In Re: MACOMB COMMUNITY COLLEGE,
Docket No. 91-80-SP
Student Financial Assistance Proceeding

Appearances: Leslie H. Wiesenfelder, Esq., Dow, Lohnes & Albertson, of Washington, D.C., for Macomb Community College.

Howard D. Sorensen, Esq., of Washington, D.C., Office of General Counsel, for the U.S. Department of Education.

Before: Judge Daniel R. Shell

DECISION

Background Information

On August 5, 1991, the United States Department of Education Office of Student Financial Assistance (OSFA) issued a preliminary department decision (PDD) demanding that Macomb Community College (Macomb) refund $G89, 761 to OSFA. On September 23, 1991, Macomb appealed the PDD and requested an administrative hearing. The parties stipulated that the relevant facts are not in issue. Macomb, in its initial brief, made clear that it:

does not contest the fact that ts failure to retain certain backup documentation resulted in its inability to document its original self-help calculations and is a violation of Title IV regulations.See footnote 1 *1*

Furthermore, in its initial brief, at 19, Macomb conceded that the effect of its "failure to retain the backup documentation was that its students received a . . . lareer share" of federal funds "than Macomb could subsequently document." The parties st pulated that "Macomb submitted to OSFA reconstructed grids verified by its auditors."See footnote 2 *2* Macomb was able to reconstruct much of the Title IV activity, but not all of it.

Based on the Income Grid reconstructed by Macomb, Macomb's substantiated allocation of funds totaled:

$66,516 for college work-study, $79,322 for Perkins loans, and $41,730 for SEOG for the 87/88 award year.

Macomb actually spent for the 87/88 award year:

$69,893 for college work-study, $250,000 for Perkins, and $157,436 for SEOG.See footnote 3 *3*

The total expenditure of funds for Macomb was $477,329 and the total substantiated allocation of Title IV funds was $187,568. Thus, the difference between the total funds allocated and the total expenditures equaled $289,751. The parties further stipulated that "[a]fter deducting

amounts actually expended by Macomb, the OSFA assessed liability of $3,377 for college wor.Ystudy, $170,578 for Perkins, and $115,706 for SEOG. The total assessment is $289,751."See footnote 4 *4* In Macomb's brief submitled February 6, 1992, counsel states: "The Grids were subsequently reconstructed by Macomb; however, because of its failure to retain the backup documentation the reconstruction of the Grids that Macomb could document decreased its proportion of the State of Michigan's so-cal'ed 'fair share' allocation of the campusbased funds by a total of $289,761." As a consequence, Macomb spent $289,761 of T-tle IV funds based upon an unsubstantiated calculation of its original self-help need.See footnote 5 *5* The parties agreed that Macomb's failure to maintain backup records of students who received Title IV funds during the 1986-87 award year violated the record keeping requirements of the program participation agreement and the regulatory requirements or 34 C.F.R. 674.19(b), 675.19(b), and 676.19(b)(1987).

Issue

Does Macomb's admission of a failure to keep records as required by the regulations and the program participation agreement cause Macomb to be liable to the Federal Government for $298,761? Accordingly, the only issue before the tribunal is an issue of law: whether, in a Subpart H proceeding, OSFA may recover Title IV funds from an institution that spent undocumented funds. According to Macomb, "[t]he critical question for the Administrative Law Judge presented by this case is what remeay is available to OSFA for that violation."See footnote 6 *6*

Arguments of Counsel

OSFA argues that since Macomb admitted it failed to retain backup documentation necessary to verify the accuracy of its application for campus-based Title IV funding for the 1987-88 award year, Macomb should, therefore, be ordered to make "restitution to the Department of Education" for the amout. stitulated.See footnote 7 *7*

Macomb argues that neither statutory nor regulatory authority exists for the recovery , Title IV funds for record keeping violations in Subpart H proceedings. In addition, Macomb urges that it "cannot be ordered to make restitution because neither the Secretary nor the Administrative Law Judge as equitable

powers."See footnote 8 *8*

Discussion

The discussion is divided into three parts: 1) the remedy sought by OSFA, 2) theory of recovery, and 3) damages.

