

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

In Re

Derech Ayson Rabbinical Seminary

Docket No. 90-100-SP

Student Financial Assistance Proceeding

Appearances:

Leslie Wiesenfelder, Esq., Washington, D.C., for the Derech Ayson Rabbinical Seminary

Steven Z. Finley, Esq., of the Office of General Counsel, United States Department of Education, Washington, D.C.

Before:

Judge Daniel R. Shell

Background Information

The Derech Ayson Rabbinical Seminary (Derech Ayson) on November 20, 1990, appealed a United States Department of Education (Education) final determination decision issued October 15, 1990. Education charges the institution's transfer of \$486,975 of federal funds from a Pell Grant account into a savings certificate of deposit was unauthorized. [1](#) Education claims it is entitled to interest in the amount of \$62,897.80 for the schools' unauthorized purchase of a certificate of deposit in the sum of \$486,975. [2](#) A hearing on the record was conducted in accordance with 20 U.S.C. § 1094(b) in Washington, D.C. on March 7, 1991.

Findings of Fact

The Derech Ayson application for Pell Grant eligibility was granted, June 25, 1985, when Education certified that Derech Ayson "meets the definition of an eligible institution ... for participation in . . . Pell Grants . . ." [3](#) In a letter dated July 31, 1986, Education stated that "Derech Ayson has fulfilled all the Department's eligibility requirements to participate in Title IV federal student financial assistance programs by means of the 3IC method." [4](#) Nevertheless, in a letter to Derech Ayson dated November 14, 1986, Education stated that it was:

rescinding our letter of determination dated July 31, 1986 . . . that questions have been raised concerning the correctness of its opinion concerning whether your institution qualified as an eligible institution and Education is therefore reassessing its opinion on that questions [sic]. [5](#)

Nine months later on August 31, 1987, the Office of Student Financial Assistance (OSFA) informed Derech Ayson that it had "determined that Derech Ayson failed to qualify as an eligible institution" during the periods: February 1982 to February 1985 and June 1985 to June 1988. [6](#) After he received the OSFA letter, Moshe H. Weider explained they could no longer receive Title IV funds:

Upon receipt of that letter we stopped taking funds. There is a sentence here [reference to DA. Ex. 4] that says "accordingly, we have requested that the Department of Education management suspend your eligibility to withdrawn funds," therefore, we were unable to draw any Title IV funds based on this letter. [7](#)

The statement in the August 31, 1987, letter "was turned into a Final Determination Letter" on October 29, 1987. [8](#) Prior to the school's receipt of the October 29, 1987 final determination letter, Derech Ayson had submitted to Education all necessary paperwork manifesting entitlement to draw \$486,975 in Pell Grant funds for the 1986/1987 award year. [9](#) However, even though Derech Ayson was entitled to draw down the \$486,975, it did not file a cash request which would have resulted in Education transferring by wire the \$486,975. [10](#)

After the August 31, 1987, OSFA letter halted funds and after a conversation with the school's accountant, according to the testimony of Moshe Weider, the decision was made to effectuate accounting journal entries. On September 30, 1987, Derech Ayson made student ledger card entries for the 1986-87 award year:

They recommended that we flag it, so to speak, for future reference or to be able to access it from the computer to get lists, . . . for future use. [11](#)

These entries were each labelled "Acct. journal Entry" and totaled \$486,975. [12](#) The students identified by the "Acct. Journal Entry" index on the student ledger card had an amount equal to each entry as a credit on the students account. [13](#) The school credited the students' accounts with the expected . . . Education funds because, according to the school, it did not want the students personally to be held liable for the funds. The amount of each "Acct. Journal Entry" is listed under the "credit" column and is subtracted from the amount listed under the "Balance" column. The total of the amounts shown on all 240 student ledger cards under the "credit's" column for each "Acct. Journal Entry" is \$486,975. [14](#)

Moshe Weider testified:

. . . These monies were not drawn yet from the Department, yet we wanted to credit the students accounts so that the students don't have a problem, and we used this separate terminology, term, flag, whatever you want to call it . . . Basically their accounts had been brought up to zero, and they were not liable to the school for those particular monies which were expected from the Department. [15](#) . . . [A] credit for the amount of money . . . \$486,975 represented was credited to each individual student where there was a balance owed . . . The funds to cover the credited accounts came from working capital. [16](#) The school credited the students account to not "put the students into turmoil."

