

IN THE MATTER OF MBTI BUSINESS . Docket No. 93-147-SA  
TRAINING INSTITUTE OF .  
PUERTO RICO, . Student Financial Assistance

. Proceeding  
Respondent. .

Appearances: Joan B. Farrell, Esq., of Hinshaw & Culbertson, Milwaukee, Wisconsin, for the Respondent.

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

This is an action initiated by the United States Department of Education (ED) to recover \$90,112 in Federal funds from MBTI Business Training Institute of Puerto Rico, Inc. (MBTI). This action was proposed following a final audit determination which concluded that MBTI had overstated the total clock hours of instruction for its programs. ED alleges that the overstatement rendered one of MBTI's programs ineligible for Pell grants and resulted in the award of excess Pell Grants to students in otherwise eligible programs. MBTI argues, in effect, that it utilized an acceptable method of computing the number of clock hours in its programs, and, therefore, properly disbursed Federal funds. Based on the findings of fact and conclusions of law, *infra*, the final audit determination is vacated and the Department may not recover any Federal funds. [See footnote 1 1/](#)

## I. FINDINGS OF FACT

The pertinent findings of fact are set forth in the opinion. The detailed findings of fact are set forth in the appendix, *infra*. To the extent that the 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 case.

## II. OPINION

Under the Pell Grant program, the Secretary provides grants to eligible students to assist in making available the benefits of postsecondary education. 20 U.S.C. § 1070(a). An eligible student is one who is enrolled or accepted for enrollment in an eligible program. 34 C.F.R. § 668.7(a)(1)(i) (1991). With respect to a post-secondary vocational institution, an eligible program is, *inter alia*, at least a six month program leading to a degree or other recognized equivalent and consists of a minimum of 600 clock hours of supervised training at an institution using clock hours to measure academic progress. See 34 C.F.R. §§ 668.2 and 668.8(a)(2)(iv).

ED contends that the duration of MBTI's Conversational English program was less than the 600 clock hour minimum and, therefore, it was not an eligible program for Pell grants. ED also

asserts that the clock hours of MBTI's Travel and Tourism program and its other programs were overstated and resulted in an overaward of Pell grants. These contentions are based upon ED's view that MBTI incorrectly computed the number of clock hours in each program. The nature of the dispute may be illustrated by the Conversational English program offered to day-time students.

The Conversational English program had 116 days of instruction and each day included three instruction sessions with a break before and after the second session. The total time of daily instruction was 275 minutes and the total time of the two breaks between the sessions was 25 minutes. [See footnote 2 2/](#)

According to MBTI, the Conversational English program was a 638 clock hour program. In its view, a clock hour may constitute 50 minutes of instruction according to the regulations. Hence, its 275 minutes of daily instruction constitute 5.5 clock hours of instruction per day (275 minutes / 50 minutes per clock hour = 5.5 clock hours). The program offered 116 days of instruction

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and, therefore, it had 638 clock hours of instruction (5.5 clock hours per day x 116 days).

ED argues that the program constituted only 580 clock hours which is 20 hours short of the minimum of 600 clock hours that is necessary to constitute an eligible program. In its view, the daily program had 275 minutes of instruction and 25 minutes of breaks for a total of 300 minutes. ED interprets a clock hour as equal to 60 minutes of which at least 50 minutes must be instruction. Accordingly, ED divides the 300 minutes of instruction and breaks by 60 minutes which equals 5 clock hours per day. The program had 116 days of instruction and, therefore, the program constituted 580 clock hours (5 clock hours per day x 116 days).

The dispute between the parties is whether a clock hour may constitute 50 minutes of instruction, as MBTI urges, or whether it must be, as ED argues, 60 minutes in duration of which 50 to 60 minutes must be instructional and any remaining time in that hour must be spent by the student at the school.

