IN THE MATTER OF COMMERCIAL TRAINING SERVICES, INC.,
Respondent.

Docket No. 92-128-SP
Student Financial Assistance Proceeding

Appearances: Bob B. Bouneff, Esq., of Portland, Oregon for the Respondent

Howard D. Sorenson, Esq., of Washington, D.C., Office of the General Counsel, United States Department of Education for the Office of Student Financial Assistance

Before: Judge Ernest C. Canellos

DECISION

Commercial Training Services, Inc. (CTSI) is a proprietary vocational school offering a transport operator program. It participates in the Guaranteed Student Loan Programs (GSL) under Title IV of the Higher Education Act of 1965, as amended (Title IV).See footnote 1[1] Program Reviewers from the Seattle Regional Office of the Office of Student Financial Assistance (OSFA) conducted a program review at CTSI from January 27-31, 1992. A program review report, issued on March 20, 1992, concluded that CTSI was in non-compliance with the requirements of Title IV due to (1) failure to meet the course length requirement for participation in the GSL Program during the period under review, (2) incomplete default reduction measures, (3) incomplete verification for one student, and (4) one student's independent status was not documented.

An inspection by the Office of Inspector General of the Department of Education (ED) was conducted from March 23-27, 1992. The report, issued on August 4, 1992, also concluded that CTSI failed to meet the course length requirement.

A final program review determination was issued by OSFA on October 7, 1992, acknowledging that CTSI had taken the corrective actions necessary to resolve findings (2) and (3) and assessing no liability thereunder. Findings (1) and (4), however, were affirmed. CTSI was directed to remit $239,813 to ED for actual losses suffered, including the default liability of $ 178,849, interest of $ 54,427, and special allowances of $ 6,537.

CTSI accepted OSFA's finding (4), but appealed finding (1), arguing that the program does meet the 300 hour requirement and that the actions of ED precluded its recovery under the doctrine of estoppel.

ISSUE

Three issues in this case are apparent: (1) whether CTSI violated the 300 clock hour course requirement, (2) whether ED is barred from recovering the $239,813 due to the doctrine of estoppel, and (3) whether ED correctly calculated the amount it claims CTSI owes. We will discuss these seriatim.

DISCUSSION

1. 300 Clock Hour Requirement

In order for a student to be eligible to receive a GSL, the student must be enrolled in an eligible program. Federal regulations state than an eligible program is a program of education or training that, "[i]n the case of an institution using clock hours to measure academic progress, is no less than 300 clock hours of supervised training." 34 C.F.R. § 668.8 (a)(2)(v)(B). Students enrolled in a program offering less than 300 hours are not in an eligible program and are, therefore, not eligible for any Title IV funds.

CTSI offered a 300 hour program in six week sessions for full-time students and ten week sessions for part-time students. Class days, however, were not offered on six holidays during the calendar year. These six holidays were: Memorial Day, the Fourth of July, Labor Day, Thanksgiving, Christmas, and New Year's Day. No additional training was scheduled to compensate for missed classroom time due to these holidays. Therefore, when one or more holidays occurred during the six week or ten week session, students received less than the mandated 300 clock hours of instruction.

OSFA contends that when holidays fell during training sessions, CTSI did not offer programs of sufficient length to meet a minimum requirement of 300 clock hours. Time off for holidays cannot be counted towards program length or hours completed because it does not meet the federal regulatory definition of a clock hour. Under 34 C.F.R. § 600.2, a clock hour is the equivalent of a 50 or 60 minute class, lecture, recitation, or faculty supervised laboratory, shop training, or internship. Unsupervised time away from class does not fall into any of these categories.

CTSI argues that the legislative history of 20 U.S.C. § 1094 established the "no less than 300 clock hour" language of 34 C.F.R. § 668.8 (a)(2)(v)(B) should be interpreted in a flexible manner. As pointed out by OSFA, the legislative history relied on is a discussion of whether schools could decide to measure their courses either on a credit hour or clock hour basis. The legislative history suggests the institutions should have flexibility in determining which measurement to use, but never discusses flexibility with regard to the minimum hours required.

