IN THE MATTER OF ASSOCIATED TECHNICAL COLLEGE,
Respondent.

Docket No. 91-112-SP
Student Financial Assistance Proceeding

DECISION

Associated Technical College (Associated) seeks to recover fees paid in defense of a Final Audit Determination in a Student Financial Assistance Proceeding (Proceeding) instituted by the Department of Education (ED) against Associated.

The jurisdictional right of Associated to fee reimbursement depends upon the applicability of the Equal Access to Justice Act (EAJA) to this Proceeding. EAJA applies only to proceedings subject to the Administrative Procedure Act (APA).

On July 23, 1992, the Higher Education Amendments of 1992 (HEA-July 92) terminated express APA application to a proceeding of the kind at hand. Conversely, the APA and EAJA expressly applied to this Proceeding prior to July 23, 1992.

There is a question whether HEA-July 92 is to be applied as a strict jurisdictional bar to any fee recovery by Associated.

The Federal government may be sued only as authorized by Congress. This is because under common law antecedents the Federal government cannot be sued without its consent. Congress, on July 23, 1993, having previously granted the Associated the right to sue, withdrew that right.

The Secretary of the United States Department of Education recognized the effect that HEA-July 92 might have on pending cases. The Secretary established a rule that mandates application of HEA July 92 to all pending cases except those where an oral hearing already was underway on July 23, 1992.

In this proceeding there was no oral hearing as such. There was an oral argument after July 23, 1992, but oral argument is not an oral hearing. ED rules, of course, say that an oral argument is an oral hearing but without sworn witnesses, cross-examination, hearing exhibits, underlying documents and so on, any claim that oral argument is the same as an oral hearing is incorrect. In any event, as noted above, the oral argument in this matter occurred after the passage of HEA-July 92.

As a general rule, new law is applied retroactively except as certain equitable factors come into play. Prejudice to a party is one such factor.

As to prejudice, such clearly is visited upon Respondent by non-application of EAJA. However, the same can be said of innocent respondents in proceedings of this kind arising after

July 23, 1992. That is, schools which presently enjoy use of Federal funds, can be unjustly accused by the Federal government, without any recourse by the school to EAJA. In my opinion the prejudice to Associated by application of HEA-July 92 to its claim for EAJA reimbursement is not one which results in "manifest" injustice. There are, of course, inhibitions against application of new law to pending cases where such results is "manifest.' injustice. I find none here.

Finally, I recognize that the exception created by the Secretary to the application of HEA-July 92 to pending cases is itself discriminatory. Oral hearings are held in fine and termination matters but not in final program review and final audit determination matters. Either class of proceeding can have a harsh effect upon a school.

In the instance of a program review or audit determination, all evidence is submitted well prior to any oral argument. Indeed, briefs also have been filed. Little remains to be done except the preparation of a decision by the presiding officer. In the instance of an oral hearing in a fine or termination matter, the compilation of the evidentiary record is just commencing. Posthearing briefs also may be filed. Thereafter, even oral argument might occur. Notwithstanding the disparity in the Secretary's treatment of the various categories of proceedings, there is a lawfully adopted ED rule which excludes application of EAJA to this Proceeding. As well, on the facts presented, I have no authority to engage in a collateral attack on ED rules.

I find that the fee request of Associated must be rejected for the reason that HEA-July 92 stands as a jurisdictional defense against any EAJA fee recovery by Associated.[1]

The fee application of Associated is dismissed.

Dated this 8th day of February, 1994.

Paul S. Cross

Administrative Law Judge
Office of Higher Education Appeals
U.S. Department of Education
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Washington, DC 20202-3644

[1] I do not reach non-jurisdictional substantive issues which include the financial worth of Associated and its owner, the point in time when fee liability upon ED would commence, when it would terminate and the allowable per hour fee amount. However, I do find that Regional Inspector General's Audit determination was substantially unjustified for the reason that while Associated followed all required procedures, obtained repeated ED approvals, obtained required accrediting approvals and submitted unrebutted expert evidence, the Inspector General submitted no evidence contrary to the affirmative and prompt showing of Associated. At best, RIG offered a presumption which was throughly rebutted by Associated.