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

In the Matter of **THE CITTONE INSTITUTE**, Respondent.

Docket No. 94-134-SP
Student Financial Assistance Proceeding
PRCN: 9202053

Appearances: Leslie H. Wiesenfelder, Esq., Peter D. Horkitz, Esq., and Stanley A. Freeman, Esq., for respondent, The Cittone Institute,

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

Before: Edward J. Kuhlmann, Administrative Law Judge

DECISION

On June 13 1994, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a Final Program Review Determination (FPRD) finding that during the award years 1990/91 and 1991/92 The Cittone Institute violated Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq.* Respondent's appeal is limited to findings 2, 3, 5, and 7 in the FPRD. ED seeks payment of $235,399 from the respondent, which consists of institutional liabilities from the Federal Family Education Loan Program, Federal Pell Grant and Federal SEOG, interest and special allowance, and interest on excess federal cash. See footnote 1 1/

I

In FPRD Finding 2, SFAP alleges that the respondent disbursed Title IV funds to students who

studied at auxiliary classroom space located at 130 Gaither Place in Mount Laurel, New Jersey. SFAP states that the Gaither Place classrooms were not licensed by the State of New Jersey, accredited by a nationally recognized accrediting agency, or recognized as an eligible site by the Secretary. SFAP alleges that students received instruction at suite 172 at the Gaither Place site since September 1991 and in suite 100 at the Gaither Place site beginning in March 1992. SFAP states that the State of New Jersey never licensed suite 172 and did not license suite 100 until after instruction already had begun at the Gaither Place location. SFAP maintains that respondent was required to immediately cease awarding and disbursing Title IV funds to, or certifying Title

IV loans for, students attending school at the ineligible site for any payment period during which the site was ineligible. The respondent was also required by SFAP to report Title IV funds disbursed to students who attended classes at the apparently ineligible site.

SFAP is seeking from the respondent repayment of $131,645 of Title IV money paid to 61 students who attended class at the Gaither Place site.

SFAP supports its claim that the Gaither Place classrooms were ineligible for Title IV funds with two letters from the State of New Jersey Department of Education to the respondent which grant approval for the Gaither Place classrooms. Those letters , dated September 14, 1992, and July 23, 1992, approved use of suite 172 effective September 14, 1992, and approved the classroom space in suite 100 effective March 26, 1992. From the existence of these letters, SFAP concludes that the State of New Jersey had not authorized the Gaither Place classrooms before they were used for classes. SFAP cites 34 C.F.R. § 600.5 (1991) in support of its conclusion.See footnote 2 2/ That regulation requires that an educational institution receive state authorization for its educational program; the elements of state authorization are not defined in the regulation.

Respondent urges that it has complied with the applicable regulations and that the students who attended classes at the Gaither Place site were eligible to receive Title IV assistance. Simon Cittone, who was the president and owner of respondent during the review period, states in a declaration attached to the respondent's brief that when the SFAP reviewers raised a question about state approval of the Gaither Place site, the respondent contacted the New Jersey Department of Education. He declares as follows: The state inspected the Gaither Place site on March 26, 1992. At the time of the inspection, respondent provided minimal information about the use and arrangements for the Gaither Place classrooms to the New Jersey Department of Education; that information included local health and safety approvals. The state official who inspected the premises spent five minutes reviewing the requested paperwork and approximately

ten minutes looking at the suite. The Cittone Institute was not required to obtain a separate state certificate for the Gaither Place classrooms. The next annual state certificate, following the inspection, that was issued, on October 1, 1992, to the respondent for its Mount Laurel campus, did not separately list the auxiliary classrooms at Gaither Place.

Mr. Cittone states in his declaration that the Gaither Place classrooms are not a separate educational location, that they are treated by respondent as part of the Mount Laurel campus, that students are enrolled at the Mount Laurel campus, that no program of study has been offered in its entirety at Gaither Place, that students take the majority of their classes at the Fellowship Road, Mount Laurel facility, that the Gaither Place site is only 900 yards from the Mount Laurel campus, that faculty members who teach at Gaither Place also teach at Mount Laurel, and that when a student was enrolled at Mount Laurel it was not known whether he or she would take classes at Gaither Place because those classrooms are used for overflow purposes.
He represented that no administrative activities were conducted at the Gaither Place classrooms. Mr. Cittone also points out that both Gaither Place suites met all relevant health and safety standards and were approved by the relevant agencies for state and local safety requirements before classes were held there. He represents that the classes held at Gaither Place were part of a

program of study that had been fully approved by both the state and the Accrediting Council for Independent Colleges and Schools (ACICS).

