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September 24, 2008

Mr. Philip A. Maestri
Director
Risk Management Service
Office of the Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-0100

Re: **Authority of Guam Offices and Officials Relative to Management and Administration of USDOE-Funded Programs (Opinion, Our ref: GPSS 08-0717)**

Dear Mr. Maestri:

In response to your letter dated September 18, 2008 which requested an opinion regarding the relative authority and responsibilities of the Guam offices and officials that manage, administer and implement programs funded by the U.S. Department of Education (USDOE),¹ below is a discussion of each question outlined in your letter.

1 and 2. What authority and responsibilities do the Guam Public School System (GPSS) and the Superintendent; and the Guam Education Policy Board (GEPB or Board) have regarding the programmatic and fiscal management and administration and implementation of grants awarded to GPSS by USDOE?

It is this Office's understanding that "the programmatic and fiscal management" of USDOE grants and their "administration and implementation," as used in your questions 1 through 3, is meant to refer to the manner in which programs funded by federal grant money are put into effect and carried out, and how those programs are supervised and the federal grant funds controlled

¹ The Office of the Attorney General is issuing this legal opinion pursuant to 5 GCA § 3107 as there are important legal issues regarding the governance of the Guam Public School System as it relates to USDOE federal funds. The Attorney General opinion requested by the GEPB and issued on July 17, 2006 was written prior to the enactment of P.L. 28-143 entitled "An Act to Amend §§ 3103 and 3112 of Title 17 Guam Code Annotated Relative to Termination of the Superintendent of Education and the Duties of the Guam Education Policy Board," on July 20, 2006.

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after they are received by GPSS. This Office concludes that these are all day-to-day activities involving the operations of GPSS and, pursuant to Guam law, have been placed under the sole authority of the Superintendent.²

The Superintendent and the employees of GPSS together discharge and carry out all of GPSS's daily activities, including those relative to handling federal grant programs and funds. Guam law does not provide the Board with the authority or responsibility to manage, administer, or implement federal grants that have been awarded to GPSS.

The Guam statutes setting up Guam's public education system support this conclusion. *See* 17 GCA, Chapter 3, §§ 3101 *et seq.*

The Guam Public School System shall be administered by the Superintendent of Education. The Guam Education Policy Board (*Board*) shall develop and adopt system-wide education policies as specified by §3112 of this Chapter. The Superintendent of Education shall be responsible for implementing the policies of the Board.

17 GCA § 3102 (Emphasis in original).

Immediately at the outset of GPSS's enabling legislation, the Guam Legislature created a clear demarcation between the functions of the Superintendent and the Board. Other portions of the enabling legislation clarify their respective duties. Specifically, the Superintendent is the Chief Executive Officer of the GPSS, and shall, among other things, "administer Federal funds/programs on behalf of the GPSS" and "serve as the GPSS's approving authority for the expenditure of funds." 17 GCA § 3103(c)(3) and § 3103(c)(4).

The Board's duties and responsibilities, on the other hand, are described predominantly in 17 GCA § 3112, with subsection (a)(9) addressing federal grants. Accordingly, Guam law provides that the Board is prohibited from any involvement with federal grants, except that if a governing board is required by law, then the GEPB acts as such governing board.³ However, if none is required, then the only involvement the Board has regarding a grant is to receive the grant application when it is presented by the Superintendent. As discussed in more detail under question 6 below, 17 GCA § 3112(a)(9) requires a fifteen-day presentment period prior to the application's submission to the federal government, but does not state that the Board must take any sort of action on the application during the fifteen-day period.

Section 3112 also prohibits certain actions by the Board. Subsections (b)(2) and (b)(4) thereof

² For a discussion on the meaning of "operations," please see question 4 below.

³ The Board approves and signs federal grant applications for the Head Start program which is currently the only federal program requiring the GEPB to act as a governing body.

state that the Board may not "interfere in or micro-manage the affairs of the GPSS or schools within the GPSS" and may not "involve itself in operational matters related to the administration of Federal funds and Federal grants."⁴ These prohibitions identify the Board as purely a policy-making body.

Also, 17 GCA § 3217 provides that the GPSS shall create a District Action Plan as required by the *No Child Left Behind Act of 2001*, and that the Plan shall be established by policy of the GEPB. This Office is informed that the District Action Plan is a state plan and serves as the basis for a consolidated grant application. Thus, the Board by establishing and approving the District Action Plan has a role in GPSS's consolidated grant application at the policy-making level.

