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

In the Matter of

SOUTHWEST BAPTIST UNIVERSITY,

Respondent.

Docket No. 16-32-SP

Federal Student Aid Proceeding

PRCN: 20150729100

Appearances: Evan Z. Reid, Esq. and Bridget G. Hoy, Esq., Lewis Rice LLC, St. Louis, Missouri, for Southwest Baptist University.

Angela L. Sierra, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Southwest Baptist University (SBU), located in Bolivar, Missouri, is a Baptist Church affiliated private, non-profit institution of higher education. It was founded in 1878 and it has been accredited by the Higher Learning Commission (HLC), North Central Association of Colleges and Schools, since 1957. SBU provides a variety of post-secondary educational programs leading to Masters and Doctoral degrees; and it is eligible to participate in the various federal student financial assistance programs that are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq*. The Office of Federal Student Aid (FSA) is the agency within the United States Department of Education (ED) that administers and oversees these programs.

PRELIMINARY MATTERS

On August 26, 2015, a staff member from FSA's Kansas City, Missouri Regional Office, conducted a program review at SBU focused on a potentially ineligible program conducted under a contract with Mercy College of Nursing and Health Services, Springfield, Missouri (Mercy). A program review report was generated on September 21, 2015, wherein it was detailed that Mercy was previously a Title IV eligible institution, but later withdrew from the status as an eligible Title IV institution on September 30, 2014. FSA contended that, as soon as Mercy effectuated such a withdrawal of eligibility, the existing contract between SBU and Mercy became subject to the regulatory requirement of obtaining an approval from SBU's accrediting agency, as required by 34 C.F.R. 668.5 (c).[1] Finding that there was no such accreditor approval at that time, the report recommended that, SBU should be required to return to ED $485,451.00, the total Title IV funds disbursed to students in those programs. After an exchange of information between the parties, this finding was confirmed by FSA's issuance of a Final Program Review Determination (FPRD), dated April 20, 2016, wherein it demanded that SBU return $485,451.00 to ED. Sequentially, on June 3, 2016, SBU filed a request for a hearing challenging the findings and demand in the FPRD; FSA forwarded the appeal to ED's Office of Hearings and Appeals; and on June 29, 2016, I was designated to preside over this matter. After my granting of a series of extensions of the briefing schedule, on January 12, 2017, final briefs were submitted.

DISCUSSION

I note as a preliminary matter, that in my resolution of any dispute that results from the issuance of a FPRD, and assessing any resulting liability therefrom, it is important to recognize that after receiving an appropriate and adequate notice of a violation of Title IV, the respondent has the burden of proving that the questioned expenditures were correct and that it did not violate any regulatory requirements. *See,* 34 C.F.R. § 668.116(d). Therefore, before I can proceed, it is critical that I recount the series of events and the time-lines, related thereto, that led up to the issuance of the FPRD.

SBU's 2014-2015 academic year began on August 25, 2014, and this is the period in issue before me. During that timeframe, SBU offered two-year programs leading separately to Associate of Science in Radiology (ASR) and Associate of Science in Nursing (ASN) degrees. These programs were operated for at least a decade by SBU, in conjunction with Mercy. The Joint Review Committee on Education in Radiologic Technology accredits Mercy; and Mercy had participated in the Title IV federal student assistance programs as an eligible institution until it voluntarily withdrew from that status on September 30, 2014. The reason for its withdrawal is not indicated in the record and, there is no indication whatsoever that such withdrawal was the result of some failures on SBU or Mercy's part. I note as significant, that this withdrawal occurred at least a month after the start of classes for the 2014-2015 academic year. The record clearly shows that FSA was timely notified of that withdrawal, however, SBU claims it received no such notice from Mercy. Before me, FSA asserts it had no responsibility to inform SBU of

[1] 34 C.F.R. §668.5 (c) provides "If an eligible institution **enters** into a written arrangement with an institution or organization that is not an eligible institution under which the ineligible institution or organization, provides part of the educational program of students enrolled in the eligible institution, the Secretary considers that educational program to be an eligible program if-

. . . .(3) (ii) (C) The eligible institution's accrediting agency . . . has specifically determined that the institution's arrangement meets the agency's standards for the contracting out of educational services." (emphasis added) the withdrawal, and suggests that SBU should have maintained a closer relationship with Mercy to somehow learn of such action. In contrast, SBU argues that under the circumstances, FSA, as the overseer of the Title IV program, should, in fairness, have provided it such notice. Apparently, it was Mercy's notice to FSA that precipitated FSA's program review and subsequent FPRD. In summary, the FPRD found that SBU's contractual relationship with Mercy violated the provisions of 34 C.F.R §668.5 (c) (3) and, consequently, SBU should return $478,451.00 to ED.

