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

In the Matter of	**Docket No. 09-02-SP**
WILLOUGHBY-EASTLAKE SCHOOL OF PRACTICAL NURSING,	Federal Student Aid Proceeding
Respondent.	PRCN: 200720525774

Appearances: David K. Smith, Esq., and Elise C. Keating, Esq., Britton, Smith, Peters & Kalail Co., L.P.A., Cleveland, Ohio, for Willoughby-Eastlake School of Practical Nursing.

Sarah L. Wanner, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Richard F. O'Hair, Administrative Judge

DECISION

On December 5, 2008, the Office of Federal Student Aid (FSA) of the U.S. Department of Education (Department) issued a Final Program Review Determination (FPRD) to Willoughby-Eastlake School of Practical Nursing (Respondent). The FPRD determined that Respondent had failed to obtain postsecondary accreditation and was ineligible for funds under Title IV of the Higher Education Act of 1965 (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* FSA seeks to recover funds improperly disbursed by Respondent in the amount of $865,556.25 for the 1998-99 through 2004-05 award years. Respondent appealed and requested an administrative hearing pursuant to 34 C.F.R., Part 668, Subpart H. Respondent has the burden of proving that its disbursement of funds was proper and that it complied with all applicable Title IV requirements.[1]

[1] 34 C.F.R. § 668.116(d).

To be eligible for participation in the Title IV programs, an institution of higher education must be accredited by an accrediting agency recognized by the Secretary of Education.[2] The scope of the Secretary's recognition extends to postsecondary programs only.[3]

Respondent operates as a component of the Willoughby-Eastlake Technical Center (Technical Center), which is affiliated with Eastlake-North High School (High School). Both the Technical Center and High School are located in the Willoughby-Eastlake City School District. Respondent offers nursing programs at the secondary and postsecondary levels. In 1997 and 2000, Respondent applied to receive Title IV funds for its postsecondary program using accreditation obtained by the High School from the North Central Association Commission on Accreditation and School Improvement (NCA CASI).[4] Respondent entered into a program participation agreement (PPA) to receive Title IV funds, and the Department issued its determination approving Respondent's eligibility.

In 2006, Respondent applied for recertification to continue its participation in the federal student aid programs. As part of its application, Respondent provided an accreditation letter from NCA CASI to the High School dated April 20, 2000. However, while Respondent was accredited under the High School at the secondary level, Respondent had not applied for approval at the postsecondary level. NCA CASI, which accredits both secondary and postsecondary programs, instituted a separate accrediting process for postsecondary programs in the 2000-01 award year. Before implementing the separate process, NCA CASI approved postsecondary programs using vocational/adult education standards. The Technical Center applied for and received postsecondary accreditation from NCA CASI on December 12, 2006.

Respondent argues that it should not be held liable for the Title IV funds it received between the 1998-99 and 2004-05 award years because it did not fraudulently obtain approval from FSA, but rather relied on FSA's determination of its eligibility. Specifically, Respondent asserts that it did not intentionally violate the accreditation requirement, since NCA CASI never notified Respondent of the separate accrediting process required for its postsecondary program. Respondent maintains that NCA CASI distributed a letter in 2000 about its new accrediting process for postsecondary programs only to joint vocational schools (JVS) and joint vocational school districts (JVSD). Respondent states that neither it nor the Technical Center is a JVS or JVSD; consequently, it never received the letter. Respondent also disputes FSA's allegation that NCA CASI otherwise informed Respondent of the postsecondary accrediting process in 1999, as implied by NCA CASI's letter, which states that it contacted all schools accredited under its vocational/adult education standards.[5]

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[2] 20 U.S.C. §§ 1001(a)(5), 1001(c), 1002(a)(1).

[3] 20 U.S.C. § 1099b(n)(3).

[4] NCA CASI also has been known as the North Central Association of Colleges and Schools Commission on Schools, and the North Central Association Commission on Schools.

[5] *See* Resp't Ex. 16 at 81.

