ADMINISTRATIVE HEARING
IN THE
UNITED STATES DEPARTMENT OF EDUCATION

In the Matters of

PENNSYLVANIA COLLEGE OF STRAIGHT CHIROPRACTIC,

DERECH AYSON RABBINICAL SEMINARY,

RABBINICAL SEMINARY OF MUNKACS,

BNOS JERUSALEM SEMINARY,

SARAH SCHENIRER TEACHERS SEMINARY, and

Respondents.

Audit Control Numbers 03-4-81

02-50504

02-50505

02-50506

02-40082

ORDER SUA SPONTE AMENDING INITIAL DECISION ISSUED FEBRUARY 21, 1990

(Issued February 26, 1990)

It appearing to the undersigned Administrative Law Judge that he misread critical portions of Exhibits 61 and 71 of the Joint Exhibits submitted on behalf of four Respondents including Bnos Jerusalem Seminary and Sarah Schenirer Teachers Seminary, an Amended Initial Decision is issued herewith, amending and in full replacing the Initial Decision previously issued on February 21, 1990, particularly the Conclusions of Law and Order thereof.

The portions of the Exhibits referred to are quoted in full at page 14, relating to Bnos Jerusalem Seminary, and at the last quotation on page 15, relating to Sarah Schenirer Teachers Seminary.

SO ORDERED.

Walter J. Alprin

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 1990, I caused a true copy of the foregoing Order Sua Sponte to be served on the following by Certified Mail, Return Receipt Requested.

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AMENDED INITIAL DECISION

(Issued February 26, 1990)

Appearances:

Stephen M. Kraut, Esq., of Office of General Counsel, Washington, D.C., counsel for the United States Department of Education.

David F. Norcross, Esq. (Myers, Matteo, Rabil & Norcross), of Washington, D.C., counsel for Pennsylvania College of Straight Chiropractic.

Michael B. Goldstein, Esq., Leslie H. Wiesenfelder, Esq. and Blain D.Butner, Esq. (Dow, Lohnes & Albertson), of Washington, D.C., for Derech Ayson Rabbinical Seminary, Rabbinical Seminary of Munkacs, and Bnos Jerusalem Seminary.

Leigh M. Manasevit, Esq. (Brustein & Manasevit), of Washington, D.C., counsel for Sarah Schenirer Teachers Seminary.

INDEX

Before:
WALTER J. ALPRIN, Administrative Law Judge.

I. STATEMENT OF THE CASE

A. General Statement of the Issues and Summary of Initial Decision

Each of the Respondents seeks review of a Final Determination Letter issued by the United States Department of Education (ED) in the course of a Final Audit Determination. The issue in each of these matters involve the institutional eligibility of a post- secondary educational

institution to obtain Federal financial assistance for its eligible students pursuant to Title IV of the Higher Education Act of 1965 (the Act), as amended.

In general, institutional eligibility is obtained by being "accredited" by a nationally recognized accrediting agency. There are, however, alternatives to this procedure, which permit unaccredited institutions to become eligible. One such alternative permits eligibility to be granted where the unaccredited institution shows that each of three accredited institutions has accepted the credits earned at the unaccredited institution "on transfer" of three students, on the same basis as it accepts on transfer any credits earned at accredited institutions. This three-institution-certification system is commonly referred to as the "3-I-C" method, and that term will be used throughout.

The specific question here is whether each of the unaccredited Respondents proved that for the periods involved the credits of three of its students were accepted on transfer by an accredited educational institution on the same basis as credits of an accredited educational institution were accepted on transfer. The Final Determination Letters reviewed herein are based by ED on the argument that the unaccredited Respondents did not achieve eligibility either because a dual or concurrent enrollment of students did not constitute a "transfer," and/or because the accredited institutions never accepted the credits granted by the unaccredited Respondents. If either of these bases is established as to a specific Respondent, the Final Determination Letter must be affirmed, and if both of these bases fail to be established, the Final Determination Letter must be rejected. As will appear below, this Initial Decision rules that, for the limited time period and institutions involved only, application of ED's definition of "transfer" would be arbitrary and capricious, that acceptance by accredited institutions of credits granted by four of Respondents is unquestioned, and that credits granted by one of Respondents were not accepted by accredited institutions. As a result, the Final Determination Letters to four of Respondents are rejected, and the Final Determination Letters to one of Respondents is affirmed.

B. Description of Respondents and Background of Proceedings

1. Pennsylvania College of Straight Chiropractic

Pennsylvania College of Straight Chiropractic (Pennsylvania), formerly and during a portion of the period herein known as the Adio Institute of straight Chiropractic, is a private, non-profit post-secondary educational institution located in Philadelphia, Pennsylvania, and has been in existence since January 4, 1978. During the period here involved it was not accredited by a recognized accrediting agency. On January 20, 1980, it applied for institutional eligibility for Title IV programs under the Act, based on the 3-I-C method. Eligibility was granted March 4, 1981, to expire March 4, 1984. From January through April 1984, ED conducted an audit of Pennsylvania's eligibility, which was updated in January 1986. On February 24, 1986, Respondent was provided with a draft audit report, with request for response, which it gave on March 21, 1986. On March 11, 1987, the final audit report was directed to Pennsylvania, which took advantage of the further opportunity to respond on May 8, 1987.

