

IN THE MATTER OF PHILLIPS COLLEGES, INC.,  
Respondent.

Docket No. 93-39-SP  
Student Financial Assistance Proceeding

Appearances: Lisa C. Bureau, Esq., of Dow, Lohnes & Albertson, Washington, D.C., for the  
Respondent.

Renee Brooker, Esq. of Washington, D.C.,  
Office of the General Counsel, United States  
Department of Education, for the Office of Student  
Financial Assistance Programs.

Before: Judge Ernest C. Canellos

#### DECISION

Phillips Colleges, Inc., (Phillips) operates for-profit trade schools, ten of which are at issue in this proceeding. Each of these schools participate in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). These Title IV Programs are administered by the Office of Student Financial Assistance Programs (SFAP), of the United States Department of Education (ED).

ED's Office of the Inspector General (IG) conducted an audit of Phillips' operations for the period July 1, 1987 to December 31, 1991. During this audit, it was determined that the schools at issue did not have documentation or their records were so deficient that they could not back up the fair-share awards in the Title IV Campus-Based Programs, for the 1990-91 and 1991-92 award years. As a result of Phillips inability to provide the requisite back-up information, ED required Phillips to "reconstruct" the information which was used to support the applications.

Phillips provided reconstructed income grid classification information for the 1988-89 and 1989-90 award years for the ten Phillips schools. On February 8, 1993, a Final Program Review Determination (FPRD) was issued to Phillips Colleges, Inc. which sought repayment of \$123,996. Phillips filed a timely appeal. The matter has been fully briefed by the parties and an Oral Argument was held. The amount in issue was reduced by agreement of the parties to \$110,356.

#### DISCUSSION

During the IG audit, it was discovered that Phillips did not possess the back up material and underlying information which supported its request for Campus-based funds. Campus-based

funds include: Perkins Loans (Perkins), 20 U.S.C. § 1087, 34 C.F.R. § 674; College Work Study (CWS), 42 U.S.C. § 2751, 34 C.F.R. § 675; and, Supplemental Educational Opportunity Grants (SEOG), 20 U.S.C. § 1070, 34 C.F.R. § 676. Only the CWS and SEOG programs are in issue in this appeal.

To receive Campus-based funds, an institution must submit an annual application, a Fiscal Operations Report and Application to Participate (FISAP). The institution is required to maintain the back-up material for that application. 34 C.F.R. § 675.19(b)(5) for CWS, and 34 C.F.R. § 675.19 (b)(4) for SEOG. A school certifies on every FISAP that, among other things, the application is true and accurate.

A statutory formula is used to determine each institution's "base guaranty," which constitutes 25% of the total funds available for allocation. The distribution of the other 75% is determined based on need, as calculated from the information contained in the FISAP. This need is determined based on an analysis of the need of the institution's students as reflected in "income grids." After the reconstruction of the income grids was accomplished, it was determined that five of Phillips' schools had received excess campus-based funds, and that excess constitutes the basis for ED's demand in this proceeding.

Phillips' counsel objects to certain parameters SFAP imposed on Phillips when it required Phillips to reconstruct student income grids. Counsel claims that SFAP is only applying them to it and not other institutions, that makes this action illegal, and dismissal of the proceeding would be an appropriate remedy.

Phillips, counsel admitted that Phillips did not possess the back- up documentation needed to determine if the original income grid was correct. It is clear that the reconstruction of the grid was driven by Phillips inability to substantiate the application for the Campus-based monies in the first place and that Phillips was required to maintain the records to support the awards.

As a starting point, it is abundantly clear that Phillips' records were so deficient and filled with gaps that they could not be used to verify the fair-share amounts at issue. Next, since a

reconstruction of the income grids was required, I agree that SFAP could impose reasonable limits on how it was to be done. The fact that those standards may not have been imposed on other schools does not make them illegal. So long as there is a reasonable correlation to the verification process of student income, the standards are not illegal.