Moreover, Respondent suggests that the Department contributed to Respondent's mistaken belief that it had proper accreditation in two ways. First, Respondent contends that the Department's regulation on institutional eligibility is unclear because 34 C.F.R. § 600.4(a)(5) does not specify that an institution of higher education must obtain postsecondary, and not secondary, accreditation. Second, Respondent argues that it informed the Department in an eligibility and certification approval report issued by the Department on December 13, 2000 that it was accredited at only the secondary level. Respondent claims that its entry in this report identifying "North Central Association of Colleges and Schools – CS (Secondary Educ)" as its accrediting agency notified the Department of its secondary accreditation status and thus gave the Department the opportunity to reject it as improper.[6] In response, FSA argues that Respondent's entry merely indicated which of NCA CASI's accrediting agencies it had been approved by, not what type of accreditation it had obtained. Even if Respondent unambiguously informed the Department of its secondary accreditation, FSA asserts that the Department's erroneous approval would not relieve Respondent of liability.[7]

Respondent alternatively argues that it should receive a waiver of liability based on fairness. Respondent asks this tribunal to acknowledge that it immediately obtained postsecondary accreditation upon learning of the requirement in 2006, and probably would have received accreditation at an earlier date if it had known to apply through the separate postsecondary accrediting process. In support of its waiver argument, Respondent asks this tribunal to recognize that it met all Title IV eligibility requirements other than proper accreditation during the award years in question. For example, Respondent notes that its postsecondary program only accepts students with a high school diploma or recognized equivalent, provides a one-academic-year program that prepares students for gainful employment in the recognized occupation of nursing, and it only disbursed Title IV funds to eligible students.[8] Lastly, Respondent suggests that repayment of the alleged liability at issue would force it to close down and file for bankruptcy.

Respondent likens its situation to three other cases where the Department sought repayment after earlier determining institutional eligibility.[9] Respondent emphasizes that in these cases the Secretary reversed financial liability and imposed fines, and Respondent urges this tribunal to similarly hold that it should not be responsible for repayment.

FSA characterizes the cases cited by Respondent as "bad law."[10] More specifically, FSA challenges the Secretary's authority to waive any institutional financial liability over $100,000.00

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[6] *See* Resp't Ex. 10 at 57.

[7] *See In re Academia La Danza Artes Del Hogar*, Dkt. No. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992).

[8] *See* 34 C.F.R. § 600.4(a)(2), (a)(4).

[9] *See In re Acad. for Jewish Educ.*, Dkt. No. 96-29-SP, U.S. Dep't of Educ. (Decision of the Sec'y) (Oct. 13, 1998); *In re Beth Jacob Hebrew Teachers Coll.*, Dkt. No. 96-77-SP, U.S. Dep't of Educ. (Decision of the Sec'y) (Oct. 13, 1998); *In re Beth Medrash Eeyun Hatalmud*, Dkt. No. 97-94-SP, U.S. Dep't of Educ. (Decision of the Sec'y) (Apr. 1, 1999).

[10] *See* U.S. Dep't of Educ. Br. at 10.

without permission from the Department of Justice.[11] FSA also argues that the Secretary cannot unilaterally impose a fine in lieu of financial liability because fines are imposed under a separate administrative procedure.[12]

Moreover, FSA contends that Respondent had notice of NCA CASI's separate accrediting process for postsecondary programs. In addition to the aforementioned notification letter sent by NCA CASI, FSA surmises that Respondent was contacted separately by NCA CASI and was asked whether it wished to continue to receive Title IV funds.[13] FSA further asserts that it is inconceivable that NCA CASI did not inform Respondent of the new process for postsecondary accreditation when Respondent was accredited during April of 2000, since that was when NCA CASI was implementing the change. FSA next claims that Respondent should have known of the separate accrediting process for postsecondary programs because it had access to NCA CASI's publication describing the separate process.

Finally, FSA contends that Respondent took on a fiduciary role when it entered into a PPA with the Department. As such, Respondent, not the Department, bears the responsibility of ensuring that its eligibility status remains up-to-date with the requirements of its chosen accrediting agency.

FSA recognizes, however, that Respondent may have held proper accreditation during the 1998-99 and 1999-2000 award years because NCA CASI already applied its vocational/adult education standards to postsecondary programs prior to the implementation of its separate postsecondary accrediting process in 2000-01. Thus, FSA is willing to assume that Respondent obtained recognized accreditation during those award years. As a result, FSA reduced Respondent's alleged liability by the amount of Title IV funds awarded during the 1998-99 and 1999-2000 award years. The remaining liability sought by FSA is $765,403.93.[14]

An institution is obligated to act as a fiduciary in the administration of funds in order to participate in the Title IV programs, as outlined in the PPA that the institution enters with the Department.[15] Accordingly, the institution must comply with all Title IV statutory and regulatory requirements.[16] Additionally, this tribunal neither has the authority to waive any applicable statute or regulation on Respondent's behalf, nor is it able to find that Respondent met all other Title IV requirements as this is not a justiciable issue.[17] This tribunal only has the authority to adjudicate alleged findings contained in the FPRD at issue.

