

In the Matter of YORK COLLEGE, San Juan, Puerto Rico
Respondent.

Docket No. 93-2-ST
Student Financial Assistance Proceeding

DECISION

RENATO BARRIOS, Esq., for Respondent. DONALD C. PHILIPS, Esq., for Student Financial Assistance Programs of United States Department of Education

Before Paul J. Clerman. Administrative Law Judge.

This proceeding was commenced by the Compliance and Enforcement Division of the Department of Education (ED) on December 15, 1992, with the issuance and transmission to the President of York College (York or respondent) of a letter/notice in which there was stated the intention of ED to terminate York's eligibility to participate in programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), 20 USC 1070 et seq. and 42 USC 2751 et seq., for reasons set forth in the letter/notice. The procedures being followed in this matter are those established by the Secretary of Education (the Secretary) and set out in 34 CFR Subpart G, specifically at section 668.86, as amended, for initiating the termination of eligibility of educational institutions to participate in Title IV programs under HEA.

The Title IV HEA programs in connection with which ED intends to terminate York's eligibility to participate are: Federal Pell Grant, Federal Supplemental Educational Opportunity Grants, Federal Work-Study, Federal Perkins Loans, and the Federal Family Education Loan Program, which was formerly called the Guaranteed Student Loan Programs. Included also are the Robert T. Stafford Federal Student Loan Program, the Federal Supplemental Loans for Students Programs, the Federal PLUS Loans Programs, and the Federal Consolidation Loans Programs.

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The termination action is stated to be based on the alleged failure of York to meet the regulatory requirements for financial responsibility at 34 CFR 668.13, particularly at

subparagraph (c)(2), which provides that an institution is considered not to be financially responsible if, under an accrual basis of accounting, the institution had, at the end of its latest fiscal year, a ratio of current assets to current liabilities of less than 1:1. The letter/notice indicated in this regard that, based on a year-end 1991 review of York's audited financial statements by ED's Financial Analysis Branch, York had at the end of its then latest fiscal year a ratio of current assets to current liabilities of less than 1:1, specifically a ratio of 1:1.25.

The letter/notice pointed out to York, also, that under subparagraphs (d), (e) and (f) of section 668.13 there are certain options available to the Secretary pursuant to which the Secretary may determine an institution to be financially responsible despite the institution's adverse asset-to-liability ratio. Reference was made to section 668.13(d) under which an institution may be determined to be financially responsible if it submits to the Secretary a performance bond or letter of credit payable to the Secretary in an amount fixed by the Secretary to demonstrate that the institution has sufficient financial responsibility to continue to participate in Title IV HEA programs. Under subparagraphs (e) and (f), additionally, the Secretary may require an institution to submit for its latest complete fiscal year, and its current fiscal year, a profit and loss statement and balance sheet based on the same basis of accounting used by the institution for financial

- reporting, or to submit a financial audit report by a certified

public accountant. The Secretary may then make a financial responsibility determination after evaluation of these documents.

Additionally, since October 1992, pursuant to 20 USC c(c)(3), notwithstanding an institution's failure to satisfy regulatory requirements for financial responsibility, the Secretary may determine an institution to be financially responsible if that institution submits to the Secretary third-party financial guarantees that shall be equal to not less than one-half of the annual potential liabilities of the institution to the Secretary for Title IV funds, including loan obligations, and to

students for
refunds of institutional charges.

The letter/notice indicates that pursuant to the above, ED notified York in August 1992 that it must within thirty days provide surety through August 1993 in the amount of \$350,000 in the form of an irrevocable letter of credit payable to the Secretary. The amount of that surety requirement was appealed by York. That appeal was denied by ED's Institutional Participation Division in October 1992 because, the letter/notice states, respondent submitted insufficient financial information. To date, according to the letter/notice, York has not submitted the \$350,000 letter of credit, and ED construes that failure to submit to mean that York

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does not satisfy regulatory requirements for financial responsibility as set out at 34 CFR 668.13. ED notified York that its eligibility to participate in Title IV programs must be terminated, and would be terminated on January 8, 1993, unless York files a timely request for a hearing or submits written material indicating why termination should not take place. On January 7, 1993, through its counsel, respondent requested a hearing in this matter. Such a hearing was ordered to be held before me, that hearing to consist of the submission by the parties of briefs and related written materials, which were filed in due course.

On brief, counsel for ED's Student Financial Assistance Programs (SAP) contends that respondent's poor financial

condition impugns its ability to administer Title IV programs in the manner required by law and regulation. SAP alleges that by allowing its financial condition to deteriorate York failed to satisfy the prerequisites of continued participation in Title IV programs and, indeed, raised doubts as to the institution's viability. SAP regards it as an absolute prerequisite to continued participation in Title IV programs that:

...an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this section. [34 CFR 668.13(a)]

SAP stressed in that connection, in its brief, that York's 1991 financial statement demonstrated a year-end current assets to current liabilities ratio of less than 1:1, contrary to the

- requirement of section 668.13(c)(2), and that, given the opportunity to show financial responsibility by providing the Secretary with a letter of credit, York failed to do so.

