UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

In re:	)	Docket No. 91-112-SP
ASSOCIATED TECHNICAL COLLEGE,	)	Student Financial Assistance Proceeding
Respondent.	)	

DECISION ON APPEAL

This proceeding arises upon an appeal of a decision of the Division of Audit and Program Review (APR) of the Office of Student Financial Assistance (OSFA) of the United States Department of Education (ED). The decision of APR is a so-called Final Audit Determination (FAD) dated October 31, 1991, wherein Associated Technical College of Los Angeles, CA (ATC) is ordered to pay ED $6,000,000 plus interest.

Upon the filing of the appeal by ATC, the matter was referred to ED's Office of Hearings and Appendix (OHA). A schedule for the filing of evidence and argument was imposed by OHA. ED's Office of Student Financial Assistance or OSFA filed an initial brief dated February 19, 1992. ATC then filed its "reply" brief dated March 24, 1992 (ATC has the burden of persuasion herein), and OSFA filed a reply or rebuttal brief dated April 6, 1992. The proceeding subsequently was assigned to this hearing officer. Because of the sizeable amount of the proposed "recoupment" sought by ED and its obvious terminal potential for ATC, I scheduled an oral argument which was held before me by ATC and OFSA at Washington, DC on October 27, 1992. Subsequently, in a letter to me dated November

6, 1992, counsel for OSFA provided me with a copy of an Initial Decision of Administrative Law Judge Paul Clerman dated October 29, 1992, in Docket No. 91-39-SP, Webster Career College of Los Angeles. By supplemental briefs dated November 19, 1992, the parties provided their views upon relationship of the decision in the Webster case with the instant matter. Finally, upon a letter request of ATC dated December 17, 1992, comments of the parties upon ED "Notes To Negotiating Committee" were filed on January 29, 1993.

I have considered the entire record in the case at hand and make the following decision upon the appeal of ATC. My decision is subject to an appeal to the Secretary of Education.

Statements of Facts

The issue herein is whether ATC breached a fiduciary duty owed to ED in awarding full Pell Grant funds to students subsequent to a 1986 conversion by ATC from a clock hour to a semester hour program. Under the clock hour program, only partial Pell Grants were awarded.

For many years prior to 1986, ATC management considered that its program should be measured in semester hours. In fact, it was through clerical inadvertence that ATC was granted ED approval for a clock hour program, when instead a semester hour program was intended. In this regard, certain background information concerning ATC is of importance.

The Los Angeles location of ATC (ATC-LA) was founded in 1967 as the Career Academy. The Career Academy was acquired in 1969 by the National Institute of Arts and Sciences. In 1973, Associated Colleges of California acquired the Career Academy and moved it to its present location, 1670 Wilshire Boulevard, Los Angeles, CA. On January 1, 1975, Career Academy was purchased by Diversified Education Company, Inc. (Diversified) and renamed Associated Technical College.

Samuel Romano is the President and owner of Diversified which in turn owns ATC. Mr. Romano began as an instructor for the Berlitz School of Languages while enrolled as a student at Wayne State University. After he moved to California, Mr. Romano became the Director of the Berlitz School of Languages located in Beverly Hills, CA in 1969. Thereafter, he progressed to operating and owning his own school, and, in 1973, to being a director of a vocational school located in Los Angeles. Mr. Romano has more than 20 years' experience in the area of vocational education.

The current branches of ATC-LA are ATC-Riverside, located at 4295 Brockton Avenue, Riverside, CA, and ATC-San Bernardino, located at 395 North "E" Street, San Bernardino, CA. ATC-San Bernardino first opened on May 23, 1988, and ATC-Riverside first opened on November 28, 1988.

Two former branches of ATC-LA are now free-standing institutions, ATC-Anaheim and ATC-San Diego. ATC-Anaheim, currently located at 1177 North Magnolia Avenue, Anaheim, first

opened in June 1984. Effective July 1, 1988, ATC-Anaheim became a free-standing institution. ATC-San Diego, located at 1475 Sixth Avenue, San Diego, first opened in July 1984. Effective July 1, 1988, ATC-San Diego became a free-standing institution.

ATC is accredited by the Accrediting Commission of Trade and Technical Schools of the Career College Association (formerly National Association of Trade and Technical Schools (NATTS) and has been continuously accredited during the entirety of the period covered by the FAD or Final Audit Determination, between July 1, 1986 and June 30, 1990.

The switch ATC made to semester hours effective July 1, 1986 was in a sense, a switch back to semester hours. This is so because originally, in January 1977, ATC applied for and received change of ownership approval on the basis of semester units on a continuous enrollment basis. At some time after the original change of ownership application was filed, ATC was obligated to submit an additional ED form 1059, Request for Institutional Eligibility for Programs. At that time, either an ATC employee or ED official inadvertently listed ATC as offering its programs on a clock hour basis. (Exhibit R-2-3).

A number of practical and administrative issues are created under the clock hour system that do not exist under the credit hour system. A great deal more recordkeeping is required of a clock hour institution in order to be able to document to ED that each student is in actual attendance a sufficient number of hours to

meet the Pell Grant student eligibility requirements. For example, as a semester hour institution, ATC is entitled to make a second Pell Grant disbursement when a student has successfully completed the course work for at least half of the course; however, at a clock hour institution, a second Pell payment cannot be disbursed until the student has attended sufficient hours to pass the mid-point while maintaining satisfactory academic progress.

At the time that Mr. Romano authorized an effort to switch ATC to semester hours as originally intended, ATC needed the approval of the State of California and of its accrediting agency, NATTS, plus the approval of the U.S. Department of Education. Thus, ATC was not in a position to make a switch except in accordance with the standards and procedures of NATTS. The applicable NATTS' standard, which was used both for degree and non-degree granting schools provides:

> Credit Hours. When a school converts its program from clock to credit hours, the following conversion ratios shall apply: One semester credit unit may be awarded for each 15 clock hours of lecture, 30 clock hours of laboratory experience, 40 clock hours of externship, and 45 hours of shop experience. One quarter credit unit will be awarded for each 10 clock hours of lecture, 20 clock hours of laboratory experience, 26 clock hours of externship, and 30 clock hours of shop.
>
> Definitions. Classroom work involves presentations of theory and lecture by an instructor. Laboratory work involves the application of theory through learner-centered training. Externship training is practical, off-campus, industrial training under indirect instructor supervision. Shop experience involves students' application of accumulated knowledge as demonstrated by their works on

> projects that are completed over their period of enrollment.

