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

In the Matter of **Docket No. 94-102-SP**

MOUNT WACHUSETT COMMUNITY COLLEGE, Student Financial Assistance Proceeding
Respondent.

Appearances: Lisa C. Bureau, Esq., Dow, Lohnes & Albertson, Washington, D.C., for Mount Wachusett Community College.

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

Before: Judge Richard F. O'Hair

DECISION

Mount Wachusett Community College (MWCC) participates in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* These programs are administered by the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED). On April 25, 1994 , SFAP issued a Final Program Review Determination (FPRD) for MWCC which contained 23 findings. The findings in the FPRD are based on the program review report for the 1988-89 through 1992-93 award years. MWCC filed a request for review for four of those findings on June 10, 1994 . Both parties have filed submissions to this tribunal in response to the Order Governing Proceedings.

MWCC has two educational programs: the Day school program and the Division of Continuing Education (DCE). The DCE program, which generally provides only evening classes, includes a prison program for incarcerated students, and one for "S" students. "S" students are Day students who attend special DCE classes which meet during the day. This proceeding focuses on the eligibility of MWCC's prison programs and the computation of the cost of attendance (COA) for the students in both the Day and DCE programs.

MWCC began its prison programs in 1987, following a request of the Commonwealth of Massachusetts to provide incarcerated students with educational opportunities. Through its

prison programs, MWCC offers a limited number of courses to incarcerated students. (Exh. R-3-13). These courses are designed to develop skills which enable the students to re-enter the workforce upon release from prison and include programs in Business Management, Heating Ventilation and Air-Conditioning, Refrigeration, Graphic Arts, Printing, Desktop Technology, Auto Body Repair, Carpentry, and Culinary Arts. (Exh. ED-14-2). MWCC currently offers a selection of these programs in seventeen correctional institutions in the Commonwealth of Massachusetts. The institution is not operating under a contract with the Commonwealth to provide this instruction and it receives no reimbursement from the Commonwealth for its services, other than that which may be received by any other college in the Commonwealth. The programs are administered through MWCC's main campus, but instruction is provided at the prison sites. Although program degrees can be awarded to these incarcerated students, the programs cannot be completed entirely at the prison sites without the assistance of consortium arrangements, transfer of credits from other colleges, or the granting of a waiver of selected course requirements. (See Exh. R-4-58).

MWCC appeals four FPRD conclusions before this tribunal: (1) each prison site was and is currently ineligible to participate in any Title IV Program; (2) MWCC improperly inflated the Federal Pell Grant COA for the incarcerated students; (3) MWCC used an inappropriate method to construct an average Federal Pell Grant COA for Day and "S" students; (4) MWCC improperly included incarcerated students on the eligible aid applicant grid of the Fiscal Operations Report and Application to Participate (FISAP).

I

Off-Campus Site Eligibility/Eligibility Letter

Reviewers for SFAP could not determine if MWCC's off-campus sites and classrooms at various prison locations are/were eligible for Title IV funds because the institution did not have a copy of its latest eligibility letter on file. According to SFAP, MWCC failed to submit evidence that it made the required notifications to ED and secured the appropriate approvals to establish eligibility at each of its seventeen prison sites prior to the disbursement of Title IV federal aid at those locations. MWCC argues that although it provides educational instruction at these prison sites, it does not need ED approval for each of these locations because it does not offer a complete educational program at any of the sites.

In a letter to ED dated June 12, 1991, counsel for Respondent requested clarification of the rules concerning eligibility certification of additional locations. (Exh. R-8-1). Counsel for Respondent raised specific examples of programs in question. In particular, counsel addressed the need to seek eligibility for locations where an institution does not offer all classes necessary to obtain a degree or certification. On July 29, 1991, Carol F. Sperry, then director of the Division of Eligibility and Certification, responded. In her response, the director provided a definition of

the term " complete educational program."

A complete educational program is a legally authorized postsecondary program of

organized instruction or study which leads to an academic or professional degree, vocational certificate, or other recognized educational credential. Under the current regulations and procedures, an institution does not need approval for additional locations which do not offer complete programs, such as the examples contained in your letter.
(Exh. R-9-1)

This definition has been codified in 34 C.F.R. § 600.2. According to this definition, if a school does not provide all of the necessary courses at a particular location for a student to obtain a degree or certification, the school does not provide a complete educational program.

