

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

IN THE MATTER OF
AMARILLO WEST TEXAS BARBER
STYLING COLLEGE,

Respondent.

Docket No. 91-90-SA

Student Financial
Assistance Proceeding

DECISION

Appearances:

John W. Reeder, Esq., Garner, Stone, & Lovell, P.C. of Texas, for Amarillo West Texas Barber Styling College.

Howard D. Sorensen, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before:

Judge Richard F. O'Hair.

BACKGROUND

On September 19, 1991, the Office of Student Financial Assistance Programs (SFAP) 1 issued a **final program determination** finding that from September 4, 1989, through July 24, 1990, Amarillo West Texas Barber Styling College, Inc. (Barber College) 2 improperly disbursed to its students \$21,060 in Pell Grant funds, \$5,075 in SEOG funds, and \$19,911 in Stafford loans. See ED Ex. 1. SFAP's final program determination is based on an audit report, by the U.S. Department of Education Region VI, Office of Inspector General (OIG), issued on March 6, 1991. See ED Ex. 2 at 3 - 9. The OIG audited the Barber College's participation in Title IV programs for the period beginning September 1989 through July 1990. See ED Ex. 2 at 1. The OIG auditors concluded that:

In September 1988, the Barber College was sold, but the change in ownership and control was not reported to [the Office of Post Secondary Education]. [The Barber College thereby] violated the standards of participation and thereby lost eligibility.

The period of ineligibility lasted from September 4, 1988, the date of the change in control, until July 25, 1990, the effective date of the new participation agreement.

ED Ex. 2 at 5, 8.

SFAP adopted the findings of OIG's audit in its final program determination. According to SFAP, the Higher Education Act of 1965, as amended (HEA) [3](#) requires an eligible institution to notify the Secretary of any change in the institution's ownership, if the change in ownership results in a change in control of the institution. The Secretary must be notified at the same time that it notifies its accrediting agency, but not later than ten days after the change occurs. SFAP concluded, in its final program determination, that the sale of the Barber College in September 1988 resulted in a change in the ownership and control of the institution, and that the Secretary was not timely informed of the sale as required by the HEA and 34 C.F.R. § 600.30. [See](#) ED Ex. 1 at 3. Accordingly, SFAP determined that the Barber College, should return HEA funds disbursed "between the date [the former owners of the Barber College] regained ownership and control, September 1989, and the date of the new participation agreement, July 1990." [4](#) ED Ex. 2 at 5.

For the reasons stated below, the final program determination finding that from September 4, 1989, through July 24, 1990, the Barber College improperly disbursed to its students \$21,060 in Pell Grant funds, \$5,075 in SEOG funds, and \$19,911 in Stafford loans is **affirmed**.

FACTS

The material facts of this case are both uncontested and clearly established. [5](#) On July 1, 1987, the Secretary of Education and the West Texas Barber Styling College, Inc. entered into a Program Participation Agreement (PPA) that, among other things, provided that the agreement would terminate automatically on the date the institution underwent a change in ownership that resulted in a change in control of the institution. [See](#) ED Ex. 4 at 6, Article X.2.b.; Joint Statement at 2, para. 3. The West Texas Barber Styling College, Inc. was sold on September 4, 1988, and this sale constituted a change in ownership and control of the institution. [6](#) [See](#) Joint Statement at 3, para. 6. In addition, the Secretary was not informed of the change in ownership and control of the institution within the time period specified by 34 C.F.R. § 600.30. [7](#) During the audit period, September 4, 1989, through July 25, 1990, the Barber College's Amarillo campus disbursed \$21,060 in Pell Grants, \$5,075 in SEOG funds, and \$19,911 in Stafford loans. [See id.](#) at 3, para. 10.

DISCUSSION

I.

According to SFAP, under 34 C.F.R. § 600.31(a), upon an institution's change in ownership that also results in a change of control of the institution, the institution's eligibility to receive funding under Title IV, HEA programs terminates, and the "new" institution must apply for eligibility to participate in Title IV, HEA programs. SFAP also points out that the Program Participation Agreement (PPA) entered into by the Secretary and the Barber College also provides that the agreement would terminate automatically if the institution undergoes a change in ownership that results in a change in control of the institution. Under these two theories, SFAP argues that any Title IV, HEA program funds disbursed after the date the PPA terminated must be returned to the Department of Education as improperly disbursed funds. [See](#) SFAP Initial Br. at 5-7.