Further he explained:

We didn't want to tell the students that the funds from the Department had ceased and that they would be liable for the tuition that they had outstanding. Most of them came from backgrounds where they cannot afford . . . to make a payment, therefore, they would . . . withdraw from the school, which would have really put the school into a serious turmoil. It was a substantial amount of money. [17](#)

On February 19, 1988, after Derech Ayson appealed Education's final determination decision, the parties entered into a new agreement. Education agreed to the execution of a new participation agreement with Derech Ayson and to permit the resolution of the \$2,549,433 contingent liability issue by an administrative law judge. The agreement stated that Derech Ayson became eligible to participate in the Pell Grant and Guaranteed Student Loan programs, upon execution of the agreement. [18](#)

Moshe Weider stated "[T]hey issued us a limitation agreement, which gave us the opportunity to continue participating under the Title IV programs Once the tap was on, then we're eligible to take the monies." However, he went on to explain that if the administrative law judge ruled against their interest on the appealed case, it would have only added to the total sum that the school would have had to return to Education had they drawn the money down. [19](#)

While the appeal was pending before an administrative law judge on the eligibility issue, Education's Payment Management system advised Derech Ayson that unless the institution actually drew down the \$486,975 Pell Grant funds by mid-December 1988, Education's authorization for the draw down would expire. [20](#) As a consequence, Derech Ayson requested the draw down; Education wired the money to the Derech Ayson Rabbinical Seminary N.I.H. Account. [21](#) Soon after the funds were transferred to Derech Ayson's Pell account, the money was withdrawn and used to purchase a certificate of deposit in the name of Yeshiva of Far Rockaway, Derech Ayson's parent corporation. [22](#)

Ayson notified Education that the "funds had been transferred to a certificate of deposit ... held in escrow due to the pending litigation with the Department of Education." [23](#) Ayson's attorney advised his client:

[I]n response to the program reviewer's inquiry, the Seminary should explain the relationship's between the Seminary and Yeshiva of Far Rockaway, that the \$486,975 in Pell Grant funds remain secure and segregated in a separate certificate of deposit in the name of Yeshiva of Far Rockaway, that these funds have never been disbursed, and that the Seminary will promptly, if the Department so directs, transfer the funds back into the Seminary's Pell Grant account. Based on the information provided to us, it appears that the federal funds have been adequately safeguarded and the Seminary should not be subject to any punitive action related to this matter. [24](#)

On February 14, 1990, Rabbi Jechiel I. Perr, President of the school, received a letter from its attorney concerning conversations held between counsel and the school personnel:

The funds were not actually disbursed to the students, because the Department of Education has questioned whether the Seminary was properly certified as an eligible institution during that period. [25](#)

In his testimony, Mr. Weider explained that he was more familiar with the details of the 3IC case than Rabbi Perr, and the phrase "funds were not actually disbursed to the students" meant "actually paid out to the institution, and spent by the institution It is because the case was still pending, and we wanted the funds in a segregated account." [26](#)

Ayson's legal counsel made the following statement:

After receiving that letter, the Seminary decided not to draw those funds or disburse them to the students, but rather to leave them in the Seminary's account in the Department of Education, so that if the Seminary ultimately lost its appeal it would not have to repay this additional amount. [27](#)

To which Mr. Weider gave the following explanation:

That we would not request . . . funds from the Department since there was a question . . . that the funds would not be paid out. The funds would be kept segregated The funds would not go into the general operation account of the institution and be spent by the institution. [28](#)

On February 26, 1990, the administrative law judge assigned to the case on the issue of eligibility decided in favor of Derech Ayson. The judge ruled that the institution was eligible to participate during the periods in question (June 1985 June 1988). Derech Ayson had no repayment obligation to Education and that decision became the final decision of the Secretary on May 21, 1990. [29](#) It was only after the Secretary dismissed the Student Financial Assistance untimely appeal that Derech Ayson transferred the \$486,975 from the certificate of deposit into the general operating account. [30](#)

However, on March 16, 1990, Education initiated the current action by proposing a finding against the school for the unauthorized use of federal funds pertaining to the draw down of the \$476,975 of Pell Grant funds and subsequent purchase of a certificate of deposit in the name of Derech Ayson's parent corporation. [31](#)

Joint stipulation number 34 recites a portion of an August 6, 1990 letter from the school's attorney Blain B. Butner to Felix Lugo of Education's Region II which follows:

Immediately subsequent to Secretary Cavazos [May 21, 1990] decision...the Seminary disbursed the \$486,975 by applying it to the accounts of the students for whom those Pell Grants had been awarded.