(Exhibit R-2-5-6; Exhibit R-2-26).

This standard was the subject of considerable discussion with ED. One example is that NATTS, together with the Accrediting Commission of the Association of Independent Colleges and Schools (AICS), sent a joint letter dated June 3, 1986 to Dr. C. Ronald Kimberling, Assistant Secretary, Office of Postsecondary Education, U.S. Department of Education, in which NATTS and AICS advised ED (1) that it "is a primary role of accrediting agencies" to "review and judge academic changes made by institutions that they accredit"; (2) that "[e]ach accrediting body currently utilizes a process to review proposed institutional changes", which changes included schools "converting from clock-hour to credit-hour status"; (3) that "standards for making appropriate conversions ... have existed for several years and are utilized by the accrediting bodies"; and (4) that the U.S. Department of Education has no "role and responsibility ... in the conversion process ... other than to ensure that the accrediting bodies are adhering to their own published standards." (Exhibit R-2-6-7; Exhibit R-2-31).

ATC complied with all of NATTS' specific procedures and standards to make the switch from clock hours to credit hours, which NATTS approved in letters dated October 7 and 16, 1986. (Exhibits R-2-34 and R-2-35, respectively). ATC also was then in the process of being reviewed by NATTS for the purpose of being

reaccredited. The process of reaccreditation required ATC, among other things, to submit Self-Evaluation Reports to NATTS. In these Self-Evaluation Reports, which ATC submitted to NATTS on October 10, 1986, ATC described in detail the curriculum for each of the current programs that are the subject of the Final Audit Determination or FAD. (Exhibit R-2-9).

The description of these programs in the Self-Evaluation Reports included their objectives, the content of the program, how the objectives were to be met, how the program was to be taught, the subject matter of the program, the length of the program, the subject matter for each module, the amount of time devoted to that module, and the measurement of the program in both clock hours and credit hours. NATTS required programs with clearly defined objectives. The Self-Evaluation Reports describe how ATC would determine that the students were achieving the objectives of the program. (Exhibit R-2-9).

It was in this context, therefore, that by letter dated September 24, 1986, to Mr. Joseph S. Somerville, Jr., who was in ED's Occupational/Vocational Eligibility Branch (OVE), Division of Eligibility and Agency Evaluation, that Ms. Criser of ATC submitted ED form 1059 Application for Eligibility.

In her letter Ms. Criser stated that ATC wanted "to officially change the type of funding from clock hours to semester (credit) hours." (Exhibit R-2-37).

At the time of the Criser letter there was an ED moratorium on conversions which had been in place for some time. Ms. Criser also inquired whether the ED moratorium would apply to ATC "[s]ince we originally applied for eligibility on the basis of semester hours, not clock hours ...". (Exhibit R-2-37) and (Exhibit R-2-12). There was no ED answer to the question, possibly because shortly thereafter, the moratorium was lifted by ED.

By letter dated October 9, 1986 (Exhibit R-2-50), Ms. Criser supplemented ATC's September 24, 1986 submission to Mr. Somerville (Exhibit R-2-37-49) by providing him with copies of letters sent to Diversified both dated October 7, 1986, from, respectively, the California State Department of Education and NATTS (Exhibit R-2-51 and R-2-34, respectively), approving ATC's intended use of semester credits. (Exhibit R-2-12). Somerville then approved the ATC conversion in behalf of ED.

ED's reliance upon accrediting agencies and ED's recognition of their expertise is evidenced by the RIG workpapers in this case, which refer to a December 12, 1990 telephone conversation between an ED auditor and Ms. Penny Surtz of the American Council on Education (ACE). (Exhibit R-2-19). The workpapers state in relevant part:

> Purpose -- To identify criteria used by ACE to determine credit hrs assigned to courses.
>
> Results -- ACE's function is to review courses and assign credit hours to the courses. The US Gov't (military) and corporations (business + industry) contract with ACE to have their courses evaluated.

> About 75-80% of colleges + universities accept ACE's credits when possible (i.e. when offer similar courses, courses required part of student's curriculum).
>
> Courses are evaluated by professional college instructors at the contractors site. Course syllabus, manuals, tests, books, etc. are reviewed. The purpose is to translate what the contractor teaches into academic credits.

(Exhibit R-13-1).

The importance of professional judgment in evaluating programs in assigning college semester credit hours and the expertise of the reviewers used by ACE to make those judgments are confirmed by other RIG workpapers generated in this matter. For example, Ms. Surtz of ACE also stated that regardless of the specific guidelines ACE uses, ACE knows the difference between applying guidelines and applying absolute formulaic rules, with the difference being professional judgment. (Exhibit R-2-21-22). The RIG workpapers state:

> Ms. Surtz mentioned that colleges + universities look at credit hours from a different angle. They usually start with the need for a 3 unit course & develop the course material to provide that amount of educational value. Whereas, ACE takes an already existing course, and assigns credit hrs to it.
>
> Ms. Surtz also mentioned that ACE only contracts with organizations which are not already accredited, such as a proprietary school.
>
> Conclusion -- ACE uses the guidelines which require 2 hours of outside preparation for each lecture hour and 1 hour for each 2 hours of lab. <u>Those guidelines plus professional judgment are used to assign</u>

> credits to vocational course offered by the military and businesses.

(Exhibit R-13-2) (emphasis added).

The RIG workpapers also refer to Guidelines that "have been prepared after extensive research into existing patterns of unit measurement in community colleges, and with assurances that adoption of unit measurement is an institutional prerogative so long as it is done on a sound academic basis. ... [s]uch a system is considered to be within existing or proposed federal student financial aid guidelines." (Exhibit R-13-3).

The actual Guidelines referred to include the following:

> GUIDELINES
>
> ***
>
> 4. In a laboratory course, or for the laboratory portion of a course, one semester/quarter unit can be earned for from two to four hour periods per week.
>
> The determination of whether this should be one unit of credit for two, three or four hours of laboratory should be based upon the amount of supervision and direct time given to students. The more independent the student is during the laboratory portion, the lesser the credit.