Remedy Sought by OSFA

OSFA elected to bring this action under a Subpart H proceeding instead of a Subpart G proceeding. Subpart H differs from Subpart G proceedings in several procedural respects. The

relevant difference is that the remedies available to OSFA in Subpart H proceedings do not include the possibility of imposing a fine, termination, or limitation upon an institution who unsuccessfully appeais a PDD.See footnote 9 *9* The remedies available to OSFA in Subpart 5 are punitive in nature whereas the remedy available in Subpart H is an action to collect a debt which is civil in nature.See footnote 10 *10*

The Higher Education Act (HEA), 20 U.S.C. § 1070 et seq., provides authority for OSFA to recover Title IV funds misused by an institution. Section 487(c)(1) provides, in pertinent part: ". . . the Secretary is authorized to prescribe such regulations as may be necessary to provide for . . . a f inancial and compliance audit of an eligible institution, with regard to any funds obtained by it under this subchapter . . ."See footnote 11 *11*

In addition, Section 487(a)(3), 20 U.S.C. § 1094(a)(3), requires all eligible institutions to enter into a participation agreement. The participation agreement conditions the institutional eligibility for Title IV funds to a requirement of establishing and maintaining records for administrative and fiscal procedures as may be necessary to ensure proper and efficient administration of funds received from the Secretary.

Subpart H governs appeal procedures in cases, like this one, which arise from audit or program review determinations. The Subpart H regulations reveal that the Secretary of Education intended that an institution incur a debt to the Federal Government for the amount of funds misused.See footnote 12 *12* Under the statutory

authority of Section 487, the Secretary promulgatea C.F.R. § 68.123 which states: "To the extent that the decision of the Secretary sustains the final audit determination or final program review determination, ED[ucation] will take steps to collect the debt at issue or otherwise effect the determination that was the subject of the request for review." Moreover, the plain language of Section 668.24 provides OSFA with the right to recover funds which were improperly spent.See footnote 13 *13* Subpart H regulations and their statutory precursor substantiate OSFA's position that Congress did not preclude OSFA from bringing a recovery of funds action in a Subpart H proceeding. Consequently, in this action, it is not beyond the powers of this tribunal to permit OSFA to recover its monetary damages.

Theory for Recovery

In order for OSFA to recover, a recognized legal theory of recovery must form the basis for establishing on what grounds OSFA may obtain relief. That is to say, the recovery of fund. that OSFA seeks is based on the well settled principle that "there is a legal remedy for every legal wrong."See footnote 14 *14* Accordingly, OSFA's request for relief in this action under Subpart H is most appropriately based on a debt incurred as a resuit of a breach the participation agreement which requires record keeping as part of the administrative and fiscal procedures necessary for an audit.See footnote 15 *15* The basis of reccvery is found in contract theory.See footnote 16 *16*

A contract action is analogous to OSFA's current action for several reasons: 1) Macomb and OSFA are parties to a participation agreement;See footnote 17 *17* 2) each party recognizes obligations under the agreement; 3) Macomb admits its liability for breach of one of the terms of

the agreement by failing to keep records, and 4) OSFA precludes itself from enforcing a quasi-criminal or punitive penalty because of its election to bring this action in a Subpart H proceeding, instead of Subpart G of 34 C.F.R. Part 668.

Damages

Under any theory of recovery, once liability has been established, the party entitled to recover must prove it suffered damages as a result of the liability created.See footnote 18 *18* The basic concern in awarding damages is to assure that the party surfering the breach is compensated for his harm in cases where harm has been proven.See footnote 19 *19* "[P]ure speculation" as to damages is insufficient to prove harm or justify the award of compensatory damages.See footnote 20 *20* In other words, OSFA would need to prove damages in an action for the recovery of funds based on a breach of contract.

Macomb, reiying on a decision by Judge Alprin in United Talmudical Academy, U.S. Dep't of Education (September 17, 1987), urges that only a "misuse of Title IV funds" and not a technical record

keeping violation may "subject an institution to a repayment liability."See footnote 21 *21* Although Judge Alprin did hold as Macomb urges this tribunal to hold, United Talmudical arose under pre-Subpart H proceedings. Consequently, United Talmudical is not binding precedent on the issue of what remedies are available in Subpart H proceedings.See footnote 22 *22* More important, the logic of United Talmudical follows the holding of this case; namely, where OSFA has proven harm to the Federal interest as a result of the breach of contract, the institution becomes subject to a repayment liability enforceable by the Federal Government. Here, OSFA has shown a breach of contract by establishing ,facts to prove that Macomb failed to keep records to insure the proper administration of the federal funds.