Based upon the foregoing, the Office concludes that the roles of both the Superintendent and the Board have been clearly established and distinguished by Guam's statutes. As the Chief Executive Officer of the GPSS, the Superintendent is responsible for the executive function of the GPSS, not the Board. Nothing prevents the Superintendent from preparing a grant application, signing it on behalf of the GPSS,⁵ and submitting it to USDOE after having observed any procedural requirements established by law.⁶ Furthermore, after receipt of federal grant funds, the Superintendent has the sole authority to implement, administer and manage the programs funded by federal grants and to control such federal money.⁷

⁴ The meaning of "operational matters" as used in § 3112(b)(4) is discussed below under question 4.

⁵ The Superintendent's authority to sign a federal grant application comes from being the Chief Executive Officer of GPSS and from having the administrative power over all of GPSS's operations and federal grants, as provided by Guam law. The Superintendent's authority to sign grant applications also stems from the fact that a grant application by itself is not a contract which would require the Governor's approval pursuant to 5 GCA § 22601. Furthermore, 17 GCA § 3123 provides that the Superintendent is not a member of the Governor's Cabinet.

This issue is raised because on review of the grant application entitled Consolidated Grant for Innovative Programs FY2008 (Revised August 2008), it was noted that the Superintendent stated on page 2 of the "Assurances" that she was "designated by the Governor of Guam to submit this application for FY '08-'09 funds." Furthermore, the Instructions for federal Form SF-424, Application for Federal Assistance, indicates for Item 18: "To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office." This Office was informed by GPSS's Federal Program Administrator that previous Governors have given their approval to GPSS's grant applications, although this Office is unsure of the exact nature of the approval or authorization given because no documentation has been provided. In any event, none is required for grant applications to be signed by the Superintendent and submitted as mentioned herein because the Superintendent is the Chief Executive Officer of the GPSS.

⁶ Besides the fifteen-day presentment time to the GEPB, the only other procedural requirement in preparing grant applications concerns the Guam State Clearinghouse (GSC). The GSC procedure is discussed in detail in question 3 below.

⁷ If GPSS plans to change a program funded by a USDOE grant, then GPSS must follow the procedures set out in 34 C.F.R. § 80.30. The pertinent portion of subsection (d) thereof provides that, regarding "programmatic changes," the grantee must obtain the federal granting agency's prior approval in order to make "[a]ny revision of the

Finally, you have requested this Office to address a point mentioned by the Superintendent in her letter to USDOE dated August 19, 2008 wherein she "answers" to the Board. This Office has been advised by GPSS legal counsel that it was the position of the Superintendent that the Board has the authority to hire and terminate the Superintendent, which is consistent with this Office's review of Guam law. See 17 GCA § 3103(a). However, termination is for cause only, and is limited to those reasons set out in the law. 17 GCA § 3103(b). The causes for termination set out in law do not allow the Board to remove the Superintendent arbitrarily or for mere convenience. Hence, so long as the Superintendent is performing her duties as provided by law, the Board may not interfere with her performance, or terminate her without cause. The Board's duty is to hire an effective manager who will carry out the policy decisions made by the Board, but once the Superintendent is hired, the Board must give the Superintendent the necessary latitude to administer and manage effectively, although the Board is entitled to monitor the Superintendent's performance to measure her success or failure. *Employment Contract* between Nerissa Bretania-Shafer, Ph.D. and GEPB, Section Eleven (July 15, 2008).

3. What authority and responsibilities does the Governor have regarding the programmatic and fiscal management and administration and implementation of grants awarded to GPSS by USDOE?

Under current Guam law, the Governor has no authority to implement, administer, or manage federal grant programs or funds which have been received by GPSS. These functions now belong solely to the Superintendent as discussed above.

Prior to the 1986 amendment of 48 U.S.C. §1421g(b), the Governor was vested by the Organic Act of Guam to "establish, maintain, and operate public schools" in Guam. Therefore, when in 1977 the Guam Legislature created an elected school board pursuant to P.L. 14-1, the public law was held inorganic by *Nelson v. Ada*, Superior Court of Guam, Special Proceedings Case No. SP 192-87 (Nov. 6, 1987); *aff'd* 878 F.2d 277 (9th Cir. 1989).