(Exhibit R-13-4) (Emphasis added).

In 1990 ED proposed a strict rule to govern conversions. In response by letter dated October 30, 1990, to the Chief, Pell Grant Policy Section, Division of Policy and Program Development, OSFA, Mr. Henry A. Spille, Vice President of ACE or American Council on Education and Director of the Center for Adult Learning and

Educational Credentials, expressed his professional opinion regarding ED's proposed formula for establishing comparability between credit hours and clock hours. Mr. Spille's letter was in response to ED's October 1, 1990 Notice of Proposed Rulemaking, 55 Fed. Reg. 40148. (Exhibit R-12-6-7).

The formula included in the subject Notice of Proposed Rulemaking was that a semester hour must include at least 37.5 clock hours of instruction. Mr. Spille stated:

> In my professional opinion I find no basis in generally accepted academic standards and principles to limit the credit-hour system of measuring academic progress to a quantitation [sic] of classroom hours of instruction. Inherent in the credit-hour system is the recognition of the equally important component, outside preparation for class.
>
> In contrast, the clock-hour system utilizes only time in class instruction to arrive at a measure of academic progress. While either the clock-hour or the credit-hour system may be utilized by an institution for the purpose of measuring academic progress, the predicate concept of each is totally discrete. Only time in class in used in the clock-hour system while the credit-hour system inherently relies upon two components, time in class and time outside of class in preparation for class.

(Exhibit R-12-7) (emphasis added).

ED withdrew the proposed rule on November 30, 1991, but it has resurfaced in somewhat modified form as a subject for "Negotiating Committee" handling.

As to existing ED rules, on April 5, 1988, ED published final regulations adopting in 34 C.F.R. § 600.2 a definition of "One-year training program" for Part 600 of Title 34, Code of Federal Regulations. 53 Fed. Reg. 11208 (1988). ...:

> A great number of commenters opposed the minimum number of calendar days requirement of the proposed definitions of the six-month training program and a one-year training program. As a result, the Secretary convened a series of meetings with representatives of the nationally recognized accrediting agencies and associations to share his concerns and to request assistance in curtailing further abuse of the student assistance programs through measurement of academic progress management. As a result of those discussions, the Secretary and the accrediting agencies agreed that the accrediting agencies and associations would recommend to the Secretary procedures by which the accrediting agencies and associations would standardize the review and approval of clock-hour and credit-hour conversions. Consequently, the Secretary has modified the proposed definitions of a six-month and a one-year training program by deleting the minimum number of calendar days requirement.

(53 Fed. Reg. 11208, col. 3) (1988) (emphasis added).

***

On October 1, 1990, when ED issued its Notice of Proposed Rulemaking (NPRM) proposing a formula for converting clock hours to credit hours by equating 37.5 clock hours to one semester hour, the following narrative was included in the NPRM:

> The Secretary is proposing these regulations only after attempting over the past decade to curb this abuse by relying on institutional self-regulation, accrediting agencies standards and reviews of accredited

institutions, and existing State law. However, those attempts met with only limited success.

Thus, it is apparent that at the time of the RIG audit of ATC, ED did not have an absolute quantitative rule governing conversions and still does not have such a rule.

Retroactive to July 1, 1986, after expiration of the ED moratorium on conversions ATC, converted in the fall of 1986 to its initially intended credit hour measurement, and assigned 27 or more semester hours to five courses. (Only 5 of ATC's courses are in question under the FAD.) Under ED regulations, students are full time if they carry at least 24 semester hours. Thus, as a result of the conversion, ATC semester hour students received 100 percent Pell Grant funds. Before as clock hour students, they received only 72 percent of a full Pell Grant. This is so because under a clock hour program at least 900 hours is required for a full Pell Grant. ATC students basically took 650 clock hours, or 72 percent of 900 hours.

At the time of conversion, there was no change in course content, and for that matter there was no change of any kind the courses offered by ATC on June 30, 1986 and one-day later on July 1, 1986. As noted above, it is and has been the consistent position of ATC that it provides a semester hour type of program.

In the circumstances presented, OSFA says that because there was no substantive change in the educational program of ATC during

1986, there is a presumption that the program conversion was unreasonable and without due regard to the fiduciary duty of ATC.

OSFA does not use the exact word "presumption," but does say that the ATC conversion "was on its face excessive and unreasonable."

ATC has the burden of proof in this program review appeal. As well, OSFA clearly takes the position that the findings of RIG create an unrebuttable presumption against ATC.

In this regard, RIG did not evaluate the qualitative nature of ATC's program. RIG might have employed educational experts to assist in determining whether there had been fraud or abuse of fiduciary duty but did nothing in that regard. RIG simply measured the clock-hours before the conversion and the corresponding investment of student class room and laboratory time after the conversion and thus, made the finding of $6,000,000, plus, in ATC liability.

As noted in its appeal, ATC shows that it took many substantive steps prior to the July 1, 1986 conversion from clock hours to semester hours. These are, State of California approval was sought and obtained; National Association of Trade and Technical Schools (NATTS) approval was sought and obtained (NATTS was then designated by ED as an accrediting agent for ED and trade schools such as ATC); and ED's Occupational Vocational Eligibility Branch (OVE), Division of Eligibility and Agency Evaluation approval was sought and obtained.

ATC also shows that on multiple occasions various officers of ED specifically confirmed the status of the school's measurement of academic progress in credit hours. See, for example, Exhibit R-2-52 where OVE gave updated confirmation of eligibility on October 17, 1986, and Exhibit R-9-7 where ED's Division of Certification and Program Review, of OSFA Region IX (CPR) found pursuant to on-site examination of ACT conducted on February 23-25, 1987, in pertinent part as follows:

> **NOTES:**
>
> a. The uneven Pell payments were due to the institution converting from the clock-hour system of control to a semester credit hour system of control. The institution was granted permission to retroactively pay an additional Pell amount of $583 to students whose Student Aid Index was zero by the Division of Eligibility and Agency Evaluation of the Department of Education, beginning with July 1, 1986. (Verified)

CPR's 1987 findings now are disavowed by OSFA on account of RIG's disputed findings.

