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

In the Matter of **Docket No. 94-30-SA**

FUNDACION EDUCATIVA ANA G. MENDEZ,
Respondent.

Student Financial Assistance Proceeding

ACN: 02-10016

Appearances:

Leslie H. Wiesenfelder, Esq., and Sherry Mastrostefano, Esq., of Dow, Lohnes and Albertson, of Washington, D. C., for Fundacion Educativa Ana G. Mendez.

Sarah L. Wanner, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before:

Ernest C. Canellos, Chief Judge

DECISION UPON REMAND

Fundacion Educativa Ana G. Mendez, Inc. (Fundacion), of Rio Piedras, Puerto Rico, operates three degree-granting institutions in Puerto Rico. These institutions are licensed by the Council of Higher Education of Puerto Rico (PRCHE), accredited the Middle States Association of Colleges and Secondary Schools (Middle States), and eligible to participate in the student financial assistance programs which are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq*.

On November 18, 1993, the Acting Chief, Audit Resolution Branch, Institutional Monitoring Division, Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (ED) issued a final audit determination (FAD) to Fundacion. Fundacion appealed the adverse findings of the FAD. On December 15, 1995, I issued a decision in which I found that Fundacion had disbursed federal funds to students attending unauthorized programs at remote sites. Further, I ordered Fundacion to return $1,712,540, to ED. The Secretary certified the

decision as the Final Decision of the Department on April 11, 1996. Fundacion appealed to the U. S. District Court for the District of Puerto Rico which, on September 30, 1997, remanded the case to the Secretary for further consideration. After the remand by the District Court, the Secretary, in turn, remanded this matter to me for adjudication.

THE INITIAL DECISION

Although a number of arguments were addressed in my initial decision, I found that the crucial issue was whether the training given at Fundacion's remote Programa Servicios Educativos Especiales (PROSEE) sites could be funded under Title IV. In that regard, Fundacion had the burden of showing that the students in issue attended an eligible program, otherwise, it would be required to repay all the Title IV funds which were disbursed to those students. *See* 34 C.F.R. § 600.10 (c)(2) (1993). Earlier in the process, SFAP had agreed to accept, if otherwise eligible, the eligibility of those PROSEE programs which Fundacion could show were both accredited by Middle States and licensed by PRCHE. In my initial decision, I found that the accreditation requirement had been met, however, I found that there was a failure of licensure. Specifically, although each of the three Fundacion schools was licensed, such license did not extend to the PROSEE sites.

In reaching that conclusion, I considered that PRCHE was never apprised of the full extent of the PROSEE program, PRCHE questioned the adequacy of the training given at some of the sites when they became aware of them and eventually directed that Fundacion close all but ten of the sites. Separately, I also found that the evidence of record indicated that some Fundacion sites issued degrees or certificates, however, it did not establish which of them did so -- this was crucial since Fundacion was required to file an application with ED to establish the eligibility of each such site, and this clearly was not done. 34 C.F.R. §600.32 (1993). It was abundantly clear that, in so far as any site which offered certificates or degrees was concerned, Fundacion failed to satisfy one of the conditions of eligibility, the submission of an appropriate application to ED.See footnote 1[1] Consequently, any such site was an ineligible location and programs at those particular sites were not eligible for Title IV purposes. Further, since Fundacion failed to provide evidence as to which of their sites fit into that category, or more appropriately which did not, I concluded that, based on the record before me, they all did. As a consequence of each of the above conclusions, I found that Fundacion had not met its burden of showing that the $1,712,540 in issue was disbursed to eligible students in an eligible program and, therefore, must be repaid.

THE REMAND

The District Court's remand was on a narrow issue, *i.e.* was PRCHE's retroactive licensing of PROSEE sites effective so as to satisfy the Title IV requirement that a program must be legally authorized to qualify as an eligible program. After a continued dialogue between Fundacion and PRCHE, which included litigation, PRCHE issued certificates which approved the PROSEE sites

with a condition that most would not operate thereafter. In its review of that issue, The District Court determined that:

> . . . certifications Nos. 108, 109 and 93-002 clearly, plainly and in no uncertain terms state that the PRCHE 'certifi[ed] for all legal effects the validity of the programs offered and degrees conferred in the [sixty PROSEE] locations,' all effective on the inception, notwithstanding that the PRCHE had prior thereto ordered the closing of forty-eight of these sixty.