With the 1986 amendment, however, §1421g(b) now states that the "government of Guam," not the Governor, shall provide an adequate public educational school system, and shall establish, maintain and operate the public school system in accordance with the laws of Guam. Because the Organic Act defines the "government of Guam" as all three branches of the government, and

scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval)."

Furthermore, 34 C.F.R. § 80.30(f)(1) concerns budget revisions to programs funded by federal grant money and indicates that prior federal approval must be obtained by submitting the budget revisions with a narrative justification.

Finally, 34 C.F.R. § 80.11(d) provides that if a state is required by a federal program's statutes to submit a state plan prior to receiving a grant, then the state agency must amend its state plan whenever there is a material change to any state law or policy or agency operation, and the amendment must be approved by the federal granting agency.

states that the school system shall be established in accordance with the laws of Guam, the Guam Legislature is now within its authority to fashion Guam's public education system. *See* 48 U.S.C. § 1421a. The Legislature has chosen to do so with an elected school board making policy decisions, and a Superintendent administering the school system's daily operations and activities.

The Governor, however, does have a role regarding federal grants (educational and non-educational) with respect to the Guam State Clearinghouse (GSC).⁸ Before a grant application may be transmitted to USDOE or any other federal agency, the application must be submitted to the GSC. The GSC reviews all federal financial assistance applications from Guam for consistency with any applicable law, coordinates comments from local agencies, and conducts a financial analysis of the proposed program. *See* 5 GCA § 2101.1. Unless a clearance letter is issued by the GSC, the local agency may not transmit a grant application to the federal government nor, according to the GSC, may the federal government accept the application without a clearance letter from a state clearinghouse. *GSC Circular 2007-01* (May 14, 2007). *See, also, GSC web site, Frequently Asked Questions* (www.guamclearinghouse.com, last checked September 23, 2008).

The GSC is established within the Office of the Lieutenant Governor. The Lieutenant Governor serves as the Director of the GSC. 5 GCA § 2101. However, it is the Bureau of Budget and Management Research (BBMR), which is within the Office of the Governor, that conducts the review for consistency on behalf of the GSC.⁹ The GSC does not issue the clearance letter until the Governor, as the chief planning officer for the government of Guam, takes "action."¹⁰ Apparently, BBMR's review for consistency is equated to the Governor taking action on the

⁸ The GSC was established to meet federal requirements, and an office called the state clearinghouse is common among many states. *See* Presidential Executive Order 12372 (dated July 14, 1982); OMB Circular No. A-102 (revised Oct. 7, 1994). These documents require federal agencies to use state and local processes of inter-governmental coordination for review of grant applications. Thus, the state clearinghouse serves as a single point of contact for the federal granting agency.

⁹ When the GSC's enabling legislation was revamped by P.L. 26-169 (effective January 5, 2003), a section was included to transition all of BBMR's powers and duties regarding federal grant applications to the GSC. 5 GCA § 2101.2. Notwithstanding, however, on March 9, 2007, the Acting Governor issued Executive Order No. 2007-04 ordering the GSC to "assist" BBMR in performing a cost analysis of all federal aid programs and grants. Subsequently, the GSC issued GSC Circular 2007-01 on May 14, 2007 setting out the guidelines for all government agencies submitting grant applications. Presently, the GSC's web site states:

The Bureau of Budget and Management Research (BBMR) within the Executive Office of the Governor actively participates in the Clearinghouse process to ensure that the Governor's role as chief planning officer of the state is preserved.

¹⁰ GSC Circular 2007-01 mentions the Governor's "action" several times, but the sort of action which is to be taken is not described in the circular. "... [T]he Guam State Clearinghouse will issue a Guam state clearance letter that is subject to *I Maga'lahaen Guåhan's* action." *GSC Circular 2007-01* at 3. "The Guam state clearance letter is subject to *I Maga'lahaen Guåhan's* action." *Id.* at 4. "The Guam State Clearinghouse upon *I Maga'lahaen Guåhan's* action, will issue the clearance letter" *Id.* at 12.

grant application. The review for consistency is limited to checking the application to make sure that it conforms to law. However, a consistency review does not involve implementing, administering or managing federal grant programs or money.

Therefore, under current Guam law, the Governor has no role in the implementation, administration or maintenance of federal grant programs or funds once grant money has been received by GPSS.