The amount of asserted excessive Pell Grants is estimated by RIG. Neither ATC nor RIG reviewed all student files and the $6 million amount, plus interest, said to be due might be less. OSFA says that RIG was free to make an estimate because ATC failed to review all student files. The estimate of RIG is based on a 28 percent subtraction of $21,719,379 in Pell Grants awarded by ATC to students between July 1, 1986 and June 30, 1990. Full Pell Grants, it may be noted, still were being awarded by ATC at the time of oral argument before me on October 27, 1992.

It again is noted that neither RIG nor OSFA submits expert testimony or evidence in this matter bearing upon the quality of ATC's educational program. Nor do they question the exacting nature of the review conducted by NATTS prior to the conversion. Clearly ED is free to conduct stringent oversight of accrediting agencies. Against this failure of OSFA, ATC submits unrebutted expert opinion that the number of semester hours awarded by ATC for each of the courses in issue in this proceeding is educationally and qualitatively correct. This expert opinion supplements the prior exhaustive review and expert judgment of NATTS and is wholly unrebutted by OSFA.

Discussion and Conclusions

OSFA's position in this matter is best summarized by ED Ex. 2, page 9, wherein the Regional IG (RIG) states:

> Our report does not preclude ATC from choosing the method in which it measures the length of its courses. However, if it chooses to convert from one method to another, it must maintain academic equivalences. The March 1979 Bulletin, as referenced in the report, clearly stated that if an institution currently measuring a program in clock hours were to convert that program to semester, trimester, or quarter hours, the program itself should still constitute the same portion of an academic year as it did under the previous method of measuring it.

This same theme is repeated in ED Ex. 1, page 7 wherein ED's Division of Audit and Program Review (APR) states:

> The Department does not preclude an institution from converting its programs from clock hours to credit hours if it is otherwise eligible to do so. However, ED has required that with a conversion, the quantity of education of that same program when measured in clock

> hours [must be maintained]. In addition, there must be some rational basis for the claimed number of credits, and the number of credits claimed for a program **must be reasonable.** These conditions did not exist with the institution's conversion.

Again in OSFA's initial brief dated February 19, 1992, at page 15, it is stated that ATC's conversion to semester hours "was on its face excessive . . .." And, again in its reply brief dated April 16, 1962, OSFA says at pages 3 and 4 as follows:

> Associated argues that OSFA has imposed a "rule of equivalence" in the Final Audit Determination that has no basis in regulation or statute, thus requiring reversal of the determination. Associated Brief, at 54-75. Contrary to Associated's lengthy arguments, the Final Audit Determination does have a regulatory foundation, and is not "ultra vires" as Associated suggests.
>
> As established in OSFA's opening brief, the Student Assistance General Provisions found in 34 C.F.R. Part 668 establish alternative, equivalent definitions for an academic year:
>
> > Academic year: (a) A period of time in which a full-time student is expected to complete the equivalent of at least two semesters, two trimesters or three quarters at an institution which measures academic progress in credit hours and uses a semester, trimester or quarter system;
> >
> > (b) A period of time in which a full-time student is expected to complete at least 24 semester hours or 36 quarter hours at an institution which measures academic progress in credit hours but does not use a semester, trimester or quarter system; or
> >
> > (c) At least 900 clock hours at an institution which measures an institution in clock hours.34 C.F.R. § 668.2 (emphasis in original). The equivalence of 900 clock hours and 24 semester hours is also maintained in a parallel definition of "One year training program." Id.

> OSFA further *** [observes that if] a student is not enrolled on a full-time basis during an academic year, then the student may only receive a proportional grant. 20 U.S.C. § 1070a(b)(2)(B). Prior to conversion, students at Associated received only partial grants based on the clock hour definition of an academic year.
>
> The definitions [OSFA contends] establish that academic years, however defined, should be equivalent. The amount of a Pell Grant should not vary, and cannot vary under the Higher Education Act, depending on which manner of measurement is used. The Secretary in his comments to the 1986 promulgation of the definitions in the Student Assistance General Provisions [according to OSFA] specifically rejected the contentions advanced by Associated. 51 F.R. 41920, at 41927 (Nov. 19, 1986).
>
> > In comments to the definition of "one year training program:
> >
> > . . . Several commenters questioned the validity of equating 900 clock hours with 24 semester hours.
> >
> > Response: No change has been made. The Secretary believes that 900 clock hours is the appropriate equivalent to two semesters, two trimesters, or three quarters. [The Secretary went on to demonstrate the calculation of the equivalence.]
>
> Id., at column 1 (emphasis added). The Secretary thus [according to OSFA] expressly recognized the equivalence of the definitions and upheld the validity of that equivalence.

Notwithstanding any of the foregoing, ATC establishes that its semester hour courses are correctly designated at 24 hours or more. Expert evaluations by NATTS and by an expert engaged by ATC confirm this and such evidence is not rebutted in any manner by any OSFA expert opinion. At most, ED has an argument that notwithstanding pre-existing course content, an "absolute" requirement of quantitative equivalence, without change in course content, applies

to conversions from clock hours to credit hours. Under such a view, ATC is in violation of an immutable ED requirement of equivalence. "Ipse dixit," with no change in course content, from pre to post conversion, the percentage amount of Pell Grant awards cannot be altered.

Although not without initial difficulty, I reject this asserted ED requirement as totally unfounded. Certainly, OSFA and ED must be given the greatest amount of discretion in the administration of Pell Grant funds, at least vis-a-vis schools which have a fiduciary responsibility in the co-administration with ED of Pell Grants.

However, OSFA's arguments are unsupported by the language of the regulations. ED's regulations by their terms do not require that ATC assign credit hours to its programs in such a way that the relationship of 24 semester hours to 900 clock hours is maintained. Instead, the regulations permit ATC to choose its method of measuring its programs, so long as it satisfies one of the alternative regulatory minimums. While OSFA may wish that ED's regulations were different, they are not and cannot be enforced as if they were. Simply stated, the regulations do not now nor have they ever supported OSFA's assertion that ATC overawarded Pell Grant funds to students based on its assignment of credit hours to its programs.

