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

APPLICATION OF THE
DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Applicant.

Docket No. 91-29-R

Recovery of Funds Proceeding

ACN: 03-98200

DECISION

Appearances:
Polly H. McElroy, Esq., Cecelia E. Wirtz, Esq. for the District of Columbia Public Schools.

Effie E. Forde, Esq., Office of the General Counsel, for the Assistant Secretary for Elementary and Secondary Education, United States Department of Education.

Before:
John F. Cook, Chief Administrative Law Judge.

I. PROCEDURAL BACKGROUND.

On March 28, 1991, the United States Department of Education through the Assistant Secretary for Elementary and Secondary Education (**Education**) issued a preliminary departmental decision (**PDD**) finding that the District of Columbia Public Schools [also referred to as the State educational agency (SEA) or (DCPS)1 improperly charged $97,191 to Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801-3808 (**Chapter 1**), repealed by Act of Apr. 28, 1988, Pub. L. No. 100- 297, tit. I, § 1003(a), 102 Stat. 293. (1)

An audit report was issued on September 14, 1990. The auditors made a finding that DCPS improperly charged the cost of the purchase of a "WANG minicomputer" to Chapter 1. (2) In the PDD, Education affirmed the conclusions of the auditors. DCPS filed an Application for Review on May 2, 1991. (3)

Both parties requested mediation which was carried out by the Federal Mediation and Conciliation Service. However the mediation efforts were unsuccessful.

Thereafter the parties filed briefs, motions, exhibits, and a Joint Memorandum of Stipulations and Issues of Fact and Law. The parties have not requested either an evidentiary hearing or an oral argument.

II. ISSUES.

A.Whether DHS validily expended Chapter I funds for the cost of a WANG minicomputer.

l. Whether the cost of the WANG minicomputer was either a proposed budget expenditure set forth in the 1987 grant application or an amendment thereof or an expenditure occurring directly as a result of a project activity proposed in the grant application.

2. Whether DMS amended its 1987 grant application to include a budget expenditure for the purchase of a minicomputer system.

3. Whether DHS received verbal approval from its State educational agency to charge $97,191 to Chapter 1 for the purchase of the WANG minicomputer.

4. If DMS received verbal approval from its State educational agency to charge $97,191 to Chapter 1 for the purchase of the WANG minicomputer, does that comply with the approval requirements of 34 C.F.R. § 204.22(a) (1986)?

5. Whether the availability of unspent or "carryover" funds from a Chapter 1 project activity conducted in a previous Federal fiscal year alters the Chapter 1 project application requirements of 34 C.F.R. § § 203.11 and 204.22 with regard to how the funds may be spent in a subsequent fiscal year.

6. Whether retroactive approval by an SEA of a subgrantee's application for use of Chapter 1 funds is permissible under 34 C.F.R. § § 204.22(a) and 203.11(b) (1986). B.If the disallowance decision is upheld, does the recovery of $97,191 represent the proportionate harm caused to federal interest(s)?

III. EXHIBITS.

A. Respondent's Exhibits.

Exhibit R-1. A copy of the Education's preliminary departmental decision dated March 28, 1991, with pages 1-4 of Education's auditors' findings and recommendations attached.

Exhibit R-2. A copy of the DCPS' application for review dated May 6, 1991, challenging Education's conclusions contained in its preliminary departmental decision.

Exhibit R-3. A copy of a "District of Columbia Board of Education Action Sheet," dated October 15, 1986.

Exhibit R-4. A copy of a September 22, 1986, letter sent by Floretta Dukes McKenzie, Superintendent of Schools for DCPS, to the District of Columbia Board of Education. Attached to the letter is a copy of the District of Columbia's "Department of Human Services' application for a Chapter 1 Grant under the Educational Consolidation and Improvement Act of 1981 for the

FY 1987 program for Neglected and Delinquent Children at the Receiving Home in Washington, D.C., and Oak Hill in Laurel, Maryland. "

Exhibit R-5. A copy of a July 16, 1986, letter sent by Floretta Dukes McKenzie, Superintendent of Schools for the District of Columbia, to David Rivers, Director of the District of Columbia's Department of Human Services.

Exhibit R-6. A copy of a two page memorandum captioned "JUSTIFICATION FOR WANG VS COMPUTER."

Exhibit R-7. A copy of a July 10, 1987, letter sent by Mary Jean LeTendre, Director of Compensatory Education Programs for the U.S. Department of Education, to Floretta Dukes McKenzie, Superintendent of Schools for the District of Columbia. Included in this exhibit is four pages of a report issued by the U.S. Department of Education reviewing DCPS' Chapter 1 programs during May 20 through May 28, 1987.

Exhibit R-8. A copy of a February 5, 1988, letter and an attached progress report sent by Floretta Dukes McKenzie, Superintendent of Schools for the District of Columbia, to Jean LeTendre, Director of Compensatory Education Programs for the U.S. Department of Education.

Exhibit R-9. A copy of a September 4, 1991, letter sent by Marion D. Williams, Executive Secretary for the District of Columbia Board of Education, to Dr. Franklin L. Smith, Superintendent of Schools for the District of Columbia.

B. Assistant Secretary's Exhibits.

ED Ex. l. A copy of Education's audit report dated September 14, 1990.

ED Ex. II. A copy of Education's audit work papers pages "1/7 - 7/7." This exhibit is the same as Respondent's Ex. R-7 except the attached report has five pages instead of four.

ED Ex. III. A copy of Education's audit work papers including audit work paper "B-4-5."

ED Ex. IV. A copy of Education's audit work papers including audit work paper "B-4-7."

ED Ex. V. A copy of Education's audit work papers including audit work paper "B-4-10."

ED Ex. VI. A copy of Education's audit work papers including audit work paper "B-4-11."

ED Ex. VII. A copy of Education's audit work paper "D-3-1."

ED Ex. VIII. A copy of Education's audit work papers including audit work paper "E-3-1."

ED Ex. IX. A copy of Education's audit work papers including audit work paper "E-3-2."

C. Ruling as to Exhibits.

In its Motion to Strike, dated February 18, 1992, (Motion to Strike I), Education objects to the admissibility of two exhibits submitted by the District of Columbia: Exhibit R-6 in its entirety and Exhibit R-8, pages 7 through 14. After pointing out that Exhibit R-6 is identical with pages 13 through 14 of Exhibit R-8, Education states that Exhibit R-6 is captioned "JUSTIFICATION FOR WANG VS COMPUTER," but the document is neither signed nor dated and is not on the official stationary of any agency of the District of Columbia. Motion to Strike I at 1; Education Initial Br. at 4n.5 & 12-13. Consequently, according to Education, the document "should not be allowed into the record as proof that the purchase of the computer was approved." Motion to Strike I at l.

