

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, DC. 20202

APPLICATION OF THE

MASSACHUSETTS DEPARTMENT OF
EDUCATION,

Applicant.

Docket No. 93-126-R

Recovery of Funds Proceeding
ACN: 01-13080G

DECISION

Appearances: Michael Brustein, Esq., Kristin E. Hazlitt, Esq., of Brustein and Manasevit, Washington, D.C. for the Applicant, the Massachusetts Department of Education.

John J. Szufnarowski, Regional Commissioner, Region I, Rehabilitation Services Administration, United States Department of Education. [1](#)

Before: John F. Cook, Chief Administrative Law Judge

I. Procedural Background.

This proceeding involves an Application for Review of a Preliminary Departmental Decision (Notice of Disallowance Decision) issued pursuant to Sections 451 and 452 of the General Education Provisions Act, Pub. L. No. 91-230, 84 Stat. 164, 512 (1970) (to be codified as amended at 20 U.S.C. § 1221 et seq.) (GEPA) .

The Regional Commissioner of the Rehabilitation Services Administration, Region I (Regional Commissioner) issued a Notice of Disallowance Decision dated September 1, 1993 in which the Regional Commissioner disallowed \$133,984 in salary expenditures charged to a Federal grant program by the Massachusetts Department of Education (MDE} under Chapter 2.

Although, in its Application for Review, MDE did not submit a statement "certifying the date the recipient received" the Notice of Disallowance Decision, MDE contends that:

[t] he determination letter was received by the Comptroller for the Commonwealth soon after September 1, 1993 [but] [t]he Office of the Comptroller did not date stamp the letter upon receipt. However, it is clear that the letter was received no sooner than September 1, 1993, the date of the determination letter.

Application for Review at 2 & n.2; See 34 C.F.R. § 81.37(c) (2)2 (34 C.F.R. § 81.27 was redesignated as 34 C.F.R. § 81.37, 58 Fed. Reg. 43,472, 43,473 (1993)). Consequently, it appears that counsel for MDE was unable to determine the date MDE received the Notice of Disallowance Decision from the Regional Commissioner. In addition, it appears from the record that on October 20, 1993, MDE filed its Application for Review by hand-delivery with the Office of Administrative Law Judges (OALJ) . MDE also certified that on October 20, 1993, it mailed a copy of the Application for Review to the Regional Commissioner.

II. Opinion.

In its Application for Review, MDE states that in the Notice of Disallowance Decision, the Regional Commissioner informed them that in the event that MDE chose to appeal the monetary determinations made in the disallowance decision, MDE must file its Application for Review not later than 60 calendar days from the date it received the Notice of Disallowance Decision. Specifically, the Notice of Disallowance Decision states:

Appeal Rights

If your agency chooses to appeal the monetary determinations in the PDL, you must submit an application for review to the Office of Administrative Law Judges (OALJ) . The application must be filed within sixty (60) calendar days from the date of receipt of this notice and should be mailed to the following address. . . .

Notice of Disallowance Decision at 3. According to MDE, the Regional Commissioner's Notice of Disallowance Decision "does not meet the jurisdictional requirements of section 451(e) of GEPA and the relevant regulations" because it did not correctly identify the time available for filing Review. Application for Review at 2. Therefore, according to MDE, the Notice of Disallowance Decision is defective. As a result, MDE requests that either the disallowance decision be returned to the Regional Commissioner or MDE's Application for Review filed on October 20, 1993 be considered timely filed.

As of November 30, 1993, 41 days after MDE filed its Application for Review with OALJ, the Regional Commissioner had not responded to the arguments made in MDE's Application for Review .

The issue then is whether the Notice of Disallowance Decision does not meet the requirements of 34 C.F.R. § 81.34, and therefore, must be returned. For the reasons stated below, the tribunal finds that the Notice of Disallowance Decision does not comply with 34 C.F.R. § 81.34(d) and § 81.37 (b), and that the appropriate remedy in this case is to return the Notice of Disallowance Decision to the authorized Departmental official who made the disallowance decision; namely; John J. Szufnarowski, Regional Commissioner, Rehabilitation Services Administration, Region I of the United States Department of Education.

34 C.F.R. § 81.34 provides, in pertinent part:

(a) If an authorized Departmental official decides that a recipient must return funds under § 81.20 [redesignated as § 81.30] , the official gives the recipient written notice of a disallowance decision. . . .