The recognition of OSFA's authority to seek restitution or repayment of funds as a remedy is supported by caselaw. In Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985), the Court held that Kentucky's use of Title I funds to pay the costs of the basic education of students in Kentucky's "readiness" classes violated the Elementary and Secondary Education Act of 1965.See footnote 23 *23* The Court concluded that as a result of the statutory violation, Kentucky spent funds on a program for which it was not authorized and therefore "misused funds received under Title I." The Court recognized that in cases where the Federal interest had been harmed through the use of Federal funds, "recovery of the misused funds" is a permissible remedy for the Secretarv of Education.See footnote 24 *24*

If the Federal Government has been harmed by a party's misuse of Federal funds, the Federal Government is entitled to recover the misspent funds. In Bennett v. Kentucky Dep't of Educ., supra, the Court recognized that the recovery of misused Federal funds is "intended to promote compliance with the requirements of the grant program [and therefore,] a demand for repayment is more in the nature of an effort to collect upon a debt than a penal sanction."See footnote 25 *25* The court clearly fixes liability based upon contract theory. According to the Court, when a private party does not fulfill its assurances that it would abide by the terms and conditions of the

Federal program, "the Federal Government is entitled to recover amounts spent contrary to the terms" of the program.See footnote 26 *26*

Furthermore, whether you characterize Macomb's expenditure of Federal funds in excess of its documented allocation as a "misuse" of funds or a "harm" to the Federal Government for which the Federal Government may collect damages, the choice amounts to a distinction without a difference. The result is the same. In this case, Macomb's conduct resulted in the school receiving a larger share of Michigan's allocated Federal funds than it was entitled. Thus, Macomb's inability to substantiate its original self-help need Income Grid amounts to a "misuse" of funds and "harm" to the Federal Government.See footnote 27 *27*

In concluslon, the failure to keep records is the harm. The failure to keep records denied OSFA of the ability to verify the institution's original self-help need which is used ultimately determine Macomb's share of Federal funds allotted to Michigan. Since OSFA is denied access to records for verification of use, the only proper conclusion is to find against the institution r its failure to produce records which could substantiate its original Income Grids. The denial of verification is the damaae caused to the Federal Government and to OSFA. As noted supra, the conclusion, here, is not out of step with the Supreme Court. Furthermore, OSFA has often sought damages as a remedy in Subpart H proceedings.See footnote 28 *28*

Undoubtedly, the purposes of Title IV could easily be defeated if institutions could not be taken to task for failure to maintain records which could substantiate that an institution was entitled to the Federal funds that it was given.

OSFA makes clear that it seeks "restitution" as a form of relief.See footnote 29 *29* Macomb recognizes that "OSFA is not asserting a repayment liability but is seeking, in its own terminology, restitution."See footnote 30 *30* "Restitution" is a legal term of art used to denote the measure of damages that may be awarded in a contract action.See footnote 31 *31* It is one way to calculate damages and is only relevant after it is established that a party is liable for a breach of contract.

As proof of the amount of "harm", "misuse", or "damage caused," OSFA points to Macomb's admissions regarding its failure to keep records of fiscal administration. Further, Macomb admits that it breached its '387-88 participation agreement. Macomb has stipulated that restitution damages are set at $289,761. The record shows that Macomb failed to substantiate that it was entitled to $289,761 in campus-based Title IV funds. Consequently, the tribunal finds that OSFA has statutory and regulatory authority for its determination that Macomb must repay the Federal Government $289,761 in Title IV funds. The "lack of proper documentation" showing the correct allocation resulted in the expenditure of $289,761 in Title IV funds. Therefore, Macomb incurred a debt to the Federal Government for the amount of funds expended. Accordingly, it is proper for OSFA, as stated by the Supreme Court in Bennett v. Kentucky, supra," to recover amounts spent contrary to the terms" of the federal program and furthermore, to "take steps to collect the debt."See footnote 32 *32*

Order

The tribunal affirms OSFA's preliminary department decision that Macomb Community College

must repay the Department of Education $289,761.

Pursuant to 34 C.F.R. 668.119, the 30 day period for appeal of this decision to the Secretary commences on the date of receipt of a copy of the initial decision delivered by certified mail to the counsel of record for Macomb Community College, Leslie H. Wiesenfelder and counsel of record for U.S. Department of Education, Office of Student Financial Assistance, Howard Sorensen.

