

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Bloomfield College Cooperative Education Program  
Docket No. 78-4  
Decision No. 82

DATE: Feb. 22, 1980

DECISION

Bloomfield College, Bloomfield, N.J. ("grantee") appeals from a determination by the Acting Deputy Director, Grant and Procurement Management Division, U.S. Office of Education ("OE") of disallowance of certain expenditures of grant funds, for alleged failure of Maintenance of Effort by grantee.

I

During the period July 1, 1970 through June 30, 1973, grantee had been awarded three annual grants authorized under Part D, Title IV of the Higher Education Act of 1965, P.L. 89-329, as amended by P.L. 90-575. The purpose of the grants was to assist colleges in planning and carrying out programs of cooperative education that alternate periods of full-time academic study with periods of full-time public or private employment to give students an opportunity to earn money and gain work experience related to their field of study.

These Federal grants were in the amount of \$15,000 for FY 1971, \$19,000 for FY 1972, and \$20,000 for FY 1973, for a total of \$54,000.

The cited legislation authorizes the granting of Federal assistance for Cooperative Education programs for not more than three years upon the filing of a separate application for each fiscal year. Section 452(b)(2) - 20 USC sec. 1133a(b)(3) during the relevant period - stated that "Each application...shall: provide that the applicant will expend during such fiscal year for the purpose of such program or activity not less than was expended for such purpose during the previous fiscal year."

It is agreed by the parties that the non-federal outlays provided for in the applications filed by the grantee for the 3 grant years were \$36,890 for 1971, \$35,370 for 1972, and \$27,769 for 1973. It is likewise agreed that the amounts actually expended by the grantee during the applicable period were \$30,003 in 1970, \$15,276 for 1971, \$19,014 for 1972, and \$24,199 for 1973. Grantee asserts that the amounts set forth in its grant applications as "maintenance of effort" cost, represent budgeted projections rather than actual expenditures, and that they found their way into the applications not for the purpose of misleading, but through inadvertence due to inadequate and uncoordinated staffing in its business office.

The Audit report of the HEW Audit Agency included findings to the effect that the grantee's program applications contained significant inaccurate or misleading

data and that the expenditures from College resources fell below the threshold needed for Federal monetary support. Accordingly, it recommended a refund of the sum of \$54,000, the total amount of grant funds awarded for the 1971-73 fiscal years.

On January 9, 1978, upon a review of the Audit recommendations, OE communicated its formal determination of disallowance in the reduced amount of \$41,540 to the grantee. This figure represents the difference between the sum of \$100,029, the total budgeted by the grantee for the three grant years, and the sum of \$58,489 actually spent by the grantee of its own resources during this period.

It should be noted that in its response to our Order to show Cause, the OE appears to have reversed itself in that it reinstated the position of the HEW Audit Agency that the amount it considered refundable is the full amount of the Federal grants, or \$54,000.

## II

We begin our discussion of the merits of the Appeal with the aspect last hereinabove noted. Grantee's Appeal is from the determination of January 9, 1978, calling for a refund of only \$41,540. It is that determination which established our jurisdiction in this matter and which set the direction for the subsequent proceedings herein. In view of this we regard OE's revival of the more extreme position in the Audit report, a position which it knowingly refused to adopt in its initial determination, not as a re-determination but merely as legal argument outlining a maximal scope of entitlement. The assertion that \$54,000, or the total Federal grant funds, should be ordered refunded, rests on the premise that grantee "could not possibly have qualified [for Federal grant assistance] in FY 1972, and 1973," if grantee had recorded the amounts actually expended in its applications. Acknowledging the wide discretion possessed by OE in granting, withholding, and specifying the amount of grant assistance for Cooperative Education programs, we find nothing in the pertinent legislation or regulations which would have made it mandatory for OE to decline funding for grantee in any amount for 1972 or 1973, had the true facts been fully made known. As a matter of fact there does not appear to be any doubt but that grantee did evidence a consistent commitment to the program, and that the Federal grant funds were applied in furtherance of the program. Equally, while the record does not contain any reasonable explanation for grantee's dereliction in failure to inform OE, after the event, that the stated amounts for maintenance of effort in the applications represented budgeted, rather than actual, expenditures, it does not require a conclusion that those figures were induced by a deliberate effort to mislead, as contended.

