In the Matter of BETH ROCHEL SEMINARY,
Respondent

Docket No. 92-110-ST
Student Financial Assistance Proceeding

Appearances: Leigh Manasevit, Esq., and Diane Vogel, Esq., of Washington, D.C., for Respondent Carol Bengle, Esq., of the Office of the General Counsel, U.S. Department of Education, for the Office of Student Financial Assistance

Before: Judge Ernest C. Canellos

DECISION PROCEDURAL HISTORY

Beth Rochel Seminary "Seminary), of Monsey, New York, is a nonprofit, post-secondary institution offering a 5-year program to Orthodox Jewish women leading to a Certificate in Judaic Studies. It participates in the Pell Grant Program, authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), which is administered by the Office of Student Financial Assistance Programs (SFAP), United States Department of Education (ED). Bais Rochel, a secondary school, is located in the same facility as Seminary, with the same administrator overseeing both institutions.

On September 23, 1992, SFAP issued a notice advising Seminary of its intent to terminate its eligibility to participate in federal student financial programs under Title IV of the HEA, and to impose a fine of $270,000. Seminary timely requested a hearing. By SFAP letter of January 5, 1993, the proposed fine was reduced to $245,000. An emergency action, imposed on August 27, 1992, has remained in effect through the course of this proceeding.

A program review was conducted at Seminary by ED's Regional Office in New York from February 4-7, 1992. Based upon their review of student files and other pertinent information, program reviewers determined that Seminary had committed the following violations: 1) disbursal of Pell Grants to students who were ineligible to receive them because they were simultaneously enrolled in high school; 2) establishment and maintenance of student records that were false and inaccurate; 3) failure to meet the standards of financial responsibility; and 4) failure to meet the required fiduciary standard for administering Title IV funds.

DISCUSSION

Seminary presented testimony on Orthodox Jewish education and practices. In essence, religious instruction at the Hebrew High School level begins immediately after the age of Bat Mitzvah (13) and continues through the age of sixteen. It is common to find students beginning their religious training at a time when they are enrolled in secular studies equivalent to the 7th or 8th grade. By the time they ordinarily begin secular high school, these same students already have had two years of religious high school studies. Students then go on to postsecondary religious studies with no secular component. Judaic High Schools do make allowance for the cultural expectations of some high school students wanting to continue secular studies by allowing them

to continue studies leading to graduation and a secular high school diploma. Yet, this in no way is required for admission into the postsecondary religious studies program.

Rabbi Rosenbaum testified that Seminary administrators were first aware that they had misread the student eligibility criteria after receiving notice of the initiation of an emergency action. They were told that the policy of accepting students for postsecondary instruction and Pell eligibility based on the students' religious high school diploma was in error as long as such students continued in the secular portion of high school. The Seminary was advised that, as a result, 25 out of 469 students in 1990-91 and 6 out of 280 in 1991-92 were ineligible Pell recipients.

Seminary now admits to having erroneously disbursed Pell funds to those students for postsecondary instruction and Pell eligibility based on their attainment of a religious high school diploma, and offers to repay ED for those grants. It asserts that such error does not amount to any breach of its fiduciary duty.

ED, however, alleges that Seminary's disbursements to ineligible students went beyond error and represents a plan to fraudulently obtain Pell funds, as evidenced by Seminary's placement of false and inaccurate records in student files. Specifically, ED points out that there were only five diplomas found in student files at the time of the program review, that these diplomas were in Hebrew, and appeared to be genuine diplomas and, when asked about them and appeared to be genuine diplomas and, when asked about them during the program review, were told that they were "high school diplomas." After the on-site review, ED reviewers discovered that many of Seminary's students, including the 5 whose files contained the apparent high school diplomas, were still enrolled in secondary school.

ED goes on to claim that Seminary compounded this error by supplying student information containing implausible "graduation" dates in light of student birth dates, and inconsistent records of graduation dates for 2 students which listed 1991 as the graduation date, while the diplomas on file stated June 1990 as their graduation date. Aside from showing implausible data, ED raises one incident where Seminary is claimed to have issued a false diploma for a student who did not even attend its secondary level (Bats Rochel).

ED's position is that the most credible explanation for variances between information on admissions applications and "diplomas" is that intentional falsifications were made by Seminary. This takes Respondent's actions out of the realm of error and calls into question its exercise of due care and diligence as a fiduciary.

Seminary urges that its religious high school diplomas should not be considered invalid or termed "fraudulent." It argues that the unfamiliarity of ED personnel in dealing with the Orthodox Jewish Community and its fragmentation of education into religious and secular studies with differing graduations is not the kind of basis upon which to allege fraudulent activity. They continue that here we have a situation of a very specialized kind of religious school where the focus and expertise is religious, not secular education. As such, there is every reason to give the Respondent the benefit of the doubt and accept its explanation. This means we should start with an assumption of good faith and that error, not falsification or other actions equivalent to fraud, occurred.

