BEFORE THE
UNITED STATES DEPARTMENT 0F EDUCATION

****

PROGRAM REVIEW PROCEEDING 0F
FRENCH FASHION ACADEMY

****

DECISION

BY PAUL S. CROSS, ADMINISTRATIVE LAW JUDGE

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STATEMENT 0F THE CASE

The Office of Student Financial Assistance (OSFA) of the Department 0f Education (ED) sent the French Fashion Academy (Academy) a final program review determination dated July 14, 1988. In that determination, OSFA notified the Academy that it had to pay ED $407,062 under the Pell Grant Program, and $36,500 under the Guaranteed Student Loan (GSL) Program Those determinations were based an OSFA's findings that the Academy was not legally authorized in New York to provide a program of postsecondary vocational education for the period of October 1, 1984 to October 31, 1985, and that it was not legally authorized or approved in New York to carry out or measure its postsecondary vocational education programs in semester hours.

On August 22, 1988, the Academy requested a review of the final program review determination under section 487(b) of the Higher Education Act of 1965 as amended (HEA), and the regulations published to implement that section, Subpart H 0f the Student Assistance General Provisions regulations, 34 CFR Part 668, Subpart H. Under those provisions, an institution may request the Secretary to review a final audit or program review determination of its administration of the student financial assistance programs authorized by Title IV of the HEA (Title IV, HEA Programs).

Previously, this proceeding was assigned to Judge Walter J. Alprin. He is no longer available to decide the case and it 15 reassigned to me.

Both ED and the Academy submit written statements of mixed facts and arguments. The written submissions contain many exhibits of a voluminous nature, even though the facts in this case appear very simple. As an aside, the Academy, but not ED, filed a reply brief. The latter indicates by letter that its initial brief contains all necessary facts and arguments.

ISSUES

The issues in this appeal are:

(1) Whether the Academy properly participated in Federal student aid programs of postsecondary vocational education for the period of October 1, 1984 through October 31, 1985; and

(2) Whether the Academy properly measured its participation in Federal student aid programs in semester hours.

Title IV, HEA Programs.

The Title IV, HEA student financial aid programs involved in this appeal include the GSL and Pell Grant Programs.

Description of the GSL Program.

The GSL Program is authorized under Title IV-B of the HEA, 20 U.S.C. 1971 et seq. The GSL Program regulations are codified in 34 CFR Part 682. 1 To be eligible to receive a loan under the GSL Program, a student must be enrolled at an eligible institution. 20 U.S.C. 1091(a)(l> and 1094. A for-profit institution, such as the Academy, must qualify as a "vocational school" to qualify as an eligible institution for the GSL Program. 20 U.S.C. 1085(a) and (c). To so qualify, the Academy, inter alia, must be

legally authorized to provide and provides . . . a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations.

20 U.S.C. 1085(c)(2).

As part of the loan application process, the institution completes a portion of the student's loan application. In that portion, it certifies, inter alia, that the student is enrolled as at least a half-time student in a "program determined to be eligible for the Guaranteed Student Loan Program." Such an eligible program may only be offered by an eligible institution or school. 34 CFR 662.102.

Description of the Pell Grant Program.

The Pell Grant Program is authorized under Title IV-A-l of the HEA, 20 U.S.C. 1070a through 1070a-6. The Pell Grant Program regulations are codified in 34 CFR Part 690. 2

Under the Pell Grant Program, the Secretary of Education provides grants to eligible, financially needy students attending eligible institutions of higher education to help them pay for their postsecondary educational costs. The size of a Pell Grant is based upon strict statutory and regulatory formulae. 20 U.S.C. 1070a(b) and 1070a-1 through 1070a-6; 34 CFR Part 690, Subpart F. The amount of a student's Pell Grant for an award year depends in part on the length of the student's program of study. 34 CFR Part 690, Subpart F.

To be eligible to receive a Pell Grant, a student must be enrolled in an "eligible program" at an eligible institution. 20 U.S.C. 1091(a)(1) and 1094; 34 CFR 690.4. A for-profit institution, such as the Academy, must qualify as a "proprietary institution of higher education" in order to qualify as an eligible institution for the Pell Grant Program. 20 U.S.C. 1088. To so qualify, the Academy, inter alia, must be

legally authorized ... to provide a program of education beyond secondary education.