On September 25, 1987, ED sent Pennsylvania a Final Determination Letter, finding that it had failed to qualify as an eligible institution from March 1981, through June 1984, and was liable to

ED for repayment of all funds it or its students had received during that period under the student financial assistance programs of Title IV of the Act, in the sum of $3,048,706, and the sum of $1,195,385 of interest and special allowances paid by ED.

By letter of November 10, 1987, Respondent requested a hearing on the issue pursuant to Section 487(b) (2) of the Act, 20 U.S.C.A. § 1094 (b)(2), 34 C.F.R. Part 668, Subpart H. The matter was referred to the undersigned Administrative Law Judge, who held an informal pre-hearing conference, ruled on motions, issued an appropriate Briefing Order, and on April 4, 1988, presided over oral argument. Issuance of this Decision was delayed in order to consider the arguments in all five matters concerning the common issues, and to issue the decisions jointly.

2. Derech Ayson Rabbinical Seminary

Derech Ayson Rabbinical Seminary (Derech Ayson) is a non- profit, post-secondary educational institution located in Far Rockaway, New York, having been founded in 1973. During the period here involved it was not accredited by a recognized accrediting agency. It held 3-I-C institutional eligibility to participate in Title IV programs under the Act, which was to expire February 10, 1985. On January 5, 1985, Derech Ayson applied for 3-I-C renewal. ED conducted an audit of eligibility during December 1984 and January 1985, updated in August 1985, and on July 31, 1986, advised by Final Determination Letter that the review had been completed. However, by another letter dated November 14, 1986, ED advised Derech Ayson that questions had been raised as to eligibility and that it was rescinding the prior Final Determination Letter, and on October 29, 1987, ED issued a new Final Determination Letter finding that Derech Ayson was not eligible to participate in Title IV programs under the Act from June 25, 1985 and was liable for repayment to ED as stated above regarding Pennsylvania, in the sum of $2,549,433.

3. Rabbinical Seminary of Munkacs

Rabbinical Seminary of Munkacs (Munkacs) is a non-profit, post-secondary educational institution located in Brooklyn, New York, the continuation of an institution founded in Eastern Europe in 1922. During the period involved here, it was not accredited by a recognized accrediting agency. Similar to Derech Ayson, Munkacs applied to ED for renewal of its 3-I-C eligibility to participate in Title IV programs under the Act on February 28, 1985. An audit was conducted in January 1985, updated in August 1985, resulting in a Final Determination Letter from ED dated July 10, 1986. However, by letter of August 31, 1987, ED again raised the issue of eligibility, and on October 29, 1987, issued another Final Determination Letter finding that Munkacs was not eligible to participate in programs under Title IV of the Act from June 25, 1985, and was liable for repayment of funds to ED as stated above regarding Pennsylvania, in the sum of $1,546,782.

4. Bnos Jerusalem Seminary

Bnos Jerusalem Seminary (Bnos) is a non-profit post-secondary educational institution located in Brooklyn, New York, and has been in existence since the 1980-1981 academic year. During the period here involved it was not accredited by a recognized accrediting agency. It obtained its 3-I-C eligibility to participate in programs under Title IV of the Act on January 20, 1984. Thereafter,

an audit was conducted between December 1984 and June 1985. By Final Determination Letter dated May 30, 1986, ED concluded the audit without action. However, by letter of October 29, 1987, ED issued a Final Determination Letter finding that Bnos was not eligible to participate in programs under Title IV of the Act from January 20, 1984 through June 30, 1987, and was liable for repayment of funds to ED as stated above regarding Pennsylvania, in the sum of $1,457,081.

5. Sarah Schenirer Teachers Seminary

Sarah Schenirer Teachers Seminary (Teachers) is a non-profit, post-secondary educational institution located in Brooklyn, New York. During the period involved here it was not accredited by a recognized accreditation agency, but had previously been designated by ED as an institution eligible to participate in programs under Title IV of the Act by reason of the 3-I-C exception. By Final Determination Letter dated October 29, 1987, ED found that Teachers failed to qualify for such eligibility from June, 1982, through June, 1985, and was liable for repayment of funds to ED as stated above regarding Pennsylvania, in the sum of $293,174.

II. STATUTORY AND REGULATORY BACKGROUND

During the periods here concerned, in order for a student attending a postsecondary educational institution to qualify for any of the student financial assistance programs under Title IV of the Act, it was necessary that the institution itself qualify as an eligible "institution of higher education." Sections 484 (a) (1) and 487(a) of the Act, 20 U.S.C.A. §§ 1091(a) and 1094(a). In a review of ED's Final Audit Determination, the educational institution requesting the review "shall have the burden of proving .. . That the institution complied with program requirements." 34 C.F.R. § 668.116(d).

In order to be an eligible institution, each of the Respondents was required to be either "accredited" by an accrediting agency recognized by ED, or to meet the requirements of an alternative accreditation. The "3-I-C" alternative to accreditation was provided by Sections 435(b) (5) (B)and 1201(a) (5) (B) of the Act, which approve eligibility for

. .an institution whose credits are accepted on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited. (Emphasis added.)

The procedure for seeking 3-I-C eligibility was established by the Department of Health, Education and Welfare, predecessor of ED, by rule published in the Federal Register on August 20, 1970 (35 FR 13324), as follows:

The U.S. . . . (Secretary) of Education hereby adopts the following procedure by which an unaccredited institution may meet the alternative requirement . . . of being an institution whose credits are accepted on transfer by not fewer than three institutions which are accredited by a nationally recognized accrediting agency or association on the same basis as if transferred from an accredited institution. This alternative is referred to as the "three-institutional-certification."