Issued: May 5, 1993
Washington, D.C. Daniel R.S hell
Administrative Law Judge

Footnote: 1 *1 Id. at 17.*

Footnote: 2 *2 Joint Stipulation, number 9, submitted February 13, 1992.*

Footnote: 3 *3 Joint Stipulations of Fact paras. 12, 13.*

Footnote: 4 *4 Id., number 13, at 6.*

Footnote: 5 *5 See ED Ex. 8 at 1, Original Income Grids.*

Footnote: 6 *6 Macomb initial brief at 17.*

Footnote: 7 *7 OSFA Initial Br. at 2.*

Footnote: 8 *8 Macomb Initial Br. at 18. Macomb's argument on equitable powers is unclear. Deciding whether the Secretary or all administrative law judge has equitable powers is nelther relevant to nor within the scope of this proceeding. The usual remedies for a breach of contract are specific performance or money damages; monetary damages is a remedy at law not in equity*

Footnote: 9 *9 See 34 C.F.R. §§ 668.92, 668.93, 668.94 and 668.95.*

Footnote: 10 *10 See, e.q., In re Electronic College & Computer Proaramming, Dkt. No. 91-7-ST, United States Dep't of Education (July 10, 1992)(Decision of the Secretary) at 2, 4.*

Footnote: 11 *11 20 U.S.C. § 1094(C)(1)*

Footnote: 12 *12 See also 3 4 C.F.R. § 690.79(a)(2)(noting that instituticns are liable for any overpayment of Pell Grants when the overpayment is the result of the institutions failure "to follow procedures set forth" in the Pell Grant program reaulations); 34 C.F.R. § 676.14(d) (2)*

(noting overpavment liability for SEOG program) and 34 C.F.R. § 675.14(a)(prohibiting overawards in (CWS program).

Footnote: 13 *13 Section 668.24 provides, in pertinent part:*

(a)(1) If, as a result of a Federal audit . . . the Education Department's Inspector General questions an expenditure or the institution's compliance with an applicable requirement (including the lack of proper documentation) [and] . . . . (b)(3) If the institution is found to have expended funds improperly under the proceedings established in subpart H, the institution shall repay those funds witnin 30 days of a final determination under subpart H unless the Secretary permits a longer repayment period.

Footnote: 14 *14 AMC/Jeep of Vero Reach, Inc. v. Funston, 403 So.2d 602, 605 (Fla. Dist. Ct. App. 1989).*

Footnote: 15 *15 Notably, a theory of recovery based on tort law is not the appropriate legal basis for the recovery of funds. Recovery in tort requires OSFA to show a duty on the part of the school which was intentionally or negligently breached. Whereas, recovery under contract theory merely requires proof of the contract and a breach of one of the terms by the institution. Here, the record indicates that Macomb has a requirement under the terms of the participation agreement, mandated by the statute, to maintain records to document Title IV fund activity.*

Footnote: 16 *16 This becomes patently obvious in footnote 9 of OSFA's initial brief, where OSFA expresses its intent to obtain relief on the basis of contract theory. In footnote 9, OSFA states that it is "entitled to recover the value of the specified funds as its damages for Macomb's breach of contract" as a result of Macomb being a signatory to a participation agreement with the Department of Education.*

Footnote: 17 *17 A participation agreement conditions the initial and continued eligibility of the institution to participate in Title IV programs upon compliance with the agreement and the program regulations. 34 C.F.R. § 668.12(b)(1). 34 C.F.R. § 668.12 (b)(2)(i) requires Macomb to agree that it will: "comply with the statutory and regulatory requirements applicable to the Title IV, HEA programs, including the requirement that it will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program."*

Footnote: 18 *18 Taylor v. Kaufhold, 84 A.2d 347 (Pa. i951). See also Restatement of Contracts § 330 (1981).*

Footnote: 19 *19 Under the well settled Hadley v. Baxendale rule, damages may be awarded for harm that is foreseeable or within the contemplation of the parties and which is caused by the breach of contract. Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1845). See also Redgrave v. BSO, 602 F. Supp. 1189, 1196 (D. Mass. 1986).*

Footnote: 20 *20 Mellon Bank v. AETNA Business Credit, Inc., 500 F. Supp. 1312, 1319 (W.D. Pa. 1980). The breach of the contract must be the "but for" cause of the injury. 5 Corbin on Contracts § 999 (1964).*