We understand that you have been provided with a complete itemization of the students to whom these Pell Grants were awarded, together with a copy of each students ledger card. Now that the funds have been disbursed, the entry on each card identified as "Accounting Journal Entry" has been revised to read "Tuition Payment."

Thus, the concern raised in your March 16 letter that these funds had not been disbursed to the students, and our statement in our February 14th letter that these funds had not been disbursed should now be revised, since the funds have been disbursed by crediting them to the students' accounts following the completion of the audit appeals process. [32](#)

Mr. Weider discussed the following excerpt of that letter: "[T]he Seminary disbursed the \$486,975 by applying it to the accounts of the students for whom those Pell Grants had been awarded." [33](#)

Q. What was your understanding about what Mr. Butner was communication in what I just read?

A. That the funds were taken from the segregated account and put into the school's general operating account.

Q. What was your understanding of the word "disbursed". . . being used here?

A. Being paid out by the school. [34](#)

However, joint stipulation number 35 states that the reference to a revision is incorrect and no revision was made. [35](#) After consideration of the institution's responses, Education rejected the institution's position and issued its October 15, 1990, final program review determination by concluding:

Each of [the student ledger] cards had an entry titled "Acct. Journal Entry." However, this does not constitute evidence that the students were paid or that Pell Grant payments were actually credited to their accounts. Pell Grant Payments were actually credited to the accounts May 21, 1990, after the appeal processes by the school and the Department were finalized. [36](#)

Arguments

A.

Education argues that it is entitled to \$62,879.80 as interest earned from December 13, 1988, through May 21, 1990, from the purchase of the certificate of deposit. [37](#) The amount of the certificate of deposit - \$486,975 - is equal to the amount totaled from the 240 student ledger cards dated September 30, 1987, and marked "Acct. Journal Entries". After the school lost its eligibility to withdraw federal funds during the period August 31, 1987 through February 19, 1988, the institution made the account journal entries on the student ledger cards. The labelling of the student ledger cards with the words "Acct. Journal Entry" and with the "belated draw down" on December 7, 1988, does not constitute a legal disbursement of the Pell Funds to the students. The funds in the certificate of deposit were federal funds which were only disbursed to the school and credited to the students accounts on May 21, 1990, the date that Education claims the eligibility appeal was "finalized" by the Department.

Education further argues that numerous assurances were given by the institution that the money was adequately safeguarded and "that the Pell Funds have never been disbursed, and the Seminary will promptly, if the Department so directs, transfer the funds back into the Seminary's

Pell Grant account." [38](#) Education maintains that the school represented consistently that the funds were held in escrow until May 21, 1990. It maintains that the school's removal of the funds from the Pell account and the purchase of the certificate of deposit was an unauthorized and impermissible use of federal funds. Finally, the limitation agreement which reinstated the institution's eligibility was conditional. [39](#)

B.

Derech Ayson argues that Education failed to show the unauthorized use of the federal funds. It states that Education's position is based on incorrect suppositions. Further, it maintains that the school's evidence shows that the uncontradicted evidence of Moshe Weider proves that the accounts of the students were credited for the Pell Grant funds on September 30, 1987, in the amount of \$486,975. Furthermore, Ayson argues Mr. Weider's testimony was confirmed by stipulations 12, 13, 14, 16, 18, 40, 47, 48, 49, and 50. [40](#) In referring to the program review determination quoted in the final paragraph of the findings of facts above and herein cited below, counsel reasons the reviewer's conclusion to be "sheer guess work":

Each of the [school's] account cards [DA. Ex. 7] had an entry titled "Acct. Journal Entry". However, this does not constitute evidence that the students were paid or that Pell Grant payments were actually credited to the students accounts on May 21, 1990, after the appeal process by the school and the Department were finalized. [41](#)

Counsel argues that this conclusion alone without testimony or other documentation to support the statement is insufficient to prove Education's conjecture that the institution's use of the federal funds was unauthorized. [42](#)

Next, Ayson argues that the evidence surrounding the labelling of the student ledger cards with the words "Acct. Journal Entry" was done at the institution accountant's suggestion in order to flag the \$486,975, and enable their computer to generate lists for future reference. It describes the action as adding "nomenclature" to be able to segregate and identify the \$486,975. Even though the school had not drawn down the monies from Education, it maintains, the use of the label "Acct. Journal Entry" is in no way meant not to credit the students account. (emphasis added) [43](#)