In addition, Education contends that pages 7 through 12 of Exhibit R-8 "should not be admitted into the record" since those pages "are also unsigned and undated." Pages 7 through 10 (4) are copies of a Federal form captioned "Annual Survey of Children in Institutions for Neglected or Delinquent Children or Children in Adult Correctional Institutions, Needed to Implement Chapter 1 of the Education Consolidation and Improvement Act of 1981." The form contains student daily attendance data for Federal fiscal year 1987, but is not signed or dated. Page 12 is a copy of a document containing monthly totals of the average daily attendance of students at DHS' Oak Hill Youth Center. The form is not printed on stationary that contains a letterhead and is unsigned. Pages 13 and 14, as noted above, are identical with Exhibit R-6.

In its second Motion to Strike, dated April 3, 1992, (Motion to Strike II), Education objects to the admissibility of the Affidavit of Frances Watts-Henry filed with the tribunal on March 16, 1992, as Exhibit A attached to the District of Columbia's Opposition to Motion to Strike I. Education argues that:

[p]ursuant to the Prehearing Order dated November 14, 1991 and the Order for Extension of Time dated December 19, 1991, the applicant was required to submit all exhibits its counsel sought to admit by January 17, 1992.

Mot. to Strike II. According to Education, the affidavit should not be admitted into evidence because its submission on March 16, 1992 was untimely.

Opposing Education's Motion to Strike I, the District of Columbia contends that its Exhibits R-6 and R-8 are authentic documents and that the authenticity of the documents is substantiated by the Affidavit of Frances Watts-Henry. Specifically, the District of Columbia argues that:

Exhibit R-6 [references to Exhibit R-6 are also references to Exhibit R-81 was submitted to the SEA (Applicant) by the subgrantee (DM5), at the request of the SEA, following the SEA giving the subgrantee verbal approval for the use of the carryover funds involved in the instant disallowance proceeding.

As clearly stated in the attached Affidavit of Frances Watts-Henry (Exhibit A), Exhibit R-6 is unquestionably authentic. Furthermore, as stated in the attached affidavit, Exhibit R-6 was prepared between November, 1987 and February, 1988 as part of the larger package to be forwarded to the U.S. Department of Education.

DC Opp. to Mot. to Strike I. In addition, the District of Columbia contends that Education's argument, that the Affidavit of Frances Watts-Henry, itself, should not be entered into the record, is "specious and unfounded." DC Opp. to Mot. to Strike II. According to the District of Columbia:

[t]he affidavit in question was submitted as an attachment to Applicant's timely filed Opposition to Motion to Strike. But for the Secretary's original Motion to Strike (filed on February 18, 1992), there would be no need for Applicant to file its opposition to which Ms. Watts-Henry's affidavit is attached.

Id.

Education's first Motion to Strike, dated February 18, 1992, is DENIED. Strict adherence to the Federal Rules of Evidence in administrative proceedings is generally disfavorded. Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951). The Department of Education has not adopted the Federal Rules of Evidence. 34 C.F.R. § 81.15 (1992). Instead, Section 81.15(a) requires that the tribunal only accept evidence that is:

(1) Relevant
(2) Material;
(3) Not unduly repetitious; and
(4) Not inadmissible under § 81.13 or § 81.14.

Consequently, the requirements for the admissibility of evidence in this proceeding are less onerous than those found in the Federal Rules of Evidence. Unless the governing statute or regulations provide otherwise, evidence, which would be inadmissible under the Federal Rules, may be admitted into evidence in an administrative proceeding if the evidence is relevant, material, and not unduly repetitious. 5 Woolsey v. National Transp. Safety Board, 993 F.2d 516, 519 (5th Cir. 1993). Significantly, the questions of admissibility and probative weight are two entirely different issues. The admission of evidence does not carry along with it any indicia of how much probative weight the tribunal may give to the evidence.

In the case at bar, Education argues that the District of Columbia's Exhibit R-6 and the relevant pages of Exhibit R-8 are not authentic documents; and therefore, should be excluded from evidence. According to Education, the documents are either unsigned or do not contain a seal or letterhead purporting to be that of the District of Columbia or a political subdivision thereof. However, even under the Federal Rules of Evidence, only documents that should be self-authenticating are expected to sufficiently establish authenticity for purposes of admissibility without extrinsic evidence to that effect.6 FED. R. EVID. 902. Thus, under the Federal Rules, the District of Columbia's exhibits could not be excluded from evidence at this stage for want of authenticity. The Federal Rules permit a party attempting to enter a nonself-authenticating document into evidence to subsequently prove, when challenged, that the document is authentic through the use of extrinsic evidence. This is so because the Federal Rules have recognized that extrinsic evidence of authenticity may be sufficient to prove that a document, lacking a signature, seal or letterhead, is what its proponent claims. FED. R. EVID. 901. More important, in this case,

the conditions precedent to the admissibility of evidence are significantly less restrictive than under the Federal Rules.

Significantly, Education does not argue, nor could it, that Exhibits R-6 and R-8 are irrelevant or immaterial. Undoubtedly, Education's interest in excluding the exhibits from the record emanates from its recognition that the exhibits are highly material to the issue of whether the District of Columbia duly amended its 1987 Chapter 1 grant application to include an expenditure for the WANG minicomputer. Under 34 C.F.R. § 81.15, the tribunal may admit any evidence that is relevant and material and not unduly repetitious or related to mediation proceedings or settlement negotiations. Accordingly, Exhibit R-6 and Exhibit R- 8 are admitted into evidence in their entirety because both exhibits meet the standards of relevance and materiality as required under 34 C.F.R. § 81.15.

In its second Motion to Strike, Education argues that DCPS's filing of the Affidavit of Frances Watts-Henry is an untimely filing; and therefore, should be barred from admission into evidence. Under 34 C.F.R. § 81.6 (1992), the administrative law judge has a duty to ensure that the presentation of evidence occurs in an orderly and fair manner. In doing so, the administrative law judge sets a briefing schedule designating the dates for the timely submission of briefs and documentary evidence in the form of exhibits. Here, the tribunal's Prehearing Order of November 14, 1991, required, in relevant part:

On or before December 18, 1991, Applicant shall file two copies of its' initial brief. Accompanying such brief will be:

a. Any request for a hearing.
b. A list of exhibits to be offered in evidence by such party. Two legible copies of proposed exhibits will accompany the submission.
c. A list of witnesses and a statement of the nature and scope of the expected testimony and the time needed for direct examination.

