THE SECRETARY
WASHINGTON, D.C. 20202

In the Matter of	)	
	)	Docket No. 89-16-S
GULF COAST TRADES CENTER	)	
	)	Student Financial
	)	Assistance Proceeding

DECISION OF THE SECRETARY

This appeal arises out of a proceeding initiated by the Gulf Coast Trades Center (Center) in its request for a hearing before an Administrative Law Judge to review a determination made by the Chief of the Audit Review Branch of the United States Department of Education (ED). It should be noted that I subsequently signed a memorandum expressly delegating the authority to direct that the hearing in this matter simultaneously address the issue of the Center's eligibility to participate in Title IV programs pursuant to the July 13, 1988, revocation instituted by the Division of Eligibility and Certification (DEC) of the Office of Postsecondary Education (OPE). In the Initial Decision issued on July 11, 1990, Administrative Law Judge Daniel R. Shell (ALJ) determined that:

(i) The Center had legal authorization from the State of Texas to provide postsecondary vocational education during the audit period in question;
(ii) The Center provided postsecondary education to the residents of its care facility, and
(iii) The Center would be retroactively reinstated as an institution eligible to participate in Title IV programs.

Pursuant to 34 CFR 668.119-122, the Office of Student Financial Assistance (OSFA) now appeals the decision below. On the basis of the official record in its entirety, I AFFIRM, REVERSE, and REMAND, respectively, the ALJ's findings, noted above.

* * * * *

OSFA asserts four primary arguments on appeal. First, OSFA claims that the Center was not legally authorized to provide a program of education beyond the secondary level because it did not satisfy the State's requirements for exemption from licensure used to obtain its legal authorization when it started charging its

students tuition. Specifically, OSFA argues that if the exemption the Center obtained from the Texas Education Agency (TEA) in 1972 was no longer valid during the audit period (December 31, 1984-June 30, 1988), the Center was not authorized to provide postsecondary education.

Under Federal law, a postsecondary vocational institution must be legally authorized within the State in which it is located to provide a program of education beyond secondary education. 20 U.S.C. 1141(a)(2), incorporated by reference in 20 U.S.C. 1088(a)(1)(B), (b)(2). Under Texas law, a school must either receive a license or an exemption from licensure under the Texas Propreitary Act (Act) to be authorized to provide a program of proprietary education. It is this act which is used to satisfy the applicable Federal law.

In 1972, the Center was granted an exemption from licensure by the TEA pursuant to the Act. The exemption granted was pursuant to Section 2.12(b) of the Act which states:

> Schools offering a course or courses of special study or instruction financed and/or subsidized by local, State or Federal funds or any person, firm, association, or agency other than the student involved, on a contract basis and having a closed enrollment may apply to the Administrator for exemption of such course or courses [as] may be declared exempt by the Administrator.

In 1976, the Center shifted its emphasis from one of remotivating youths to return to high school to one of preparing students to find employment. Subsequently, all but three of the 13 courses offered at the time the Center received its exemption were changed to correspond to the changes made in the Center's goals. Simultaneously, the Center began to charge tuition to the Texas Youth Commission. Despite these changes, the Center did not reapply to the TEA. On its face, these two changes could affect the viability of the exemption granted in 1972.

Despite the plain reading of the Act, the ALJ relied upon the State of Texas' representative's claim that it is TEA policy to disregard the specific language of the law and to read Section 32.12(b), which is limited to exemption of a course or courses, as though it is not distinct from Section 32.12(a), which provides for exemption of schools and educational institutions. ID at 23-24. Moreover, evidence was introduced from the TEA Commissioner which asserted that "(d)uring the years in question, the Center was found to be exempt from regulation under the Texas Proprietary Act," and was "legally authorized to offer and conduct postsecondary vocational courses in the State of Texas." ID at 20

Despite a forceful argument by counsel for OSFA in his appeal brief, and in the absence of any State action which may have indicated the State's dissatisfaction or acknowledgement of the

Center's deviation from published State law, I decline to instruct the State on how it should interpret its own, clearly written, laws. Moreover, in his capacity as fact-finder the ALJ found that the Center's students did not, per se, pay tuition. ID at 10, 24, n.104. After reviewing the record below, I do not find that this determination was necessarily against the weight of the evidence. Therefore, I feel constrained to AFFIRM the ALJ on this point. The argument, however, does not end there.