Seminary summarizes it argument on this issue by stating that while ED has established variances between graduation dates, birth dates, and admissions application information, and challenged later supplied graduation records in student files, this qualifies as erroneous information at worst. It closes by asserting that ED has an extremely high burden to prove falsification of documents and that this has not been met.

In disputing ED's claim of a violation of fiduciary duties, Seminary relies on the discussion of fiduciary duty in Southern Vocational College, U.S. Dept. of Ed., Docket No. 90-41-ST (Dec. 21, 1992). There, in reviewing the actions of a fiduciary, and quoting 90 C.J.S. Trusts, § 247(d) (1955), the Judge found the fiduciary duty to be qualified as follows:

A trustee is a fiduciary of the highest order who is held to a high standard of conduct..., but he is not an insurer of the trust property or of the results. and [he] will not be held responsible for mere mistakes or errors of judgment or for losses not attributable to lack of fidelity. (emphasis added).

Seminary argues that by applying this characterization of fiduciary to its situation, the error in mistakenly disbursing Pell funds to some ineligible students who were concurrently enrolled in high school is not enough to support the finding of breach of fiduciary duties. It maintains that the record does not establish that it acted maliciously or with ill will, or that it engaged in a schematic attempt to wrongfully obtain Pell Grant funds. Rather, it asserts that its erroneous disbursements of Pell Grants were made due to it's flawed internal policy of allowing postsecondary admission based on graduation from a Hebrew High School.

ED argues that an institution cannot use Hebrew diplomas as proof of completion of a secondary school program under New York State law. Such "diplomas" clearly do not have legal status as certificates of completion of secondary school or its equivalent because they lack a secular component and Seminary's attempt to justify their claim that the religious diploma suffices as proof of completion of high school for Title IV purposes is totally unreasonable.

For Pell Grant eligibility, a student must be enrolled in an eligible postsecondary institution and may not be enrolled, at the same time, in a secondary school. 20 U.S.C. §1091 (a) and 34 C.F.R. § 668.7 (a)(2). ED's regulations do not define what enrollment in a secondary school means; therefore, we must rely on the common meaning of the term. In providing evidence of Beth Rochel students' enrollment at the secondary level, ED proffered East Ramapo School District book and bus lists for students which identified names and grade levels for the two years in question, 1990-91 and 1991-92. The lists are compiled from information given by parents before the start of school to support their request for bus transportation for the upcoming year. ED maintains that both book and bus lists demonstrate reliable proof of student enrollment in secondary school. Significantly, Seminary did not refute the accuracy of the book or bus lists.

ED's presentation of School District bus and book lists and the testimony of School District officials to verify the authenticity of those lists is convincing. The students in issue were secondary students by District and State definition, receiving subsidized books and bus transportation, but were, nonetheless, being given Pell Grant funds as postsecondary students. Seminary admitted during the hearing that these students took secular courses at the high school so that they could then take advantage of the secular opportunities occasioned by the possession

of a traditional high school diploma. I cannot think of a more obvious example of "being enrolled."

Finally, ED alleges that Seminary did not meet the standards of financial responsibility by failing to pay a $52,268 debt owed to ED, in violation of 34 C.F.R. §668.13, which provides:

(b) In general, the Secretary considers an institution to be financially responsible if it is able to

...(3) Meet all of its financial obligations, including but not limited to

...(ii) Repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.

The debt in question has been the subject of extensive litigation over a seven year period and is final. ED basically argues that nonpayment is proof of financial irresponsibility. However, the simple fact that the debt exists does not automatically contravene Beth Rochel's status as a financially responsible institution. ED has presented neither evidence of collection efforts, nor of Seminary's refusal to pay. Moreover, the size of the debt is not overwhelming when compared with assets of the school. As well, there is nothing in the record to indicate Beth Rochel is incapable of presently satisfying the debt.

TERMINATION ISSUE

The procedures for initiating the termination of eligibility of an institution to participate in the Title IV, HEA programs are set forth at 34 C.F.R. § 668.86. Section 668.86(a) provides:

The Secretary may terminate or limit the eligibility of an institution to participate in any or all Title IV, HEA programs, if the institution violates any provision of Title IV of the HEA or any regulation or agreement implementing that Title.

ED seeks termination for Beth Rochel's violation of 34 C.F.R. §668.7(a)(2), which states that students enrolled in either an elementary or secondary school are not eligible to receive Title IV assistance. The record clearly supports such a violation as Beth Rochel did, in fact, disburse Pell Grant funds to students knowing they were attending secondary school and it has admitted its error.

The disbursement of Title IV funds to noneligible students is a very serious offense and one which, standing alone, warrants termination of an institution.See footnote 1[1] Its procedures of assisting students in securing Pell Grants as postsecondary students while, at the same time, assisting these very same students in getting New York State assistance as secondary students, is aggravating. Seminary's claim that they believed that the religious high school diploma was sufficient to qualify the students for Title IV aid is less than believable.