20 U.S.C. 1088(b)(2) and 1141(a)(2).

FACTS

The Academy is a long-time vocational institution located in New York State which for many years has been legally authorized to provide postsecondary vocational education programs. On September 8, 1983, the Academy submitted an application for renewal of its license to the New York State Department of Education (NYSED). The application included a complete listing of courses taught by the Academy On February 9, 1984, license #732 was routinely issued. It was effective from October 1, 1983 through September 30, 1985, and included a listing of advanced courses offered by the Academy. The application was not denied in any respect. In 1981, the Academy applied to the NYSED for course approval of the courses it offered. That approval was granted routinely on November 12, 1981 for 16 courses. The effective dated of approval for each course was October 1, 1981; the expiration date for approval of each course was September 30, 1984. Each course was approved for a specific quantity of education, and that quantity of education was stated in clock hours, as is required by the State for vocational schools. The approval disclaims any impact upon Federal requirements and included the advanced courses already listed in base license #732

In June 1934, the NYSED routinely advised the Academy of the September 30, 1984 expiration date for each course approval and the need to reapply for that approval. It further advised the Academy of that expiration date on February 19, 1985, March 20, 1985 and June 27, 1985. The Academy inadvertently failed to seek reapproval courses, however, until August 1985.

The NYSED routinely approved the courses on May 14, 1986, but did not do so entirely "nunc pro tunc." Left uncovered was the period between October, 1984 and October 31, 1985. The courses, as required by the State, were approved for a specific quantity of education, and that quantity of education was expressed in "instructional hours." For example, the Patternmaking Technology course was approved for 630 instructional hours. The courses were approved retroactive to November 1, 1985; the expiration date for each course approval was October 31, 1988. The courses which were approved had the same content as courses which were approved in other years for instructions by the Academy. There was no change of any kind. Thus, for the period of October 1, 1984 through October 31, 1985, the Academy had a license to operate a vocational school but technically failed to gain approval to offer any courses for that period.

In addition, the Academy's license as a school lapsed on September 30, 1985. It did not receive renewal until a month later on November 1, 1985. Thus, technically, the Academy was neither licensed nor had any approved courses for the month of October 1985.

During the period of October 1, 1984 through October 31, l985, the Academy awarded $330, 202 of Pell Grant funds to students who were newly enrolled in the Academy during that period, and certified on the GSL applications of newly enrolled students that the students were, in effect, enrolled in an eligible institution. As a result, those students received loans under the GSL Program totaling $36,500. There is scant information concerning the Academy's student loan default rate, although there is some indication that the record is "good" as opposed to "poor". I make no judgement.

On April 10, 1984, the Academy submitted to ED an institutional eligibility form, "Request for Institutional Eligibility for Programs Form," ED form 1059. In that form, it listed the programs it offered in credit hours instead of clock hours. For example, the Academy listed its Patternmaking Technology Course as a 31 credit hour course.

On the basis of that application, ED sent the Academy eligibility notice updates on July 17, 1984. These notices updated the Academy's designation as an eligible vocational school, and updated the Academy's designation as an eligible proprietary institution of higher education In each notice, ED stated that

Please note that this eligibility pertains to the school listed at the above address as long as the school . . . continues to meet all of the statutory provisions for eligibility. . .

For the period of December 1, 1985 through November 30, 1986, the Academy was on the ED cash reimbursement system of funding. For that period, the Academy indicated to ED that it made $427,000 of Pell Grant awards to its students and therefore requested that amount in payment. It further indicated that the Pell Grant awards were calculated on a semester hour basis.

OSFA paid the Academy The $427,000 but requested that the Academy calculated the Pell Grant awards for that period on a clock hour rather than semester hour basis. The Academy acceded to ED's request and determined that the Pell Grant awards, when calculated on a clock hour basis, totaled only $350,140. Therefore, there was a $76,860 difference between calculating the Pell Grants on a semester hour rather than a clock hour basis.

DISCUSSION AND CONCLUSIONS

I

In order to qualify as an eligible institution under the GSL and Pell Grant Programs, the Academy must be authorized to provide postsecondary vocational education programs in New York State. 20 U.S.C. 1085(c), 1088(b)(2) and 1141(a)(2). Also, in order to provide a postsecondary vocational education program in the State of New York, the Academy itself must receive a license from the New York State Education Department (NYSED), and in addition, NYSED must approve that vocational program.

