arguendo, the truth of NYSED's assertion that "The [BOCES] program is considered to be 50% vocational education related . . . " See NYSED Initial Brief at 25.

15 The comment to § 302.46 notes that children counted under the EHA-B program cannot be counted under the Chapter 1 Handicapped program. The comment further states as follows:

However, handicapped children who receive special education and related services from a State agency directly responsible for providing them with free public education may be counted under this Part or under Part B. In addition, handicapped children coun counted or eligible to be counted under this part may be served with Part B funds, if all requirements of Part B are met.

Thus, while some children may be counted under either the EHA-B or Chapter 1 Handicapped programs, and in fact may be counted under Chapter 1 Handicapped and receive EHA-B funds as long as they were not counted under the EHA-B program, they cannot be counted under both programs for the purpose of receiving a grant under both programs.

16 NYSED could not locate the performance evaluation for Edward MacDonald. NYSED Initial Brief at 33, note 21.

17 These numbers exclude the amounts conceded by NYSED. Specifically, NYSED concedes that $2,420.60 of the salary of Janice Pecora was properly disa2lowed, $67.80 of the salary of Ruth Strait was properly disallowed, and $5,256.81 of the salary of Deborah Ames was properly disallowed. See NYSED's Initial Brief at 35, note 24, and Appendix D.

18 See discussion supra as to the allowability of charges to code 997.

19 See discussion supra as to allowability of charges to code 999.

20 See discussion supra as to allowability of charges to code 997.

21 NYSED's figure of $13,037.99 is derived by taking half of the $25,505.49 that Mr. McNamera charged to code 000 during the period not barred by the statute of limitations ($12,752.74), and adding the $40.75 and $244.50 that Mr. McNamera charged to EHA-B codes 202 and 203, respectively. See Ex. A-56-6-7.

22 For example, the total amounts of charges within the period not barred by the statute of limitations in Ex. A-56-6-7 are as follows:

Code	Amount	Conceded by NYSED	Conceded by Ass't Sec.	Amount Disputed
000	$25,505.49	12,752.75		12,752.74
180	122.25	122.25		
184	20.37	20.37		
186	204.05	204.05		
202	40.75		40.75	
203	244.50		244.50	
TOTAL	$26,137.41	13,099.42	285.25	12,752.74

The total amount of charges within the period not barred by the statute of limitations in Ex. A-56-6-7 is $26,137.41, whereas the stipulation filed by the parties listed this amount as $26,138.22. Ex. E-2-5.

23 The tribunal is not in any way suggesting that the New York Remand was incorrectly decided by the EAB and the Secretary, but is merely pointing out that the Office of Administrative Law Judges must follow the precedent set out by the Secretary and, therefore, does not have the authority to question the merits of basing the use of equitable offset upon the federal court decisions cited by the EAB

24 In Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113, 119 (1960) , the court discussed dictum as follows:

Where a decision rests on two or more grounds, none can be relegated to the category of "obiter dictum." Woods v. Interstate Realty Co., 1949, 337 U.S. 535, 69 S. Ct. 1235, 1237, 93 L. Ed. 1524. Nor is a decision of the court on a certain point dictum, merely because something else was found in the end which disposed of the whole matter. Florida Cent. R. Co. v. Schutte, 1880, 103 U.S. 118, 143, 26 L. Ed. 327. The fact that the same result may be reached by either of two rulings of a court does not make either "dictum." Trustees of Phillips Exeter Academy v. Exeter, 1940, 90 N.H. 472. 27 A.2d 569, 577. See also Commonwealth v. Almeida, 1949, 362 Pa. 596, 603, 68 A.2d 595, 12 A.L.R.2d 183.

In Gillespie v. United States Steel Corporation, 321 F.2d 518, 530 (6th Cir. 1963), the court held that where a matter is before a court and is argued before the court and is passed upon by the court, the language in the opinion in respect thereto is not dicta.

25 It should also be noted that the official record in the Florida case indicates that the Assistant Secretaries involved therein, in arguments filed as Initial Comments as to the EAB initial decision, urged the Secretary to vacate the second portion of the EAB decision concerning the offset issue as unnecessary and immaterial to the decision, in event the Secretary upheld the first part of the EAB decision. The EAB decision was permitted, in all respects, to become the final decision of the Department without the deletion urged by the Assistant Secretaries .

26 The Assistant Secretaries acknowledge as much in the section of their brief in which they discuss the amount of EHA-B equitable offset to which NYSED is entitled. In arguing that the amount of EHA-B equitable offset should be reduced by considering only the period remaining after application of the statute of limitations, the Assistant Secretaries state: "It also relates more closely to the harm to the Federal interest for the disallowed costs, as the harm from those costs certainly is not lessened by offset costs from an earlier period." Assistant Secretaries' Br. at 82. This language implies that the harm to the Federal interest for disallowed costs is directly related to, and is lessened by, offset costs from the same period.

27 During the oral argument held in Washington, D.C., the Assistant Secretaries indicated that they are not claiming that a matching violation would occur if the tribunal allowed an offset of VEA funds here. Oral Argument Tr. at 116.

28 For example, counsel for the Assistant Secretary for OVAB argued as follows:

We're saying that there can only be one set of allowable costs under a federal grant. And if the costs in dispute . . . are disallowed, and if the state is permitted to come up with other allowable costs, they have got to prove those costs. They then have the burden of approving allowable costs to this grant . . . But with respect to the VEA, to now consider that those state funded costs would be the allowable federal costs would put federal money where state money had been. . . .

Oral Argument Tr. at 110-111.

29 The period not barred by the statute of limitations consists of half of pay period 18, and all of pay periods 19-26 and 1-7.