The Court reasoned that, by its terms and under Puerto Rican law, those certifications authorized the sites retroactively. Despite that finding, however, the Court recognized that it was the Secretary's responsibility to determine if PRCHE's action constituted "legal authorization," as that term is envisioned under Title IV. Stated in another way, the Court questioned whether the Secretary was bound by PRCHE's action, or did he have the right to independently determine if Fundacion's programs were "legally authorized" for Title IV purposes. 20 U.S.C. § 1141(a). The Court's remand was for the specific purpose of allowing the Secretary to consider that question.

DISCUSSION ON REMAND

In his Remand Order, the Secretary directed that I determine whether Fundacion "satisfied the eligibility requirement set forth in the Higher Education Act, at 20 U.S.C. § 1141(a), which requires Title IV participants to be legally authorized by the states in which they are located." I determined that the issue on remand as enunciated by the District Court and the Secretary's Remand was limited to a narrow question of law; therefore, I directed the parties to address the following question: "what is the effect of PRCHE's certifications contained in Nos. 108, 109, and 93-002 upon the Secretary's determination of whether Respondent's programs were eligible programs at the time Title IV funds were disbursed to its students." The significance of that question was obvious. However, rather than addressing this narrow issue, the parties attempted to discuss other aspects of this appeal. Since the scope of my charter is abundantly clear, I will disregard the submissions which do not directly relate to the specific question before me.

As a general premise, it is well established that in subpart H -- audit and program review -- proceedings, the institution has the burden of proof. 34 C.F.R. § 668.116(d). Consequently, to sustain its burden in this particular matter, Fundacion must establish, by a preponderance of the evidence, that the Title IV funds in issue were lawfully disbursed. In this context, Fundacion is required to prove that the PROSEE programs at its various sites were eligible programs. For the same two separate and distinct reasons, I find, as I did in my initial decision, that Fundacion has failed to meet that burden. First, in the context of Title IV and its implementing regulations, the PROSEE programs were not legally authorized. Inherent in that finding is my conclusion that the Secretary is not bound absolutely by the apparent decision of PRCHE, and is free to, if not absolutely obliged to, review that issue under the federal practices and procedures which are attendant to Title IV.

As part of the federal government's obligation to safeguard federal student financial assistance funds, a tri-partite gatekeeping system has been established. The participants in this gatekeeping function include: accrediting agencies which have been approved by the Secretary to be the

judge of the quality of the content of education programs; state licensing bodies which oversee the legal existence of educational programs within their respective states; and ED which has the overall responsibility to scrutinize the compliance with federal law of all Title IV participants. Although accrediting agencies and state licensing bodies are, indeed, independent entities, they do not operate in a vacuum in so far as Title IV issues are concerned -- Congress has delegated to the Secretary the final and ultimate authority to determine whether or not compliance with Title IV is achieved. In a previous decision, the Secretary determined that when an accrediting agency failed to comply with Title IV in making an accreditation decision, he could overturn the accreditation decision in so far as it impacted on Title IV. *See generally, In re Webster Career College, Inc.*, Docket No. 91-39-SP, U.S. Dep't of Educ. (Decision of the Secretary, July 23, 1993). To put this issue in context, it seems abundantly clear that a state agency, in addition to its secondary role of aiding the federal government with its oversight functions in the Title IV program, acts primarily to safeguard the parochial interests of its various citizens.See footnote 2[2] Given this situation, it is clearly the Secretary who is ultimately charged with responsibility to protect the federal interest. Consequently, I find that a decision by a state agency relative to a licensing issue should be treated similarly to a decision by an accrediting agency when they each deal with Title IV matters -- each type of decision is subject to being overridden by the truly responsible official, the Secretary. When I review the question of whether the PROSEE sites were legally authorized, I find that they clearly were not.