One of the grantee's arguments before the Agency and in its appeal has to do with the propriety of using the year 1970 as a "base year" by which to measure

the adequacy of its maintenance of effort during a subsequent year. Admitting that it spent \$31,003 in furtherance of cooperative education in FY 1970, it urges that fully \$24,000 of this amount was derived from a non-recurring Ford Foundation grant. It is said that, because of the non-recurring and extraordinary nature of this grant, the sum of \$24,000 applied by it to the program in 1970 should not be viewed as part of its normal resources for the purpose of calculating the scope of its maintenance of effort for the FY 1971.

We see no merit in this argument. Both the Statute and OE's Instruction for Submitting Applications merely direct that the applicant "will expend..." without qualification as to the source of the funds expended and the latter, even more convincingly, contains the phrase "from other than Title IV-D funds." Reinforcement for this conclusion is found in the form of the Application itself which describes grantee's financial contribution to the program in terms of expenditure "from its own sources" without further elaboration. The Maintenance of Effort Regulation, 45 CFR 182.13, also speaks of "sources other than this part." It is hard to maintain that money expended on cooperative education is any less part of grantee's "own resources" or that it constitutes less than money "from other than Title IV-D funds" merely because its source was that of the Ford Foundation. Elimination of such funds from grantee's institutional resources for the purpose of weighing the scope of maintenance of effort is no more logical than to suggest that funds obtained by a college from a non-recurring capital gain distribution to it as a shareholder, or from a testamentary gift should not be included for such purpose.

Grantee also argues that if cost-per-student rather than total dollar amounts be used for determining maintenance of effort, it will be found that there occurred no diminution in its financial contribution to the program during the relevant period. Admittedly, the cost-per-student yardstick is infirm and unrepresentative in that the rate would vary in inverse proportion to the number of students enrolled during a given year. While "maintenance of effort" has on occasion been considered as satisfactorily established in terms of per-student cost in respect to OE programs, it was due to a choice allowed by the authorizing statute. See, e.g. the General Education Provisions Act, 20 U.S.C Sec. 1232-1; the Adult Education Act, 20 U.S.C. Sec. 1206(b), or the Vocational Education Act of 1963, 20 U.S.C. Sec. 1803(a)(11).

In contrast to the foregoing, the Act creating the authority for Cooperative Education grants does not provide alternative methods for defining maintenance of effort. In view of the fact that Congress had manifested an awareness of the two methods, the absence of the cost-per-student criterion in Sec. 452(b), and its statement of the requirements in terms of annual expenditures, fairly lead to the conclusion that the test for determining whether, and the degree to which, grantee has fulfilled the maintenance of effort requirement is that of fiscal year dollar amounts.

III

Examined in terms of fiscal-year dollar amounts, it is readily seen that grantee's annual expenditures viewed singly or in the aggregate, and depending upon the fixing of the base year as a standard of comparison, do not disclose compliance with the maintenance of effort requirement. The extent of the default, therefore of the refund, will depend upon the selection of a formula which reasonably takes cognizance of time sequences and relevant amounts.

It may conceivably be argued that grantee's performance through the years 1971-73 should be weighed against the amount it had expended in the year, 1970, immediately prior to the first grant. In that year grantee has expended the sum of \$31,003, hence this might be regarded as establishing the measure of its "effort" for 1971, the first grant year. If grantee be held to this standard for 1972 and 1973, the total dollar amount it should have expended would be \$93,009. Since it actually spent only \$58,489, it leaves \$34,520 as the possible disallowance figure. But this approach must be discarded because each of the three grants herein must, as prescribed in the Statute, be treated as separate and distinct. Furthermore, the Statute and the implementing regulation express grantee's obligation in any grant year with reference to its non-Federal expenditure in the previous fiscal year.

Another approach would be to ignore the figures grantee recorded on its applications, and to consider only the expenditures it actually incurred: \$31,003 for 1970, \$15,276 for 1971, \$19,014 for 1972, and \$24,199 for 1973. This would show that, except for FY 1971, grantee's yearly expenditures from its own sources, have not only been maintained as compared with the previous year, but that they have increased. It would follow that grantee was in non-compliance only in FY 1971, and the disallowance should be for no more than the difference between the amount expended in 1970 (\$31,003) and the amount actually spent in 1971 (\$15,276), i.e., \$15,727.