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[11] *See* 31 U.S.C. § 3711(a)(2).

[12] *See* 34 C.F.R., Part 668, Subpart G.

[13] *See* Resp't Ex. 16 at 81.

[14] I recognize that FSA has stated different figures for Respondent's financial liability. FSA's Brief holds Respondent responsible for $765,403.93, while FSA's Response to Respondent's Reply Brief quotes the amount of $765,409.93. I am following the financial liability as calculated in FSA's Brief.

[15] *See* 34 C.F.R. §§ 668.14, 668.82(a).

[16] 34 C.F.R. §§ 668.14, 668.16.

[17] *See* 34 C.F.R. § 668.117(d).

This tribunal has long-held that an institution that either loses or does not acquire proper accreditation is not an eligible institution.[18] In the present case, Respondent admits that it was not separately accredited at the postsecondary level until 2006. When an institution incorrectly determines that it satisfies eligibility requirements, the institution is liable to repay all Title IV funds it received.[19]

Furthermore, the record in this proceeding does not support the conclusion that the Department had knowledge of Respondent's improper accreditation before 2006 and erred in approving its eligibility in 1997 and 2000. However, even if the Department knew of Respondent's ineligibility, Respondent still would not be relieved of liability. It is the institution, and not the government, that bears the risk of a government agent exceeding the bounds of his authority by mistakenly or even deliberately approving the institution's participation in the Title IV programs.[20]

Additionally, Respondent's equitable arguments that it acted in good faith and was not notified of its accrediting agency's separate process for postsecondary programs are not relevant to the disposition of this case. If an institution is ineligible to receive Title IV funds, the Department is entitled to repayment notwithstanding the institution's good faith or lack of notice.[21] Moreover, it is beyond this tribunal's authority to disallow liability based on these equitable arguments.[22]

While the Secretary has plenary authority to reduce or waive fines imposed as punishment under 34 C.F.R., Part 668, Subpart G, this authority is not analogous to the tribunal's authority in a Subpart H proceeding. This tribunal has no authority to waive financial liability whether the claim is under or over $100,000.00.[23]

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[18] *In re Clerical Art Sch.*, Dkt. No. 00-04-ST, U.S. Dep't of Educ. (May 9, 2000); *In re Phila. Wireless Technical Inst.*, Dkt. No. 99-76-ST, U.S. Dep't of Educ. (Mar. 8, 2000); *In re Ackerman Inst. For Family Therapy*, Dkt. No. 98-50-SP, U.S. Dep't of Educ. (Dec. 1, 1998); *In re Sue Bennett Coll.*, Dkt. No. 97-145-ST, U.S. Dep't of Educ. (Feb. 10, 1998); *In re La Newton Sch. of Beauty Culture*, Dkt. No. 97-11-ST, U.S. Dep't of Educ. (Apr. 10, 1997); *In re Wheeling Coll. of Hair Design*, Dkt. No. 95-68-ST, U.S. Dep't of Educ. (July 31, 1995); *In re Int'l Acad. of Hair Design and Tech.*, Dkt. No. 93-124-ST, U.S. Dep't of Educ. (Aug. 4, 1994).

[19] 34 C.F.R. § 600.10(c)(3).

[20] *In re Academia La Danza Artes Del Hogar*, Dkt. No. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)); *see also In re Molloy Coll.*, Dkt. No. 94-63-SP, U.S. Dep't of Educ. (Mar. 1, 1995).

[21] *In re Molloy Coll.*, Dkt. No. 94-63-SP, U.S. Dep't of Educ. (Mar. 1, 1995).

[22] *See* 34 C.F.R. § 668.117(d).

[23] *See In re Howard Cmty. Coll.*, Dkt. No. 08-21-SP, U.S. Dep't of Educ. (Dec. 4, 2008), at 4. Under federal law, no executive, judicial, or legislative agency has the authority to waive claims over $100,000.00. *See* 31 U.S.C. § 3711(a)(2).

ORDER

On the basis of the foregoing, it is hereby **ORDERED** that Willoughby-Eastlake School of Practical Nursing pay $765,403.93 to the U.S. Department of Education.

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Judge Richard F. O'Hair

Dated: July 1, 2009

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested, to the following:

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