

In the Matter of The Proposed Debarment of CARL SIMMONS
Docket No. 93-95-DA

DECISION OF GOVERNMENTWIDE DEBARMENT
FROM FEDERAL NONPROCUREMENT
TRANSACTIONS

This DECISION is issued by the United States Department of Education (Department) pursuant to 34 CFR . 85.314. I have jurisdiction to act in this matter by virtue of a Delegation of Authority from the Secretary to me to act as the Department's Designated Deciding Debarment and Suspension Official. The regulations, 34 CFR Part 85, and the Nonprocurement Debarment and Suspension Procedures mailed to Dr. Simmons with the notice of proposed debarment govern this action.

On April 8, 1993, Dr. Carl Simmons, co-owner and Chairman of the Board, Dudley Hall Career Institute (Institute) of Worcester, Massachusetts, was issued a "Notice of Proposed Governmentwide Debarment from Federal Nonprocurement Transactions" pursuant to 34 CFR . 85.312. The notice informed Dr. Simmons that the proposed debarment was based upon the adverse findings of an October 1991 program review conducted jointly by the Massachusetts Higher Education Assistance Corporation (MEHAC), and Department's Region I. Dr. Simmons was also given notice of his right to submit information and argument in opposition to the proposed debarment.

On September 15, 1993, and October 14, 1993, pursuant to Dr. Simmons' request, I held hearings on this matter in Washington, D.C. At such hearings, Dr. Simmons appeared Pro se while the Department's Notice Official was represented by Jennifer L. Woodward, Esq., of the Office of the General Counsel. At the hearing, evidence was introduced and both Dr. Simmons and Ms. Woodward presented oral argument. The hearing was recorded by a court reporter and a transcript was made.

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As stated earlier, the Department's action is based primarily on the joint Department and MEHAC findings. Those findings include: 1) repeated failures to make required tuition refunds of guaranteed student loans (GSL), pursuant to 34 CFR . 682.607(c)(1); 2) failure to implement adequate procedures to evaluate satisfactory progress, in violation of 34 C.F.R. . 668.7(c); and 3) failure to adhere to the fiduciary standards required in administering the student financial assistance program authorized under Title IV of the Higher Education act of 1965, as amended, 20 U.S.C. . 1070 et seq. (Title IV). The evidence presented at the hearing established the violations enumerated above. The Department argues that the violations are serious, that Dr. Simmons participated directly in them, and that, therefore, he should be debarred.

During his presentation, Dr. Simmons argued that prior to 1989 he was not personally involved in the operations of the Institute. Moreover, he argued that some of the allegations against the Institute pre-dated his management. He asserted that a cash-flow problem resulting from a declining enrollment caused the refund problem. After the program review, MEHAC terminated the Institute's GSL participation, and the Department put the Institute on the Pell Grant cash reimbursement system. The combination of those activities made it impossible for the Institute to pay its refunds. As a result, the Institute closed and filed for bankruptcy protection.

Based on the presentations of the parties and evidence submitted, I find that Dr. Simmons participated directly in violating regulations applicable to the programs authorized under Title IV. He was co-owner and hands-on manager of the Institute, exercising absolute control over the school's operations. As such, he is fully responsible for the violations of Federal student financial assistance program requirements. It is abundantly clear that these violations were significant and resulted in the loss of program funds. Consequently, I find that the Department has established, by a preponderance of the evidence, that Dr. Simmons is subject to debarment under 34 C.F.R. . 85.305 (b) and (d). In reaching this conclusion, I have considered only those violations which occurred during Dr. Simmons' management.

As stated in 34 CFR . 85.115, the policy of the Federal Government is to conduct business only with responsible persons. It seems clear that in order to support the governmentwide debarment from Federal nonprocurement transactions of an individual, some degree of personal culpability must be shown. Merely establishing the violation of program regulations which could constitute the violation of the fiduciary status conferred upon Title IV participants, thereby leading to termination of eligibility, is not sufficient.

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My review of the facts and circumstances in this case reveals that the seriousness of the violations and the degree of personal wrongdoing envisioned by the debarment process has

been established. Dr. Simmons was directly responsible for the violation of provisions dealing with his responsibility to account for federal funds. This clearly and adversely affects his present responsibility to participate in federal programs. See generally *Sellers v. Kemp*, 749 F.Supp. 1001 (W.D.Mo. 1990). I note as significant that the failure to pay refunds in the Title IV Program can now lead to criminal penalties. 20 U.S.C. . 1097(a). I also note that during the period of time when refunds were not made, Dr. Simmons paid the Institute's funds to other companies he owned. This is as clear a violation of a fiduciary duty as one can imagine.

In light of the foregoing, I find that the Department has met its burden of proof and persuasion that the debarment of Dr. Simmons is warranted. Under the provisions of 34 C.F.R. . 85.320, the period of debarment is to be commensurate with the seriousness of the cause(s) of debarment, generally not to exceed three years. Based upon the circumstances here, I have determined that the period of debarment shall be three years.

I order that Carl Simmons be DEBARRED from initiating, conducting, or otherwise participating in any covered transaction under the nonprocurement programs and activities of any Federal agency, and is ineligible to receive Federal financial and nonfinancial assistance or benefits from any Federal agency under nonprocurement programs and activities. He may not act as a principle, as defined in 34 C.F.R. . 85.105(p), on behalf of any person in connection with a covered transaction. This debarment is effective for all covered transactions unless an agency head or authorized designee grants an exception for a particular transaction in accordance with 34 C.F.R. . 85.215.

ERNEST C. CANELLOS,
Deciding Debarment and Suspension Official
Dated: April 18, 1994