Respondent points out that the ED regulations do not require institutions to establish eligibility for separate classroom locations that offer only a partial educational program in order to disburse Title IV funds. Respondent points out that SFAP does not cite a regulation that requires the State of New Jersey's or ACICS's approval of auxiliary classrooms. Moreover, respondent claims that its Eligibility Notice for the Mount Laurel campus from ED does not limit the geographic scope of Title IV eligibility. Respondent submitted as exhibits New Jersey Department of Education certificates for the review period that approved the Mount Laurel campus educational program.

SFAP responds to respondent's factual and legal arguments by pointing to ED's regulation that educational institutions must to be legally authorized by the state to provide their educational program. It maintains that the letters from the New Jersey Department of Education approving the Gaither Place classrooms establish that the classes being offered there were unauthorized before the New Jersey Department of Education inspected them. SFAP does not point to any ED policy concern or regulation about auxiliary classrooms, or any regulation requiring the approval of the State of New Jersey or ACICS.

Respondent has met its burden on Finding 2. Respondent's use of auxiliary classrooms at Gaither Place was not unauthorized within the meaning § 600.5 (a) (4). Respondent has demonstrated that its educational program was fully certified by the state during the review period and by the accrediting group ACICS. The letters from the New Jersey Department of Education approving the auxiliary classrooms do not state that its inspection or approval was necessary for respondent to maintain its certification. The record reflects that the respondent requested approval after

SFAP reviewers raised the issue. The approach of the New Jersey Department of Education to the inspections was perfunctory. The state was aware that the classrooms were being used at the time of the inspection in March 1992; nevertheless, the state did not even notify the respondent about its approval until four months later, in July 1992. The State Department of Education letter explains that it wasn't until it was reviewing its files that it realized that approval was never sent for the auxiliary classroom space. The state correspondence does not state that the inspections were required or that it affected the validity of respondent's certificate to operate the educational program licensed to respondent in Mount Laurel.

Respondent has shown that an "educational program" was not being offered at the Gaither Place classroom. The record supports respondent's claim that students from the certified site at Fellowship Road, Mount Laurel, New Jersey were taking some classes in court reporting at Gaither Place and that this occurred when respondent had insufficient classroom space at Fellowship Road. The evidence is that a full program was not offered at Gaither Place but only part of one. Students registered at the Fellowship Road campus and administrative activities relating to Title IV were carried out there. Respondent's uncontradicted representation is that it did not know when students registered which ones would attend class at Gaither Place. In the past, SFAP has found that adding a new location to a school raises authorization questions under the regulations (In the Matter of LeMoyne-Owen College, Dkt. No. 94-171-SA, U.S. Dept. of Educ. (May 18, 1995)), but this is not a case where a new educational program was instituted;

respondent, instead, established a suite of classrooms 900 yards from its Mount Laurel campus to hold spillover classes in court reporting. For these reasons, Finding 2 is reversed.

II

Finding 3 concludes that the respondent's system for recording clock hours actually completed by students was inadequate. Respondent did not record the days on which a student was actually in attendance. Without such records, SFAP maintains, respondent was unable to determine student eligibility to receive second and subsequent disbursements of Title IV aid during the 1990/91 and 1991/92 award years. SFAP reviewers found that respondent recorded the days absent, days late, days excused early, or other times when a student was not present on a "Student Attendance Record Card." Reviewers found that there was no procedure to record the days on which a student was actually in attendance. Respondent told the reviewers that students not marked absent on the record cards were assumed to be present. The source documents for attendance cards, teacher attendance books, were destroyed after two months.

When reviewers examined the system used by the respondent they found discrepancies. For example, while the respondent stated that it marked absences for students who were not present, that course was not followed in the case of student #14, who withdrew. For student #14 the last day of attendance (LDA) was 10/1/91 and withdrawal was made on 10/3/91. The attendance record card, however, did not indicate that the student was not present on 10/2/91. If respondent had recorded all absences, as it claimed, then it could be assumed that the student was present on 10/2/91 since that day was left blank. The reviewers also did not know how the LDA was

determined. Reviewers could not tell when student #24 was in class. They found that there were many C's on four dates for that student. The legend indicated that C meant "closed". But reviewers were told by repondent's staff the C meant "cut." According to the school's policy, students who cut class are considered absent for the day. Discrepancies were found for students 29, 31 and 32. SFAP reviewers were told by respondent's staff that they do not rely on the Student Attendance Record Card for accurate attendance information. They told the reviewers that they call the departmental offices for attendance information.

