

Corporation for
**NATIONAL &
COMMUNITY
SERVICE**

OFFICE OF INSPECTOR GENERAL

To: David Eisner, Chief Executive Officer

From: Gerald Walpin, Inspector General

Cc: Frank Trinity, General Counsel
Nicola Goren, Chief of Staff

Re: Memorandum from Frank Trinity to David Eisner dated April 23, 2008¹

Date: May 6, 2008

As Frank Trinity notes in his Memorandum to you, which, we believe, represents the work of the Corporation's Office of General Counsel ("General Counsel"), there have been extensive discussions on how the Corporation should handle improper end of term service hour certifications for AmeriCorps members. Congress, in its wisdom, has mandated that AmeriCorps members serve a specified number of hours in order to earn an educational award, and the certification that those hours have been earned operates as a gateway to the disbursement of previously encumbered funds from the Trust. General Counsel and OIG have stated and refined their views in a number of memoranda, and it is time for that process to come to an end with a management decision.

In this Memorandum, I will, first, set forth the structure of the Trust, and, then, briefly reiterate OIG's position and respond to the points that General Counsel has raised. I hope to do this by identifying the issues as to which there is still disagreement with sufficient clarity that there will be no need for a responsive memorandum.

The Trust Structure

At the outset, it is important to understand how Congress has structured the Trust, how it determines the amount it appropriates each year for the Trust, and how the protective provisions covering the Trust work.

Congress annually appropriates an amount for the Trust which provides the Trust with sufficient funds to cover the present value of education awards for each member envisaged in the total amount of AmeriCorps grants contemporaneously appropriated. Congress is essentially

¹ I have previously responded to Frank Trinity's memorandum to me of the same date. That earlier reply memorandum from me likewise responds to the last paragraph of Mr. Trinity's memorandum to you. I merely add that, of course, you are free to reject my views in favor of those you received from Mr. Trinity; I, however, would never suggest that you should disregard any views that you receive from any source, but rather analyze any different view that you receive and then make your own conclusions based on your judgment of the merits of the competing views.



saying to the Corporation that it wants the Corporation to have sufficient funds to finance education awards for the total number of members which the Corporation is thereby authorized to recruit and who validly serve the minimum number of hours required for an education award. Congress also has created a reserve amount in the Trust to cover the possibility that the historical percentages of education awards draw-downs and presumed discount rate are inapplicable in any one year -- again as insurance that the Corporation would always have funds available in the Trust to cover the total number of member slots awarded in grants for each year.

As soon as a grant is made, the Trust amount, applicable to the total number of members for which the grant is made, is automatically encumbered, *i.e.*, that amount can no longer be used by the Corporation for any additional number of members. At the end of the year, the amounts applicable to these members who either never signed up or, if they signed up, didn't fulfill the required service hours, is unencumbered, *i.e.*, the applicable funds again become available for other valid members. Whatever Trust funds remained encumbered at the end of the first year then continue that encumbered status for seven years, during which time these funds would be disbursed to pay the amount of education awards for which the member applies, with any remaining funds in the Trust, not requested by the awardee, unencumbered only at the end of seven years (the statutory time limitation before an award expires).

This procedure ensures that the Corporation would have available the total amount needed to cover recruiting members for the total hours of service to be validly served by the total number of members for which Congress appropriated grant funds.

Issues

A. The Responsible Entity

With respect to which entity is to be held liable for an improper service hour certification, General Counsel and OIG agree that two entities may potentially be liable: (1) the grantee State Commission or national direct, and (2) the subgrantee. The Corporation focuses on the certifying entity, which is usually the subgrantee, while OIG follows a line of privity that runs first to the grantee and then, through the grantee, to the subgrantee. OIG agrees that the certifying party, most often the subgrantee, may well be looked to for primary responsibility for any improper certifications, but believes that the grantee should not be absolved from responsibility.

A construction law analogy is instructive. On large construction projects, the owner contracts with the general contractor, which then subcontracts portions of the work to specialty subcontractors. Even when a portion of the work has been subcontracted, the general contractor remains responsible for its performance and for making sure that any necessary coordination is done. One common issue is the wiring up of mechanical equipment: Who is responsible, the electrical subcontractor that does the wiring for other parts of the project, or the mechanical subcontractor that puts the equipment in place? The owner does not care because it is the general contractor's obligation to coordinate the work of its subcontractors so that the installed equipment works. When the owner complains, it complains to the general contractor, which is

free to try to pass the complaint on to one or both of the subcontractors, but the general contractor's efforts to pass the responsibility on do not absolve it.