30 Employees who used no codes other than 000, VEA codes, or general codes are denoted by asterisks.

31 These ten employees are Nancy Anderson, Maureen Barton, Helen Branigan, Alice Dyer, Marianne Esposito, Susan Holbrook, Richard Jones, George Palmer, Sterling Pierce, and Gary Toth.

32 These six employees are Ira Certner, Joan Dedeo, John Fabozzi, Herbert Ranney, Janet Stout, and Conrad Wettergreen.

33 In footnote 16 of their response, the Assistant Secretaries state that the page contained at Ex. E-12-4 is the first page of the PAR Effort Report that was included with the May 7, 1990 letter

from Mr. Sheldon. In its reply, NYSED did not dispute this assertion. Having no reason to question the accuracy of this assertion, the tribunal will assume that it is correct.

34 The tribunal is aware of the parties' arguments concerning the effect of changes in the method by which PAR code 952 was prorated. However, as NYSED notes, the EAB allowed charges to code 952 for employees who also worked on VEA programs. Initial New York at 5 (finding 5). Moreover, out of the 19 employees for whom NYSED seeks an offset, Appendix A demonstrates that the changes in the prorating of code 952 had no significant impact on all but one employee, Deborah Ames. In fact, for unexplained reasons, Ms. Ames' effort on state funded line items actually decreased after the changes in the prorating of code 952 (amount in Ex. A-66 is less than amount in Ex. A-55). While these changes may have increased the cost of effort for Carol Lynn Donnelly, whom NYSED removed from its claim for offset, the overall effect of these changes on all employees is unclear. Nonetheless, these changes had virtually no effect on the cost of effort for the other employees for whom NYSED requests an equitable offset.

In any event, as discussed supra, the tribunal has disallowed Ms. Ames' charges from NYSED's offset claim. Therefore the changes in the prorating of code 952 had no significant impact on the employees for whom NYSED will receive an offset, and thus NYSED is not unjustly benefitting in any way from these changes, nor have the Assistant Secretaries suffered any detriment. As a result, equitable estoppel does not apply.

35 In theory, NYSED should be equitably estopped only from offsetting the portion of these bonuses and awards that was actually charged to VEA codes during the period not barred by the statute of limitations. However, because this amount is impossible to determine from the current record in this case, because it is also impossible to determine the amount of additional improper charges by VEA funded employees for which the Assistant Secretaries could have sought recovery, because equitable estoppel is a doctrine invoked to avoid injustice in particular cases, and because NYSED maintains the burden of proving its offset claim, the tribunal will deduct the amount of these bonuses and awards for each employee from the amount allowed in equitable offset for that employee. As the Supreme Court stated in Heckler, "a hallmark of the doctrine [of equitable estoppel] is its flexible application . . . . " 467 U.S. at 59.

36 The tribunal notes that Herbert Ranney used no codes other than VEA codes, 000, and general codes. As a result, NYSED could have requested an additional $25,921.38 in offset for Mr. Ranney's efforts.

37 For example, the EAB stated: "Since Appellant charged $3,620,164 to state funds for VE administration and $3,044,203 to federal funds, an overmatch of $575,961 resulted. . . . One half of this overmatch, or $287,980, could have been charged to the federal grant . . . Florida at 52 (emphasis added). The EAB further stated: "This Panel concludes that the amounts available for overmatching offset, if such is allowed, are as claimed by Appellant as discussed above in this section." Florida at 54 (emphasis added). The EAB concluded that "Appellant is entitled to an equitable offset . . . for FY 1986, in the amount of $305,539, the part of the overmatch . . . available under the Perkins Act." Florida at 59. The Secretary of Education allowed this decision to become the final decision of the Department.

38 See 20 U.S.C. § 2323(b) (4) (1988).

39 See Ex. A-68.

40 It is also interesting to note NYSED's claim at page 11 of its Supplemental Memorandum that $4,679,097 of the $8,274,405 in federal funds "represents the universe of allowable state-wide activities, including State administration and other costs such as technical assistance, that were not required to be matched by the State." Yet if the State was not required to match these funds, then it seems unuasual that the total of these federally- funded amounts plus the federal funds authorized to be spent on state administration under 20 U.S.C. § 2312(a) (1) was exactly matched by the $8,274,405 in State funds spent on "State Administration." Under the scenario proposed by NYSED, the State just happened to exactly match the $8,274,405 of federal funds it received, even though it was required to match only the $3,595,308 of federal funds that NYSED claims it spent on state administration. As NYSED itself states, "NYSED was simply not required to match Federal expenditures on statewide activities and, in fact, no state would have made such a match without a specific obligation. . . . NYSED would not have expended this large amount on a match that was not required." NYSED Reply at 7 (footnotes omitted). Therefore, the more likely conclusion is that NYSED was matching the $8,274,405 in federal funds spent on "State Administration" as listed in Ex. A-69-2.

41 The slip opinion contained the following notation at the end:

This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

It is unclear as to whether the present case is an "unrelated case". It is not the identical case that was facing the Second Circuit, but it does involve the same parties and essentially the same issues, including New York's claim to an equitable offset for non-line-item employees. Therefore, the tribunal finds the instant case to be sufficiently related to confer probative value on the Second Circuit's slip opinion.

In any event, even if the Second Circuit's statements in the prior New York Order are not controlling here, the reasoning utilized is equally applicable in the instant case.

42 In addition, at the oral argument held in Washington, D.C., counsel for the Assistant Secretaries indicated that he did not dispute the numbers contained in Ex. A-48. Oral Argument Tr. at 66-67.