Indeed, ED itself has recognized that the basic procedure for regulating the assignment of credit hours to academic programs is

through the issuance of formal regulations and oversight of accrediting agencies. Insofar as rulemaking is involved, notice and public comment are essential. For example, in a November 19, 1984 letter to ATC's accrediting agency, NATTS, ED declined to provide comments on a paper presented by the proprietary accrediting associations concerning the clock hour conversion issue, stating as follows:

> As Dr. Kimberling and Dr. Brown mentioned in their letter of October 18, we have concluded that a blanket statement on clock hour conversions should not be issued at this time. This is a complex issue at this time. This is a complex issue involving a number of fundamental principles concerning the relationship of the Department and participating institutions. We want to avoid undue Federal intrusion into institutional affairs; yet we must also remember our primary role of stewardship of Federal tax dollars.
>
> Thus, we believe the proper forum for discussion of the clock hour conversion issue is the notice of proposed rulemaking (NPRM) procedure in which all institutions, students, other interested constituencies, and the general public are provided an opportunity to comment on the topic.

(Exhibit 4-1). Letter from Edward M. Elmendorf, Assistant Secretary for Postsecondary Education, U.S. Department of Education, to Ms. Donna Lumia, NATTS (Nov. 19, 1984). Thus, ED itself has recognized the necessity to address the clock hour to credit hour "conversion" issue within the rulemaking procedures established by the Administrative Procedure Act. Also see Declaration of Ernest Canellos, then Acting Deputy Assistant Secretary for OSFA. (Exhibit 5).

Clearly, a retroactive application of a rule of equivalence cannot be applied. First of all, as noted ED has not formally adopted a rule of equivalence through a Federal Register or other notification process. In fact, ED abandoned a 1990 proposal to establish such a rule. Moreover, ATC followed all ED procedures in effecting its conversion from clock hours to credit hours. ED was fully informed of ATC's efforts. The State of California approved ATC's conversion; NATTS, ED's accrediting agent, after an in depth examination, approved ATC's conversion; ED, itself pre-conversion, approved ATC's conversion; NATTS post conversion, again approved ATC's programs; ED itself, post conversion expressly approved ATC's handling of Pell Grants after a February 1987 audit.

A due process issue is directly presented. ATC had a "safe harbor" on account of its procedural and substantive dedication toward covering all "bases." With its fiduciary duty toward Federal funds, there is no reason to give the school the benefit of any doubt. Nonetheless, ATC carefully followed all of ED's rules. Reasonably such conduct spares ATC from repayment of the sought $6,000,000 with interest, plus, no doubt Pell funds awarded after the audit period. Most likely, the collection of the total amount would be terminal for ATC. Beyond this there is evidence that ED itself grants "Safe Harbor" to schools such as ATC which follow ED rules. As noted, ATC followed all existing rules of ED and at all times ATC acted in accordance with the instruction of ED.

OSFA and the Regional IG rely upon a March 1979 ED Bulletin. Indeed, the bulletin provides the basic predicate for RIG action. The San Francisco IG said that "The March 1979 Bulletin, as referenced in the report, clearly stated that if an institution currently measuring a program in clock hours were to convert that program to semester . . . hours the program itself should still constitute the same portion of an academic year as it did under the previous method of measuring it." Stated differently, according to RIG, ED's 1979 Bulletin provided that full Pell Grants to students are prohibited in circumstances where a credit hour program of less than 900 hours is converted unchanged to a semester hour program of 24 or more hours.

In this regard, RIG, APR and OSFA espouse a policy position taken in 1979, but abandoned in 1981. Such a return to 1979 policy, if proper, cannot be taken where appropriate preliminary procedures are not followed. Unfortunately, no action of any kind directed toward readoption of the 1979 policy is shown to have been taken by ED.

On October 16, 1981, as reflected in Exhibit R-8-1 and 2, ED's OSFA disavowed the March 1979 BSFA Bulletin. Instead, as reflected in Exhibit R-6-1, ED took a directly contrary policy position in 1981 as follows:

> Concerning the issue raised in Region IX's memo of May 29, 1981, our position is that the Department of Education presently has no authority to tell an institution how it should measure progress. Rather, an institution's accrediting agency should oversee such

> decisions. For an expanded explanation of our position, we are attaching to this memo a copy of a letter dated January 21, 1981 to Mr. William Goddard. As indicated in that letter, it is imperative that the accrediting agencies use adequate review procedures and make realistic decisions in their determination in these areas. If the accrediting agencies are found to be lacking in their decisions in this area, we will have to reassess our position. However, at the present time, the "Goddard letter" represents our position on conversion from clock hours to credit hours.

As to the "Goddard letter" itself, Exhibit R-6-3, James Moore, ED's Director, Division of Policy and Program Development wrote to William Goddard of NATTS in 1981 saying in pertinent part:

> In view of these arguments then, we have reassessed our position on acceptable conversion methods. If the accrediting agency of a particular school allows that school to convert from clock hours to credit hours on the basis of the aforementioned conversion table, the conversion will be acceptable to the Basic Grant Program. Needless to say, it is imperative that adequate review procedures be used by the accrediting agencies in making determinations related to conversions from clock hours to credit hours.

In passing, it must be noted that the "Goddard letter" also spoke approvingly of a conversion method of one hour of classroom lecture per week for 15 full weeks or two hours of laboratory experience per week for 15 full weeks. However, no absolute standard for conversion was adopted as is apparent from Exhibit R-8-2 wherein on October 16, 1981, ED's Chief Policy Section Basic Grant Branch stated:

> Therefore, the Office of Student Financial Assistance has reassessed its position on acceptable conversion methods. If the accrediting agency of a particular school allows that school to convert from clock hours to credit hours on the basis of the aforementioned conversion table, the conversion will be acceptable to the Basic Grant Program.

> Other accrediting agencies may develop different conversion standards but needless to say, it is imperative that adequate review procedures be used by the accrediting agencies in making determinations related to conversions from clock hours to credit hours.

Further, on September 10, 1982, ED's Policy Section, as reflected in Exhibit R-11-1 said "We leave the determination up to the institution on how they award credits . . . as long as the institution's accrediting agency approves of the method."