4. As used in 17 GCA § 3112 (b)(4), what is the definition of the term "operational matters"? In other words, what does that term mean in the context of that section of the law, and in terms of 17 GCA § 3112(b)(2)? What direction or guidance may GEPB have received in determining what matters constitute "operational matters related to the administration of federal funds and federal grants," in which GEPB is not to involve itself? How are § 3112(b)(2) and § 3112(b)(4) implemented and enforced?

Title 17 GCA § 3112(b)(2) and § 3112(b)(4) state that "[t]he Board shall *not* collectively or individually . . . interfere in or micro-manage the affairs of the GPSS or schools within the GPSS . . . [or] involve itself in *operational* matters related to the *administration* of Federal funds and Federal grants." [Emphasis in original.]

As used in §3112(b)(4), it appears that the word "operations" may be substituted for "operational matters" without changing the meaning of the sentence. However, before looking at the terms "operational matters" or "operations," as they relate to the "administration of Federal funds and Federal grants," there must be an understanding of what it means to "administer Federal funds or Federal grants."

A grantee's administrative responsibilities are found at 34 C.F.R. Part 76 entitled "State-Administered Programs" and, in particular, Subpart G entitled "What are the Administrative Responsibilities of the State and Its Subgrantees?" Stated as a general administrative responsibility in §76.700 thereof is the grantee's duty to "comply with the State plan and applicable statutes, regulations, and approved applications," and to "use Federal funds in accordance with those statutes, regulations, plan, and applications." In other words, in order to properly administer federal grant funds, the grantee must do whatever is permissible under those legal and administrative requirements to carry out the state plan and the grant application.

GPSS's current state plan for a number of federal programs and grants is the 2008-2013 District Action Plan dated March 25, 2008. The District Action Plan describes GPSS's goals and objectives, and is a formulation of policy and programs. In contrast, making these plans a reality requires the execution of day-to-day activities.

Turning to the definition of "operational matters," it is a principle of statutory construction that undefined terms in a statute are generally ascribed their common ordinary meaning. *Carlson v. Guam Telephone Authority*, 2002 Guam 15 ¶ 34.

The meaning ascribed to "administration" by *BLACK'S LAW DICTIONARY* 4 (5th Ed.) is:

Management or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like. In public law, the administration of government means the practical management and direction of the executive department, or of the public machinery of functions, or of the operations of the various organs or agencies. *People v. Salsbury*, 96 N.W. 936, 941 (Mich. 1903).

Black's, infra at 984, defines "operations" as:

Exertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity.

To "micro-manage" means "to manage with great or excessive control, or attention to details." *MERRIAM WEBSTER'S COLLEGIATE DICTIONARY* 735 (10th Ed.)

Therefore, absent any ambiguity, the Superintendent is solely responsible for the performance of the executive duties of GPSS, and the management of its operations, which includes the administration of federal funds and grants.

In response to your inquiry about any direction or guidance the Board may have received regarding what constitutes "operational matters," Guam law requires all Board members to attend a professional training development program geared towards "improving, expanding and refining their individual and collective policy making skills" within thirty days of taking office. *See* 17 GCA § 3112(a)(15).

Accordingly, the University of Guam adopted a training program which includes the following topics: board operations; board skills and service; Guam laws relative to GPSS; Roberts Rules of Order; budgeting procedures and guidelines for GPSS and the government; and the differences between policy making and micro-management of the affairs of GPSS. *See* 17 GCA § 3112(a)(15). This Office was able to obtain the course materials for one day of the three-day training program. Among these materials, items addressing the subject of policy-making versus micro-management were found.¹¹

Finally, you have asked how 17 GCA § 3112(b)(2) and § 3112(b)(4) are implemented and enforced. The law does not give any guidance except to say that any Board member may report a

¹¹ Ronald Aguon, Esq., one of three lawyers teaching the training program, provided the following materials which he uses in his training session: "Balancing and Differentiating between Governance and Administration" (source unidentified); "Governance and Administration" from McNeese State University Compliance Plan for Reaffirmation; excerpt from "Effective School Boards" by Eugene R. Smoley, Jr.; "Best Practices - Board of Directors/Governance" from Whatcom Council of Non-profits; unidentified material from Caldwell Community College and Technical Institute SACS Reaffirmation Site.

potential or alleged violation by other Board members to the Guam Legislature. 17 GCA § 3112(b). This Office is not aware of any incident having been reported thus far. Also, the Guam Legislature has the authority to initiate a referendum election to remove an elected Board member pursuant to 17 GCA § 3124.

