

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: South Dakota Department of Social Services  
Docket Nos. 79-111-SD-HD  
79-112-SD-HD  
Decision No. 180

DATE: May 29, 1981

DECISION

By letters dated June 13, 1979, the South Dakota Department of Social Services appealed from determinations by the Acting Regional Program Director, Administration for Public Services, Office of Human Development Services, dated May 17, 1979 and May 16, 1979, disallowing Federal financial participation (FFP) totalling \$9,982 claimed under Title XX of the Social Security Act for training costs for the quarters ended December 31, 1978 and March 31, 1979 (May 17 determination) and June 30 and September 30, 1978 (May 16 determination). The appeals were assigned Docket Nos. 79-111-SD-HD and 79-112-SD-HD, respectively, and, with the consent of the parties, were considered jointly. This decision is based on the applications for review, the Agency's responses to the appeals, the parties' responses to an Order to Show Cause issued by the Panel Chair, a telephone conference with the parties held by the Panel Chair, and the Agency's report on a meeting between the parties held pursuant to the telephone conference.

The Order to Show Cause identifies those parts of the disallowances not appealed by the State or withdrawn by the Agency in its responses to the appeals. The remaining issues, representing FFP totalling \$4,839, are discussed separately below.

Travel and Per Diem Costs for Training Programs Lasting Less Than Five Full Days (\$1,665 FFP)

The Agency found that the State had claimed travel and per diem costs incurred for attendance at training programs which lasted less than five full days and disallowed those costs on the ground that 45 CFR 228.84 (1977) allows only education costs for attendance at such training programs. That section provides, in pertinent part, that --

[c]osts matchable as training expenditures include:

- (a)(2) For State agency employees in full-time training programs of less than eight consecutive work weeks:  
per diem, travel and educational costs;

(a)(3) For State agency employees in part-time training programs (part of work week, evenings, mornings):  
Education costs.

The Agency's position is that Section 228.84(a)(3) clearly indicates by the phrase "part of work week" that "part-time" means less than five full days. (Response to appeal, Docket Nos. 79-111-SD-HD and 79-112-SD-HD, p. 2.) The State does not contend that the regulation is unclear,\* but argues that "an exception should be made to the five day rule in rural areas," since training programs of that length are less effective yet more costly than shorter programs. (Application for review, Docket Nos. 79-111-SD-HD and 79-112-SD-HD, p. 1.) We find that the State's argument, standing alone, does not provide a basis for requiring the Agency to make an exception to the regulations, and, accordingly, sustain the disallowance with respect to this item except as indicated below.

The State also contends that \$187 of the amount disallowed, (Voucher 10800, Docket No. 79-111-SD-HD), was incurred for attendance at a training program which ran from a Saturday through the following Wednesday, and argues that this amount should have been allowed since the Agency had not previously defined a work week as Monday through Friday and since some of the trainees may not have worked a traditional work week in any event. (Application for review, Docket No. 79-111-SD-HD, p. 1.) The Agency maintains in response that "unless the training coincides with the exact five full days of an employee's work week, the training is only for part of a work week." (Response to appeal, Docket No. 79-111-SD-HD, p. 2.) Section 228.84(a)(3) allows education costs but not travel and per diem costs for training programs lasting "part of work week."

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\*In several decisions involving this issue, the Board reversed the disallowances to the extent that they covered periods before each state received actual notice of an Agency publication explaining the term "part-time training" (or the contents of that publication.) Montana Department of Social and Rehabilitation Services, Decision No. 119, September 29, 1980; Alabama Department of Pensions and Security, Decision No. 128, October 31, 1980; Oregon Department of Human Resources, Decision No. 129, October 31, 1980; Utah Department of Social Services, Decision No. 130, October 31, 1980; and South Dakota Department of Social Services, Decision No. 142, January 21, 1981. The publication was dated September 14, 1977, however, and lack of notice is therefore not an issue in the instant appeals, which involve substantially later time periods.

In its response to the Order, the State stated that only one trainee was involved and that he worked on a flexible schedule that sometimes included a Saturday through Wednesday work week. (State's response to Order, p. 2.) Even if the training program did not coincide with the trainee's regular work week, however, we find that the travel and per diem costs were allowable. Since the regulation does not specify particular days as constituting a "work week," any five-day period can be considered as such.

