

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: University of Arizona
Docket No. 78-11
Decision No. 58

Date: June 19, 1979

DECISION

BACKGROUND

The University of Arizona ("grantee") appealed to the Board by letter dated April 21, 1978 from the March 23, 1978 determination of the Deputy Commissioner, Bureau of Higher and Continuing Education, Office of Education, disallowing a total of \$33,398 charged to grantee's Veterans' Cost-of-Instruction Program grants for the years ending June 30, 1975 and 1976. This amount included \$32,848 disallowed on the ground that grantee had not implemented special education programs based on the assessed needs of educationally disadvantaged veterans and \$550 disallowed for travel to activities which OE found were not directly related to providing services for veterans. OE also stated in its adverse determination that grantee should implement procedures to ensure that veteran enrollment counts were adequately supported and made in accordance with program regulations, but did not disallow any funds although it found that grantee had overstated its veteran enrollment and consequently received more funds than it was entitled to receive. OE's response to the appeal states that this issue "has been satisfactorily negotiated by the Office of Education and the University, and is now considered moot." (p. 4.)

JURISDICTION

The Veterans' Cost-of-Instruction Program was established by Section 420 of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070e-1. It was designed to encourage colleges and universities to serve the special needs of Vietnam-era veterans by making payments to such institutions to provide certain specified services for veterans. (118 CONG. REC. 5798 (1972) (Remarks of Senator Cranston).) The program is a mandatory grant program (although an institution must apply to receive its entitlement), and thus the Deputy Commissioner's adverse determination was not automatically subject to the Board's jurisdiction. However, on July 31, 1977, the Secretary of HEW approved the designation of the program by the Commissioner of Education as a program subject to the jurisdiction of the Board, so that this appeal may be accepted pursuant to 45 CFR 16.2(a).

DISCUSSION

A. Special Education Programs

Grantee received a grant award of \$70,707 for the year ended June 30, 1975 and a grant award of \$73,862 for the year ended June 30, 1976. (OE response to appeal, dated 5-30-78, Tabs B and C.) It expended a total of \$32,848 of grant funds for instructional expenses pursuant to 45 CFR §189.17(a) during the two-year period beginning July 1, 1974 and ending June 30, 1976. However, this amount was disallowed by OE on the ground that special education programs based on the assessed needs of educationally disadvantaged veterans had not been implemented, and that therefore grantee was not free to spend any funds for general instructional expenses.

The disallowance was based on the findings and recommendations of the HEW Audit Agency in its report dated May 12, 1977 (Audit Control No. 71014-09). (Letter from Moye' to Schaeffer dated 3-23-78, 3rd paragraph.) The auditors found that grantee had established motivational and tutorial programs, but had not implemented a special remedial program for veterans. (Audit report, p. 7, 1st paragraph.) In fact, grantee offered remedial classes in English, Mathematics, Reading-Study Skills, and Basic Social Studies and/or Humanities. (Audit report, p. 35.) These courses were open to all university students. All of the courses were established before grantee began participating in the Veterans' Cost-of-Instruction Program, with the exception of the Mathematics course. (Audit report, p. 29, 2nd paragraph.) Approximately 15 veterans per year enrolled in these remedial classes in each of academic years 1974-75 and 1975-76. (It is not clear whether this is a total for each class or for the program as a whole, however.) (Audit report, p. 35.)

However, the auditors took the position that separate remedial classes open only to veterans were required. (Audit report, p. 5, 2nd paragraph, 2nd sentence.) They also found grantee's course offerings inadequate on the ground that program regulations required that the special education programs be established in response to an assessment of veterans' needs, problems and interests, and that no such assessment was made. (Audit report, p. 9, 1st paragraph.) Grantee, however, contended that the head of its Division of Continuing Education, who was responsible for coordinating remedial course offerings for the entire university, had made extensive efforts to assess the educational needs of veterans as well as other students and had determined that the university-wide remedial courses met the veterans' needs. (Audit report, p. 24, item a.) Grantee also stated that it wished "to offer a comprehensive program without making specific groups eligible for preferential treatment" and that it "must continue to avoid any form of discrimination." (Audit report, p. 23.)

