

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND
REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
WASHINGTON, DC 20202

POLICY DIRECTIVE
RSA-PD-92-09
RSM-3015
DATE: July 10, 1992

TO: STATE VOCATIONAL REHABILITATION AGENCIES (GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES (BLIND)
CLIENT ASSISTANCE PROGRAMS
REGIONAL REHABILITATION CONTINUING EDUCATION PROGRAMS
(RRCEPS)
RSA SENIOR MANAGEMENT TEAM

SUBJECT:

Federal Financial Participation in the Payment by States of Arbitration Panel Damages Award under the Randolph-Sheppard Act

BACKGROUND:

Several arbitration panels convened by the Secretary pursuant to the Randolph-Sheppard Act at 20 U.S.C. 107d-1(a) have directed State licensing agencies (SLAs) to pay retroactive compensatory damages and/or attorney fees to prevailing blind vendors. The most recent panel award in the approximate amount of \$240,000 was issued on May 17, 1989, in the case of Hinton vs. Tennessee. In view of such awards, it is important to establish RSA policy on the use of Federal Financial Participation (FFP) in the payment of damages and/or attorney fees from funds granted under Title I of the Rehabilitation Act of 1973, as amended (29 U.S.C. 701 et. seq.). RSA's policy is that neither panel-ordered retroactive awards nor payments made by SLAs to settle arbitration disputes are eligible for FFP.

To date, only the court in McNabb vs. U.S. Department of Education, 862 F.2d 681 (8th Cir. 1988) has squarely adopted the Department's position that retroactive monetary relief against SLAs is not available under the Randolph-Sheppard Act. This court specifically ruled that while the Act permits a panel to award prospective damages against a State from the date of an arbitration panel decision until the vendor is placed in a suitable vending position, the Act proscribes such relief prior to the date of the award. A decision contrary to the Department's position was rendered in Delaware Department of Health and Human Services vs. u. S. Department of Education. 772 F.2d 1123 (3rd Cir. 1985).

In addition, the Eleventh Circuit recently ruled that a blind vendor has no cause of action for damages against a SLA based upon the SLA's decision not to file an arbitration complaint against a Federal agency over termination of the vendor's facility. See Georgia Department of Human Resources vs, Nash. (11th Circuit, Oct. 30, 1990). This case may prove to be of less precedential value than the above cases because of the uniqueness of the facts.

Finally, relying on the Eleventh Amendment, the U.S. Supreme Court held that States are immune from suits, brought by parents under the Education of the Handicapped Act, that claim tuition reimbursement for private school special education. Dellmuth vs. Muth. 109 S. Ct. 2397 (1989). While RSA anticipates that future rulings under the Randolph-Sheppard Act, based on this case, will bar actions for retroactive damages against SLAs, and will render the present series of FFP questions moot, guidance is needed pending clarification and final resolution by the courts.

Analysis

Congress has never appropriated funds pursuant to the authorization contained in the Randolph-Sheppard Act. Instead, States have used Title I funds to pay for certain costs pertaining to the vending facility program. However, neither the Rehabilitation Act nor the Randolph-Sheppard Act explicitly addresses the use of Title I funds to cover SLA judgment or settlement costs related to arbitration. Therefore, the question of the allowability of these costs turns on an analysis of whether they fall under the rubric of Vocational Rehabilitation (VR) services for groups, specifically the Small Business Enterprise Program for the severely handicapped, or whether they can be considered costs incurred in the administration of the Title I State Plan.

A. Administrative Costs

Under the Education Department General Administrative Regulations (EDGAR) at 34 CFR Part 80, the test for determining whether a particular cost is allowable under a State- administered grant program is whether the expenditure is " ... necessary and reasonable for proper and efficient administration of the grant program..." See 34 CFR Section 80.22. Panel-ordered damages awards have generally resulted from either a failure by the SLA to follow its rules and regulations pertaining to transfer or promotion of vendors, or from violations of the Randolph-Sheppard Act. The measure of damages is usually based on vendor loss of income, i.e., the difference between what the vendor actually earned and what he would have earned at the facility to which he should have been promoted. RSA does not believe that costs resulting from violations of the Act or of regulations by the SLA meet the above "necessary and reasonable" test. Rather, arbitration damages awards appear to fall within the category of "fines or penalties", which are expressly unallowable under the cost principles incorporated into EDGAR at 34 CFR Section 80.22.

B. VR Services

The Rehabilitation Act defines VR services as "any goods or services necessary to render an individual with handicaps employable". 29 U.S.C. Section 723(a). During the period of the

typical arbitration panel process involving promotional disputes, the vendor would have been earning his own living with, possibly, supportive services provided by the SLA in the form of management and supervision, equipment and supplies. If the SLA action giving rise to the arbitration had not occurred, VR funds would have been spent by the SLA only for these purposes. Therefore, if VR funds were later used to carry out a panel order to compensate a prevailing vendor for loss of income, funds would be targeted for purposes not covered by the grant, or otherwise within the scope of the program. Stated another way, because funds would not originally have been used to directly provide wages to a vendor -- as opposed to providing supportive services that would enable the vendor to earn wages -- payment of lost wages pursuant to an administrative ruling also is not an allowable cost. This situation is therefore distinguishable from other situations in which this Department has permitted the use of Federal funds to carry out administrative rulings that required grantees to provide additional compensation for authorized services provided under the grant. An example would be where school boards have been ordered to make retroactive payments to teachers who provided appropriate services under a Federal grant, but who were underpaid. In these instances, use of Federal funds is allowable because grant funds would have originally been expended at the higher rate if no error had been made by the grantee.

POLICY STATEMENT:

Damages awards ordered by arbitration panels are not allowable costs either as vocational rehabilitation services under the Title I State Plan, or for the administration of the vending facility program. In addition, the prohibition against using Federal funds to share in the award would cover any voluntary payment made by a SLA to settle arbitration disputes, as well as panel-ordered SLA payments of vendor attorney fees.

RSA policy also extends to the required non-Federal matching share of the SLA's VR budget. Panel awards or attorney fees cannot be paid from State VR funds required to match Federal Title I VR funds. Awards or attorney fees cannot be paid from Randolph-Sheppard set-aside funds because this is not an allowable use of these funds under the Randolph-Sheppard Act and regulations.

CITATIONS

IN LAW: Randolph-Sheppard Act, 20 U.S.C. 107d-1(a);
Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.,
29 U.S.C.723(a)

CITATIONS

IN REGULATIONS: EDGAR, 34 CFR Part 80

EFFECTIVE

DATE: Upon Issuance

POLICY

DELETED: None

INQUIRIES
TO:

RSA Regional Commissioners

/s/

Nell C. Carney
Commissioner of Rehabilitation Services
Administration

cc: CSAVR
NCSAB