For the period of October 1, 1984 through September 30, l985, while the Academy itself was licensed, none of the Academy's programs technically was approved by the NYSED. Also, for the month of October l985, none of the Academy's programs was approved by the NYSED, and

the Academy was not licensed. OSFA found that for that period, the Academy had made $330,202 of Pell Grant awards to newly enrolled students, and certified GSL loans totaling $36,500 for those students

Also, as noted, the NYSED approved the Academy's postsecondary vocational education programs in clock hours only. In fact, under the laws and regulations of the State of New York, the Academy was authorized to provide its post postsecondary vocational education programs only in clock hours. However, for the period of December 1, 1985 through November 30, 1986, the Academy calculated Pell Grant awards on the basis of semester hours ($427,000) rather than clock hours ($350,140), and thus made higher Pell Grant awards to its students by $76,860. Thus ED paid the Academy the higher figure of $427,000

In order for a student enrolled in the Academy to be eligible to receive a loan under the GSL Program or a grant under the Pell Grant Program, the Academy should be authorized by New York State to provide a program postsecondary vocational education 20 U.S.C. 1085(a), 1085 (c) (2>, 1070a (a>, 1088 (b> (2), 1091(a)(1>, 1094, and 1141(a)(2>. For the period of October 1, 1984 through October 31, 1985, the Academy was not authorized by New York State to provide a program of postsecondary vocational education, because through inadvertence none of its postsecondary vocational education programs was approved by New York State during that period. In addition, through inadvertence the Academy was not licensed for the month of October 1985. Although there were technical licensing lapses, there is no indication that the Academy was or Is facing legal action against it by New York State. This is so even though the law of the State is clear.

Under the statutes and regulations of New York State, in order for the Academy to offer postsecondary vocational education programs in New York, it must be licensed by the NYSED, and, in addition, each program it offers must be approved by the NYSED. Section 5001(1) of the New York Education Law provides that

No private school which charges tuition or fees for instruction and which is not exempted hereunder shall be operated by any person . . . for the purpose of teaching or giving instruction in any subject or subjects, unless it is licensed by the education department.

Section 5003(1) of the New York Education Law provides in pertinent part that

. . . In every such school, . . . the standards and the methods of instruction, . . . the qualifications of teaching and management personnel, . . . [and] the form and content of the student enrollment agreement or contract, . . . shall comply with standards for approval set forth in regulations of the commissioner.

Section 126.4(a) and (b) of the regulations of the New York State Commissioner of Education provide that

(a) Schools shall conduct only those curricula or courses which have been approved by the commissioner.

(b) The director of the school shall cause to be prepared data concerning curriculum or courses of study and methods of Instruction in sufficient detail to clearly indicate the nature of the proposed instruction. He shall submit such data to the commissioner in such form as said commissioner shall direct, accompanied by a request for approval.

Section 126.10(a) of those regulations provides that

(a) Every applicant shall submit an application for licensure of a private school, . . . upon forms provided by the commissioner, together with such other information as he may require including applications for approval of curricula or courses of study. . . .

Officials of the NYSED charged with the administration of these statutes and regulations have indicated that these statutes and regulations require an institution to be licensed by the NYSED and, in addition, to have its courses approved by the NYSED in order for that institution to offer those courses in New York. In this regard, it appears that New York is well able to administer its statues without the assistance of DE. New York State licensing officials state that:

New York State Education Department private school licensing procedures require that a school submit an application for renewal of a license 60 days prior to the expiration date of the current authorization to operate a school.

[i]f any item is missing or if there are no approved courses, the school is notified to correct these items. A new private school license will not be issued, but the schools authorization to continue to offer instruction under the current license is provided in Section 126.l0(b)(3).

A license to operate a private trade school cannot be issued unless there is at least one approved course. A school that has a valid license but the courses have expired may continue to offer instruction to current students only. They are not authorized to enroll new students in an expired course. (emphasis in original)

The course approval process is independent of the license renewal process. The school is notified approximately 120 days prior to the expiration of a course that an application must be submitted to obtain reapproval. The course should be submitted no later than 90 days prior to the expiration of the currently approved curricula or course of study. If an application for course approval is submitted after the expiration date, students in the course.

It is the schools responsibility to ensure that soon to be expired courses are resubmitted prior to the expiration date.

Thus, under the laws and regulations of the State of New York, in order for the Academy to provide a course of study in New York, the Academy must be licensed, and, in addition, the course of study must be approved. If the Academy failed to get the course approved in time, it was not authorized to enroll new students in that course. Further, if the Academy's license expired, the license could not be renewed unless the Academy had at least one course approved by the NYSED.

In 1981, the Academy applied to the NYSED for course approval of the courses it offered. That approval was granted on November 12, 1981 for 16 courses. The effective date of approval for each course was October 1, 1981; the expiration date for approval of each course was September 30, 1984.