Even while rejecting the 1979 BSFA Bulletin, ED continued to study the matter of conversion from clock hours to credit hours, and eventually established a moratorium on conversions pending adoption of certain formal rules. However, the moratorium was abandoned by ED in 1986. Although rules on the subjects of clock hours and semester hours were affirmed, it basically was the conclusion of the Secretary of Education in 1986 that the existing regulations need not be modified. In so doing, there absolutely was no indication that the Secretary resurrected the 1979 BSFA Bulletin. Instead, the Secretary reaffirmed the rationale of placing reliance on the accrediting agencies. Of course as must be emphasized, accrediting agencies still are subject to strict ED oversight.

Again as stated herein above, in 1990, the Secretary revisited the subject of conversion with a proposed new rule. However, that proposed rule has not been adopted and in modified form is the current subject of negotiated rulemaking by ED and various educational groups. Clearly, the 1990 proposed rule does not

govern the outcome of this matter, except that it is proof that at present ED does not have rigid quanitative rules for conversions from clock hours to semester hours.

More specifically on October 1, 1990, ED issued a Notice of Proposed Rulemaking (NPRM) proposing a formula for converting clock hours to credit hours by equating 37.5 clock hours to one semester hour. 55 Fed. Reg. 40,150 (Oct. 1, 1990). That NPRM specifically referred to the formula as a "proposed formula" and did not purport to assert that such a formula was previously mandatory, because, of course, it was not. Indeed, the NPRM acknowledged that ED believed it important to propose specific conversion regulations because of the limited success of its previous attempts to address this area through institutional self-regulation, accrediting agency standards, and existing State laws. In addition, the fact that ED proposed this specific conversion formula establishes that there is no legitimate rationale supporting the attempt by RIG and OSFA to regulate in the area through the use of the non-binding guidance. And, of course, at this time the proposed rules is the subject of study by a committee created by ED.

Also, with respect to the earlier 1986 rules action of ED, which essentially was a codification of existing standards, ED rejected a rule of equivalence. In a November 19, 1986 Federal Register Notice, ED, in responding to a question concerning whether one semester credit hour must be the equivalent of 37.5 clock hours, stated that it was rejecting the principle that clock hours

and credit hours must be equated. ED instead affirmed the regulatory framework which permits an institution to choose between the alternative definitions of academic year. Ed summarized its position as follows:

> Comment: Another commenter asked if the regulations imply that for vocational schools one quarter credit is the equivalent of 25 clock hours or that one semester credit is the equivalent to 37.5 clock hours.
>
> Response: No change has been made. The minimum program length for vocational schools are based on the regulatory definition of an academic year, not on a comparison of credit and clock hours.

51 Fed. Reg. 41,927. Thus, ED emphasized, during the period covered by this Final Audit Determination or FAD that complying with the definition of academic year is what is important, and not any rigid comparison of clock and credit hours. OSFA's reliance on the 1986 ED rules action therefore also is misplaced.

Coupled with the 1986 action of the Secretary lifting the moratorium on conversions, NATTS took action in 1986 as reflected in Exhibit R-2-55-59 to formally adopt certain generally recognized educational standards, among them the following:

> Program -- The complete body of prescribed subjects or studies to prepare students for gainful employment in a recognized vocation, occupation or profession leading to a certificate, diploma or degree.
>
> Course -- A coherent unit of learning that is an integral part of a program.
>
> Clock hour -- A period of sixty (60) minutes with a minimum of fifty (50) minutes of instruction.

> Credit hour -- One semester credit awarded for each 15 clock hours of lecture, 30 clock hours of laboratory, 40 clock hours of externship and 45 hours of shop; or one quarter credit awarded for each 10 clock hours of lecture, 20 clock hours of laboratory, 26 clock hours of externship and 30 clock hours of shop.
>
> Lecture -- Presentation of theory and information by an instructor in a classroom setting or its equivalent, including discussion, testing and use of audio-visual materials.
>
> Laboratory -- application of theory through learner-centered training with instructor present, supplemented by out-of-class assignments.

Based upon those standards including a complete multiple person on-site review and exacting follow-up reviews, NATTS approved the conversion of ATC.

ED has established a so-called "safe harbor" for past actions. If a school fully acts in the manner instructed by OSFA, there will be no penalty for such past action if OSFA subsequently decides to change a policy direction. Exhibit R-5 reflects that fact. Here it also must be kept in mind that ATC was subject to an examination or audit in 1987 wherein the subject of full Pell Grants was investigated and retroactive full payment was authorized to "students."

Oral Argument

At the oral argument OSFA raised a make-weight argument that ATC was not in compliance with NATTS guidelines at the time of conversion. The five disputed courses of ATC consist of two semesters, each 13 weeks in duration. OSFA argues that NATTS allowed one unit of credit for one hour of classroom or two hours

of laboratory or two hours of laboratory experience per week for 15 full weeks. OSFA, thus, argues that the courses of ATC are deficient because they are 13 weeks per semester not 15 weeks. However, the statement of OSFA is incorrect. NATTS provided for one semester credit hour for each 15 hours of lecture at the time of conversion. There was no requirement for 15 full weeks as opposed to 13.

The courses of ATC are broken down to at least 325 hours of lecture. Also, none has more than 325 hours of lab. All are assigned 27 or more credit hours, at least three hours in excess of that required for a full academic year. Twenty-six weeks into 325, produces 12.5 classroom hours per week. For purposes of argument, one can examine the situation that would exist if the same total number of classroom hours were retained but spread out over four more weeks. Thirty into 325 produces 10.1 classroom hours per week. There is no actual increase in classroom hours, simply the students goes to school four more weeks but not as often during any particular week. At the rate of one unit of credit per 15 weeks or two units of credit for one hour of classroom for 30 full weeks, ATC students would accumulate 20 hours of credit for their classroom work alone. The addition of credits for lab work would place them well over the required 24 credits for an academic year. It thus appears that the OSFA argument about the asserted need for a 15 week semester and a 30 week academic year cannot withstand analysis.

As stated, NATTS' applicable standard for conversion simply is that one semester credit unit may be awarded for each 15 clock hours of lecture or for each 30 clock hours of laboratory experience. This test is more than met by ATC.

Not even the RIG offered this silly post hoc OSFA argument.

