IN THE MATTER OF Docket No. 93-58-SP .
.
PHILLIPS COLLEGE OF CHICAGO, . Student Financial
. Assistance Proceeding
.
Respondent. .

Appearances: Leslie H. Wiesenfelder, Esq., and Kelli J. Crummer, Esq., of Dow, Lohnes & Albertson, Washington, D.C., for the Respondent.

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

Before: Judge Ernest C. Canellos

DECISION

Phillips College of Chicago (Phillips) is one of a number of proprietary schools owned by Phillips Colleges, Inc. On May 28, 1992, the Office of the Inspector General (OIG) of the U.S. Department of Education (ED), issued a report of the results of an audit performed at Phillips between September 24, 1991 and December 13, 1991. The audit analyzed Phillips' administration of the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV) between February 1989, and June 30, 1991.

ED's Office of Student Financial Assistance Programs (SFAP) issued a final audit determination (FAD) dated March 22, 1993, which found that Phillips violated various provisions of Title IV. Three of those findings are the subject of this appeal. They are: Phillips employed commissioned salespersons to promote the availability of the Guaranteed Student Loan Programs (GSL); Phillips disbursed Title IV funds in two rather than the required three installments; and, Phillips administered its Title IV programs in such an improper manner that all its records are unreliable and do not support any of the expenditures of federal student financial assistance during the period of the audit.

Two of the issues enumerated above, namely, the commissioned salesperson issue and the payment in two rather than three installments, have been litigated previously between the schools of Phillips Colleges Inc., and ED. Since all the schools under the umbrella of Phillips Colleges Inc., operate under the same corporate student financial aid regulations, the decisions in those two cases are relevant to the current dispute.

First, in In the Matter of Phillips Colleges Inc., Docket No. 93- 48-SP, U.S. Dep't of Educ. (August 23, 1994), the judge found that the company-wide policy of "One-Stop Shopping" violated the prohibition against employment of commissioned salespersons to promote the availability of GSL funds. A similar decision was reached in In the Matter of Phillips College of Atlanta, Docket No. 91-96-SA, U.S. Dep't. of Educ. (February 28, 1994). My review of the evidence in the instant case, and the arguments of Phillips' counsel, reveals that the facts of this case are indistinguishable from those in the cases cited above. Consequently, I find that Phillips violated 34 C.F.R. § 682.200 by employing commissioned salespersons to promote the availability of GSL funding from February 1989 until April 11, 1991.

Second, in In the Matter of Edmondson Junior College, Docket No. 93-7-SP, U.S. Dep't of Educ. (June 4, 1993), I found that another school in the Phillips Colleges Inc. family did not violate the Title IV regulations by dispensing federal student financial assistance in two payments as a non-term school, rather than in three payments as a term school. On April 5, 1994, the Secretary affirmed my decision. The facts of the current case and those in Edmondson, are also indistinguishable. Therefore, I find that Phillips did not disburse federal student financial assistance by utilizing incorrect payment periods.

Finally, the remaining issue is that Phillips' records were so deficient and unreliable that all Title IV funds are unsupported and should be returned. Specifically: 32 out of 60 randomly selected files contained some conflicting information; in 14 instances, social security numbers differed on documents (only two of which were out of the random sample); one file did not contain a financial aid transcript; the cost of attendance for one student was incorrectly determined; the dependency status of one student was incorrectly determined; in one case, an SLS application was certified prior to certification of a Stafford Loan application; one student's academic file could not be located; the school had a 1989 cohort default rate of 36.9% and a 40% withdrawal rate for calendar year 1990. SFAP concluded that because of the extent of these violations, "(W)e consider all Stafford Loans certified after April, 1990 (the date Phillips Schools Inc. purchased the school) to be unsupported."

