IN THE MATTER OF INSTITUTE OF JEWISH CULTURE AND HERITAGE,
Respondent.

Docket No. 93-17-SX
Student Financial Assistance Proceeding

INITIAL DECISION

On December 16, 1992, the Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) imposed an emergency action against the Institute of Jewish Culture and Heritage (IJCH) of Brooklyn, New York, in accordance with 20 U.S.C. §1094(c)(1)(G) and 34 C.F.R. §668.83. In response to the notice, on January 19, 1993, the IJCH requested an opportunity to show cause why the emergency action is unwarranted.

In addition, on January 15, 1993, ED notified IJCH that it was no longer eligible to participate in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended. No hearing right was included within the notice. However, IJCH moved in the United States District Court for the Eastern District of New York for a temporary restraining order as well as preliminary and permanent injunctions against ED's action. On February 12, 1993, Judge Hurley, of that Court, issued an Order requiring ED to provide a hearing under the provisions of 34 C.F.R. § 668, prior to February 19, 1993.

Both pursuant to the Delegation of Authority from the Secretary to me to conduct proceedings and issue final decisions in such circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, as well as an assignment from the Director of Hearings and Appeals to conduct a hearing in compliance with Judge Hurley's Order, I conducted a hearing on both issues in Washington, D.C., on February 19, 1993. At the hearing, the IJCH was represented by Lee Manasavit, Esq., of Brustein and Manasavit, while OSFA was represented by Carol S. Bengle, Esq., from the Office of the General Counsel. The proceeding was transcribed by a Court Reporter.

ED's contention as to both actions is the same; that, as a result of the passage of the Higher Education Act Amendments of 1992, IJCH was not eligible to participate in the student financial assistance programs after October 1, 1992. Specifically, prior to October 1, 1992, IJCH had been eligible to participate in these programs under the transfer of credit alternative to accreditation, commonly referred to as 3-I-C. After that date, however, an institution must be, among other things, accredited or preaccredited by a nationally recognized accrediting agency to so qualify. IJCH did not qualify under either of these alternatives and, therefore, it was no longer eligible to participate in federal student financial assistance programs.

At the hearing, Mr. Manasavit moved for dismissal of the emergency action asserting that ED had not initiated a limitation, suspension or termination proceeding within 30 days, as required. Ms. Bengle agreed that no such action had been initiated.

In accordance with 20 U.S.C. § 1094(c)(1)(G) and 34 C.F.R. §668.83, an emergency action cannot exceed 30 days unless a limitation, suspension or termination proceeding is initiated within that period of time. Since I found that ED had not taken the steps necessary to extend the emergency action and, as a result, the emergency action had lapsed by operation of law, I granted IJCH's motion and DISMISSED the emergency action.

After dismissing the emergency action, I considered the question of the hearing directed by Judge Hurley. Since the type of hearing on the loss of eligibility was not specified by Judge Hurley, the parties were required to state on the record what type of hearing each party envisioned. IJCH's counsel opined that the hearing was a full termination hearing as provided for in 20 U.S.C. § 1094 and 34 C.F.R. § 668. As such, the hearing official should conduct a hearing and issue an initial decision. Such a decision could be appealed to the Secretary, who would render the final decision. ED's counsel generally agreed that the hearing officer would issue an initial decision and the Secretary could issue the final decision, noting, however, that the hearing should be a very limited one.

I note that provision for a termination hearing in situations where ED seeks to terminate a school because it no longer satisfies the statutory requirements that define an eligible institution is consistent with 34 C.F.R. § 600.41; 34 C.F.R. § 668.83, and Continental Training Services, Inc. d/b/a Superior Training Services v. Lauro Cavazos, 893 F.2d 877 (7th Cir. 1990). See also, Institutional Eligibility Under the Higher Education Act of 1965,, as amended; Student Assistance General Provisions, 55 Fed. Reg. 32180 (1990). I also note that, in the absence of a viable emergency action, ED has no authority to withhold funds from a school during the pendency of a termination proceeding.

During the evidentiary portion of the hearing, the parties agreed in essence to the following facts:

1. IJCH was certified by ED as an eligible institution of higher education and, thereby, qualified to participate in student financial assistance programs by virtue of the transfer of credit alternative (3-I-C) to accreditation, 20 U.S.C. § 1141(a)(5)(B).
2. This category was removed from the category of eligible schools by the Higher Education Amendments of 1992.
3. This change was effective on October 1, 1992.
4. IJCH does not now qualify under any other provision of law as an eligible institution of higher education.

Although agreeing to the facts, the parties disagreed as to the effect of the removal of the 3-I-C alternative to accreditation for eligibility to participate in the federal student financial assistance programs. ED's position is that by removing the transfer of credit alternative, Congress removed 3-I-C schools from the definition of what constitutes an eligible institution of higher education and, as such, IJCH cannot participate in these federal programs in any way. ED notes that the 1992 Amendments contained no savings clause and provided no discretion to the Secretary to continue them in the programs, even for a temporary period of time. Given this situation, it was the duty of ED to take immediate action to terminate IJCH.

IJCH, on the other hand, argues that although the statute eliminates 3-I-C schools from the definition of an eligible institution and, thereby, effectively prevents new schools from so qualifying, the statute is silent as to schools that are already certified for participation in these programs. Silence in this regard, the school argues, is a signal that Congress intended to apply the Amendments prospectively and never meant to terminate schools already in the program. In addition, 20 U.S.C. § 1099c.(h)(2) provides that, in instances where a school loses accreditation because an accrediting agency is no longer recognized by the Secretary (such accreditation being necessary to participation in student aid programs), the Secretary has discretion to continue such school in the program for up to 18 months. Since the two situations are parallel, the same Secretarial discretion should be inferred in the 3-I-C cases. Finally, counsel noted that Congress had originally removed candidacy status for accreditation in the 1992 Amendments but, after apparently some second thoughts, returned candidacy status to full coverage under the definition of eligible institution. Since the changes to the definition of what constitutes an eligible institution of higher education should be applied only prospectively, IJCH's certification should not be affected adversely.

Upon my review of the evidence, and consideration of respective arguments of counsel, I find that:

1. IJCH has, since October 1, 1992, been ineligible to participate in the federal student financial assistance programs because it no longer in included in the definition of what constitutes an eligible institution of higher education.
2. The 1992 Amendments to the Higher Education Act of 1965, as amended, were, in pertinent part, made applicable on October 1, 1992, and no specific provision was included making the coverage of those changes effective only prospectively.
3. Although IJCH had been certified by ED as eligible to participate in the federal student financial assistance programs prior to the implementation of the 1992 Amendments, that certification was rendered inoperative by the statutory change.

I note that discretion, as a form of equitable relief may be applicable in this situation. Such discretion, however, is outside the scope of my authority; it lays exclusively within the purview of the Secretary by virtue of his plenary powers.

Finally, I note with great consternation the lateness of the notice which was afforded IJCH and the other 3-I-C schools. While the Department is arguably not obligated to inform institutions, generally, of changes in the law, the time lapse from July 23, 1992, the day the legislation was signed by the President, to December 16, 1992, the date of the letter of notification, seems unseemly. A more decorous notice could have provided this small, well defined pool of educational institutions the opportunity to accelerate applications for accreditation; appeal to members of Congress for a form of interim coverage, or assist students with alternative modes of financing. Since the notification occurred over two months after the schools had lost their eligibility, these actions were almost impossible to perform, especially because the notice was sent so close to the traditional holiday break in the academic calendar.

Consistent with the findings above, I hereby **AFFIRM** the termination action.

Judge Ernest C. Canellos

Dated: March 10, 1993
Washington, DC