

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: Jamestown College
Docket No. 76-14
Decision No. 63

DATE: July 31, 1979

DECISION

This case is concerned with an appeal by Jamestown College (Grantee) from the disallowance by the Office of Education (OE) of certain items identified by the HEW audit agency in an audit of Grantee's administration of grants under various statutes between fiscal 1965 and fiscal 1974, inclusive.

The appeal was filed on May 11, 1976, and since that time the grantee and OE have provided the Board with information and briefing in response to a request for documentation, dated April 14, 1977, and an Order for Clarification of the Record dated March 6, 1978. The time for further submissions having expired, this panel was designated on January 4, 1979, to take such further action as might be necessary to dispose of the appeal.

During proceedings before the Board, both parties have had occasion to review earlier positions, and a number of items are no longer in dispute, as indicated below.

The following constitutes the decision of the panel in the case, based on the record in the case. The parties have had ample opportunity to brief the questions raised by the Board, and have in the main taken full advantage of the opportunity. The Board's task is made easier because of the candor and thoroughness of Grantee's latest submissions.

TITLE II-A - Library

The auditors disallowed the entire amount of the grants for the fiscal years 1968, 1969, 1970 and 1973 on the grounds that the funds were not separately accounted for as required, and the institution appeared to be expending funds at the same level as before the grant, so that either the grant funds were not being used for the purchase of library materials, or they were supplanting the institutional funds.

In the Order for Clarification of the Record, the Board presented an analysis of the grantee's expenditures and the required commitment of institutional funds based on the following assumptions, inter alia:

- 1) That the figures from the grantee's certified audit were most reliable.
- 2) That the statute required institutional funding for library materials to be not less than the average of such expenditures for the two prior years or for (pre-1973 years) the base years 1964-1965, plus a "match" of the federal grant.
- 3) That grants awarded in one fiscal year would be expended in the next fiscal year.

Parties were invited to comment on the above assumptions and also to brief the following questions:

The parties should brief the question of whether it is necessary for a grantee to meet maintenance and matching requirements by actual audited expenditures or whether it is sufficient that expenditures were projected in good faith and appear sufficient and are followed by a good faith effort on the part of the grantee to meet the projection. If projection and good faith effort are sufficient, are they present in this case?

The parties should brief the issues raised above regarding the matching requirement under the statute as amended in 1972 and the computation of the grant under the same statute.

The parties should also brief the questions of whether a disallowance may be made when a grantee meets required expenditure levels in one category but not in another (i.e., in total library resources but not in library materials or vice versa), and, if a disallowance is to be made, whether it should be of the whole grant or just the amount of the deficiency. In this regard, the parties should discuss the effect of the 1972 statutory amendment including a discussion of the amended statute's limitation of the grant to the excess of expenditures for library resources, and should provide any instructions or other material issued prior to 1972 which contain language bearing on this determination.

The grantee's response acknowledged the reliability of the audited figures, but argued, with respect to the basic import of the statute, that if the statute called for a comparison of projected with actual expenditures, the remedy would be a reduction in the grant, rather than revocation.

With respect to the other questions presented, there was no disagreement with the Order to Clarify the Record in either response. Grantee, by its counsel, presented argument on the question of whether the applicable statutory provision should be interpreted as imposing a "maintenance of effort" requirement—calling for strict accounting or a "no supplant" requirement—calling for good faith. The panel reads the provisions in this case as requiring strict accounting: The very wording of the provision "not less than" combined with a dollar for dollar matching requirement, with respect to expenditures for overall library purposes is meaningless unless there is full compliance with the level of effort component.

On the other hand, in the absence of any response from OE to the invitation to brief contained in the Order for Clarification, the Panel is not prepared to hold that the requirement operates as a condition subsequent, requiring disallowance of the entire grant if the provisions are not fully complied with. Rather, the panel believes that the disallowances should be limited to the amount by which the institution failed to make the required expenditures. The statutory language does not require forfeiture, and the match provision supports an equivalent dollar approach. (As that provision operates, total institutional expenditures for library purposes in fact exceed prior levels, in most instances, but the match may not be complete.)

In applying the statute to the history of expenditures presented here, two other questions are presented. Whether deficiencies in overall expenditures and in library materials expenditures should be cumulated, and how supplemental grants should be treated.

Neither party briefed the first question and the second was not addressed because the grantee appeared to have complied with the requirements. (Order for Clarification at 6.)

The Order for Clarification took the position, which we adopt, that the failure to keep the funds in a separate account is not fatal if the financial records of the grantee permit a reconstruction, and it is assumed that the federal funds, which went into the common account, were used for library purposes since cash is fungible.

