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APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Purpose availability - Lump-sum appropriation - Augmentation - Multi year appropriation APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Amount availability - Augmentation - Lump-sum appropriation DIGEST: The Department of Education may use funds in its fiscal year 1990 lump- sum appropriation for Student Financial Assistant to meet projected shortfalls in its 1989-1990 Pell Grant award year in addition to $131 million provided for that purpose. On its face the appropriation is available for obligation from October 1, 1989 through September 30, 1991, which includes nine months of the 1989-1990 award year. There is also nothing in the language of the appropriation indicating that the $131 million was intended to be the exclusive amount available for shortfalls. Further, the legislative history of the appropriation shows a clear intent that funds from the lump-sum appropriation be used to cover the shortfall should the $131 million prove insufficient.

The Honorable Tom Harkin

Chairman, Subcommittee on Labor, HHS, Education

Committee on Appropriations

United States Senate

Dear Mr. Chairman:

In your letter of August 11, 1989, you asked for a legal opinion on the authorities available to the Department of Education to "borrow" against subsequent year appropriations for the Pell Grant program when cost estimates indicate a funding shortfall for the current program or award year. Specifically, you were concerned with the Department's plans to meet expected shortfalls in the 1989-1990 award year with monies to be appropriated to the Department for fiscal year 1990.

Subsequent to our receipt of your letter, the Congress enacted the Department of Education Appropriations Act, 1990, Pub.L. No. 101-166. That act appropriated a lump-sum amount of some $6 billion for Student Financial Assistance (including the Pell Grant program), to remain available for obligation for two fiscal years, "together with an additional $131,000,000 which shall be available only for unfinanced costs in the 1989-90 award year Pell Grant program." Since it is clear that the additional $131 million is available to meet projected shortfalls in the 1989-1990 award year, we shall limit our opinion to whether amounts in

the $6 billion appropriation are also available to cover 1989-1990 award year shortfalls should the $131 million prove insufficient.

As is our usual practice, upon receipt of your letter, we requested the formal views of the Department of Education. The Department, in a letter from its Office of the General Counsel dated December 11, 1989, replied that its two-year Pell Grant appropriations are available for grants in any of the award years that fall within the period of availability of the appropriation and that the specific appropriation of $131 million in the fiscal year 1990 appropriation does not restrict the Department's authority to use additional funds to meet award year shortfalls in excess of that amount.

In its letter, the Department also informed us that the Office of Management and Budget (OMB) does not agree with the Department's position. Although we do not have OMB's official views, OMB employees have informally told us that OMB's position is that appropriations for Pell Grants may only be used for grants for the award year for which they are enacted in the absence of specific statutory authority. Presumably, OMB would argue that only the additional $131 million is available for shortfalls in the 1989-1990 award year.

For the reason indicated below, we conclude that the Department may use amounts in its fiscal year 1990 Pell Grant appropriation to meet projected shortfalls in the 1989-1990 award year in addition to the $131 million provided specifically for that purpose.

BACKGROUND

The Pell Grant program provides financial assistance to needy students to help them meet the costs of post-secondary education. Title IV of the Higher Education Act of 1965, as amended, which authorizes the program, provides for a grant that, within statutory limits, will meet 60 percent of a student's cost of attendance at an institution of higher learning. 20 U.S.C. Sec. 1070a(b). The law also sets forth the standards that the Secretary of Education shall apply in determining student eligibility, expected family contributions, and the amount of each grant. See 20 U.S.C. Secs. 1070a - 1070a-4.