The Regional IG, however, did create an imaginary or mooted scenario of his own as follows:

> For example, one of ATC's Medical Assistance courses consisted of 390 lecture hours and 260 laboratory hours. Therefore, under ATC's representations, a student would be required to attend 650 hours of class and devote 780 hours of outside preparation for the 390 lecture hours and 130 hours of outside preparation for the 2160 laboratory hours, a total of 1,560 hours. Since the program is intended to be completed in 26 weeks, the average student is expected to spend about 60 hours a week. We consider it unreasonable to expect students to spend 60 hours per week for a six-month period. See ED Ex. 2, pages 6 and 7.

RIG is factually incorrect. Attached as an appendix is a course description at the time of conversion. Also, if RIG is speaking in gualitative terms, it is out of its expertise. RIG could have employed educational experts to evaluate the qualitative nature of AJC's programs but did not. Moreover, during the audit period, ATC's programs generally were broken down evenly between laboratory and lecture (325 hours each) resulting in at least 27 credit hours for a 650 clock hour program. Indeed, the course which RIG condemns either is that for Medical Assistant/Emergency Medical Technician or Medical Assistant Cardiac Technician. Sixty hours of student investment a week including

homework may be entirely reasonable. Furthermore, Exhibits R-2-42, R-2-43 and R-2-49 establish that, at the time of conversion, the class hours and lab hours for these courses were evenly divided at 325 hours a piece and that student investment would be less than 60 hours a week, even though there also were 32 hours of Internship for mandatory ambulance Ride-A-Long for one program, making a total of 682 hours for the emergency medical technician course. Simply, RIG failed to exercise any opportunity for qualitative review of the course content of ATC as it existed at the time of conversion or at any other time and is factually incorrect in terms of the quanitative aspects of the ATC programs as they existed at the time of conversion. Furthermore, the quanitative aspects of the ATC conversion were not prohibited by any ED rule or policy. Rig objects to the qualitative aspects of ATC's program, in that the courses were not changed. In this regard, I understand that ED is prohibited from establishing requirements for the qualitative aspects of a school's programs. However, ED certainly is as free as ATC to use experts to make individual evaluations of programs thought to be an abuse of fiduciary duty. It did do so. Indeed, even in quanitative terms, RIG fails to establish that it has any expertise. On this record, RIG offers nothing other than lay opinion.

Upon review of the entire record, I find a stunning abuse of discretion by the RIG. There is absolutely nothing to support the travail to which ATC has been subjected. The linchpin of the

adverse findings of RIG is the March 1979 BSFA Bulletin which was repudiated by ED in 1981. Apart from that erroneous RIG finding, there is nothing which undermines the proper reliance of ATC upon the multiple conversion approvals granted by ED and NATTS.

Before closing, a few additional comments are warranted concerning the FAD of APR and the initial brief of OSFA. These two cite the repudiated March 1979 BSFA Bulletin. As well, the FAD is loaded with verbiage carried forward from RIG's report. For example, the imaginary or moot scenario of RIG concerning the ATC Medical Assistance Courses is blindly adopted at pages 5 and 7 of the FAD.

In its initial brief, OSFA assigns the egregious findings of RIG and APR concerning the repudiated March 1979 BSFA Bulletin to a footnote. (See footnote 2 of the brief.) Basically, OSFA presently argues that even though the Secretary has not adopted a rule which bars the conversion accomplished by ATC with multiple full approvals by both ED and NATTS, the conversion nonetheless was per se unreasonable.

However, as previously laboriously explained, the existing rules of ED are designed to commit the conversion process to authorized accrediting agencies which in turn are subject to strict controls by ED.

The correctness of ATC's position in this regard is underscored by reference to the RIG's workpapers in this case. Those workpapers establish that ED's own Office of General Counsel

does not believe that ED's regulations establish that 900 clock hours necessarily must equal 24 semester hours. Specifically, the workpapers state at B-18.4:

> He [an RIG auditor] insisted that the regulations are explicitly stated: 900 clock hours = 24 semester hours, and the audit should show this noncompliance. This is contrary to the Office of General Council [sic] (OGC), where the emphasis emphasis [sic] is excessive and unreasonable credit hours based on the conversion. ...

A further bar to the obvious death sentence upon ATC proposed by RIG exists in the terms of ATC's Program Participation Agreements with the Secretary. This is so because in certifying institutions to participate in the Title IV student financial assistance programs, the Secretary expressly limits the obligation of institutions to compliance with all applicable "statutes and implementing regulations." The standard Program Participation Agreement entered into between ATC and ED provides protection for ATC except as there may be a violation of fiduciary duty. Here there was no such violation.

It is stated earlier herein that ED may use experts on the subject of qualitative educational context for enforcement purposes.

It is true that under law:

> No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the

> selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. § 1232a.

However, in adversarial cases ED is free to strike down fraud, waste and abuse of its programs through the utilization of educational experts on an equal basis with educational institutions. Here APR and RIG fail to use potential resources and instead rely upon ispe dixit, which cannot pass. Of course, for policy, budgetary or other reasons, ED may decline to use available educational resources. Instead, ED , if it chooses, may strengthen its control over accrediting agencies. In any event, there is no evidence, rule or law which supports the action RIG and APR in this program review.

The Webster Case

I asked for a brief analysis of the similarities and dissimilarities between the instant case and an Initial Decision in Webster Career College, Docket No. 91-39-SP ("Webster"), appeal filed November 18, 1992. Dissimilarities between the two cases are extensive. The principal categories of dissimilarity are the materially different documentary records and the fact that several very important legal issues need to be resolved in the instant case which are not addressed in Webster.

With respect to the record, in Webster a number of exhibits apparently were excluded from consideration. I do not know which exhibits were excluded or how the Webster decision would have been affected had those documents not been excluded. However, apparently there are documents which were included in the record in Webster that clearly affected how that case was decided which are not part of the record in the instant case. By the same token, there are items in the record of the instant case that were not part of the record in Wester. Among other things, included in the record in the instant case is the opinion of an independent expert, Dr. Gary Ballmann, regarding the qualitative value and nature of the programs of ATC when measured in credits (Exhibit R-3-1-6). His analysis establishes that credits awarded for ATC's programs are reasonable for the training provided. No such independent expert opinion is referenced in Webster.

