



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

IN THE MATTER OF

CHARMS BEAUTY SCHOOL,

Respondent.

Student Financial
Assistance Proceeding

Emergency Action

DECISION

On April 28, 1993, the Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) imposed an emergency action against the Charms Beauty School (Charms) of Jackson, Mississippi, in accordance with 20 U.S.C. §1094(c)(1)(G) and 34 C.F.R. §668.83. In response to the notice, on May 3, 1993, Charms requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the Delegation of Authority from the Secretary to me to conduct proceedings and issue final decisions in such circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, I conducted a hearing by teleconference in Washington, D.C., on May 27, 1993. At the hearing, Charms was represented by Lynda Robinson, Esq., and Charms' Owner and President, Floree M. Samuel. OSFA was represented by Renee Brooker, Esq., from the Office of the General Counsel. Also in attendance were Mark Gilbert from OSFA's Compliance and Enforcement Division and Carla Byrd from the Office of the General Counsel.

ED's contention in this matter is that inasmuch as Charms filed for bankruptcy on November 20, 1992, after the effective date of Section 481(a)(4) of the Higher Education Act of 1965, as amended (HEA), Charms no longer meets the definition of an institution of higher education and is, therefore, ineligible to receive Title IV funds. Section 481(a)(4), as pertinent, states:

- (4) An institution shall not be considered to meet the definition of an institution of higher education in paragraph (1) if-
- (A) such institution has filed for bankruptcy;...

A copy of the bankruptcy action titled In re: Floree M. Samuel d/b/a Charm's Beauty School, filed with the United States Bankruptcy Court for the Southern District of Mississippi, reflects the assigned bankruptcy case number as 9204327JC. This has been made a part of the record of these proceedings. In addition, both Ms. Samuel and Ms. Robinson confirmed the bankruptcy filing during the teleconference.

The only issue raised by counsel for Charms was that the emergency action fell within the automatic stay provision of the Bankruptcy Code. 11 U.S.C. §362. The parties were tasked to brief their respective positions on the effect of the Bankruptcy Stay provision. Briefs were received from both. Counsel for Charms concedes that the Secretary of Education has the right to commence emergency proceedings against Charms in light of the revised provisions in 11 U.S.C. §362 and that such action does not come under the automatic stay provision. Yet counsel disputes that ED can, by emergency action, withhold funds earned after the institution files a bankruptcy petition (post petition) but prior to ED's institution of the Emergency Action. The issue of what funds ED can withhold under an emergency action is not within my jurisdiction since I am limited to only determining the appropriateness of the emergency action. The proper forum for Charms to pursue this matter is the termination action brought under 34 C.F.R. §668, et seq.

I find that 11 U.S.C. Section 362(b)(16) is dispositive of the issue of the automatic stay. That provision states:

(b) The filing of a petition under section 301, 302, or 303 of this title,... does not operate as a stay--

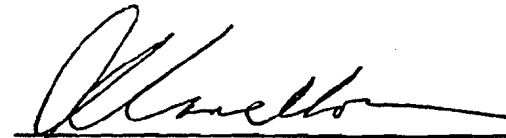
. . . .

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.

The three conditions for imposing an emergency action are found at 34 C.F.R. §668.83(c). They are: 1) there is reliable evidence that Charms is violating provisions of Title IV of the HEA; 2) immediate action is necessary to prevent misuse of Federal funds, and 3) the likelihood of financial loss outweighs the importance of adherence to the procedures for limitation, suspension, and termination actions.

First, it is an undisputed fact that Charms is a party to a bankruptcy proceeding. By virtue of filing its bankruptcy petition, Charms no longer meets the definition of an institution of higher education and is not eligible for receipt of funds under the Title IV, HEA Programs. Second, any further participation in Title IV, HEA Programs by Charms would constitute a misuse of federal funds and immediate action is necessary to prevent such further misuse of funds. Third, given the fact that all aid disbursed by an ineligible institution is erroneous, the likelihood of loss does outweigh the importance of awaiting completion of the procedures for termination of eligibility. Therefore, I find that the three criteria are satisfied.

Having found that the three conditions for imposing emergency actions are met in this case and that the automatic stay provisions of the Bankruptcy Code do not apply, I hereby affirm the emergency action.



Ernest C. Canellos

Dated: June 8, 1993
Washington, D.C.