

IN THE MATTER OF HEALTH CARE TRAINING INSTITUTE,
Respondent.

Docket No. 92-42-ST
Student Financial Assistance Proceeding

DECISION

Appearances: Robert Stephen Butler, Esq., Arlington, Tennessee, for the Respondent.

Edmund J. Trepacz, II, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for the Office of Student Financial Assistance Programs.

Before: Allan C. Lewis, Chief Administrative Law Judge

This is an action initiated by the United States Department of Education, Office of Student Financial Assistance Programs (ED) to terminate the eligibility of Health Care Training Institute (HCTI) to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, and to impose a fine in the amount of \$831,000. [See footnote 1 1/](#) This action was proposed following an audit and program review which concluded that HCTI failed to properly administer its ability-to-benefit test, that HCTI had an excessive cohort default rate without diligently implementing Appendix D, that HCTI failed to provide exit counselling to GSL recipients, and that HCTI failed to meet the standards of conduct required of a fiduciary. Based on the findings of fact and conclusions of law, *infra*, termination of the eligibility of HCTI to participate in the Title IV programs is unwarranted; however, a civil fine in the amount of \$4,000 is imposed.

I. FINDINGS OF FACT

The pertinent findings of fact are set forth in the opinion. Other detailed findings of fact are set forth in the appendix, *infra*. To the extent that proposed findings of fact or conclusions of law by a party have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this matter.

II. OPINION

On March 20, 1992, ED notified HCTI that it intended to terminate the institution from its participation in the Title IV programs and to impose a fine. Thereafter, HCTI filed a request for a hearing on March 25, 1992. The request was filed within the period prescribed by 34 C.F.R. §§ 668.84(b) and 668.86(b), and, therefore, jurisdiction is proper. [See footnote 2 2/](#)

The termination and fine actions raise several issues. One issue common to both actions, the ability-to-benefit issue, was previously resolved in favor of HCTI in an Interlocutory Decision

issued on November 4, 1993, and is incorporated herein by reference. [See footnote 3 3/](#) As a result, the issues under the termination action as narrowed by the Interlocutory Decision are (1) whether HCTI provided exit counseling for GSL borrowers under 34 C.F.R. § 682.604(g) or for other borrowers as required by 34 C.F.R. Appendix D; (2) whether HCTI had a cohort default in excess of 60% and, if so, whether it had diligently implemented Appendix D; (3) whether HCTI failed to act as a fiduciary because it had a cohort default rate in excess of 60% and did not properly implement Appendix D.

As a result of the Interlocutory Decision, the amount at issue in the fine action was reduced to \$56,000. The remaining issues in this action are whether HCTI failed to provide exit counseling for GSL borrowers in four instances and whether HCTI failed to provide exit counseling in 52 instances for other borrowers as required by Appendix D.

It is apparent that the Appendix D inquiry and the fiduciary issue are relevant only if HCTI had a threshold cohort default rate in excess of 60%. 34 C.F.R. § 668.15(b)(1)(ii) and Appendix D. In this regard, ED maintained at the hearing in January 1994 that a determination of HCTI's cohort default rate was not a matter properly before the tribunal. ED argued that any challenge regarding the cohort default rate was a matter to be decided by another official with the Department. [See footnote 4 4/](#)

Subsequent to the hearing, the Secretary promulgated, on April 19, 1994, a regulation governing appeals by institutions regarding their cohort default rates based upon allegations of improper loan servicing or collection activities by the loan guarantor agencies. The appeal process under 34 C.F.R.

§ 668.17(f) requires an institution to obtain from the guaranty agency or agencies a representative sample of the loan servicing and collection records relating to borrowers whose loans were included within the institution's cohort default rate calculation. The guaranty agency has 15 working days in which to comply with an institution's request for records. 34 C.F.R. § 668.17(f)(3)(iii). Thereafter, the institution files an appeal with the Secretary which identifies each loan which it feels was improperly serviced or collected and explains the basis therefor. 34 C.F.R. § 668.17(f)(3)(iv). Upon receipt of this information, the Secretary or his designee reviews the information and redetermines the institution's cohort default rate. 34 C.F.R. § 668.17(f)(3)(v).

