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

In the Matter of **Docket No. 94-127-SP**

HALLMARK INSTITUTE OF TECHNOLOGY, Student Financial Assistance Proceeding

Respondent.

Appearances: Leslie H. Wiesenfelder, Esq., Dow, Lohnes & Albertson, Washington, D.C., for Hallmark Institute of Technology..

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

Before: Frank K. Krueger, Jr., Administrative Judge

DECISION

The Respondent, Hallmark Institute of Technology, is a non-term proprietary school that has been in operation since 1969. Respondent offers a number of programs in aviation, electronics, accounting, and business technology at two campuses in San Antonio, Texas. Hallmark's programs run for twelve, thirteen, and fourteen months; its academic year is seven months.

On June 1, 1994, the Student Financial Assistance Programs (SFAP), U. S. Department of Education (ED), issued a final program review determination for the award years July 1, 1990, to June 30, 1993. As part of that determination, SFAP made three findings which are the subject of this proceeding. In Finding # 3, SFAP concluded that Hallmark charged its students the full cost of attendance at the beginning of its academic programs, but then prorated the costs over the entire academic program for purposes of securing additional loans for its students under the Federal Family Education Loan (FFEL) Program. For this finding, SFAP seeks reimbursement in the amount of $179,776. In Finding # 4, SFAP determined that Hallmark failed to include all Federal financial assistance -- *e.g.,* College Work Study -- received by its students when it certified their applications for FFEL loans. For this violation of the program requirements, SFAP assessed a liability of $27,177. In Finding # 5, SFAP determined that Hallmark was in

violation of program standards by including in its estimate of the cost of attendance for Pell Grant applications the cost of tuition and other fees which were paid by various agencies under the Joint Training and Partnership Act. SFAP assessed liability for this violation at $20,198.

Hallmark properly appealed these findings. During oral argument on August 2, 1995, Hallmark confessed liability with respect to Finding # 4, although it continues to take issue with SFAP's calculation of ED's actual loss as a result of the violation. In order to ensure administrative finality, I have entered specific findings with resect to Finding # 4, even though Respondent confessed to liability. With respect to Findings # 3 and # 5, for the reasons discussed below, I find in favor of the Respondent.

DISCUSSION

Finding # 3

SFAP contends that Hallmark, which offers programs of more than one year in length, with academic terms of seven months, charged each enrolling student tuition and fees for the entire program up front when the student enrolled in the program. Under the FFEL Program, a participating institution, such as Hallmark, must complete a portion of a student's loan application, providing the student's estimated cost of attendance at the institution. When Hallmark completed its portion of the FFEL application for a student's first academic year, it did not include the full amount of tuition and fees charged that student as the student's estimated cost of attendance. Instead, according to SFAP, it prorated the tuition and fees it charged the student at the beginning of the program over the number of academic years for the program in which the student was enrolled. Thus, when the student reapplied for a second FFEL loan to cover the student's second year, Hallmark included a prorated tuition and fees charge, even though the student was charged the full tuition and fees at the beginning of the first year and there was no charge for the second year. Hallmark contends that SFAP is factually wrong in its determination, and that it charged its students tuition and fees on a monthly basis; thus, its estimated cost of attendance was determined by the total number of monthly payments that a student was expected to make during an academic year.

I find Hallmark's position to be the more persuasive and clearly supported by the evidence in the record. SFAP relies very heavily on Hallmark's enrollment agreements with its students (see Exhibit R-3-7 for an example of an agreement), wherein the total cost of the program for both academic years is listed. As noted by Hallmark, its enrollment agreement had to be approved by the Texas State Board of Education, which required that proprietary schools list the total cost of tuition and fees, along with the payment schedule, on enrollment agreements. That is exactly what Hallmark's enrollment agreements did -- listed the total cost of the entire program, not just the first year, and the amount and number of monthly payments the student was expected to make if the student completed the program. It is clear from the face of the agreements that the student was not required to pay the total cost of the program at the beginning of the program, but only on a monthly basis as the program progressed. It is also clear that Hallmark interpreted its student enrollment agreements to require payments on a monthly basis. (*See* Exhibit R-3, Affidavit of Richard H. Fessler, Hallmark President since 1974, pp. 3-4.) Further evidence that Hallmark was

not requiring its students to pay the full cost of the program at the beginning, but was requiring payment on a periodic basis, is demonstrated by the Student Accounts Receivable Ledgers,

which show that most students were paying on a monthly basis. (See Exhibit R-23.)See footnote 1 *1*