Finally, they insist, on December 13, 1988, when the certificate of deposit was purchased, Derech Ayson undeniably was free to do whatever it wanted with those funds since it was Derech Ayson's money. The money was drawn down from the segregated account and no longer considered federal funds. They argue that the funds became general account funds of the school because the student accounts were credited for their Pell Grant awards. Therefore, they conclude the money was disbursed on September 30, 1987. [44](#)

Discussion

It is clear that money held by the institution in the Pell account is grant money provided by the United States for a specific purpose of student education. The institution serves as a conduit through which funds flow to eligible students. Any interest that the institution receives while the

funds are being held in the Pell account for the benefit of the students is interest that accrues to the Federal Government. The former Secretary of Department of Education, Lauro F. Cavazos, stated "Since the 1920's, it has been axiomatic that interest gained on grant money prior to its disbursement must be repaid to the Federal Government." [45](#)

Here, Education claims that the Pell Grant money was not disbursed to its students until May 21, 1990, when Secretary Cavazos' decision became a final decision. It has tendered the argument that the institution made many references to the Pell funds not being disbursed and that the Pell funds would be returned to the Pell account if requested. It also relies on the labelling of the student cards with the words "Acct. Journal Entry."

Derech Ayson maintains that Education's conclusions are not supported with hard supportable evidence. It maintains that Education has relied on unsupported conclusions drawn from representation made by Ayson's legal counsel.

The comments made by Mr. Butner, Ayson's attorney, appear to vacillate on the issue of exactly what the institution intended by the identification of the label "Acct. Journal Entry" on the students accounts. By comparison, the reference indicating disbursement to the students in stipulation number 34 to the statement in the August 6, 1990, letter indicating disbursement by crediting them to student's accounts is no doubt confusing. It becomes even more opaque when one considers stipulation number 35 and the testimony of Mr. Weider which states that no revision of the account was made. Exactly what Mr. Butner intended by his letters could only be resolved by Mr. Butner but that testimony is not before the tribunal.

What is the real issue to be considered? The only issue to be considered is the status of the funds - the \$486,975 - during the period of December 13, 1988, through May 21, 1990. Was the money actually in a Pell Grant account fund? Was the grant money being held by the school as a conduit for the students? Or was the money disbursed from the Pell Grant account?

Derech had submitted all necessary paperwork to draw down \$486,975 in Pell Grant funds for the 1986/1987 award year. Though the institution chose not to draw down the funds for some period of time, it nevertheless was entitled to the funds. Additionally, even though the institution's funds were "frozen" by Education until reinstatement by the limitation agreement, the institution continued to be entitled to those funds. Education's counsel argues in his posthearing brief that the limitation argument which reinstated the institution's eligibility was conditional. However, a review of that limitation agreement does not deny Derech Ayson's entitlement to the \$486,975. There is no evidence or argument presented by Education that denies Derech Ayson's right to the \$486,975. In fact, Education's Payment Management System advised Derech Ayson to draw the money down by mid-December 1988 or lose the authorization. There are no conditions in the limitation agreement which in any way restricts the institution's right to the \$486,975.

If the school was entitled to the money, if the school was not restricted in its ability to draw down funds, and if the institution was told by Education to draw the money or forever lose the funds, it is reasonable to assume the school would draw the money down. To do otherwise would

not be reasonable or prudent. Therefore, the school drew the money down and kept the money segregated.

During the pendency of the eligibility litigation, the status of the fund changed even though the money was not transferred to the general operating account. The institution drew the money from the Pell Grant account. It was properly disbursed, dispensed, or distributed to a separate account of the institution. The stipulations and testimony make it clear; the school chose not to put the money in an operating account and spend the funds in the general operation of the institution. Although the money was segregated and identifiable, the title or color of the funds changed. It was removed from the Pell account and placed in the institution's financial reserve to be made available in the event the administrative law judge should rule against them on the eligibility issue.

The evidence from the stipulations is also clear that the money was used for the benefit of the students. The student accounts were flagged but nevertheless the accounts were credited. The credible testimony shows the intention of the school to credit the students accounts.

Finally, Education failed to establish that the federal funds were not used for the benefit of the students. Furthermore, Education has failed to show that the federal funds had not been disbursed. Counsel for the institution correctly stated in his posthearing brief that Derech Ayson was free to do whatever it wanted to with the funds because it was Derech Ayson's money.