Procedure for institutional qualification under three-institutional-certification method.

(a) To initiate the procedure an applicant unaccredited institution must submit . . . .

(1) The names and addresses of not fewer than three institutions of higher education accredited by an accrediting agency or association currently listed in the FEDERAL REGISTER as being nationally recognized agencies or associations . . . (which) accepted the credits (and continues to accept such credits) earned at such unaccredited institutions; and

(2)The names and dates of transfer of their credits, of at least three students or graduates of the applicant unaccredited institution who have subsequently been enrolled in each of such accredited institutions. (Emphasis added.)

Administratively, an unaccredited institution seeking 3-I-C eligibility must submit an eligibility application on ED Form 1059, identifying the three accredited institutions that accepted the credits of the applicant's students on transfer on the same basis as they accepted credits of students on transfer from accredited institutions. It then had to identify at least three students, by date of transfer, who transferred to each of three accredited institutions. The instructions forming part of the Form specifically provide:

Item 10(c): Unaccredited . . . institutions may apply for eligibility under the "three-institutional-certification (3IC) method" as an alternative to accreditation. The 3IC method seeks to establish that an unaccredited institution's students and credits are accepted, upon transfer, by accredited institutions, on an equal basis with students and credits transferring from an accredited institution. Under this proces, an unaccredited institution must provide:

a. the names of at least three accredited institutions which have accepted students and credits . . .

b. the names or (sic) at least nine students (three to each accredited institution . . .) who transferred to and enrolled in the accredited institutions as "regular students;" ** and

c. the dates of each transfer.

**"Regular student" means a student who enrolls for the purpose of receiving a degree or certificate; and "transfer and enroll" means that the students have registered . . . and attended classes at the accredited institutions, and the accredited institutions have applied the credits earned at the unaccredited institution toward the students' degree or certificate programs.

(Emphasis added.)

ED then vetted each of the nine transfers by contacting the accredited institutions with ED Form 1261, to verify the information provided by applicant. ED Form 1261, at paragraph 5.D., provides that:

STUDENTS WHO REMAIN ENROLLED AT THE UNACCREDITED INSTITUTION APPLYING UNDER THE 3 I C METHOD WHILE THEY SIMULTANEOUSLY ENROLL AT THE ACCREDITED INSTITUTIONS ARE NOT DEEMED TO HAVE ACTUALLY TRANSFERRED.

This language does not appear in any of the involved Statutes, Regulations, or forms utilized, and the record does not indicate notice of this language to the unaccredited institutions.

III. FINDINGS OF FACT

A. Factual Situation Regarding Each Institution

1. Pennsylvania College

Pennsylvania's 3-I-C application was submitted on January 20, 1980, and stated that the three accredited institutions which accepted credits on transfer on the same basis as credits from accredited institutions were Gwynedd-Mercy College, Spring Garden College and Eastern College. On September 22, 1980, that application was amended by the substitution of Goldey Beacon College in place of Eastern College.

Based on the information submitted by Pennsylvania and the verification forms provided by the three accredited institutions, ED concluded that 3-I-C eligibility had been established, and notified Pennsylvania on March 4, 1981 that its eligibility extended through March 4, 1984.

Each of the three students listed by Pennsylvania College as having had their credits accepted by Gwynedd-Mercy College remained a full time student at Pennsylvania while taking a one-credit course in microbiology at Gwynedd-Mercy, and did not return to Gwynedd-Mercy after the one semester of attendance in the fall of 1979. All three graduated from Pennsylvania in 1980. Examination of the records of Gwynedd-Mercy College revealed that credits granted by the unaccredited institution, Pennsylvania had not been accepted. In a letter dated May 18, 1987, Gwynedd-Mercy's Vice President for Academic Affairs explained as follows:

In 1979 after consultation with representatives from (the predecessor of Pennsylvania College) and after examination of course outlines currently in use at this Institution,, the Natural Science Division of Gwynedd- Mercy College agreed to accept for transfer the credits as described below:

Histology (3 credits)

Microbiology (3 credits)

Human anatomy (4 credits)

Embryology (3 credits)

Since (the predecessor of Pennsylvania at that time) did not provide a laboratory for microbiology we required that a student take a one credit lab course at Gwynedd- Mercy in order for the microbiology credits to be transferrable. It was believed that this relationship would foster an opportunity for students from (the predecessor of Pennsylvania College) to pursue a bachelor's degree in biology at Gwynedd-Mercy College.

In the fall semester of 1979 the three students mentioned in your letter . . . enrolled at Gwynedd-Mercy for the one-credit laboratory course in microbiology. This was the only credit earned at Gwynedd-Mercy and consequently no transfer of credits were ever applied for matriculation. With the passage of time it became apparent that applicants from (the predecessor of Pennsylvania College) were not seeking admission to Gwynedd-Mercy College.

In conclusion, no student from Pennsylvania College of Straight Chiropractic has ever matriculated at Gwynedd-Mercy College. Although there was a verbal (sic) agreement regarding transfer of credit in 1979, it was never used as had been anticipated. It is highly unlikely that such a policy will ever be established.

(Emphasis added.)

Spring Garden College was also stated to be an accredited institution which accepted Pennsylvania's credits. The three students identified by Pennsylvania as having credits accepted attended Spring Garden College for one course during the summer quarter of 1979. Two of the three remained enrolled at Pennsylvania College as full time students, though the third did not, and attended neither Pennsylvania nor Spring Garden after that summer semester.