In reaching my determination of whether the PROSEE sites were “legally authorized” for the purposes of participation in Title IV, no in-depth legal analysis is necessary; what is required is the application of commonsense. In that vein, first, my review of the record fails to reveal any indication that, during any of the periods during which the PROSEE sites operated, PRCHE ever indicated that the sites met its standards. It was only after-the-fact and as part of an overall settlement agreement, and in a site closing planSee footnote 3[3] that PRCHE issued its so-called “licenses.” PRCHE's reason for its actions in this regard are only known to it. It seems , however, that the more probable one is that the agency wished to protect the students from any possible adverse ramifications of a declaration that the programs were not authorized. It would defy credulity to extrapolate from PRCHE's action, in the context of its sequence and timing, that the PROSEE sites were, in reality, legally authorized to offer the programs that they did. These sites were not authorized when Fundacion's three main campuses were certified, and they were not authorized when the Title IV aid was disbursed.

To support its thesis that the PROSEE sites were legally authorized by the retroactive action of PRCHE, Fundacion refers to a number of ED decisions.See footnote 4[4] Some of these deal with accreditation decisions, while others deal with licensure decisions. The plain fact is that in all these decisions, whether they tangentially involve licensure or accreditation, there were determinations made by the responsible agency that: the institution was currently qualified, it was qualified on the date to which approval was made retroactive, and it would appear it would continue to be qualified in the forseable future. Given the marked difference between those cited cases and the subject one, I find that all the of cases cited by the Respondent are inapposite. Accordingly, I find that PRCHE's retroactive licensing of the PROSEE sites has no effect on my determination that Fundacion's PROSEE locations were ineligible to participate in Title IV during the period in issue.

Separately, I find that Fundacion failed to apply to ED for approval to offer degree or certificate programs at its remote PROSEE sites, as required. As I found in my initial decision, Fundacion applied for certification of the eligibility of the main campus of its component schools, omitting mention of any of the PROSEE sites. This was an apparent attempt to keep the operations at all those sites screened from scrutiny by the various oversight agencies. From the record, it appears Fundacion had good cause to suspect that any such scrutiny would lead to a disapproval of the satellite sites. The failure to include the PROSEE sites which issued degrees or certificates in its applications for Title IV eligibility resulted in those sites being ineligible. Since Fundacion did not offer evidence that indicated which of its sites issued such degrees or certificates, I can only conclude that all the sites were ineligible.

FINDINGS AND ORDER

Fundacion Educativa Ana G. Mendez failed to meet its burden of proof in establishing that the students attending the PROSEE sites were participating in an eligible program. Consequently, it must return $1,712,540 in Title IV funds, as misspent. On the basis of the foregoing, it is hereby ORDERED that Fundacion Educativa Ana G. Mendez pay to the U.S. Department of Education the sum of $1,712,540.

_____

Ernest C. Canellos, Chief Judge

Dated: July 16, 1998

Footnote: 1 [1] *SFAP alleged that Fundacion operated the PROSEE program at ineligible off-campus sites, resulting in those programs being ineligible to participate in Title IV programs. Evidence of record indicated that in 1985, Fundacion's three institutions applied to ED to become eligible to participate in the Title IV student financial assistance programs listing as their address only the respective post office box, city, and zip code of its main campus. Although many PROSEE sites were in existence at that time, they were not identified in any way. On each of the applications, the institutions noted "N/A" where it was requested to list additional locations where programs were offered.*

Footnote: 2 [2] *By this observation, I do not intend to imply that state actions are not entitled to a degree of deference under the tripartite gatekeeping system established by Congress. Instead, I am distinguishing instances where deference is proper and warranted from those instances where the state's actions leave the federal interest unaccounted for or unprotected.*

Footnote: 3 [3] *At that time, 43 of the PROSEE sites had already closed, others would close shortly, and only a small number could continue to operate. Fundacion claims that $1.1 million of the amount claimed was disbursed at the sites which were retroactively approved and which would continue in operation.*

Footnote: 4 [4] *In re French Fashion Academy, Docket No. 89-12-S, U.S. Dep't of Educ. (March 30, 1990); In re Baytown Technical School, Docket No. 91-40-SP, U.S. Dep't of Educ. (April 12, 1994); In re Simmons School, Docket No. 93-6-SP, U.S. Dep't of Educ. (November 4, 1994). In re Malloy College, Docket No. 94-63-SP, U.S. Dep't of Educ. (March 1, 1995); and In re LeMoyne-Owen College, Docket No. 94-171-SA U.S. Dep't of Educ. (May 18, 1995).*