
In the Matter of Chicago Educational, Inc.,
Respondent.

Docket No. 94-132-SA
Student Financial Assistance Proceeding

Appearances: Peter S. Leyton, Esq., Ritzert & Leyton, P.C., Fairfax, Virginia, for the Respondent.

Sarah L. Wanner, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Student Financial Assistance Programs.

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

DECISION

INTRODUCTION

The Respondent, Chicago Educational, Inc. (CEI), is a proprietary trade school which, from July 1, 1990, to May, 18, 1993, operated a program in cosmetology and participated in the Federal student aid programs under Title IV of the Higher Education Act of 1965, as amended. The school was purchased by James C. Fedalen in August of 1991, who changed the name of the corporation and the location of the school. As a result of an audit report issued on January 6, 1993, covering the period of July 1, 1990, through June 30, 1992, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued a Final Audit Review Determination on June 3, 1994, assessing liability to CEI of $17,415 in unauthorized funds awarded to ten students under the Federal student aid programs. On May 19, 1993, CEI went out of business. On June 9, 1993, CEI turned over most of its records to ED's Office of the Inspector General (OIG) in response to a subpoena issued on May 19, 1993. CEI's audit appeal is based on three arguments: that the audit review should be dismissed as moot since it has gone out of business and has no assets; that it cannot defend itself since all of its records are in the possession of OIG; and that it is not, in any event, responsible for any audit liability covering the period of July 1, 1990, to June 30, 1991, since it was not in existence during that period.

For the reasons provided below, I uphold the findings contained in the Final Audit Review Determination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Mootness.

On May 19, 1993, CEI went out of business. Since it claims that it has no assets, and cannot pay any liability assessed against it, CEI argues that this audit proceeding should be dismissed as moot. CEI relies on several cases issued by ED in which termination proceedings where dismissed as moot because the institutions had gone out of business. See In Re Pikeville Beauty College, Docket No. 94-36-ST, U.S. Department of Education, Initial Decision (April 19, 1994); *In Re Bliss College,* Docket No. 93-150-ST, U.S. Department of Education, Decision of Secretary (February 23, 1994). SFAP argues that the cases cited by CEI are inapposite, since they deal with a termination proceeding, and not an audit proceeding, the former dealing with the termination of an institution's eligibility to continue to participate in Federal student aid programs, the latter dealing with liability of claims made by the government.

I conclude that the case is not moot. The argument made by SFAP is correct; there is a fundamental difference between an audit liability appeal and a termination proceeding. If the final decision of ED in an audit proceeding is that an institution has an outstanding audit liability, even though it has gone out of business, ED may seek to collect on that liability. Although CEI argues that it has no assets, and thus ED can never collect on anything involving CEI, this is the wrong forum to consider the issue of whether CEI has any assets, or whether CEI's owner has any personal liability; those issues are for a bankruptcy court, or a state or local court considering any ED claim based on the outcome of this proceeding. In addition, subsequent to the filing of the briefs in this case, the Secretary recently ruled that a Title IV program review did not become moot because the participating school went out of business. *In Re Computer Processing Institute,* Docket No. 92-20-SP, U.S. Department of Education, Decision of Secretary (April 13, 1995). Under this ruling, a Title IV audit review cannot be considered moot simply because the school in question goes out of business. Finally, it should be noted that the cases relied on by CEI were reversed by the Secretary, again subsequent to the filing of briefs in this case. It is no longer the controlling ED precedent that a termination proceeding is moot when the institution which is the subject of that proceeding goes out of business. *See In Re Fisher Technical Institute, et al.,* Docket Nos. 92-141-ST, 92-94-ST, 93-27-ST, and 94-36-ST, U.S. Department of Education, Consolidated Order of Remand issued by Secretary (January 27, 1995).

II. Denial of Due Process.

CEI argues that it is unable to defend itself since, on June 9, 1993, it turned over the records necessary to respond to the Final Audit Review Determination to OIG. CEI further argues that OIG has denied it access to the records at issue because it would only make those records available during normal business hours, 8:30 A.M. to 4:30 P.M., Monday through Friday. OIG would not allow CEI to use its copying machine, but required CEI to arrange to have a copier brought into the OIG office to make copies. CEI argues that it has no assets, and cannot afford to have someone review the records during normal business hours (a former CEI employee

volunteered to review the records in the evening or on weekends), or have the records reproduced at its own expense. Thus, CEI contends that it cannot defend itself and is being denied due process.

