IN THE MATTER OF MILE HI COLLEGE,
Respondent.

Docket No. 93-105-ST
Student Financial Assistance Proceeding

DECISION

The Student Financial Assistance Programs (SFAP) of the Department of Education (ED) seeks to terminate Mile Hi College (Mile Hi) from further participation in student financial assistance programs authorized by Title IV of the Higher Education Act (HEA) of 1965, as amended.

The notice of intent to terminate Mile Hi mostly is based upon Mile Hi's failure to satisfy numeric financial strength indicators contained in applicable Federal regulations. Mile Hi incurred operating losses over the last three fiscal years. Financial statements of Mile Hi disclose that in fiscal year 1991, Mile Hi had an operating loss of $33,902. In fiscal year 1992, the operating loss increased to $89,876. In 1993, the fiscal year loss was $67,771. In addition, at the end of its 1992 fiscal year, Mile Hi had current assets of $148,980 and current liabilities of $153,544 for a negative ratio of .097. At the end of its 1993 fiscal year, current assets were $133,095 and current liabilities were only $116,696, producing a positive ratio of 1.22. As well, as of June 30, 1993, Mile Hi had a positive net worth of about $22,000.

An institution must meet three financial tests in order to presumptively demonstrate financial responsibility under 34 C.F.R. § 668.13(c). Mile Hi meets only two of them.

As permitted under section 498(c)(3)(A) of the HEA, Mile Hi had an option to submit a letter of credit or surety bond to demonstrate that it is financially responsible. According to SFAP, this surety figure is approximately one-half of the amount of Title IV, HEA funds Mile Hi receives during the award year. SFAP derives a $250,000 surety amount by multiplying .50 by $486,000, the total amount of Title IV funds Mile Hi received according to recent data. At an earlier time Mile Hi obtained a letter of credit of $75,000. It is not clear whether that letter of credit is still in existence. While $25,000 possibly is excessive, a significant guarantee appears to be required. I conclude that an amount of only $75,000 is insufficient. Here it should be noted that Mile Hi offers no evidence concerning the required amount of the surety. Only SFAP presents evidence on this subject.

In its response to SFAP's initiation of the termination action, Mile Hi submitted a new financial statement for the 1993 fiscal year. This statement demonstrates that Mile Hi continues to suffer operating losses now stretching over the three most recent fiscal years. As noted, Mile

Hi thereby fails one of the mandatory financial responsibility tests under ED regulations. 34 C.F.R. § 668.13(C)(l)(I)

Mile Hi does not rebut the numeric evidence which demonstrates that it is not financially responsible. Instead, the school argues that other factors should be taken into consideration. Mile Hi's arguments, which are addressed below, fail to provide a satisfactory alternative basis upon which it can be found to have an acceptable level of financial strength.

Mile Hi cites section 2(I)(9)(C) of P.L. 103-208 (107 STAT. 2479), the Higher Education Technical Amendments (HETA) of 1993,See footnote 1 [1] arguing that as an alternative to a surety for up to one-half of the Federal liability, the school has statutory authority to make an alternate demonstration of financial responsibility.See footnote 2 [2] 20 U.S.C. 1099c(3)(C). Although final regulations incorporating the HEA Amendments of 1992 and the HETA of 1993 have not been promulgated,See footnote 3 [3] SFAP believes that the HETA changes do not weaken current law or permit any greater leniency toward institutions regarding the Department's financial responsibility determinations.See footnote 4 [4] Indeed, SFAP construes the 1993 HETA changes as having imposed more stringent responsibility standards.

Under existing law and regulations, institutions which do not meet the numeric requirements for financial responsibility, may still demonstrate financial responsibility by various means, including the posting of a letter of credit or a surety bond. As noted, SFAP seeks to require Mile Hi to post a $250,000 letter of credit.

Again, as noted, Mile Hi hopes to avoid the posting of a large letter of credit. Mile Hi points out that section 2(I)(9)(C) of HETA references another type of proof of financial responsibility that an institution can invoke. However, Mile Hi submits scant evidence in support of this alternative.

ED, as required by statute, must permit an institution to avail itself of section 2(I)(9)(C) of HETA, in situations where an analysis of the institution's financial information, aided by an opinion of a certified public accountant, shows that the institution had taken comprehensive steps to put in place mechanisms to ensure against its precipitous closure. Nonetheless, Mile Hi has not submitted an adequate operational plan demonstrating that it "has sufficient resources to ensure against [its] precipitous closure, including the ability to meet all of its financial obligations." 20 U.S.C. § 1099c(c)(3)(C). There is an insufficient basis, therefore, for the institution to escape the consequences of its failure to pass the regulatory numeric tests (it is not profitable) and its failure to post a letter of credit that is otherwise required to safeguard Federal funds disbursed through the institution.

Instead of showing how the institution has sufficient resources to meet contingent liabilities, the owner and President of Mile Hi, Mr. Hoflin, makes statements about his own personal wealth, which lend insufficient support to the claims of Mile Hi that it has readily available financial resources in the event of closure. He says that he has invested $750,000 in Mile Hi, but fails to provide a detailed explanation. He also says that he has given the school $112,500 in text book inventory. However, the school must sell the books to gain any benefit therefrom. And, of course, Mile Hi is incorporated, and as such, the personal assets of the owner are inaccessible to ED in the event of bankruptcy or closure of Mile Hi.See footnote 5 [5]