In general, the Pell Grant program is administered through participating educational institutions. The Secretary of Education makes payments to the institutions, which in turn pay eligible students the grant amounts to which they are entitled. 20 U.S.C. Sec. 1070a. The law requires that the Secretary advance to each educational institution not less than 85 percent of the amount estimated as needed to pay eligible students before the start of each payment period. Id. /1/

The legislation establishing the Pell Grant program provides for program cuts--referred to as linear reduction-- when there is a funding shortfall. The provision in question reads:

"(1) If, for any fiscal year, the funds appropriated for payments under this subpart are insufficient to satisfy fully all entitlements, as calculated under subsection (b) of this section, the amount paid with respect to each entitlement shall be--

"(B) a percentage of that entitlement, as determined in accordance with a schedule of reductions established by the Secretary for this purpose, for any

student whose expected family contribution is more than $200."

20 U.S.C. Sec. 1070a(g).

From its inception, Congress has funded the Pell Grant program (formerly called the Basic Educational Opportunity Grant program) by appropriations available for obligation for a period of two years. See, e.g., Department of Education Appropriations Act, 1989, Pub.L. No. 100-436, 102 Stat. 1704 (1988); Department of Labor, Health, Education, and Welfare Appropriation Act, 1974, Pub.L. No. 93-192, 87 Stat. 755 (1973). Since the award year for Pell Grants is defined as running from July 1 of one year through June 30 of the next year, 20 U.S.C. Sec. 1070a-6(3), and the fiscal year for the federal government runs from October 1 of one year through September 30 of the next year, 31 U.S.C. Sec. 1102, the Pell Grant award year does not begin until the fourth quarter of one fiscal year and runs through the first three quarters of the next fiscal year. Each two-year appropriation provides funding intended primarily for the award year beginning nine months after its enactment. The question you raise is whether this appropriation can also be used to fund grants in the award year already in progress when it is enacted.

DISCUSSION

As a preliminary matter, your letter, written during the last quarter of fiscal year 1989, raised the possibility that the Department may have "borrowed", that is, obligated against, its fiscal year 1990 appropriation before it was enacted. The Department, in its December 11 letter, indicated that in covering projected shortfalls in the 1989 1990 award year, "[o!nly appropriations already made and legally available for this period were used." Had the Department actually obligated the fiscal year 1990 appropriation before it was enacted it would have violated the Antideficiency Act, 31 U.S.C. Sec. 1341(a)(1)(B).

Appropriations available for obligation for a definite period of time may be used only to pay for expenses properly incurred during that period or to complete contracts properly made during that period and properly obligated. See 31 U.S.C. Sec. 1502(a).

On their face, appropriations for Pell Grants are lump-sums available for obligation for a full two fiscal years. The fiscal year 1990 appropriation reads:

"For carrying out subparts 1, 2, and 3 of part A and parts C, D, and E of title IV of the Higher Education Act, as amended, $6,044,097,000 ... which shall remain available until September 30, 1991 ... "

Department of Education Appropriations Act, 1990, Pub.L. No. 101 166, *** Stat. *** (1989).

This appropriation is available for obligation from October 1, 1989 through September 30, 1990. Therefore, this appropriation should be available to meet shortfalls in the Pell Grant 1989-1990 award year, nine months of which fall within its period of availability.

We need to determine, however, whether the $131 million specifically provided in the fiscal year 1990 appropriation for shortfalls in the 1989- 1990 award year is the exclusive amount intended for that purpose, thus precluding the

Department's use of the lump-sum appropriation for this purpose.

First, the language of the Act itself suggests that the Congress did not intend the $131 million to be the exclusive amount available to cover 1989 -1990 shortfalls. The statute refers to this money as an amount "additional" to the lump sum, to be used only for 1989-1990 award year shortfalls. Further, there is no language indicating that no more than this amount may be used for this purpose.

Second, the legislative history of the fiscal year 1990 appropriation makes it clear that the Congress did not intend the $131 million to be the only funds available to cover award year 1989-1990 shortfalls, and that prohibiting the use of funds from the larger lump sum appropriation would defeat the very purpose of the Congress in appropriating the additional amount.

