CONSOLIDATED APPLICATIONS OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION,
Applicant.

Docket Nos.93-136-R and 93-44-R
Recovery of Funds Proceeding

ACN:03-23136G and 03-13002G

DECISION

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

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

Before: Thomas W. Reilly, Administrative Law Judge

BACKGROUND

The Pennsylvania Department of Education (Applicant or PDE) has appealed two program determination letters (PDLs) and the resultant preliminary departmental determinations (PDDs) issued by the Assistant Secretary for Vocational and Adult Education, U.S. Department of Education, (Assistant Secretary or ED). As a result of those two PDLs and PDDs (based upon audit results)See footnote 1 [1], the Assistant Secretary demanded repayment of $328,799 in Federal funds awarded PDE in fiscal year 1989 (FY'89)(Dkt.93-44-R), and $2,967,774.20 awarded PDE in fiscal year 1991 (FY'91)(Dkt.93-136- R). After reviewing further documentation submitted by PDE (and mediation), the Assistant Secretary ultimately reduced the amounts of both demands to $194,307.75 and $2,887,781.20, respectively, for a new total of $3,082,088.95.

Both of these consolidated proceedings are based upon adverse "maintenance of effort" (MOE) findings by the Assistant Secretary, i.e., that PDE had failed to comply with maintenance of fiscal effort requirements set forth in the Carl D. Perkins Vocational Education Act, 20 U.S.C. §2301 et seq.(1988)(Perkins I). Section 503(a) of Perkins I (20 U.S.C. §2463(a)) requires a State receiving such vocational education Federal funds to maintain its fiscal effort from State sources

for vocational education on either an aggregate or per-student basis. (See also §113(b)(1) of Perkins I, 20 U.S.C.§2323(b)(1) (1988); and 34 C.F.R. 401.19(a)(1).)

ISSUE

The basic disagreement between the parties is the method of calculation of the "maintenance of effort" required by Perkins I. ED has included the pertinent prior year's Pennsylvania expenditures for the State's "Customized Job Training program" (CJT) in the calculation of PDE's fiscal effort requirements for vocational education. PDE maintains that the CJT amounts should not be included in such calculation, thereby arriving at a lower total for each year against which to measure the required State vocational education expenditure. Viewed more narrowly, the dispute comes down to whether the definition of "vocational education" as used in Perkins I is controlling, or whether the State's own interpretation, intentions, and CJT program objectives, should be the guide. (§521 (31) of Perkins I, 20 U.S.C. §2471(31) (1988); 34 CFR 400.4(b).) As expressed by PDE counsel (Reply Brief, at 12): "the sole question in this case is whether or not Pennsylvania's Customized Job Training program falls under the definition of vocational education as provided in Perkins I."

STATUTES AND REGULATIONS

The following are relevant portions of the critical statutes and regulations affecting this proceeding.

20 U.S.C. §1234a (1988): "Recovery of Funds"
* * * *
(b)(3) In any proceeding before the Office under this section, the burden shall be upon the recipient to demonstrate that it should not be required to return the amount of funds for which recovery is sought in the preliminary departmental decision ....
(See also 34 C.F.R. 81.30.)

20 U.S.C. §2463 (1988): "Maintenance of Effort"

(a) No payments shall be made under this chapter for any fiscal year to a State unless the Secretary determines that the fiscal effort per student or the aggregate expenditures of such State for vocational education for the fiscal year preceding the fiscal year for which the determination is made, equalled or exceeded such effort or expenditures for vocational education for the second preceding fiscal year.
(See also 34 C.F.R. 401.22(a).)

20 U.S.C. §2471 (1988): "Definitions"

As used in this chapter:
* * * *

(31) The term "vocational education" means organized educational programs which are directly related to the preparation of
individuals in paid or unpaid employment
in such fields as ... business occupations,
... technical and emerging occupations,
modern industrial and agriculture arts,
and trades and industrial occupations,
or for additional preparation for a career
in such fields, and in other occupations,
requiring other than a baccalaureate or
advanced degree ....

DISCUSSION

The Applicant (PDE) has the burden of proof in this proceeding. 20 U.S.C. §1234a(b)(3) (1988); 34 C.F.R. 81.30. In totalling the fiscal effort for vocational education, a State must include all expenditures from State sources that meet the definition of "vocational education." (20 U.S.C. §2463(a) (1988); 34 C.F.R. 401.22(a) (1988).) Although PDE argues otherwise, the Federal definition of "vocational education" does not require that a program or activity be part of a "coherent sequence of courses" or include "academic competencies."