Despite the fact that all of its course approvals expired on September 30, 1984, the Academy did not reapply for approval of those courses until August 1985. The NYSED approved the courses on May 14, 1986 and made the course approvals retroactive to November 1, 1985. Thus, for the period of October 1, 1964 through September 30, l985, the Academy had a license to operate a vocational school but it was not technically approved to offer any courses for that period. At the same time, there is no indication that NYSED required the Academy to discharge all of the new students who enrolled during the lapse in course approval. There also is no indication of a sanction of any kind by NYSED.

In addition, technically the Academy was neither licensed nor had any of its courses approved for the month of October 1985. The Academy's license had expired on September 30, 1984, it could not receive a new license until it had at least one approved course. This "Catch 22" situation finally ended on May 14, 1986, with retroactive approval to November 1, 1985. As noted earlier there was no change in course content and except for the time-lapse the course approval was routine.

Accordingly, during the period of October 1, 1984 through October 31, 1985 the Academy in the strictest sense was not authorized to provide postsecondary vocational education courses in New York. Therefore, the Academy arguably did not qualify as a proprietary institution of higher education nor a vocational school, and was consequently ineligible to participate in the Pell Grant and GSL Programs. Again, however, there is no indication that NYSED required ouster of students enrolled during this period, or even that the Academy was fined.

Even though it was the Academy's responsibility to ensure that soon to be expired courses were resubmitted prior to the expiration date, the NYSED specifically and generally notified the Academy about its September 30, 1984 expiration date and the need to reapply for course approval. In June 1984, more than three months before the September 30, 1984 expiration date, the NYSED specifically advised the Academy of that expiration date and the need to reapply for course approval. It again advised the Academy of that expiration date and the need to reapply on February 19, l985, March 20, 1985, and June 27, 1985. The Academy did not reapply for approval of those courses, however, until August 1985.

Further, in a form letter sent to all schools NYSED advised those schools of the procedures to follow when seeking to have their curricula of courses of study approved by the Education Department NYSED stated that:

Curricula or courses submitted for approval (with or without revisions) should be submitted no later than 90 days prior to the expiration date of the currently approved curriculum or course of study (Reapplication Date.). Few curricula or courses of study should be submitted 90 days prior to the date you plan to offer the curriculum or course at your school. (emphasis in original)

NYSED further stated that schools may continue to enroll students into curricula/courses beyond the stated expiration date only when the curricula/course is submitted prior to the reapplication date but no notification of approval or disapproval from the Department has been given by the expiration date. Finally, the memorandum warns the school directors that it is their responsibility "to ensure that soon to be expired curricula or courses are resubmitted prior to the reapplication date."

The NYSED made it clear to all schools in the September 30, 1984 memorandum that it was the responsibility of each school to reapply to the NYSED for course approval in a timely manner in order to continue to be authorized to provide that course. Further,

NYSED specifically notified the Academy in June of 1984, more than 90 days before the expiration of its course approvals, of the impending expiration of those course approvals, and the need to reapply to the NYSED to have those courses approved for another three-year period. Moreover, the NYSED continued to notify the Academy of the need to reapply for course approval in February, March and June of 1985. However, the Academy failed to comply with those notices, and failed to reapply in a timely manner, since it was not until August of 1985 that the Academy resubmitted those applications.

Despite the failure of the Academy to take time].y action, there is no indication that NYSED has applied any sanction against the Academy Indeed, when the Academy finally decided to reapply in August 1985, the NYSED routinely made its course approval effective November 1, 1985. Thus, It is difficult to understand why DE chooses to enforce New York State laws when the State itself has elected to treat the licensing violations as less than minor.

On page 5 of its August 22, 1988 review request, the Academy observes that the 1983-85 license it received from the NYSED included all the advanced courses for which it had been approved in November 1981. Of course, beginning courses reasonably would be included in the advanced courses.

The license provided that:

Authorization is given to conduct the following courses of instruction: ADVANCED CLOTHING CONSTRUCTION - 735 HOURS; ADVANCED FASHION DESIGN AND CLOTHING CONSTRUCTION -735 HOURS; ADVANCED HIGH FASHION CUSTOM DRESSMAKING - 635 HOURS; ADVANCED PATTERN MAKING - 630.

This license is valid from October 1, 1983 to September 30, 1985.

As can be seen the license did not repeat all of the 16 courses that the NYSED had approved for the Academy in 1981, particularly the beginning courses which are part of the advanced course programs. At the same time, there was a basis for believing that course approval had been given up until October 1, 1985.