(d) The notice must describe

(1) The time available to apply for a review of the disallowance decision; and

(2) The procedure for filing an application for review.

(emphasis added)

Section 81.37(b) provides:

A recipient shall file an application for review not later than 30 days after the date it receives the notice of a disallowance decision. Upon receipt of a copy of the filed material, the authorized Departmental official who made the disallowance decision provides the ALJ with a copy of any document identified in the notice under § 81.24(b) (2) [redesignated as § 81.34(b) (2)].

The plain language of Section 81.37(b) requires that an Application for Review be filed not later than 30 days after the date the recipient received the Notice of Disallowance Decision.

As MDE contends, the Regional Commissioner's disallowance decision stated that MDE could file its Application for Review anytime within 60 calendar days from the date it received the disallowance decision. The Regional Commissioner's statement inexplicably departs from the language of Section 81.37(b). The disallowance decision did not correctly describe the time available for filing an Application for Review, and therefore, the disallowance decision did not accurately identify the time available to apply for a review of the disallowance decision as required by 34 C.F.R. § 81.34 (d) (1).

Although MDE does not state in its Application for Review on what date it received the disallowance decision, which causes uncertainty in the present record as to the timeliness of MDE's Application for Review under Section 81.37(b), MDE does contend that it relied upon the disallowance decision in filing its Application for Review 49 days after September 1, 1993, the date of the Notice of Disallowance Decision. Indeed, had the Regional Commissioner's Notice of Disallowance Decision been accurate, MDE's Application for Review would have been timely filed because the application clearly was filed within the 60 day period noted in the Regional Commissioner's disallowance decision. Nonetheless, the disallowance decision is not accurate, and if the tribunal were to apply the requirements of Section 81.37 to MDE's Application for Review, MDE would be prejudiced after having relied to its detriment on the Regional Commissioner's Notice of Disallowance Decision. Accordingly, the appropriate remedy for the Regional Commissioner's failure to correctly identify the time available for filing an Application for Review is to Order the return of the Notice of Disallowance Decision.

Pursuant to 34 C.F.R. § 81.38 (see 58 Fed. Reg. 43,472, 43, 473 (1993)) , the tribunal determines whether the Notice of Disallowance Decision meets the requirements of 34 C.F.R. § 81.34. If the disallowance decision does not meet those requirements, the tribunal returns the disallowance decision to the authorized Departmental official who made the disallowance decision and

provides the official with the reasons why the disallowance decision does not meet the requirements of 34 C.F.R. § 81.34. See 34 C.F.R. §§ 81.38(b) (1) (i) and (ii). The tribunal is also required to inform the recipient of its decision by certified mail, return receipt requested. 34 C.F.R. § 81.38(c) (3) . In addition, 34 C.F.R. § 81.38(b) (2) permits the authorized Departmental official to modify and reissue a Notice of Disallowance Decision that the tribunal returns. Accordingly, the Notice of Disallowance Decision is returned to the Regional Commissioner because the disallowance decision incorrectly informed the Massachusetts Department of Education of the time available to apply for a review of the disallowance decision, and therefore, did not comply with the requirements of 34 C.F.R. § 81.34.

ORDER

Based on the foregoing findings and conclusions, IT IS ORDERED: 1. That this proceeding be DISMISSED without prejudice and, 2. That the attached Notice of Disallowance Decision, be returned to the authorized Departmental official who made the decision for such action as that official considers appropriate.

John F. Cook

Chief Administrative Law Judge

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

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REGION I
JOHN W. MCCORMACK POST OFFICE AND COURTHOUSE
BOSTON, MASSACHUSETTS 02109

Rehabilitation
Services
Administration

September 1, 1993

Certified Mail - Return Receipt Requested

Mr. William Kilmartin
Comptroller
Commonwealth of Massachusetts
One Ashburton Place, Room 909
Boston, MA. 02108

RE: Audit Control Number: 01-13080G
Auditee: Commonwealth of Massachusetts
Audit Period: July 1, 1989 - June 30, 1990
Final Audit Report Issued: November 22, 1991

Dear Mr. Kilmartin:

This letter presents the determinations of findings for which the U.S. Department of Education is responsible as part of the organization-wide audit of the Federal Financial Assistance Programs of the Commonwealth of Massachusetts for the audit period July 1, 1989 through June 30, 1990, Audit Control No. 01-13080G. The audit was conducted by Deloitte & Touche, 125 Summer Street, Boston, Massachusetts, pursuant to the requirement of the Single Audit Act of 1984 (Public Law 98-502) and Office of Management and Budget Circular No. A-128.