The language of the Prehearing Order clearly stated the tribunal's intention to require DCPS to submit its proposed exhibits concomitant with the filing of its initial brief. DCPS filed its initial brief along with a list of proposed exhibits and copies of those exhibits on January 17, 1992. Although the Affidavit of Frances Watts-Henry was not among those exhibits, the record shows that DCPS did not submit the affidavit as an exhibit to be considered as a part of the case-in-chief. According to DCPS:

[t] he affidavit in question was submitted as an attachment to Applicant's timely filed Opposition to Motion to Strike. But for the Secretary's original Motion to Strike (filed on February 18, 1992), there would have been no need for Applicant to file its opposition to which Ms. Watts-Henry's affidavit is attached .

DC Opp. Mot. to Strike II. Consequently, the tribunal's Prehearing Order setting forth the dates for the timely submission of evidence relating to the case-in-chief is not relevant to DCPS's submission of the Affidavit of Frances Watts- Henry; that submission is an attachment to an otherwise timely filed pleading. Not surprisingly, since Education's original Motion to Strike was

dated February 18, 1992, DCPS's responsive pleading opposing that motion could not have been submitted until after the tribunal's Prehearing Order deadline for the submission of d evidence which was, as noted above, January 17, 1992. In addition, as a practical matter, DCPS's Exhibit R-8 contains the information to which the Affidavit of Frances Watts-Henry refers. Consequently, the substance of Frances Watts-Henry's affidavit is actually a part of the evidentiary record in this case. Therefore, even if the affidavit were a part of the evidentiary record relating to the case-in-chief, Education would not be prejudiced by the submission of DCPS' affidavit. Nonetheless, Education's second Motion to Strike is denied simply because the affidavit is an attachment to a pleading submitted in response to Education's original Motion to Strike, and is not a part of the evidence in the record relating to the case-in-chief. Accordingly, Education's Motion to Strike dated, April 3, 1992, is DENIED.

DCPS' Exhibits R-1 through R-9 and Education's Exhibits I through IX are received in evidence.

IV. FINDINGS OF FACT AND OPINION.

A. STIPULATIONS OF FACT 7

l. The District of Columbia Public Schools is the State Educational Agency for the District of Columbia (SEA).

2. The Office of Inspector General (OIG) for the U.S. Department of Education (Department) conducted an audit of the Oak Hill Youth Center (Oak Hill) for federal fiscal years (FY) 1984 through 1987 and 1989.

3. Oak Hill is part of the Youth Services Division of the District of Columbia Department of Human Services (DMS).

4. DHS is a subgrantee of the SEA.

5. DMS provides services under the Chapter 1 Neglected or Delinquent Program (N or D Program) to children incarcerated in various institutions, including Oak Hill.

6. DMS submitted, for approval, an application and budget for FY 1987 to the D.C. Board of Education (Board) of the SEA.

7. The Board approved the application and budget submitted by DMS but they did not include any costs for the WANG minicomputer.

8. The approved budget for FY 1987 included $72,443 of FY 1986 carryover funds, a portion of which included $6,000.00 for equipment items, but did not include the costs associated with the WANG minicomputer.

9. DHS submitted, to the Board, a budget amendment requesting approval to expend Federal funds in the amount of $28,247 for personnel costs.

10. The costs for the WANG minicomputer were not included in any budget amendments submitted by DHS, to the Board, for approval.

11. The SEA conducted a monitoring review at Oak Mill and reported on March 2, 1987, that there was $100,690 in FY 1986 Federal funds that either had to be expended by September 30, 1987, or returned to the Department.

12. DHS did not receive written approval from SEA to expend $97,191.00 for costs associated with the WANG minicomputer.

13. SEA did not seek approval from the Board of Education prior to giving DMS permission to use the Federal funds to purchase the WANG minicomputer.

14. DHS purchased the WANG minicomputer using 1986 Federal Chapter 1 carryover funds.

15. The auditors recommended that SEA refund to the Department $97,191.00 which was used by Oak Mill to purchase the WANG minicomputer .

16. The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) reviewed the audit report and issued a preliminary departmental decision to SEA on March 28, 1991 demanding that SEA refund to the Department $97,191.00 of the Federal funds appropriated under certain provisions of Chapter 1 of the Education Consolidation and Improvement Act of 1981 (Chapter 1).

17. The Assistant Secretary sustained the auditors findings and recommendation and determined that SEA is accountable for the expenditure of the Chapter 1 funds that were expended without having on file a current approved Chapter 1 project application that prescribed the expenditure of those funds.

18. The Assistant Secretary also found that the failure of SEA to have on file a current approved application violates the provisions of 34 C.F.R. §§ 203.10 -203.13, and 204.22 (a) (1) - (a) (3) (1987) and represents a substantial harm to the federal interest in preserving the integrity of planning and application requirements .

19. The Assistant Secretary disallowed the $97,191.00 that had been expended on the cost of the WANG minicomputer.

20. The SEA filed an application for review on May 6, 1991 with the Office of Administrative Law Judges challenging the Department' 5 preliminary departmental decision .

21. On September 3,1991, the SEA's Board retroactively approved DHS expenditure of the $97,191.00 in carryover funds for the purchase of the WANG system.

22. All of the exhibits, except for Exhibits R-6, and, R-8 pages 7-14 and the Affidavit of Ms. Francis Watts-Henry should be admitted into the record. Exhibits R-6, R-6 pages 7-14, and the Affidavit of Frances Watts-Henry are the subjects of pending motions .

23.The relevant Federal regulations are 34 C.F.R. §§ 204.22 (a) (1) - (a) (3) and 203.10 - 203.13 (1987).

B.OPINION AND ADDITIONAL FINDINGS OF FACT.

Education contends that $97,191 in Federal funds awarded to the District of Columbia under Chapter 1 of the Education Consolidation and Improvement Act of 1981 were misspent by the District of Columbia; and therefore, should be returned to the Federal Gov Government. As a result of an audit conducted by Education's Office of Inspector General, the auditors found that:

DHS [the subgrantee] purchased $97,191 of computer equipment in FY 1987 that was not in an approved application .

After delivery of the computer system on September 23, 1987, vouchers were paid in October for an adjusted total of $97,191. This amount is comprised of $77,296 for the WANG computer system(,) $250 for installation and $19,645 for technical assistance and training.

The normal Chapter 1 application process required the DC Board of Education to approve the application and the expenditures that were included. The records we reviewed did not document approval by DCPS [the grantee] or the Board of Education.