Since the parties agree that the amount of instruction was adequate, the practical effect of the disagreement is that ED seeks the recovery of Pell funds because, under its view, MBTI did not provide its students with an additional 10 1/2 minutes of break time each day in the Conversational English program. [See footnote 3 3/](#)

A clock hour is defined by 34 C.F.R. § 668.2 (1991) as the equivalent of "[a] 50 to 60 minute class, lecture or recitation." This is precisely the definition implemented by MBTI. MBTI used 50 minutes as representing a clock hour and determined the number of clock hours in its programs based upon the actual amount of instruction. It did not include any break time as part of a clock hour of instruction. This construction is fully consistent with the above definition of a clock hour.

The positions and arguments of the parties in this litigation are identical to the dispute in *In re Denver Paralegal Institute*, Dkt. Nos. 92-86-SP and 92-87-SA, U.S. Dep't of Education at 15-16

(Mar. 14, 1994). There, ED's argument was rejected and the tribunal held that the clock hour regulation focuses solely on instructional time and that a clock hour of instruction may be

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less than an actual hour of time--

[A] clock hour is defined by 34 C.F.R. § 668.2 . . . as '[t]he equivalent of [a] 50 to 60 minute class, lecture, or recitation.' Thus, 50 minutes of instruction is sufficient to constitute one clock hour. Hence, the regulation is clear that clock hour measurement does not correspond precisely with the actual amount of time of instruction. Clock hour measurement will always be the same or more than the actual instruction time. Hence, ED's . . . premise underlying its litigating position -- that clock hour measurement reflects actual time -- is inconsistent with the Department's regulation.

. . . .  
The clock hour regulation focuses solely upon the period of instruction. Break periods are not relevant under the regulation. Thus, the determining factor is the quantity of education provided, not whether there is or is not a break provided before or after the period of instruction.

Id.

Notwithstanding the unambiguous definition of clock hour in 34 C.F.R. § 668.2, ED relies upon a June 1985 Dear Colleague Letter (Gen-85-12) as authority for the proposition that an institution cannot divide the total number of minutes of instruction in a day by 50 minutes to determine the number of clock hours in that day. [See footnote 4 4/](#) This proposition was also included in the 1992-93 Student

Financial Aid Handbook which ED relied upon as its primary authority in Denver Paralegal Institute.

The position advanced in the Student Financial Aid Handbook in Denver Paralegal Institute was disregarded and its basis is equally applicable to the Dear Colleague Letter--

[It] conflicts with the rationale of the definition of clock hour in 34 C.F.R. § 668.2, as noted above, and, therefore, the handbook may be disregarded.

Id., at 17.

Moreover, the legal significance of a Dear Colleague Letter was also addressed in Denver Paralegal Institute. There, it was held that a Dear Colleague Letter cannot--

serve as a basis for substantive rules upon which ED can rely. This view is consistent with *Jackson v. Culinary Sch. of Wash.*, 788 F. Supp. 1233, 1262 (D.D.C. 1992) which held that a Department policy, not subject to the notice and comment procedures of the Administrative Procedure Act (APA), was not binding on third parties--

[since] this policy has not yet been codified in law or regulation . . . [t]he case law in this Circuit clearly suggests that such a pronouncement, which has not been subjected to the notice and comment procedures required by the APA, 5 U.S.C. § 553, cannot be binding on third parties.

See also *In re Baytown Technical Sch., Inc.*, Dkt. No. 91-40- SP, U.S. Dep't of Education (1991) at 26 (the Department's Dear Colleague Letters may be useful as a "backdrop of published policy statements . . . but these indicia of policy cannot stand alone as the basis for regulatory violation.")

*Id.*, at 4-5.

For the reasons indicated above, the position set forth in the Dear Colleague Letter is rejected.