The Code of Federal Regulations specifically addresses the situation where a school does not provide a full program at a particular location, and completion of that program can occur only when an institution accepts transfer credits from another institution. In the definition of an "educational program", the Code states that:

the Secretary does not consider that an institution provides an educational program if the institution does not provide instruction itself. . . but merely gives credit for one or more of the following: instruction provided by other institutions or schools, examinations provided by agencies or organizations, or other accomplishments such as "life experience."

(34 C.F.R. § 600.2)

Although MWCC's prison programs do not directly match the examples addressed in the 1991 letter, it is clear these programs do not offer all of the classes necessary to obtain a certification or degree. In order for an incarcerated student to receive a degree or certification from MWCC, the school must either waive certain requirements or accept transfer credits from another institution. When accepting transfer credits, MWCC is not providing the instruction itself, but is merely giving credit for instruction provided by another institution. Applying the interpretation of the definition given by the director and the codification of that definition in 34 C.F.R. § 600.2, MWCC's DCE prison programs do not offer a complete educational program and, therefore, need not apply for separate eligibility to participate in Title IV programs for each of the programs offered at its prison sites.

Accordingly, MWCC is relieved of any liability under this finding.

II

Inflated Federal Pell Grant Cost of Attendance for Incarcerated Students.

Cost of attendance figures are used by ED to determine the amount of Pell Grant awards an eligible student can receive. SFAP contends that MWCC improperly inflated the COA for its incarcerated students in two ways. First, MWCC inflated the figure by improperly including tuition and fees in the computation. SFAP notes that tuition and fees can only be included in the COA if a student is actually "charged" these fees, and it alleges that MWCC's incarcerated

students were not charged tuition and fees. The second issue raised by SFAP is that it was improper to include the room, board, and miscellaneous expense component in the COA for incarcerated students. SFAP contends that these, too, were not expenses incurred by incarcerated students and, therefore, should not be included in the COA.

MWCC disagrees and claims that all of its incarcerated students are charged tuition and fees.See footnote 1 *1* Tuition bills, however, are sent only to incarcerated students who have other financial resources and, thus, do not receive student financial assistance. (Exh. R-5-14-21). Bills are not sent to those students receiving financial aid, even though the amount of the financial assistance is less than the tuition fee, because the institution has implemented a program whereby it can grant a waiver of all fees in excess of the financial assistance. MWCC further explains that, for those students who are not receiving financial assistance, if that student fails to pay the billed amount, the student is "locked out" by the school and thus prevented from registering or attending classes until the bill is satisfied. Since there is evidence that the students who receive Federal aid technically owe MWCC for the balance of their tuition and fee bill, even though they are normally granted a waiver of this balance, I conclude that incarcerated students actually incur the cost of tuition and fees. Accordingly, the cost of tuition and fees is appropriately included in the COA for incarcerated students enrolled through MWCC.

With respect to the room, board, and miscellaneous expenses of the incarcerated students, the statutory provisions in effect at the time of the review did not require schools who had several categories of students, such as day students and incarcerated students, to compute a separate living allowance component in the COA calculation for each category of student, but rather the

institution could compute an average COA and apply it to all categories of students. (Dear Colleague Letter, GEN-88-7 (January 1988)). Further support for this position is found in the Question and Answer section of a subsequent Dear Colleague Letter (GEN-89-49 (September 1989)) which highlights the elimination of the previous regulatory requirement that "required different treatment for calculating the cost of attendance for certain special categories of students, including incarcerated students." The 'Answer' continues by explaining that "an institution may establish a category within the allowance for room, board, books, supplies, and miscellaneous expenses to reflect costs incurred by an incarcerated student." [Emphasis in original]. MWCC interpreted this guidance as giving it the discretion to develop only one living allowance component and apply it to all categories of its students, including its incarcerated students. MWCC further relies on the 1990-91 Federal Student Financial Aid Handbook, at 4-18, which permitted schools to "establish allowances based on the typical costs for its students," to say that the computation of one living allowance component for inclusion in the COA calculation for all its students was appropriate.