That Hallmark was in full accord with the program requirements is supported by a memorandum entitled "GSL Cost of Attendance -- Tuition and Fee Component,"See footnote 2 *2* dated September 1, 1992, from Clarence H. Hicks, Chief, Institutional Review Branch, Division of Audit and Program Review, SFAP. In this memorandum, Mr. Hicks advised the SFAP regional offices as follows:

To ascertain if the GSL cost of attendance is correct, the reviewer must determine how the school charges its students tuition and fees. If the school charges the full tuition and fees at the beginning of the course *and considers them due immediately*, all tuition and fees must be included in the first loan period. . . .

Some schools may appear to be charging the full amount of tuition and fees, but may actually be billing students in increments (months, academic years, terms, phases, modules, payment periods, etc.). Even if the ledger card shows the full tuition and fees, if the enrollment agreement clearly states that students are billed and obligated in increments, the school should include the amount of tuition and fees actually billed the student during the loan period.
[Emphasis added.]

Although Hallmark's enrollment agreements listed the total cost of the program, it is clear, not only from the face of the agreements, but also from the Student Accounts Receivable Ledgers, that Hallmark did not consider the total cost immediately due.See footnote 3 *3* Thus, under the Hicks

memorandum of September 1, 1992, Hallmark was using the correct methodology to estimate the cost of attendance on FFEL applications.

SFAP counters Hallmark's argument by citing to the 1992-93 Student Financial Aid Handbook, which states as follows:

If tuition and fees are charged to the student at the beginning of a program that is longer than an academic year, the cost of attendance for GSL programs should include the full amount of the tuition and fees charged for the period of enrollment in which the loan is made. For example, a school with a 1,350 clock hour program defines its academic year as 900 clock hours and charges its students the full $3,000 in tuition and fees at the beginning of the program. In this case, an enrolling student usually would be entitled to two Stafford Loans because the program is longer than one academic year. The tuition and fee charge for the first academic year would be $3,000; there would be no tuition and fee component in the cost of attendance for the second Stafford loan.

However, the 1993-94 Handbook fails to define the term "charge"; thus it begs, rather than answers, the question at issue in this case -- how did Hallmark "charge" its students? Under the Hicks memorandum "charge" includes not just listing total cost for the entire program, but considering it due immediately.

In its brief and at oral argument, SFAP notes that Respondent was informed of the provisions of the 1992-93 Handbook by its financial advisor, Mitchell Sweet & Associates, through a news release dated July 1992. The news release provided as follows:

ED has now stated that the tuition cost must be included only in the first Academic Year if the student is charged for the entire program at the time of the student's enrollment. This applies unless the student is charged in other increments (by Academic Year, phase, term, etc.). If all costs are charged and billed up front, no tuition costs may be applied to the second Academic Year. For example, if you offer a course that is 48 credits long, which has a 24 credit Academic Year and a cost of $6000 which is charged at the beginning of the program, all $6000 would have to be included in the first Academic Year for GSLP/CBC COA determinations. [Underlining in original.]

To the extent that this news release does anything to clarify the ambiguity in the 1992-93 Handbook, it supports Respondent's interpretation. By emphasizing "charged and billed" it suggests that Respondent's practice of providing for monthly payments in its enrollment agreements, while listing the total cost of the entire program, allowed Respondent to include tuition and fees in the estimated cost of attendance calculation for both years of a student's FFEL application.

During the oral argument and in its brief, SFAP contends that Hallmark changed its practice subsequent to the review period and no longer charges its students up front for the entire program; that Hallmark now charges its students on an academic year basis. Counsel for SFAP contends that this change in procedure is evidence that Hallmark's original procedure was suspect. However, the revised enrollment agreement on which SFAP relies (ED Exhibit 10) is simply the old agreement, which lists total cost of tuition and fees for the entire program, itemized by the number and amount of monthly payments required if the program is completed, with an attachment that further itemizes the total costs of tuition and fees by academic year. Hallmark continues to do exactly what it has always done, namely, charge students on a monthly basis; except now, under insistence by SFAP, Hallmark also itemizes the total cost of tuition and fees by academic year.