Records at Spring Garden indicate that no credits on transfer were in fact accepted. In a letter dated May 21, 1987, the Vice Dean and Academic Dean of Spring Garden explains as follows:

. . . These three students were enrolled as NDS, non- degree students. Which is a student with no declared major which can be designated as non-matriculated status. As NDS, no evaluation was made of any credits for transfer nor any entry made on the student's transcript. Only when a student matriculates, is an evaluation made of transfer credits and, those credits are listed on the transcript.

There existed an articulation agreement between the two schools, which provided as follows:

Graduates of (the predecessor of Pennsylvania College) who entered that institution with an A.S. degree will be awarded thirty (30) credits.

The explanatory letter from Spring Garden also stated that:

Pennsylvania College did not qualify as an eligible institution because, under the articulation agreement between Pennsylvania College and Spring Garden College, Spring Garden College did not accept the credits on transfer of the students that Pennsylvania listed as having transferred to Spring Garden College.

(Emphasis added.)

2. Derech Ayson Rabbinical Seminary

Derech Ayson filed its application for the 3-I-C exception for the period of 1982 through 1985, as subsequently amended, naming Queens College, Nova University, and Baruch College as the

three accredited institutions which accepted its credits upon transfer, and naming three students who "transferred" to each of the accredited institutions. Following verification of this information, ED notified Derech Ayson on February 10, 1982 of its eligibility.

Derech Ayson filed a similar application for the period of 1985 through 1988, naming Queens College, New York Institute of Technology, and Mercy College as the accredited institutions, also listing three students "transferring" to each. Again, after verification, ED notified Derech Ayson on June 35, 1985, of its eligibility. On July 31, 1986, ED again notified Derech Ayson that it was eligible, but on November 14, 1986, notified the institution that its previous letter was "premature" and that additional information and review was needed.

By letter dated February 25, 1987, Baruch College responded to ED's inquiry regarding the 1982-1985 period, in pertinent part as follows:

. . . we do accept for credit courses taken at (Derech Ayson), but with special conditions that do not apply when evaluating courses at accredited colleges and universities. These conditions are that no more than eight credits are awarded for each semester spent at the Seminary, and that no more than thirty two credits will be awarded in total.

. . . Baruch College did not award transfer credit for any of the three students named. Our records indicate the following:

(One student) never attended Baruch College as a matriculated student. While he did attend as a non- degree student, no evaluation of previous work is done unless a student is admitted as a degree candidate.

(The other two students) both attended Baruch College as matriculated students and both have graduated. Neither indicated (Derech Ayson) as a school previously attended on the admissions application.

(Emphasis added.)

On March 13, 1987, Nova University responded to ED's inquiry, in pertinent part as follows:

1. Nova University accepted no transfer credit from any of the noted unaccredited institutions.

2. Six of the nine students (names) each successfully completed only one Nova University course for 3 credits.

3. Nova University did review the offerings of the unaccredited institutions, but no life experience credit was awarded to any student.

. . .

4. The forms, OBM No. 1840-0001, apparently were completed, in anticipation of the entire process being finalized. However, the life experience credits were never transacted nor did any of the students complete a degree program at Nova University.

5. The $1500 fee mentioned in your correspondence was not a fee assessed the unaccredited institutions "in connection with accepting its credits." (It represented the) flat fee assessments for unaccredited college work which all students would pay when requesting a similar portfolio assessment. . . .

5 (sic). . . . It was Nova University's intent to assess the total learning experienced at the rabbinical seminaries for the possible awarding of life experience credit, not to evaluate each course separately for possible awarding of transfer credit.

(Emphasis added.)

For the period of 1985 through 1988, ED's review of the records revealed that one student enrolled in Queens College had completed seven credits, and then had concurrently enrolled at both Derech Ayson and at Queens College as a matriculating student. The other two students had maintained concurrent enrollments at both institutions for the entire period.

On October 27, 1987, ED sent Derech Ayson its Final Determination Letter. On grounds not otherwise stated, ED determined there was no evidence that Derech Ayson knew, or should have known, of the failure of the accredited institutions to accept credits. Therefore, ED did not charge Derech Ayson with liability for ED payments during the period of 1982 through 1985 on this basis.

With regard to the 1985 through 1988 period, ED's review revealed that all of the nine students listed by Derech Ayson as having "transferred" to the accredited schools remained full time students concurrently enrolled at Derech Ayson. On this basis, ED charged Derech Ayson with liability for ED payments for the period of 1985 through 1988. ED did not question the acceptance of credits by accredited institutions for the period of 1985 through 1988.

3. Rabbinical seminary of Munkacs

Munkacs' 3-I-C application for the period from 1982 through 1985 was made on November 19, 1981, and stated that the three accredited institutions which accepted credits on transfer on the same basis as credits from accredited institutions were Nova University, Adelphi University, and Mercy College. Based on the information submitted by Munkacs and the verification forms provided by the three accredited institutions, ED concluded that 3-I-C eligibility had been established, and notified Munkacs on March 23, 1982, of its eligibility for the period through March 23, 1985.