5. As used in section 140 of GEPB's board policy, how is the distinction drawn between "policy determination," which is GEPB's responsibility, and "administration," which is the Superintendent's responsibility? What direction or guidance may GEPB and the Superintendent have received in carrying out their responsibilities in accordance with this distinction?

Section 140 of the GEPB's Board policy does not offer explicit guidance as to how the distinction between policy determination and administration is to be made; however, it does assume a basic difference between policy-making and "administration" and correctly characterizes its powers as "basically that of determination of policy."

A leading authority on the question has stated: "I call 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change.)" Dworkin, R., *TAKING RIGHTS SERIOUSLY* 21 (18th Ed. 2001). Policy, as defined, is "[t]he general principles by which a government is guided in its management of public affairs." *BLACK'S LAW DICTIONARY* 1196 (8th Ed.)

As it pertains to the federal grants and funds GPSS receives, the Board's policy must be consistent with the scope of authority and limitations prescribed by Guam law as discussed above. Furthermore, the distinction between policy-making and administration was one of the topics covered by the mandatory training required by Guam law for Board members. *See* discussion regarding question 4.

6. What authority does GEPB have with respect to federal grant applications when they are transmitted to GEPB within fifteen days prior to transmittal to USDOE, as required by 17 GCA § 3112(a)(9) and section 120.5 of GEPB's board policy?

Regarding federal programs that require no governing board under federal law, 17 GCA § 3112(a)(9) provides that federal grant applications must be "presented" to the Board at least fifteen calendar days prior to transmittal to USDOE. The verb "present" is commonly understood to mean "to offer to view" and "to offer for consideration." *AMERICAN HERITAGE DICTIONARY* 980 (2nd Ed.) However, § 3112(a)(9) does not require the Board to take any action after the application is presented to it. Therefore, while the Board may deliberate over the contents of the application, the Board, under current Guam law, has no authority to change the application or to prevent it from being filed after fifteen days have passed. Once the fifteen days has expired, the Superintendent may transmit the application to the USDOE at any time.

When a grant application is presented to it, the Board may choose whether or not to review the

application. If the Board chooses to review the application, then the Board's review must be limited to assuring itself that nothing in the application is contrary to the policies set by the Board. However, the Board may ask questions regarding anything in the application for informational purposes. The Board is entitled to be kept informed and abreast of all GPSS matters as a background for the formulation of new policy and the amendment of existing policy on any subject. See 17 GCA § 3103(c)(10).

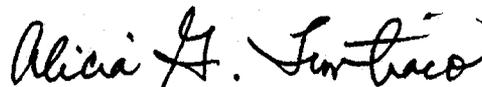
Because the fifteen-day presentment period is set by statute, the fifteen days must elapse before the Superintendent may transmit the application. However, if due to an emergency fifteen days is too long to wait, then the Board is authorized to shorten or waive the fifteen-day period at the request of the Superintendent. 17 GCA § 3112(a)(9).

Therefore, under Guam law, the Board's authority regarding grant applications during the fifteen-day presentment period is limited to reviewing for consistency with established Board policy, if the Board chooses to review at all, and for informational purposes. The Board also has the authority to shorten the statutorily mandated presentment period in the event of an emergency requiring an immediate transmittal of the application to USDOE. The Board has no authority under Guam law, however, to change the grant application or to prevent its transmittal once the fifteen-day presentment period has passed.

7. What entity or official is ultimately accountable to USDOE for ensuring that federal funds are used appropriately, and what official should sign the required assurances in applications that must be filed for participation in programs funded by grants awarded to GPSS by USDOE?

The Superintendent as the Chief Executive Officer of GPSS and the administrator of federal funds and programs is ultimately accountable to USDOE for ensuring that federal funds are used appropriately, not the Board nor the Governor. See the foregoing discussions. Therefore, the Superintendent is the appropriate official to give the assurances required by state plans and grant applications.

Sincerely,



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cc: Superintendent, GPSS
Chairperson, GEPB
Governor of Guam
Guam Congressional Delegate
Speaker, Twenty-Ninth Guam Legislature