Since the purchase of the minicomputer was not included in the approved application, or a subsequently approved amendment request as required by Federal regulations, we question the $97,191 used to purchase the WANG minicomputer. We also question the reasonableness of purchasing the minicomputer. DMS officials indicated that the primary purpose for purchasing the minicomputer was to assist in computing ADA. This has not yet been successfully accomplished for the reasons mentioned .

Consequently, we recommend that ED instruct DCPS to have DMS return the funds to ED.

Ed. Ex. I at 4, 6, and 9.

In its preliminary departmental decision, Education affirmed the conclusions of the auditors. According to Education, 34 C.F.R. § 204.22(a) (2) (1986) "specifically require(s] that funds may 'only' be used to meet the costs of activities that are 'included in an approved application." Education Initial Br. at 11. In addition, Education argues that "[i]f the SEA intended to use carryover funds for a new activity such as the purchase of the WANG computer, the application would have had to have been amended and approved prior to expenditure." Id. In rebuttal, DCPS contends that:

[t]he Board did properly approve the 1987 Program Plan for DHS (see Exhibit R-3) which included $71,302.00 in estimated fiscal year 1986 carryover monies, as requested by then Superintendent Floretta McKenzie (see Exhibit R-4) . However, following its final accounting, and after the Board approval action, the SEA advised DHS, by memorandum dated March 2, 1987, that its final actual carryover amount from fiscal year 1986 was $100,690.00 (Exhibit R-5) . DHS received verbal approval from the Chapter 1 SEA (DCPS) to use $97,191.00 of that

carryover amount to purchase the WANG System. The verbal approval was subject to written justification from DHS to ensure that the equipment would be used for Chapter 1 purposes. DHS subsequently provided the requested justification (Exhibit R-6) .

DC Initial Br. at 3. According to DCPS, although 34 C.F.R.§ 204.22(a) (2) states that Chapter 1 funds may be used only to meet the costs of project activities that are included in an approved application, "there is no specific federal regulatory language which states that the SEA must resubmit an approved application to the Board when, after a final accounting, it is determined that additional carryover monies are actually available." Id.

For the reasons stated below, the preliminary departmental decision, finding that the District of Columbia Public Schools misspent $97,191 received under Chapter 1 of the Education Consolidation and Improvement Act of 1981, is **affirmed**.

Education promulgated 34 C.F.R.§ 204.22(a) (2) under the authority of Chapter 1 of the Education Consolidation and Improvement Act of 1981. The pertinent language of Chapter 1 provides:

[a] local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b) (2) of this title, **and which are included in an application far assistance approved by the State educational agency.**

20 U.S.C. § 3804(c) (emphasis added). The regulation, 34 C.F.R. § 204.22(a) (2) (1966), follows the language of its statutory precursor by requiring Chapter 1 grant recipients to use Chapter 1 funds only for projects that have been included in an approved application. Section 204.22 provides, in pertinent part:.

(a) An agency that receives Chapter 1 funds may use those funds only to meet the cost of project activities that--
(1) Are designed to meet the special educational needs of the children eligible to be served under the applicable Chapter 1 program;
(2) Are included in an approved application; and
(3) Comply with all requirements applicable to Chapter 1 programs.

In addition, 34 C.F.R. § 203.12 permits SEAs to approve a Chapter 1 project application for a period of up to three years. During the second and third fiscal years of a three year project, however, a state educational agency must annually update its Chapter 1 application by submitting to the SEA:

(1) Data showing that the State agency has maintained fiscal effort on the same basis as is required for LEAs by section 558(a) of Chapter 1;
(2) A budget for the expenditure of Chapter 1 funds;
3) Any additional updating resulting from significant changes in the number or needs of children to be served, or the services to be provided; and
(4) Other information the SEA may request.

34 C.F.R. § 203.12(c). In other words, under Section 203.12, a state agency may amend a previously approved Chapter 1 application. Thus, there are only two means by which Chapter 1 funds may be expended; a state agency may expend Chapter 1 funds to meet the cost of project activities that are included in an approved application or a state agency may expend Chapter 1 funds to meet the cost of project activities that are included in an amendment to an approved application. Accordingly, the pivotal issue, here, is whether DMS' expenditure of Chapter 1 funds was approved either as a cost of a project activity included in the 1987 grant application or through an amendment of the 1987 grant application .

In the case at bar, the District of Columbia Board of Education (the Board) approved, the local educational agency's, DHS, Chapter 1 grant application and budget for Federal fiscal year 1987 on October 15, 1986. (8) DC Ex. R-3 at 2. The budget approved by the Board did not include costs for the WANG minicomputer. Joint Memorandum of Stipulations at paras. 5, 6, and 7. In March 1987, the State educational agency, SEA, discovered that DHS had not spent 100,690 in Chapter 1 funds from its 1986 project application. Those funds were carried forward for 1987.(9) Id. at 2, paras. 11, 13, and 14. The Board retroactively approved DHS' expenditure of $97,191 in Chapter 1 funds for the purchase of the WANG minicomputer on September 3, 1991, after Education issued its preliminary departmental decision disallowing the expenditure. Id. at 3-4, para. 21.

DCPS makes much of the fact that "there is no specific regulation requiring approval of usage of a carryover amount" of Chapter 1 funds. DC Reply Br. at 2; DC Initial Br. at 3. Yet, despite DCPS' protestation to the contrary, the regulatory framework governing the allocation of Chapter 1 funds does encompass how "carryover" funds should be expended. Education correctly recognizes that the use of carryover funds for an activity not included in the current grant application requires an amendment to the grant application. Education Initial Br. at 11.Consequently, the existence of carryover funds from a Chapter 1 project activity conducted in a previous fiscal year does **not** alter the project application requirements of 34 C.F.R. § § 203.11 and 204.22.

To begin with, as noted supra, Section 204.14(b) prohibits the expenditure of Chapter 1 funds that are not obligated by the end of the succeeding fiscal year. Section 204.14 provides, in pertinent part:

(a) An SEA or any other agency that receives Chapter 1 funds may obligate funds during the Federal fiscal year for which the funds were appropriated and during the succeeding Federal fiscal year.
(b) The SEA or any other agency shall return to the Department any funds not obligated by the end of the succeeding Federal fiscal year.

Thus, if DCPS would have failed to obligate the 1986 carryover funds by the end of Federal fiscal year 1987, under Section 204.14, DCPS would have been required to return the carryover funds to the Department of Education.

Additionally, Section 204.22 also governs the expenditure of carryover funds. The plain language of Section 204.22 prescribes that a state agency, which receives Chapter 1 funds, "may

use those funds only to meet the cost of project activities" that are "included in an approved application." Consequently, the existence of carryover or unspent Chapter 1 funds does not create a safe harbor for subgrantees to expend Federal funds as the subgrantee wishes, unfettered by regulatory requirements. The fact that Chapter 1 funds are carried forward from one year to the next year does not alter the regulation's requirement that Chapter 1 funds may only be expended on approved project activities .