In summary, the evidence overwhelmingly indicates that Hallmark "charged" its students on a monthly basis and estimated the cost of attendance in full compliance with all program requirements.See footnote 4 *4*

Finding # 4

In order to ensure an accurate calculation of a student's financial needs, Federal regulations require that institutions participating in the Federal student loan programs provide information concerning all Federal assistance received by its students when the institution certifies loan applications for its students. SFAP determined that Hallmark was failing to carry out this requirement. SFAP required Hallmark to calculate the excessive amount of loan proceeds received by its student as a result of this failure to carry out the program requirements. Hallmark reported that amount to be $47,336.03.

In the final program review determination, SFAP applied a 30 percent preliminary cohort default rate for award year 1991 to initially assess liability under this finding. While admitting liability in this area, Hallmark argues that its most recent preliminary cohort default rate of 12.3 percent for 1993 should be used. (Transcript, pp. 31-43.) SFAP argues that the 12.3 percent rate should not be used since it is preliminary, and suggests that an average of the rates for the previous two years, which are now final, be used. At oral argument all parties agreed that, strictly speaking, none of these rates applied since the students at issue in this finding have not yet begun repayment. Thus, to quote from counsel for SFAP, use of any of the rates under consideration -- 1991, 1992, or 1993 -- is a "crap shoot" since it assumes that default rates in the future will be the same as the past. (Transcript, p.102.)

In fairness to all parties, and to avoid using the rate for one particular year, which may be an aberration, I have decided to use an average of the final rates for 1991 (29.3 percent), 1992 (17.7 percent), and the preliminary rate for 1993 (12.3 percent). I decided to use the 1993 preliminary rate since it indicates a continuing downward trend for Hallmark students, and the default rate may be even lower when the cohort rate for 1995 becomes available. Applying the average of these three rates (19.7 percent) to the actual excessive loan awards ($47,336.03), I conclude that Hallmark owes ED $9,325.19.

Finding # 5

During the review period, Hallmark entered into contracts with various Dislocated Worker Centers that provided funding to train students under the Job Training Partnership Act (JTPA). Separate contracts were let for specific students who would then enroll in one of Respondent's programs. SFAP claims that Hallmark, when it calculated the costs of attendance when completing Pell Grant application for students participating in the JTPA program, should not have included the costs that were paid under the JTPA contracts. In making its argument, SFAP does not cite any statutes or regulations, but simply argues that the total costs of training JTPA students were specified in the JTPA contracts. Hallmark argues that the JTPA students, like all other students, signed student enrollment agreements whereby they became committed to pay the monthly costs of tuition and fees specified in those agreements. This ensured that Hallmark would receive payment for all costs of tuition and fees which were incurred by the student, but not paid by the JTPA agency. The record supports Hallmark's argument rather than that of SFAP.

For each JTPA student, Hallmark would enter into a separate contract with the JTPA agency to reimburse Hallmark for all or part of the cost of training that student. The JTPA student, like all other Hallmark students, would sign the student enrollment agreement, wherein the student became contractually obligated to pay for tuition and fees incurred. The obligation of the student was separate and apart from the obligation between the JTPA agency and Hallmark. The student and the JTPA agency were jointly and severally liable for the student's tuition and fees up to the amount specified in the JTPA contract. Any amount in excess of the JTPA contract was the sole responsibility of the student or other source of financial aid. (*See* Affidavit of Richard H. Fessler, President of Hallmark, p. 5.) None of the JTPA contracts included a prohibition against students being billed for tuition and fees, even if paid for by JTPA. (*Id.)*

The JTPA contracts themselves make clear that "[JTPA] students should apply for Pell Grants

and any other available financial aid to help their supportive services. . . ." (ED Exhibits 12, 13, 14, and 15.) One of the JTPA agencies, the Alamo Area Council of Governments, included the following language in some of its JTPA contracts with Hallmark: "All other costs incurred that are not covered by this Letter of Referral [the JTPA contract] by the School/Institution, AACOG, or Grants, etc., are the sole responsibility of the participant [student]." Thus, not only did the JTPA contracts themselves not preclude Hallmark from holding the student personally responsible for tuition and fees, but they contemplated additional costs which were not be covered by the contracts. The record contains several examples where Hallmark sought payment directly from the students for charges not paid by the JTPA contracts. (Exhibits R-3-32, -33, and -34.)

