IN THE MATTER OF: .
. Docket Number 93-170-SP
BERK TRADE AND .
BUSINESS SCHOOL, . Student Financial
. Assistance Proceeding
Respondent. .
.

Appearances: Peter S. Leyton, Esq., of Ritzert & Leyton, Washington, D.C., for the Respondent

Denise Morelli, Esq., Office of the General Counsel, U.S. Department of Education, for the Office of Student Financial Assistance Programs.

Before: Judge Ernest C. Canellos

DECISION

PROCEDURAL HISTORY

Berk Trade and Business School (Berk) is a proprietary vocational institution located in New York, New York. Berk offers varied programs at seven locations in the New York City metropolitan area, and is accredited by the Accrediting Alliance of Career Schools and Colleges of Technology. Berk participates in the Federal Family Education Loan (FFEL) Program[See footnote 1 */] and Pell Grant Program, both authorized under Title IV of the Higher Education Act of 1965, as amended. These programs are administered by the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED).

A program review was conducted at Berk from October 15-18, 1990, by SFAP's Regional Office in New York City. The review examined Berk's administration of the Title IV programs for award years 1989, 1990 and 1991. SFAP's program review report, dated July 23, 1992, cited several areas of Berk's non-compliance with pertinent statutes and regulations. While the parties attempted to resolve the outstanding issues from the above report, an additional program review was conducted to evaluate Berk's compliance with its 1990 Default Management Plan. In March 1993, SFAP issued another program review report citing Berk with several violations of its plan.

On October 19, 1993, SFAP issued a final program review determination letter (FPRD) detailing the findings that remained outstanding from the two program review reports. All violations from the 1992 report were resolved by agreement of the parties, except the finding that Berk funded ineligible programs. That finding was made because two of Berk's programs, the Auto Mechanics and the Security/Loss Prevention Programs, were not authorized during specific periods by the appropriate state agency, thus making those programs ineligible for those specific periods. With respect to Berk's compliance with its Default Management Plan, the FPRD referred SFAP's 1993 finding to the SFAP Compliance and Enforcement Division, ED's Office of Postsecondary Education (OPE), for further action.

As a result of the finding that Berk applied Title IV funds to ineligible programs, ED claims Berk must return $107,526 in FFEL funds, interest subsidies, and special allowances, and $23,209 in Pell Grant funds paid for students in these ineligible programs.

ISSUES

Two issues are apparent in this case: (1) whether Berk's auto mechanics and security/loss prevention programs were ineligible for specific periods, and (2) whether ED has accurately calculated Berk's FFEL liability resulting from that ineligibility. I will discuss these seriatim.

DISCUSSION

Ineligibility of Programs

As a prerequisite to participating in Title IV programs, an institution must be legally authorized to provide educational programs in the state where it is physically located. 20 U.S.C. §§ 1085(c), 1088(b) and 1141(a). Here, the laws of the State of New York are controlling. The New York State Education Department (NYSED) oversees authorization of all educational institutions in the state.

Under the statutes and regulations of New York, an institution such as Berk must be (1) licensed by the NYSED, and (2) each program it offers must be approved by NYSED. It has been clearly established that a school located in New York must satisfy both prongs of this test to be eligible for Title IV funds. Berk's contention to the contrary is therefore without merit. See In the Matter of French Fashion Academy, Docket NO. 89-12-S, U.S. Department of Education (Decision of the Secretary) (March 30, 1990), affirmed sub nom. French Fashion Academy, Inc. v. Cavazos, No. 90 Civ. 6645 (S.D.N.Y. 1991), affirmed sub nom. French Fashion Academy, Inc. v. Cavazos et al., Nos. 92-6010, 93- 7316 (2nd Cir. 1994).

Both programs at issue had been previously approved by NYSED. NYSED's approval of the auto mechanics program expired August 31, 1988. Berk's initial application for renewed approval was rejected by NYSED on August 10, 1988. Berk reapplied for renewal on December 9, 1988. With respect to the security/loss prevention program, NYSED's approval expired on March 31, 1988. Berk's application for renewal was not received by NYSED until May 10, 1988. NYSED denied approval of the program, and Berk reapplied January 5, 1989. NYSED subsequently granted approval to both programs on January 19, 1989. In each case, such approval was explicitly stated to be effective January 1, 1989, thereby creating a situation where the auto mechanics program was not authorized between August 31, 1988, and January 1, 1989, and the security/loss prevention program was not authorized between March 31, 1988, and January 1, 1989.

Berk argued that NYSED's enrollment agreements constituted program approvals during t he periods at issue. However, as indicated by a July 23, 1991 letter from NYSED to Berk, the enrollment agreements explicitly state that review has not been made for compliance with any other provisions of Federal or State statutes or regulations. Consequently, these enrollment agreements have no bearing on Title IV eligibility.