Consistent with the basic principles set forth above, there follows the panel's disposition of the appeal from the Title II-A disallowance, with each year discussed separately. Reexamination of the audited financial statements, which we relied on, called for some modification of the figures contained in Appendix A to the Order for Clarification.

(A) Fiscal 1968 (Year ending August 31, 1968).

The two year average for institutional expenditures for library materials for 1964 and 1965 was \$13,222. (While the audited financial statement was for a 14 month period, from July 1, 1965 to August 31, 1966, the level of expenditure was in line with the prior and successive 12 month periods, so we have used the 14 month figure.) The two year average for all library expenditures was \$29,152. Grantee's actual expenditures in Fiscal 1968, exclusive of federal funds, were \$12,513 for library materials, and \$28,603 for all library purposes. Thus for the basic grant, the deficiency was \$709 in expenditure for library materials (\$13,222 minus \$12,513), and \$5,549 for all library purposes (the sum of the matching requirement of \$5,000 and the deficit in expenditure level). For the supplemental grant, the deficiency was the same as for the basic grant in the library materials category, and was \$549 in the all expenses category (the matching requirement did not apply). Accordingly, we affirm the disallowance of both grants for that year.

(B) FY 1969 (Year ending August 31, 1969.)

Institutional expenditures for library materials amounted to \$15,570, and for all library purposes, \$32,634. There was accordingly, only one deficit: \$1,518 in the all expenditures category (Average of base period 1964-65: \$29,152, plus federal grant of \$5,000=\$34,152 minus actual expenditures of 32,634.) The panel assumed that \$5,000 of the \$37,634 reported expenditures was federal grant funds from the prior year.

Accordingly, the disallowance for 1969 is reduced to \$1518.

(C) 1970 The expenditures for 1970 were above minimum requirements in all respects, and the entire disallowance is reversed.

	1964-65 average	Actual 1970	Excess
Library materials	\$13,222	\$16,505	\$3,283
All Library	\$29,152	\$34,862	\$ 710

(D) 1973 For 1973 the match requirement was eliminated by the Education Amendments of 1972, and the base period provision was changed by eliminating the optional use of the the 1964-1965 period, and requiring the use of the two fiscal years immediately preceding the grant year.

	Library Materials	Total Library
1971	\$17,034	\$35,902
1972	28,890	54,608
2 Year Average	22,962	45,255
1973 Actual	19,570	54,708
Excess (deficit)	(3,390)	9,453

Accordingly, the disallowance is reduced to \$3390 for FY 1973.

The disallowance of Title II-A grant funds for the years in question is accordingly reduced from \$18,648 to \$10,149.

Title III

The auditors disallowed \$2315 in unexpended funds. Grantee originally argued that it had returned \$1,000 to North Plains Consortium for Education. Grantee was the nominal recipient of the grant and coordinating institution of the six member cooperative body. In its most recent submission in response to the Order to Clarify, Grantee has disavowed its "transfer of funds" argument (which was not persuasive in light of Jamestown's role as coordinating institution and nominal grantee), but argues that it had made allowable expenditures of \$2,037 which were not on the books at the time of the audit. With respect to the claimed allowable expenditures, since they have not been passed on by OE, the Board is not in position to consider them./ Grantee is, of course, free to request OE to address them since they have been in the record for some time.

Accordingly, for purposes of this appeal the disallowance of the \$2315 is affirmed.

Title IV-D

Neither Grantee nor OE have questioned the analysis of the Order to Clarify the Record (attachment 1 to this opinion) with respect to the items in this program. The Board adopts the reasoning of that order, with the exception of \$44 and the \$70 expenditures charged to fringe benefits.

Fringe benefits are provided for as being 11.2% of the salary expense in both the Application for the grant (Exhibit 16) and the Plan of Operation and Budget (Exhibit 18). There is no provision for the recovery of specific charges for fringe benefits because the allowance

/ Also, it appears that the grant as a whole may have been used up. See Exhibit 11 to Grantee's submission of June 9, 1977.

of a percentage of salary costs is in lieu of itemizing specific charges for fringe benefits. In fact, the expression of fringe benefit recovery as a percentage allowance of the allowable salary costs excludes recovery of specific items. (There is no indication that the 11.2% allowance was intended to represent only certain stated benefits, e.g. health insurance).

To the extent that the total claim for fringe benefits exceeds 11.2%, of the allowable salary costs involved in the grant, they should be disallowed. We reserve decision on whether the \$70 and \$44 charges would otherwise be allowable as fringe benefits under applicable cost principles.

Accordingly, the appeal on Title IV is disposed of as follows:

<u>Item</u>	<u>OE Action</u>	<u>Board's Disposition</u>
1) Salaries	a) Director \$948 disallowed	\$ 948 disallowed
	b) Coordinator \$2,623 disallowed	\$ 2,623 disallowed
	c) Secretaries \$250 disallowed	\$ 250 disallowed
	d) Salaries \$1,986 disallowed	\$ 993 disallowed (50%)
	e) \$ 750 No action	\$ 375 disallowed (50%)
	f) Fringes 1) \$1,404 credited	\$ 1,468 credited (11.2% of \$13,108)
	2) \$70 disallowed	\$ 70 disallowed
	3) \$44 disallowed	\$ 44 disallowed
2) Travel	\$679 disallowed	\$679 disallowed
3) Indirect Cost: at 8%	\$1,454 allowed	\$1,504 allowed
Salaries	\$13,108	
Fringes	1,468	
Cons.	360	
Travel	3,135	
Office exp.	670	
Printing fund	60	
	<hr/> \$18,807	

Title VI, National Defense Education Act
(Language Development and Area Centers Program.)

The first area to be discussed is personal services. Much of the discrepancy in the initial audit report can be attributed to the grantee's practice of including the allowance of fringe benefits in the reports of direct salary expenditure; the remainder grows out of grantee's use of a base salary figure for the instructional staff in FY 1973 which exceeded the budgeted amount. In its most recent submission, grantee conceded the

latter point, so there is no remaining dispute in this area. The Board accordingly affirms the OE disposition of the claimed personal services expenditures. By our calculations, the net disallowance should be \$918, arrived at as follows: disallowances of \$518 (director's salary excess) plus \$1,738 (excess of instructional salaries), totalling \$2,256, minus a credit of 11.2% of salaries for fringe benefits, amounting to \$1,338 (the last two figures were apparently transposed in the auditor's report).

The second area to be reviewed was that of library costs. Here OE disallowed as undocumented \$1,820 of the \$5,620 claimed for book purchases in the year ending 1973; \$1,400 as handling charges for that year, and \$2,000 as "other costs" for the year ending June 30, 1974. A related item, discussed in the auditors' report under the heading "grant related income", was \$635 for books purchased with funds from another federal program in the year ending June 30, 1973.

With respect to the \$1,820 in undocumented expenditures, grantee's present position is that it concedes the validity of the auditors' finding, but asserts that \$3,310 in allowable documented expenditures not previously passed on by OE should be allowed as a credit. For the reasons set forth in our discussion of the Title III grant, supra at p. 5 we affirm the disallowance of the \$1,820 and note that grantee is free to urge OE to consider allowance of the \$3,310.

The \$1,400 for handling costs and \$2,000 for "other costs" are apparently being regarded by grantee as referring to the same cost category: expenses directly related to the acquisition of the books. For the reasons set forth in the Order for Clarification, we hold first, that those are direct costs. They are expenses directly connected to the implementation of the grant, as opposed to the impact on general administrative overhead which the 8% figure represents. The fact that they are arrived at by a formula does not depend on their being "direct" or "indirect" but on problems of documentation.*/ With regard to the use of 20%, rather than \$2.75 per volume, we note first that while we do not have an actual volume count, the average cost of a book purchase for college use in 1973, according to the figures provided in the grantee's latest submission, was about \$12.00, so a 20% handling charge appears reasonable. (See attachment (2) to the Title VI section of Grantee's Response to the Order to Clarify the Record.) The ALA standard, which grantee provided, calls for the purchase price of the book to be the base of the computation. In addition, since we are not bound by 45 CFR 131.2, and since the acquisition cost is an appropriate base for projecting the cost of processing of acquisitions, the Board holds that 20% of the allowable expenditures for the years ending June 30, 1973 and June 30, 1974 for books should be allowed for handling costs. Since the \$635 should be deducted from the cost of books purchased during the year ending June 30, 1973, leaving a total of \$3,145 for that year, and

*/ Order to Clarify the Record at 13-14. Compare the widespread use of a percentage in lieu of itemized fringe benefits, which are still direct costs.

the figure for books purchased with grant funds in 1973-74 was \$3,981, according to the auditors, grantee is entitled to a handling allowance of \$1,425, for the two years, and the disallowance of the other \$1,975 is affirmed.

Operational materials

The \$513 disallowed for undocumented expenditures for operational materials has been conceded by grantee.

Other Charges: Honorarium

The grantee appealed from the disallowance of an allocation of \$500 to cover a portion of the expenses connected with bringing Dr. Avarad Fairbanks to the campus for lectures related to the Interpretive Man portion of the program. The disallowance was originally based upon, 1) The failure of the grantee to have the project director's concurrence in the expenditure, and 2) the relevance of the lectures to the project. Grantee conceded that it had not followed proper procedures, but argued that the lectures were, in fact, an integral part of the International Fair which was described in the application for funding. (Exhibit 22a to Grantee's letter of June 9, 1977, at 8.)

OE's latest response does not meet the substance of grantee's position; it does take an oblique cut at Dr. Fairbanks' personal qualifications.

The Board starts from the premise that in general, the views of recipients about the educational relevance and merit of particular activities and the individuals who conduct them should not be set aside lightly, unless there is some glaring deficiency in one or both respects. Here, grantee's judgment is supported by direct documentation that such an activity was contemplated as a direct part of the project. The substantive basis of the audit exception was the questioned relevance of Dr. Fairbanks' participation, and that relevance has been demonstrated. OE's later questioning, with no factual basis, of Dr. Fairbanks' credentials, is entitled to no weight.

Accordingly, the disallowance by OE of the \$500 allocation to cost of obtaining Dr. Fairbanks' services is reversed.

Grant-related income

There were three items originally included under this heading:

- a) \$414 from the International Festival held in fiscal 1973;
- b) \$15 from the International Center in the same year;
- c) \$635 as an adjusting entry for books bought with funds from another federal program.

Grantee has conceded that the auditors' treatment of the first two items as grant-related income is appropriate. (Summary sheet of Title VI section of Grantee's Response to Order to Clarify the Record.) The \$635 should be handled by deducting it from project costs altogether.

Indirect Costs

The attached chart (Attachment 1) presents the amounts claimed by the grantee, the auditor's recommendations (which were adopted by OE) and the Board's disposition.

Summary and Conclusion

In accordance with the above discussion, the Board hereby Orders that the appeal of Jamestown College be disposed of as follows. With respect to Title II-A, the OE disallowance is reduced from \$18,658 to \$10,149. With respect to Title III, the disallowance of \$2,315 is affirmed, without prejudice to whatever rights Grantee may have to submit claims for additional allowable expenditures. With respect to Title IV-D the disallowance of direct costs claimed is reduced by \$618, from \$6,600 to \$5,982; the allowance for fringe benefits is increased from \$1,404 to \$1,468, and the allowance for indirect costs is increased from \$1,454 to \$1,504. Accordingly, the net disallowance is reduced by \$732, to \$4,645 (exclusive of outlay of \$171 over grant ceiling). With respect to Title VI, the disallowance of \$11,401 (including \$2,391 in unexpended funds) is reduced by \$4,198, to \$4,812. Overall, the disallowance of \$38,384 is reduced to \$24,945.

	OE Adjustment	Board Adjustment
Title II-A	\$18,658	\$10,149
Title III	2,315	2,315
Title IV-D	5,377	4,645
Title VI-A	633	633
Title VI	<u>11,401</u>	<u>7,203</u>
Total	\$38,384	\$24,945

/s/ Francis D. DeGeorge

/s/ Thomas Malone

/s/ Theodore A. Miles, Panel Chairman

Attachment 1 to Decision of HEW Grant Appeals Board
in No. 76-14 (Jamestown College)

<u>Cost Category</u>	<u>Cost Charged by College</u>	<u>Allowable cost per audit</u>	<u>Recommended Adjustment</u>	<u>Board Adjustments</u>	<u>Cost Allowed on Appeal</u>
Personal services	\$28,613	\$27,740	\$ (873)	\$ (918)	\$27,695
Library Costs	13,484	8,264	(5,220)	(2,455) <u>1/</u>	11,029
Travel	2,418	2,418	-0-	-0-	2,418
Operational Materials	1,332	819	(513)	(513)	819
Other	<u>5,528</u>	<u>5,028</u>	<u>(500)</u>	<u>-0-</u>	<u>5,528</u>
Total direct costs	\$51,375	\$44,269	\$ (7,106)	\$ (3,886)	\$47,489
indirect costs	<u>4,297</u>	<u>3,457</u> <u>2/</u>	<u>(840)</u>	<u>(497)</u>	<u>3,800</u> <u>3/</u>
	\$55,672	\$47,726	\$ (7,946)	\$ (4,383)	\$51,289
Grant related income	<u>(-0-)</u>	<u>\$ (1,064)</u>	<u>\$ (1,064)</u>	<u>(429)</u>	<u>\$ (429)</u>
	\$55,672	\$46,662	\$ (9,010)	\$ (4,812)	\$50,860

1/ includes \$635 adjustment to reflect items purchased with funds from another grant.

2/ 8 percent of \$43,205 (\$44,269 less grant related income of \$1,064)

3/ 8 percent of \$47,489, with no adjustment for grant-related income.