

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Operation SHARE  
Docket No. 77-19  
Decision No. 96

DATE: MAY 2, 1980

DECISION

On June 10, 1976, the Office of Education (OE) issued to Operation SHARE (SHARE), the grantee, a non-profit organization, a \$111,095 award under the Emergency School Aid Act to provide tutorial services to 875 students in the New Haven Unified, Paramount Unified, Pasadena Unified, and Los Nietos Unified school districts for the year 1976-1977. This grant program is authorized by Public Law 92-318 as amended by Public Law 93-380, Catalog of Federal Domestic Assistance Number 13.532, listed in 45 CFR Part 16, Appendix A(27). Applicable programs regulations are contained in 45 CFR 185, Subpart G. General Provisions for Office of Education Programs are contained in 45 CFR Part 100.

In a letter dated July 26, 1977, John P. L. Thorslev, Contracting Officer, OE, Region IX, issued a reduction of grant award in the amount of \$15,714 because no services were provided to the Pasadena School District. That was the amount attributed to the Pasadena element of the project in an August 9, 1976 letter from Mr. Gilbert Solano, Director, Operation SHARE Foundation, to Ms. Mary Ann Faris, Program Officer, OE. In his letter notifying grantee of the grant reduction, Mr. Thorslev accepted the grantee's estimate.

By letter of August 19, 1977, signed by Mr. Solano, SHARE requested an extension of time until October 28, 1977 to file an application for review by the Board. The extension was granted. SHARE'S application for review, of the determination to make the reduction, was dated October 27, 1977 and signed by Mr. Solano.

The Board requested a response to the appeal from OE by memorandum dated November 11, 1977. In a memorandum dated December 12, 1977 OE requested an extension of thirty days from the date of that memorandum until January 12, 1978 to provide its response to the appeal. The requested extension was granted by memorandum dated December 22, 1977. The response to the appeal by OE was dated January 13, 1977. A letter dated February 15, 1978 was sent to the Board, by SHARE, responding to certain matters covered in the OE response to the appeal. This letter was not filed and served in conformance with the provisions of 45 CFR 16.53(a). By letter dated May 16, 1978 the grantee was directed to comply with the provisions of 45 CFR 16.53(a), which was accomplished by SHARE's letter dated May 22, 1978.

An Order to Develop the Record was dated August 31, 1979 and addressed to both parties. By letter dated January 30, 1980, grantee responded to the Order. By memorandum, dated February 25, 1980, OE informed the Board that it could not locate the file in this appeal and would, therefore, be unable to respond to the Order.

OE, in its response to the appeal maintained that the grant reduction be upheld because (1) no services were provided to the Pasadena School District, (2) no approval was granted by the appropriate OE official for changes in the program, (3) no application for program change sufficiently justifying the change had been submitted to OE by SHARE, and (4) the increased scope of services proposed by SHARE for the three remaining districts never occurred.

(1) No Services for Pasadena School District

In both the letter of reduction of grant award and the response to the appeal, OE has maintained that the services designated for the Pasadena School District described in the original application for the grant were not performed. OE stated, in its response to the appeal, that the services were not offered to the Pasadena School District by SHARE until November 17, 1976. SHARE is in agreement that no services were provided to the Pasadena School District. SHARE maintained that in place of providing services to Pasadena, it expanded the scope of services in the remaining three districts.

According to SHARE, Ms. Mary Ann Faris, Program Officer then assigned to SHARE by OE, in a telephone conversation of July 9, 1976, informed SHARE that the Pasadena School District did not intend to participate in the program.

Mr. Delano Yarbrough, Project Officer for ESAA for the Pasadena School District, in an October 7, 1976 letter to Mr. Al Villa, Assistant Regional Commissioner, OE, said, "In July Mr. Solano called the ESAA office to ask if the District was still interested in participating in the Operation SHARE project. I indicated that there are some concerns and that we probably would not." On August 23, 1976, Ms. Faris, in a letter to grantee, addressed to Mr. Solano, refers to "Pasadena's decision to withdraw from your program."