ED also relies on the Preamble to the Federal Register published on July 23, 1993. In the Preamble, the Secretary notes that an

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institution may not compute clock hours by dividing by 50 minutes--

To demonstrate the number of clock hours in an educational program, certain institutions have aggregated the number of minutes of instruction provided in that program, and have divided those minutes by 50. This practice is inconsistent with the Secretary's long-standing interpretation under the current definition of the term "clock hour." Under that interpretation, if an institution seeks to determine the number of clock hours in an educational program by aggregating the number of minutes in that program, it has to divide those minutes by 60 rather than 50.

The revised definition of a clock hour requires that each clock hour of instruction takes place in a discrete 60- minute period.[\[See footnote 5 5/\]](#)

58 Fed. Reg. 39,619 (July 23, 1993).

Regulations and decisions of the Secretary, issued in response to appeals of the decisions of Administrative Law Judges or hearing officials, are binding on this tribunal as accepted means of expressing policy and interpretation. However, a comment by the Secretary in a Preamble is not a regulation and has no binding effect. See *Bissette v. Colonial Mortgage Corp. of D.C.*, 477 F.2d 1245, 1247 (D.C. Cir. 1973); *Gersman v. Group Health Ass'n, Inc.*, 725 F. Supp. 573, 577 (D.D.C. 1989); *Council of Hawaii Hotels v. Agsalud*, 594 F. Supp. 449, 453 (D. Haw. 1984). "[T]he preamble . . . is merely a general statement of policy which does not mitigate and certainly does not override the specific requirements laid out in the body of the statute." *Samuels v. District of Columbia*, 650 F. Supp. 482, 484 (D.D.C. 1986).

In addition, the Preamble to a regulation published in 1993 does not affect the period of July 1, 1990, through June 30, 1991, which is in issue in this proceeding. Regulations promulgated

subsequent to the year of the program may not govern the program in a prior year. *Bennett v. New Jersey*, 470 U.S. 632 (1985); *In re Temple University*, Dkt. No. 89-26-S, U.S. Dep't of Education (1990). Such a proscription is equally applicable to a Preamble which came after the period in issue. See *Denver Paralegal Institute*, at 17.

In summary, ED's position is contrary to the plain language of the definition of clock hour as set forth in 34 C.F.R. § 668.2. Accordingly, ED's proposed recovery, which seeks \$90,112 in Pell funds due solely to MBTI's purported failure to compute properly the clock hours of its programs, is denied and the final audit recovery determination is vacated. [See footnote 6 6/](#)

### 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 demand by the United States Department of Education to recover funds from MBTI Business Training Institute of Puerto Rico is denied and the final audit recovery determination is vacated.

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Allan C. Lewis  
Administrative Law Judge

Issued: April 15, 1994  
Washington, D.C.

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### Appendix

1. MBTI Business Training Institute operated institutions in Wisconsin and Puerto Rico. In 1990, MBTI Business Training Institute in Wisconsin was sold.
2. MBTI Business Training Institute of Puerto Rico (MBTI) was founded in 1969 and has operated in San Juan, Puerto Rico since that time. MBTI has been licensed by the Puerto Rico Department of Education since its founding.
3. MBTI is accredited by the Commission for Independent Colleges and Schools of the Career College Association. MBTI has been accredited since 1974 and its accreditation remains in effect until December 31, 1996.
4. During the 1991 award year, 662 students were enrolled in MBTI programs. These programs included in Secretarial Sciences, Sales and Marketing, Accounting Clerk, Fashion Merchandising, Travel and Tourism, Data Entry, and Conversational English.

5. The Conversational English day program was 638 total clock hours which consisted of 116 days of instruction with each day accounting for 5.5 clock hours--

**Status Period Minutes Clock Hours**

Class 8:00 - 9:45 105 2.1

Break 9:45 - 10:00 15

Class 10:00 - 11:50 110 2.2

Break 11:50 - 12:00 10

Class 12:00 - 1:00 60 1.2

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Total 5.5

6. The Conversational English night day program was 639 total clock hours which consisted of 142 days of instruction with each day accounting for 4.5 clock hours--

**Status Period Minutes Clock Hours**

Class 6:00 - 8:00 120 2.4

Break 8:00 - 8:15 15

Class 8:15 - 10:00 120 2.1

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Total 4.5

7. During award year 1991, MBTI participated in the Pell Grant program, the Federal Supplemental Educational Opportunity Grant (FSEOG), and the Federal Family Education Loan programs.