A detailed discussion of the program determinations is included in the enclosures to this Program Determination Letter (PDL). This letter presents the program determinations of the U.S. Department of Education (ED) officials as follows: Regional Commissioner, Rehabilitation Services Administration (Enclosure No. 1); Director, Office of Financial and Management Control (Enclosure Nos. 2 and 3); Assistant Secretary, Office of Special Education and Rehabilitative Services (Enclosure No. 4); Assistant Secretary, Office of Elementary and Secondary Education (Enclosure No. 5); and the Assistant Secretary, Office of Vocational and Adult Education (Enclosure No. 6). The monetary determinations in these enclosures constitute "preliminary departmental decisions" within the meaning of Section 452 of the General Education Provisions Act, 20 U.S.C. ss. 1234a.

The findings and determinations covered in the enclosures to this PDL are subject to the provisions of the General Education Provisions Act (GEPA). The determinations of the Assistant Secretary, Office of postsecondary Education for non-GEPA findings were issued in a separate PDL.

Corrective Actions on Non-Monetary Findings

Within sixty (60) days of the date of this PDL, please advise the appropriate Departmental official in writing of the steps your agency has initiated to carry out corrective actions for non-monetary findings cited in the enclosures to this PDL.

Review of the implementation of corrective actions for non-monetary findings, to determine whether they were in fact implemented properly, may occur during future reviews of your Federal education programs. Please be aware that failure to implement corrective actions may result in the issuance of monetary determinations, or affect future Federal funding of your agency.

Source of Repayment

When remitting repayment for this debt, your agency must use non-Federal funds or Federal funds for which accountability to the Federal government is not required.

Method of Repayment

Repayment should be made by electronic transfer through the FEDWIRE Deposit System. The Department of Agriculture's National Finance Center (NFC) serves as the Department of Education's collection agency. You should request your bank to transmit payment to NFC through FEDWIRE via the Federal Reserve Bank in New York. If your bank does not maintain an account at a Federal bank, it may use the services of a corresponding bank. Instructions for completing the electronic fund transfer message format are enclosed. Items 1-4 must be completed for proper credit to your account.

Timing of Payments and Interest

Payment must be made within sixty (60) days of the date of this letter, unless you file a timely appeal of the PDL. If neither payment is received nor an acceptable appeal is filed within this period, interest will accrue from the date of this letter on the unpaid portion of the refund demand. Interest will be charged at the rate established under 31 U.S.C. 3717 and published by the Secretary of the Treasury in the Federal Register and the Treasury Financial Manual as in effect on the date the PDL is issued.

Statute of Limitations

Your attention is directed to the statute of limitations provision of Section 452(k) of the General Education Provisions Act (GEPA), 20 U.S.C. Section 1234a (k). If you believe that portions of the program determination(s) are affected by this provision, you may submit documentation to this office to indicate the effect of this provision, and/or you may raise the effect of the provision as part of an appeal before the Office of Administrative Law Judges.

Appeal Rights

If your agency chooses to appeal the monetary determinations in the PDL, you must submit an application for review to the Office of Administrative Law Judges (OALJ). The application must be filed within sixty (60) calendar days from the date of receipt of this notice and should be mailed to the following address:

Office of Administrative Law Judges
U.S. Department of Education
400 Maryland Avenue, s.w.
Washington, D.C. 20202-3727

Any Department official whose PDL enclosure contains monetary determinations that are appealed to the Office of Administrative Law Judges becomes a "party" under the regulations in 34 CFR Part 81. Therefore, a copy of the application must also be sent to each Department official who issued a determination that is being appealed. The addresses of the respective Department officials issuing determinations are included in an appendix to this letter.

An application for review must contain the following information:

- * A copy of this notice;
- * A statement certifying the date you received this notice;
- * A short and plain statement of the disputed issues of law and fact, your position with respect to these issues, and the identity of the disallowed funds that you contend need not be returned ;
- * A statement of the facts and the reasons that support your position; and
- * A statement certifying the date the application was served on the Department official(s) who issued the determinations that are being appealed.