(2) Prior Approval

OE maintained that SHARE had never received prior approval for the program change to use the resources originally delegated to Pasadena to increase the scope of services in the three remaining school districts. There is no showing that written approval for the changes was ever given by OE.

SHARE maintained, in its application to this Board that (1) upon being informed of the Pasadena School District's intention not to participate in the SHARE program, SHARE officials met with Ms. Faris on July 12 to discuss how the funds allocated to the Pasadena District might be otherwise put to use, (2) in a letter dated August 9, 1976, presented to Ms. Faris on the same date, SHARE outlined the following alternatives for disposition of the funds: (a) adding an additional school district to replace Pasadena, (b) increasing the services in the remaining three districts and, (c) reducing the grant by \$15,714 the amount committed to the Pasadena element, (3) at the meeting with Ms. Faris on August 9, 1976, SHARE was informed that Ms. Faris would not support the alternative of substituting another school district, (4) by letter dated August 12, 1979 grantee requested that the Office of Education accept the alternative of reducing the grant, (5) during the summer of 1976, OE officials informed SHARE that reducing the grant was a poor alternative, (6) on August 27, 1976 Mr. Al Fain, who had been appointed Program Officer for SHARE by OE on August 17, 1976, directed SHARE to work on plans to use the funds from the Pasadena component to expand services in the remaining three school districts and informed grantee of what information would be necessary for a modification of contract, (7) on September 28, 1976 and October 1, 1976, SHARE officials met with OE regional officials (including a grant specialist) and submitted a proposed modification of program, revised budget, and support documentation, (8) there was unanimous agreement from all in attendance that the modification be recommended for approval (OE has disputed that there was any agreement to recommend that the modification be approved), and (9) the program changes were implemented.

SHARE maintained that, in light of the circumstances mentioned above and the fact that OE waited until April 28, 1977 to correspond with SHARE on the proposed changes, it was justified in believing that the proposed changes had been approved.

SHARE included with its application the following statement, by Mr. Fain, dated April 19, 1977, with respect to the proposed reduction, "I do not agree with this action. The client has presented sufficient evidence over a series of meetings (requested by us) to justify an increased scope of work in the three districts they had been serving. We said we would let them know - but never did. The grantee has gone on the assumption that they had \$111,095 to spend and has spent most of it. To reduce the grant now would in my judgment be unfair to grantee."

### (3) Sufficiency of the Application

Although Mr. Thorslev's notice of award reduction makes no mention of any incompleteness in the documents submitted by grantee, OE maintains in its response to the appeal, "Appellant failed to supply a revised budget request and an adequate justification to support this change." That

contention seems to be contradicted by the statement in the notice of award reduction: "at that time (April 28, 1977) you were told that the Office of Education had taken the proposed budget revision under consideration..."

The statement dated April 19, 1977 by Mr. Fain, discussed above, also appears to contradict OE's position on this matter.

(4) Increased Scope in the Three Remaining Districts

Although Mr. Thorslev's notice of award reduction does not discuss this matter at all, OE, in its response to the appeal, contended that the work was not performed in conformance with the proposed changes, because "Appellant had served only three out of four school districts and 562 out of the promised 875 students."

The file contains a letter from the grantee to Mr. Fain, dated September 16, 1976, outlining its plans for the method of expanding services to the three remaining districts. That letter does not mention an increase from the 562 students originally slotted for the three remaining districts but rather says, with respect to the increase in services, "This would best be accomplished by making extensive usage of consultants during peak periods of recruitment.... it would also be advisable to reinstate the half-time position Tutorial Resource Specialist, which was deleted from our original budget."

Grantee also included the remarks of Mr. Fain, with respect to the final program report, dated October 6, 1977, "Excellent final program report. This applicant has performed the program activities of the grant in a manner satisfactory to the government and I recommend that the grant be closed." These remarks were made by the program officer responsible for this grant.