In the instant case, HCTI requested on May 5, 1994, the pertinent

loan servicing and collection records of the Higher Education Assistance Foundation from ED which, for this purpose, was the custodian of the Higher Education Assistance Foundation's records. ED failed to comply with HCTI's request within the 15 day period. In fact, ED took no action for almost four months. On September 28, 1994, and well aware of the pending demise of HCTI, ED finally responded to HCTI's request for the records by refusing to supply the pertinent records. ED demanded, instead, the payment of a \$3,300 processing fee as a prerequisite before providing the documents. In addition, ED also advised HCTI that--

[f]ailure to submit the \$3300 check immediately may result in the Department's determination that you have not complied with the requirements for appealing on the basis of improper loan servicing and collection, and your appeal may be dismissed.

Furthermore, please be advised that the Department does not intend to decide appeals from schools that have closed.

Approximately two weeks later, HCTI formally ceased operations on October 14, 1994.

In this context, HCTI argues that it was futile to pay the fee demanded by ED and to continue to pursue the correct determination of its cohort default rate due to ED's representation that it would not make a redetermination of HCTI's cohort default rate. Under this circumstance, HCTI maintains that ED's action should bar any issue in the termination and fine actions which is based upon a specified cohort default rate of 60% or in which the cohort default rate is a predicate to compliance with some other regulation, i.e. the Appendix D issue and the fiduciary issue. ED asserts that HCTI failed to pursue its appeal of its cohort default rate and, therefore, the original rate stands as well as all issues concerning the cohort default rate or dependent upon a specified cohort default rate in excess of 60%.

Initially, the regulations do not require or contemplate that an institution must pay a fee to the guaranty agency for its loan servicing and collection records before the agency forwards the records. In fact, the opposite is true. The regulation requires the guaranty agency to provide the records within 15 working days of the request by the institution. This limited period is barely sufficient time for the guaranty agency to determine the size of the sample and to gather the information -- let alone to then notify the institution of the appropriate charge and to receive, in turn, the payment thereof. Hence, ED's demand was not in conformance with the regulations.

Even if ED's request for payment was consistent with the

regulations, ED's statement--that it would not continue to process the appeal of an institution that has closed--was sufficient to relieve HCTI of tendering such a payment. It is well settled that a party's performance is excused, if the completion of the act is an exercise in futility. Any other conclusion "would be tantamount to saying that the law venerates the performance of obviously futile acts -- a proposition we consistently have refused to espouse." *Cook v. Rhode Island Dept. of Mental Health*, 10 F.3d 17, 26 (1st Cir. 1993). "The law should not be construed idly to require parties to perform futile acts or engage in empty rituals." *Northern Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 461 (1st Cir. 1988). See *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 34 (1934); *Gilbert v. City of Cambridge*, 932 F.2d 51, 60-62 (1st Cir. 1991), cert. denied, 502 U.S. 866 (1991); *Christopher W. v. Portsmouth School Comm.*, 877 F.2d 1089, 1096-97 (1st Cir. 1989); *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988); and *Parkview Corp. v. Department of the Army*, 490 F. Supp. 1278, 1282 (E.D. Wis. 1980). Hence, it was not necessary for HCTI to tender the fee requested by ED.

It is axiomatic that a party cannot raise an allegation or charge and then act in a manner which prevents, in effect, the other party from challenging the allegation or charge or raising a defense thereto. *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995);

Hearns v. Rhay, 68 F.R.D. 574, 581 (D. Wash. 1975). In short, ED cannot decline to redetermine HCTI's cohort default rate and then seek to terminate and fine HCTI due to an excessive cohort default rate. Therefore, justice requires that the effect of ED's refusal to redetermine the cohort default rate of an institution mandates, for purposes of the termination action, the dismissal of the charge that HCTI had an excessive cohort default rate and all other charges which are predicated upon an excessive cohort default rate, i.e. HCTI's failure to diligently implement Appendix D and its failure to act in a fiduciary manner.[See footnote 5 5/](#) For purposes of the fine action, justice requires the dismissal of the charge relating to the 52 purported violations of exit counseling under Appendix D.