Pennsylvania's Customized Job Training Program (CJT) was developed by the State legislature in 1985:

> ...to meet the training needs of the State's new and expanding business by enhancing the skills of the workers of this Commonwealth ... funding shall be dedicated towards training projects which result in net new full- time employment opportunities, significant wage improve- ments, the retention of otherwise lost jobs or other conditions which would offer substantial economic benefit to this Commonwealth. Recognizing that many regions of the State remain economically distressed, customized job training programs should attempt to meet the special job training needs of these areas.

(PDE Initial Brief, at 4, and PDE Ex.3, at R-3-1.)

Although PDE now argues that CJT amounts should not be considered in calculating the fiscal MOE requirement, PDE admits that it did include CJT in the MOE calculation for prior years (five consecutive years). (PDE Initial Brief, at 5; PDE Ex.6; and see bottom of page 19, PDE Ex.2, at R-2-24, regarding auditor's findings on this point; also ED Exs. E-1-2,-3 & -4.) However, PDE argues that doing so was a mistake, that CJT does not really qualify as "vocational training" within the meaning of Perkins I, and that this is why the State started to delete CJT funds from the MOE calculations in subsequent years. PDE argues that because the focus of the CJT program is economic development and aid to State businesses, and because the successful completion of the program was intended to result in a trainee being employed full-time by the firm at which he was training, that this somehow pulled the CJT program out of the definition of "vocational education."

The CJT program appears to fit well within the Federal definition of "vocational education" as specifically defined in Perkins I and its implementing regulation. 20 U.S.C.§2471(31) (1988); 34 C.F.R. 400.4(b) (1988). However, PDE argues that the State's own interpretation and legislative intent should be given deference, as well as the State's different objectives in preparing and executing the CJT program. PDE maintains that consideration of those State objectives and intentions led the State to conclude that the CJT program is not true "vocational education," and argues that the State's interpretation should take precedence over the Federal definition in the Act and regulations. ("The Department of Education must defer to Pennsylvania's interpretation of its own statute." PDE Initial Brief, at 10, citing cases and the Tenth Amendment, U.S. Constitution.) But the Tenth Amendment does not require giving deference to the State in a case where a State voluntarily agrees to maintain fiscal effort, as required by Federal statute and regulations, as a condition of receiving a Federal grant. "Courts have held innumerable times that the federal government may impose conditions on the receipt and use of federal funds." Alabama v. Lyng, 811 F.2d 567, 568 (11th Cir. 1987), citing Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

PDE argues that Pennsylvania's interpretation of the CJT program is that it is a State labor and business incentive program and not a vocational education program. The problem with that argument is that although it might have some weight in the absence of a Federal definition, in this case we have an existing and quite clear Federal definition in both the statute itself and its implementing regulations (supra). I find PDE's cited cases to be inapposite to the situation we have here. For example, this is not a situation where the Education Department is attempting to interfere with issues properly reserved for local determination, nor is it an attempt by the Federal Government to exercise control over curriculum, to dictate what courses will be taught, and how, etc. See 20 U.S.C. §1232a (1990). Nor is this a case where the Federal Government is attempting to instruct a State on how it should interpret its own laws. In re Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dept. of Educ. (Decision of the Secretary, Oct. 19, 1990), at 3.

PDE also argues that the revised definition contained in subsequent legislation ("Perkins II," the Carl D. Perkins Vocational and Applied Technology Education Act, 20 U.S.C. §2301 et seq. (Supp.IV, 1992)) had the effect of "clarifying" the definition of vocational education in a way that supports the State's position here, by requiring certain new elements not specified in Perkins I. There appear to be several flaws in this approach. First, Perkins II definitions have no applicability here, as only Perkins I (and its definitions) were in effect at the time of the pertinent years in issue. Secondly, it appears that the new definition in Perkins II is not merely a "clarification," but an intended new definition providing new direction and emphasis to the program. H.R. Rep.No.41, 101st Cong., lst Sess., 5-6 & 131 (1989). (See ED Ex.E-6-2, -3, & -5.) Thirdly, it appears that even if the Perkins II definition of "vocational education" were applied, the State's CJT program would still fit that later definition. PDE's alleged distinctions appear to be "distinctions without a difference." (See also comments and responses in the NPRM for Perkins II, 57 Fed.Reg. 36720, 36814 (1992); and legislative history, House Conf.Rep. 101-660, 5 U.S.C.C.A.N. 1288, item 285, ED Ex.E-5-5.)