Several statutory and regulatory provisions are relevant to a consideration of this item. (At the outset, it should be noted that regulations for the Veterans' Cost-of-Instruction Program underwent a number of changes. The version published in the Federal Register on May 3, 1974 (39 FR 15481) was

applicable to the first grant under which funds were disallowed, which began on July 1, 1974. Amendments were next published in the Federal Register on May 23, 1975 (40 FR 23301) in time to apply to the second grant involved in this case; however, the sections pertaining to this item of the disallowance remained unchanged.)

The basic program requirements are found in two sections of the regulations: 45 CFR 189.12, captioned "Office of veterans' affairs," and 45 CFR 189.12, captioned "Related veterans' services." Section 189.2 requires that the institution maintain "a full-time office of veterans' affairs with adequate services...in the areas of outreach, recruitment, special education programs, and counseling." This provision essentially repeats the language of the program legislation, which requires that the institution "maintain a full-time office of veterans' affairs which has the responsibility for veterans' outreach, recruitment, and special education programs, including the provision of educational, vocational, and personal counseling for veterans...." 20 U.S.C. §1070e-1(c)(1)(B)(i).

Section 189.13 contains requirements for actually providing the services for which the office of veterans' affairs is given responsibility in Section 189.12. It should be noted that the term "special education programs" in Section 189.12 is defined in Section 189.11(d) as "specially designed remedial, tutorial, and motivational programs designed to promote success in the postsecondary experience," and thus relates to more than one paragraph of Section 189.13. Paragraph (a) of Section 189.13 requires the institution to carry out "[p]rograms designed to prepare educationally disadvantaged veterans for postsecondary education...." Paragraph (b) requires "[a]ctive outreach, recruiting and counseling activities." Paragraph (c) requires "[a]n active tutorial assistance program." (These requirements parallel the provisions of 20 U.S.C. §1070e-1(c)(1)(B)(ii), (iii) and (iv).)

More detailed requirements for these activities are found in Section 189.16. Paragraph (d) of that section states that the criterion by which the adequacy of the special education programs will be evaluated shall be the establishment and maintenance of:

- "(1) Support from appropriate departments of the institution for launching special education programs for the veteran student of a remedial, motivational, and tutorial nature;
- (2) Support throughout the institution for appropriate changes in rules, policies, and procedures that will accommodate the special needs and problems of the veteran student; and
- (3) Adequate guidance for individual veteran students that will insure the highest possible rate of their retention in educational programs."

Finally, the regulations provide that at least 50 percent of grant funds must be used for the office of veterans' affairs and related veterans' services,

but that any balance remaining after defraying such expenses may be used for instructional expenses in academically related programs of the institution. 45 CFR §189.17(a).

In its initial response to grantee's appeal, OE supported the disallowance by contending that the veterans' special educational needs had not been met because, in part, the remedial programs provided by the University had already been established for all students (Moye' letter, May 30, 1978). However, in its response (January 15, 1979) to this Board's Order to Develop Record, OE appears to have retreated from this position by stating: "It has not been the position of the program that statute and regulation mandate separate classes for veteran students only." Rather, OE now appears to rely exclusively for its disallowance on the program's "operational belief that assessment of need is implicit in providing a program of remedial services and therefore affirmed the audit finding that such assessment had not formally occurred." (p. 1.) This reading of OE's current position finds additional support in that same response which argues: "It is evident from our reading of the legislation that the Congress intended specialized consideration of Veterans needs which cannot be satisfied by providing access to programs that are designed for regular students without an accompanying additional individualized assessment that could determine whether or not such access did resolve the remedial needs of the student." Thus in our view, assignment to existing remedial courses without a proper and accurate assessment of the educational deficiencies of the individual veteran did not fulfill program requirements as determined by the auditors and as affirmed by this office on the basis of the audit report." (p. 3, emphasis in the original).

