UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the matter of	Docket No. 89-35-S
ARISTOTLE COLLEGE	Student Financial Assistance Proceeding
Respondent.	

DECISION OF THE SECRETARY

This matter comes before the Secretary as a review of the Decision by Administrative Law Judge Allan C. Lewis (ALJ) dated August 21, 1991. I recognize that the Office of Student Financial Assistance (OSFA) has filed a notice of appeal in this case on September 11, 1991. However, prior to receiving the OSFA notice, I decided to review the ALJ Decision directly. I find no reason to subject the parties to the additional expense and delay of an appeal.

The assertion by Aristotle College of Medical & Dental Technology (Aristotle) that the ALJ Decision is a final agency decision is without merit. The Administrative Procedure Act (APA) provides, in part, that --

> When the presiding employee makes an initial decision, that decision then becomes the final decision of the agency without further proceedings unless there is an appeal to, or a review on motion of the agency within the time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or rule...

5 U.S.C. § 557 (b).

Aristotle notes that the APA limits the right to appeal or review the initial decision to a period "within the time provided by rule." Aristotle argues that because final rules governing the disqualification procedure do not exist, the authority to appeal or review the initial decision is void.

This conclusion is contrary to the clear intent of the APA and 20 U.S.C. § 1082 (h)(3), the statute which created the disqualification procedure. Both statutes clearly intend that the Secretary maintain final Department authority. In addition, the courts have consistently interpreted the APA to hold that it remains the Secretary's function to make final agency determinations. For example --

> The APA explains that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557 (b). "[I]n the last analysis it is the agency's function, not the [ALJ] to make findings of fact and select the ultimate decision." Greater Boston Television Corp. v. FCC, 444 F.2d. 841, 853 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d. 701 (1971).

Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d. 1285, 1294, footnote 9 (D.C. Cir. 1989). The language of the APA questioned by Aristotle does not void the Secretary's statutory authority. It would only serve to limit the Secretary's authority, if in fact a final rule existed.

The Holding:

I hold that it is within my authority to review the ALJ Decision. The initial Decision of the ALJ in this cause is in conflict with the procedural framework laid down in the Decision of the Secretary in Michigan Paraprofessional Training Institute, Docket No. 90-7-ST, dated August 29, 1991. Therefore, this cause is remanded to the ALJ for further proceedings necessary to remove the conflict with Michigan, and consistent with the procedural clarification below. I further find all pending motions moot.

The Disqualification Procedure:

To understand the nature of the 20 U.S.C. § 1082 (h)(3) disqualification proceeding, it is helpful to consider which procedures and doctrines are not to be emulated. Upon considered reflection, it is clear that language of the Preamble to the Proposed Rules referring to "collateral estoppel" is responsible for at least part of the confusion surrounding the disqualification procedure. 55 Fed. Reg. 48335 (1990).

Contrary to the language of the Preamble, a disqualification proceeding does not invoke the common law doctrine of "collateral estoppel." The disqualification proceeding was created by statute, and is limited and defined first by the statute -- not common law doctrine, or the proposed rule. Further, because the

issues presented in a disqualification proceeding are different from the issues relevant to the guaranty agency hearing, the doctrine of "collateral estoppel" will rarely -- if ever -- be applicable.

The disqualification proceeding is an expedited procedure created by Congress in Section 432 (h)(3) of the Higher Education Act of 1965, as amended by Section 402 (a) of the Higher Education Amendments of 1986, Pub. L. No. 96-374, 100 Stat. 1263, codified at 20 U.S.C. § 1082 (h)(3), which reads as follows--

> **(3) Review of sanctions on eligible institutions**
>
> (A) The Secretary shall, in accordance with sections 556 and 557 of title 5, review each limitation, suspension, or termination imposed by any guaranty agency pursuant to section 1078(b)(1)(T) of this title within 60 days after receipt by the Secretary of a notice from the guaranty agency of the imposition of such limitation, suspension, or termination, unless the right to such review is waived in writing by the institution. The Secretary shall disqualify such institution from participation in the student loan insurance program of each of the guaranty agencies under this part, and notify such guaranty agencies of such disqualification-
>
> (i) if such review is waived; or
>
> (ii) if such review is not waived, unless the Secretary determines that the limitation, suspension, or termination was not imposed in accordance with requirements of such section.