In its brief York states that it is now solvent, profitable, and financially responsible. York alleges in this regard that it is financially responsible within the meaning of section 668.13(b), in that it is able to: (1) Provide the services described in its official publication and statements, (2) Provide the administrative resources necessary to comply with the requirements of Subpart B of Part 668, and (3) Meet all of its financial obligations including, but not limited to, refunds of institutional charges, and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary. York points out, also, that notwithstanding subparagraph (b) of section 668.13, an institution may be considered by the Secretary not to be financially responsible if, under its basis of accounting, it has had operating losses over at least its two most recent fiscal years, or, it had a deficit net worth for its latest fiscal year (see section 668.13(c)). York contends that it does not fall under this latter category. In support, York submitted what it refers to as its financial statement for the natural year 1992, appended to its brief.

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There is a cover letter to York's financial statement (reproduced as an appendix to this Decision) in which the preparing accountant describes her review of York's financial data as, among other things, "...substantially less in scope than an examination in accordance with generally accepted auditing standards..." The balance sheet in this financial statement shows total current assets of \$409,873 and total

current liabilities of \$409,770, reflecting, according to York, a ratio of current assets to current liabilities in excess of 1:1.

In its reply brief SAP contends that York's 1992 financial statement is unreliable, and that even if it is deemed to be reliable it fails to demonstrate that York meets the requisite standards of financial responsibility. In the latter regard, SAP alleges that a key factor in York's calculation of its total current assets, \$409,873, is an item captioned stockholders receivable, \$157,306. SAP points out

that at no place in the financial statement is there any indication as to what this item consists of, by what is it secured, or when that receivable is due and payable. SAP alleges that with this major uncertainty there is no demonstration by York that its current assets exceed its current liabilities or that York passes the section 668.13(c)(2) ratio test of current assets to current liabilities.

Primarily, however, SAP emphasizes the alleged unreliability of York's financial statement. SAP points out that the Secretary's determination as to the financial responsibility of an institution may be based on a financial audit of that institution, which, under section 668.13(e)(2), must have been conducted by a certified public accountant in accordance with generally accepted auditing standards. In this case, SAP notes, York's accountant specifically disclaimed any adherence to generally accepted standards in her review. See appendix hereto. SAP asks that York's 1992 statement be disregarded because of its unreliability.

Aside from the issue of the reliability of York's financial statement, and assuming *arguendo* that the statement reflects York's financial condition, SAP contends that York has failed to meet other "numeric tests" of financial responsibility. SAP notes that under section 668.13(c)(1)(i) and (ii) the Secretary considers an institution not to be financially responsible if it had operating losses over its two most recent fiscal years or had a deficit net worth for its latest fiscal year. As previously indicated, York contends that it does not fall under this category. SAP contends to the contrary, however, that York's own 1992 financial statements

show a net loss of \$1,135 for that year and a net loss of \$156,201 for 1991. SAP notes that the same statements show for the item of retained earnings a negative value of \$157,336, which is regarded by SAP as synonymous with a negative net worth. Thus, according to SAP, York has failed in every way to pass the tests imposed in section 668.13(c).

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Respondent was given the opportunity, the same as SAP, to submit a reply brief in this matter, but failed to do so.

I have considered the facts and arguments submitted by the parties. Based on my evaluation thereof, I make the following findings of fact:

1. York is an educational institution that participates in Title IV HEA programs.
2. York was notified through proper channels that ED intends to terminate York's eligibility to participate in such programs, because of York's failure to meet the regulatory requirements for financial responsibility in 34 CFR 668.13.
3. York was given the opportunity, at its request, to demonstrate at an administrative hearing before me that it is a financially responsible institution under standards established in 34 CFR 668.13.
4. York failed to demonstrate that it is a financially

responsible institution under the standards in 34 CFR 668.13(b), in that York failed to show, in particular, that it is able to meet all of its financial obligations.

5. York failed to demonstrate that it is a financially responsible institution under the standards in 34 CFR 668.13(c), in that the evidence established that York has had operating losses in 1992 and 1991, and in 1992 had a deficit net worth; and in that the evidence failed to establish that York in the latter year had an acceptable ratio of current assets to current liabilities.

6. York was given the opportunity under 34 CFR 668.13(d)(1) to

demonstrate its financial responsibility by submitting to the Secretary a letter of credit payable to the Secretary in the amount of \$350,000, but failed to submit any such letter of credit or to establish that the amount thereof is unreasonable.

7. York failed to demonstrate to the Secretary as required under 34 CFR 668.13(a), that it is a financially responsible institution under the standards established in that section.

8. York has failed to demonstrate under governing statute and regulations that it is fit to continue to participate in any Title IV HEA programs.

In light of the foregoing findings of fact, I conclude and find that the eligibility of respondent, York College, of San Juan, Puerto Rico, to participate in student financial assistance programs under Title IV, HEA, should be, and it is hereby, terminated.

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This Decision shall take effect when it is served, and at that time this proceeding will be closed.

IT IS SO ORDERED.

By Paul J. Clerman Administrative Law Judge.

October 25, 1993,
at Washington, D. C.