We cannot help but take note of the unusual circumstance, reflected in the quoted statement, of "program requirements as determined by the auditors and as affirmed by this office on the basis of the audit report." (Emphasis ours). So far as the record discloses, the interpretation of the program regulations to such effect was first expressed by the auditors. Nowhere can be found any indication in the regulation or responses of OE to this appeal that that interpretation did not originate with the auditors, an undertaking which would seem to be beyond their jurisdiction or responsibility. OE appears to acknowledge the absence of any explicit articulation of such a requirement in stating its "operational belief that assessment of need is implicit in providing a program of remedial services...."

Be that as it may, we, nevertheless, address the merits of such interpretation as well as the question whether separate veterans' remedial classes are required.

Although the disallowance was based in part on the lack of any assessment of veterans' needs in connection with the special education programs, it appears that there is no requirement for such an assessment. 45 CFR §189.16(b)(2) requires the establishment and maintenance of "[a] procedure for assessing veterans' needs, problems, and interests," but specifically states that this is "[w]ith respect to outreach...." The term "outreach" is defined in 45 CFR §189.11(b) as "an extensive, coordinated, communitywide program of reaching veterans within the institutions' normal service area, determining their needs, and making appropriate referral and follow-up arrangement with relevant service agencies." It thus appears that the required assessment is of the needs of

veterans in the community for various social services rather than of the needs of student veterans for remedial courses. Thus, even assuming that the assessment by the Division of Continuing Education was inadequate (and there is no showing that it was), reliance on this alleged particular program requirement as a basis for disallowance is not, in our view, justified.

On the question of whether separate veterans' remedial classes are required, the statute and program regulations are ambiguous in that they neither specifically prohibit nor specifically permit the use of existing remedial classes open to all veterans. The legislative history of the Veterans' Cost-of-Instruction Program offers no definitive answer, but seems to support the reading that separate classes are not required. The purpose of the program (as explained by Senator Cranston when he introduced it as an amendment to the pending bill) was to encourage the fuller use of educational benefits under the G.I. bill. New provisions of that bill had been enacted some two years earlier providing, among other things, for payments to veterans enrolled in "refresher courses, deficiency courses, or other preparatory or special educational assistance..." (38 U.S.C. 1691) and for payments to veterans receiving "individualized tutorial assistance" (38 U.S.C. 1691). However, Senator Cranston stated that because G.I. bill benefits go directly to the veteran, "institutions of higher learning have had neither the resources nor the incentive to actively recruit veterans," and consequently the number of veterans who had availed themselves of these benefits was very low. The Veterans' Cost-of-Instruction Program was intended "to provide institutions of higher education with the motivation and the money to recruit and to prepare veterans for post-discharge education, and to realize more fully the potential of existing programs which have been established, funded, and intended by Congress to facilitate this readjustment process." 118 CONG. REC. 5799 (1972).

Thus, the special education programs required to be carried out by an institution receiving a Veterans' Cost-of-Instruction grant are apparently the same programs as those in 38 U.S.C. 1691 and 1692, and other, similar provisions of the G.I. bill. Since there appears to be no requirement in the G.I. bill for separate classes, it may be concluded that no such requirement was intended by the Veterans' Cost-of-Instruction provisions.

It should be noted that allowing grantee to meet the needs of veterans for remedial courses by encouraging them to enroll in already established courses open to all students does not run afoul of any "no supplant" or maintenance of effort provision such as is applicable to many grant programs. As previously noted, under the Veterans' Cost-of-Instruction Program, an institution which meets the grant requirements is allowed to use any remaining funds for the instructional costs of related academic activities. Thus, the idea is not for a grantee to use the full amount of the grant to build up its services to veterans, but rather to use whatever amount is needed to provide the necessary services, applying the rest to improve the overall quality of instruction at the institution.