The two parameters which Phillips objects to are: (1) the elimination of any less than full time students from the income grid calculations and (2) the requirement that only students with signed Student Aid Reports (SARs) be included in the income grid. Phillips claims that, under the FISAP instructions, neither of those parameters are required of recipient institutions.

In response to my questioning at the oral argument, Phillips counsel could not quantify the effect on the student income grid if neither parameter was used. Counsel could not state that if those students were included there would be a measurable difference in the income grids. Strangely enough, it seems that the parameter involving only counting full-time students which Phillips

claims to be a more restrictive definition of eligible aid applicant than FISAP requires, actually had no practical effect in this case since there were no part-time students receiving campus-based funds. As to the effect of requiring a signed SAR, SFAP can reasonably impose the requirement since that is a more reliable verifier of income status than an unsigned SAR. Since, an income grid must be based on accurate information, the signed SARs give a more accurate projection and, as such, are deemed to be a reasonable requirement for the grid reconstruction process.

Phillips' counsel also argues that an offset is warranted because, as a group, the institutions returned at least \$435,047 in CWS and SEOG funds to ED for the 1990-91 and 1991-92 award years. This amount exceeds the repayment liability claimed by SFAP (\$110,356) and the total liability must be offset against the total funds returned. It argues had its institutions accurately reported their "need," some of them might have received more "fair-share" funds.

In determining the merits of an offset, the threshold issue is that an offset entails a situation where two parties owe each other. Such a situation is not applicable to this proceeding - this is not a case where reimbursement is being made for monies spent on students for which the institutions are out-of-pocket. Phillips is not in line for reimbursement for monies spent. Phillips counsel has done nothing more than speculate that under-awarding happened; there is nothing in the record to backup such a hypothesis.

Phillips also argues it has no repayment liability because it did not misuse any federal funds and that SFAP failed to separate record keeping violations from a liability claim. Citing to the Administrative Law Judge's Decision in United Talmudical Academy (UTA) (U.S. Dept. of Education, Sept. 17, 1987), which

differentiated between record keeping requirements and misuse of funds, Phillips charges that for there to be a liability, misuse of funds must be shown.

Phillips does acknowledge the Administrative Law Judge's Decision in *In Re: Macomb Community College*, Docket No. 91-80-SP, (May 5, 1993), but attempts to distinguish and to weaken it by noting that it only became final by operation of law, rather than by affirmative act of the Secretary. However, *Macomb* is directly on point as repayment was sought for failure to retain backup documentation to verify the accuracy of its application for Campus-based funds and stands for the proposition that ED may recover Title IV funds from an institution that spent undocumented funds and may pursue that recovery by tracing the institution's contractual obligations back to the participation agreement. Under a participation agreement, an institution obligates itself to repay funds for which it becomes accountable as a Title IV recipient and recovery is based on contract theory.

In any event, SFAP disputes Phillips' claim that there was no harm done for which liability should attach. SFAP asserts that there was harm because the violation meant the Phillips schools got more than they could document need for and that other schools and their students were penalized by not getting a greater fair-share.

Finally, Phillips argument that the FPRD must be dismissed for SFAP's failure to carry its burden on the amount for which Phillips is liable is not persuasive. Ultimately, Phillips has the burden of proof as to compliance with regulations and whether it owes the questioned funds here.

34 C.F.R. §668.116(d). Phillips lack of records and its inability to disprove what the reconstructed grids showed, clearly establishes that it has failed to carry its burden of proof.

## FINDINGS

I FIND the following:

Phillips failed to maintain back-up documentation, as required;

SFAP established a reasonable reconstruction process and the liability claimed is supported in the record;

Phillips did not establish that the reconstruction process SFAP required was fatally flawed or illegal;

Phillips failed to meet its burden of establishing that the Title IV funds in issue were properly accounted for;

Phillips is not entitled to an offset as claimed; and

Phillips liability amounts to \$110,356.00.

## ORDER

On the basis of the foregoing it is hereby--

ORDERED, that Phillips Colleges, Inc., repay to the United States Department of Education the sum of \$110,356.

Ernest C. Canellos

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