Munkacs' application for the period from 1985 through 1988 was made on February 26, 1985, and stated that the three accredited institutions which accepted credits on transfer on the same basis as credits from accredited institutions were Caldwell College, New York Institute of Technology, and Mercy College. Based on the information submitted by Munkacs and the

verification forms provided by the three accredited institutions, ED concluded that 3-I-C eligibility had been established, and notified Munkacs on June 25, 1985, of its eligibility for the period through June 25, 1988. On July 10, 1986, ED again notified Munkacs that it was eligible, but on November 14, 1986, notified the institution that its previous letter was "premature" and that additional information and review was needed.

By letter dated March 13, 1987, the president of Nova University responded to ED's inquiry regarding the 1982 through 1985 period, in pertinent part as set forth above regarding Derech Ayson, stating:

Nova University accepted no transfer credit from any of the noted unaccredited institutions. (Emphasis added.)

The letter in response to ED'S inquiry regarding the 1982 through 1985 period, from the Dean, Adelphi University/University College, dated March 24, 1987 and in pertinent part, deserves extensive quotation:

1) You are correct in assuming that Adelphi University reviewed transfer credit from unaccredited institutions through a case-by-case evaluation. In 1981 I communicated with the Department of Education and inquired about "ambiguities" in the nature of the (ED) certification form. specifically, I informed his office that with regard to question #3 all candidates for transfer of postsecondary credits from non-accredited institutions, whether postsecondary credits from non- accredited institutions . . had some restrictions placed on their transfer; at the same time, credits transferred from accredited institutions also had some restriction. I indicated that the way questions #3 and #4 were framed could lead to ambiguity in attempting to honestly and forthrightly answer them. The reply from the Department of Education spokesperson was that the "Department of Education cannot deal with ambiguity."

So much for guidelines. In short. while there are differences in the ways in which Adelphi evaluated the transfer of credits from non-accredited and accredited postsecondary institutions ,restrictions .albeit distinctive ones. were placed upon both. The certification form was inadequate to incorporated these distinctions.

You are quite correct in stating that the credit through transfer from any non-accredited postsecondary institution would not become official until the student successfully completed six credits at Adelphi. In point of fact, students in this situation were given a conditional transfer of credits, i.e., told how many they would receive, prior to the completion of six credits. The transcript would become official, i.e. , be officially transcripted, after the completion of six credits.

As you can see from the enclosed transcripts of (two students) , they were granted only three (3) credits each in Hebrew Language--for which they were tested and which, therefore, were excluded from the six credit ruling-- prior to taking courses at Adelphi. Subsequently, both students left Adelphi after futile attempts to complete one course. Neither was awarded, therefore, credit in transfer from Munkacs. (The remaining student) was awarded ninety (90)

credits in transfer from Munkacs and successfully completed all requirements toward the Baccalaureate degree in Social Science.

(Emphasis added.)

However, on grounds not otherwise stated, ED later determined there was no evidence that Munkacs knew, or should have known, of the failure of the accredited institutions to accept credits. Therefore, ED did not charge Munkacs with liability for ED payments during the period of 1982 through 1985 on this basis, but only on the basis that students with dual or concurrent enrollment had not "transferred" within the meaning of the statute.

With regard to the 1985 through 1988 period, ED's review revealed that all of the nine students listed by Munkacs as having "transferred" to the accredited schools remained full time students concurrently enrolled at Munkacs. On this basis, ED charged Munkacs with liability for ED payments for the period of 1985 through 1988. ED did not question the acceptance of credits by accredited institutions for the period of 1985 through 1988.

4. Bnos Jerusalem Seminary

Bnos filed its application for the 3-I-C exception for the period of 1984 through 1987, on January 16, 1984, naming Nova University, Caldwell College, and Mercy College as the three accredited institutions which accepted its credits upon transfer, and naming three students who "transferred" to each of the accredited institutions. Following verification of this information, ED notified Bnos on January 20, 1984, of its eligibility for the period through January 26, 1987.

ED thereafter instituted an internal review of Bnos' 3-I-C eligibility, and "mistakenly" notified Bnos by letter of May 30, 1986, that it was eligible. However, in a letter dated November 14, 1986, ED notified Bnos that its prior approval had been "premature," and continued its review.

On March 13, 1987, Nova University responded to ED's inquiry in pertinent part, as previously set forth in regard to Derech Ayson, specifically that it had accepted no transfer credit, and that it had been Nova's intent only to assess the students' "total learning experience" at the non-accredited school for the awarding of "life experience credits," rather than credits awarded for specific courses, and that in fact not even such "life experience credits" were awarded.

Additional review revealed that the three students "transferred" to Caldwell College remained concurrently enrolled at, and received Pell Grants under Title IV of the Act, at Bnos at the same time as enrolled at Caldwell.

ED issued its Final Determination Letter of October 29, 1987, denying eligibility for the involved period and imposing liability for ED payments on the basis of students not having "transferred." On grounds not otherwise stated, ED

. . . did not find any evidence to suggest that Bnos Jerusalem knew or should have known that Nova University did not accept the Bnos Jerusalem transfer credits of (the three students involved) . (Parenthetical material inserted.)

5. Sarah Schenirer Teachers Seminary

The 3-I-C application of Teachers was submitted December 10, 1981 for the period of 1982 through 1985, and stated that the three accredited institutions which accepted credits on transfer on the same basis as credits from accredited institutions were Adelphi University, Long Island University (LIU), and Hoffstra University. Based on the information submitted by Teachers and the verification forms provided by the accredited institutions, ED concluded that 3-I-C eligibility had been established, and notified Teachers on June 10, 1982 that its eligibility extended through June 10, 1985.