The State in its application for review contends with respect to another portion of the costs claimed for travel, (Voucher 06819, Docket No. 79-111-SD-HD), that it had been informed that the disallowance "should [not] have been taken and a correction will be made." (Application for review, Docket No. 79-111-SD-HD, p. 2.) In response to the Order's request for further clarification, the State replied that it could not support this contention, but asserted that the costs, for travel by the State Agency Director of Staff Development, were nevertheless allowable. The matter was raised at the telephone conference, and the Agency subsequently agreed to allow the \$118 involved. (Confirmation of Telephone Conference, dated 4/24/81, p. 1; Agency's letter dated 5/6/81, pp. 1-2.)

Finally, the State argues that \$173 of the costs claimed, (in Vouchers 12120, 15127, and 14948, Docket No. 79-111-SD-HD), was incurred in connection with training programs which lasted five full days, although the three individuals in question did not attend the entire program. The State contends that there was good cause for the individuals to return to their duty stations prior to the end of the program, and that the costs should therefore be allowable. (Application for review, Docket No. 79-112-SD-HD, p. 1.) In its response to the appeal, however, the Agency argues that, even assuming that it could make exceptions to the regulation for good cause shown, good cause did not exist in two of the cases, since one individual returned for a court appearance which was already scheduled (the implication being that he should not have attended the program in the first place) and the other returned "to open a satellite office," an event which presumably could have been scheduled around the training program. In the third case, the Agency found that the training program in question related to the WIN program, which is funded out of Title IV-C of the Social Security Act, and contends that the costs are unallowable on that basis. (Response to appeal, Docket No. 79-112-SD-HD, pp. 2-3.)

The State later agreed that the costs were not allowable in the third case. (State's response to Order, p. 2.) With respect to the other two individuals, although the regulation speaks in terms of the duration

of the program, not individual attendance, we find persuasive the Agency's argument (at p. 5 of Agency's response to Order) that the intent of the regulation would be defeated if travel and per diem were routinely allowed where individuals attended only part of a five-day training course. Under such circumstances, the State would be reimbursed for these costs even where they related to what was in effect part-time training. We further agree with the Agency that the State has not made an adequate showing in this case to support an exception to the regulation for good cause. The Order suggested that the Agency might have considered factors other than the reason for leaving the training early (such as the availability of similar training programs should the individuals not have attended the one in question), but the State did not identify any other factors present in the instant case, although given an opportunity to do so.

Persons Ineligible for Training (\$725 FFP)

The Agency disallowed a portion of the costs claimed for attendance at two training programs on the ground that some of the trainees were not paid directly or indirectly by Title XX funds and hence were not eligible for training under 45 CFR 228.81. The State appealed the disallowance of this item in part, contending that only 35 participants, rather than 38 as found by the Agency, were ineligible for the first training program, and that only one participant, rather than five as found by the Agency, was ineligible for the second training program. (Application for review, Docket No. 79-112-SD-HD, p. 2.) None of the participants named by the State as eligible for training were among those identified by the Agency as ineligible, nor were they even shown to have attended the training programs in question. (Response to appeal, Docket No. 79-112-SD-HD, p. 5 and Exhibits 2 and 3.)

In response to the Order's request to clarify its position, the State identified three individuals not previously named by it who it contended were paid directly or indirectly by Title XX funds. (State's response to Order, p. 3.) In the telephone conference, the State further modified its position, contending that only one of the three individuals was eligible. (Confirmation of Telephone Conference, dated 4/24/81, pp. 1-2.) The Agency agreed to withdraw the \$17 disallowance relating to that individual after reviewing the documentation provided by the State. (Agency's letter dated 5/6/81, p. 2.)

Training Grant (\$2,449 FFP)

The State claimed Federal financial participation in payments made to the South Dakota Association of Mental Health Centers (SDAMHC) for a workshop entitled "Care of the Long-Term Mentally Disabled."

Faculty for the workshop came from two universities and from a program not affiliated with SDAMHC. The agreement with SDAMHC is in the form of a Notice of Grant Awarded, which specifies the title of the workshop, shows the amount budgeted for various line items, and requires grantee participation in the project over and above the amount of the grant. (Response to appeal, Docket No. 79-112-SD-HD, Exhibit 3.) The payments made pursuant to the grant were disallowed on the ground that the cost of training by other than a state agency is allowable under 45 CFR 228.84 only if furnished by an "outside expert" or by a "provider agency" and that SDAMHC was neither of these. The State's appeal does not specifically address the stated basis for the disallowance, but simply contends that the purpose of the training provided under the grant was to improve direct Title XX service delivery and that the major participant group was Title XX service delivery staff. (Application for review, Docket No. 79-112-SD-HD, p. 2.) The State's basic point is that training of benefit to the Title XX program was provided and that the cost of such training should therefore be allowable.