The additional $131,000,000 was appropriated in response to an Administration projection of award year 1989-1990 shortfalls of over $300 million and a threat that if the Congress did not explicitly provide funding for these shortfalls the Administration would institute the linear reduction mandated by 20 U.S.C. Sec. 1070a(g). The conference committee stated:

"Cost estimates calculated by the Congressional Budget Office, on the other hand, indicate a 1989 funding shortfall of not more than $131 million ...

"Based on this information, the conferees have provided an immediate appropriation of $131 million to cover the funding shortfall for the 1989/1990 academic year ... As a result of this 1989 appropriation and some 1989 savings ... 'the conferees consider any attempt to impose a linear reduction of Pell Grant Awards in the current academic year to be both unacceptable and unnecessary.'"

H.R. Rep. No. 274, 101st. Cong., 1st Sess. 40-41 (1989).

Any doubt about Congressional intent was resolved when you further explained the intent underlying the appropriation of an additional $131 million on the floor of the Senate. You stated:

"The bill before us ... provides explicit authority at the level of $131 million for use in the current award year. However, I wish to make clear that in reserving this amount for the shortfall, it was not intended that the Secretary of Education be precluded from using other available funds in the Pell grant appropriation, as done in previous years, to cover the unfinanced costs for the current academic year. As was stated in the conference report to the original Labor-HHS appropriations bill, 'the conferees consider any attempt to impose a linear reduction of Pell grant awards in the current academic year to be both unacceptable and unnecessary.'"

135 Cong. Rec. S 15804 (daily ed. November 16, 1989)

The clear intent of the Congress was to avoid the threatened linear reduction. To avoid this possibility, it appropriated $131 million, relying on the Congressional Budget Office's advice that $131 million would be sufficient to meet this goal. Congress clearly understood, as witnessed by your floor statement and the language of the appropriation itself, that the Department was able to use additional fiscal year 1990 appropriations to avoid linear reduction

of Pell Grants if the shortfall turned out to exceed $131 million. Therefore, we conclude that the Department may use other available funds in its lump-sum appropriation to meet shortfalls in the 1989-1990 Pell Grant award year if the additional $131,000,000 appropriated for that purpose proves to be insufficient.

In reaching this conclusion we are aware that the fiscal year 1990 Pell Grant appropriations are intended primarily to fund the award year beginning July 1, 1990. In requesting appropriations for any fiscal year, the Department uses projections for the award year that begins nine months after the beginning of the fiscal year. In recommending appropriation levels, the House and Senate Appropriations Committees also refer to the upcoming rather than the current award year. There is even language in the appropriations referring to the next award year. For example, the fiscal year 1990 appropriation places a ceiling on the amount that each student may receive in the 1990-1991 award year.

As we have indicated, however, the Congress has not chosen to specifically limit the availability of Pell Grant appropriations to the upcoming award year. Rather it has used language making the appropriations available for two full fiscal years, including the nine month period prior to the beginning of the next award year.

When the Congress intends to restrict the use of appropriations to a program year that does not coincide with the fiscal year it uses language clearly indicating that intent. For example, in appropriating for "forward funded" education programs, the Congress specifically defers the availability of the funds until the following July 1, the beginning of the next program year. See, for example, the appropriations for School Improvement Programs, Department of Education Appropriations Act, 1989, Pub.L. No. 100-436, 102 Stat. at 1702 ("shall become available on July 1, 1989 and remain available until September 30, 1990"); Education for the Handicapped, id., 102 Stat. at 1703; and Vocational and Adult Education, id., 102 Stat. at 1703.

We trust that this opinion is responsive to your needs. As agreed by Michael Hall of the Subcommittee staff, unless you announce its contents earlier, this opinion will be available to the public on February 5, 1990.

/1/ In its implementing regulations, the Department has defined "payment period" as the semester, trimester, quarter, or other academic term, for institutions that have academic terms, and half the period of study for institutions that do not have academic terms. See 34 C.F.R. Sec. 690.3 (1988).