The respondent's attendance cards also conflict with time sheets required to be kept by the Job Training Partnership Act (JTPA). Reviewers found instances in which a JTPA student was recorded as being in attendance on JTPA time sheets on days the attendance cards indicated that the student was absent. The reviewers found cases where a student's attendance was recorded before it could have been known whether the student was present or absent. Finding 3 states that the respondent, because it is a clock-hour institution, had to maintain and establish an adequate system for recording and retaining attendance history. Without such a system, SFAP stated, it could not be determined whether the hours attended were sufficient for students to have received second and subsequent financial aid disbursements. Respondent was required by SFAP to review the educational records (other than the student attendance cards which reviewers had found unreliable) for all students who received Title IV funds during 1990/91 and 1991/92, and determine the number of clock hours that students attended which could be documented by the institution. Respondent was required to ascertain whether the documented clock hours attended were sufficient for students to have received second and subsequent financial aid disbursements.

SFAP stated that the respondent was required pursuant to 34 C.F.R. § 668.14. (e) (1991) to demonstrate the requisite level of administrative capability to participate in Title IV, HEA programs. It needed to show that it had established and applied reasonable standards for determining whether a student maintained satisfactory academic progress in the course of study. The standards include a maximum time frame for completing the program, a schedule for determining by increments whether the student has successfully completed an appropriate and specified percentage of the work, and specific policies defining the effect of course incompletes and withdrawals. SFAP urges that without attendance records, the requirements cannot be met. In addition, SFAP points out that 34 C.F.R. § 668.23 (1991) requires that institutions establish and maintain, on a current basis, records regarding the student's enrollment status at the institution and whether the student is maintaining satisfactory academic progress.

Respondent's required file review resulted in institutional liability in the following amounts: Federal Pell Grant $12,796, Federal SEOG $1,000, Federal Stafford Loan $66,930.66, Federal SLS/PLUS loan $19,846.13.

Respondent disputes liability for the Federal Stafford Loan, Federal SLS/PLUS and the Federal SEOG because no regulation requires an institution to base time of disbursements on the number of instructional hours that students attended. It also disputes liability because some of the students who received second or subsequent disbursements before they had attended the requisite

number of instructional hours continued at The Cittone Institute for a sufficient number of instructional hours to entitle them to the disbursements. Respondent argues that the funds disbursed early were not overpayments. To support this contention respondent cites the student listed in exhibit 12 to the Request for Review, who received a $1,200 Pell Grant and $200 SEOG and completed her program. Respondent also maintains that $1,088 in Pell Grants represent students who were on leave when the review was conducted, but eventually completed a sufficient number of clock hours to warrant the disbursements. For the same reason, respondent claims that the SEOG, Stafford, and SLS/PLUS liability should be reduced by $22,777.

SFAP argues that respondent's claim about the on leave or absent students is unsupported. SFAP points out that respondent produced no evidence to document that any leave it permitted complied with regulations, that the students completed their program within the maximum time frame required by the regulations, that the claimed resumption of attendance pertained to the same award year in which the improper disbursements were made, or that the students in question did not obtain additional financial aid for the studies they pursued after the period covered by the program review. SFAP asserts that the action taken against the respondent is consistent with 34 C.F.R. § 668.24 (1991) which provides that a "lack of proper documentation" is an appropriate basis for requiring repayment of Title IV funds that cannot be shown to have been properly spent.

Respondent responds that SFAP's requirement that it establish that the students were on leave or absent when the review took place and resumed attendance at the appropriate time enlarges the issues beyond those cited in the FPRD.

SFAP reviewers found that respondent did not have in place an accurate and consistent system for keeping track of students who were present. Under the regulations such a system is necessary in order for respondent to determine when it should disburse Title IV funds no matter what the program. As respondent points out in the declaration of Mr. Cittone, The Cittone Institute is a clock hour institution where students are self-paced. They are not present for any set or predetermined period of time, according to Mr. Cittone. Unless there is some accurate system for keeping track of their attendance, respondent cannot fulfill its disbursement obligations under the Title IV regulations. Respondent has not met its burden by supplying reliable attendance records to counter the unreliable attendance data which the reviewers found. Furthermore, respondent is not correct in asserting that the SFAP has altered its findings or that it has now relied on different regulations to substantiate the violations cited in the FPRD. SFAP's argument is that respondent's claim that disbursements made to students who were absent or on leave is unsubstantiated by reliable records. That is exactly the finding made in the FPRD. While the FPRD does not cite § 668.24, there would have been no reason since it is in that section that ED has notified schools that they may have to repay funds which they cannot properly document. Respondent does not dispute the basic premise that it must have a reliable system for recording time and attendance. Respondent has failed to make that demonstration; Finding 3 is affirmed.