CEI's argument is rejected. The President and sole owner of CEI is James C. Fedalen, a practicing attorney in California. When Mr. Fedalen made the decision to turn the records over to

OIG without making copies, he knew that his corporation was subject to an audit report which contained findings adverse to CEI. In addition, Mr. Fedalen knew that, as a Title IV participant going out of business, CEI would have to make arrangements for a close-out audit, which, one could safely assume, would require a retention of school records. Since Mr. Fedalen is a practicing attorney, I must assume that he took an intelligent risk that he would no longer need those files, and knew the potential consequences of his action.

The decision by OIG to make the pertinent records available during normal business hours was entirely reasonable. Under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, OIG is not required to make files available except during normal business hours, and is allowed to charge a reasonable fee for reproduction. Other than the possible exception of requiring CEI to arrange for its own reproduction, OIG's action with regard to the CEI records was consistent with its legal responsibilities under FOIA. If CEI was not happy with this arrangement, it should have filed a formal FOIA request, which provides a mechanism for administrative and judicial review of any conditions laid down concerning the release of documents. FOIA also provides that the first one-hundred pages of a FOIA request are reproduced without charge to the requester and that, under some circumstances, ED will waive all fees involved in responding to a FOIA request.

To accept CEI's argument that the Federal government should pay for the reproduction costs would mean that the Federal taxpayers would be subsidizing Mr. Fedalen's corporate decision, or irresponsibility, to release the documents without keeping copies. In addition, although CEI may have no assets, there has been no showing that Mr. Fedalen could not pay the reproduction costs. Given the small number of files involved in this audit appeal (files concerning ten students), the cost involved in reproducing those files, even under the somewhat cumbersome conditions imposed by OIG, would have been modest. In addition, Mr. Fedalen himself, or his attorney, could have reviewed the files at issue on the OIG premises. Thus, I conclude that there was no denial of due process in this audit appeal.

III. Liability for the Period of July 1, 1990, through June 30, 1991.

CEI argues that it has no responsibility for any claims arising during this period, since it did not take over operation of its cosmetology program until July 1991. This argument too must be rejected as somewhat frivolous, and, again, it appears to be an attempt by Mr. Fedalen to avoid the consequences of earlier decisions.

From July 1, 1990, through June 30, 1991, CEI operated under the name of Moler Hairstyling College, Inc., in Joliet, Illinois. In August 1991, Moler Hairstyling College, Inc., was

bought by Mr. Fedalen, who then changed its name to Chicago Educational, Inc., and moved the location of the school to Chicago. When ED was reviewing whether Chicago Educational, Inc., was eligible to continue participation in the Title IV programs, as the successor to Moler Hairstyling College, Mr. Fedalen, through the same counsel representing him in this proceeding, vociferously argued that Moler Hairstyling and CEI were the same institution, but with a new name and location. In addition, Mr. Fedalen represented to OIG that, as part of the purchase agreement with the previous owners of Moler Hairstyling College, Mr. Fedalen assumed

responsibility for any liability that was incurred by Moler under the Title IV programs. (See SFAP Exhibit 9.) Now, Mr. Fedalen argues that Moler and CEI were separate corporate entities. I find that the weight of the evidence demonstrates that these two institutions were the same, and that when Mr. Fedalen purchased Moler Hairstyling College, the changed corporate structure assumed the liabilities of the earlier structure.

Order

ORDERED, that CEI reimburse ED for improperly awarded grants and loans issued by CEI under the Title IV programs, and refund to lending institutions improperly awarded Title IV loans, in the dollar amounts and under the conditions specified in SFAP's Final Audit Review Determination of June 3, 1994.

Issued: July 12, 1995
Washington, D.C.

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Frank K. Krueger, Jr.
Administrative Judge

S E R V I C E

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

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