

Memorandum

B-148513-AM, D

December 21, 1976

TO : Associate Director, HRD - Ronald F. Lauve

FROM : Senior Attorney, OGC - Robert H. Hunter, Jr. *PH 12-13-76*

SUBJECT: Purchase of Prefabricated, Portable Classrooms Under the Indian Elementary and Secondary School Assistance Act (B-148513)

20 USC 1221 (b)(1), 1975
 In a memorandum dated July 20, 1976 (attached), we advised you that the use of grant funds under the Indian Elementary and Secondary School Assistance Act for the purchase of prefabricated, portable classrooms was questionable. Incident to preparing a proposed report on this and other matters, "Improvements Needed in Meeting the Educational Needs of Indian Children," Al Schnupp of your staff has requested our assistance in explaining the above legal conclusion and in responding to HEW's comments on the question. We were also asked to provide an appropriate recommendation.

We suggest that our legal conclusion and response to HEW be explained as follows in the section of the draft report which begins on page 25 concerning math laboratories:

1. Delete the paragraph which reads:

The purchase of prefabricated classrooms is not minor remodeling in a previously completed building but in our opinion, more in the nature of building construction. Also, we do not believe that portable classrooms (28 feet by 32 feet) constitute the acquisition of necessary equipment. After we brought this matter to OIE's attention, a policy memorandum was issued in April 1976 instructing OIE program officials not to approve building purchases in the future. However, HEW in responding to our report reversed its position and stated that the purchase of math laboratories housed in prefabricated portable buildings should not be considered construction.

2. Insert in place of the above the following paragraphs:

The purchase of prefabricated classrooms is not a minor alteration in a previously completed building. It is more in the nature of "building construction." Consequently, the purchase of prefabricated classrooms does not appear to constitute "minor remodeling."

HEW regulations do not define the term "necessary equipment." ^{1/} The term equipment is an exceedingly elastic term, the precise meaning of which depends on the context in which it is used. Elliot v. Payne, 239 S.W. 851 (Sup. Ct. Mo. 1922). As used in the Act, we do not believe it encompasses the prefabricated classrooms in question. Those classrooms are large (28 feet by 32 feet), fully-equipped structures attached to prepared land sites by means of pilings. In our opinion, it would be anomalous to say that only "minor remodeling of classroom or other space" is permissible on the one hand, while provision of completely new classrooms or other space on the other hand is permissible.

We brought this matter to OIE's attention, and, subsequently, in April 1976, a policy memorandum was issued instructing OIE program officials not to approve prefabricated classroom purchases in the future. However, in responding to our report HEW stated that it did not believe that the purchase of 8 prefabricated buildings constituted construction. HEW added that there is authority under its regulations to engage in lease/purchase agreements and there is precedent which indicates the purchase of math laboratories housed in prefabricated, portable buildings should not be considered construction.

Although HEW regulations authorize the lease or purchase of equipment, as explained above, we believe the term "equipment" as used in the Act does not embrace the prefabricated, portable buildings in question. Further, even if there is a basis for arguing that the purchase of prefabricated, portable buildings does not constitute "building construction" as that term is used in HEW's regulations, it is our view that the applicable HEW regulations define the term "minor remodeling" in such a way as not to include the purchase of prefabricated buildings. Therefore, in our opinion, the allowance of grant funds for the purchase of prefabricated buildings was questionable.

^{1/} When regulations under the Act were first promulgated in July 1973 (38 Fed. Reg. 18018), a definition of "equipment" was included, but it was revoked in November 1973 (38 Fed. Reg. 30661), prior to the grant in question. In our view, the portable classrooms would not have qualified as "equipment" under the revoked definition.

Regarding the classrooms in question, it appears that the LEA schools involved exhibited good faith in applying for and in using grant funds for the 8 prefabricated buildings. The school board fully disclosed the purpose for which grant funds were to be used when it applied to HEW for the grant, and the prefabricated buildings were contracted for in accordance with the application approved by HEW.

Considering all the facts and circumstances related to the use of the grant funds, we would be reluctant to require the school board to repay the amounts expended. However, we would be required to question similar expenditures under future grants unless specific statutory authority is obtained for the purchase of prefabricated buildings.

RECOMMENDATION

We recommend that HEW revise its regulations to more clearly implement the Indian Elementary and Secondary School Assistance Act and to prevent the future use of grant funds under the Act for the purchase of prefabricated buildings.

We hope you will find these suggestions helpful. We will be glad to provide further assistance should you require it.

cc: Mr. Pierson, OGC
Mr. Sperry, HRD
Mr. Taylor, OGC
Index and Files
Index Digest