ED also seeks to terminate HCTI from participating in the Title IV programs based upon its failure to provide exit counseling to four students under the GSL program as required by 34 C.F.R. §682.604(g). Under 34 C.F.R. §682.604(g)(1), an institution is required to "conduct in-person exit counseling with each GSL and SLS borrower shortly before the borrower ceases at least half- time study at the school." If in-person exit counseling is not

conducted, the institution "shall mail written counseling material to the borrower at the borrower's last known address within 30 days after learning that the borrower has withdrawn from school or failed to attend the scheduled session." 34 C.F.R. § 682.604(g)(1)(ii). Finally, an institution is required to "maintain in the student borrower's file documents substantiating the school's compliance" with the exit counseling requirements. 34 C.F.R. § 682.604(g)(4).

HCTI concedes that it was unable to locate exit counseling documents in these four instances; however, it argues that it is possible that these documents existed at one time, but were misplaced during one of the many reviews and audits HCTI has undergone. HCTI argues that, in any event, this failure is de minimis and, therefore, there was no violation.

HCTI's argument is unpersuasive. HCTI was required to maintain documentation concerning exit counseling conducted. A mere allegation that documentation may have existed, without more, is insufficient to overcome the mandate that documentation be maintained. While the severity of the violation is an appropriate factor in determining the sanction for a violation of the regulations under 34 C.F.R. §§ 668.90(a)(2) and 668.92(a)(1)(i), it is not an appropriate consideration as to whether a violation occurred. Accordingly, HCTI violated 34 C.F.R. § 682.604(g) by failing to provide exit counseling in four instances.

Where, as here, there is a violation of the regulations by an institution in a termination proceeding, it is incumbent upon the tribunal to determine the nature of the appropriate sanction. In this regard, the tribunal may terminate the institution or--

issue a decision to fine the institution or impose one or more limitations on the institution rather than terminating its eligibility to participate.

34 C.F.R. § 668.90(a)(2).

Clearly, termination in this case is inappropriate. As discussed above, the only violations committed by HCTI consisted of its failure to conduct proper exit counseling in four instances.

These violations simply do not demonstrate a pervasive disregard for the regulations governing the programs which would warrant termination. Such conduct, however, warrants a fine.

A civil penalty may be imposed "upon such institution of [an amount] not to exceed \$25,000 for each violation or misrepresentation" of any provision of the subchapter or any regulation promulgated thereunder. Higher Education Act of 1965, Pub. L. No. 89-329, § 487(c)(2)(B)(i), 79 Stat. 1219, as added by the Higher Education Amendments of 1986, Pub. L. No. 99-498, § 407(a), 100 Stat. 1268, 1490, and amended by Section 490 of the Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448, 627 (to be codified as amended at 20 U.S.C. § 1094(c)(3)(B)(i)).

ED proposes a fine in the amount of \$4,000 for HCTI's purported failure to provide exit counseling under 34 C.F.R. § 682.604(g). This represents a fine of \$1,000 for each failure by HCTI to maintain adequate records of exit counseling. [See footnote 6 6/](#)

In determining the amount of the fine, 34 C.F.R. § 668.92(a) provides that the tribunal "shall take into account . . . [t]he gravity of the institution's violation . . . and [t]he size of the institution." The gravity of the violation reflects the relative degree of the seriousness of the violation while the size of the institution reflects the degree to which the institution has received Title IV funding. See *In re Hartford School of Modern Welding*, Dkt. No. 90-42-ST, U.S. Dep't of Education at 18 (Jan. 31, 1991).

