

the award years of 1991-92 and 1992-93. Allied requested and was granted a postponement of that program review, and it was rescheduled for June 14-18, 1993. Prior to the scheduled visit, the New York office received two pieces of correspondence, one of which was anonymous, which were intended to alert the program reviewers of certain discrepancies or deficiencies in Allied's implementation of the Title IV program. Receiving such letters about a particular school is not an unusual occurrence, and the items described in the correspondence were noted.

The program review was begun by examining 20 student files. The reviewers found program deficiencies in several areas, and this resulted in their expanding the sample number from 20 to 62. On November 16, 1993, a program review report was sent to Allied which described 14 findings of non-compliance with the administration of Title IV student assistance programs. Seven of the original findings have been closed. The termination and fine notice highlighted three findings which it described as reflecting Allied's impaired administrative capability. Those three findings alleged: 1) Misuse of Federal Funds/Excess Cash-on-hand, 2) Inadequate Fiscal Controls, and 3) Federal Pell Grant Funds Paid to Ineligible Students. These findings formed the basis for SFAP's conclusion that Allied had violated numerous regulatory and statutory program requirements and, therefore, its eligibility to participate in Title IV programs should be terminated. Ms. Edelson testified as to the factual basis of each of these findings.

The first finding Ms. Edelson addressed was Allied's maintenance of excess cash-on-hand and its misuse of federal funds. This situation occurs when an institution obtains a cash advance from ED's Financial Management Service accounts for the purpose of making Pell Grant disbursements to student accounts, but the institution retains the cash in the school accounts in excess of three days. [See footnote 2 2](#) This allegation was demonstrated by the practice whereby Allied consistently drew down funds from federal accounts and either failed to apply the funds to student accounts or obtained and held them for more than 3 days before disbursing them to student accounts. An example of the former occurred in July, 1992, when Allied drew down \$516,757 in Pell Grant funds and applied the bulk of this to the repayment of a school loan

Allied procured from a private commercial bank. [See footnote 3 3](#) Ms. Edelson testified that this was an improper use of these federal funds and that the only proper use was their disbursement to eligible students. Allied supplied a May 1992 student start list to justify the July draw-down of \$516,757; however, Allied's disbursements to the students on that start list added up to "about \$100,000," significantly less than the amount of federal funds Allied received. The witness was shown a Cash on Hand Analysis for award year 1992-93 which discloses that disbursement of the July draw-down to student accounts did not begin until August 3, 1992; the next draw-down occurred on October 5, 1992, when Allied drew down an additional \$140,000. However, on that later date, Allied still had a balance of \$264,521.46 from the July draw-down. Between October 5, 1992, and September 30, 1993, Allied made five additional draw-downs of federal funds and, with the exception of the last day of that period, Allied's cash on hand balance never fell below \$200,000.

An independent auditor's report (submitted on April 2, 1992) for the award years ending June 30, 1990, and June 30, 1991, provides further support for a finding that Allied has a history of holding excess federal funds. There the auditors noted that Allied's cash requests exceeded their

awards by \$410,827 for 1991 and \$358,888 for 1990. The report went on to explain that Allied had taken corrective measures to cure this problem.

Ms. Edelson agreed with respondent that the amount of federal funds that Allied drew down during the award years under review never exceeded their ED-determined authorization limit, a fluctuating maximum amount of funds which a school may draw down. She followed that, however, with the statement that keeping draw-downs below that authorization did not eliminate an excess cash situation. She reiterated that the only approved methods available to Allied for eliminating an excess cash situation were either to disburse it to eligible students or return it to the ED account. She said that reporting the excess to ED, knowing that this would cause ED to reduce the school's authorization limit, is not a proper means of reducing excess cash.