Congress has charged the Secretary with the straightforward duty to disqualify such an institution, <u>unless</u> the guaranty agency's termination action was not imposed in accordance with the requirements of 20 U.S.C. § 1078 (b)(1)(T).

20 U.S.C. § 1078(b)(1)(T) reads as follows --

> (1) Requirements of insurance program: Any State or any nonprofit private institution or organization may enter into an agreement with the Secretary for the purpose of entitling students who receive loans which are insured under a student loan insurance program of that State, institution, or organization to have made on their behalf the payments provided for in subsection (a) of this section if the Secretary determines that the student loan insurance program- ...

> (T) provides no restrictions with respect to eligible institutions (other than nonresidential correspondence schools) which are more onerous than eligibility requirements for institutions under the Federal student loan program as in effect on January 1, 1985, unless-
>
> (i) that institution is ineligible under regulations for the emergency action, limitation, suspension, or termination of eligible institutions (other than nonresidential correspondence schools) under the Federal student loan insurance program which are substantially the same as regulations with respect to such eligibility issued under the Federal student loan insurance program; ....

The plain language 20 U.S.C. § 1082 (h)(3) limits the Secretary's review to whether the guaranty agency's termination was in accordance with 20 U.S.C. § 1078 (b)(1)(T). 20 U.S.C. § 1078 (b)(1)(T) limits the appropriate scope of review to an investigation of whether the guaranty agency applied the appropriate standards and procedure in its termination action. While such a review may require a de jure review of the factual findings of the guaranty agency, it is inappropriate to relitigate the underlying facts determined during the guaranty agency action. The ALJ simply does not have the statutory authority to substitute his judgment for that of the factfinder in the guaranty agency hearing.

> The issues to be determined before the ALJ are:
>
> 1. Whether the agency took action on the basis of substantive agency requirements regarding either initial or continuing eligibility that were not more onerous than those in effect for schools participating in the Federal Insured Student Loan Program (FISLP) as of January 1, 1985; and,
>
> 2. Whether the agency took that action in accordance with procedures that were substantially the same as those that govern the limitation, suspension or termination of a school's eligibility under the FISLP.

Michigan, at 2.

Contrary to the holdings of the ALJ below, the Congressional Record clearly supports a procedure where the guaranty agencies determine the facts within a framework established by the Secretary, with the Secretary's review limited to whether the framework was appropriately applied. When offering his amendment creating the disqualification procedure, Congressman Goodling stated, in part --

> Each lender and institution of higher education will be accorded full due process under the regulations and criteria approved by the Secretary...,The State agency will be expected to have all the facts in hand before issuing an [limitation, suspension or termination] finding....This amendment merely "closes the circle" by requiring a national response to a potential abuse discovered by a State agency. Without this amendment State [limitation, suspension or termination] actions would have no teeth.

131 Cong. Rec. 34177 (1985)

Congressman Ford's comments are equally consistent with this interpretation. Congressman Ford indicated that the committee was concerned with guaranty agencies who "wanted more or less autonomous power to cut off ... colleges ... for whatever standards they established" and the --

> ...legitimate concerns about the failure of the Department of Education heretofore to respond when a State called bad practices of an institution...to the attention of the Department.

Id. Congressman Ford stated that the disqualification considered both these concerns because it --

> ...makes it necessary for the Secretary to take action when a State triggers a complaint, but at the same time...insulates the lenders and institutions against arbitrary action...

Id.

The Congressional Record supports a holding that Congress intended for the guaranty agencies to act as the finder of fact and the Secretary to guard against abuse of due process by requiring the consistent application of standards and procedures. Neither the statute, nor the Congressional Record, supports relitigating facts originally considered before the guaranty agency. The factual findings of the guaranty agency are relevant to the Secretary's review only to the extent that they are insupportable as a matter of law.

So ordered this 25 day of October, 1991.

Lamar Alexander

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