Internal guidance provided by SFAP again appears to support Hallmark's position. In another memorandum from Clarence Hicks, Chief, Institutional Review Branch, Division of Audit and Program Review, this one dated May 5, 1991, Mr. Hicks advised as follows:

PELL COST OF ATTENDANCE FOR JTPA STUDENTS

There are two instances when an institution can include a tuition and fee charge in the Pell Grant cost of attendance for JTPA recipients:

* when the charge is made directly to the student; and

* the charge is paid by either the student or by student financial assistance (i.e. JTPA).

An institution cannot include a tuition and fee charge in the Pell Grant cost of attendance if the contract between the institution and JTPA prohibits it from charging tuition and fees directly to the student.

Listed below are the most commonly used agreements between institutions and Service Delivery Agencies (SDA):

AGREEMENTS WHICH DO NOT ALLOW FOR TUITION AND FEES TO BE INCLUDED IN THE PELL COA

* Blanket agreements which do not specify an individual amount to be paid by the SDA for tuition and fees, but may include a number of students to be trained and an amount of compensation to be paid to the school.

* Performance based contracts on which a payment is contingent upon the student completing the program or obtaining employment after completing the training.

Note: For performance based contracts, the Department of labor requires that tuition and fee charges be omitted from the costs of attendance calculated when JTPA participants apply for a Pell Grant.

AGREEMENTS WHICH ALLOW FOR TUITION AND FEES TO BE INCLUDED IN THE PELL COA

* Agreements which specify the individual tuition and fees which the SDA will pay for each student.

If an institution charges the student for tuition and fees, it must expect the student to pay the charge if the JTPA agency or other source of assistance does not pay. The existence of the tuition and fee charge must be documented in the same way as for any non- JTPA student (i.e. in the school's contract with the student or in the agreement with the JTPA agency). [Underlining in original.]

The practice questioned by Finding # 5 is specifically allowed by this memorandum.See footnote 5 *5* As we have seen, the tuition and fees charged to the JTPA students are charged directly to the students as part of their student enrollment contracts, which spell out the total cost for the entire program, broken down by monthly payments. If the tuition and fees are not paid by the JTPA agency or other source of financial assistance, the student is legally obligated to pay. In addition, the Hallmark JTPA contracts are not blanket agreements, but are individual agreements covering individual students. And they are not performance-based agreements, in which payment by the JTPA agency is contingent on the student completing the program or obtaining employment after completion. Thus Hallmark's contracts are not the two types of contracts in which the listing of tuition and fees in the cost of attendance is specifically prohibited by the Hick's memorandum. The conclusion is inescapable that not only is the practice of including tuition and fees for JTPA students in Pell Grant applications not proscribed by any program regulation, but that it is specifically allowed by the Hicks memorandum. Thus, I must conclude that Finding # 5 is erroneous and not supported by the evidence.

FINDINGS AND CONCLUSIONS

SFAP Findings # 3 and # 5

1. At all times covered by the review period, the Respondent charged its students for tuition and fees on a monthly basis. Although the student enrollment agreements specified the total program costs, the agreements made clear that the students were obligated to pay on a

monthly basis. SFAP's finding to the contrary is not supported by the evidence in the record.

2. At all times covered by the review period, the student enrollment agreements for Hallmark's JTPA students legally obligated the students to pay for all costs incurred by the students which were not paid by the JTPA agency. According to SFAP's own policy interpretation, Hallmark was fully authorized to include its tuition and fees in the cost of attendance when completing Pell Grant applications.

3. Respondent has sustained its burden of proof that all of the costs questioned by SFAP in Findings # 3 and # 5 of the Final Program Review Determination are allowable and in full conformity with all program requirements. (*See* 34 C.F.R. § 668.116(d).)

SFAP Finding # 4

4. Respondent's students received an excess in FFEL awards because it failed to include other sources of financial assistance when it estimated the cost of attendance for these students, in violation of program requirements. ED suffered an actual loss of $9,325.19 as a result of these excessive loans, for which Respondent must repay ED.

ORDER

On the basis of the foregoing, it is hereby ORDERED that the Respondent pay $9,325.19 to ED as reimbursement for excessive loans made to Respondent's students as a result of Respondent's failure to include in its cost of attendance other sources of financial assistance awarded to these students.