Grantee contends in support of its position that the Region IX Veterans' Program Coordinator, Dr. Albert Piltz, approved its use of regular remedial classes. According to the director of grantee's Office of Scholarships and Financial

Aid, Dr. Piltz had discussed the role of the Division of Continuing Education in providing remedial courses for veterans with several grantee officials during a site visit on October 1, 1975 and agreed that the funds budgeted for this purpose (\$1,000) would not be needed unless the head of that division found that courses other than those already provided by his division would be needed. (Audit report, p. 71.) Dr. Piltz's approval, if given, might be further reason to construe the statute and program regulations in grantee's favor.

Although OE has denied that Dr. Piltz provided either written "approval" or "disapproval" of specific activities, it has acknowledged that "[h]is role as site visitor was to assist university personnel in interpreting rules and regulations governing the program so that Federal funds would be expended in accordance with established policies and procedures." (Item 3, p. 2, OE's response dated January 15, 1979.) He was also "fully authorized to assess the performance of participating institutions and to judge compliance or non-compliance with program rules and regulations."

It would be unreasonable to hold this grantee—after a site visit by a duly authorized OE program coordinator and his review of the grantee's conduct of the program and report thereon—to established policies and procedures or interpretations of regulatory requirements expressed to it for the first time in an after-the-fact audit by auditors, rather than by a program official. Even if their reading of the regulations does in fact reflect OE policy—on the soundness of which interpretation we entertain substantial doubt—the reports by Dr. Piltz both to grantee (November 28, 1975) and to the Regional Commissioner (December 4, 1975), made after the site visit in October 1975, discuss pointedly the excellent performance of the program and certain specific deficiencies. The significant omission in this context of criticism of the program for lack of a separate remedial program surely implied that grantee's administration of the VCIP program was in conformance with the legislative and regulatory requirements.

In view of the foregoing, this portion of grantee's appeal is sustained.

B. Travel Costs

The second item disallowed was \$550 in travel costs. \$478 was charged to the grant in fiscal year 1975 and \$72 in fiscal year 1976. According to grantee, there were a total of fourteen trips taken by four individuals. Grantee identified three of the individuals as the Assistant Director, the Associate Director and the Director of the Office of Scholarships and Financial Aid. This was the office to which the coordinator of veterans' affairs reported. Eight of the trips were to meetings of the Arizona Association of Financial Aid Administrators. Four of the trips were to "counselors workshops" at Northern Arizona University and Arizona State University, apparently to acquaint the counselors at those institutions with how grantee's Office of Scholarships and Financial Aid operated. Another trip was to a meeting and workshop held at Arizona State University by HEW, the purpose of which is not identified. The last trip was for the purpose of getting acquainted with a number of Indian leaders, who were meeting in Phoenix, a week before a recruiting trip to Indian reservations. (Audit report, pp. 88-91, 91.)

The auditors' description of the travel costs indicates that in addition to "financial aid counselors workshops" and "association meetings for financial aid officers," there were "meetings with scholarship donors." (Audit report, p. 18.) According to grantee, however, one such meeting was combined with a meeting of the Arizona Association of Financial Aid Officers, while the "expense claim" for another trip to a meeting of that association incorrectly described it as a meeting of scholarship donors. (Audit report, pp. 90-91.)

The auditors recommended that the travel costs be disallowed because the workshops and meetings did not directly benefit the Veterans' Cost-of-Instruction Program, as required by 45 CFR §189.17. (Audit report, p. 18.) 45 CFR §189.17(b) (effective May 3, 1974) provides that "[a]ll assistance received under this part must be expended or obligated for the foregoing purposes...." OE disallowed the costs based on the audit report.

Grantee contended, however, that the \$478 in travel costs charged to the grant in fiscal year 1975 (which included all trips except the one to Phoenix to meet with Indian leaders), was reviewed and approved by the program officer, Dr. Piltz, during his site visit in October 1975. (Audit report, pp. 26 and 88.) It also contended that it had incurred an additional \$3,733 in travel costs directly related to the Veterans' Cost-of-Instruction Program but not charged to the grant funds which were determined to be unallowable. (Audit report, pp. 27, 92-95.)