III

The SFAP reviewers found in Finding 5 that respondent made second and subsequent disbursements of Pell Grant funds to students before they had completed the required number of clock hours. SFAP states in the FPRD that when a student's progress is measured in clock hours, a student may not receive the second or subsequent disbursement of a Federal Pell Grant until he or she completes the required hours for the first or prior payment period. Reviewers were told by respondent that it defined its academic year as 900 clock hours for all courses except court reporting which is defined as 1000 hours. The reviewers found that disbursements for students 2, 3, 5, 25, and 33 were based upon course scheduled hours, not attended hours; disbursements were made instead at the scheduled midpoint of the academic year.

SFAP required the respondent to determine, using the academic year clock hours, whether the Pell Grant students in the 1990/91 and 1991/92 award years eventually attained the hours necessary to become eligible for the second or subsequent payment. Ineligible disbursements were determined by SFAP to be institutional liabilities. Respondent was required to discontinue the practice of making a second or subsequent disbursement of a Federal Pell Grant prior to a student's completing the hours from the previous payment period. The FPRD cited 34 C.F.R . § § 690.3, 690.75. 690.79 (1991).

Based on the respondent's file review, institutional liabilities were as follows: Federal Pell Grant $42,137, Federal SEOG $1,983.50, Federal Stafford Loan $127,477.18, Federal PLUS/SLS $47,217.16.

Respondent agrees that Pell Grant disbursements are to be made as outlined in the FPRD. Respondent urges, however, that GSL loan proceeds are to be disbursed in two payments, the second of which may take place only after one-half of the loan period has elapsed. The regulations do not, it argues, require that an institution wait until a student has attended the required number of clock hours for a previous period of enrollment before processing the loan proceeds.

Respondent also urges that because 34 C.F.R. § 676.2 (1991) defines the first SEOG payment period from the beginning to the midpoint of the academic year, with the remainder of the academic year as the second payment period, the payment may be made to a student without regard to the student's attendance. Respondent argues that 34 C.F.R. 676.16 (a) (3) gives the institution the discretion to determine when within that payment period to disburse SEOG funds.

Respondent has attached to its filing a list of students it claims eventually completed their programs, a list of SEOG disbursements that were less than $501 and therefore could be made in a single payment, and a list of students whose liability is double counted.

SFAP argues that respondent has missed the point of the assessment of institutional liability for GSL and SEOG grants. SFAP points out that Appendix D to the FPRD was prepared by

respondent and lists funds it disbursed to students who were not actively pursuing the programs for which aid had been approved.See footnote 3 3/ SFAP notes that respondent does not maintain that the students in Appendix D were active at the time of the disbursements were made. SFAP, citing 34 C.F.R. §§ 682.604 (d) and (e) and 668.7 (1992), urges that disbursements to students that cease attending on at least a half-time basis are prohibited. SFAP also urges that SEOG disbursements cannot be made/retained by a school without regard for whether students have withdrawn or dropped out. 34 C.F.R. §§ 668.22, 676.16 (e). SFAP asserts that even if the students were on leave of absence, respondent has not submitted evidence that authorized leave was in place. When an institution is unable to show that leave was granted in compliance with the requirements of 34 C.F.R. § 668.605 (c), SFAP maintains, the institution is liable for GLS disbursements. In the Matter of Kane Business Institute, Dkt. No. 94-70-SP, U. S. Dept. of Educ. (Oct. 21, 1994) at 4.

Respondent has not submitted evidence to rebut the allegations made by SFAP in Finding 5. While it has demonstrated that the regulations for timing second and subsequent disbursements may vary from program to program, SFAP does not dispute that analysis. Instead, Finding 5 provides a list of students who received disbursements out of time, either because the student, in the case of Pell Grants, had not completed enough clock hours or respondent was unable to demonstrate that the student who was absent or on leave was eligible for Title IV funds, when he or she was not in attendance. Respondent has not submitted reliable and probative evidence demonstrating that the students were eligible for second or subsequent disbursements. In order to do so, respondent needed to show that the disbursements were made within the payment period and/or that the leave was granted in compliance with the regulations. For these reasons, Finding 5 is affirmed.

FPRD Finding 7 states that reviewers were unable to verify the numbers respondent provided in Section E, Information on Eligible Aid Applicants, for the years 1990/91 and 1991/92 of the Fiscal Operations Report and Application to Participate (FISAP). The FPRD noted that the institution failed to maintain the backup data used for the income grids. On the basis of reconstructed income grids for the awards years 1990/91 and 1991/92, the respondent's authorization of Title IV funds for the 1992/93 year was reduced. The Federal SEOG authorization was reduced from $193,403 to $124,613.

