IN THE MATTER OF BNAI ARUGATH HABOSEM,
Respondent.

Docket No. 92-131-ST
Student Financial Assistance Proceeding

INITIAL DECISION - LEGAL FEES

Appearances: Leigh Manasevit, Esq. of Brustein & Manasevit, Washington, D.C., for the Respondent

Carol Bengle, Esq. of the Office of the General Counsel, United States Department of Education, for the Office of Student Financial Assistance Programs

Before: Judge Allan C. Lewis

This initial decision addresses a request filed by Bnai Arugath Habosem (Bnai) on January 20, 1993, for the award of fees and other expenses in the total amount of $6,578.75 under 5 U.S.C. § 504 (1992) which was added by Section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321 and extended and amended by Section 1 of the Act of August 5, 1985, Pub. L. No. 99-80, 99 Stat. 183. Following the submission of respondent's petition, the United States Department of Education (ED) filed a motion to dismiss this matter on the theory that the award of fees and other expenses in this proceeding is not permitted under the Equal Access to Justice Act. Bnai was then given an opportunity to respond. For the reasons stated below, Bnai may not recover fees and other expenses.

OPINION

Pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1), "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."

An adversary adjudication, according to 5 U.S.C. § 504(b)(1)(C), means as pertinent herein--

(i) an adjudication under section 554 of this title [i.e. title 5] in which the position of the United States is represented by counsel or otherwise . . . .

An adjudication under the Administrative Procedure Act, 5 U.S.C. § 554(a), applies--

in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except . . . [as to matters not pertinent herein].

The parties agree that the present termination and fine proceedings are conducted, respectfully, under Sections 487(c)(1)(D) and (c)(2)(B)(i) of the Higher Education Act of 1965, as amended by Section 490(b)(2) of the Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (to be codified at 20 U.S.C. §§ 1094(c)(1)(D) and (c)(2)(B)(i)). These provisions provide, presently, that the Secretary is authorized to prescribe regulations for--

(1)(D) the . . . termination of the eligibility for any program . . . or the imposition of a civil penalty under paragraph (2)(B) whenever the Secretary has determined, after reasonable notice and opportunity for hearing, that such institution has violated or failed to carry out any provision of this subchapter . . . .

and the Secretary may impose a civil penalty--

(2)(B)(i) [u]pon determination, after reasonable notice and opportunity for a hearing, that an eligible
institution--
(I) has violated or failed to carry out any provision of this subchapter . . . .

Prior to July 23, 1992, these provisions mandated a "hearing on the record" as opposed to a "hearing." The phrase "on the record" was deleted in July 1992 by Section 490(b)(2) of the Higher Education Amendments of 1992.

In ED's view, an award of fees and other expenses under the Equal Access to Justice Act is permissible only if the fees were incurred in an adversary adjudication conducted in accordance with the Administrative Procedure Act. 5 U.S.C. § 554(a), i.e. it was a hearing "on the record."See footnote 1 1/ According to ED, termination

and fine proceedings were hearings "on the record" until this phrase was deleted in 1992 from the governing statutes and its underlying regulations.See footnote 2 2/ Inasmuch as these proceedings arose after the change in the Higher Education Act and this statute authorizes only a "hearing," ED argues that these proceedings are not "on the record" and, therefore, fees and other expenses may not be awarded.

ED acknowledges that, under 34 C.F.R. § 21.10 (1992) of its regulations governing the award of fees and other expenses, the Secretary indicated that termination and fine proceedings are adversary adjudications under section 554 of Title 5 and, therefore, an award of fees and other expenses is permitted. It urges, however, that this aspect of the regulation, in view of the 1992 legislation altering the type of hearing afforded institutions in the termination and fine proceedings, "has recently become outdated . . . [and] cannot be relied upon as authority" to award fees and other expenses. Accordingly, it urges, in effect, that the regulation be disregarded and that an award of fees and expenses be denied.

Bnai, on the other hand, asserts that the present proceedings remain "on the record" for purposes of the Administrative Procedure Act, 5 U.S.C. § 554, and the Equal Access to Justice Act, 5 U.S.C. § 504(b), even though the governing statute mandates only a "hearing" in this case. Bnai builds on this concept and urges that the Secretary's failure to delete the termination and fine

proceedings from his list of adversary adjudications under 34 C.F.R. § 21.10 reflects his concurrence that these proceedings are still treated as "on the record" for purposes of the award of fees and other expenses.

The initial question is whether the present proceedings are "on the record" under the Administrative Procedure Act, 5 U.S.C. § 554, and, therefore, constitute an adversary adjudication under the Equal Access to Justice Act, 5 U.S.C. § 504(b).

