UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DECISION IN THE MATTER OF
NATIONAL SCHOOL OF
HEALTH TECHNOLOGY

On December 19, 1991, Molly Hockman, Director, Division of Audit and Program Review, Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) imposed an emergency action against the National School of Health Technology (National School), 801 Arch Street, Philadelphia, PA 19107. The emergency action was imposed pursuant to 20 U.S.C. § 1094(c)(1)(E) and the procedures for emergency action set forth at 34 CFR § 668.83. In response, National School requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the Delegation of Authority from the Secretary to me, dated September 10, 1991, to conduct proceedings and issue final decisions in circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, I conducted a hearing in Washington, D.C., on January 14 and 15, 1992. National School was represented by Peter S. Leyton, Esq., of White, Fine & Verville, Washington, D.C., and OSFA was represented by counsel from the Office of General Counsel, Lawrence G. Brett, Esq. The proceeding was transcribed by a court reporter, witnesses testified under oath, and documents were introduced into evidence.

As a threshold matter, prior to my finding on the determination regarding the appropriateness of the emergency action, I must address an issue raised by counsel for OSFA for the first time at the conclusion of his argument. The issue is whether I possess the authority, pursuant to the Secretary's delegation to me, to do more than make absolute findings as to whether an emergency action is or is not warranted. The question was raised by counsel for OSFA as a reaction to a proffer from National School to establish an escrow arrangement whereby all Title IV funds would go to an independent escrow agent who would hold them and remit them to the institution only as they were earned. National School then argued that the third prong of the three-prong test for the appropriateness of emergency action, i.e. that the likelihood of loss outweighs the importance of following the normal process of termination had been obviated, making the emergency action unwarranted. See 20 U.S.C. § 1094(e) and 34 C.F.R. § 668.83(a). Since this question had not been previously raised, I ordered both parties to brief the issue.

In its brief, National School argues that I have explicit authorization to unconditionally withdraw an emergency action and, thus possess implicit authority to withdraw conditionally the emergency action in such manner as to prevent any likelihood

of loss of Federal funds. I could do this either in my capacity as hearing official or, in the alternative, as Acting Deputy Assistant Secretary for Student Financial Assistance. National School points to the Secretary's delegation and argues that I possess the full power and authority of the Secretary to issue final decisions in such matters by virtue of that delegation.

National School argues that because my decision is tantamount to that of the Secretary and, by analogy, is equal to an agency review under the Administrative Procedure Act (APA), I have all the powers which I would have had had I made the initial decision to impose the emergency action, subject to limitations imposed by the Secretary. As reviewer of the action, I possess the power to lift the pending action absolutely or with conditions. This discretionary power arises out of the fact that I, as Acting Deputy Assistant Secretary, could have imposed such a condition as an alternative to imposing an emergency action.

Counsel for OSFA, in opposition, argues that the governing regulation, 34 CFR § 668.83, provides no authority for the show cause official to modify the emergency action, rather, the official can only grant relief from the action or sustain it. Moreover, OSFA argues that the delegation of authority provides no authority for modifying an emergency action.

I have carefully considered the arguments of both parties. On the one hand, an automatic lifting or affirmation of the emergency action without the ability to entertain a logical modification appears too mechanical. On the other hand, there is no explicit power in the underlying statute, regulations, or delegation providing me with the authority to impose modifications in an emergency action.

Past practice by both ED and myself, however, indicates that I have such power. In the emergency action involving Trend Colleges, Inc., I issued a decision on June 19, 1991, which concluded with my finding that the third prong of the three-part test found at 20 U.S.C. § 1094(e) and 34 C.F.R. § 668.83(a) was not met. This finding was predicated upon my acceptance of an escrow agreement similar to the one proposed here. I modified the emergency action on the condition that the escrow agreement remained in full force and effect. Moreover, I reserved the right to reimpose the emergency action, upon motion by ED, if the escrow agreement was materially breached.