ED thereafter instituted an internal review of Teachers' 3-I- C eligibility, and "mistakenly" notified Teachers by letter of July 31, 1986, that it indeed qualified. However, in a letter dated November 14, 1986, ED notified Teachers that its prior approval had been "premature," and continued its review.

The letter from the Dean, Adelphi University/University College, dated March 24, 1987, responding to ED's inquiry, in pertinent part set forth above regarding Munkacs, submitted as an attachment to Joint Respondents' Exhibit 44 regarding Munkacs and then as an attachment to Joint Respondent's Exhibit 75 regarding Teachers. The letter makes clear that ". . . while there are differences in the ways in which Adelphi evaluated the transfer of credits from non-accredited and accredited postsecondary institutions, restriction, albeit distinctive ones, were placed upon both." From this circumlocution one must infer that for 3-I- C purposes Adelphi maintained "differences in the way in which (it) evaluated the transfer of credits from non-accredited and accredited postsecondary institutions . . ."

By letter dated March 30, 1987, the Dean of Student Administrative Services and Registrar of LIU responded to ED's inquiry, in pertinent part that credits from Teachers

. . . are accepted with the same restrictions as, or even fewer restrictions than an institution accredited by some specialized, non-regional accreditation agencies. In fact, credits from (Teachers) are treated by Long Island University's Brooklyn Campus exactly as credits from a school accredited by the Association of Advanced Rabbinical and Talmudic Schools would be treated. . .

With regard to the three students from (Teachers) . . . (A)ll. three students enrolled, but withdrew before the end of the semester. Their transcripts indicate "W" grades .

Notes from ED's Inspector General, submitted by Teachers as Consolidated Exhibit No. 72, reflect that

The preceeding (sic) three students all received grades of "W" in classes enrolled. OIG requested the dates of the official withdrawal, but was told that no such information could be found. Furthermore, University policy specifically states that "no transfer credit will be given in advance" to students from Jewish schools (W/P E-7-7). Since none of these students completed 30 credits with a 2.0 GPA, no credits could be accepted.

The above statements are belied by the Final Determination letter issued by ED on October 29, 1987, which at page 4 states:

However, we did not find any evidence to suggest that Sara Schenirer knew or should have known that Adelphi University did not accept the credits or students transferring from unaccredited institutions on the same basis as it accepted the credits of students transferring from accredited institutions. Further, we did not find any evidence to suggest that Sara Schenirer knew or should have known that Long Island University did not accept the Sara Schenirer transfer credits of London or that Long Island University did not accept Perr as a matriculated student .

The third student to attend LIU, Meisels, is not specifically mentioned, but since the Final Determination letter is in direct conflict with the ID'S findings it is obvious that the same findings must be made to acceptance of Meisel's credits.

B. Applicable Definitions

On brief, ED cites various contemporary general dictionaries indicating that the word "transfer," whether used as a transitive or intransitive verb or as a noun, denotes actually withdrawing from a former position or location and entering another position or location. ED also has submitted two specialized dictionaries in support of its arguments. The first, and most frequently cited herein, is the "Definitions of Student Personnel Terms in Higher Education," which was "Prepared by the National Center for Educational Statistics in Cooperation with the American Association of Collegiate Registrars and Admissions Officers." Published by the National Center for Educational Statistics, it was printed by the U.S. Governments Printing Office in 1968, and distributed for sale by the U.S. Superintendent of Documents. The second is the "A.A.C.R.A.O. Handbook, 1980, Data and Definitions," containing "Definitions of Terms for Admissions and Records," prepared and published, in 1980, by the Systems Development Committee of the American Association of Collegiate Registrars and Admissions Officers.

The term Transfer Student (Student, Transfer) is defined in the first source as "A student who terminates enrollment in one institution and subsequently enrolls in another, usually with advanced standing credit. The term is sometimes applied to students who transfer from one college to another within an institution." The second source defines it as "A student who has withdrawn from one institution and is admitted to another." Respondents have submitted several affidavits from individuals in the educational field stating that the term includes those students with dual or concurrent enrollments, and pointing to the general statement in the second source mentioned above that each institution may have its own definition of the phrase "transfer."

Respondents have also submitted an internal memorandum dated February 12, 1982, from ED's Director of Eligibility and Agency Evaluation Staff to the Office of General Counsel, related to concurrent enrollment by students of an unaccredited institution in an accredited institution, which stated:

Based on past experience, we do not find that these charges, if true, violate specific statutory or regulatory provision governing the 3-I-C method.

There is also another internal memorandum, dated May 13, 1982, from ED's Chief of College Eligibility Unit of the Eligibility and Agency Evaluation Staff to a Regional Branch Chief, Division of Certification and Program Review, which stated:

4. . . . we should stress the following points (which were not clear to us or institutions in the use of the 3IC method);

c. The transferring student may not be enrolled at both the unaccredited institution and the accredited institution.

(Emphasis added.)

ED filed a Notice of Proposed Rulemaking on October 21, 1986, 51 Fed. Reg. 37366, which, among other things, did "include a provision dealing with the transfer-of-credit alternative to accreditation . . . that is currently contained in the rule published in . . . 35 FR 13324," specifying that concurrent enrollment does not qualify as a transfer for these purposes.