Bnai asserts that the absence of the phrase "on the record" in the governing statute does not necessarily mandate that the hearing is not an "on the record" hearing. In this regard, it relies upon Marathon Oil v. EPA, 564 F.2d 1253 (9th Cir. 1977) and its progeny, Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978) and West Chicago, Ill. v. NRC, 701 F.2d 632 (7th Cir. 1983).

In Marathon Oil, the Ninth Circuit held that petitioners seeking discharge permits were entitled to a hearing "on the record" although the statute did not specifically provide for an "on the record" hearing. The Ninth Circuit reasoned, in part, that--

> whether the formal adjudicatory hearing provisions of the APA apply to specific administrative processes does not rest on the presence or absence of the magical phrase "on the record." Absent congressional intent to the contrary, it rests on the substantive character of the proceedings involved [which include whether the proceeding was conducted in order to adjudicate disputed facts and whether the provision for judicial review within the specific act required an "on the record" proceeding].

Marathon Oil, 564 F.2d at 1263.

Seacoast and West Chicago were resolved in a similar manner. Seacoast, 572 F.2d at 876; West Chicago, 701 F.2d at 641.

In the instant case, Congress removed the phrase "on the record" from the governing statutes. This action reflects a congressional intent to withdraw the right to an Administrative Procedure Act hearing that was previously afforded institutions in the termination and fine proceedings. Thus, Bnai was not a party to a hearing "on the record" in the case at bar.

This conclusion does not apparently resolve this matter, according to the parties, due to the presence of 34 C.F.R. § 21.10(a) (1992) which indicates that termination and fine proceedings are adversary adjudications under section 554 of Title 5. ED urges that this regulation should be disregarded as it is outdated and, as of December 8, 1992, is under consideration to delete therefrom the reference to the termination and fine proceedings. 57 Fed. Reg. 58,100, 58,102 (Dec. 8, 1992). Bnai argues that the regulation should be given effect and that the award of fees and other expenses is permitted.

Both parties fail to recognize the effect of the definition of adversary adjudication set forth in 34 C.F.R. § 21.3 as it pertains to 34 C.F.R. § 21.1(a)(1). Section 21.1(a)(1) of 34 C.F.R. provides for the award of fees and other expenses to applicants that--

(1) Are prevailing parties in adversary adjudications before the Department of Education; . . .

An adversary adjudication is defined by 34 C.F.R. § 21.3 as a proceeding--

(a) Conducted by the Department for the formulation of an order arising from a hearing on the record under the Administrative Procedure Act (5 U.S.C. 554);
(b) Listed in § 21.10, and
(c) In which the position of the Department was represented by counsel or by another representative.

Even though termination and fine proceedings are listed in Reg. § 21.10, the hearings must be conducted "on the record" in order to satisfy the definition of an adversary adjudication under Reg. § 21.3(a). As noted above, the hearing afforded Bnai in this case was not an "on the record" hearing. Therefore, Bnai may not recover fees and other expenses under the Equal Access to Justice Act.

Accordingly, it is HEREBY ORDERED that Bnai Arugath Habosem's petition for the award of fees and other expenses is denied.See footnote 3 3/

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Allan C. Lewis
Administrative Law Judge

Issued: March 11, 1993
Washington, D.C.

Footnote: 1 1/ The majority of the fees and other expenses in issue were incurred in defending an emergency action initiated by ED under 20 U.S.C. § 1094(c)(1)(E) to withhold funds from Bnai and to withdraw the institution's authority to obligate funds under any program. The resolution of that action caused ED to revise its notice of termination and fine in the instant case. It is assumed, without deciding in this case, that these fees and other expenses may be properly claimed in this action. In addition, ED disputes the substantive merits of Bnai's entitlement to an award of fees and other expenses. These concerns were not specifically briefed by ED in its motion to dismiss and are not addressed in this decision.

Footnote: 2 2/ The references to "on the record" and "administrative law judge" were removed from Subpart G of 34 C.F.R. Part 668 on October 19, 1992. 57 Fed. Reg. 47,752, 47,753-54 (Oct. 19, 1992).

Footnote: 3 3/ Pursuant to 34 C.F.R. §§ 21.51(b)(3) and (4), Bnai is notified of its right to request a review of this initial decision by the Secretary. The review by the Secretary is governed under 34 C.F.R. § 21.52 and any request for review must be submitted to the Secretary in writing, within 30 days after the initial decision is issued. Bnai is referred to 34 C.F.R. § 21.52 for further details regarding any request for review. In the event Bnai is dissatisfied with the final decision under 34 C.F.R. §§ 21.52 or 21.53, Bnai may seek judicial review of that determination under 5 U.S.C. § 504(c)(2).