Such power to modify an emergency action was conceded, if not embraced, by both OSFA and ED in that case. Therefore, I find that I have the authority to modify an emergency action for the purposes of consideration of an escrow agreement if it is shown

that such an arrangement will impact on the third prong of the aforementioned three-prong test.

Having decided that I do have the power to modify an emergency action, I must now analyze this case on its merits. Counsel for OSFA submitted that National School is not paying refunds that it owes. Moreover, based on a random sampling, OSFA demonstrated that National School had, in many instances, failed to make timely refunds of student loans. National School was shown to have failed to obtain financial aid transcripts for transfer students and for improperly conducting and/or documenting entrance and exit counseling. Evidence was submitted that the institution has failed to submit timely financial and compliance audits. Finally, evidence was presented that National School does not meet the standards of administrative capability and does not meet the standards of conduct required of a fiduciary. Cumulatively, OSFA argued that the gravity of the above infractions and the institutions precarious financial situation, merit this emergency action.

In its brief, National School argues that its refunds were calculated properly and that the institution is in the process of paying refunds, but concedes that such repayment is late. National School submitted conflicting testimony with regard to obtaining financial aid transcripts for transfer students and with regard to its entrance and exit counseling. The institution concedes there are outstanding, late financial and compliance audits, but argues that it has attempted, in good faith, to have them done. Generally, National School disputes the allegations contending its failure to meet the standards of administrative capability and the standards of conduct required of a fiduciary. In short, National School argues that most of the allegations are incorrect, and that those which are unrebuttable are fortified by good faith attempts at rectification. In closing, it argues that even if the violations did exist, the escrow arrangement referenced above would obviate the need for emergency action.

Pursuant to 34 CFR § 668.83, an emergency action may be taken if: reliable information is received that an institution is violating applicable laws, regulations, special arrangements, agreements, or limitations; it is determined that immediate action is necessary to prevent misuse of Federal funds; and it is determined that the likelihood of loss outweighs the importance of following the procedures set forth for suspension, limitation, or termination.

The holder of Federal funds such as student grants and loans acts as a fiduciary. As such, it is clear that National School failed in, at least some respect, to adhere to the highest standards of

care and diligence in administering Title IV of the Higher Education Act (HEA) Programs and in accounting for the funds received under those Programs.

Based upon my review of the evidence, and consideration of respective arguments of counsel, I find that:

(a) there is reliable information that National School violated provisions of Title IV of the HEA;
(b) immediate action is necessary to prevent misuse of Federal funds; and
(c) in light of the repetitive nature of the infractions and in consideration of the institution's financial difficulties, the likelihood of financial loss outweighs the importance of adherence to the procedures for limitation, suspension, and termination actions.

National School argues that an escrow arrangement would negate the potential of an adverse finding with regard to the third prong of the three-prong test mentioned above. National School suggested that an escrow arrangement could incorporate mandatory checks of all submissions by an escrow agent, even up to a 100% check, to give further security and comfort to ED. OSFA has refused this offer. OSFA argues that escrow arrangements may be effective in certain instances, but here, because the basic accounting and documentation systems are questionable, ED could not be assured that an escrow arrangement would adequately protect the Federal funds at stake.

After consideration of the evidence and arguments presented, I find that the suggested escrow arrangement is insufficient to negate the third finding, above. First, OSFA will not agree to the proposed escrow arrangement. Second, based on the evidence of questionable bookkeeping effectiveness, ED could not be assured of the protection of Federal funds. Finally, based on the school's past inability to secure the services of a Certified Public Accountant to comply with its obligation to provide audits of its financial condition, I question whether an escrow arrangement, as proposed, can be effectuated by National School.

In summary, I find that the three conditions for imposing emergency actions, as enumerated in 34 CFR § 668.83, are met in this case. Therefore, I hereby **affirm** the emergency action.

Signed this 28th day of January, 1992, in Washington, D.C.

Ernest C. Canellos