IV. DISCUSSION

A. Burden of Proof

As indicated above, the Regulations promulgated pursuant to the Act, 34 C.F.R. § 668.116(d), specifically require that the educational institution requesting review of the final audit review bears the burden of proving that the institution complied with program requirements. It is thus the burden of the Respondents herein to prove that they achieved eligibility to participate in the Student Financial Assistance programs under Title IV of the Act by complying with the 3-I-C requirements of having three students transfer to each of three accredited institutions which accepted credits granted by the unaccredited institutions to the same extent that they would accept credits granted by accredited institutions. There is, however, no proof required of matters not contested by ED's Final Determination Letters.

B. Acceptance of Credits

Just as it is undeniable that 3-I-C accreditation can occur only where there has been a valid transfer from the unaccredited institution to the accredited institution, it is undeniable that credits granted by the unaccredited institution must have been accepted by the accredited institutions. Respondents have never denied or disproved the statements of the accredited institutions that the credits granted by the unaccredited institutions were not accepted. Where ED does not contest the issue, however, neither denial nor proof by Respondents are required.

As to Respondent Pennsylvania, it is clear that neither Gwynedd Mercy, nor Spring Garden, accepted any credits granted by Pennsylvania. Thus, Pennsylvania failed to prove that three accredited colleges accepted on transfer any credits granted by Pennsylvania, and failed to prove its eligibility under the Act.

As to Respondents Derech Ayson, Munkacs, and Bnos, it is clear that for the period of 1982 through 1985 there is no issue as to eligibility based on credits not being accepted, and for other periods eligibility ED's disallowance of eligibility is based only on the issue of whether credits were allowed.

As to Respondent Teachers, ED'S disallowance of eligibility is not based on a failure to accept credits.

C. The Meaning of "Transfer"

Respondents have produced evidence that there are individuals in the field of education who consider that dual or concurrent enrollment qualifies as a transfer, and that the definition preferred by any specific institution should be permitted to apply to that institution. With greater weight, ED has shown through entries of both standard dictionaries and dictionaries of terms applicable specifically to the educational field, a general acceptance that a transfer occurs only where a student departs one institution to enter another and not while dual or concurrent enrollments continue.

That some individuals, or some institutions, may consider some other definition to be equally correct, bears no weight. As stated in Perrin v. United States, 444 U.S. 37, 42 (1979),

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

Statutes must obviously have a universal application, and to argue that any entity may define the terms of a statute as it sees fit, with the effect of exempting it from the statute, is destructive of any rule of law.

However, Respondents also argue that during the applicable period involved ED itself was uncertain as to a definition of the word "transfer" as applied to 3-I-C eligibility, and that ED changed such definition in a manner which was ipse dixit, arbitrary, capricious and violative of due process without prior notice and an opportunity to be heard.

Evidence of internal disagreement within the ED exists in the two internal memorandum quoted above. Both memoranda originated in ED'S Eligibility and Agency Evaluation branch, during 1982, and both are contrary to the theory presently argued by General Counsel, that dual or concurrent enrollment does not constitute transfer. The first memorandum states that "Based on past experience, we do not find that these charges . . violate specific statutory or regulatory provision governing the 3-I-C method," while the second memorandum specifies that the point involved was "not clear to us or institutions in the use of the 3IC method." Since the record does not show a change in this during the periods involved, without notice to Respondents and opportunity to be heard, such change as to these Respondents would be arbitrary and capricious on the part of ED.

D. Other Affirmative Defenses

1. Estoppel

A number of cases have disputed the applicability of estoppel as a defense against the government, but it has been noted in Heckler v. Community Health Services of Crawford County, 467 U.S. 51, 60-61 (1984) , that the courts are hesitant "to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealing with their government."

Estoppel was succinctly defined in Giles v. Carlin, 641 F. Supp. 629, 635 (E.D. Mich. 1986), in part as follows:

Estoppel is an equitable doctrine invoked to avoid injustice in a particular case. The traditional elements of equitable estoppel have been summarized as follows:

1. The party to be estopped must know the facts; . . .

The party sought to be estopped is ED. ED was first misinformed by Respondents, and then misinformed by the accredited institutions as to whether the credits granted by Respondents to the designated students "are accepted." Until it concluded the further investigation resulting in withdrawal of eligibility letters, ED did not have the true facts in its possession. Under these circumstances, estoppel will not lie against the actions of ED.

Respondents, on the other hand, had or are chargeable with full knowledge of the language of the statute. There is no dispute that this language requires that credits "are accepted," though Pennsylvania, on brief, considers that it is merely necessary that they be "acceptable," using quotes as if that word were part of the statute. The statute clearly refers to a current unconditional acceptance, and not to a future or conditional possibility of acceptance. If Respondents were misled by the accredited schools into believing that credits were in fact accepted by the accredited institutions when in fact acceptance was conditioned upon future action, then it is not ED which has caused the damage, and it is not an equitable defense against action by ED.

Neither is it the fact, nor even the argument, that ED improperly or incorrectly induced Respondents to make faulty applications for eligibility. The accredited institutions were chosen for listing by Respondents, based upon information either in their possession or available to them. An equitable defense is, in these circumstances, not available to Respondents.

2. Laches

Laches is also an equitable relief claimed by Respondents, which provides that a party may not claim relief where it has unreasonably and inexcusably delayed in the assertion of its claim.

In the matter at hand, ED was initially unaware of the true status of the claimed acceptance of credits. It was not until some time after the issuance of eligibility letters that the true facts were determined, despite attempts by ED to verify the information given to it by Respondents. In the

circumstances, Respondents have failed to prove a time lapse of sufficient length to warrant assertion of defense against their own incorrect statements.