On pages 3, 5, and 6 of its August 22, 1988 review request, the Academy contends that by giving it a license on February 9, 1984 for the period of October 1, 1983 through September 30, 1985,

the NYSED also extended its approval of all of the Academy's courses of study from September 30, 1984 to September 30, 1985. The Academy contends, not unreasonably, that the license superseded the course approval documents that indicated that course approval for those courses expired on September 30, 1984. The Academy's contention again is technically incorrect, although as noted the Academy's application for a license itself did list all of the involved courses and the ensuing license # 732 did in fact list the advanced courses.

The NYSED approval of course offerings is separate from its granting of a license although, of course, both functions could coincide. Unfortunately for the Academy, however, the license which approved the school until September 30, 1985 did not extend the course approvals to that date and did not supersede the official NYSED course approval that the Academy received in November 1981. This, of course is highly technical and certainly is viewed as such by NYSED.

While the Academy's license could be viewed as confusing to an institution that was not specifically notified of the need to have its courses approved in addition to the need to have itself licensed, or was unfamiliar with the license and course approval process, the Academy is an established institution and should know the difference. In any event, it is clear that there was no fraud or misrepresentation by the Academy and that its failure to take routine licensing action was solely the result of inadvertence. Moreover, the Academy had some basis for its inaction since its school license described four advanced courses which would include all or part of the other less advanced courses which were offered.

At the same time, it is equally clear that NYSED specifically notified the Academy of the need to reapply for course approval. In a letter dated July 12, 1982 NYSED wrote in pertinent part that:

A review of our records indicate that you currently are offering instruction in courses or curricula that have expired or will expire in the very near future.

For your convenience, I have enclosed a listing of each course or curriculum that must be submitted for reevaluation. Failure to submit two copies of each course or curriculum for reevaluation within 90 days of the date of this letter will result in loss of authorization to enroll students in the course(s) or curriculum(s) listed.

Therefore, contrary to the Academy's contention on pages 3, 5, and 6 of its August 22, 1988 review request, NYSED did not -extend the approval its courses that expired on September 30, 1984 by the issuance of a license that expired on September 30, l985, and the Academy should have known that to be the case.

On page 4 of its August 22, 1988 review request, the Academy contended that a memorandum of Donna Lumia indicated that in June of 1986, OSFA of DE agreed with the Academy that it was legally authorized in New York to provide postsecondary vocational programs for the period of October 1, 1984 through October 31, 1985.

Donna Lumia was a representative of the National Association of Trade and Technical Schools (NATTS), the Academy's accrediting association. She wrote a memorandum to Mr. Klamar, the owner of French Fashion Academy, in which she indicated that ED had agreed in a meeting she

attended that the Academy was legally authorized in New York to provide postsecondary vocational education programs for the period of October 1, 1984 through October 31, 1985.

Ms. Lumia's interpretation of ED's position is incorrect. First, the Academy offered no evidence from any ED source or document that agreed with her conclusion. Second, one of the participants in that meeting, Brian Carageen, in a letter to John Klamar dated December 29, 1986 somewhat contradicted that conclusion. He stated that:

This . . . is . . . a reminder that you agreed in our December 1, 1986 meeting to send us a copy of the letter you were to write to the New York State Department of Education to request: a ruling concerning course approval for the time period October 1, 1984 to October 31, 1985.

Mr. Carageen would not have had to remind Mr. Klamar in December 1986 to contact NYSED officials to obtain a ruling of whether the Academy was legally authorized to provide postsecondary vocational education in New York for the period of October 1, 1984 through October 31, 1985 if, in June of 1986, ED had already decided that the Academy was so authorized

Finally, Ms. Lumia's conclusion is inconsistent with the actions ED took, including the July 14, 1988 final program review determination, that indicated that ED believed the Academy was not authorized in New York to provide postsecondary vocational programs for that period. At the same time, based on the Lumia letter, the Academy again had reason to believe that it was authorized to participate in Federal student aid programs.

On page 4 of its August 22, 1988 review request, the Academy further contends that It was authorized to provide postsecondary vocational education programs in New York between October 1, 1984 and October 31, 1985 because Ed had updated the Academy's eligibility designation as an eligible vocational school and an eligible proprietary institution of higher education in July 1984. However, those ED updates had no bearing on whether the Academy was authorized to provide postsecondary vocational programs in New York for that period, and thus whether it was eligible to participate in the Pell Grant and GSL Programs.

The updated eligibility designations were issued on July 17, 1984 on the basis of the Academy's April 10, 1984 application. In both April 1984 and July 1984, the Academy qualified as an eligible vocational school and as an eligible proprietary institution. It was not until October 1, 1984 that its course approval expired and it was no longer technically authorized in New York to provide postsecondary vocational education programs.