Conclusion and Order

The transfer of the funds from the Pell Grant account to the certificate of deposit for the sum of \$486,975 was proper. It is, therefore, found that Derech Ayson violated no law when it transferred \$486,975 of federal funds from a Pell Grant account into a savings certificate of deposit. The U.S. Department of Education's effort to seize the \$62,897.80 of interest earned on the certificate of deposit owned by Derech Ayson is improper and the action will be dismissed with prejudice.

Daniel R. Shell
Administrative Law Judge

Issued: July 3, 1991
Washington, D.C.

¹ Education Exhibit (Ed. Ex.) G-8 at 1 is the October 15, 1990, final determination letter issued by Robert J. McKiernan, Chief of the Region II, Institutional Review Branch of Student Financial Assistance; Derech Ayson Exhibit (DA. Ex.) A is the November 20, 1990, appeal letter of Derech Ayson.

² Joint stipulations of fact, February 8, 1991, number 38. The period of interest has been calculated from December 13, 1988, the purchase date of the certificate of deposit, through May

21, 1990, the date Education maintains the money was disbursed to the students. Education Posthearing Brief at 1.

[3](#) Joint stipulations of fact, February 8, 1991, number 5.

[4](#) Joint stipulations of fact, February 8, 1991, number 6.

[5](#) Joint stipulations of fact, February 8, 1991, number 7.

[6](#) Joint stipulations of fact, February 8, 1991, number 8. Stipulation number 9 calculated the total amount due as \$2,549,433 based on the total advanced to the institution.

[7](#) Tr. at 41-45. Mr. Weider, vice president of Derech Ayson, has the responsibility to oversee the financial aid programs, including federal Title IV programs.

[8](#) Joint stipulations of fact, February 8, 1991, number 9.

[9](#) Joint stipulations of fact, February 8, 1991, number 10.

[10](#) Joint stipulations of fact, February 8, 1991, number 11. Joint stipulations of fact, February 8, 1991, number 19.

[11](#) Tr. at 47.

[12](#) Joint stipulations of fact, February 8, 1991, number 12.

[13](#) Joint stipulations of fact, February 8, 1991, number 14. The parties also agreed that all ledgers marked "Acct. Journal Entry" equalled the \$486,975 in question. See number 17 and 18 of the stipulations .

[14](#) Joint Stipulations of fact, February 8, 1991, number 47 & 50.

[15](#) Tr. at 48.

[16](#) Tr. at 49.

[17](#) TR. at 50.

[18](#) DA. Ex. 9-2.

[19](#) Tr. at 53.

[20](#) Joint stipulations of fact, February 8, 1991, numbers 20 and 21.

[21](#) This is the Ayson Pell Grant account.

- [22](#) Joint stipulations of fact, February 8, 1991, number 22, 23, 24 and 25.
- [23](#) Joint stipulation of fact, February 8, 1991, number 27.
- [24](#) Joint stipulation of fact, February 8, 1991, number 28.
- [25](#) Ed. Ex. G-S, Page one, first full paragraph, second sentence.
- [26](#) Tr. at 57-58.
- [27](#) ED. Ex - G-S at 2.
- [28](#) Tr. at 59-60.
- [29](#) Joint stipulations of fact, February 8, 1991, number 29 and number 33.
- [30](#) Tr. at 63.
- [31](#) Joint stipulations of fact, February 8, 1991, number 30.
- [32](#) Ed. Ex. G-7 at 2, paragraphs 2-4; See also Tr. at 63-64 for a discussion of the letter
- [33](#) Ed. Ex. G-7 at 2, second full paragraph.
- [34](#) Tr. at 66-67. The witness stated that he was the only person from the school that discussed the facts of the case with Mr. Butner .
- [35](#) Joint stipulations of fact, February 8, 1991, numbers 34 and 35. See also Tr. at 64.
- [36](#) Joint stipulations of fact, February 8, 1990, number 37.
- [37](#) Education Posthearing Brief at 1. May 21, 1990, is the date Education stated those funds were disbursed to the students.
- [38](#) Education Posthearing Brief at 2-3.
- [39](#) Education Posthearing Brief at 7.
- [40](#) Education Posthearing Brief at 1-2.
- [41](#) Ed. Ex. H at 1-2.
- [42](#) DA. Posthearing Brief at 3.
- [43](#) DA. Posthearing Brief at 5.

[44](#) DA. Posthearing Brief at 6.

[45](#) In the Matter of California State University and Colleges System, Docket No. 89-13-S, U.S. Dep't of Education (Sec. Dec. At 1, June 22, 1990).