8. The Office of Inspector General, United States Department of Education conducted an field audit of the Student Financial Assistance programs at MBTI from November 1991 through February 1992. The audit included the period from July 1, 1990 to June 30, 1991 and the audit report was issued on February 2, 1993.

9. Effective April 6, 1992, MBTI changed its class schedules to comply with the Inspector General's audit report which interpreted a clock hour to be the equivalent of 60 minutes of actual time.

10. On April 9, 1992, MBTI received a letter from the Department of Veterans Affairs, Regional Office 355, which responded to MBTI's inquiries concerning the certification of VA beneficiaries. The Department of Veterans Affairs indicated that, with respect to its financial aid

awards, a standard class session is computed by converting the student's hours of attendance per week to minutes and dividing by 50.

11. On September 14, 1993, the United States Department of Education issued a final audit determination which asserted that MBTI overstated the number of clock hours of instruction which resulted in student financial assistance awards to students enrolled in ineligible programs and overpayments to students enrolled in otherwise eligible programs.

12. On November 4, 1993, MBTI, through counsel, appealed the final audit determination.

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## SERVICE

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On April 15, 1994, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

Edmund J. Trepacz, II, Esq.  
Office of the General Counsel  
U.S. Department of Education  
Room 4083, FOB-6  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202  
Joan B. Farrell, Esq.  
Hinshaw & Culbertson  
100 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202

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*Footnote: 1 1/ This is a 34 C.F.R. Subpart H proceeding which is resolved based upon the written submissions of the parties. 34 C.F.R. § 668.116(b). Upon review of this material, it was evident that an oral argument was not necessary to decide this matter.*

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*Footnote: 2 2/ The class schedule was as follows--*

***Status Period Minutes***

*Class 8:00 - 9:45 105*

*Break 9:45 - 10:00 15*

*Class 10:00 - 11:50 110*

*Break 11:50 - 12:00 10*

*Class 12:00 - 1:00 60*

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*[Footnote: 3](#) 3/ This is the additional amount of break time necessary to provide, under ED's view, the requisite minimum of 600 clock hours for the program. The additional amount of break time necessary to reach MBTI's designated a total of 638 clock hours, as interpreted by ED, is 30 minutes per day.*

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*[Footnote: 4](#) 4/ Dear Colleague Letter (Gen-85-12) provides in pertinent part--*

*Clock Hour Definition*

*Q. The definition of a "clock hour" (Section 690.2), refers to "the equivalent of a 50 to 60-minute class, lecture, or recitation." Can an institution divide the total number of minutes of instruction in a day by 50 minutes to determine the number of clock hours in a day of instruction?*

*A. No. For Pell Grant and Campus-based program award calculations, a clock hour is defined as an hour of instruction with an allowance for a 10-minute break in a given 60-minute period. If schools were allowed to divide the total number of minutes by 50, a student would earn approximately 1.17 clock hours in an hour. This is not consistent with the concept of a clock hour as an hour of instruction. For the purpose of calculating a financial aid award, a student may not earn more than one clock hour in a given 60-minute period.*

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*[Footnote: 5](#) 5/ The newly promulgated definition of clock hour provides that a clock hour is "[a] 50-minute to 60-minute class . . . in a 60-minute period." 58 Fed. Reg. 39,620 (July 23, 1993).*

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*[Footnote: 6](#) 6/ Although not relevant to this proceeding, MBTI modified the schedules of its classes, effective April 6, 1992, in order to comply with ED's position.*