

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Topeka Public Schools, Topeka, Kansas-- DATE: SEP. 28, 1978
Docket Nos. 77-7, 77-8, and 77-9
Decision No. 47

DECISION

This is an appeal by the United School District No. 501, Topeka, Kansas (grantee) from determinations by the Chief, International Equal Education and Procurement Management Division, Office of Education (OE), that the grantee has failed to meet its proper share of the project cost of a grant, and demanding refunds.

The determinations relate to three successive grant awards in support of a follow-through program for three periods commencing August 1, 1972, and ending June 30, 1975. These will be referred to for convenience as years A, B, C. Upon audit, the deficiencies in non-Federal contributions were calculated to be in the amounts of \$709.34, \$7,218.00, and \$17,328.51, for the grant years A, B, and C, respectively.

Grantee does not dispute the mathematical correctness of the amounts of the asserted underpayments nor the formula upon which they are based. It contends, however, that during each of the relevant periods, it had contributed considerably in excess of its required share of the follow-through project costs by contributing the services of five teachers who "would not have been employed except for the grant," and that it had paid their salaries out of its general fund. In this connection, it argues that to be allowable in satisfaction of its proper share of the actual project cost, the contribution is not required to be made in cash, but can consist of in-kind services.

We do not understand the OE to be in disagreement with this last-cited proposition as a matter of principle. What the OE does assert is that grantee has failed to demonstrate that the payment of the salaries of the five "follow-through" teachers by the grantee out of its general fund, if made, was necessarily or reasonably related to the follow-through grant program.

Federally-assisted follow-through programs are authorized by section 222(a)(2) of the Economic Opportunity Act of 1964, as amended (P.L. 90-222) 42 USC 2809(a)(2). Their objective is the educational progress of children of low-income families who were previously enrolled in Head Start or similar programs, through provision of intensified and enriching instructional activities and parent participation. Section 225(d) of the Act, 42 USC 2812(d), provides that no program be approved for assistance under Section 222(a) unless the Director satisfies himself:

"(1) that the services provided under such program will be in addition to, and not in substitution for, services previously provided without Federal assistance, and (2) that funds or other resources devoted to programs designed to meet the needs of the poor within the community will not be diminished in order to provide contributions required under subsection (c). . ."
(Emphasis added.)

Section 225(c) of the Act prescribes minimum percentages of the non-Federal contribution, and vests discretion in the administering agency to lower the rate if he determines such action to be required "in furtherance of the purposes of this subchapter," and authorizes the adoption of regulations for the establishing of objective criteria. Implementing guidelines and regulations duly established a sliding scale formula for determining the extent of a non-Federal share in follow-through grants by reference to the number of elementary school grades and number of grant years involved. Since there is no disagreement between the parties as to the applicable percentage rate, further elaboration concerning this is not required.

In support of its position, grantee has introduced into the record of this proceeding an inter-office memorandum dated March 1, 1977, to its treasurer's office confirming that teachers there listed were employed as follow-through teachers and that they have all received their remuneration from grantee's general fund. The list shows the total number of such teachers to have been 14 for year A, and 12 for each of years B and C of the grant. The memorandum further states for each of the grant years that five of these teachers "would not have been employed" had the follow-through program not been in existence. This is due to the alleged fact that "many of the follow-through students are transferred from their home school to the building where the follow-through program is assigned."

The foregoing, together with some additional information furnished by the grantee in response to our Order to Develop the Record, bearing upon the designation of the follow-through attending schools and the number of pupils, according to grade, who attended them from the several home schools, and salaries paid to each of the teachers, represents the entire evidence for the grantee's assertion that it has satisfied its statutory obligation in respect of meeting a specified part of the follow-through cost project. An examination of the entire body of information in the file leads us to a contrary conclusion.

To begin with, we note a discrepancy in respect to the total number of alleged follow-through teachers employed during school year A between the inter-office memorandum (14) and the response to our Order to Develop the Record (13). Furthermore, while grantee indicates that 166 pupils required transportation to a follow-through attending school in year A, compared with 261 for year B, and 258 for year C, it claims the salaries of five teachers as its contribution to the Follow-Through program in year A, as in year B or C, without offering any explanation for such result.

Nor does it provide any information concerning the total number of teachers employed in its school system in relation to the number of pupils attending kindergarten and grades 1-3 prior to the A grant year, as compared to the situation in year A.

Of even greater significance is the inconsistency of grantee's position with the statutory and regulatory postulates governing follow-through assistance and the difficulty of reconciling that position with official documentation in the file. The requirement that follow-through assistance, whether from Federal or non-Federal sources, must be supplemental to what a recipient would normally contribute in routine practice, and not in substitution thereof, must be viewed as of cardinal importance. All guidelines and regulations governing this matter, in force during all of the grant periods, have emphasized this requirement. No assistance by a grant recipient which does no more than maintain its normal effort of performance can qualify as an allowable contribution, whether cash or in-kind, in satisfaction of the contractual obligation to contribute from non-Federal sources to the cost of the follow-through project. A contrary view would be patently repugnant to the legislative purpose. Follow Through Program Manual, February 24, 1969, pp. 27-8*; 34 F.R. sec.158.2(d); 39 F.R. 158.67; 45 CFR 158.67.