Since DHS was required to expend the 1986 carryover funds on a project activity that was described in its grant application, the next issue is whether the WANG minicomputer expenditure is a cost that could have resulted from a project activity described in its grant application. DCPS has consistently conceded that the expenditure at issue was not specifically included in DMS' Chapter 1 application or budget for fiscal year 1987. See Joint Memorandum of Stipulations at 1-2, paras. 6, 7, 8, 10, 12, 13, and 14; DC Initial Br. at 3; Reply Br. at 3. (10) In fact, the 1987 grant application provided for only $139,363 in total expenditures that included, besides expenditures for salaries and administration, the following:

Travel and transportation $4,000
Fees for consultant services $1,500
Registration fees for conferences $500
Subscript ions $437
Educational supplies/materials $7,247
Office supplies $500
Office equipment $3,000
Educational equipment $1,000
Audio-visual equipment $2,000 (11)

In addition, the project activities noted in the 1987 grant application do not on their face require an expenditure for a minicomputer. The project activity described in the DCPS' Exhibit R-4 includes:

compensatory educational services which are supplemental to the regular basic educational program at the Receiving Home for Children and at the Oak Hill Youth Center. These services will be provided to Chapter I targeted delinquent and neglected students who, through Court action, are residents of these juvenile institutions. Reading and mathematics are the curricular areas that will be supplemented through this Chapter I project.

DC Ex. R-4 at 8. The project activity described in Education's Exhibit VIII does not differ significantly from Exhibit R-4. In Exhibit VIII, the project activity is summarized as a project:

to provide special education services - supplementing the regular institutional programming - to the Chapter 1 target students at the Receiving Home and Oak Mill Youth Center. This goal will be accomplished through the provision of supplementary instruction in the areas of Reading and Mathematics.

Special Education Teachers and Educations [sic] Aides will constitute the primary core of the program, providing direct services to the targeted population in the classrooms. These staff will

be further augmented by a Music Teacher and a Computer Education Teacher, who will also be focusing on the basic skill needs of the students through their particular subject matter.

Ed. Ex. VIII at 10. The description of the project activity proposed in the 1987 grant application found in both exhibits describes a project that involves providing basic educational instruction in reading, mathematics, music, and computer education. On its face, the costs associated with paying and training instructors to teach basic educational courses and purchasing basic educational books and supplies normally do not entail the purchase of a WANG minicomputer system.12 Accordingly, DHS' expenditure of Chapter 1 funds for the cost of the WANG minicomputer is not permissible under 34 C.F.R. § 204.22(a) (2) because the cost of the WANG minicomputer was neither a proposed budget expenditure in the 1987 grant application nor an expenditure occurring directly as a result of a project activity proposed in the grant application..

As an alternative basis for justifying its expenditure of funds, DCPS contends that it amended its application in a February 5, 1988, report to include a work plan for its use of a minicomputer and as a result, "SEA approved the expenditure within the context of the corrective actions that were taken in response to the Education program review." DC Initial Br. at 3. According to DCPS, the Board of Education approved DHS' 1987 Chapter 1 grant application on October 15, 1986, but the budget in that application only included $71,302 in fiscal year 1986 carryover funds. See DC Initial Br. at 2; DC Ex. R-3. Not until March 2, 1987, according to DCPS, did SEA advise DHS that the 1986 carryover funds actually totaled $100,690; and shortly thereafter, SEA allegedly gave DMS verbal approval to "use $97,191.00 of that carryover amount to purchase the WANG System." DC Initial Br. 2-3. On March 10, 1987, DHS amended its 1987 grant application to reflect increased personnel expenditures covering the additional carryover funds that were recently discovered .

In addition, DCPS argues that the September 3, 1991, retroactive approval of DHS' expenditure of $97,191 in carryover funds for the purchase of the WANG minicomputer by the District of Columbia Board of Education is tantamount to the Board of Education's ratification of SEA's verbal approval of the expenditure and the amendment to DHS' 1987 grant application containing "a written justification for the computer." Id. at 3 & 4. According to DCPS, it:

permitted amendments to the plan solely to allow for specific corrective actions required therein. A February 5, 1988 report from DCPS [SEA] (Exhibit R-8) lists a summary of amendments including the approval of the computer purchase. Documents were submitted in the appendix to the report that included a written justification for the computer, objectives and a work plan for use of the computer, and budget information (Exhibit R-8 pages six (6) through fourteen (14)). Therefore, the SEA approved the expenditure within the context of the corrective actions that were taken in response to the Education program review.

Id. at 3. Finally, DCPS argues that the "unique facts of this case" places DHS' expenditure outside the regulatory prohibitions found in 34 C.F.R. § § 204.22 (a) (2) and 203.13 because none of the applicable regulations state that:

SEA may not verbally approve the use of carryover funds when that approval is given for an amount that is larger than an originally designated amount, and, if such verbal approval is completed in writing and the funds are used for Chapter 1 purposes.

DC Reply Br. at l.

Education argues that the implementation of corrective actions in response to a "Departmental review does not constitute approval of DHS' application." 13 According to Education, the February S, 1988, report listing corrective actions proposed by SEA cannot support DCPS' contention that DHS received proper approval to purchase the WANG computer with Chapter 1 funds because the report "was written after the expenditure had been made . . . in October, 1987." Education Initial Br. at 13. In addition, Education argues that post hoc and retroactive approvals of grant expenditures frustrate the administration of Chapter 1 programs and are improper under the regulations because the regulations require prior approval of grant expenditures. Id. at 17-18. Education also points out that DCPS' assertion that DHS received verbal approval from SEA to purchase the minicomputer "is not supported by any evidence." Id. Finally, Education asserts that, by the DCPS' own admission, DHS' budget amendment submitted to SEA on March 10; 1987, requesting approval to expend the full $100,690 in 1986 carryover funds did not include an expenditure to purchase a minicomputer system. See Education Initial Br. at 14; Ed. Exs. I at S and IX at 3-4.

As stated supra, the only alternative by which Chapter 1 funds may be expended, other than as a result of an expenditure , to meet the cost of a project activity included in an approved application, is contained in Section 203.12(c) which provides for an amendment to the application.