In its brief, SBU asserts several defenses to FSA's action. First, it argues that the regulatory provision that FSA relies on, 34 C.F.R. 668.5 (c), applies to a situation where an eligible institution enters into a written arrangement with an institution or organization that is not an eligible institution. SBU points out that when the agreement between it and Mercy was executed, or entered into, it was with an eligible institution and its accrediting body was not required to approve it. In addition, HLC, its accrediting agency did make such a specific finding, albeit later, as part of its reaccreditation. In fact, the record indicates that on September 14, 2015, SBU's received its 10-year accreditation renewal together with its certification from HLC that the above contracting arrangement complied with its contracting-out rules. The HLC renewal also referenced the fact that the accrediting agency had been clearly aware of that same arrangement with Mercy from the beginning and now makes that finding formally and specifically to comport with the regulatory requirement for such approval. Further, I note that HLC's previous 2006 accreditation review and report attests to the agency's review of the arrangement, without objections and with some positive comments, at that time.

SBU further asserts that, "[T]he practical effect of the FPRD outcome is to penalize SBU for providing awards to eligible students enrolled in its ASN and ASR programs which were administered as they had been for years prior, in cooperation with Mercy." In context, SBU points out that: Mercy's withdrawal of eligibility was in mid-academic year; the withdrawal was without SBU's knowledge or consent; the agreement with Mercy had been in place for over a decade with the knowledge of HLC; HLC received notice of Mercy's withdrawal however, did not realize that the agreement now required its formal approval; FSA failed to provide any timely notice or guidance that it viewed the terms "enters into a written arrangement" to equate with "renewal of such arrangement," resulting in even the accrediting agency being unaware that it had to approve agreements of this type; after being advised of the regulatory provision, SBU promptly submitted a request for approval of the agreement to HLC in April 2015, and HLC approved it on September 14, 2015. Finally, SBU points out that Mercy did not lose its eligibility due to some adverse action related to academic deficiencies-- and the continued agreement with Mercy did not seek to frustrate the conduct proscribed by the regulation. Rather, SBU has continued to provide high quality learning through the ASR and ASN programs as it had for a decade prior, and as it does today.

Although I do not possess plenary authority in adjudication of Title IV matters as an assigned hearing official, I believe that it is necessary to posit a personal observation regarding the situation that SBU found itself when Mercy, unannounced to SBU, withdrew as a Title IV eligible institution. I have previously considered the issue of contracting-out of portions of educational programs and how that affects Title IV eligibility. *See, In the Matter of Camden County College,* Docket No. 13-54-SP, U.S. Dep't of Educ. (January 20, 2014). Therein, I held that such contracting-out should be looked upon with some degree of caution because of the potential of an adverse effect on the educational program and students. In the present case, apparently, Mercy is still an accredited institution -- why Mercy chose to withdraw its eligibility is not clear in the record, however, there is no intimation that it was done for some wrongful purpose. What appears not contradicted is that: SBU was not notified of that withdrawal action either by Mercy or HLC. Separately, FSA counsel, without further support, argues that FSA had no responsibility in that regard. However, given the context of Mercy's change in status, especially its timing, it is important to ponder what action SBU could have or should have taken to protect its students and their title IV eligibility. Since the award year had already started, more than a month before Mercy's withdrawal, it seems SBU's options were few. If you follow FSA's argument, the ASR and ASN programs became ineligible the moment Mercy withdrew from Title IV eligibility without any notice to SBU; and any Tile IV funds disbursed for those programs afterwards was deemed improper and had to be returned.