Date: August 23, 1995 Frank K. Krueger, Jr.
Administrative Judge

S E R V I C E

A copy of the attached decision has been sent by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED,** to the following:

Leslie H. Wiesenfelder, Esq.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-third Street, N.W.
Washington, D.C. 20037

Stephen M. Kraut, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Ave., S.W.
Washington, D.C. 20202-2110

Footnote: 1 *1 Counsel for SFAP considers the monthly payment schedules provided in the enrollment agreements to be "bogus" (transcript of oral argument, p. 63), since an examination of the Accounts Receivable Ledgers reveals that students receiving Federal financial aid were not paying on a monthly basis. However, students not receiving Federal aid were paying on a monthly basis; students receiving Federal aid were, instead, simply having their accounts credited as the student aid became available to the institution. Thus, all students were paying on a periodic basis, although not on a strict monthly basis.*

Footnote: 2 *2 The Guaranteed Student Loan (GSL) Program is now called the Federal Family Education Loan (FFEL) Program.*

Footnote: 3 *3 At oral argument, counsel for SFAP stated that he also did not consider the full costs of tuition and fees to be immediately due. (Transcript, p. 68.) In light of this admission, it is difficult to understand exactly what SFAP's objection to Hallmark's practice was. It appears to be that Hallmark commits its students to the full amount of tuition and fees at the beginning of the education program, rather than committing them on a periodic basis as the program progresses, and that this is wrong since the school is forcing students to incur a huge obligation up front. (See transcript, pp.70, 80.)*

Although Hallmark's refund policy, which is provided on the student enrollment agreement, does not directly correspond to the amount of payments actually made to the institution at the time a student drops out of a program, the refund policy does make it clear that a student is not legally obligated to pay the total cost of tuition and fees if the student fails to complete the program. Because of the refund policy, the student is incurring very little in the way of an obligation, except to pay for services provided. It is also worth noting that by providing the total cost of the program on the enrollment agreement, Hallmark is not only binding the student, but is also binding itself. There are, I am sure, many parents of undergraduate students at traditional four-year colleges and universities, where tuition and fees seem to escalate on an annual basis, who would welcome being "charged" the full cost of tuition and fees at the beginning of the freshman year, so long as they only became committed to paying the tuition and fees on a periodic basis.

Footnote: 4 *4 During oral argument (transcript, p. 82), counsel for SFAP cited the following two cases in support of its position that the word "charged" means simply to incur an obligation: In re Education Management Systems, Inc., Docket No. 94-31-SA, U.S. Dept. of Education (May 18, 1995); In re Microcomputer Technology Institute, Docket No. 94-88-SA, U.S. Dept. of Education (August 15, 1995). Both of these cases are inapposite to the issue at hand. Both cases dealt with programs operated for prisoners, and the judges in both cases determined that the prisoners taking the programs were not responsible for paying for the programs; thus, the institution operating the programs was not authorized to list tuition and fees as a cost of attendance. In both cases, the enrollment agreement specifically provided that the prisoner was not obligated to pay anything for the programs. In the case at hand, the enrollment agreements provided the contrary. In addition, Finding # 3 does not deal with whether Hallmark students actually incurred an obligation, but with when the obligation was incurred. As noted above, the evidence demonstrates that the obligation was incurred on a monthly basis as the student moved through the training program.*

Footnote: 5 *5 During oral argument, counsel for SFAP stated that the "purpose of Finding Number 5 is that a school shouldn't be paid twice for doing the same thing -- called double dipping." (Transcript, pp. 84, 90.) However, there is no evidence that Hallmark was "double dipping." Hallmark was simply doing what any sound business would do, ensure that any costs not covered by the JTPA agencies would be paid by the students. The JTPA contracts are analogous to scholarships. When completing a Pell Grant application, institutions are not*

required to deduct any scholarships which the student may receive from the estimated cost of attendance. (Transcript, pp. 117-120.) If, for some reason, an organization providing the scholarship does not honor the scholarship, or does not pay for all of the cost incurred by the student in pursuing the training program, the student is still required to pay his or her tuition and fees. As with Finding # 3, it is difficult to understand the problem that SFAP had with Hallmark's practice of listing tuition and fees on Pell Grant applications for JTPA students.