In the same way, the Corporation deals directly with the grantee. The Corporation selects the grantee, and the grantee selects its subgrantees. The grantee should be encouraged to stand behind its selection and take steps to make sure that the subgrantee is spending the grant funds consistent with the obligations set out in the grant documents. If the Corporation looks to the grantee, the grantee is free to pass the claim through to the certifying subgrantee, but it is not absolved from potential responsibility by doing so; it is absolved only when the certifying program makes the Trust whole, and not before. It is important to note that one non-pecuniary benefit to holding the grantee responsible is that it induces proper attention by the grantee to its supervisory responsibility over the subgrantee: if the Corporation does not look to the grantee for satisfaction, the grantee will have no incentive to monitor the activities of its subgrantees.

The Corporation's responsibility is to recover funds that have been improperly disbursed, so as to have funds freely available for use for the purpose for which Congress appropriated it: to finance the number of validly serving members envisaged by the appropriations. It should not abandon that responsibility by declaring in advance that it will not pursue grantees unless facts establish that the grantee was involved in the improper certification -- a sure-fire deterrent against the grantee even bothering to get involved in monitoring sub-grantees. Instead, OIG suggests that, if the Corporation is inclined to look at the certifying subgrantee program first, it should treat the grantee as a guarantor. If the subgrantee fails, for one reason or another, to satisfy its responsibility to make the Trust whole, the Corporation should hold the grantee responsible.

B. When the Trust Should Be Made Whole

With respect to the issue that General Counsel has characterized as "Collectible debt vs. contingent claim," the fundamental questions are when a debt arises and the amount of the debt, *i.e.*, when the Trust fund needs to be made whole. In General Counsel's presentation, there is no occasion to make the Trust whole until a debt arises which does not occur until there has been a disbursement, and the amount of the debt is the amount of the disbursement.² OIG does not view the triggering event as the disbursement to the member, but rather to what is in reality creation of the debt to the Trust fund to allow it to use the appropriated funds for the purpose for which Congress appropriated the funds: to use for valid education awards. As discussed above in describing the Congressionally-created Trust structure, funds are put into the Trust to allow use for the intended awards to the intended number of members who are entitled to an award -- who provide the service required. This Trust structure ensures that objective, by encumbering sufficient funds as soon as the grant is issued for a specified number of members. At the end of the year, funds applicable to the number of members who never signed up or who did not perform the required number of service hours are unencumbered, *i.e.*, allowed to be used for other members. Indeed, the purpose of allowing funds in the Trust to be used for valid members

² If General Counsel is correct in this characterization, there would appear to be no barrier to putting all funds recovered back into the Trust under the nonstatutory but well established "refund" exception to the Miscellaneous Receipts Act because those funds are, *ipso facto*, refunds of funds that have been improperly disbursed.

is emphasized by the ability of the Corporation (through the grantee) to use encumbered dollars in the first year for a "substitute" member, if the first chosen member drops out early.

If a member is awarded an education award to which not entitled, through a grantee's fault, either due to affirmative wrongdoing or passive negligent administration, the effect is that encumbered Trust funds cannot be used for Congress' purpose. The only way to make the Trust fund whole is for the responsible grantee or liable sub-grantee, or both, to make the Trust whole immediately.

The contrary view does not recognize the effect of the grant on the Trust. The grant starts a process of encumbrance that continues with the certification. With certification, the encumbrance can remain in place for up to seven years until the member's ability to draw down the award expires. Again, that encumbered amount will not be available for another AmeriCorps member until up to seven years have run.

Immediate imposition of liability on grantee/subgrantee for improperly encumbered amounts due to education awards furnished to members who did not complete the required service is not only correct, but is the only practical solution. When the member draws the award down in increments, the Corporation's efforts to recover the amounts disbursed from the responsible party will be inefficient, if anything is done at all. Given that reality, it is likely that the Trust will never be refunded the amounts improperly paid, thus precluding use of those funds for their purpose.

C. Recipient of Recovered Funds

With respect to where the recovered funds should be placed, OIG must make clear that it understands and agrees that, if more than the amount of the actual loss is recovered, the excess goes into the Treasury. But, the first step should be to make the Trust whole.