Now FSA accepts that HLC's approval of a substantially identical contractual agreement between SBU and Mercy makes the contract acceptable from the date of such action, but not for the interim period that is in contest, herein. Given the above, there is no mention of an obvious potential question -- what would FSA conclude if HLC had declared, in its formal approval action, that the approval was made retroactive to the date of Mercy's eligibility withdrawal action? Most importantly, what seems to be lost in this entire equation of parsing out the fine points of and the meaning and parameters of the pertinent regulation is what the best outcome is for the students. All of us who participate within the boundaries of Title IV adjudication know what that answer is. Within the possible outcomes of this proceeding, the best course of action for the students was, the students continued in their courses of studies to completion and, thereby the students earned the Title IV funding that they were disbursed. However, just as clearly, if all the questioned Title IV funds must be returned, SBU's best financial decision would be to drop the programs in question and release the students. What SBU did do was continue the program, initiate the request to gain specific approval from its accreditor, and allow the students to complete their respective programs. I note that although the provisions of 34 C.F.R. §668.26 (d), are not exactly on point, it is interesting to note that upon certain conditions, students can be disbursed Title IV funds that they were, otherwise, eligible to receive, after the institution has lost its eligibility, to allow them to complete their programs. Surely, the merits of SBU's actions are, at least, as meritorious.

In conclusion, before me SBU defends against FSA's demand by referring to the longstanding operation of the programs, its attempt to gain accreditor's approval, a final approval from the regulator, and the unfairness of having to return all the Title IV funds disbursed to those students. It is exceedingly difficult to claim, on the facts here, that FSA's action herein is intended to, and results in, protection of the students. It is apparent that the students received the training and, after all, they are the ones that should benefit from the Title IV program. To make this situation potentially worse for the respective students, can SBU, if it wishes to do so, take legal action to recover its lost funding from the students that benefited from the program? I have raised this question in the past – aren't students that complete their program of study and earn their degree, contractually obligated to pay the cost of their education to their school if their Title IV funding fails to materialize? If that occurs, have we not failed in our basic duties to protect those students, the true beneficiaries of the Title IV program?

FINDINGS OF FACT

With that as a background, and applying the 34 C.F.R. § 668.116(d) applicable burden of proof, I make the following pertinent findings of fact:

(1) SBU is a private, nonprofit institute of higher education.

(2) SBU has been accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools since 1957.

(3) SBU is eligible to participate in the various Title IV federal student aid assistance programs, including the Pell Grant and Direct Loan Programs.

(4) For approximately 10 years, SBU has contracted with Mercy to provide a portion of its ASR and ASN programs.

(5) Mercy was a Title IV eligible institution, therefore, students in ASR and ASN programs were eligible to receive Title IV aid without limitations found in 34 C.F.R §668.5(c), i.e. the agreement between SBU and Mercy did not require prior accrediting agency approval.

(6) Effective on September 30, 2014, Mercy, although still an accredited institution, withdrew its status as a Title IV eligible institution.

(7) Mercy reported such action to FSA, however, did not inform SBU.

(8) The withdrawal date was at least five weeks after the start of the 2014-2015 Title IV award-year, i.e. August 25, 2014.

(9) For the 2014-2015 award-year, by agreement, Mercy taught 48% of the ASR Program and 50% of the ASN Program. Once Mercy withdrew, the 50% share by Mercy was excessive.

(10) On February 20, 2015, the contract between SBU and Mercy was renewed, with SBU providing 51% of those programs and Mercy 49%.

(11) On March 23, 2015, FSA notified SBU by E-mail of the requirement to obtain HLC's approval of the contractual relationship with Mercy, noting therein that Mercy could provide up to 51% of the joint program.

(12) On April 3, 2015, SBU forwarded the executed contract to HLC and requested that they approve the contractual arrangement.

(13) On September 14, 2015, HLC approved the contract at SBU - 51% and Mercy - 49%, thereby satisfying the program sharing limitations of 34 C.F.R. §668.5(c).