Also, services to be "acceptable" as in-kind contributions must be shown to be necessary and reasonable for the proper and efficient accomplishment of objectives of the grant, 45 CFR 100a.92(b), and as directly benefiting and specifically identifiable to the federally-supported activity, id., at 100 a. 91.

The factual evidence in this proceeding must be measured against the foregoing criteria. There is nothing in the Follow Through Applications filed by the grantee to have suggested to the grant officials or to put them on notice in any way, that grantee had contemplated the appointment of additional teaching staff in furtherance of the grant project and that such appointment was necessary or reasonable. Absence of such information effectively precluded the administering officials from scrutinizing the claimed in-kind contribution for acceptability. The Manual, supra, at p. 30, contains a seemingly absolute prohibition of the use of grant funds--Federal or non-Federal contribution--for the payment of salaries of regular classroom teachers during the normal school day except for supplementary

* Although titled "Draft," this document served as the primary administrative guide in the follow-through grant field during the grant years involved in this proceeding prior to the promulgation of the implementing regulations in June 1974.

Grantee admits that it had been furnished a copy of the Manual contemporaneously with the grant of the initial award, and it draws upon provisions of the Manual as a basis for legal argument.

kindergarten teachers, which the record shows have been paid out of Federal funds. But even aside from this outright prohibition, the important point here is that there is nothing in the official documentation which grantee was required to submit, or which it did presumably submit, to indicate that additional instructional staff was, indeed, appointed or needed.

Thus, in its proposed budget for year A, grantee, under "Instructions, Salaries, Teachers" listed 14 teachers in the "Maintenance of Effort" column, including seven whose names are identical with seven of the 14 teachers whose names appear in the list attached to grantee's inter-office memorandum of March 1, 1977. An attempt does appear to have been made in the proposed budget for year B to list a sum of \$32,000 as salaries for 4 (not 5) follow-through teachers in the non-Federal contribution column, but this item is shown to have been stricken through on the face of the application. Similarly, the proposed Follow-Through Budget for year C (1974-5) merely lists only two kindergarten teachers and two master teachers (i.e., teachers having no direct teaching responsibility, except to afford guidance to other teachers) whose compensation was, in fact, charged to Federal funds.

The absence of supporting documentation is especially hard to explain in view of the requirements set forth in the Grant Terms and Conditions which apprised grantee herein of its obligation to submit a variety of program and fiscal reports at various intervals during a grant period. Thus, the Notification of Grant Award for 1973-4 (year B) requires the grantee to submit to OE, by December 31, 1973, a report showing "the work planned to be accomplished during the next budget period, and a detailed estimate of expenditure report for the current budget period." It is almost inconceivable that an in-kind non-Federal contribution now estimated by grantee to have a value of approximately \$35,000, annually, would not have found its way into one or another of those reports.

It remains to be added that in a letter from grantee, bearing the February 17, 1976, to OE, it admits "some difficulty in meeting the "in-kind" costs in the past and expresses the hope that "fiscal year 1975-76 should reflect greater emphasis on the meeting of these non-Federal costs." This admission is almost totally irreconcilable with the claim made March 1, 1977, in the inter-office memorandum, concerning the payment by grantee of the salaries of five teachers out of its general fund for each of the three grant periods, the aggregate of which is computed by grantee in its memorandum of March 8, 1977, to be of a value exceeding \$117,000 or almost five times as much as the aggregate of the deficiencies asserted by OE.

As indicated earlier, the record does not disclose any disagreement between the parties concerning the percentage rates applicable to grantee's contribution to the grant project costs for any of the three grant periods. A reading of the file does, however, show a

stated overlap between the second and third grant periods. It appears that while the second grant period is defined as August 1, 1973, to August 31, 1974, the third period is stated to have run from July 1, 1974, to June 30, 1975. Since the non-Federal contribution was assessed at 16% of the project cost for the third period (year C) and at only 14% for the second period (year B), the erroneous inclusion of the months of July and August in the third period worked a prejudice against the grantee. But, in view of the fact that OE has offered to make an adjustment in its deficiency determination in the amount of \$17,328.51 for year C to reflect a 2% reduction to the extent of authorized obligation made by the grantee prior to September 1, 1974, we do not consider it essential to delay a decision pending a recomputation based upon further development of the record.

Accordingly, we dismiss the appeal and affirm the demands for a refund on account of underpayment of non-Federal contributions in the amount of \$709.34 for year A, \$7,218.00 for year B, and \$17,328.51, as adjusted in a manner consistent with our opinion, for year C.

/s/ Francis D. DeGeorge

/s/ David V. Dukes

/s/ Irving Wilner
Panel Chairman