



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

Application of
STATE OF MISSOURI,
DEPARTMENT OF SOCIAL SERVICES,

Petitioner

Docket No. 89-32-R
Recovery of Funds

DECISION OF THE SECRETARY

I have received and reviewed the August 30, 1990, Decision and Order of Administrative Law Judge Daniel R. Shell (ALJ) in this case, the Petition for Review of the State of Missouri, Department of Social Services, the Regional Commissioner's Response to the Petition, the hearing transcript, and the briefs and other documents submitted for the ALJ's consideration. The ALJ found that the Missouri Department of Social Services failed to comply with the recordkeeping requirements of the General Education Provisions Act and the Code of Federal Regulations governing the keeping of records for payroll employees engaged in work effort on more than one State or Federal program. Therefore, the ALJ ordered the Missouri Department of Social Services to refund a total of \$198,572.64 and referred collection to the appropriate division of the United States Department of Education. I agree with the result reached by the ALJ, subject to the following comment.

In its Petition, the Missouri Department of Social Services argues that the decision fails to address issues regarding the "cognizant federal agency" and "mitigating circumstances." Moreover, Petitioner argues that "(i)nstead of addressing the issues of the case, the ALJ bases its entire decision upon creating his own definition of 'indirect costs' as defined by material cited as "Indirect Costs," Management Concepts Incorporated, pg. 1-1 (1988) (See, Decision p. 6)." Petitioner

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further asserts that this definition is not the one upon which argument and the eventual decision should have been based, noting, instead, that the definition found at 34 CFR Part 74, App. C, I.F, is controlling.

Upon review, I find that the ALJ was using the same definition of "indirect costs" as the parties, but that he merely cited to a different source for that definition. Under our regulations, "indirect costs" are defined as "those (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefited, without effort disproportionate to the result achieved." 34 CFR Part 74, Appendix C, Part I.F. (1985). The ALJ states that indirect costs "are those incurred for a common or joint objectives, and therefore cannot be readily and specifically identified with a particular project or activity." Decision and Order at 6. The paragraph concludes, however, with a proper cite to Subpart F of Appendix C. While I can understand the party's preference for citation to the document generally set forth as the source for the definition of indirect costs, I cannot find any indication that reference to the source cited by the ALJ affected the substantive analysis of his findings with regard to whether the salaries in dispute were direct or indirect costs. At best, this inconsistency constitutes harmless error upon which I cannot justify a reversal of the ALJ's decision.

Second, the Missouri Department of Social Services argues that the costs at issue were necessarily indirect because the employees worked on more than one cost objective. This alone, does not dictate a finding that such costs were indirect. The ALJ was correct in his finding that:

[t]he argument that indirect costs are created by the mere fact of an employee working on two separate cost objectives is in error. It must be shown that the keeping of actual time distribution records is too expensive or too impractical before one can consider personnel costs as an indirect cost. There is no evidence to show this to be the situation in this case. Decision and Order at 7.

In the absence of some indication that there was evidence to the contrary, I must agree with the ALJ on this point. I am similarly unpersuaded by the Missouri Department of Social Services' correlative arguments related to the above.

The Missouri Department of Social Services argues that the ALJ's decision is unlawful and incomplete by failing to address the

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"cognizant federal agency" approval as authorized under 34 CFR 74, App. C, I.J.4. The U.S. Department of Health and Human Services (HHS) is the cognizant federal agency for approval of the Missouri Department's cost allocation plan concerning indirect costs. Moreover, since the costs at issue were direct, rather than indirect, the approval of the cost allocation plan was not relevant to this case. Therefore, the ALJ properly found that argument on that issue was not necessary to resolve this matter.

Furthermore, the ALJ found that the one month time study included in the cost allocation plan did not provide an equitable method for distribution of time between the Vocational Rehabilitation and Bureau of the Blind cost objectives. Decision and Order at 8. As well, the ALJ found that the Missouri Department never submitted evidence establishing that those programs were covered as part of the cost allocation plan adopted by HHS. Id. Therefore, even if the cost allocation plan were relevant to this matter, the ALJ properly found that the time study is not a valid means of supporting the disallowed salaries and that the Missouri Department failed to show that the cost allocation plan even covered these costs.

Finally, the Missouri Department of Social Services argues that there are mitigating circumstances as allowed under 34 CFR 81.23. Primarily, this argument stems from the Missouri Department's claim that there are mitigating circumstances based on HHS' approval of the Missouri Department's cost allocation plan. The properly ALJ found, however, that the evidence presented by the Missouri Department did not support its argument that HHS ever adopted a cost allocation plan which included the division of Vocational Rehabilitation and Bureau of the Blind time distribution. Id. Therefore, there could have been no reliance on the cost allocation plan by the Missouri Department for its decision not to maintain time distribution records for employees that worked on both the Vocational Rehabilitation program and the State Prevention of Blindness program.

Moreover, the Missouri Department of Social Services argues that this Department was aware of Petitioner's cost allocation methodologies and implicitly approved of that usage. What the Missouri Department alleges to be implicit approval, however, does not constitute a mitigating circumstance. Moreover, the evidence introduced to bolster its position, a letter from the Regional Commissioner to the Missouri Department, was not even sent to the Missouri Department until one month after the end of the 1985 fiscal year, the period during which the disallowed salaries were incurred. Therefore, I am unpersuaded that this evidence constitutes a mitigating circumstance.

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In conclusion, I AFFIRM the ALJ's Decision and Order. This decision signed this 26th day of October, 1990.

A handwritten signature in cursive script, reading "Lauro F. Cavazos", written over a horizontal line.

Lauro F. Cavazos

Washington, DC

SERVICE LIST

Ronald B. Petracca, Esq.
Office of the General Counsel
U.S. Department of Education
Room 4094, FOB-6
400 Maryland Avenue, SW
Washington, DC 20202

Richard Beaver, Esq.
Kerry Barton, Esq.
Department of Social Services
Division of Legal Services
PO Box 1527
221 West High Street
Jefferson City, MO 65102

The Honorable Daniel R. Shell
Office of Administrative Law Judges
U.S. Department of Education
Room 3053, FOB-6
400 Maryland Avenue, SW
Washington, DC 20202