An eligibility designation notice specifically provides that:

Please note that this eligibility pertains to the school listed at the above address as long as the school . . . continues to meet all of the statutory provisions for eligibility . . . .

Thus, by its own terms, ED's updated eligibility designation continued only as long as the Academy continued to satisfy all the statutory eligibility requirements.

However, ED does have discretion to excuse highly technical defaults. For example at page 24 of its brief ED states:

"In previous audit and program review determinations, OSFA has taken the position that an institution that was mistakenly designated as an eligible institution by ED was not liable to repay to ED any Title IV, HEA Program funds it properly received unless it knew or should have known that it was ineligible despite ED's mistaken designation. This principle is inapplicable in this case since the Academy was not mistakenly designated by ED as an eligible vocational school and eligible proprietary institution of higher education When ED updated the Academy's eligibility designation in July 1984, it qualified as an eligible proprietary institution of higher education and as an eligible vocational school."

In my opinion, the foregoing quotation shows that ED as a matter of regular administrative practice, waives, as it should, "de minimis" defaults. Here, contrary to the view of ED stated in its brief, the Academy had reason to believe it was eligible Moreover, the mistake of the Academy did not involve bad faith and was highly technical.

In sum, for the period of October 1, 1984 through October 31, 1985, the Academy arguably did not qualify technically as a proprietary institution of higher education, and was therefore technically ineligible to participate in the Pell Grant Program. However, NYSED applied no sanction, no Federal funds were misspent and no one was injured. ED regularly excuses defaults of this kind, even though there is technically negligent conduct by the school. Accordingly, the Academy need not return to ED the $330,202 of Pell Grant Funds otherwise properly awarded to its newly enrolled students during that period. Similarly, the Academy need not return to ED the $36,500 of GSL Program loan proceeds those students otherwise properly received. ED cannot pick and choose arbitrarily between "de minimis" defaults of educational institutions. The sin of the Academy is that it "should have known," but its redemption is that the "mistake" was exceedingly minor, and apparently was viewed as such by NYSED. If the State imposed no sanction. Why is it necessary for DL to impose one.

Of course, the Academy should have updated its programs. However, It did eventually do what was required. Also, except for one month (October 1985) it continued to hold a valid license as a school. That license did refer to the advanced courses of the school and there was even an updated eligibility from DE granted July 1984. At the same time, needy students benefitted, there was no fraud, course content was not changed, and public money was spent for the intended purpose. Moreover the "penalty" sought by ED is grossly disproportionate to the offense of the Academy If the school Is to be severely punished, It should be for a substantive Infraction and should be done through the "front door" and not through the "back door" only because of a minor oversight. In the circumstances presented, the policy of DE to excuse "de minimis" defaults must be Invoked. At most, I would impose a sanction on the Academy only for October 1985 when there was no school license and no course approval. However, on the basis of the available evidence I cannot calculate the amount the Academy should pay for that month. Otherwise the position of ED herein is far beyond that required for protection of Federal Funds Instead, the position of DE appears to be one of seeking extreme punishment for wrongs not shown to exist.

For the period of December 1, 1985 through November 30, 1986, the Academy Indicated to ED that it made $427,000 of Pell Grant awards to its students, and ED reimbursed the Academy for those awards. Those awards, however, were based upon a semester hour rather than a clock hour system of measuring the quantity of education the Academy provided in its courses. When the Academy calculated those Pell Grant awards using a clock hour system of measuring educational quantity, the Pell Grant awards totaled only $350,140. Therefore, based upon the Academy's own calculations, there was a $76,860 difference between the calculation of Pell Grants on the semester hour versus the clock hour system Therefore, the Academy seemingly must repay Ed the $76,860 because It was not authorized or approved by the NYSED to provide or measure the quantity of education provided in semester hours. In this regard, it appears that in order to calculate a Pell Grant for a student, it is necessary to calculate the amount that student would receive as a full-time student for a full academic year. If the student's program of study was less than a full academic year, the amount of the student's Pell Grant award would be proportionately reduced. 34 CFR 690.2, 690.3, and 690.63.

An academic year when measured in clock hours is 900 clock hours, while an academic year when measured in semester hours is 24 semester hours. 34 CFR 600.2 and 668.2. When the Academy measured the quantity of education it provided in its courses in semester hours, the quantity of education greatly exceeded the quantity of education when measured by clock hours.

For example, the Academy's Patternmaking Technology course was approved by the NYSED as consisting of 630 clock hours. Since the course was less than 900 clock hours, the course was less than a clock-hour academic year. Therefore, the maximum Pell Grant that a clock-hour student enrolled in that course could receive for an academic year was a fraction, 630/900, of the maximum Pell Grant for that year.