CTSI further argues that the very definition of a clock hour as a 50 or 60 minute class suggests its flexible nature. This difference could mean a 300 hour course using a 50 minute clock hour is actually substantially shorter (50 less hours of classroom instruction) than if the 60 minute clock hour was utilized.[See footnote 2][2]

CTSI also argues that holidays should be counted as excused absences which do not have to be made up. Students who miss class time due to sick days do not attend 300 hours of classroom time yet are able to graduate. The regulations, however, require the school to offer the minimum hours. Due to the holiday policy, students could attend every hour offered by CTSI and still not attend the minimum required number of hours.

I find that the regulations clearly require 300 clock hours for an institution to be eligible to receive Title IV funds. CTSI was not offering an eligible program when offering less than 300 hours of instruction. Therefore, CTSI's failure to offer an eligible program makes it liable for the return of all Title IV funds improperly expended on such programs.

2. Estoppel

CTSI asserts that ED should be estopped from ordering CTSI to remit the $239,813 since CTSI had relied on certain communications from ED with respect to its holiday policy.

CTSI became eligible to participate in various Title IV programs and was so certified on February 22, 1985. Its holiday policy remained unchanged from 1973 through March 1992. In September, 1990, CTSI reduced the program from 320 to 300 hours. On November 1, 1990, CTSI submitted a required Renewal Application for Institutional Eligibility and Certification which was granted. Included with its Application for Renewal was its calendar, catalog, and program hours. CTSI claims it relied on the 1985 Participation agreement and the 1990 Renewal in maintaining its holiday policy.

I find that ED may recover the funds. The long standing rule is that no estoppel will lie against the Government. This rule was originally articulated in Utah Power and Light v. United States, 243 U.S. 389 (1971) and confirmed more recently in Schweiker v. Hansen, 450 U.S. 785 (1981). The Secretary recently affirmed that ED may not be estopped from recovering funds disbursed contrary to law, even when ED had erroneously granted eligibility. In The Matter of Academia La Danza Artes Del Hogar, Decision (Judge Lewis) (May 19, 1992), Docket No. 90-31-SP, aff'd Certification of Decision by the Secretary (Aug. 20, 1992). Therefore, CTSI's reliance on estoppel is misplaced.

3. Amount of Recovery

CTSI argues that if ED is not estopped, then any liability on its part should be reduced due to mitigating factors such as CTSI's reliance on ED's communications, contending that its circumstances directly correspond to the requirement for mitigation under 20 U.S.C. § 1234(b)(2). I note, by its terms, these provisions are inapplicable to higher education student loan cases. See 20 U.S.C. § 1234i.(2).

CTSI argues that it submitted its program hours and calendar during its certification process and the holiday policy was not challenged at that time. OSFA responds by stating it was ED who relied on CTSI's Certification of the length of its programs. CTSI was charged with compliance of all applicable laws and regulations and acknowledged this obligation in its Program Participation Agreement.

I find that ED, in fact, has put forth a reasonable calculation of CTSI's liability. 34 C.F.R. § 668.95 states that an institution may be required to take corrective action to remedy violations of regulations. The corrective action may include payment of any funds which the institution improperly received. Although every GSL certified by CTSI for programs with less than 300 scheduled hours was ineligible, ED has not required CTSI to repay every ineligible loan. The

face amount of those loans would have been $376,006. Instead, ED calculated its expected actual losses--default claims plus interest and special allowance incurred as follows:

Ineligible Stafford Loans	$ 377,318 See footnote 3[3]
Multiplied by default rate (47.4%)	$ 178,849
In addition	
Estimated subsidies from disbursement to repayment	$ 54,427
estimated special allowance from repayment to default	$ 2,041
estimated special allowance from repayment to PIF	$ 4 496
Total to be Reimbursed	$ 239,813

CTSI suggests any liability should be the actual amount of each student's total federal loan that was proportionately attributable to the missed holidays which totals $12,873.See footnote 4[4] This is not appropriate. CTSI fails to recognize that the entire program is ineligible during those periods when a full 300 hour course was not offered, not just the actual hours missed due to the holidays.