Mile Hi posits that this tribunal should take into consideration its financial progress, notwithstanding its failure to meet minimum financial responsibility criteria. Although Mile Hi's financial condition is slightly improved, it still is losing money and fails to meet financial requirements. Ed cannot rely upon vague predictions by an institution of its financial potential and under regulations is required, inter alia, to look at previous awards years in its analysis of an institution's financial responsibility. Mile Hi asks the Department to extrapolate its future financial condition based upon estimated revenue from a new course, which arguably might generate income in upcoming years, and from a $66,000 cost reduction in administrative salaries. These projections are tenuous, and underpinned by unproven assumptions. In addition, the anticipated increase in revenue would be generated from students who receive Title IV, HEA funds, and not from an independent source that externally strengthens the institution. Moreover, as to expenses, note F to Mile Hi's 1992 and 1993 financial statements reveals that the school is paying $52,000 a year in rental expenses. As well, it paid $72,000 in such rent in 1991. All of these funds were paid to its president and primary stockholder. Here, it should be noted that forgiveness of the 1991 rent by the president, would have produced a 1991 Mile Hi profit of $41,000. In my opinion, the financial recovery plan offered by Mile Hi is not sufficiently credible.

Considering Mile Hi's total financial circumstances, a finding is required that the school fails to show financial responsibility, in accordance with HETA and HEA. As well, there is no surety even approaching the amount sought by SFAP.See footnote 6 [6]

This matter was handled under a written procedure. Mile Hi also seeks an oral hearing to further argue its position. However, it offers nothing which would justify this further procedural step. The request for oral hearing is denied.

I find that Mile Hi fails to demonstrate financial responsibility.

I also find that Mile Hi should be terminated from further participation in Title IV, HEA programs. It is so Ordered.

In the absence of a timely appeal or a stay, this decision shall become effective as the decision of the Secretary of the Department of Education

Dated this 15th day of March, 1994.

Paul S. Cross
Administrative Law Judge
Office of Higher Education Appeals
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-3644

Footnote: 1 [1] *The Higher Education Technical Amendments of 1993 became effective as if such amendments were included in the Higher Education Amendments of 1992 (P.L. 102-325), pursuant to 5 of P.L. 103-208 (107 STAT. 2488).*

Footnote: 2 [2] *Under 2(I)(9)(C) of HETA, the Secretary shall determine an institution to be financially responsible, notwithstanding the institution's failure to meet the criteria under paragraphs (1) and (2), if--*

> *(C) Such institution establishes to the satisfaction of the secretary, with the support of a financial statement audited by an independent certified public accountant in accordance with generally accepted auditing standards, that the institution has sufficient resources to ensure against the precipitous closure of the institution, including the ability to meet all of its financial obligations (including refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary). 20 U.S.C. 1099c(c)(3)(C).*
>
> ---
>
> *Footnote: 3* [3] *A notice of Proposed Rulemaking reflecting the changes made by the Higher Education Amendments of 1992 and the Higher Education Technical Amendments of 1993 was recently issued. 59 Fed. Reg. 39, 9526-9590 (1994) (to be codified at 34 C.F.R. § 668.15) (proposed February 28, 1994). The proposed regulation embodies an interpretation of the statute that is a preliminary interpretation unless and until adopted by the Secretary as a final rule. The preamble offers a proposed analysis of the controlling law and the weight to be given different factors affecting the interpretation of the law.*

There are no proposed changes to the financial responsibility standards that weaken the current regulations. Instead, the proposed factors of financial responsibility for profit institutions are more stringent than those currently found in the regulations. For example, it is proposed to require that a for profit institution have, at the end of its latest fiscal year, a ratio of current assets to current liabilities of at least 1.25:1. 59 Fed. Reg. 39, 9541, 9568 (1994) (to be codified at 34 C.F.R. § 668.15(b)(7)(I)). [proposed February 28, 1994]. Additionally, it is proposed that a for profit institution is not financially responsible if it has had operating losses over both of its two latest fiscal years that cause an operating loss exceeding 10 percent of its previous year's tangible net worth for its latest fiscal year. 59 Fed. Reg. 39, 9542, 9568 (1994) (to be codified at 34 C.F.R. § 668.15(b)(7)(ii)) (proposed February 28, 1994). Both of these proposed requirements are more stringent than present regulations.

Footnote: 4 [4] *During Senate hearings on the Higher Education Technical Amendments, Senator Pell commented, "We also clarify the financial responsibility provisions enacted as part of the 1992 Higher Education Amendments. This will protect institutions that are not financially at risk, but it does so without weakening the current law. It has been difficult to strike the necessary balance in this area, but the provisions in the amendment will, we believe, make sure that financially at-risk institutions will be subject to careful scrutiny and even exclusion from participation in Federal student aid programs. Our goal in this regard has been a constant one: to insure that students have access to a quality education at schools that are strong and viable* *institutions of postsecondary education." 139 Cong. Rec. 162-2, S16593 (daily ed. November 19, 1993) (statement of Senator Pell).*

Footnote: 5 [5] *In order to permit continued participation in Title IV, HEA programs by a deficit ridden educational institution, the Secretary may require financial guarantees of personal liability from an owner to satisfy the institution's potential liability to the Department. 20 U.S.C. § 1099c(e). This could include a demand for the owner's assumption of personal liability for the payment of liabilities to the Department, refunds to students, or salaries to teachers and other expenses incurred during a teach-out phase in the instance of the institution's closure. 20 U.S.C. § 1099c(e). Mr. Hoflin has made no offer to SFAP to become personally liable for these expenses, notwithstanding his personal wealth. As well, ED has limited resources and is not well equipped to go behind the corporate form.*

Footnote: 6 [6] *Under the HEA, the Secretary is enabled to request at least one-half the institution's annual potential liabilities in the form of a surety; this permits the Secretary to request an amount commensurate with the estimated risk of loss of Federal funds.*