The Academy, however, listed the 630 clock-hour course as consisting of 31 semester hours in its April 10, 1984 eligibility application to ED, ED Form 1059. Since an academic year when measured in semester hours is 24 semester hours, that same course, when measured In semester hours, consisted of almost one and one/third academic years. However, the maximum Pell Grant a student could receive student for an academic year is based on 24 hours. Thus, the dispute here is solely whether students' course at the Academy is measured for Federal Pell Grant purposes in clock hours or semester hours. At least, it is not asserted that the Academy exceeded the 24 hour maximum semester hour base in disbursing Pell Grant funds.

NYSED clearly does not authorize the Academy nor other vocational schools to provide or measure its postsecondary vocational programs in credit (semester) hours. As early as 1980, NYSED notified all directors of licensed private schools and registered private business schools in New York that:

In April 1980, the Board of Regents approved an amendment to Section 50.1(n) of the Regulations of the Commissioner of Education which defines credit as "a unit of academic award applicable toward a degree offered by the institution." This amendment is effective September 2, 1980.

This amendment means that institutions which do not have degree granting powers, including all licensed private schools and registered private business schools cannot award credit or credit hours to students. No references should be made to credit or credit hours in school catalogs and materials published after September 2, 1980. (emphasis added)

Further, in 1986, NYSED stated that:

While it is true that under state law licensed private schools and registered business schools operating under the provisions of Article 101 of the Education Law are considered to be providing programs of postsecondary education, all such Programs licensed and registered by this Department are approved in terms of instructional hours and the term instructional hour refers exclusively to clock hours. The Department does not register or approve such institutions in terms of semester, trimester or quarter hours. (emphasis added)

Again in 1988, NYSED stated:

Please be advised that according to Section 50.1(n) of the Regulations of the Commissioner of Education, schools licensed and or registered under Sections 5001 and 5002 of the Education Law cannot award credit or credit hours to students. . .

All courses or curriculums approved for licensed and registered schools ... are approved in terms of an instructional or clock hour NOT credit hours. An instructional hour means an instructional unit of time consisting of a minimum of 50 minutes and a maximum of 60 minutes.

Finally, in a letter to Nadine Keller of the National Association of Trade and Technical Schools (NATTS) dated January 23, 1986, Exhibit G-6, Alfred J. Epstein of the NYSED stated that:

In addition, the school's catalog is not approved since all forms of advertising also expire with the license. The present catalog will not be approved until the use of credits is removed and meets the provisions of Section 126.3(e). (emphasis added)

The Academy, a private school, was and is licensed under section 5001 of the New York Education Law. Accordingly, it was not and is not legally authorized in New York to provide or measure postsecondary vocational education programs in credit, i.e., semester hours, and therefore, seemingly the Academy could not calculate the Pell Grant awards to its students in semester hours.

As indicated, NYSED approved the Academy's courses in clock hours in 1981 and in "instructional hours" in l986. 3 Further, as indicated all programs approved by the NYSED for private schools licensed under section 5001 of the New York Education Law are approved exclusively in terms of instructional, i.e., clock hours. They are not approved in terms of credit hours. 4 Accordingly, the NYSED did not approve of the Academy's offering postsecondary vocational courses in credit hours, and therefore, seemingly the Academy could not award Pell Grants on a semester hour basis.

However, on pages 6 and 7 of its August 22, 1988 review request, the Academy states that the Institutional Eligibility regulations, 34 CFR Part 600, published in the Federal Register on April 5, 1988, are relevant to whether it is authorized for Pell Grant purposes in 1985-86 and other years to provide and measure its programs in semester hours.

Further, in its reply brief, the Academy argues in fact that it is authorized for Pell Grant purposes to measure its programs in semester hours by no less authority than NATTS, which is empowered by DE to perform such work. In this regard, DE has held in its possession since November 1985 evidence germane to the clock-hour versus semester hour dispute between the Academy and OSFA. This evidence was submitted in somewhat different form by the Academy in its reply brief and, thus, having been previously placed in the possession of DE, is timely and must be considered Next following is a letter as to which there is no evidence by DE to the contrary.

September 30, 1986

William C. Clohan, Jr., Esq.
Clohan, Adams & Dean
Suite 400
1101 Vermont Avenue, N.W.
Washington, D.C. 20005

Dear Mr. Clohan

I am writing in response to your request on behalf of the French Fashion Academy to Dr. Fenwick, Executive secretary of the Accrediting Commission of the National Association of Trade and Technical Schools for certain information concerning the accreditation status of the Academy This firm represents the Accrediting Commission .