Lastly, CTSI argues that if CTSI must reimburse funds, OSFA's calculations are incorrect. CTSI asserts that the default rate used by OSFA (FY '90) does not correspond precisely to the program review period and includes defaults on loans from other programs.

CTSI states that due to the six month grace period, none of the students whose loans were used in computing the liability for the period under review would go into repayment until at least January 1991, after the Cohort year 1990. CTSI requests the more relevant 1991 and 1992 Cohort Default rate be used to compute CTSI's liability. Additionally, CTSI requests that noncomparable programs used in OSFA's calculations be excluded. In the review period, CTSI was offering one transport operator program (T.O.P.) in Portland, Oregon. OSFA's 1990 calculation includes T.O.P. in both Portland and Los Angeles, as well as a corrections officer training program at the same two locations.

I find that the school's objection to the cohort rate used is not persuasive. OSFA used the most recent default rate available, the FY 1990 Cohort which includes those who entered repayment in FY 1990 (Oct. 1, 1989 to Sept. 30, 1990) and defaulted by September 30, 1991. Since the review period was July 1, 1989, through June 30, 1991, this rate is a reasonable indicator of ED's default losses. This FY '90 default rate, as the most recent data, is the only one ED could effectively use.

ED's assessment of liability is consistent with the best information available. ED did not assess the maximum it could have, and its assessment evidences its good faith efforts to institute a fair and corrective action. Most importantly, CTSI did not provide any information to establish that any other rate would be substantially different. Although CTSI argued that the default rate may be lower due to the Default Management Plan instituted in July 1989, no evidence to support this contention was provided. It should be noted that CTSI has the burden of proof both as to compliance with regulations and the expenditures which are questioned. 34 C.F.R. § 668.116(d).

FINDINGS

I FIND the following:

CTSI did not offer the required 300 clock hours and so was not conducting an eligible program during those periods where a holiday occurred during the training sessions,

ED is not estopped from recovering the funds,
and

CTSI's liability amounts to $ 239,813.

ORDER

On the basis of the foregoing it is hereby-

ORDERED, that Commercial Training Services, Inc., repay to the United States Department of Education the sum of $239,813.

Ernest C. Canellos

Issued: August 4, 1993
Washington, D.C.

Footnote: 1 [1] *GSL Programs are now called Federal Family Education Loan Programs (FFELP).*

Footnote: 2 [2] *2/ It appears that CTSI notes the alternative definitions of "clock hour" to argue there was to be flexibility in the regulatory requirements and not to suggest that the students actually completed a 300 hour course if a 50 minute clock hour was used. (i.e., 300 hours of actual class time could mean 360 (50 minute) hours). It should be noted that the 1992-1993 Federal Student Financial Aid Handbook, chapter 3, page 3-10, contains the following:*

It is not allowable to count more than one clock hour per 60-minute period; in other words, a school cannot schedule several hours of instruction without breaks, and then count clock hours in 50-minute increments. The result would be that seven hours of consecutive instruction would count as 8.4 clock hours (420 minutes/50 minutes = 8.4 hours). This is not allowable, seven real-time attendance hours cannot count for more than seven clock hours.

Footnote: 3 [3] *3/ This figure represents the total face value of ineligible Stafford loans including $376,006 for ineligible loans due to the failure to meet the course length requirement and $ 1,312 for an ineligible loan due to the failure to document one student's independent status.*

Footnote: 4 [4] *4/ CTSI's computation of liability, based on percentage of holiday hours missed, is as follows:*

Number Gross Number % of Total of of Total Students Loans Holidays Trng Hrs. Liability

Full Time

74 190,522 1 2.675,081
15 38,484 2 5.332,052

Part Time

34 89,250 1 2.672,380
18 47,250 2 5.332,520
4 10,500 3 8.00840

$ 12,873