In its defense, Phillips presented evidence seeking to rebut the specific findings of error enumerated in the audit report. It points out that, with the exception of two students, the errors, even if correct, did not lead to receipt of more Title IV funds than the respective students were entitled. In the two cases where excess awards were made, Phillips refunded those amounts. Phillips also questions how the stated cohort default rate or withdrawal rate is indicative of poor program administration. In addition, Phillips pointed out that: the school had two biennial audits ending on June 30, 1990 and June 30, 1992, accomplished by an independent Certified Public Accounting firm; the reports generated by those audits indicated compliance by Phillips with the applicable regulations. Those audits were accepted by ED without dispute. Phillips argues it is illogical to believe that its records are as bad as alleged by SFAP.

This issue seems to be one of first impression. It is the first time that I have been able to ascertain where SFAP is seeking the return of all Title IV funds on the basis of a showing of inadequate administration of the Title IV programs in specified situations. This is not an attempt to determine liability of the universe by applying an error rate from a statistically significant sample. See, In the Matter of Hi-tech Institute of Hair Design, Docket No. 93-129-SA, U.S.

Dep't of Educ. (July 14, 1994). Neither is this a case when the institution is given the option of the extension of the sample to the universe or completing a full file review. See, In the Matter of Oregon State System of Higher Education, Docket No. 92-25-SP, U.S. Dep't of Educ. (March 1, 1993). Finally, this is not a case where the Respondent was ineligible to participate in the Title IV Programs and, as a result, all federal funds received during the period of ineligibility must be returned. See, In the Matter of Long Beach College of Business, Docket No. 92-132-SP, U.S. Dep't of Educ. (July 14, 1994). Rather, this is a case where SFAP demands the return of all Title IV funds as an audit recovery on the basis of its showing of instances of poor program administration.

In an appeal of a FAD, the institution has the burden of proving that its expenditure of Title IV funds was correct. 34 C.F.R. § 668.116(d). This presupposes that the FAD raises a prima facie case of erroneous expenditure of funds for which ED should be compensated. By definition, audit recoveries under Subpart H procedures, 34 C.F.R. § 668.111 et seq., are meant to provide a mechanism for compensatory recovery with the institution being afforded an opportunity to prove it did not violate the rules as alleged. Here, SFAP's own evidence reveals most files reviewed by the OIG were correct, yet SFAP still demands the return of all the funds in those cases. How, therefore, can Phillips meet its burden under this scenario. It would appear that, whatever hearing right is available, there is no practical way the school could prevail.
It further appears to me that SFAP has attempted, through the medium of a FAD, to sanction Phillips in a punitive way. I note that the only available method to accomplish such sanction is through a termination, fine or suspension action under Subpart G, 34 C.F.R. § 668.81, et seq. I note further that ED has the burden of proof in these cases and the procedural rights afforded are more favorable to the Respondent than those under Subpart H.

It is quite clear that Subpart H and G procedures are separate and complimentary. The remedies available in a Subpart H proceeding are contractual in nature and allow for recovery of proven compensatory damages while the remedies in a Subpart G proceeding are punitive in nature. See generally, In the Matter of Macomb Community College, Docket No. 91-80-SP, U.S. Dep't of Educ. (June 28, 1993).

Consistent with the above, I find that ED has attempted to assess liability on an impermissible basis - punishment as opposed to compensation. I find further that Phillips has met its burden of establishing that it did not misspend Title IV funds as alleged, and, as a result, I disapprove the finding that Phillips should return all Title IV funds received because of its failure to properly administer the Title IV programs.

In summary, having found that Phillips improperly utilized commissioned salespersons between February 1989 and April 11, 1991, I must assess an appropriate recovery. It is clear that an institution that violates the prohibition against the employment of commissioned salespersons to promote the availability of the GSL Programs becomes ineligible to participate in those programs during the period of such violation. In the Matter of Phillips Colleges Inc., supra. All GSL funds expended by an institution during a period when it was ineligible are improperly spent and must be returned. See, In the Matter of Long Beach College of Business, supra.

Accordingly, Phillips Colleges, Inc., is ordered to refund to the appropriate lenders $692,632, for improper Guaranteed Student Loans, and repay $256,799 to the U.S. Department of Education for excess interest and special allowance costs.

SO ORDERED:

Judge Ernest C. Canellos

Issued: November 14, 1994