

93-148-ST  
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UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

**In the Matter of**  
**UPSALA COLLEGE,**

**Docket Number 93-148-ST**  
**Student Financial Assistance**  
**Proceeding**

**Respondent**

**DECISION OF THE SECRETARY**

This matter comes before the Secretary on appeal by Upsala College (Upsala), and on cross appeal by the United States Department of Education (Department), Office of Student Financial Assistance Programs (SFAP) of the initial decision issued by the administrative law judge (ALJ) on May 17, 1994. Based upon an October 23, 1993, notice of intent to terminate (Notice) and submissions related thereto, the ALJ concluded Upsala was not a financially responsible institution, as mandated by the Higher Education Act of 1965, as amended, (HEA or Title IV). The ALJ Decision (ALJ Dec.) at 37. Accordingly, the ALJ terminated Upsala's participation in the Title IV programs and imposed a fine of \$5,000 against the school for violating Title IV audit regulations. *Id.*

Upsala and SFAP filed timely appeals on June 27, 1994. Upsala timely filed an opposition to appeal on July 27, 1994, and SFAP filed its opposition the next day. Although Upsala and SFAP agree with respective portions of the initial decision, each seeks to have various portions reversed. *See* Appeal Brief of Upsala to Secretary of Education (Upsala Appeal) *passim*; SFAP Brief on Appeal (SFAP Appeal) *passim*. For the reasons outlined below, I set aside the ALJ's decision, and remand it to the tribunal below for further consideration.

**BACKGROUND AND PROCEDURAL HISTORY**

Upsala is a non-profit institution of higher education located in East Orange, New Jersey. ALJ Dec. at 2. The school offers programs in the humanities, natural sciences, social science, fine arts, social work, and accounting. *Id.* As last reported, Upsala is on a cash reimbursement system and, thus, less than one semester of Federal funds are at risk in the event the school should cease operations. *Id.* at 3.

Upsala's 1993 financial statement indicates the school has significant debt. *Id.* at 2. A large portion of that debt is owed to the Mission Fund of the Evangelical Lutheran Church of America, the Evangelical Lutheran Church of America, and four of Upsala's Lutheran-affiliated sister schools (collectively, Upsala's Creditors).<sup>1</sup> *Id.* at 3. By the same token, a large portion of Upsala's debt is guaranteed by the city of East Orange and Essex County.<sup>2</sup> *Id.*

In the Notice, the Department alleged that Upsala was not financially responsible because it failed to meet departmental numeric financial standards set forth at 34 C.F.R. § 668.13(c). *Id.* at 6. Specifically, the Department alleged that Upsala experienced either operating losses over its two most recent fiscal years, or a deficit net worth for its latest fiscal year. *See* 34 C.F.R. § 668.13(c). In either case, the Department argued, the school should be terminated from participating in the Title IV programs.<sup>3</sup>

Upsala argued that the precipitous closure standard was applicable to this matter, and the ALJ agreed. *See id.* at 3-7. Thereafter, the ALJ concluded Upsala failed to satisfy the precipitous closure standard and, thus, he ruled the school should be terminated from participating in the Title IV programs. *Id.* at 32. Moreover, rather than upholding SFAP's \$40,000 fine, the ALJ imposed a \$5,000 fine against the school. *Id.* at 36.

Now, Upsala appeals the ALJ's ruling regarding the precipitous closure standard. Upsala Appeal *passim*. SFAP appeals the ALJ's ruling to reduce its proposed fine from \$40,000 to \$5,000. SFAP Appeal *passim*.

#### DISCUSSION

Among other things, Upsala argues that the school's due process rights were violated when it was not provided adequate notice that the precipitous closure standard would serve as the grounds for its termination from the Title IV programs. Upsala Appeal at 5. Upsala asserts that, although the ALJ properly considered the precipitous closure standard relevant, he nonetheless exceeded his authority by allowing the Department to terminate the school from the Title IV programs based upon this same standard. *Id.* at 5-6. Upsala concludes the ALJ should have simply rejected the Notice in light of the Department's failure to refer to the foregoing standard.

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<sup>1</sup> The debt is estimated to be \$1.8 million.

<sup>2</sup> This amount totals \$4.2 million.

<sup>3</sup> The Department, at its discretion, invoked the above regulation over the precipitous closure standard set forth in Section 498c(c)(3)(C) of the HEA, *i.e.*, another means by which to determine whether an institution is financially responsible. ALJ Dec. at 7.

In response, SFAP argues Upsala was only entitled to notice of the Department's intent to terminate the school from the Title IV programs based upon the school's alleged failure to demonstrate financial responsibility. SFAP Response to Brief on Appeal (SFAP Br.) at 4. According to SFAP, the school received exactly that. Id.

SFAP insists the Department was not obligated to inform Upsala that the allegation of financial irresponsibility was solely based upon the precipitous closure provision because that provision could serve as a defense against similar allegations. Id. at 5. SFAP acknowledges that Upsala, as the moving party, properly raised this defense at the hearing below, but concludes the school failed to convince the ALJ that it was meritorious. Id. at 5-6.