While the failure to provide exit counseling is a serious violation, the four instances of violations do not demonstrate a widespread disregard by HCTI in providing exit counseling. HCTI is clearly a large school and, therefore, its size is not a mitigating factor. [See footnote 7 7/](#)

In light of the above, a \$1,000 fine per violation, as proposed by ED, is appropriate. Thus, HCTI is fined a total of \$4,000 for its violations.

III. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is hereby--

ORDERED, that the proposed termination of the eligibility of

Health Care Training Institute to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, is unwarranted; it is further

ORDERED that Health Care Training Institute immediately and in the manner provided by law pay fines in the total amount of \$4,000 to the United States Department of Education.

Allan C. Lewis
Chief Administrative Law Judge

Issued: April 13, 1995
Washington, D.C.

APPENDIX - FINDINGS OF FACT

1. Health Care Training Institute was founded in 1972 as Health Care Training Institute of America. HCTI's main campus is located at 1378 Union Avenue, Memphis, Tennessee, its branch campus is located at 121 River Roads Mall, St. Louis, Missouri, and its classroom facility is located at 222 North Sixth Street, West Memphis, Arkansas.

2. Health Care Training Institute (HCTI) is a private career institution which participates in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended.

3. By letter dated March 20, 1992, the United States Department of Education (ED) notified HCTI that it intended to terminate its eligibility to participate in the Title IV programs. This action was proposed following an audit and program review which concluded that HCTI failed to properly administer its ability-to-benefit test, that HCTI had an excessive cohort default rate without diligently implementing Appendix D, that HCTI failed to provide exit counseling to GSL recipients, and that HCTI failed to meet the standards of conduct required of a fiduciary.

4. On March 25, 1992, HCTI filed its request for a hearing.

5. Documentation regarding exit counseling was not contained in student files for students 13, 19, 52, and 53.

6. Title IV funds received by HCTI between 1981 and 1991--

7. By letter dated May 5, 1994, HCTI appealed its fiscal year 1989 cohort default rate based on improper servicing and collection. In this appeal, HCTI requested access to a representative sample of loan servicing records of the Higher Education Assistance Foundation (HEAF). Due to the demise of HEAF, ED has assumed control of HEAF's records and processes requests for its records.

8. On July 12, 1994, the tribunal stayed the proceeding pending resolution of HCTI's cohort default rate appeal based on allegations of improper servicing.

9. By letter dated September 28, 1994, the Chief of the Default Management Section, Institutional Monitoring Division, United States Department of Education, acknowledged that HCTI requested a representative sample of loan servicing records for defaulted loans guaranteed by HEAF which were included in HCTI's fiscal year 1989 cohort default rate. ED identified a representative sample of all defaulted loans guaranteed by HEAF using a formula which reflected a 95% confidence level with a plus or minus 5% confidence interval. Based on this formula, ED calculated the sample size to be 333 accounts. The September 28, 1994, letter also

demanded a \$10 processing fee for the loan servicing records for each account in the representative sample. ED advised HCTI that it must send a check payable to the United States Department of Education in the amount of \$3,330 in order to receive the loan servicing records.

10. By letters dated October 17, 1994, HCTI notified ED and its accrediting agency that, as of October 14, 1994, HCTI permanently closed and ceased operations.

11. By letter dated November 14, 1994, the Deputy Assistant Secretary for Student Financial Assistance Programs, United States Department of Education, acknowledged receipt of HCTI's May 5, 1994, request for a representative sample of loan servicing records, ED's response dated September 28, 1994 which informed HCTI that due to its impending closure, it must remit a check for \$3,300 to ED in order to receive these records, and that its failure to comply could result in the determination that it had not complied with the requirements for appealing its cohort default rate based on allegations of improper servicing which may result in the ultimate dismissal of its appeal. In light of HCTI's failure to remit a check in the amount requested, ED now considered HCTI's appeal to be abandoned--

As of November 9, 1994, the Department has not received a check from your school for the requested loan servicing records. Since your school has not initiated the appeal process to any other guaranty agency, the Department is considering the FY 1989 appeal abandoned. As a result of this decision, and since your school did not initiate any appeal on any other cohort default rate, your school may not appeal the FY 1989 . . . cohort default rate[] under any of the Department's appeal procedures. This decision will serve as the Department's final determination.