We agree with the Agency's position that SDAMHC is not a "provider agency" within the meaning of 45 CFR 228.84(f) (1977) since it did not contract with the State to provide social services under Title XX of the Social Security Act. Although there is no express definition of a "provider agency" in the Title XX regulations, parts of 45 CFR 228.70(a) and (d) use the term "provider" to refer to an "agency, individual, or organization from which services are purchased" (emphasis added) by the state agency. SDAMHC, however, provided training, which is treated as discrete from services by the Social Security Act. (See, for example, Section 2002(a)(1) of the Act, which refers to "personnel training and retraining directly related to the provision of ... services.") Hence, SDAMHC cannot be considered a provider agency.

We are not persuaded, however, by the Agency's argument that, because SDAMHC did not itself provide the training but hired persons outside the organization to do so, it is not an "outside expert" within the meaning of 45 CFR 228.84(c)(1) (1977).

The Agency, citing the generic definition of "expert" as one having special skill or knowledge (Webster, Third New International Dictionary at 800 (Unabridged)), argues that "[o]nce the total work is subcontracted, the prime contractor is not contributing any special skills or knowledge and therefore is not an 'expert.'" (Agency response to Order, p. 7.) The Agency also contends that allowing subcontracting under such circumstances "would result in an unnecessary administrative cost level." (Agency response to Order, p. 7.)

Section 228.84 of Title 45 provides in pertinent part that --

[c]osts matchable as training expenditures include:

- (c) State agency training activities.
- (1) for experts outside the State agency engaged to develop or conduct special programs: salary, fringe benefits, travel and per diem.

There is no language in this provision which requires the distinction made by the Agency. Moreover, an official agency issuance interpreting Section 228.84(c)(1) specifically refers to "the employment of experts, either as individual consultants or from a firm." Addendum to PIQ 77-31 (APS), dated August 25, 1977. (Response to appeal, Docket No. 79-112-SD-HD, Exhibit 7.) A "firm" or other organizational entity must of necessity arrange for the presentation of the training which it has contracted to provide by individuals. In the instant case, SDAMHC recruited individuals from a number of sources to present various segments of the workshop. We find that this constitutes the provision of training by an expert outside the state agency within the meaning of the regulation. With respect to the Agency's expressed concern with the incurrence of unnecessary administrative costs, we note that the Agency did not identify any unreasonable or unallowable costs charged to Title XX funds under the SDAMHC grant, although invited to do so. (Confirmation of Telephone Conference, dated 4/24/81, p. 2.)

The Agency also argued, however, that even assuming that SDAMHC remained an expert despite the subcontracting, the costs were unallowable because the notice of grant award did not authorize SDAMHC to subcontract the training. (Agency response to Order, dated 4/2/81, p. 7.) We find no support for this argument. The award notice shows an approved budget of \$1,545 for "travel," \$770 for "supplies," and \$1400 for "contractual." Since there is no separate line item for personnel or salaries, SDAMHC's intent to have the training provided under contract is clear from the face of the document.

The Agency stated in the notification of disallowance in Docket No. 79-112-SD-HD that if the disallowance of this item was not upheld on the ground that SDAMHC was neither a provider agency nor an outside expert, it would propose to disallow some of the costs on other grounds. One of the alternate bases for disallowance was that trainers' salaries exceeded the rate of pay in their regular employment. The Agency stated in its response to the appeal, however, that it had determined this to be an allowable cost. (Response to appeal,

Docket No. 79-112-SD-HD, p. 8.) The other alternate basis was that 13 of the 50 workshop participants had neither a direct nor an indirect relationship with Title XX activities. (Response to appeal, Docket No. 79-112-SD-HD, p. 8.) Since the State stated in its application for review in Docket No. 79-112-SD-HD (at p. 2) that it did not contest a disallowance on this basis, the \$547 of the disallowance allocable to the 13 ineligible individuals stands.

Conclusion

For the foregoing reasons, the Board's disposition of the two docketed cases is as follows:

Travel and Per Diem Costs

Disallowance sustained except for \$305 FFP claimed in Vouchers 10800 and 06819.

Persons Ineligible for Training

Disallowance sustained except for \$17 FFP allocable to one individual.

Training Grant

Disallowance reversed except for \$547 FFP allocable to 13 ineligibles.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair