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December 30, 2002

The Honorable George Miller
Ranking Minority Member
Committee on Education and the Workforce
House of Representatives

The Honorable David Obey
Ranking Minority Member
Committee on Appropriations
House of Representatives

Subject: U.S. Department of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants

You asked for our opinion regarding the Department of Education's (Education) use of appropriations available for only one fiscal year to fund grant awards for multiple years for the Gaining Early Awareness and Readiness for Undergraduate Program (GEAR UP) and the Early Childhood Educator Professional Development Program. As you are aware, this question raises the issue of whether the bona fide need rule prohibits award of multiyear grants with fiscal year money.

For the reasons explained below, we conclude that (1) for grants, the principle of severability is irrelevant to a bona fide need determination, (2) a bona fide need analysis in the grant context focuses on whether the grants are made during the period of availability of the appropriation charged and further the authorized purposes of program legislation, (3) beginning in fiscal year 2002, Education's award of Early Childhood Educator program grants up to 4 years in duration is explicitly permitted by program authority and fulfills a bona fide need of the period for which the funds used are available, and (4) Education's award of 5-year GEAR UP grants during fiscal year 2001 and 2002 and 2-year Early Childhood Educator grants during fiscal year 2001 is in accordance with the program legislation and fulfills a bona fide need of the period for which the funds used are available.

BACKGROUND

Education establishes policy for, administers, and coordinates most federal assistance to education in the United States. One of the ways Education accomplishes its mission is by making discretionary and formula-based grants. Concerns about Education's use of fiscal year funds to award grants that could cover more than one year arose initially in the context of the Gaining Early Awareness and Readiness for Undergraduate Program (hereinafter GEAR UP). After conversations with your staff about this issue, your staff asked that we address the issue not only in the context of GEAR UP but also for other grant programs. This opinion addresses GEAR UP and the Early Childhood Educator Program.

GEAR UP is a discretionary grant program¹ authorized by Title IV of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. § 1070a –21 et seq. It seeks to increase the number of disadvantaged students that continue on to postsecondary education by providing early support services and assurances of financial assistance that enable students to prepare for and pursue a college education. The Early Childhood Educator Program, also a discretionary grant program, is authorized by Title II of the Elementary and Secondary Education Act of 1965 (ESEA), as amended, 20 U.S.C. § 6651(e). Its goal is to enhance the school readiness of young children, particularly disadvantaged children, through grants of financial assistance to improve the knowledge and skills of early childhood educators who work in communities with high concentrations of children who live in poverty.²

¹ A discretionary grant is one that permits Education to use judgment in selecting applications for funding. 34 C.F.R. § 75.200(b)(1). Grants through these programs are competitively awarded (as opposed to noncompetitive, formula grant programs). 34 C.F.R. §§ 75.200(b) and (c) (2001).

² The Early Childhood Educator Program became an authorized program under ESEA pursuant to the No Child Left Behind Act of 2001 (NCLB Act). Pub. L. No. 107-110, 115 Stat. 1425, 1635-41 (January 8, 2002). Education initiated the program the year before pursuant to funding provided for such activities in the Department of Education's Appropriations Act. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-554, Appendix A, 114 Stat. 2763A-33-34 (2000).

Congress has financed both programs with fiscal year appropriations. The GEAR UP program is funded from Education's lump sum "Higher Education" appropriation. Pub. L. No. 107-116, 115 Stat. 2206 (2002); Pub. L. No. 106-554, Appendix A, 114 Stat. 2763A-38 (2000).³ The Early Childhood Educator Program is funded from Education's lump sum "School Improvement Programs" appropriation. Pub. L. 107-116, 115 Stat. 2202-03 (2002); Pub. L. No. 106-554, Appendix A, 114 Stat. 2763A-33-34 (2000).⁴

In the past, for GEAR UP, Education's practice was to award grants for one fiscal year at a time; that is, Education would impose a one-year term on the grantee's use of grant funds. Education, at its discretion, would award continuation grants for additional years, one year at a time for up to five years, out of appropriations of the fiscal year in which it made the continuation grant. In fiscal year 2001, Education changed its practice and began to award five-year GEAR UP grants, charging the full amount of the grant to its fiscal year 2001 appropriation. According to Appropriations Committee reports, this practice has resulted in funding GEAR UP grants in a manner different than Education had indicated in its budget justification for that fiscal year, and using up budget authority for GEAR UP grants more rapidly and for fewer grantees. See S. Rep. No. 107-84 at 329 (2001) and H. Rep. No. 107-229 at 164 (2001). For the Early Childhood Educator Program, Education reports that it awarded two-year grants in fiscal year 2001, the first year of grant competition under this program, with the full amount of the grant charged to that year's appropriation.

Pursuant to our standard practice, we asked Education for its views on its authority to make multiyear grants with fiscal year funding. Letter from Susan A. Poling, Associate General Counsel, GAO, to Brian W. Jones, General Counsel, U.S. Department of Education, February 28, 2002. Education responded that it had authority to issue multiyear grants with fiscal year funds because these two programs represent single nonseverable undertakings and are a bona fide need of the fiscal year appropriation. Letter from Brian W. Jones, General Counsel, U.S. Department of Education, to Susan A. Poling, Associate General Counsel, GAO, March 18, 2002.

³ According to the conference reports, the conferees agreed to a level of funding for GEAR UP at \$285,000,000 for fiscal year 2002 (H.R. Rep. No. 107-342, at 217, December 19, 2001) and \$295,000,000 for fiscal year 2001 (H.R. Rep. No. 106-1033, at 202, December 15, 2000).

⁴ According to the conference reports, the conferees included \$15,000,000 for the Early Childhood Educator Program for fiscal year 2002 (H.R. Rep. No. 107-342, at 122, December 19, 2001) and \$10,000,000 for fiscal year 2001 (H.R. Rep. No. 106-1033, at 182, December 15, 2000).

ANALYSIS

The issue presented is whether Education can use appropriations available for only one fiscal year to fund multiyear grant awards for GEAR UP and the Early Childhood Education Program. To answer this question, we examine the bona fide need rule, the principle of severability in the grant context, the program legislation and applicable statutory language found in fiscal year 2001 and 2002 appropriations acts. We start our discussion with the bona fide need rule.

Bona Fide Need Rule

The bona fide need rule is a fundamental principle of appropriations law addressing the availability as to time of an agency's appropriation. 73 Comp. Gen. 77, 79 (1994); 64 Comp. Gen. 410, 414-15 (1985). The rule establishes that an appropriation is available for obligation only to fulfill a genuine or bona fide need of the period of availability for which it was made.⁵ 73 Comp. Gen. 77, 79 (1994). It applies to all federal government activities carried out with appropriated funds, including contract, grant, and cooperative agreement transactions.⁶ 73 Comp. Gen. 77, 78-79 (1994). An agency's compliance with the bona fide need rule is measured at the time the agency incurs an obligation, and depends on the purpose of the transaction and the nature of the obligation being entered into. 61 Comp. Gen. 184, 186 (1981) (bona fide need determination depends upon the facts and circumstances of the particular case). In the grant context, the obligation occurs at the time of award.⁷ 31 Comp. Gen. 608 (1952). See also 31 U.S.C. § 1501(a)(5)(B).

⁵ The rule has its statutory roots in 31 U.S.C. § 1502(a), which provides: "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability."

⁶ The Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301-6308, requires the use of a procurement contract if the purpose of the transaction is to fund the agency's acquisition of property or services for its own needs. 31 U.S.C. § 6303. If the purpose is to provide assistance to a non-federal entity through the transfer of money or anything else of value to accomplish a public purpose, the proper funding mechanism is a grant. 31 U.S.C. § 6304. If the assistance resembles a grant and substantial involvement is expected between the agency and the recipient when carrying out the contemplated activity, the proper funding mechanism is a cooperative agreement. 31 U.S.C. § 6305.

⁷ The particular obligating document may vary, and may even be in the form of an agency's approval of a grant application or a letter of commitment. See 39 Comp. Gen. 317 (1959); 37 Comp. Gen. 861, 863 (1958).

The Bona Fide Need Rule and the Principle of Severability

In a number of contexts, but for our purposes here most notably government contracts for services, we have addressed whether the bona fide need rule is violated when an agency uses current fiscal year funds to pay for contractual services rendered subsequent to the end of that fiscal year. See, e.g., 65 Comp. Gen. 741 (1986) and 33 Comp. Gen. 90 (1953). In these instances, we evaluate the appropriateness of using current year funds to pay for such services by determining whether the services are part of a single undertaking that fulfills an agency need of the fiscal year charged, or whether the services are severable in nature and fulfill a recurring need of the agency from fiscal year to fiscal year. 71 Comp. Gen. 428 (1992), 23 Comp. Gen. 370 (1943); B-277165, January 10, 2000 and B-259274, May 22, 1996. When services are severable, the bona fide need rule serves to limit the amount of a service contract charged to an available fiscal year appropriation. In these cases, the rule ensures that fiscal year funds are only used for those services required to meet the needs of that fiscal year. 73 Comp. Gen. 77 (1994), 60 Comp. Gen. 219 (1981); B-235678, July 30, 1990.

In 64 Comp. Gen. 359 (1985), we were asked whether the Administration's plan to fund some National Institutes of Health (NIH) research project grants for three fiscal years with fiscal year 1985 appropriations violated the bona fide need rule. In our analysis we relied on our case law applying the bona fide need rule in the context of service contracts, stating that "where continuous and recurring services are needed on a year-to-year basis, contracts for the services are severable and must be charged to the fiscal year in which they are rendered." 64 Comp. Gen. 359, 364 (citing to 33 Comp. Gen. 90, 92 (1953)). We observed that the NIH grant program authorizing legislation reflected a government policy to stimulate certain kinds of research that would be needed year-after-year and that grants under the program would not typically contemplate a required outcome or product. Id. at 365. Since it could not be said that there was a need for an end product in any particular year or that the grant envisioned an end product, we concluded that the bona fide need rule was violated when funds were obligated for more than 1 year for these grants. Id.

This application of the severability concept to grants has not been without doubt. In the NIH decision, we expressed reservations concerning the application of the contract principle of severability to grants. Indeed, in our analysis, we expressly noted that the severability concept was not completely analogous to the NIH grants at issue in that decision which resembled subsidies rather than contracts for services. 64 Comp. Gen. 359, 365. Three years later, in B-229873, Nov. 29, 1988, we significantly undercut the analysis used in the NIH decision. In that opinion, we held that the Small Business Administration (SBA) did not violate the bona fide need rule when it used its fiscal year appropriation on September 30, the last day of the fiscal year, to

award cooperative agreements to Small Business Development Centers even though the Centers would use the money in the next fiscal year.⁸ *Id.* In effect, we concluded that the concept of severability was not relevant to the cooperative agreement at issue.

Our SBA decision significantly departed from the reasoning relied upon in the NIH case. It went further, and we think correctly so, by stating that the concept of severability is not relevant to grants or cooperative agreements, specifically, in that case, the SBA program. While this particular situation related to cooperative agreements, the distinction drawn for purposes of discussing the relevance of severability was between contracts and federal assistance programs (through grants or cooperative agreements). While we recognized that the bona fide need rule applies to grants and cooperative agreements as well as contracts, the application of the rule is shaped by the different types of purposes for which appropriations are available (e.g., contracts for goods or services or financial assistance like grants or cooperative agreements). *Id.* The purpose of the SBA program was to assist the Centers by providing financial assistance through grants or cooperative agreements within the fiscal year charged. In this context it really did not matter when the Centers began or completed their tasks since the statutory purpose was fulfilled once SBA awarded a grant or cooperative agreement during the period of availability of its appropriation. In other words, the award constitutes the obligation, and upon award, the agency's need—to financially assist the awardee—is complete. *Id.* It was for that reason that we advised SBA that the dates on which the Centers use the financial assistance is irrelevant for purposes of assessing the agency's bona fide need, because the agency's bona fide need was to provide financial assistance through grants or cooperative agreements to the Centers in accordance with the program legislation.

We believe the application of the bona fide need rule found in the SBA case is the correct approach. It expressly recognizes the fundamental difference between a contract and a grant or cooperative agreement and the significance this difference has on a bona fide need analysis. Contracts and grants are transactions that fulfill significantly different needs of an agency, the former to acquire goods and services and the latter to provide financial assistance. B-222665, July 2, 1986 (principal purpose of a grant is to transfer something of value to the recipient to carry out a legislatively established public policy instead of acquiring goods or services for the direct benefit or use of the United States). *See also* 31 U.S.C. § 6303-4.

⁸ Congress had specifically authorized the SBA to make grants and cooperative agreements to qualifying applicants, to assist in establishing Small Business Development Centers for small business oriented employment or natural resources development programs, studies, research, and counseling. The SBA authorizing statute explicitly limits the term of the SBA grants to a calendar year or a Federal fiscal year. 15 U.S.C. § 648(a)(1).

The SBA decision is also more in keeping with past decisions, where we have routinely permitted agencies to award grants using fiscal year funds irrespective of the fact that the funds would not be expended until some time after the end of the fiscal year. See, e.g., 31 Comp. Gen. 608 (1952) (fiscal year appropriations obligated upon the effective date of the grant agreement and remain available for expenditure for 2 years following the fiscal year for which appropriated even though underlying grantee contracts with their suppliers are not executed during the fiscal year for which the funds were appropriated); 20 Comp. Gen. 370 (1941) (fiscal year funds may be used to fund grants to States even though courses to be conducted under such grants will not be concluded until after the fiscal year ends); B-37609, Nov. 15, 1943 (agency may award grants extending over a 12-month period, thereby obligating fiscal year funds which will remain available until expended), B-24827, April 3, 1942 (funds legally obligated at the time of grant agreement may be made available for expenditure without regard to the fiscal year limitation of obligated appropriation). In these cases we did not use the fact that grantees would expend funds subsequent to the fiscal year as a basis for questioning the proper scope or duration of the grant award. Rather, we focused on whether the proposed grants were in accordance with the authority provided the agency and fulfilled a bona fide need of the period for which the funds used were available. But see 73 Comp. Gen. 77 (1994) (bona fide need determination in the context of a cooperative agreement properly required assessing severability of research activities where agreement under which research was conducted more closely resembled a contract than a grant of financial assistance).

Early Childhood Educator Program for Fiscal Year 2002

When addressing compliance with the bona fide need rule for grants or cooperative agreements, the primary focus must be on the authority provided the agency. We now turn to the program legislation and the appropriation act for the Early Childhood Educator Program for Fiscal Year 2002. The permanent program authority enacted in fiscal year 2002 states that “[t]he [Department] shall award grants . . . for periods of not more than 4 years.” 20 U.S.C. § 6651(e)(2)(B)(i). Although this language explicitly permits Education to award 4-year grants using fiscal year funds, it is restricted by the program’s fiscal year 2002 appropriation which limits the duration or term of some of the grant funds available. The “School Improvement Programs” appropriation for 2002 that funds the Early Childhood Educator grant program provided three separate sums, one of which was an advance appropriation⁹ available to fund grants only for one academic year: “. . . and of which \$1,765,000,000 shall

⁹ An advance appropriation is budget authority provided in an appropriation act which is first available in a fiscal year beyond the fiscal year for which the appropriation act is enacted. GAO/AFMD-2.1.1. Budget Glossary (exposure draft dated January 1993), at 11.

become available on October 1, 2002, and shall remain available through September 30, 2003, for academic year 2002-2003.”

Using the advance appropriation funds, Education is only permitted to award Early Childhood Educator grants for a period encompassing the academic year 2002-2003. To conclude otherwise would be to ignore the phrase “for academic year 2002-2003.” The phrase is not necessary to establish the period of availability of the appropriation for obligation by Education, since that is already expressly addressed – October 1, 2002 through September 30, 2003. Therefore, to give meaning to Congress’ words, we interpret the phrase “for academic year 2002-2003” to limit the time period of the grants funded by the appropriation.

This limitation does not apply to all sums appropriated, only the amounts of the advance appropriations. Therefore, Education can use funds provided in the fiscal year 2002 appropriation that are not so limited to award grants up to 4 years in duration. Upon using these funds to award grants of up to 4 years in duration, Education has fulfilled its bona fide need to provide financial assistance in the form of grants as prescribed by the program legislation. Assuming that Education made the grant awards during the period of availability of the funds to be used, Education’s grant awards are in compliance with the bona fide need rule.¹⁰

GEAR UP and Early Childhood Educator Program for Fiscal Year 2001

The program authorizations for the GEAR UP Program and the Early Childhood Educator Program for fiscal year 2001 do not provide explicit authority to award multiple year grants. 20 U.S.C. § 1070a-21 *et seq.* and Pub. L. No. 106-554, Appendix A, 114 Stat. 2763A-33-34. However, as discussed below, we find that Education’s award of multiple year grants is in accordance with the authority provided Education under both programs.

While the GEAR UP program legislation is silent as to the duration of the grants that Education is authorized to award, the program seeks to ensure that students who have received services under GEAR UP (or its predecessor program) continue to receive GEAR UP services through the 12th grade. Under the program legislation, Education is to require partnership grantees to provide services under a so-called cohort approach, meaning they are to serve at least one grade level of students (beginning not later than 7th grade) in participating schools through the 12th grade. 20 U.S.C. § 1070a-22(g)(1)(A). Also, the program legislation requires Education, in making grants to states, to ensure that students who received services under the

¹⁰ While this program legislation provides Education with the authority to award 4-year grants, it does not require Education to do so. In other words, consistent with the program legislation Education may choose to fund these grants one year at a time.

grant program preceding GEAR UP continue to receive assistance through their completion of high school. 20 U.S.C. § 1070a-21(b)(2)(B). The legislation further requires Education, in making grant awards, to give priority to funding states that provided services to students under the program preceding GEAR UP. 20 U.S.C. § 1070a-22(a)(1).