For its part, the Barber College contends that the conclusions of the final program determination are "correct but do[] not recognize the totality of circumstances and the events that later took place." Barber College Initial Br. at 1. According to the Barber College, the institution remained eligible to receive Title IV, HEA program funds throughout the audit period because the Barber College gave oral notice of its change in ownership and control to Greda Kreyer, an OIG investigator, "in September/October of 1989" and written notice to "Cliff Bacon [a SFAP employee] in November of 1989." *Id.* at 6. In addition, the Barber College contends that a letter dated December 13, 1989, addressed to James Watson, "President [of] West Texas Barber College," from Lois M. Moore, Chief of the Occupational/Vocational Eligibility Branch, Division of Eligibility and Certification for SFAP, "constituted a new participation agreement and became effective on September 4, 1989, pursuant to 34 C.F.R. § 668.12(c)(3)." *Id.* at 7. I find each of the Barber College's arguments unpersuasive.

As SFAP notes, Section 600.31(a) provides, with exceptions that are not relevant here, that upon an institution's change in ownership that also results in a change in control of the institution, the institution's eligibility to receive funding under Title IV, HEA programs terminates, and the "new" or previously eligible institution must, itself, apply for eligibility to participate in Title IV, HEA programs. See also 34 C.F.R. §§ 600.5(a)(7) and 600.20. Therefore, an institution ceases to be eligible to participate in Title IV, HEA programs on the date on which the institution ceases to meet the eligibility requirement under Section 600.31(a). See 34 C.F.R. § 600.32. Significantly, the Barber College does not dispute that the institution was sold on September 4, 1988, and that the sale resulted in a change in ownership and control of the institution.

More importantly, both 34 C.F.R. § 668.12(e) and the PPA involved in this case contain specific language that an institution's PPA automatically terminates on the date the institution undergoes a change of ownership that results in a change in control of the institution. In accordance with Section 668.12(b)(1), a PPA conditions the initial and continued eligibility of an institution to participate in Title IV, HEA programs upon compliance with the program regulations. As a result, the termination of the PPA ends an institution's eligibility to receive Title IV, HEA program funds. The fact that the Barber College did not obtain eligibility to participate in Title IV, HEA programs after its change in ownership and control on September 4, 1988, and prior to its disbursement of Title IV funds from September 4, 1989, through July 24, 1990, meant that funds disbursed during that period were improperly disbursed Title IV funds. In summary, on September 4, 1988, the Barber College lost its eligibility to receive Title IV, HEA program funds because its PPA automatically terminated by the operation of the terms of its PPA, and the institution could not lawfully disburse Title IV funds until it had "re-established" its eligibility as required by 34 C.F.R. § 600.31(e). In addition, as SFAP contends, the Barber College clearly had a duty under Section 600.30(a)(4) to notify the Secretary in writing of the institution's change in ownership and control.

II.

According to the Barber College, the institution remained eligible to receive Title IV funds throughout the audit period at issue because the Barber College gave oral notice of its change in ownership and control to an OIG investigator in September or Oct October of 1989 and subsequently sent written notice of the changes to the Department of Education in November of

1989. The Barber College acknowledges that an institution participating in Title IV, HEA programs has a duty to provide the Secretary with notice of any change in its ownership, if that ownership change results in a change in control of the institution, but asserts that even an untimely notice has the effect of providing the institution with a safe harbor from the application of Section 668.12(e). This cannot be so.

Compliance with the notice requirement of Section 600.30(a)(4) does not provide institutions with a safe harbor from the strict operation of Section 668.12(e). Section 668.12(e) imposes a standard for participation in Title IV, HEA programs that is independent of the requirements of Section 600.30(a)(4). As the plain words in Section 668.12(e) make clear, an institution's PPA automatically terminates on the date the institution changes ownership that results in a change in control of the institution. [8](#) Compliance with Section 600.30(a)(4) does not alter that result. Consequently, whether the Barber College provided notice to SFAP, albeit untimely notice, of the institution's change in ownership and control is irrelevant to the issue before me: whether the Barber College was legally entitled to disburse Title IV funds from September 4, 1989, through July 24, 1990. The resolution of that issue turns on whether an effective PPA existed during the time the alleged improper disbursement of Title IV funds occurred. [9](#)

III.