The key phrase in these various forms of ED guidance for the schools is that the costs of attendance which ultimately serve as a guide for Federal student aid must be costs which are actually incurred by the students. With regard to MWCC's incarcerated students, as well as those addressed in *Microcomputer* and *Chenier*, the students had no obligation to pay for their room and board because the state provided their housing, food, and clothing. Likewise, the only personal financial obligations of MWCC's incarcerated students were for miscellaneous and book expenses. While the theme of the guidance ED provided the institutions was that it was no

longer necessary to develop a separate COA figure for each category of student, it is unrealistic to argue that the living expense component for one category of student which incurs housing, food, and clothing expenses should be applied to another group of students which incurs none of those expenses. I cannot accept MWCC's argument that room, board, and clothing expenses are "typical" costs incurred by incarcerated students which would justify including such a figure in that group's COA calculation. I make this finding despite the fact that the incarcerated students comprise only 15% of the total student population at MWCC. This student group is large enough and dissimilar enough from the other 85% of the student body to warrant a separate calculation of the living allowance component of its COA that does not include an assigned cost for room, board, and clothing.

Consequently, MWCC must recompute the cost of attendance of its incarcerated students for Pell Grant purposes, and may include only costs of tuition and fees, books and miscellaneous expenses.

III

Undocumented Cost of Attendance

SFAP asserts that MWCC improperly averaged the lower tuition costs for Day students

with the higher tuition costs for DCE "S" studentsSee footnote 2 *2* when determining the Day student COA which the school reported to ED for the Spring, 1991 semester. Relying on guidance found in the 1990-91 Federal Student Financial Aid Handbook (page 4-14), SFAP concludes that MWCC was not permitted to use average costs for its Day and DCE "S" students while at the same time the institution reported the actual costs incurred by the remainder of the student population. There is no statutory guidance on this issue other than that found in the Higher Education Act of 1965 which defines "cost of attendance" as:

(A) the tuition and uniform compulsory fees normally charged a full-time student at the institution at which the student is in attendance for any award year, ...

20 U.S.C. § 1070a-6-(5); *See also* 20 U.S.C. § 1087*ll*(1).

SFAP explains that the Handbook authorizes institutions to compute a COA utilizing either an average amount or the actual amount it charges. SFAP interprets this provision as a prohibition against an institution's use of both methods for calculating the COA for different categories of students at that institution. By using both methods, SFAP asserts that MWCC inflated the COA for Day students and permitted them, as a group, to receive $6894 more in Federal Pell Grant money than they would have received had the COAs from the two groups not been averaged.

I disagree with this interpretation of the Handbook and cannot conclude, as does SFAP, that the tuition and fees component must be computed by using either the average costs or actual costs, to the exclusion of the other method. Without any regulatory guidance on this issue, it is

logical for MWCC to use actual costs of tuition and fees for its students who take only DCE classes, but that an average of the fees would be appropriate for Day students who may also be enrolled in DCE "S" classes which happen to have a higher tuition cost than straight Day program classes. I think the Handbook unnecessarily attempts to restrict an institution's ability to generate a COA which is both easy to apply and generally reflects the true costs of the tuition and fee component of MWCC's COA for its Day students.

Even if I were to agree with SFAP's interpretation of the provisions of the Handbook that an institution may use only the average or the actual costs of tuition and fees, I must agree with MWCC that, in the absence of statutory or regulatory guidance on this issue at the time of this program review[See footnote 3 *3*], it cannot be financially penalized for its failure to comply with ED policy on this

issue. To do so would be in contravention of the requirements of the General Education Provisions Act, 20 U.S.C. § 1232, which formalizes the Federal government's rulemaking procedures by requiring the publication for comment of any proposed regulations, rules, guidelines, and so forth. The 1990-91 Handbook has not been subjected to these formalized procedures and, therefore, cannot be used as the basis for imposing a liability on MWCC in this instance. As this tribunal held in *In the Matter of Baytown Technical School, Inc.*, Dkt. No. 91-40-SP, at 26 (Init. Dec., January 13, 1993), aff'd by the Secretary, November 14, 1994:

[T]his tribunal is obliged to finding violations of law, not violations of statements of policy. While a statement of policy may assist the tribunal in interpreting the law, policies and procedures, it, without more, cannot carry the weight of law. The existence of a statutory violation may be appraised against the backdrop of published policy statements or published bulletins but these indicia or policy cannot stand alone as the basis of a regulatory violation.