The Commission's records reflect that the French Fashion Academy was initially accredited by NATTS in January of 1974 and has maintained Its accreditation continuously since that date. The most recent Commission accreditation action concerning French Fashion Academy occurred in July of 1986 when the school was re-accredited for a six-year term concluding in July of 1992.

As was indicated in a letter dated November 4, 1985 from Dr. Fenwick to Mr. Robert McKiernon, Region II Branch Chief, U.S. Department of Education, the Academy has, since 1979, measured student academic progress in credit units pursuant to Accrediting Commission authorization to do 50. The school's use of credit hour measurement in its applications for Federal funds, as well as for other purposes, is entirely consistent with applicable standards of the Accrediting Commission .

I trust that this information is responsive to your request; if I can be of further assistance, feel free to be in touch with me.

Sincerely

Ian D. Volner

cc: Dorothy C. Fenwick, Ph.D.

As can be seen in the third paragraph, the Academy appears to have gained DE approval through NATTS in 1979 to measure students in credit hours. There is no explanation why OSFA ignores evidence it long has held In Its own files pertaining to the entitlement of the Academy to use semester hours In lieu of clock hours for Pell Grant purposes. OSFA may take the position that the evidence of the Academy Is tardy, but I cannot agree in circumstances where DE was given virtually the same evidence two years ago. (See paragraph 3 of the letter)

Of course, NYSED has determined that the Academy was approved and legally authorized only to provide and measure its postsecondary vocational education programs In clock hours, but so are all other vocational schools in New York. The Pell Grant program is a Federal plan, not a state plan. Uniform administration, across the nation, absent rules to the contrary, is warranted. The NATTS findings concerning the Academy may be erroneous, but there is no evidence that the NATT's finding was incorrect. Further, the NYSED determination about clock hours is not a Federal finding. Indeed, at that point in time, there was a Federal finding that the Academy was authorized to use semester hours in calculating Pell Grant awards. (See the September 30, 1986 Volner letter, supra.> Thus, the Academy need not repay DE $76,860 for semester hour students.

Under § 690.79(a) (2) of the Pell Grant Program regulations, 34 CFR 690.79(a)(2), an institution is responsible for repaying any Pell Grant overpayment "if the overpayment occurred because the institution failed to follow the procedures set forth in" the Pell Grant Program regulations. Under § 690.4(a) a student must be enrolled in an institution of higher education. For the period of October 1, 1984 through October 31, 1985, except possibly for October l985, the Academy was In fact an institution of higher education. NYSED has not stated otherwise, and appears to agree that the Academy was only in technical default. Moreover, for the period of December 1, 1985 through November 30, 1986, the Academy calculated its students' Pell Grants on a semester hour basis because it was authorized, through NATTS with the acquiescence of DE to measure Its postsecondary vocational education programs in semester hours for Federal Pell Grant purposes. Therefore, the Academy Is not required to return to ED the $407,062 of Pell Grant Program funds under § 690.79(a)(2)

FINDINGS AND ORDER

For the reasons stated in this decision, the Administrative Law Judge finds that the July 14, 1988 final program review determination that the Academy must repay ED $407,062 under the Pell Grant Program, and $36,500 under the Guaranteed Student Loan (GSL) Program should be and it is vacated.

By Paul S. Cross, Administrative Law Judge on the 26th day of October, 1989.

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1 Under the GSL Program, an eligible student applies to a private lender for a loan to help pay for his postsecondary educational costs. If the lender decides to make a loan, a guarantee agency guarantees the lender against defaults on the part of borrowers. If the guarantee agency satisfies certain Federal requirements, the guarantee agency is reimbursed by ED for all or part of the default claims it pays. 20 U.S.C. 1078(c).

ED pays the interest and special allowances that are due on each loan until the loan reaches the repayment stage, which is generally six months after the borrower ceases to be at least a half-time student at an institution of higher education or a vocational school. However, ED continues to pay special allowances until the loan is repaid. 34 CFR 682.300 through 682.302.

2 For the period in question, the regulations governing the Pell Grant Program are the ones found in Part 690- of Title 34 of the Code of Federal Regulations, Revised as of July 1, 1987.

3 The term "instructional hour" is defined in §126.1 of the regulations of the New York Commissioner of Education as

an instructional unit of time consisting of a minimum of fifty minutes and a maximum of sixty minutes.

which is, in effect, the definition of a clock hour. See 34 CFR 668.2 and 600.2.

4 Obviously, if a school is not legally authorized to provide programs in credit hours in New York, the NYSED will not approve those programs In credit hours.