Respondent requests that the hearing officer direct SFAP to calculate the amount of under award in 1993-94 and offset that amount against the over award in 1992-93. Respondent maintains that § 490 (d) (7) of the Higher Education Amendments of 1992 permits an institution to offset Title IV funds to which it was entitled but did not receive against any Title IV funds owed. Respondent also claims that its SEOG authorization was $186,152 not $193,403, the amount

used to calculate the reduction in the authorization. Respondent represents that it reported the wrong number on the FISAP. To substantiate its error in reporting, it submits the declaration of Colleen Russo, who prepared the original filing, and supporting documentation. It urges that, because of that clerical error, its authorization for 1992/93 should be increased by $7,251.

SFAP urges that respondent's offset argument is without support. SFAP maintains that the offset statute provides reimbursement to institutions that have expended Federal financial assistance funds on their students. It points out that respondent does not claim to have spent money on student grants for which it was not reimbursed, but that it under-represented in its 1991-92 FISAP its need for campus based "fair share" funds. SFAP argues that the deficiency, if any, resulted from respondent's deficient record keeping. SFAP asserts that it is equitable to have the respondent return overpayment of Title IV funds. SFAP, citing 20 U.S.C. § 1094 9 (c) (7), urges that the offset statute only provides for reimbursement to institutions that actually expended Federal financial assistance funds on their students. SFAP also disputes respondent's claim that the incorrect authorization was used to report the reductions for 1992/93. It points to its Exhibit 4 which is the FISAP filed by the respondent with the Department on September 29, 1993. That FISAP indicates that the respondent expended FSEOG funds in award year 1992/93 of $193,403.

The offset issue raised by respondent was fully considered in In the Matter of Phillips Colleges, Inc., Dkt. No. 93-39-SP, U.S. Dept. of Educ. (May 16, 1994). There it was held that an offset can occur only where money was expended by the respondent for which it was not reimbursed. Respondent has not made that showing. It does appear that respondent incorrectly reported the amount of SEOG funds received in 1992/93. The correct amount was $186,152 and, therefore, the $68,790 repayment should be reduced by $7,251. Finding 7 is affirmed, except as indicated.

FINDINGS

1. Respondent has established that the Gaither Place classrooms were not unauthorized within the meaning of 34 C.F.R. § 600.5 (1992). Accordingly, Finding 2 is reversed and respondent need not repay the amounts sought.

2. Respondent has not submitted reliable attendance data for the students who received Title IV funds that rebuts Finding 3; therefore, it has not met its burden. In addition, respondent has not produced reliable records that establish that students who received second and subsequent disbursements were eligible for such payments. Findings 3 and 5 are affirmed.

3. Respondent has not demonstrated that SFAP was in error in reducing respondent's authorization of Title IV funds for the 1992/93 year. But the amount to be repaid should be decreased by $7,251 because of the arithmetic error made by respondent in preparing the FISAP. In all other respects, Finding 7 is affirmed.

4. Respondent must repay the sums assessed in the FPRD for all findings listed in the FPRD except Finding 2. The U.S. Department of Education should recalculate the amounts to be repaid

for Federal Stafford Student Loans and Federal SLS/PLUS Loans considering only the institutional liability under Findings 3, 5, 8 and 10. In the computation, the Department should eliminate the duplication in FPRD Exs. C and D. The amount to be repaid under Finding 7 should be reduced by $7,251 to $61,539. Nothing in this proceeding altered respondent's liability for the $552.34 to be paid under Finding 4 and the $53.02 in interest and special allowance identified in Finding 17.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that The Cittone Institute pay to the United States Department of Education the amounts found due in the foregoing findings.

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Edward J. Kuhlmann
Administrative Law Judge

Date: March 22, 1996

Footnote: 1 *1/ SFAP in the FPRD found that respondent's total liability was $253,357, but in its brief SFAP agreed with the respondent that there is $17,958 in duplication of liability and that when that duplication is eliminated the amount owed is $235,399.*

Footnote: 2 *2/ Section 600.5 (a) provides that "A proprietary institution of higher education is an educational institution which-... (4) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located; ...." The requirements of §600.5 (a) are applicable to funds dispursed under GSL and PLUS programs, Pell, and SEOG.*

Footnote: 3 *3/ SFAP describes Appendix D as being replete with evidence of disbursements made outside any payment period and/or made during payment periods with respect to which little, or no, attendance is noted.*