In the case at bar, DCPS asserts that it amended its 1987 grant application in a February 5, 1988, report submitted to Mary Jean LeTendre, Director of Compensatory Education Programs at the United States Department of Education. See DC Ex. R-8 at 1-2. The first page of Exhibit R-8 states that the report "contains information about recent actions to implement the [corrective actions recommended by the] program [review] and a description of amendments to the 1987 plan that were approved by the SEA." DC Ex. R-8 at l. On page 3 of Exhibit R-8, the report states:

A copy of the approved 1986-87 plan is attached and a summary of the amendments are listed here:

2.The Chapter 1 program staff identified and purchased a computer system of sufficient capability to accommodate the communications and data processing needs of the Chapter 1 project within the organizational structure of the Department of Human Services. The project established an objective in August, 1987 which was proposed to the SEA with justification based on the corrective action required in the program review regarding ADA, evaluation and expenditure reporting. The justification for the purchase of the computer is contained in the appendix to this report. The objective and appropriate reallocation of funds to purchase the equipment were approved by the SEA after lengthy discussion which included an SEA requirement to add to the 1987-88 program plan a management objective (Objective 4)' work

plan, and specific details of the data collection to be conducted. Those items are contained in the attached 1987-88 program plan in the section 3 "Major Objectives," in section 4 "Evaluation," and section 5 "Project Work Plan." The SEA raised several concerns about the purchasing of the computer, but, in view of the enormous data retrieval problems in ADA, evaluation, and fiscal reporting, it was determined that the best course of action was one which had the support of the Chapter 1 leadership in the Department of Human Services. Indeed, recent experience with finding, reviewing and verifying ADA data and fiscal data from noncomputerized data bases suggest that cutting the Gordian knot with an automated data system may be the best approach.

DC Ex. R-8 at 3-4. Although the February 5, 1988, report plainly refers to an allegation that DHS amended its 1987 grant application to include the purchase of a minicomputer, the record is void of any evidence that supports the assertion. As noted supra, the budget amendment submitted to SEA by DMS on March 10, 1987, did not include an expenditure to purchase a computer. See Ed. Exs. I at 5 and IX at 3-4; Joint Stipulation at 2 para. 10. Nothing else in the record identifies the existence of an amendment by DHS to the 1987 grant application. Accordingly, the tribunal finds that the record does not support DCPS' contention that it amended its 1987 grant application to include an expenditure for the purchase of the WANG minicomputer.

Furthermore, the February 5, 1988, report, itself, cannot amount to an amendment of the 19B7 grant application because the report was filed with the Director of Compensatory Education Programs at the United States Department of Education. Section 203.12(c) requires amendments to Chapter 1 grant applications to be submitted to the SEA by the local state agency. Mere, the SEA is DCPS. Consequently, to comply with Section 203.12(c), DMS was required to submit to DCPS an amended budget for the expenditure of Chapter al funds covering the cost of the purchase of a minicomputer and any other "additional updating resulting from . . . the services to be provided" from the acquisition of the minicomputer. 34 C.F.R. § 203.12(c)(3). Plainly, a summary report submitted to the Director of Compensatory Education Programs does not meet this standard. Accordingly, the tribunal is persuaded by Education's position that the February 5, 1988, report, neither is an amendment to the 1987 grant application, itself, nor supports DCPS' contention that DHS amended the 1987 grant application to include an expenditure for the purchase of a minicomputer .

Nor is the tribunal persuaded that DMS received verbal approval from SEA to purchase the minicomputer prior to its actual purchase of the computer. According to DCPS, "DMS received verbal approval from the Chapter 1 SEA (DCPS) to use $97,191.00 of that carryover amount to purchase the WANG System." DC Initial Br. at 2-3. Although DCPS asserts that the SEA gave DHS verbal approval to use $97,191 of the 1986 Chapter 1 carryover funds to purchase the WANG minicomputer, DCPS makes no effort to present any evidence to support its assertion. See DC Initial Br. at 2-3. The record is lacking any documentary or testimonial evidence showing that an authorized official of the District of Columbia's State educational agency gave verbal approval for the purchase of the WANG minicomputer. More important, DCPS offers no rationale or explanation for why its apparent post hoc verbal approval of the WANG expenditure would comply with the standards for approval under 34 C.F.R. § 203.13. Section 203.13 permits SEAs only to approve applications for Chapter 1 funds that meet the requirements of the applicable regulations. The WANG expenditure did not meet that requirement because the

expenditure was not a cost relating to a project activity described in the 1987 Chapter 1 grant application.

In addition, the tribunal cannot find retroactive approvals for Chapter 1 expenditures to be valid. Although the evidence shows that on September 3, 1991, the District of Columbia Board of Education "retroactively" approved of the purchase of the WANG minicomputer with Chapter 1 funds, the tribunal is persuaded by Education's argument that a retroactive approval of a grant application occurring four years after a Chapter 1 project application year is both contrary to the requirements of 34 C.F.R. §§203.11, 204.14 and 204.22 and would frustrate the efficient administration of Chapter 1 programs. In enacting Chapter 1 of the Education Consolidation and Improvement Act of 1981, Congress intended that:

[i]n order to receive funds under this subpart, LEAS must have an application describing the programs and projects to be conducted with such funds for a period not to exceed three years, and the application must be approved by the SEA.

S.REP. No. 139, 97th Cong., 1st Sess. 923 (1981), reprinted in 1981 U.S.C. C.A.N. 396, 918. More important, the statute plainly states that:

[a] local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b) (2) of this title, and which are included in an application for assistance approved by the State educational agency. 20 U.S.C. § 3804(c). Consequently, the authorization of retroactive approval of Chapter 1 grant applications would frustrate the efficient administration of Chapter 1 programs and would defeat Congress' intent that the grant application serves as the basis for deciding whether a state agency should receive a Chapter 1 Federal grant, as expressed in the statute and the statute's legislative history.

Further, as the tribunal has noted, supra, 34 C.F.R. § § 203.11 and 204.22 set out the standards for approval of Chapter 1 grant applications. Together, those sections make it evident that: (1) DMS may not receive Chapter 1 funds unless it has a grant application that "[h)as been approved by the SEA[,]'1 and (2)Chapter 1 funds may be spent only on project activities that are "included in an approved application." 34 C.F.R. § § 203.11(b) and 204.22 (a) (2). Accordingly, the District of Columbia Board of Education's September 3, 1991, retroactive approval of the purchase of the WANG minicomputer does not comport with the statutory and regulatory requirements that a SEA approve Chapter 1 applications prior to the expenditure of Chapter 1 funds.