The difficulty with this formula is that it reads section 452(b)(2) as if it provided for no more than the previous year's expenditures as the absolute measure of maintenance of effort. On the contrary, that section seems to adopt the previous year's expenditure as a minimum ("not less"), and, in this connection, it is noteworthy that the exaction of this minimum is not merely a substantive condition for eligibility, but is something to be reached through the application process. Thus, this section opens with the statement "Each application...shall..." Stated directly, to comply with the maintenance of effort requirement it is not sufficient to show that grantee has, in fact, spent during a fiscal year not less than what he had spent during the previous year, but it must be shown that this commitment had been expressed in the application, as well.

A consideration of the regulatory scheme pursuant to 452(b)(2), makes clear the significance of the application under this section.

45 CFR 182.3 provides for the submission of an application by an educational institution. The following section makes assistance provided under this part subject to applicable provisions contained in "subchapter A of this chapter" relating to fiscal, administrative, management, and other matters.

45 CFR 100a.10 makes regulations under this part applicable to ...(25) Cooperative Education programs under Title IV-D of Higher Education Act of 1965.

45 CFR 100a.16 reads: "the application shall describe...(c) the facilities and resources that will be made available; (d) justification of the amount of Federal funds requested; (e) the portion of the cost of the project proposed to be contributed by the applicant; (f) a proposed budget; and (g) such other information and assurances as the Commissioner may require" (emphasis added).

45 CFR 100a.26 enumerates in detail the factors considered by the Commissioner in reviewing the application including (5) reasonableness of estimated cost in relation to anticipated results; (7) sufficiency of size, scope and duration of the project (emphasis added).

45 CFR 100a.27 makes a grant subject to terms and conditions set forth in "App. A to this subchapter pursuant to section 100a.290." Paragraph 2 of the terms and conditions provides, under "scope and duration of the project"... "the project to be carried out thereunder shall be consistent with the proposal as approved..."

It is obvious that if the normal exercise of discretion by the Commissioner of Education in his administrative decision-making in the area of grant awards and enforcement of their terms is to possess any viability they must rest upon an assumed integrity of an institution's representation when applying for a grant. In the matter under consideration, the Federal support for grantee's cooperative education program, and the amounts thereof, were induced by the representation in the application, including representations as to amounts budgeted in previous years as required by official Instruction. A formula which ignores the effect accorded to the application in the statute and the implementing regulations is clearly inadequate as a measure of grantee's compliance with the maintenance of effort requirement.

It seems to us that a supportable criterion by which to judge grantee's duty to make refund is one which is reasonable in that it takes cognizance of the grantee's substantial contribution to the effectuation of the statutory purpose; which takes account of what grantee had stipulated in the application to be the scope of its contribution, and which gives effect to the

distinct character of the three consecutive annual grants.

The record shows that grantee had projected maintenance expenditures in the sums of \$36,890, \$35,370 and \$27,769 for fiscal years 1971, '72 and '73, respectively. During this period, OE grants were \$15,000 for 1971, \$19,000 for 1972, and \$20,000 for 1973. Since the projected expenditures were set forth as budget items in the grant applications for the relevant years, it must be assumed that the grants awarded for these years were made, inter alia, in consideration of the proffered non-Federal contributions. It is thus seen that the percentage of the grant to the grantee's projected maintenance expenditure was .406 for 1971, .537 for 1972, and .720 for 1973.

Amounts actually expended by grantee from other than Federal sources are shown as \$15,276 for 1971, \$19,014 for 1972, and \$24,199 for 1973. The record is without evidence as to what the ratio of the grants might have been if these expenditures had been disclosed in the grant applications. To avoid speculation and to accomplish substantial justice, we assume the ratio applicable to the reduced, actual maintenance of effort expenditures to be identical with that applicable to the projected expenditures. Thus applied the grants would have been \$6,202 for 1971, \$10,211 for 1972, and \$17,423 for 1973, for a total of \$33,836. Since the aggregate sum of the grants for 1971-3 amounted to \$54,000, grantee is properly chargeable with the duty to refund the difference, i.e., \$20,164.

We accordingly affirm the determination of disallowance and refund in the amount of \$20,164.

/s/ Francis DeGeorge

/s/ Thomas Malone

/s/ Irving Wilner, Panel Chairman