12. On October 31, 1994, HCTI filed a Motion to Dissolve the Stay in this proceeding. In this regard, HCTI indicated that it closed and ceased operations on October 14, 1994, and that ED has indicated by letter dated September 28, 1994, that it does not intend to decide appeals from schools that have closed.

13. On November 4, 1994, the tribunal dissolved that stay and issued a modified briefing schedule.

SERVICE

On April 13, 1995, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 1/ More specifically, ED seeks to terminate HCTI from participating in the Pell Grant, Supplemental Educational Opportunity Grant (SEOG), Perkins Loan, College Work-Study (CWS), and the Federal Family Education Loan (FFEL) programs (formerly known as the Guaranteed Student Loan (GSL) programs) which include the Robert T. Stafford Federal Student Loan, Federal Supplemental Loans for Students (SLS), and Federal PLUS Loans programs.

Footnote: 2 2/ On September 16, 1992, the undersigned issued an Order re Jurisdiction and Scope of Appeal which determined that HCTI's request for a hearing encompassed the termination action and the fine action. This order is incorporated herein by reference.

Footnote: 3 3/ The termination and fine actions were consolidated on January 26, 1993, with a program review determination (Dkt. No. 92-124-SP) which sought to recover certain funds based on the ability-to-benefit issue. In response to a Motion for Judgment as a Matter of Law, the tribunal separated these cases and, on November 4, 1993, issued an Initial Decision in Dkt. No. 92-124- SP which resolved the ability-to-benefit issue under the program review determination in favor of HCTI. On the same day, the tribunal issued an Interlocutory Decision in this proceeding resolving the ability-to-benefit issue in favor of HCTI on the same basis. This Interlocutory Decision partially resolved the termination and fine actions. On November 8, 1994, the Secretary certified the Initial Decision in Dkt. No. 92-124-SP as the Final Decision of the Department. ED did not appeal the Interlocutory Decision with regard to the termination and fine proceeding. In light of the Interlocutory Decision which is incorporated herein by reference, it is not necessary to address further the ability- to-benefit issue as it pertains to the termination and the fine actions.

Footnote: 4 4/ ED's position is based upon the 1993 legislation which provided certain institutions with an opportunity to appeal the calculation of their cohort default rate based on improper loan servicing or collection activities by the lenders. Higher Education Act of 1965, Pub. L. No. 89-329, §435(a)(3), 79 Stat. 1219, as added by §2(c)(55) of the Higher Education Technical Amendments of 1993, Pub. L. No. 103-208, 107 Stat. 2457, 2468.

Footnote: 5 5/ The fiduciary charge is based upon a purported excessive cohort default rate and HCTI's alleged failure to diligently implement the default reduction measures in Appendix D.

Footnote: 6 6/ Initially, ED sought a fine in the total amount of \$831,000. This reflected a fine of \$775,000 based on the ability-to-benefit issue which was resolved in favor of HCTI in the Interlocutory Decision of November 4, 1993; a fine in the amount of \$52,000 based on the exit counseling requirement under Appendix D which has been dismissed, supra; and a fine of \$4,000 pertaining to the exit counseling requirement under the GSL program.

*Footnote: 7 7/ HCTI received between \$316,000 and \$16,000,000 per year of Federal funds from 1981 through 1991, with an average of approximately \$7,400,000 per year. As such, it constitutes a large institution. See *In re Bnai Arugath Habosem*, Dkt. No. 92- 131-ST, U.S. Dep't of Education at 3 (Sec. Dec. Aug. 24, 1993).*