Second, OSFA argues that the Center never provided postsecondary education to its residents while it contemporaneously received Federal Chapter 1 funds intended to benefit elementary and secondary students. The question arises, therefore, whether the Center provided postsecondary education. As noted by counsel for OSFA:

> (although) the provision of postsecondary education is not explicitly listed as a distinct statutory requirement for institutional eligibility to participate in Title IV programs, 20 U.S.C. 1088, 1141, it is implicitly an essential component. The legislative purpose for Pell Grant authorization is 'to assist in making available the benefits of postsecondary education to eligible students.' 20 U.S.C. 1070. Necessarily, then, Pell Grants are not intended for use to benefit students attending elementary and secondary education. Moreover, the requirement that a school be authorized to provide postsecondary education would be an absurdity if read to mean that once a school was authorized to provide postsecondary education, it could use the funds to teach anything it wanted, to include courses at the elementary and secondary level. OSFA Appellate Brief at 32, n. 32. (emphasis added)

Moreover, as noted by counsel for OSFA, the basis for the ALJ's decision that the Center did provide such education appears to be based on (1) the TEA's official representative's assertion that it was the TEA's official position that the Center had been providing a postsecondary program of education; ID at 23, (2) the argument that the Center is a postsecondary vocational institution because the courses are designed to prepare students for gainful employment in a recognized occupation; ID at 28, and (3) the Center was accredited by the Southern Association of Colleges and Schools (SACS). ID at 16, 28. I am unpersuaded that the ALJ's conclusion was correct, based on the weight of the evidence.

Without a Federal or State definition of "postsecondary" to guide us, the only way of detemining what level of coursework is being offered by a school is to examine the instructors and the kind of instruction being offered its students. Despite the assertion of the TEA's official representative that the Center's level of education was postsecondary in nature, such testimony does not necessarily warrant the same deference as it did on the issue of

whether the institution was validly exempted from licensure under state law. Exhibits P-S, U, and EE also address this point. In my opinion, the exhibits prove to be more consistent and valuable in ascertaining the level of the courses in question.

Furthermore, the argument that the Center is postsecondary because the courses were designed to prepare students for a vocation and because the Center was accredited by SACS is, at best, specious. While these considerations may be indicative of a postsecondary curriculum, they are hardly conclusive. Moreover, the Center was receiving both Chapter 1 assistance and Title IV funds contemporaneously. The Houston Independent School District (HISD) was responsible for the Center's educational portion of the program in question. To the extent that an HISD teacher taught both the remedial and vocational aspects of the coursework, the curriculum was necessarily limited to the secondary level.

On the basis of the record in its entirety, I do not feel that the the weight of the evidence demonstrates that courses offered by the Center were postsecondary in nature. Therefore, I REVERSE the decision on this issue and REMAND for consideration as to whether there was any impropriety in the Center's receipt of both Title IV funds and Chapter 1 assistance and, if so, what, if any, liability is merited.

Third, OSFA requests that I reverse the ALJ's Order that the Center be retroactively reinstated as an institution eligible for Title IV programs. Pursuant to my delegation of April 20, 1990, I intended to have the ALJ hear all of the Center's claims. Moreover, upon review of the record, I believe that the Center was provided a hearing which sufficiently covered the facts and issues necessary for a determination on the eligibility question. Therefore, I REMAND and instruct the ALJ to issue a decision based on the record below and consistent with my findings herein, on the question of the Center's eligibility to participate in Title IV programs within the next 20 calendar days. [This remand, as well, should address what liability, if any, is existent due to my reversal of the second issue, above.]

Fourth, and finally, counsel for OSFA invites me to issue an order that the ALJ was not free to disregard my regulations governing an audit appeal hearing and to implement and utilize ad hoc procedures in their stead. Among those noted were the admission of evidence in contravention of 34 C.F.R. 668.116(e), the creation of a requirement that witness testimony be heard as a matter of course in an audit appeal, and disregarding Section 668.116(h) of my regulations which stipulates that all oral proceedings in audit appeals be conducted in Washington, DC. The ALJ seems to have based these deviations on his belief that my regulations are "regulatory verbiage" "designed to suggest a desired course of action." ID at 7-8 (emphasis in the original).

In response to OSFA's request, I have the following comment. As Secretary, I have the authority and the burden to adopt agency rules which are consistent with the mandates of the Administrative Procedure Act (APA). 5 U.S.C. 556, et seq. The regulations in question were properly considered, published on August 12, 1987, in the Federal Register, and adopted pursuant to the rulemaking procedures required by the APA. Besides my authority to adopt these rules, the very regulations governing the Administrative Law Judges in conducting student financial assistance proceedings for the Department explicitly provide that "the administrative law judge is bound by all applicable statutes and regulations. The administrative law judge may not- (1) Waive applicable statutes and regulations . . . ." [1] 34 C.F.R. 668.117(a).

Unless I implement a revision to a regulation, I expect that my regulations, drafted as they are and not inconsistant with the mandates of the APA, be followed as written. Only in this way may these proceedings be carried out in a uniform manner which will meet the dictates of Congress and due process.

Therefore, on remand, I order the ALJ below to issue a decision within twenty (20) calendar days of this decision consistent with the foregoing which shall address the question of liability and eligibility to participate in Title IV, HEA programs.

This decision signed this 19th day of October, 1990

Lauro F. Cavazos

Lauro F. Cavazos

Washington, DC

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1 On any event, a witness-type hearing was appropriate for the revocation issue and such a hearing was properly held in the State of Texas. See 34 C.F.R. 668, Subpart G.