Next, Ms. Edelson testified as to Allied's inadequate fiscal controls, which she said was demonstrated by its inability to provide a clear audit trail of its receipt and disbursement of these federal funds. She explained that Allied should have current financial records that reflect all program transactions. One of the means of evaluating a school's fiscal controls is to examine the school's Form 272's and ED's student payment summary for that school. The 272 is a quarterly report to ED in which the school submits a list of its disbursements for each Title IV program. At the end of the award year ED prepares a student payment summary which is student specific and lists all disbursements to each student for the year. For each award year, the amounts reflected in all 272's should equal the amount of disbursements contained in the student payment

summary. However, Allied's quarterly reports of programmatic disbursements for the period ending September 30, 1992, reported disbursements of \$934,376, whereas the ED generated student payment summary for the same period reported total payments of \$964,764. These two amounts should have been identical. Ms. Edelson concluded that the fact that they were not identical exhibits a loss of accountability for the difference between these two amounts of federal funds, funds over which Allied was required to maintain fiscal control.

The final aspect of the charged regulatory violations was that Allied disbursed Pell Grant payments to accounts of students who, for a variety of reasons, were not authorized to receive or retain them. The program reviewers found these violations occurred when:

- 1) One disbursement was made for students who did not report for school (no shows). (Students: 2, 22, 23, 24, 27, 31, & 32)
- 2) Two disbursements were made for students who did not report for school. (Students: 4, 8, 26, 30, 36, 47, & 50)
- 3) Six of the above accounts were subsequently adjusted for a refund, but there is no evidence the refunds were returned to ED or disbursed to another student. (Students: 2, 4, 8, 26, 31, & 32)
- 4) A second Pell Grant disbursement was made to students before they completed half the program, i.e., 450 hours. (Students: 33, 39, 40, 45, & 46)
- 5) Students received more than a \$1200 disbursement, but withdrew from school before completing 450 hours. (Students: 7, 9, 10, 21, 25, 35, 38, 41, 43, & 51)
- 6) Students received an excess Pell Grant disbursement of \$1200 while completing a 900 hour program. (Students: 53 & 56)
- 7) Students received two Pell Grant disbursements in the 1991-92 award year and an

unauthorized additional disbursement in the 1992-93 award year. (Students: 54, 55, 57, 58, 59, 60, 61, & 62)

8) A disbursement was made to students who subsequently withdrew from the program, but no refund calculation was made. (Students: 28, 48, & 52)

9) Refund calculations were performed for students who withdrew from the program, but there is no evidence the refunds were credited to the students' accounts. (Students: 34 & 37)

During the program review, the reviewers appropriately requested Allied to present them with school records which would document the timely disbursement of these Title IV funds to eligible students. Allied employees presumably accomplished this by providing the reviewers with the requested student attendance records, student account files, student cancellation lists, and bank statements. During her direct testimony, Ms. Edelson testified regarding approximately 44 student files which contained evidence of the improper disbursements and/or refund calculations referenced above.

In cross-examination, Respondent directed Ms. Edelson's attention to various entries in the exhibits which Respondent alleges disputed her original findings. These challenges addressed records of attendance, disbursements, refund computations, and numbers of class

hours completed by students which differed with many of her original findings in the program review. Ms. Edelson explained that upon her arrival at Allied's administrative offices she informed Allied employees exactly what records she needed to view and for what purpose. She believed it was the responsibility of the institution, and not the program reviewer, to have the school's documents which identified the school's management of student financial assistance funds readily available at the time of a program review and to provide them to the program reviewers. She acknowledged it was possible that a prior flooding of Allied's facilities may have damaged some of their business records, or made them temporarily unavailable.

Having been shown reports regarding seven students whom she previously had identified as being students who were "no shows," but who had received Pell Grant disbursements, she was then shown reports which seemed to contradict her earlier finding. This consisted of Allied reports that indicated that the students in question attended some hours of classes, but they withdrew before the completion of the program. She explained that even though this indicated the students would have been eligible for an initial Pell Grant disbursement, these school records were deficient in that they did not document that appropriate adjustments were calculated upon the students' eventual withdrawals from the program. In the case of other students who withdrew after Pell Grants had been disbursed, Allied showed documents to Ms. Edelson indicating that adjustments to the student account were computed, but there was no evidence of any refunds being returned to the ED federal account or of the refunded amounts being disbursed to other eligible students. The witness was shown a number of Overpayment Adjustment Reports for students for whom the program review alleged that Allied had not made the required Pell refund within 30 days of the student's withdrawal. The witness concluded these Reports were not evidence that a refund was made, but only that a refund calculation had been prepared.