3. Procedural Defects

Respondents allege a number of procedural defects in issuance of rules, Regulations and procedures. Regulations entitled "Appeal Procedures for Audit Determinations and Program Review Determinations," covering Subpart H to Part 668 of 34 Code of Federal Regulations, were published on August 12, 1987 at Vol. 52, No. 155, Page 30114 of the Federal Register. Included in the explanatory "Supplemental Information" preceding the proposed regulations is the following statement:

The Secretary intends for the ALJ to apply the same rule of deference to agency interpretations of its statutes and regulations that is observed by the Federal courts. See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council. Inc., 267 U.S. 837 (1984); Udall v. Tallman, 380 U.S. 1 (1965); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945). Under this rule, an interpretation of an agency's statute or regulations by an authorized official is generally treated as controlling unless clearly erroneous or contrary to the plain meaning of the statute or regulation at issue. An ALJ's primary function is to perform the initial fact- finding for the Department on issues raised in applicable appeals. cf. 16 CFR 0.14 (Federal Trade Commission ALJ is fact-finder, and must exercise this function in conformity with decisions and policy directives issued by the Commission.)

In addition, the Administrative Law Judge in these proceedings is restricted by 34 C.F.R. § 668.117(d)(l) and (2) to the extent that he may neither waive applicable statutes and regulations, nor rule them invalid. In terms of "due process," even without such clear regulatory restrictions an Administrative Law Judge is without authority to question the constitutionality of the statutes and regulations granting him his jurisdiction. Frost v. Weinberger, 375 F. Supp. 1312, 1320 (EDNY 1974), rev'd on other grounds 515 F.2d 57 (1975), cert. denied 96 S. Ct. 1435, 424 U.S. 958 (1976). A priori, it would be unacceptably anomalous for an Administrative Law Judge to have the authority to rule unlawful and invalid that which gave him the right to rule.

In view of all the above, the Administrative Law Judge does not have the right in this proceeding to rule on the statutory, regulatory or procedural matters alleged by Respondents.

4. Failure to Prove Amount of Claim

Section 487 of the Act, which governs these proceedings, was amended, effective October 17, 1986, to provide in part as follows:

(1) An institution that has received written notice of a final audit or program review determination and that desires to have such determination reviewed by the Secretary shall submit to the Secretary a written request for review . . .

(2) the Secretary shall . . . arrange for a hearing on the record . . .

The legislative history pertaining to this type of hearing is sparse, but Conference Report No. 99-861, Higher Education Amendments of 1986, p. 424, states:

Due process standards for recovery of funds

The House amendment, but not the Senate Bill, requires that final audits and determinations will only be made following written notice and the opportunity for a hearing on the record and that the burden of proof will be on the Secretary and that all parties will have discovery procedures available to them.

The Senate recedes with an amendment deleting the provisions relating to discovery and burden of proof.

(Emphasis added.)

Thus, the final legislation provides for the burden of proof, as cited above at Section IV (A) of this Initial Decision, to fall on the appellant, and not on ED.

5. Other Defenses

Respondents' other arguments, procedural and substantive, have also been considered, but not found to be applicable, meritorious or determinative of the issues.

V. CONCLUSIONS OP LAW

During the periods here involved, Respondents were postsecondary educational institutions and are subject to the Act and to the rules and regulations thereunder.

Respondent Pennsylvania College of Straight Chiropractic failed to prove that, during the period here involved, credits granted by the unaccredited Respondent were accepted for three students, on transfer, by each of three accredited postsecondary educational institutions, on the same basis as credits granted by accredited educational institutions.

Respondents Rabbinical Seminary of Munkacs, Derech Ayson Rabbinical Seminary, Bnos Jerusalem Seminary, and Sarah Schenirer Teachers Seminary proved that, during the period here involved, credits granted by the unaccredited Respondents were accepted for three students, on transfer, by each of three accredited postsecondary educational institutions, on the same basis as credits granted by accredited educational institutions.

During the period here involved, Respondent Pennsylvania College of Straight Chiropractic was not eligible to participate in the said programs.

During the period here involved, Respondents Rabbinical Seminary of Munkacs, Derech Ayson Rabbinical Seminary, Bnos Jerusalem Seminary, and Sarah Schenirer Teachers Seminary were eligible to participate in the said programs.

VI. ORDER

On the basis of the findings of fact and conclusions of law herein, it is hereby ORDERED that the Final Determination Letter addressed to Respondent Pennsylvania College of Straight Chiropractic is affirmed, and the Final Determination Letters addressed to Respondents Rabbinical Seminary of Munkacs, Derech Ayson Rabbinical Seminary, Bnos Jerusalem Seminary, and Sarah Schenirer Teachers Seminary are rejected.

Walter J. Alprin
Administrative Law Judge

NOTICE: 34 C.F.R.§ 668.119 governs appeals of this decision to the Secretary, and provides, in part, that any appeal must be made within 15 days of receipt of this decision. The mailing address of such appeal is United States Secretary of Education, c/o Office of Hearings and Appeals, Attn: Janice Pope, Docket Clerk, Room 3053, 400 Maryland Avenue N.W., Washington, D.C. 20202. A copy of the appeal should also be directed to the Counsel for General Counsel, United States Department of Education, as per the service list.