In our opinion, Education's award of 5-year grants is both consistent with program objectives and within its discretion under the program legislation. Under the program legislation, Education is not merely required to provide financial assistance, it is to ensure through various ways that students who have received services under the GEAR UP program continue to receive those services from year-to-year until completion of high school. Awarding grants 5 years in duration will aid in ensuring the continuity of grantee services to GEAR UP students which the programs legislation seeks to provide. Therefore, Education is fulfilling its bona fide need under this program when it awards these 5-year grants.

The initial authorization of the Early Childhood Educator Program pursuant to the fiscal year 2001 appropriation does not speak to the duration of grants to be awarded, unlike the program authorization passed in fiscal year 2002, discussed above. For fiscal year 2001, a proviso in Education's "School Improvement Programs" appropriation authorized these grants:

"Provided further, That of the amount made available under this heading for national activities under section 2102 of the Elementary and Secondary Education Act of 1965, the Secretary is authorized to use a portion of such funds to carry out activities to improve the knowledge and skills of early childhood educators and caregivers who work in urban or rural communities with high concentrations of young children living in poverty."

Pub. L. No. 106-554, Appendix A, 114 Stat. 2763A-33-34. This language does not establish any program requirements beyond setting forth the basic objective for using the funds. As such, this legislation reposed broad discretion in Education in making grants and in our view the decision to award 2-year grants is within that discretion.

Education's discretionary authority under these programs was not limited by funding legislation. We did not identify any limitations in either the fiscal year 2001 or 2002 "Higher Education" appropriation used to fund GEAR UP grants that would limit the length of grant awards made out of such funds. Nor did we identify any limitation with regard to Early Childhood Educator Program grants awarded in fiscal year 2001. Like the fiscal year 2002 appropriation that we discussed earlier, the fiscal year 2001 "School Improvement Programs" appropriation contained a variety of appropriated

amounts, including fiscal year funds, forward funds¹¹ (available July 1, 2001 through September 30, 2002), and an advance appropriation available only for one year.¹² Education awarded the 2-year Early Childhood Educator grants out of the funds available during fiscal year 2001, not the advance appropriation, and those funds were not limited unlike the advance appropriation, as discussed earlier with regard to the fiscal year 2002 appropriation. Upon using these funds to award the 2-year grants, Education fulfilled its bona fide need to provide financial assistance under the broad grant of discretion provided.

In summary, Education's award of multiple year grants under the GEAR UP and Early Childhood Educator programs is in accordance with program authorization and to the extent that Education awards these grants during the period of availability of the appropriations made for such purpose, such awards comply with the bona fide need rule.¹³

CONCLUSION

We conclude that (1) for grants, the principle of severability is irrelevant to a bona fide need determination, (2) a bona fide need analysis in the grant context focuses on whether the grants are made during the period of availability of the appropriation charged and further the authorized purposes of program legislation, (3) beginning in fiscal year 2002, Education's award of Early Childhood Educator program grants up to 4 years in duration is explicitly permitted by program authority and fulfills a bona fide need of the period for which the funds used are available, and (4) Education's award of 5-year GEAR UP grants during fiscal year 2001 and 2002 and 2-year Early Childhood Educator grants during fiscal year 2001 is in accordance with the program legislation and fulfills a bona fide need of the period for which the funds used are available.

¹¹ Forward funding is budget authority that is available for a specified period of time, generally in excess of one fiscal year, which may cover periods that do not coincide with the start or end of a fiscal year. GAO/AFMD-2.1.1. Budget Glossary (exposure draft dated January 1993), at 23.

¹² The advance appropriation was not available until the start of fiscal year 2002, and was available only for grants for the academic year 2001-2002: "... and of which \$1,765,000,000 shall become available on October 1, 2001 and shall remain available through September 30, 2002 *for academic year 2001-2002.*" (Emphasis added.) However, the availability of the forward funding amount was not limited: "... of which \$2,403,750,000 shall become available on July 1, 2001, and remain available through September 30, 2002."

¹³ As noted with regard to the Early Childhood Educator grants for fiscal year 2002, while Education is permitted to make multiple year grants the program authorization here would also permit it to fund these grants one year at a time.

Should you have any questions, please contact Susan A. Poling at (202) 512-2667. We are sending copies of this letter to the Secretary of Education and other interested congressional committees. The letter will also be available on GAO's home page at <http://www.gao.gov>.

A handwritten signature in black ink, reading "Anthony H. Gamboa". The signature is written in a cursive style with a large, stylized "A" and "G".

Anthony H. Gamboa
General Counsel