With regard to three of the five students who allegedly received a second disbursement of a Pell Grant before they completed 450 hours of the program, the Respondent provided evidence

that these three ultimately completed more than 450 hours. The witness maintained that this evidence, if true, did not contradict a finding that the students received the second disbursement before it was properly earned. Addressing the three students who withdrew from Allied and for whom it was alleged no refund calculation had been made, Respondent showed Ms. Edelson refund calculation worksheets for each of the three. Her explanation for this discrepancy was simply that, for whatever reason, Allied personnel did not provide her with these documents at the time of her program review, despite her request for all documentation the school had at its disposal to substantiate the disbursement of Pell Grants.

FINANCIAL AND COMPLIANCE AUDITS

For the award years ending on June 30, 1992, and June 30, 1993, Allied had a regulatory obligation to supply ED with financial and compliance audits prepared by an independent auditor in compliance with the standards contained in the General Accounting Office's Standards

for Audit of Governmental Organizations, Program Activities, and Functions.[See footnote 4 4](#) The audits for these two award years were required to be submitted to ED's New York Regional Office by March 31, 1994. Mr. Whiting, the supervisory auditor for that office, testified that Allied sent the audits for these two award years to his office on July 26, 1994, and they were received on August 8, 1994.[See footnote 5 5](#) These audits were reviewed by one of the other auditors in his office, and in October 1994 they were forwarded to ED's Audit Resolution Branch at its headquarters in Washington, D.C. Mr. Whiting said his office does not keep track of audit due dates, but that once an audit is received, he can determine if it is late simply by examining the date it is received and the date of the last audit submitted by the school. ED does not have a practice of sending a notice to a school which informs it that an audit is due, and any requests for an extension of the due date can be acted upon only by the Audit Resolution Branch. In his opinion, Allied's audits for the period discussed were submitted late and no one in his office was a participant in the decision to initiate this termination proceeding. Mr. Whiting was aware that Allied previously had filed late audits and that termination action does not occur in every instance where a late audit is filed.

DISCUSSION

Allied incurred a fiscal responsibility to act in the nature of a fiduciary when it elected to participate in the Title IV, HEA programs. The evidence presented during this hearing convinces me that Allied failed to comply with this obligation based upon a showing by ED that Allied violated regulatory and program requirements. An institution may draw down Pell Grant funds from federal accounts in amounts which the institution can expect to disburse to eligible students' accounts within an average of three days. Any cash in excess of these needs must be returned to ED.[See footnote 6 6](#) There certainly was no authority for Allied to make a payment on a school loan directly from the federal funds, as was accomplished in July 1992. The testimony and documentary exhibits clearly illustrate that during the award years in review, Allied developed a pattern whereby it requested federal funds weeks in advance of its needs, an unquestioned violation of federal regulations and other guidelines. Allied's contention that its excess cash problems began during the 1990-91 award year as a result of the consolidation of its five campuses into one may be true; however, that is not a satisfactory explanation for the

continuation of an excess cash problem in the ensuing two award years. Furthermore, I disagree with Allied's argument that an excess cash position can be cured by simply reducing the subsequent withdrawals by the amounts of the excess cash-on-hand. These draw-downs require advance planning and, if unanticipated variables preclude the disbursement of funds to students'

accounts within three days, the funds must be returned to ED rather than retained for an eventual disbursement at an unspecified future date.

I believe ED also met its burden of proof as to the allegations that Allied exercised inadequate fiscal controls over its Title IV funds and made improper payments to ineligible students. The files of the student samples which were presented as part of ED's case demonstrated that Allied made Pell Grant disbursements to an excessive number of students who were ineligible to receive them and that Allied did not regularly conduct a follow-on review to determine if, because of a student's withdrawal, a refund was warranted.

Allied would have me believe that one of its former contract employees who worked in its student financial aid office may have been partially, if not totally, responsible for these findings of noncompliance with program requirements. I find that allegation to be unsubstantiated and without merit. Regardless of whether that person was an employee or a private contractor, Allied retained the ultimate responsibility to ensure total compliance with Title IV requirements, and that was not done.