While Upsala's contention of inadequate notice was not addressed by the ALJ, portions of his decision are quite relevant to my analysis of this issue. For example, he stated there are alternative ways to demonstrate that an institution is or is not financially responsible. ALJ Dec. at 4-6. In this regard, the ALJ set forth the precipitous closure standard in his decision. Id. at 3. Specifically, the ALJ underscored a portion of the precipitous closure standard which provides an institution must establish to the satisfaction of the Secretary that the school has sufficient resources to ensure against the precipitous closure of the institution. Id. The ALJ acknowledged that when a school makes the foregoing showing, it is deemed to be financially responsible, irrespective of the findings made under other applicable departmental standards. Id. at 4.

In conjunction with the above discussion, the ALJ also noted that, although the Department bears the overall burden of persuasion in termination proceedings, the party seeking to invoke the precipitous closure standard is expected to carry the evidentiary burden of production. Id. at 9. Hence, my determination as to whether the Department provided Upsala with adequate notice is based upon my review of how the precipitous closure standard aligns itself with departmental notice standards and certain evidentiary burdens.

Clearly, in the instant case, the precipitous closure provision provided Upsala with an alternative way to refute the Notice's finding that, under departmental numeric standards, the school allegedly was not financially responsible, i.e., a defense. Thus, as alluded to by the ALJ, the burden of production fell upon the school to substantiate this defense. Nonetheless, Upsala somehow assumes the Department must: 1) notify the school of the Title IV termination decision based upon the Department's financially irresponsible finding; 2) notify the school that this finding is based entirely upon Upsala's failure to have sufficient resources to avoid a precipitous closure; and 3) solely carry the burdens of production and persuasion. The second and third assumptions are incorrect.

The Department was neither required nor should it have been expected to include possible defenses within the Notice. This notion defies all that is fundamental to the adjudicatory process.<sup>4</sup> At any rate, the ALJ's decision to strike down this defense had no bearing on the adequacy of the Notice, since the Notice expressly listed financial irresponsibility as the primary grounds for termination. See National Realty and Construction Co., Inc. v. Occupational Safety and Health Review Comm'n, 489 F.2d 1257, 1264, (Administrative pleadings are very liberally construed to require only that the notice fairly apprise the party of the reason for the action). Therefore, I find that Upsala received sufficient notice.

Upsala also argues that the ALJ erroneously concluded the school did not satisfy the precipitous closure standards due to its large debt. Upsala Appeal at 13. Although Upsala concedes it has significant debt, the school contends other factors reflect it has significant resources to prevent a precipitous closure. Id. at 15. According to the school, Upsala's Creditors acknowledge that from both financial and community relations standpoints, the institution is more valuable to them open. Id. at 16. Furthermore, in an effort to strengthen its position, Upsala argues that the testimony of a Department witness who refused to testify that the school was financially unstable, must be considered. Id. at 15.

SFAP argues the ALJ had more than enough facts and data regarding Upsala's purported deteriorating financial condition to justify his rejection of the precipitous closure defense and, ultimately, his decision to terminate Upsala from the Title IV programs. SFAP Br. at 6-21. Consequently, SFAP asserts the ALJ's ruling on this issue should be affirmed. Id. at 24.

Contrary to Upsala's arguments, the ALJ based his decision to reject the precipitous closure defense on more than just Upsala's significant debt. See ALJ Dec. at 16-37. For example, the ALJ noted Upsala failed to meet departmental numeric standards, which prompted the Department to conclude the school was not financially responsible. Id. at 9. Furthermore, the ALJ questioned Upsala's failure to post a surety of \$1.15 million, which he deemed to be reasonable under the circumstances. Id. at 18-19. The ALJ also expressed concern about the disproportionately large amount of revenue Upsala shifted to pay scholarships and grants, which could prove financially irresponsible. Id. at 19-24. Finally, for purposes of this discussion, the ALJ found that Upsala represents a large credit risk given the report of a nationally recognized credit reporting agency. Id. at 24-25.

By the same token, the ALJ acknowledged that "Upsala's support from the East Orange community and affiliated religious institutions certainly is a resource against precipitous

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<sup>4</sup> Surely, Upsala would not want, nor should it expect, the Department to devise and dictate the school's adjudication strategy.

closure." Id. at 13. Moreover, his decision recognized the school's "long-term debt is owed to or guaranteed from friendly creditors who are interested in the well-being and continuation of the school." Id. (emphasis added). Furthermore, at the time of this hearing, the ALJ opined, based upon the facts presented, that Upsala would not close in mid-semester. Id. at 14. The ALJ also noted Upsala was current in paying program liabilities and did not owe HEA refunds. Id. at 31.

Given the ALJ's various observations, I am not fully convinced Upsala fails to meet the precipitous closure standard. Therefore, I set aside the ALJ's ruling on this matter, and remand it to the tribunal below for further review as to whether Upsala has established that sufficient resources are readily available to ensure against a precipitous closure.

As for SFAP's appeal, I shall withhold my decision as to whether the \$5,000 penalty is proper, pending the review of the above matter.

#### ORDER

Accordingly, I order the tribunal below to review the findings of the ALJ to determine whether they conform with the provisions of section 498c(c)(3)(C) of the HEA.

So ordered this 15th day of May 1995.

  
Richard W. Riley

Washington, D.C.

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