Footnote: 21 *21 Macomb Initial Br. at 20.*

Footnote: 22 *22 See United Talmudical at 12n.19. Although Macomb relies on United Talmudical, the school acknowledged during the hearing for this case that the regulations governing Subpart H proceedings were not in effect when United Talmudical was decided.*

Footnote: 23 *23 Id. at 1553.*

Footnote: 24 *24 Id. at 1548-1550.*

Footnote: 25 *25 470 U.S. 656, 105 S. Ct. 1544, 1549 (1985).*

Footnote: 26 *26 Kentucky, 105 S. Ct. at 1549; Bell v. New Jersey & Pennsylvania, 461 U.S. 773, 103 S. Ct. 2187 (1983); Tanqipahca Parish School Board v. U.S., 821 F.2d 1022 (5th Cir. 1987). Nor is it of any consequence when parties agree to the amount of misused funds. As the Supreme Court has made clear, the Federal Government is not limited to recovering funds that are "specifically identified" or "proscribed in advance." Kentucky, 105 S. Ct. at 1550. That is to say, in determining the amount damages, mathematical accuracy of proof is not required. National Merchandisinq Corp. v. Leyden, 348 N.E.2d 771, 774 (Mass. 1976). Institutions that choose to participate in Title IV programs agree to abide by the requirements of Title IV programs as a condition for receiving Federal funds. Consequently, agencies are free to negotiate or compromise the amount of funds reccvered.*

Footnote: 27 *27 The tribunal aeclines Maccmb's invitation to adopt its narrow definition of "harm." At the hearing in this case, Maccmb urged that since the $289,761 that OSFA now seeks would have been spent regardless of Macomb's conduct, the Federal Government has suffered no monetary harm. This cannot be so. Macomb's position fails to recognize that although Macomb's unsubstantiated Inccme Grids may not lead directly to a decrease in Federal expenditures, the unsubstantiated Grids demonstrate that Maccmb ultimately received more than its permissible share of Michigan's allotment of campus-based Title IV funds.*

In addition, appeal proceedings under the General Educati n Provision Act (GEPA), 20 U.S.C. 1221e -3(a)(1), 1234 et seq.,provide for an analogous recovery of funds proceeding. In. the GEPA implementing regulation, Education is permitted to recover funds "to the extent of the harm" caused to an identifiable federal interest. 34 C.F.R. § 81.22(a)(1). An identifiable federal interest includes "providing only authorizied services" and preserving the "integrity of planning, application, record keepinq, and reporting requirements." (emphasis added) 3 C.F.R. § 81.22(a)(2)(ii) and (iv).

Footnote: 28 *28 See, e.q., In the matter of Berk Trade and Business School, Dkt. No. 91-5-SP, U.S. Dep't of Education (December 10, 1992 Judge Cook)(school ordered to repay $42,040.89 in*

Title IV funds); In the matter of Garces Commercial College, Dkt. No. 9223-SP, U.S. Dep't of Education (November 25, 1992 Judge Shell)(school ordered to repay $702,704 in Title IV funds); In the matter of French Fashion Academy, Dkt. No. 89-12-S, U.S. Dep't of Education (March 30, 1990 Decision of the Secretary)(school ordered to repay $356,702 in Title IV funds); In the matter of Temple University, Dct. No. 89-26-S, U.S. Dep't of Education (March 13, 1990 Judge Lewis)(school ordered to repav $169,208 in Title IV funds). See also Bell v. New ,Jersev, 461 U.S. 773, 783 (1983)(collecting Title I cases wherein Education sought the recovery of funds under an analogous administrative proceeding).

Footnote: 29 *29 OSFA Initial Br. at 2.*

Footnote: 30 *30 Macomb Initial Br. at 16.*

Footnote: 31 *31Second Restatement of Contracts 371(a) (1981); 2 Samuel Williston, A Treatise on the Taw of Contracts 142 (3d ed. 1961). Restitution also denotes a measure of damages in suits brought in quasi-contract. An excursion into the law of remedies in quasicontract, however, would be far off the mark in this case because the contractual relationship between the parties is both uncontested and well established. See,e.q., Kentuckv, 105 S. Ct. at 1552.*

Footnote: 32 *32 34 C.F.R. § 668.24 and 668.123.*