If the OALJ accepts your appeal, you may request mediation by an independent mediator agreed to by your department and the applicable program office(s) .

All correspondence must refer to Audit Control No. 01-13080G, including the suffix, and the finding number(s). Thank you for your cooperation in the resolution of this audit.

Sincerely,

John J. Szufnarowski

RSA Regional Commissioner

Enclosures

Determination of the Assistant Secretary for Elementary and Secondary Education

Auditee: Commonwealth of Massachusetts
Audit Control No. 01-12080

Finding No. 54 - Inadequate Supporting Documentation (Audit Report, p. 139)

Audit Finding

The auditors determined that the Massachusetts Department of Education (MDE) charged 100 percent of the salaries of three individuals, who did not work solely on the Chapter 2 program, to the federally funded chapter 2 administrative account.

The auditors stated that the Office of Management and Budget Circular A-87 establishes the principle and standards for determining the costs applicable to grants and contracts. The auditor contended that the circular also defines a cost allocation plan as "the documentation identifying, accumulating and distributing allowable costs under grants and contracts together with the allocation methods used" and the required plan to support the distribution of any joint or common costs related to the grant program. Furthermore, the circular requires that salaries of

employees chargeable to more than one grant program should be supported by appropriate time distribution records to produce equitable distribution of time and effort.

The auditors concluded that the MDE did not maintain records supporting the charges to Chapter 2 for three individuals resulting in excess personnel costs of \$148,368.

Audit Recommendation

The auditors recommended that personnel charged to Federal programs work on the programs to which they are charged. The auditors further recommended that the MOE develop a department-wide cost allocation plan that would support the personnel charges to Federal programs.

Auditee's Response

The MDE did not concur with the auditors' finding for three reasons. First, the auditee maintained, the Chapter 2 law has recently been revised, which in the opinion of the MDE, did not prohibit the activities provided by these individuals. Second, the MDE contends that these individuals provide considerable service, which would, under any reasonable interpretation of the revised Law and regulations, provide equitable offsets for the disputed services.

Finally, the MOE has transferred the three individuals cited in the audit to State funded positions.

Assistant Secretary for Elementary and Secondary Education's Determination

We sustain the auditors' finding that the MDE did not maintain adequate supporting documentation for employees paid with Chapter 2 funds. Chapter 2 funds may only be used for authorized Chapter 2 activities. 20 U.S.C. 3811(a) (1982), 2941 (1988). Accordingly, several provisions require a State educational agency (SEA) to ensure proper accountability for Chapter 2 funds. Section 435(b) (5) of General Education Provisions Act (GEPA) (20 U.S.C. 1232d(b) (5)) requires a State to use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to a State under each program." Section 437(a) of GEPA (20 U.S.C. 1232f (a) requires an SEA to "keep records which fully disclose 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." Finally, Chapter 2 requires an SEA to keep such records and provide such other information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibility of the Secretary under this Chapter)." (20 U.S.C. 3814 (a) (6) (1982), 2932(a)(7) (1988)).

In addition to these requirements, Appendix C of the Education Department General Administrative Regulations (EDGAR) sets forth general cost principles to ensure proper fiscal control and fund accountability. Specifically, Part II.B.10.b required that salaries and wages of employees charged to more than one grant program or cost objective must be supported by "appropriate time distribution records." Under Chapter 2 of the Elementary and Secondary Education Act (ESEA), States have to have fiscal control procedures to meet the requirements in 34 CFR 298.2(b).

The contention of the MOE that the questioned positions were allowable even though the chapter 2 statute has recently been revised and that the revised Law and regulations, although more explicit, do not prohibit the activities provided by the individuals who occupied the three questioned positions is not correct. On the contrary, unlike Title V of the ESEA of 1965 and Chapter 2 of the Education Consolidation and Improvement Act (ECIA) , State strengthening activities are not allowable. Under section 1521 of Chapter 2 of the ESEA and section 298.13 of the regulations, Chapter 2 funds reserved for State use may only be used under three categories: State administration of Chapter 2 programs ; assistance to local educational agencies (LEAs) with respect to targeted assistance under section 1532; and assistance to LEAs and statewide activities to carry out effective schools programs under sections 1541-1542. Moreover, State administrative activities that are allowable under Chapter 2 include (1) supervising the allocation of funds to LEAs, (2) planning, supervising, and processing Chapter 2 funds reserved for State use, (3) monitoring and evaluating the Chapter 2 programs and activities , and (4) operating the State Advisory Committee

Two of the questioned positions are described in the auditors' workpapers as assigned to the legal office and the third is assigned to the Office of the Commissioner. The individuals assigned to the legal office are described as providing legal service to all federally funded projects. The position assigned to the Office of the Commissioner is described as providing media services to all federally funded projects. The same review of the audit workpapers revealed that the MOE charged an additional position in School Management Services to the Chapter 2 Administrative Account. Further, the same workpapers, which were prepared on September 30, 1990 , indicate that the MOE had been attempting to transfer these positions from Chapter 2 Administration into the State Administration Account for the "past 18 months". However, according to the workpapers, the transfer had not been approved at the time of the audit by the Department of Personnel Administration. As a result, the two positions in the legal office had been charged to Chapter 2 from September 1988 until September 1990. The other two positions, one in the Office of the Commissioner and one in School Management Services were charged to Chapter 2 from April 1989 until September 1990. The auditors stated in the workpapers that they based these conclusions on a review of the job descriptions of these positions and the proposed transfer documents.

The MDE's second contention, that the individuals in the questioned positions provided "considerable services" which offset the questioned services , is also specious since the services provided by these individuals were not allowable under Chapter 2.

Finally, the MDE's contention that the individuals in the questioned positions were transferred to State administration, is irrelevant. A transfer of these individuals effected after the date of the audit in no way affects the findings.

It is our determination that the MDE was not in violation of Chapter 2 for the period from September 1988 to September 1989 since the MDE chose to conduct its Chapter 2 programs under the provisions of the ECIA which permitted State strengthening activities. In October 1989, however, the provisions of Chapter 2 of Title I of the ESEA, as amended, became effective and the activities performed by the individuals were no longer allowable. The MDE, therefore, was in violation of section 1521 of Chapter 2 from October 1989 through September 1990.

From the evidence presently before this office, which consists of the audit and workpapers for this finding, We have determined that the MDE must return \$133,984 to the Federal government. This amount is based on the salaries of the four positions questioned in the workpapers. Specifically, salaries for 12 months for Robert Blumenthal (\$48,770) and Dianne Curran (\$43,745) as well as salaries for 6 months for Edward Melihan (\$18,847) and Peter Murphy (\$22,622).

The repayment procedures for the monetary determination in this enclosure are set forth in the cover letter of this PDL. If you wish to appeal the monetary determinations, you must follow the appeal procedures specified in the PIL cover letter.

Additionally, the MDE must send to this office a list of the positions that it presently supports with Chapter 2 funds together with a statement that describes the basis upon which the MDE determined that the individual in each position performs only allowable Chapter 2 activities. The MDE must send this information , in writing to this office within sixty days of the date of this letter. The information should be sent to:

Assistant Secretary for
Elementary and Secondary Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Attention: Delores Warner

1 The Regional Commissioner is mentioned under "Appearances" for the United States Department of Education because he is the authorized Departmental official who signed the Notice of Disallowance Decision. A Notice of Receipt of Application for Review was issued by the undersigned on October 21, 1993, and sent to the following: Michael Brustein, Esq. and Kristin Hazlitt, Esq. of Brustein & Manasevit, counsel for the Massachusetts Department of Education; John J. Szufnarowski, Regional Commissioner, Region I, Rehabilitation Services Administration; The Assistant Secretary for Elementary and Secondary Education; Nancy Hogle, Chief, Loans and Accounts Receivable Branch, Financial Management Service; and the Operations Management Staff, Office of the General Counsel.

On November 1, 1993, a notice of appearance was filed by counsel for the Applicant. As of November 30, 1993, neither the Regional Commissioner nor his counsel, in the Office of the General Counsel, had filed a Notice of Appearance or responded in any other manner. Recognizing that 34 C.F.R. § 81.38(b) requires that in the event that the administrative law judge determines that the Notice of Disallowance Decision does not meet the requirements of Section 81.34, the administrative law judge "[r]eturns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision, " despite the lack of any response on behalf of the authorized Departmental official, the tribunal is issuing this decision now without further delay in order that the this case may move forward in accordance with the applicable regulations

[2](#) Section 81.37(c) (2) requires that the Application for Review contains a certified statement of the date the recipient received the Notice of Disallowance Decision.