(14) In seriatim: on August 25, 2015, a FSA reviewer examined the agreement between SBU and Mercy; a program review report was generated; on April 20, 2016, FSA issued a FPRD finding that the agreement violated the provisions of 34 C.F, R. §668.5(c) (3) and consequently demanded that SBU return $485,451.00 to ED. The FPRD reported that Mercy's provision of 50% of the ASN program during the 2014-2015 award year, also violated 34 C.F.R § 668.5 (c).

CONCLUSIONS

In full recognition of the limitations placed upon me as the hearing official, as they are enumerated in 34 C.F.R. §668.117 (d), I reach the following conclusions. It is of importance to consider the language of 34 C.F.R §668.5 where it deals with agreements between institutions to provided portions of an educational program. Clearly, the regulation favors the agreement with another eligible institution rather than with an ineligible one. In either case, the regulation uses the term enters into a written agreement. It seems abundantly clear that because a contractual arrangement is multi-faceted and needs to be meticulously designed, so as to satisfy the varied points of view of the parties, it takes time to complete. In the current case, that obviously needed to happen -- agreements between SBU and Mercy operated for over ten years, apparently with a favorable understanding from SBU's accrediting agency and FSA. Up to the time that Mercy withdrew its eligibility, there is nothing in the record to indicate any adverse issues. Mercy's withdrawal was not expected, especially by SBU and it was at least five weeks afterwards that it finally was notified. I look with disfavor at the arguments of Mercy, HBU, and FSA, that denied any responsibility to notify SBU. However, my review indicates that upon Mercy's withdrawal, all the participants, FSA, Mercy and HLC, acted as if this matter was routine and not requiring any degree of immediacy. This pervasive attitude, I believe, contributed to the slow pace of the resolution of this issue and acted to, somehow, mislead SBU into believing it was "business as usual, and it would be taken care of in the end." That attitude appears to be in direct conflict with FSA's FPRD and apparent attitude and arguments indicated during this administrative enforcement proceeding. Despite that fact, as currently before me and as indicated above, if I follow FSA's argument, there is no practical or timely way for an eligible institution, in a very similar position as SBU, to comply with the applicable Title IV regulations in order to maintain eligibility of their programs. That being the case, I must question whether FSA's interpretation raises the question of, is this administrative process confiscatory, so as to violate the Constitutional Due Process mandates?

It should not be forgotten that beyond the scope of that question, SBU operated a program with Mercy that educated students for over a ten-year period. HLC had previously observed the contractual arrangement and made comments on its acceptability, and finally when it was asked to formally assess whether the agreement satisfied its contracting-out requirements, HLC found that it did. It seems clear, that taken in context and based upon a reading of the plain language of the provisions of 34 C.F.R. § 668.5 (c), it is obvious it is meant to apply to a situation where a contract between an eligible institution and an ineligible institution is being proposed, with a built-in adequate amount of time for the parties to agree on their responsibilities to each other, and most important, adequate time for their accrediting agency to assess the acceptability of the arrangement. None of that is clearly possible in the current situation. Even though HLC had accredited SBU for years and knew about the contract with Mercy, it still took over six months to provide their approval. We now must consider that: SBU's contractual program was acceptable for ten years, FSA finds it is acceptable now, and I cannot find, under the circumstance, that SBU must return $478,451.00 for an interim, short period where the requirements unexpectedly changed through no apparent fault of SBU, and with no practical way to rectify the situation.

Although FSA's claim relative to Mercy's operating the ASN program at the 50% rate during the 2014-2015 award-year, is subsumed in the above finding, it is important to note the confusion regarding the amount of the program the ineligible school may validly perform. The current version of 34 C.F.R. § 668.5 (c) (3) provision limits it to "less than 50%." This same provision in its 2011 regulatory version limited to "up to 50%." To further compound the issue, even though FSA clams it was a typographical error, an FSA employee sent an Email to SBU during inquiries regarding the issue and stated that the figure is "less than 51%." Taken all the above in context, one is left to wonder, how could any school have timely solved the conundrum that SBU faced.

ORDER

Consequently, and based on the unique facts and circumstances, herein, it is ORDERED that Southwest Baptist University be relieved of any obligation to repay to the United States Department of Education the sum of $478,451.00, as demanded in the FPRD.

Ernest C. Canellos
Chief Judge

Dated: March 7, 2017

SERVICE

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

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