In further support of its proposed termination, ED points to violations of the general record-keeping requirements at 34 C.F.R. § 668.23(f) and Pell-specific record-keeping requirements at 34 C.F.R. §690.82(a)(1), by maintaining records which contained erroneous information.

Clearly, the records did contain erroneous information. I need not speculate on the motive behind such action because, if caused by either fraudulent intent or mistake, the cumulative effect of such errors is so egregious as to evidence a failing of Seminary's fiduciary responsibilities.

FINE CONSIDERATIONS

In addition to the proposed termination of eligibility, ED seeks a fine of $245,000 pursuant to §487(c)(3)(B) of the HEA, and 34 C.F.R. 668.84. ED describes Beth Rochel as a large institution because its students received more than $1 million in student aid in the 1990-91 award year. The actual figure taken from ED's Institutional Data System was $1,034,986.

ED treats the violation for wrongful disbursement of funds to students Beth Rochel knew or should have known were ineligible as serious and seeks a fine of $155,000. ($5000 for each of 6 ineligible students in 1991-92 and $5000 for each of 25 ineligible students in 1990-91).

The remainder of the fine sought is premised on Beth Rochel's failure to comply with record-keeping requirements. ED considers this to be a grave violation in Beth Rochel's case as it claims the Seminary created and maintained false records so as to mislead or defraud ED. ED seeks a fine of $90,000 for this conduct ($5000 each for 5 student files with false high school diplomas and $5000 each for 13 student files with false high school graduation dates on admissions applications).

In reviewing the proposed fines, I note the Secretary's Decision in Puerto Rico Technology and Beauty College. and Lamec. Inc., U.S. Dept. of Ed., Docket Nos. 90-34-ST & 90-38-ST (June 11, 1993). There the Secretary iterates the statutory and regulatory requirement that in setting an appropriate fine, one must take into account the gravity of the violations and the size of the institution. The Secretary did not delineate what qualified as a large, medium or small institution, but did indicate that size should be a mitigating factor in establishing the appropriate level of the fine. In determining Beth Rochel's size, there is other case precedent which reviews numbers of students receiving Title IV funds and total amounts of such funds in making the determination of size.2 Therefore, despite ED's claims that Beth Rochel qualifies as a large institution in light of its student assistance receipts in the last recorded year, Beth Rochel should more appropriately be described as a small-to-medium institution.

Also, whether the violations were intentional is not so clear cut. No doubt, Beth Rochel erred in meeting record-keeping requirements. I find no evidence of fraud, however there is clear evidence of failure to diligently enforce program regulations. Therefore, I believe a category fine is warranted instead of a cumulative fine based on singular incidents. As a starting point, the maximum categorical fine is $25,000, as set forth in 34 C.F.R. § 668.84(a), and this amount must then be reduced for mitigating factors. Puerto Rico. supra. Because the School is at the small-to-medium School level, a reduced fine in the amount of $10,000 for this conduct is adequate and reasonable.

For the disbursement of Pell Grant funds to ineligible students, ED claims a fine of $155,000. In this case, ED has a stronger claim that a fine should be based on a per incident basis. However, there was a showing that the violations were decreasing in the two award years. Giving

consideration to this and to the mitigating factor of size, an appropriate fine would be $2,000 per violation for a total of $64,000.

In sum, a total fine for the two categories of violations noted above is $74,000. When assessing an appropriate "punishment" for the violation of program regulations, it is the total punishment that must be appropriate. This sum of the fine seems to be reasonable and just in light of the imposition, above, of the severest sanction available, that of termination.

See In the Matter of Southern Institute of Business and Technology, U.S. Dept. of Ed., Docket No. 90-62-ST (May 28, 1991), and In re Hartford Modern School of Welding, U.S. Dept. of Ed., Docket No. 90-42-ST (Jan. 31, 1990).

FINDINGS

I FIND the following:

Beth Rochel disbursed Pell Grants to students who were ineligible to receive them because they were enrolled in high school.

Beth Rochel violated record-keeping requirements by establishing and maintaining erroneous records.

There is insufficient evidence to show that Beth Rochel did not meet standards of financial responsibility.

Beth Rochel breached its duties as a fiduciary.

Beth Rochel's participation in federal student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, should be terminated.

A fine of $74,000 is warranted against Beth Rochel.

ORDER

On the basis of the foregoing it is hereby-

ORDERED, that the eligibility of Beth Rochel to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, is terminated.

ORDERED, that Beth Rochel immediately and in the manner provided by law pay fines in the total amount of $74,000 to the United States Department of Education.

Judge Ernest C. Canellos

Issued: October 20. 1993
Washington, D.C.

Footnote: 1 [1] *I have reviewed the decision in the appeal of Bnai Arugath Habosem, Docket No. 92-131-ST, and find it clearly distinguishable. There, the school discovered its erroneous payment of Pell Grants to students enrolled in high school, and attempted to return the funds to ED, prior to its program review. Also, there was no evidence that the school was receiving state aid for the students as secondary school enrollees at the same time they were being given Pell Grants as postsecondary students.*