In Webster the initial decision (at 10-11) cites and relies on a March 1979 Bureau of Student Financial Assistance Bulletin. That document is not part of the record in the instant case but is cited herein by RIG, APR and OSFA. In the instant case, Exhibit R-6-1-4, dated July 1981, unequivocally establishes that the guidance in the 1979 BSFA Bulletin is superceded as of 1981. In addition, in Webster, the initial decision finds, in part, that in approving Webster's conversion from clock to credit hours, Webster's accrediting agency, the Association of Independent Colleges and Schools or AICS did not properly perform the conversion. No such

allegation of improper performance is made in the instant case. Rather, the allegation made by RIG is that ATC's accrediting agency did not use a fixed quanitative formula. (Exhibit R-13-6). Therefore, another material dissimilarity between the two cases is that the propriety of the conversion approval process by NATTS, ATC's accrediting agency is not in issue.

In this regard, an additional factual dissimilarity is that ATC's accrediting agency, NATTS, did a thorough reaccreditation review of ATC both before and after it approved ATC's conversion from clock to credit hours. These reviews included an independent and separate validation of the amount of credit hours assigned by ATC to its programs. See Exhibit R-2-9-11.

It is significant that ED did not discover "these improper conversions" in Webster (at 19) until the RIG audit which is the subject of Webster. By way of contrast, in the instant case, a program review was conducted by ED shortly after the conversion. In issuing its program review report, ED's program reviewers specifically approved the conversion, including the resulting increase in the amount of Pell grants payable to ATC's students, retroactive to July 1, 1986. (Exhibit R-9-7).

Furthermore, the Webster decision seems to be materially affected by a finding of affirmative misconduct of Webster in its dealings both with its own accrediting agency as well as with ED. For example, the record in Webster reflects that fines had been assessed against Webster at least twice, that Webster paid those

fines (at 19, n.12), and that Webster refused to provide ED with a management representation letter (at 21, n.14). All of these factors negatively reflect on the bona fides of Webster and its representatives. No such issues exist in the instant case.

In a related issue, critical to the ultimate decision in Webster, is RIG's allegation that ED approved the clock to credit hour conversion of Webster "under false pretenses" (at 26). In the instant case, ATC, without contradiction, shows that ED had full and complete information regarding all aspects of ATC's conversion, which is another factor making the instant case materially dissimilar from Webster.

Also in Webster it is found that "based on the evidence, ED is not estopped from asserting a claim against [Webster] for improper conversion," which finding is based on a conclusion that ED did not learn until the RIG audit "that the actual procedures AICS used in approving [Webster's] conversion of its clock hours into semester hours did not support AICS' policy as expressed in its manuals and other documents" (at 38). No such allegation or issue exists in the instant cases.

In Webster several other important considerations that are pivotal to a decision in the instant case are not addressed. Specifically, Webster does not address the argument that the General Education Provisions Act prohibits regulations from above by ED in the area of qualitative assignment of credits to an institution's programs. Qualitative regulation by ED is one

matter. Oversight of particular qualitative situations is another. Particularized attention to fraud, waste or abuse in the assignment of educational credits may be undertaken by ED through the use of educational experts. Here there is nothing to support ED's conclusions other than a rejected 1979 Bulletin.

Webster does not address in any detail the argument that RIG is attempting to utilize the provisions of a proposed regulation concerning clock/credit hour conversions retroactively to reach its result. Webster does note, however, with respect to the 1990 proposed regulation on clock to credit hour conversions "that one cannot violate a 'proposed' regulation that, in essence, doesn't exist . . . . " (at 43).

In addition, Webster does not address ATC's equal protection argument, that is, why are there not enforcement actions against many other converted schools if there is a strict rule of equivalence in achieving conversion from clock hour to semester hour. Only two cases, this one and Webster are cited by OSFA, both generated by the San Francisco RIG. I find this to be selective enforcement beyond coincidence.

Webster, as well, does not rule on ATC,s argument that, based on its Program Participation Agreement, ATC's obligations are limited to strict compliance with statutes and implementing regulations. ED as a government agency acting in the public interest is not subject in public matters to equity considerations such as laches or estoppel. However, the past actions of OSFA

establish that a new unpublished rule is proposed by RIG. Past conduct and opinions of OSFA and ED must be considered in determining whether there is a new policy or merely a lapse in enforcing an established policy. Here, there is no question that RIG seeks to establish a new policy which has been rejected continuously by ED since 1981.

In Webster, RIG fails to disclose that ED rejected the March 1979 BSFA Bulletin. As shown that Bulletin was superseded in 1981. Thus Webster does not address the legal issues raised by ATC in this case and, as well, there are numerous factual differences as cited above.

Negotiating Committee On Clock Hour Conversions

Pursuant to a request of ATC and my order of December 21, 1992, the parties submitted comments concerning a recent ED "draft" of final regulations dealing with the previously mentioned Notice of Proposed Rulemaking on the issue of clock-to-credit hour conversions published in the Federal Register on October 1, 1990. This "draft" has not been signed by the Secretary of Education and does not represent a final position of ED with respect to the NPRM on the subject of clock-hour conversion.

The document is a starting point for negotiation presented by the Office of Postsecondary Education to the participants in negotiated rulemaking, which resumed on February 1, 1993.

OSFA says that the "draft" has no relevance. OSFA also says that the real issue in the present case is the past assignment by

ATC of credit hours to courses previously measured in clock hours, and not prospective changes in the regulations governing student financial assistance programs. OSFA notes that changing the measuring label--and nothing else about its program offerings, ATC increased the maximum Pell Grant funding for its programs by 39 percent. OSFA says that such action is per se illegal and on its face contrary to ED rules. No such rule is identified, however. Thus, OSFA returns to the ipse dixit of RIG as the sole basis for upholding the FAD.

Attached as Appendix B are the comments of ATC upon the "draft." I agree with ATC that the action of RIG was ultra vires, and that the FAD must be reversed.

On account of all of the foregoing findings and conclusions, the FAD is set aside. On this record, ATC has no repayment liability to ED. The proceeding is discontinued.

Paul S. Cross

By Paul S. Cross, Administrative Law Judge, on the 3rd day of February, 1993.