Regulations

45 CFR 100a.28 and 45 CFR 100a.29 are the regulations governing amendments to grants, budget revisions and minor deviations in direct project grants administered by the Office of Education. 45 CFR 100a.29(b) states, "(b) Recipients Other Than State and local governments. Minor deviations from the project of a recipient other than a State or local government (as defined in §100.1 of this subchapter) are permitted without the necessity for an approved amendment or revision where (1) they do not result in expenditures in excess of the total amount granted, (2) there is not any material change in the content or the administration of the approved project, and (3) expenditures are otherwise made in accordance with, and for kinds of expenditures authorized in the approved application."

OE maintained, and the grantee has not disagreed, that this section would not apply because the removal of an entire school district and increase in support of the other three districts amounts to a material change.

45 CFR 100a.28 states, "The grant or contract must be appropriately amended prior to any material change in the administration of an approved project, or in organization, policies, or operations affecting an approved project. Substantive amendments will be subject to approval in the same manner as original applications. Project amendments may be initiated by the Commissioner if changes are made in Federal appropriations or laws governing such projects. If such amendment constitutes a partial termination of the award, the procedures contained in § 100a.495 shall apply."

45 CFR 100a.15 makes it clear that the amendment application must be in writing.

45 CFR 100a.27(c) provides, "(c) The Commissioner will notify the applicant in writing of the disposition of its application."

SHARE, in maintaining that it submitted a revision request and received no answer for months, asked that 45 CFR 100a.29(a)(8) be applied to this case. That section states "Within 30 days from the date of receipt of the request for budget revisions, the Commissioner will review the request and notify the recipient as to whether or not the budget revisions have been approved. If the revision is still under consideration at the end of that 30-day period, the Commissioner will inform the recipient in writing as to when the recipient may expect the Commissioner's decision."

That section would seem not to be binding on OE in this case, however, because 45 CFR 100a.29(a)(1) provides that, "(a) State and local governments. (1) This paragraph applies only to recipients which are State and local governments (as defined in §100.1 of this subchapter)."

In its application for review, grantee maintains that its budget revision to increase the scope of work of the grant program in the New Haven Unified, Paramount Unified, and Los Nietos Unified School Districts "was justified from the events that occurred and from the information and advice we were given from Regional Office staff." However, it is clear that no prior approval in writing was received by grantee from the appropriate official for this budget revision which makes a material change in the administration of the approved project.

Nevertheless, grantee's claims depict a situation where the agency had expressed disapproval of the alternatives of returning to OE the funds attributed to Pasadena and substituting another school district for Pasadena. Although grantee would not have suffered financial jeopardy had it not spent the funds attributed to Pasadena, grantee could well

have believed that it would have been criticized by the agency for not expending the funds at all--especially after grantee's request that the funds merely be returned to the agency had not been accepted by the agency.

We must accept these un rebutted claims in view of the fact that the agency has been unable to respond to the Order to Develop the Record in this appeal. That Order stated in part, "...[2] OE is directed to confirm, deny or state that it has no knowledge with respect to the claim that the grantee received directives during the summer of 1976 from OE officials that the alternatives of (a) reducing the grant by the amount attributed to the Pasadena district, and (b) adding a new school district to replace Pasadena were considered inferior to the alternative of increasing work scope in the three school districts."

45 CFR 100a.27(c) requires that the Commissioner of Education notify, in writing, the applicant of the disposition of his application. That regulation does not state how much time from the date of the application the Commissioner has to notify the applicant. Under a reasonable interpretation of the regulation, we find that 45 CFR 100.a27(c) was not complied with by OE when the grantee, faced with a situation where there had to be a change in the project, made an application for amendment in the third month of the grant and OE did not respond in writing until the July 26, 1977 notification of disallowance, one month after the end of the grant.

#### Conclusion

For the reasons stated above the appeal of Operation SHARE Foundation is granted. The decision of the Office of Education to reduce the grant award by \$15,714 is reversed.

/s/ Clarence M. Coster

/s/ Donald G. Przybylinski

/s/ Frank Dell'Acqua, Panel Chairman