PDE concedes that Pennsylvania's CJT program expenses must be included in PDE's "maintenance of effort" calculation if it meets the regulatory definition of "vocational education," but argues that it is not an "organized education program" as specified in the Perkins I definition, that the purpose of CJT is not to further the education of individuals but is to serve the needs of

industry, that the program does not benefit only individuals who are entering fields that do not require a baccalaureate or advanced degree, and that the CJT program is not structured in such a way that the PDE could have the level of control necessary to provide the assurances required under Perkins I. (PDE Reply Brief, at 1-2.) PDE asserts that the Assistant Secretary's interpretation of the CJT program is thus not consistent with the interpretation by the State that created and administers the program, asserting that CJT has a unique definition that varies from State-to-State and even from business-to-business. On all the above points, based upon my review of all the exhibits (including auditors' reports and witness statements), the legislative history, and the clear, unambiguous definitions of "vocational education" contained in the Act (Perkins I) and the pertinent regulations, it appears that the Assistant Secretary and the auditors' positions are logical and meritorious on these points and I cannot reasonably conclude that the State's interpretation must prevail and control the outcome of this proceeding. It appears that the views of the independent auditors and State auditor are eminently reasonable. (Nothing in the Government Auditing Standards casts any doubt upon the fairness of their work, notwithstanding PDE's disagreement with their conclusions.)

Certainly, it should not be surprising that a vocational education program would (also) serve "the needs of industry," and not benefit "only" individuals entering fields not requiring baccalaureates or advanced degrees. This would appear to be true of virtually any vocational education program. I also fail to see how PDE would lack the "level of control" of the CJT program demanded by Perkins I or its implementing regulations, as asserted by PDE.

The comparison with the State's "TOP" program is interesting, but not dispositive. ("Training for Occupations with Promise") There can be (and are) many different state vocational education programs with varying targets and objectives, but still they could all fit within the wide definition of vocational education in Perkins I and the ED regulations.

EXHIBITS

All exhibits[See footnote 2][2] from both sides have been accepted and received in evidence, with the exception of that portion of PDE Exhibit 19 consisting of Interrogatory 6(a) and its response (at R-19-2), to which ED counsel filed an objection and motion to strike (9/27/94), and PDE counsel filed a response (10/3/94, inadvertently dated "1996"). That material appears to come from conduct and statements made during mediation of another unrelated proceeding (Florida Dept. of Education, Dkt.92-115-R, Office of Admin. Law Judges, U.S. Dept. of Education,), and is therefore inadmissible under 34 C.F.R. 81.13(f)(1). For the reasons stated in ED's response explaining the objection (9/27/94) and after having given due consideration to PDE's opposing argument (10/23/94), ED's objection is SUSTAINED. That limited portion of PDE Exhibit 19 is denied admission, and ED's motion to strike from the record PDE's reference to Interrogatory 6(a) in PDE's Reply Brief (at 17-18, including footnote 9) is GRANTED. The fact that the subject information is now "freely obtainable as a public record pursuant to ... the Freedom of Information Act" does not cure the defect relating to inadmissibility and confidentiality of conduct or statements made during mediation. See 34 C.F.R. 81.13(f)(1)&(2).

Save arguments to relevance or materiality, ED counsel otherwise had no further objections to PDE's exhibits. PDE had no opposition to ED Exhibits 1 - 6 and 8 - 9. As to ED Exhibit 7, PDE

objected to its admissibility if the author of the memorandum was not made available for cross-examination. In view of the fact that said author is a Pennsylvania state employee, coupled with the fact that there has been an abundance of time available to PDE counsel to interview or depose such employee long before now, that objection is overruled and ED Exhibit 7 is received in evidence. PDE had no objection to ED Exhibit 10 so long as it is treated as merely a summary compilation of other documents in evidence, and that is clearly how it is being viewed. Accordingly, ED Exhibit 10 is received.

AMOUNT OF REFUND

In assessing the amount of refund required, the Assistant Secretary for Vocational and Adult Education expressly considered the harm that PDE's "maintenance of effort" shortfall caused to the Federal interests related to the Perkins I vocational education program, and declined to demand the full amount of the grants that the auditors had questioned.See footnote 3 [3] The Assistant Secretary thus limited the refund demand to just the amount by which PDE failed to maintain effort in the fiscal years in issue. (See General Education Provisions Act (GEPA), §453(a), 20 U.S.C. §1234b (1) & (2); 34 C.F.R. Part 81, Appx.illustra.9.) PDE submits that it has reduced the harm that these violations caused to the Federal interest through a supplemental appropriation to local educational agencies (LEAs) in a later year (June 1993) to compensate for the shortfalls in FY 1988 and FY 1990. But I fail to see how a supplemental appropriation in FY 1994 reduces the harm caused by MOE failures in FY 1989 and FY 1991, which had been calculated based on PDE's vocational education expenditures in FY 1987 through FY 1990. The MOE requirement is based upon expenditures made in the two years prior to the grant year in issue. To accept PDE's logic would be to change the standards (to which all States are uniformly held). By using the per-student calculation rather than aggregate expenditures and not requesting recovery of the entire grant award for each year in question, the Assistant Secretary has already minimized the amount of refund demanded for each year.

REQUEST FOR EVIDENTIARY HEARING

PDE counsel had requested an evidentiary hearing (Initial Brief, at 2.) However, in view of the completeness of the record (on both sides) and the briefs, and after fully reviewing all appropriate submissions, I have determined that an evidentiary hearing would serve no useful purpose, and that an evidentiary hearing is not needed to resolve any material factual issue in dispute. In view of the conceded facts, what we have remaining is more in the nature of a dispute as to a matter of law, i.e., the application of specific Federal statutory and regulatory definitions in the face of mainly agreed facts. The only factual issue relevant to this dispute pertains to the nature of the CJT program and how it fits within the Federal statutory and regulatory definition of "vocational training." The opinions and credibility of lay witnesses (e.g., Pennsylvania state employees) explored on direct or cross-examination as to the State's intentions and objectives in administering the CJT program would add nothing material to the limited issues involved in this proceeding. (See 34 C.F.R. 81.6(b).)

FINDINGS OF FACT

After due consideration of the complete record, I find that the Pennsylvania Customized Job Training Program (CJT) comes within the definition of "vocational education" as specifically defined in both the Perkins Act ("Perkins I", 20 U.S.C. §2471 (31)) and the implementing Department of Education regulations (34 C.F.R. 400.4(b)). Accordingly, I also find that PDE should have included CJT expenditures in its calculations to measure compliance with the maintenance of effort (MOE) requirements of Perkins I and the Department of Education regulations relating to vocational education grants for the years in issue. I find that the Pennsylvania Department of Education has failed to comply with statutory and regulatory requirements for maintenance of fiscal efforts from State sources for vocational education, and that PDE is therefore required to refund to the U.S. Department of Education $194,307.75 for Fiscal Year 1989 Federal funds and $2,887,781.20 for Fiscal Year 1991 funds, for a total of $3,082,088.95.

CONCLUSIONS OF LAW

After due consideration of all the documents of record, including briefs of counsel, exhibits from both sides, and the applicable law and regulations, I conclude that Federal law controls which State activities fall within the Federal definition of "vocational education" for the purpose of the grant of Federal education funds and the calculation of "maintenance of effort." I find and conclude that the Applicant, the Pennsylvania Department of Education, has failed to sustain its burden of proving that it should not be required to refund to the U.S. Department of Education the total of $3,082,088.95 (consisting of $194,307.75 of FY 1989 funds and $2,887,781.20 of FY 1991 funds) based upon PDE's failure to maintain its fiscal effort from State sources for vocational education as required by the Federal Vocational Education Act ("Perkins I"), §503(a), §113(b)(1), 20 U.S.C. §2463(a)(1988), §2323(b)(1); and its implementing regulations, 34 C.F.R. 401.22(a), 401.19(a)(1) (1988).

ORDER

The Pennsylvania Department of Education is ordered to refund the total of $3,082,088.95 to the U.S. Department of Education (consisting of $194,307.75 of FY 1989 funds, and $2,887,781.20 of FY 1991 funds).

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Thomas W. Reilly
Administrative Law Judge
Issued: February 3, 1995.
Washington, D.C.

Footnote: 1 [1] *Excerpts from the two audit reports, Audit Control Nos.(ACN) 03-13002G & 03-23136G, appear in ED Ex. E-1 & E-2. These audits are conducted pursuant to requirements of the Single Audit Act of 1984, 31 U.S.C. §7501-7507, and OMB Circular A-128.*

Footnote: 2 [2] *For PDE Exhibits, see separate volume "Applicant's Exhibits To Initial Brief" (Exs. 1 - 15), and appended to rear of Reply Brief (Exs. 16 - 19). For ED Exhibits, see rear of "Brief of the Assistant Secretary" (Exs. E-1 thru E-10).*

Footnote: 3 [3] *It should be noted that even if CJT expenditures are excluded from the calculations for FY 1991, PDE still failed to maintain required fiscal effort, regardless of whether the fiscal effort is calculated on an aggregate or per-student basis. (PDE Initial Brief, at 6-7; PDE Ex.R-2-22.) PDE has conceded that even if CJT costs are not included in the calculations, its State per-student expenditures in FY 1990 decreased from FY 1989. (PDE Initial Brief, at 6-7.) But PDE asserts that if CJT costs are dropped from the calculations, the per-student expenditure increased between FY 1987 and FY 1988, thus meeting its MOE requirement for FY 1989. (PDE Initial Brief, at 6; PDE Ex.R-2-22 and 25.)*