MWCC has met its burden of proving that its use of an average cost of tuition and fees for the Day students and actual costs for the remainder is not prohibited by a statute or regulation, and has shown that this practice is not an improper expenditure of Federal student financial aid.

MWCC, therefore, is not required to repay ED the $6,894 Federal Pell Grant liability pursuant to this finding.

IV

Inaccurate Data Reported on the Fiscal Operations Report and Application to Participate (FISAP)

Schools are granted campus-based funds in accordance with the number of eligible students enrolled in the institution. SFAP concludes that MWCC's allotment of campus-based funds was greater than it should have been for the years in question because the school improperly included incarcerated students as eligible applicants when, in fact, they were not, and that this practice improperly boosted the total number reported to ED.

The basis for this finding is that the college should not have included incarcerated students in its eligible aid application grid because MWCC does not offer campus based aid to incarcerated students, thereby making incarcerated students ineligible for campus based funds. MWCC has produced evidence to the contrary, including a report written by SFAP discussing the details of the prison work study program, which is a campus-based aid program. Since MWCC offered work study aid to its incarcerated students, the institution properly included these students in the FISAP as students who were eligible to receive financial aid. According to the instructions on the

FISAP, an institution must include all eligible aid applicants who applied for financial aid for that year. (Exh R-16-3) . The instructions also clearly state that "[y]ou must include students for whom you had no funds to award . . ." (Exh R-16-3). I find that MWCC offered campus-based aid to the incarcerated students and, therefore, correctly included incarcerated students on its eligible aid application grid.

Accordingly, MWCC is relieved of any liability under this finding.

FINDINGS

1. MWCC's seventeen prison locations do not provide a complete educational program and, therefore, need not be separately authorized so as to be eligible for Title IV funding.

2. MWCC improperly inflated the COA of students enrolled in its prison programs by including a cost for room and board.

3. MWCC used a correct average COA for its Day students.

4. MWCC correctly included incarcerated students in its reported data on the FISAP.

CONCLUSION

MWCC must recompute the cost of attendance for its incarcerated students for Pell Grant purposes, without including a cost for room and board, and reimburse the United States Department of Education for the excess amount of Pell Grants it disbursed. All other findings are resolved in favor of MWCC.

ORDER

On the basis of the foregoing, it is hereby ORDERED that MWCC shall repay to the United States Department of Education in the manner authorized by law the excess amount of Pell Grants awarded because of improperly including the cost for room and board in the computation of the COA for its incarcerated students.

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Judge Richard F. O'Hair

Dated: September 1, 1995

SERVICE

On September 1, 1995, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 *1 The facts in this case are to be distinguished from those in In the Matter of Microcomputer Technology Institute, Dkt. No. 94-88-SP, U.S. Dep't of Educ. (May 5, 1995), wherein the incarcerated students signed an enrollment contract with Microcomputer which contained the provision that if the student applied for Federal funding, but was rejected, the school would grant a tuition waiver. In that scenario, no student was ever required to pay tuition and fees to the school. Similarly, the facts in the case before me are different from those found in In the Matter of Education Management Systems, Inc. d/b/a/Chenier, Dkt. No. 94-31-SA, U.S. Dep't of Educ. (June 22, 1994), where, pursuant to a contract with the state, the institution was precluded from charging incarcerated students tuition or fees.*

Footnote: 2 *2 DCE "S" students are Day students who attend special DCE classes which are scheduled during the day.*

Footnote: 3 *3 The Secretary of Education was statutorily barred from promulgating any regulations "to carry out this subpart," [basic educational opportunity grants], with two exceptions which do not apply here. 20 U.S.C. § 1070-5(a)(1).*