The auditors stated, however, that their review of the additional \$3,733 in travel costs disclosed that these costs also were incurred "while conducting activities that did not directly relate to providing required program services." In addition, they stated that the program officer had advised them that he had not approved any specific travel costs. (Audit report, p. 20.) OE in its response to the appeal also contends that no such approval was given, and includes as evidence a memo dated December 4, 1975, about two months after Dr. Piltz's site visit, from him to the Regional Commissioner which mentions "travel by an administrator to events of dubious veterans business," but does not otherwise refer to travel costs. (OE response to appeal, Tab E.)

Even assuming that grantee could show that Dr. Piltz approved the travel costs, this would not resolve the issue, since he did not have authority to approve an unallowable cost. Thus, this Board must reach the question whether the costs were allowable under the applicable regulations. Regulations dealing specifically with travel costs were in effect in fiscal years 1975 and 1976. 45 CFR Part 100, Appendix C, Part I, ¶J.44, made applicable to training and other educational services under grants and contracts with educational institutions by 45 CFR Part 100, Appendix C, Part II, ¶J., provides that travel costs are allowable "when they are directly attributable to specific work under

a research agreement or are incurred in the normal course of administration of the institution or a department or research program thereof." However, it appears that current knowledge of the availability of financial aid for veteran students would be essential in order to successfully carry out the recruitment, counseling and outreach activities under the grant, and that if the meetings of the Arizona Association of Financial Aid Administrators contributed to this knowledge, the cost of attending these meetings should have been allowable. It is less apparent how the counselors' workshops may have benefitted the grant program if members of grantee's staff were the instructors rather than the students. The trip to the HEW-sponsored meeting should clearly be allowable if it was related to the grant program. In this connection, it is noted that the 1976 budget submitted by grantee included allocations of \$1500 for workshop/conference professional travel and \$2500 for recruitment/outreach travel. This suggests that travel for either of the purposes was considered appropriate and allowable. However, we think a reasonable interpretation of the purposes for which travel costs were budgeted requires that the travel be directly related to the VCIP.

In its response to the Board's Order to Develop Record, grantee undertook to justify travel costs which had been disallowed. As to the travel during FY 1975, the costs claimed for Mr. Warden and Mr. Hill were detailed. Two of these trips involved workshops for courses at which Mr. Warden made presentations. The direct relationship between those presentations and the VCIP has not, however, been demonstrated to our satisfaction. The other two meetings are similarly lacking in relating their purpose to this program, even though incident to the February 2, 1975 meeting, Mr. Warden called on the Dougherty Foundation to discuss veteran loans.

What we have said above concerning the two September 1974 workshops is equally applicable to the claim for Mr. Hall's costs for attendance there. Even less of a case is made by grantee to relate the other travel of Mr. Hall to the program.

We would observe that attendance at a professional association meeting, such as the State Association of Financial Aid Administrators, does not justify travel costs because some veteran's concern was discussed at the meeting among other subjects. More direct relationship to the program would have to be demonstrated to support charging the costs to the VCIP.

Under the circumstances we sustain the disallowance of the claimed travel costs for fiscal 1975.

In fiscal year 1976, a different, more restrictive standard was applicable, as the program regulations were amended effective May 29, 1975, to provide that "travel expenditures shall be restricted to recruitment and outreach

activities, attendance at OE sponsored meetings providing technical assistance for this part, and attendance at OE approved professional meetings." 45 CFR §189.17(c). This regulation was applicable only to the travel costs incurred in that year to visit the Indian leaders in Phoenix in preparation for the next week's recruiting trip to some reservations. The explanation of the nature and purpose of Mr. Jae's trip to the Phoenix meeting in March, 1976, appears to us to be reasonably related to his responsibilities and duties as Outreach and Recruitment Officer. As to this item of travel, the appeal of grantee is sustained.

/s/ Manuel B. Hiller
Panel Chairman

/s/ Thomas Malone

/s/ Malcolm S. Mason