In sum, the tribunal upholds Education's disallowance decision finding that DCPS improperly charged $97,191 to Chapter 1 of the Education Consolidation and Improvement Act of 1981 on three grounds: [1] the cost of the WANG minicomputer was neither a proposed expenditure in the 1987 grant application nor an expenditure occurring directly because of a project activity proposed in the grant application, [2] the record does not support DCPS' contention that it amended the 1987 grant application to include an expenditure for the purchase of the WANG minicomputer or that it verbally approved the expenditure prior to the purchase of the

minicomputer, and [3] retroactive approval of Chapter 1 expenditures is contrary to the statutory and regulatory standards for approval of Chapter 1 grant applications .

II.

Finally, DCPS contends that "even if there is a technical violation of a statute or regulation, that violation is, at worst, de minimus [sic], . . . and that the 'spirit' of the law should not be overlooked in favor of the 'letter' of the law." DC Reply Br. at 2. In applying the principles of equity, DCPS advises the tribunal that it should recognize that "there has never been any allegation that the funds were not used for legitimate purposes" and that DHS's expenditure of Chapter 1 funds is tantamount to a harmless violation in which SEA "performed one less step in approving the usage of the money - a step which is, at best, questionably required." Id. at 3.

Education contends that DHS' expenditure constitutes substantial harm to the Federal interest. According to Education, identifiable Federal interests include the integrity of planning, application, recordkeeping and reporting requirements" and "maintaining accountability for the use of funds." Education Initial Br. at 16 (quoting 20 US.C. § 1234b(a) (2)) (alteration in original) . Consequently, according to Education, DHS' failure to obtain approval to use Chapter 1 grant funds for an authorized activity represents a substantial harm to the Federal interest in preserving the integrity of application requirements; and therefore, justifies a monetary refund. Id. at 16-17. As a basis for its position, Education relies, in part, on the illustration of proportionality found in Item 12, 34 C.F.R. Part 81 App. (1992). In contrast, the District of Columbia argues that the illustration of proportionality found in Item 13, 34 C.F.R. Part 81 App. more appropriately applies to the instant case. According to DCPS, Item 13 identifies a violation that has not measurably harmed a Federal interest associated with a grant program and as a consequence, financial recovery was not required. DC Reply Br. at 3.

Under the General Education Provisions Act, Education is limited to recovering funds "that [are) proportionate to the extent of the harm" that the expenditure of misspent funds "caused to an identifiable Federal interest associated with the program under which the recipient received the award." Section 453(a) (1), 20 U.S.C. § 1234b (a) (1) (14) By way of illustration, the Appendix to Part 81 lists hypothetical scenarios describing the appropriate measure of recovery of funds under 20 U.S.C. § 1234b(a) (1) and 34 C.F.R. § 81.32. (15) Item 13 of the Appendix is captioned "Harmless violation" and describes an instance where:

The drafters of Item 13 conclude by finding that:

[n]o financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

In effect, Item 13 characterizes the grantee's failure to fill one vacant seat on an advisory council of 15 members as a technical violation of program requirements that does not rise to the level of a violation of law for which a disallowance decision could be upheld. As the regulation states, no financial recovery is appropriate. Consequently, Item 13 is inapposite to the case at bar. The tribunal has already determined that the disallowance decision properly seeks financial recovery

based upon DMS' misspent funds. The issue, however, is whether circumstances exist that justify a reduction in the amount of recovery sought by Education.

The tribunal holds that a reduction in the amount of recovery sought by Education is not appropriate in this case and that the proper measure of recovery is the full amount sought by Education: $97,191. As Education notes, this case falls squarely within the illustration provided in regulation Item 12. Item 12 describes an instance where:

an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students - an authorized activity under the Federal statute. However, the LEA does not consult with interested parties and does not amend its application.

The drafters of Item 12 conclude by finding that:

20 percent of the LEA'S subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of the application process, but cause significant harm to other Federal interests associated with the program [such as . . . fiscal accountability [which] was impaired because the SEA and those various local interests were, in effect, misled by the LEA'S unamended application regarding the expenditure of Federal funds.

Significantly, Item 12 does not require the DCPS return of 100 percent of the funds received under the grant. The measure of recovery is the amount of funds spent for a project activity that was not described in the approved grant application. The related Federal interests harmed by a violation of the grant application requirements include: the integrity of the application process and fiscal accountability regarding the expenditure of Federal funds .

Similarly, in the case at bar, Education seeks to recover only the amount of funds spent for a project activity that was not included in DHS' 1987 grant application; namely, the expenditure of $97,191 for the purchase of the WANG minicomputer. Education has not sought the recovery of the full 1987 Chapter 1 grant, which was $481,893, according to Education. See Ed. Ex. VIII at Work paper E-3-1, l. Accordingly, the proper measure of recovery, as illustrated by Item 12 of the proportionality regulations, requires that DCPS return $97,191 to the Federal government .16

V. CONCLUSIONS OF LAW.

A. DHS' expenditure of Chapter 1 funds for the cost of the WANG minicomputer could not have been permissible under 34 C.F.R. § 204.22(a) (2) because the cost of the WANG minicomputer

was neither a proposed budget expenditure in the 1987 grant application or an amendment thereof, nor an expenditure occurring directly as a result of a project activity proposed in the grant application .

B. The record does not support DCPS' contention that the 1987 grant application was amended to include an expenditure for the purchase of the WANG minicomputer or that it verbally approved the expenditure prior to the purchase of the minicomputer. Further, if verbal approval had occurred, it would not satisfy the requirements of 34 C.F.R. § § 203.11 and 204.22.

C. The existence of carryover funds from a Chapter 1 project activity conducted in a previous fiscal year does not alter the project application requirements of 34 C.F.R. § § 203.11, 204.14 and 204.22 by creating a safe harbor for grantees to expend carryover funds unfettered by regulatory requirements.

D. A retroactive approval of a grant application occurring four years after a Chapter 1 project application year is contrary to the requirements of 34 C.F.R. § § 203.11, 204.14 and 204.22 and 20 U.S.C. § 3804(c). In addition, the authorization of retroactive approval of Chapter 1 grant applications would frustrate the efficient administration of Chapter 1 programs and would defeat Congress' intent that the grant application serves as the basis for deciding whether a state agency should receive a Chapter 1 Federal grant, as expressed in the statute and the statute's legislative history.

E. In a proceeding where Education seeks to uphold a disallowance decision demanding the recovery of funds based on a violation of 34 C.F.R. § 204.22 under the Chapter 1 grant program, the proper measure of recovery is the amount of funds spent on a project activity or program that was not described in nor embodied within a project activity described in an approved Chapter 1 grant application.

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

Education and DCPS filed their initial briefs and a joint memorandum of stipulations. A reply brief was filed by DCPS. Insofar as such filings can be considered to have contained proposed findings and conclusions, they 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, the District of Columbia Public Schools is hereby ORDERED to repay the United States Department of Education the sum of $97,191.