Allied presented documentary evidence which supposedly refuted some of the findings of inadequate fiscal controls by the program reviewers, suggesting that the files existed at the time of the program review but that program reviewers were derelict in not conducting a thorough search of all of Allied's files. I strongly reject that suggestion and adopt the position taken by Ms. Edelson, which is that it is unequivocally the responsibility of the institution being reviewed to provide the reviewers with all necessary documentation to create a clear audit trail of the Title IV funds over which the institution has exercised control. I am confident Ms. Edelson and Mr. Whelchel made this obligation clear to Allied at the inception of their program review. When Allied now presents student and institutional files and records which are inconsistent with those viewed at the time of the program review, the validity/authenticity of those late arrivals is certainly questionable. Even if I were to accept the later documents without reservation, there still remain sufficient instances of improprieties to support my conclusion that Allied's fiscal control over these Title IV funds was seriously inadequate.

The second prong of this termination proceeding is based on Allied's failure to file timely financial and compliance audits as required by 34 C.F.R. § 668.23(c). This portion of the termination proceeding was initiated pursuant to 34 C.F.R. § 668.90(a)(3)(iv) (1993), which provided for the following:

(iv) In a termination action taken against an institution based on the grounds that an institution has failed to comply with the requirements of § 668.90(c)(4), the hearing official must find that the termination is warranted; ...(emphasis added)

This section was modified and is now found at 34 C.F.R. § 668.90(a)(3)(v) (1994) and reads as follows:

(v) In a termination action taken against an institution or third- party servicer on the grounds that the institution or servicer failed to comply with the requirements of § 668.23(c)(3), if the hearing official finds that the institution or servicer failed to meet these requirements, the hearing officer finds that the termination is warranted; ... (emphasis added)

Respondent interprets the deletion of the word "must" from the current regulation as incorporating an element of discretion into the hearing officer's determination of whether to find that termination is warranted. Absent the inclusion of another qualifying word or words in the current regulation, I do not share the Respondent's viewpoint. In my opinion, a finding that an institution failed to file a required financial and compliance audit obligates the hearing officer to find that termination is warranted. A hearing officer has no other optional finding available. ED has satisfied its burden that Allied did not timely file its 1992 and 1993 financial and compliance audits. They were due on March 31, 1994, and were not filed until August 8, 1994.

Allied's regulatory and program violations, coupled with its untimely filing of its financial and compliance audits for the 1992 and 1993 award years, convinces me that Allied's eligibility to further participate in Title IV, HEA programs should be terminated.

With respect to the proposal to impose a fine against Allied to punish it for its past misconduct and to deter similar misconduct by other institutions, I find that a fine in the amount of \$50,000 adequately serves both purposes.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that Allied should be terminated from further participation in Title IV programs and fined \$50,000.

Judge Richard F. O'Hair

Issued: March 23, 1995
Washington, D.C.

S E R V I C E

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 amount of the proposed fine was later reduced to \$189,000.

Footnote: 2 2 1989 Payment Management System Recipient's Guide; 1988 Audit Resolution System Directive, Appendix 6; 34 C.F.R. § 668.16(c)(1) and 34 C.F.R. § 668.82(a) and (b).

Footnote: 3 3 Allied obtained this loan in June 1992 to secure funds to repay ED \$413,637. This debt to ED was generated by a previous determination that Allied had excess cash-on-hand in this amount at the end of the 1990-91 award year, which Allied maintains occurred upon the closing of four of its five campuses in December 1990.

Footnote: 4 4 34 C.F.R. § 668.23(c).

Footnote: 5 5 The audit for the 1991-92 award year was completed by the auditor on May 27, 1993, and the audit for the 1992-93 award year was completed by the auditor on June 27, 1993.

Footnote: 6 6 31 C.F.R. §205.4(a); Recipient's Guide to the Payment Management System, (April 1989); In the Matter of New York Business School, Dkt. No. 93-81-SP, U.S. Dep't of Educ. (July 22, 1994).