Although in the Barber College's view the December 13, 1989, letter sent to the institution by SFAP constituted the issuance of a new PPA, the Barber College's view is far off the mark. The Barber College does not contend, nor could it, that the December 13, 1989, letter, itself, was a PPA. Nonetheless, the Barber College persists that the December 13, 1989, letter effectively authorized the Barber College to disburse Title IV funds from the date of the letter and thereafter. Significantly, however, the content of the letter neither implicitly nor explicitly refers to the existence of a new PPA that had become effective after the automatic termination on September 4, 1988, of the previous PPA. The letter merely acknowledges that the Houston, Texas branch of the Barber College was closed as of September 1, 1989, and informs James Watson that the Amarillo, Texas location of the institution qualified, as of December 13, 1989, "to apply to participate in" Title IV programs. [See](#) Barber College Ex. Eat 1. In fact, in accordance with 34 C.F.R. §§ 600.20 and 600.21, the December 13, 1989, letter is a notification of eligibility that is sent to an institution upon its application for designation as an institution eligible to apply to participate in Title IV programs. [10](#) Significantly, SFAP's determination that an institution qualifies as an eligible institution does not, by that determination alone, authorize the institution to disburse Title IV funds. The designation of eligibility noted in a notice of eligibility letter is a condition precedent to the lawful participation in Title IV programs. 34 C.F.R. § 600.20. An institution may lawfully participate in Title IV programs only if, inter alia.

(iii) The institution enters into a written participation agreement with the Secretary, on a form approved by the Secretary.

34 C.F.R. § 668.12(a)(2). Consequently, the fact that SFAP sent the Barber College a notification of eligibility letter dated December 13, 1989, does not support the Barber College's position that a new PPA existed between the parties on September 4, 1989. Plainly, a notification of eligibility letter is not a PPA.

IV.

Finally, the Barber College presents several arguments involving the "doctrines of equity." See e.g., Barber College Initial Br. at 10 - 12. Ostensibly, the Barber College argues that since the Title IV funds at issue "did not involve the inappropriate use of Title IV funds not supported by actual education and qualified students," I should invoke my "equity powers" under 34 C.F.R. § 668.92 and limit or excuse entirely the amount of funds SFAP is seeking to recover. See Barber College Initial Br. at 10; Barber College Reply Br. at 3. Although I am not unsympathetic to the Barber College's situation - assuming, without deciding, that the funds were disbursed to eligible students - in deciding this case, I must decline the institution's invitation to look beyond the plain language of 34 C.F.R. § 668.12(e) and the unambiguous terms of the PPA signed by the Barber College. To begin with, this tribunal sits without jurisdiction to waive the requirements of the Secretary's regulations, and must follow the regulations as they are written. See In the Matter of Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dep't of Education (Decision of the Secretary October 19, 1990) at 5. In addition, the regulation that the Barber College cites as the basis of my "equity powers" is inapposite to this proceeding. Section 668.92 applies to Subpart G fine proceedings and merely provides the judge with instructions on how to determine the appropriate amount of a fine. Unlike Subpart G proceedings, this proceeding is a Subpart H proceeding in which the appropriate amount of a fine is not at issue. Accordingly, SFAP's determination as to the amount of funds that should be recovered cannot be altered by me under the doctrines of equity referred to by the Barber College. [11](#)

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED, that the final program determination finding that the Amarillo West Texas Barber Styling College, Inc. must repay the Department of Education \$21,060 in Pell Grant funds, \$5,075 in SEOG funds, and refund to the appropriate lenders \$19,911 in Stafford loans is **affirmed**. Any arrangements regarding the payment of this liability shall be made through the appropriate Department of Education office.

Judge Richard F. O'Hair

Issued: June 7, 1994
Washington, D.C.

SERVICE

A copy of the attached document was sent by certified mail to the following:

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1 At the time of the issuance of the final program determination, SFAP was named the Office of Student Financial Assistance (OSFA).

2 The name of the institution and its parent corporation changed several times between 1988 and 1990. In August 1988, the corporate name of the Barber College was changed to Jeamus, Inc. from West Texas Barber Styling College, Inc. Also in August 1988, a new corporation was formed under the same name of the former parent corporation: West Texas Barber Styling College, Inc. (West Texas Inc.). According to SFAP, in September 1988 the owners of the Barber College, O'Neal Watson and James Watson, sold the school, but continued to operate the Barber College's Amarillo Texas location for the new owners. The newly incorporated West Texas Inc. held all of the assets of its predecessor except the land and the building occupied by the Barber College's Amarillo, Texas location, which became assets of Jeamus, Inc. By August 1989, the new owners had reneged on the terms of the sales contract and in September 1989 ownership of the Barber College reverted to O'Neal and James Watson. On April 26, 1990, West Texas Inc. was dissolved, and in May 1990 Amarillo West Texas Barber Styling College, Inc. was formed. See ED Ex. 2 at 6 - 7. Amarillo West Texas Barber Styling College, Inc. is the name of the corporation that owned the institution which disbursed the Title IV funds at issue, and is the name of the party under which SFAP has commenced these proceedings. For purposes of clarity and consistency, this decision uses "Barber College" to refer to the institution regardless of the institution's official name or the name of its parent corporation during the period at issue.