John F. Cook
Chief Administrative Law Judge

Issued:December 30, 1993
Washington, D.C.

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1 Although the Act has been repealed, the alleged underlying violation occurred in 1987 while the Act was effective. Consequently, references to Chapter 1 are to the provisions in effect in 1987.

2 The State agency which submitted its 1987 Chapter 1 grant application to DCPS was the District of Columbia, Department of Human Services (hereinafter, referred to as DHS).

3 In the case at bar, the tribunal's jurisdiction is governed under the General Education Provisions Act, Pub. L. No. 91-230, 84 Stat. 164, (1970) (to be codified as amended at 20 U.S.C. § 1221 et seq.) (**GEPA**) and the statute's implemeting regulations found under 34 C.F.R. Part 81 (1992). GEPA provisions apply to Chapter 1 grants. The statute creates a right of action for the Federal Government to impose liability upon a recipient of various Federal grants, if the recipient spends the grant funds contrary to the requirements of the grant. Bell v. New Jersey, 461 U.S. 773, 784 (1983) .

Although the PDD issued in this case contained two audit findings, the DCPC has appealed the finding related to purchase of the WANG minicomputer only.

4 The exhibit does not contain a numbered page 11. It appears that the pages of this exhibit were mistakenly numbered and as a result page 11 was numbered page 12.

5 See also Section 556(d) of the Administrative Procedure Act, which applies to this proceeding, wherein the Act only requires that the evidence that the administrative law judge accept for the record be relevant, material, and not unduly repetitious. S U.S.C. § 556(d).

6 Under FED. R. EVID. 902, the documents contained in Exhibits R-6 and R-8 are not self-authenticating documents.

7 These findings of fact are based upon stipulations contained in the Joint Memorandum of Stipulations filed by the parties .

8 DHS allocated the Chapter 1 funds at issue to the Oak Hill Youth Center, which provides services to youth incarcerated at its facility and is a part of DHS Youth Services Division.

9 Under 34 C.F.R. § 204.14, a SEA may obligate Chapter 1 funds during the fiscal year for which the funds were authorized and during the succeeding fiscal year. SEAs are not required to return unspent Chapter 1 funds unless those funds are not obligated by the end of the succeeding fiscal year.

10 DHS' application for Chapter 1 funds for fiscal year 1986 is not part of the record in this case, but neither party contends that an expenditure for the WANG minicomputer was included in the

1986 application. See Joint Memorandum of Stipulations at 1-2. In addition, it is undisputed that DHS' 1987 Chapter 1 grant application does not contain a proposed expenditure for the WANG minicomputer. See DC Ex. R-4; Joint Memorandum of Stipulations at 1-2.

11 DC. Ex. R-4. The record actually contains two versions of SEA's 1987 Chapter 1 grant proposal: Education's Exhibit VIII and DC's Exhibit R-4. DCPS describes its exhibit as "the basic underlying grant document for this case, " and therefore, the tribunal has relied upon this exhibit in all instances, unless explicitly noted otherwise, when referring to the 1987 grant application .

Although the fact that there are two versions of the 1987 grant application in the record does not alter the tribunal's analysis of the grant application's contents because the parties have agreed that the 1987 grant application does not contain an expenditure for the WANG minicomputer, the tribunal notes that there are unexplained discrepancies between the parties' two exhibits. DCPS' Exhibit is missing an entire page from item 10 "Estimated Budget." See DC Exhibit R-4 at 13-14. DCPS' Exhibit was submitted for approval by DHS' Acting Administrator, Robert A. Malson in July 1986 while the grant application contained in Education's exhibit was submitted on an unstated date by the DHS Administrator Patricia L. Quann. The "Summary of Proposed Program" differs in both applications. And, perhaps the most significant discrepancy is the differing carryover amount indicated under item 10 of the estimated budget. In DCPS' Exhibit that amount is $72,443 while Education's Exhibit indicates that the amount is $81,779. See DC Ex. R-4 at 14; Ed. Ex. VIII at 12.

Attached to Education's Exhibit VIII is the auditor's work paper E-3-1. The work paper is dated December 13, 1989, and contains notes presumably based on the auditor's review of the copy of the 1987 grant application included in Education's Exhibit. If this is so, then the audit may have been based, in part, on an incomplete version of the grant application. The record is clear that the carryover amount of Chapter 1 funds did change from $72,443 to $100,690. See Joint Memorandum of Stipulations at 1-2. (In DCPS' opening brief and in Exhibits R-2 and R-3, this amount is mistakenly referred to as $71,302.00) . This evidence would tend to validate the accuracy of DC Exhibit R-4, at least with regard to its correct reference to the original carryover amount. Nonetheless, nothing in the record fully aids the tribunal in determining which exhibit contains the 1987 grant application that was actually filed and approved by the District of Columbia Board of Education.

12 Although one project objective described in the 1987 grant application included computer education instruction, neither party contends that the purchase of a $77,296 WANG minicomputer is suitable for this purpose. Indeed, DHS paid the company from which it purchased the WANG minicomputer, $19,645 so that its own staff could be trained in how to use the complex minicomputer. In addition, according to the auditors, three years after DMS acquired the WANG minicomputer, no one at DHS had the technical skills to use the minicomputer for the purposes for which it was allegedly purchased. Ed. Ex. I at 6.

13 Education also attacks the reliability of the DCPS' evidence supporting DCPS' assertion that its corrective action constitutes approval of the WANG expenditure. Specifically, Education challenges the reliability of DCPS' documentary evidence containedin DC Exhibit R-6 and DC

Exhibit R-8, pages 7 through 14. Since the tribunal evaluated these arguments supra, the tribunal does not restate these arguments here.

14 Section 453(b) permits a reduction or waiver of recovery of funds for mitigating circumstances; that section, however, is not relevant to the issues in this case.

15 [Section 81.22 was redesignated as Section 81.32, 58 Fed. Reg. 43,472, 43,473(1993)]. Section 81.32 is substantially similar to its statutory precursor; 20 U.S.C. § 1234b(a) (1). In pertinent part, Section 81.32 provides:

(a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return 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 it received the grant or cooperative agreement. a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring and evaluation Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified..

16 It is well settled that in this type of proceeding, "funds spent contrary to the requirements governing their use must be returned to the government." Appeal of the Marty Indian School (SD), Dkt. No. 89-8-R, U.S. Dep't of Education (Decision of the Secretary July 12, 1990) at 2; Application of the California Department of Education, Dkt. No. 90-82-R, U.S. Dep't of Education (Final Decision Dec. 4, 1992), [81 Ed. Law Rep. 1276, 1282 (1993)].