The employee who was responsible for ensuring Berk's compliance with state requirements during the time in dispute declared that it was not uncommon to request and receive oral extensions of program approvals. However, he did not remember if he made such a request in these particular instances. Nevertheless, this statement is insufficient to overcome the evidence that the two programs were not approved by NYSED for the specific periods at issue.

Berk has demonstrated NYSED's current practice of granting interim extensions of program approval in writing, and claims that NYSED adopted the written form as a substitute for the oral extensions described above. However, the record does not support the claim that such an oral extension occurred in this case.

I find that the record clearly supports SFAP's determination that the auto mechanics program was ineligible from September 1, 1988, through December 31, 1988, and that the security/loss prevention program was ineligible from April 1, 1988, through December 31, 1988. This is not a mere technical violation where a program, in essence unchanged, is renewed, albeit late. Here, NYSED had substantive reasons for denying the renewals, and it was only after the programs had been restructured by Berk to satisfy NYSED's concerns that they were approved.

Calculation of Liability

All Title IV funds expended to students in ineligible programs is erroneous and is subject to be returned to ED. However, ED is seeking only its actual loss based on applying Berk's cohort default rate of 47.7 percent to the total and demanding the return of that amount. In addition to $23,209 in Pell Grant funds, ED claims that Berk must return $107,526 in FFEL funds, interest subsidies, and special allowances paid for students in the above programs. Berk does not contest the Pell Grant amount, but maintains that SFAP's calculations of its FEEL liability are excessive.

Berk contends that SFAP improperly calculated its actual loss by utilizing the FFEL amount certified for each student, rather than the amount actually disbursed. Berk asserts that certified amounts do not always reflect the loan amount disbursed to the student. In addition, all Title IV funds must be issued in at least two disbursements. 34 C.F.R. § 682.604. It is therefore erroneous to assume that Berk actually expended the entire certified amounts to its students.

SFAP argues that the document used to calculate the FFEL amounts was submitted by Berk itself, and that Berk had ample opportunity to revise its figures before the FPRD was issued. While this may be true, Berk has since made an apparent good faith effort to correct its error. Furthermore, when requesting Berk to provide the loan amounts certified, SFAP indicated that second disbursements were assumed to be half of the amount certified. It is therefore not unreasonable that Berk would provide the total amount certified, presuming SFAP would then assess any liability based only on actual disbursements.

I have an obligation to ensure fairness in administrative proceedings. Permitting ED to assess liability based on FFEL amounts certified, rather than disbursed, would be inconsistent with that responsibility. This is particularly true given Berk's continued insistence that its original submission was in error.

I find that SFAP improperly assessed Berk's FFEL liability based on certified loan amounts of $198,750. Berk's accurate liability should be based on its disbursement of $102,111. When applied to SFAP's actual loss work sheet, this proper amount creates a liability of $56,194.

Berk's Remaining Contentions

Berk also appeals SFAP's determination regarding compliance with its Default Management Plan, which SFAP transferred to OPE for further action. Since Berk was not adversely affected by the determination, this Tribunal has no authority to review such SFAP finding.

Finally, Berk maintains that it has been improperly imposed with the burden of proof in this proceeding. The burden of proof in this type of procedure is on the Respondent. 34 C.F.R. § 668.116(d). SFAP does have the burden of production and this burden is satisfied if SFAP presents sufficient evidence to enable a reasonable person to draw the inference that a violation has occurred. In the Matter of Sinclair Community College, Docket No. 89-21-S, U.S. Department of Education (Decision of the Secretary) (September 26, 1991). SFAP has clearly met its burden, and there has been no unlawful imposition upon Berk.

FINDINGS

I FIND the following:

Berk's auto mechanics program was not properly authorized by the State of New York from September 1, 1988 through December 31, 1988, therefore, was not a Title IV eligible program during this period;

Berk's security/loss prevention program was not properly authorized by the State of New York from April 1, 1988 through December 31, 1988, therefore, was not a Title IV eligible program during this period;

SFAP improperly assessed Berk's consequent FFEL liability based on loan amounts certified rather than amounts actually disbursed. Berk's accurate FFEL liability is $56,194.

SFAP properly assessed Berk's liability for Pell Grants as $23,209.

Berk's total liability for the funding of these two ineligible programs is $79,403.

ORDER

On the basis of the foregoing it is hereby --

ORDERED, the Berk Trade and Business School repay to the United States Department of Education the sum of $79,403.

Judge Ernest C. Canellos

Issued: June 27, 1994
Washington, D.C.

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*Footnote: 1 */ FFEL includes the Stafford Loan (formerly Guaranteed Student Loan (GSL)) and Supplemental Loan for Students (SLS) Programs.*