3 Pub. L. No.89-329, 79 Stat. 1219 (to be codified as amended at 20 U.S.C. § 1070 et seq.)

4 Although the OIG's audit indicates that the total amount of Title IV funds improperly disbursed by the Barber College exceeded \$3,000,000, the scope of this proceeding is limited by the liabilities identified in SFAP's final program determination, dated September 19, 1991, and the findings of this decision are relevant only to the allegations asserted therein. See ED Ex. 2 at 5.

5 The parties have submitted a Joint Statement stipulating to the material factual issues in this case.

6 The parties have stipulated to this fact, and the stipulation is consistent with 34 C.F.R. § 600.31(c), which provides, in pertinent part:

For the purposes of this part, a change in ownership of an institution that results in a change of control means any action by which a person or corporation obtains new authority to control the actions of that institution. That action may include, but is not limited to -

(1) The sale of the institution.

[7](#) Citations to the Code of Federal Regulations are to the 1989 edition unless otherwise specified.

[8](#) As noted supra, the terms of the Barber College's PPA incorporated the regulatory requirement of Section 668.12(e) as well.

[9](#) I am not persuaded by the Barber College's argument that because SFAP failed to instruct the institution that its eligibility had terminated, SFAP should be estopped from recovering the improperly disbursed Title IV funds. The short answer to the Barber College's argument is that the institution is a signatory to the March 16, 1987, PPA, and as such, it agreed to be bound by the terms of the agreement, which plainly state, inter alia that "[t]his Program Participation Agreement automatically terminates . . . [o]n the date the Institution undergoes a change in ownership that results in a change in control." ED Ex. 4 at 6. By its plain language, the provision is self-executing and does not require notice by SFAP prior to its execution.

In addition, the Barber College raises the affirmative defense of estoppel without establishing any of the elements of estoppel. It is well settled that the Federal Government may not be estopped on the same terms as any other litigant. Heckler v. Community Health Services, 467 U.S. 51, 59 (1984). The Federal Government may be estopped from enforcing the law against a private party if that party proves the traditional elements of estoppel as well as establishes that the Government or its agent acted to deceive or mislead the party. Id. (citing Restatement (Second) of Torts § 894(1) (1979)). Notably, there is no probative evidence in the record that Department of Education officials misled the Barber College into believing that the institution was lawfully authorized to disburse Title IV funds during the period at issue. As noted *infra*, the December 13, 1989, notification of eligibility letter is neither a PPA nor a notice authorizing the Barber College to disburse Title IV funds. Here, the Barber College's failure to prove even the traditional elements of estoppel leaves no doubt why estoppel should not be applied in this case.

[10](#) The Secretary has recognized that some institutions have misinterpreted the notice of institutional eligibility as a notice authorizing the institution to participate in Title IV programs; nonetheless, an institution's mistaken interpretation of the notice has not altered the requirements relating to the lawful participation in Title IV, HEA programs. See 59 Fed. Reg. 9533 (February 28, 1994).

[11](#) The Barber College states in summary fashion that SFAP has:

waived any right to reimbursements from Amarillo West Texas Barber Styling College, Inc. by presenting their conclusions after six months had elapsed from the auditor's opinion letter.

Barber College Initial Br. at 12. Although the Barber College does not state the basis for its position, its argument is not unique, and in fact has been resoundly rejected by North Carolina Department Public Instruction, Dkt. No. 91-86-R, U.S. Dep't of Education (Interlocutory Decision of the Administrative Law Judge October 13, 1993), wherein the administrative law judge held that "Item 12 of Appendix, Part 80 of 34 C.F.R. is a regulation which provides only guidance to the Department . . . and that a failure to comply therewith does not invalidate or

otherwise bar the recovery" sought by the Department. Id. at 5. Consequently, despite the fact that Item 12 states that the resolution of audit findings should be made within six months after receipt of the audit report by the Federal Government, the guidelines within Item 12 do not restrict SFAP's ability to maintain a post-audit recovery of funds action to within six months after SFAP's receipt of the audit report. More importantly, the six month audit guidelines apply to audit requirements for state and local governments. See 34 C.F.R. Part 80 app. Item 1. Consequently, even if the guidelines did impose a time limitation on the Federal Government's right to recovery of funds, the guidelines are inapposite to this proceeding.