UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of
Emergency Action Against
Instituto Artes de Belleza

DECISION

On December 10, 1992, the Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) imposed an emergency action against the Instituto Artes de la Belleza (Instituto) of Santurce, Puerto Rico, in accordance with 20 U.S.C. §1094(c)(1)(G) and 34 CFR §668.83. In response to the notice, on December 18, 1992, the Instituto requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the Delegation of Authority from the Secretary to me to conduct proceedings and issue final decisions in circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, I conducted a hearing in Washington, D.C., on January 27, 1993. At the hearing, the Instituto was represented by Andrew Usera, Esq., while OSFA was represented by Lawrence Brett, Esq., from the Office of General Counsel. The proceeding was transcribed by a Court Reporter.

ED's main contention in this case is that an emergency action is necessary because Instituto drew down Pell Grant funds for 391 students (later revised to 387) who never started classes at the Instituto and were, therefore, ineligible to receive Pell Grant funds. This situation was discovered by OSFA program reviewers during an on-site review at Instituto conducted May 18-22, 1992. Initially, the program reviewers identified 150 such individuals during the 5-day program review, but that number was later revised upwards after further inspection of records supplied by Instituto.

The basis for the finding of Pell Grant payments to non-students is the Instituto's own records. While Instituto's President, Blanca Canalas, testified that there was confusion in the records when a new computerized system was introduced at the Instituto, such testimony was rebutted by the program reviewers who testified that they relied on Mrs. Canalas and the school's various officials to whom she directed them (Financial Aid Officer, Admissions Officer and the Registrar). They also testified that they relied on manual

Admissions Records, not on computer generated Admissions Records which the school claimed were unreliable. 150 such students were first identified in May 1992, but it took a time consuming review of Instituto's records to later compile the total count of 391.

Department officials met with Instituto's President and its attorney in December 1992 to review the need for the emergency action. Based on the serious nature of the charges against Instituto, the evidence upon which they based their recommendation of emergency action, and the fact that the Instituto had not presented any reliable evidence in the meantime to answer the findings against it, those officials believed that the emergency action was appropriate. In fact, after examining a second box of Instituto's Attendance Records in early January 1993 which the school claimed would absolve the "no-show" finding, the program reviewer was even more convinced of the accuracy of the adverse finding against the school. In addition, another OSFA staff member, who is bilingual, called students the school had listed in its records to verify their actual attendance. He received phone confirmation through this random calling of names that a number of students never attended the school. He further found that many of the listed phone numbers were not accurate, but corresponded to churches and other public institutions or groups.

Instituto's counsel, Mr. Usera, called Blanca Canalas, the school's President, to testify. She recalled the meeting held in December 1992 with OSFA staff, which Mr. Usera had requested to try and resolve the emergency action matter. She recalled having other Instituto staff with her, the Financial Aid Officer and accountants, who could better explain the school's records and answer OSFA's allegations. She testified she lacked knowledge of the Admissions Records which are a critical part of the case. Mrs. Canalas spoke about problems with computer generated records and discrepancies, but they had no relevance to the school's manual attendance records. She did not recall having been informed of the amount of no-show students at her school at the program review. She denied the school had prepared such a list, while a program reviewer recalled discussing such a list with her. She closed by promising that she would provide evidence to completely rebut the allegation "soon."

Mr. Usera invoked the argument that the 3-pronged test to uphold an Emergency Action was not satisfied in this case. Specifically, he claimed that since the finding of students who were non-starters involved past award years and no additional allegations had arisen since July 1992, this finding did not represent ongoing violations. Under §668.83(a)(1), the language speaks of reliable information that an institution is violating applicable laws and regulations. Usera submits there must be a showing of ongoing violations to meet such language. Since there was a 7-month lapse between the program

review, the issuance of the emergency action notice, and the final program determination letter, the deciding official was not acting on the basis of ongoing violations. Hence, the Emergency Action is not well founded. Mr. Usera also argued that the Instituto is under the cash reimbursement system, under which ED's interests are protected, and the matter is, therefore, best handled under the regular termination process.

Mr. Usera's arguments on the ongoing nature of the violations was countered by Ron Lipton, the deciding official, who testified that he deemed the violations to be ongoing when he notified Instituto of the Emergency Action. The requirement is not that violations be simultaneous or that OSFA is required to have "live-in" program reviewers on the scene at the school in order to justify an emergency action. Instead, Lipton explained that he could not impose the emergency action earlier because of his caseload and backlog of cases requiring action. In any event, the Instituto has not paid back any monies allegedly due because of this finding and this makes it an ongoing violation. Mr. Lipton also commented on the reliability of the information upon which he based the emergency action when he said the program reviewers were well qualified and familiar with the requirements and the process for an emergency action, and that there were no inconsistencies or contradictions on the face of the program review report.

The Instituto's argument that the violations are not ongoing and that the requirement for current violations under §668.83 is not satisfied here is not persuasive. Rather, the testimony compels the opposite conclusion. The deciding official was clearly entitled to consider the violations to be continuing absent some evidence to the contrary from Instituto.

Upon my review of the evidence, and consideration of respective arguments of counsel, I find that:

(a) there is reliable information that Instituto Artes de la Belleza violated provisions of Title IV of the HEA;

(b) immediate action is necessary to prevent misuse of Federal funds, and

(c) in light of the serious nature and substantial number of violations, the likelihood of financial loss outweighs the importance of adherence to the procedures for limitation, suspension, and termination actions. Bolstering that determination is the fact that all of the Instituto's records are now suspect, leaving ED with no assurance that further substantial losses might not occur.

The holder of Federal funds, such as student grants and loans, acts as a fiduciary. I find that Instituto has failed in its regulatory obligation to adequately account for such funds. What Instituto is

charged with is drawing funds for invalid, ineligible students. This is a very serious charge and, however one characterizes it, clearly indicates a violation of fiduciary duties.

I find that the three conditions for imposing emergency actions, as enumerated in 34 CFR §668.83, are met in this case. Specifically, I find that Instituto has failed to carry its burden of showing why the emergency action is unwarranted. At most, Instituto has raised questions of fact, dispute of which must be resolved by the trier-of-fact assigned to hear the termination proceeding. Therefore, I hereby **AFFIRM** the emergency action.

Judge Ernest C. Canellos

Dated: February 10, 1993
Washington, DC