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

In the Matter of **Docket No. 94-152-SP**

MORGAN COMMUNITY COLLEGE, Student Financial Assistance Proceeding
Respondent.

Appearances: Leigh M. Manasevit, Esq., Brustein & Manasevit, Washington, D.C., for Respondent.

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

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

DECISION

The Respondent, Morgan Community College, is located in Fort Morgan, Colorado, and is accredited by the North Central Association of Colleges and Schools. After conducting a program review of Morgan's participation in the Federal student assistance programs under Title IV of the Higher Education Act of 1965, as amended, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued its final program review determination on July 29, 1994. SFAP found that (1) from January 1992, to June 30, 1994, Morgan was operating a satellite facility at the Limon Correctional Facility without having the proper ED approval , and (2) from July 1, 1993, to June 30, 1994, Morgan had contracted out its entire truck-driving program to an unauthorized organization, the Sage Corp., in violation of Federal regulations. For the first violation, SFAP determined that Morgan must pay back to ED $380,417 in unauthorized Pell Grants that it awarded to students at the Limon Correctional Facility. For the second violation, SFAP determined that Morgan must remit to the holders of unauthorized Stafford Loans and Supplemental Loans for Students (SLS) awarded to students in its truck-driving program $85,158; that it reimburse ED $1,383 in interest and special allowances paid on the loans; and that it reimburse ED $30,521 for unauthorized Pell Grants awarded to students in the truck-driving program.

Morgan does not contest SFAP's monetary calculations,See footnote 1 *1* but it does put forth a number of arguments which it contends excuses it from liability. For the reasons noted below, except for SFAP's determination that the Respondent must actually purchase all of the loans

made to students in Respondent's truck-driving program, the program review determination is upheld.

DISCUSSION

I. Limon Correctional Facility.

In January 1992, Morgan began providing educational services at the Limon Correctional Facility. On July 1, 1993, Morgan entered into a contract with the Colorado Department of Corrections to provide educational services for a specified cost stated in the contract, agreeing to provide several full-time instructors for classes at the facility. *See* SFAP's Exhibit 2. A total of 128 students, all receiving Pell Grants, took courses at the facility before SFAP issued its determination questioning the program. According to Morgan's Registrar, the programs offered at Limon consisted of a 41-42 credit Industrial Technology Certificate; a 62-credit Associate of Arts degree; and a 60-credit Associate of General Studies degree.

The regulations, from the time Morgan established the Limon program to the present, provide that an educational institution seeking to participate in the Federal student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended, shall apply for a determination from ED that it is an "eligible institution." 34 C.F.R. § 600.20 (1991, 1992, 1993). The Secretary of Education then notifies the institution by letter whether or not the institution is eligible and which locations or programs qualify. *Id.* at § 660.21. "Eligibility does not extend to any location that the institution establishes after it receives the eligibility designation." *Id.* at § 600.10(b)(3). If an eligible institution seeks to provide educational services at an additional location not specified in its eligibility determination letter, it must notify the Secretary in writing at the time it notifies its accrediting agency or association, but in no event later than ten days after the change occurs. *Id.* at §§ 600.30 and 600.32(a).See footnote 2 *2* "Additional

location" is defined as one not designated as an eligible location in the letter of eligibility sent to the institution under 34 C.F.R. § 600.21. *Id.* at § 600.32(e).

Morgan admits that it never provided the Secretary with the required notification for the addition of the Limon location, but argues that for a number of reasons it was not required to provide the notification clearly called for by the regulations. First, Morgan argues that it was required by state law to provide educational services to its entire service area, and that the Limon Correctional Facility was in its service area; therefore, since Limon students were incarcerated at the institution, it had no other choice than to provide the entire program at Limon. Thus, Morgan should be excused for not seeking ED approval. This argument makes little sense. One can follow state law and provide educational services to the entire service area and still provide the Secretary with the required notice of the additional location. Even if the Secretary disapproves the additional location, Morgan can still provide the educational services at Limon, but without Federal student assistance. There is no requirement that the Federal taxpayers subsidize Morgan's compliance with state law.

Morgan next argues that long-standing ED policy exempted it from providing the required notice to the Secretary. In support of its contention that such a policy existed, Morgan cites to

several documents -- a letter from Lois Moore, Chief, Division of Eligibility and Certification, to Leigh Manasevit, dated July 28, 1989 (Respondent's Exhibit 19) and ED Form E40-34P, Application for Institutional Eligibility and Certification (Respondent's Exhibit 20). In response to an inquiry from Mr. Manasevit concerning another client, Ms. Moore advised as follows:

If an eligible institution will be providing only a portion of an eligible education program at an auxiliary classroom that is separate from the main campus, it is not required to submit an Application for Institutional Eligibility and Certification (ED Form E40-34P) to report the addition or utilization of that classroom space. However, the institution should contact its accrediting agency to determine if approval is needed to offer portions of eligible education programs at auxiliary classrooms.[See footnote 3 *3*]

If an institution offers an eligible educational program in its entirety

at an auxiliary classroom location and publishes a catalogue or brochure listing programs offered at that classroom location, then, the institution must submit a completed application for approval to include the classroom at that location in its eligibility status.

ED Form E40-34P (9/88) provided as follows:

Non-Main Campus Locations. If the institution offers a portion of an eligible program at a classroom location that is separate from the main campus (i.e., auxiliary or supplemental classroom space) of the eligible institution, at the time the institution requests eligibility/renewal for that educational program, the institution must notify ED that a portion of that program is offered at a separate classroom location.

If an institution offers only a portion of an eligible educational program at a separate classroom location, the institution is not required to submit a separate Application for Institutional Eligibility and Certification form for that classroom location.

If an accredited and licensed educational program is offered in its entirety at a non-main campus location and the institution publishes a catalogue or brochure of programs offered at that location, institutional eligibility is required at that location. To establish eligibility, the institution must submit to ED a completed Application for Institutional Eligibility and Certification form (ED Form E40-34P) for that location.

Although the September 1988 version of ED Form E-40-34P continued to be used (*see* transcript pp. 48 and 89), it was revised in "9/90" to delete the reference to publicizing the availability of the satellite location. Based on the Moore letter and the quoted language in ED Form E-40-34P, Morgan argues that there was a longstanding policy of not requiring auxiliary classrooms to seek a separate eligibility determination.

I agree that, at the time Morgan commenced its program at Limon, it was not required to seek approval or give notice to the Department for the operation of an off-campus auxiliary classroom. However, the evidence in this case indicates that Morgan was operating a complete and separate program at the Limon Correctional Facility. Morgan's counsel conceded that the

Limon program was designed to allow inmates to take all of the courses necessary to be awarded a certificate or an associate degree. Transcript, pp. 60-61. At any rate, it was more than the

"auxiliary" classroom contemplated by the Moore letter and ED-40-34P.See footnote 4 *4* The evidence in the record establishes that Morgan operated a complete and separate program at Limon over a two year period attended by 282 inmates. The program was staffed by instructors from both the main Morgan campus, and instructors hired especially for the Limon program. Transcript pp. 15-16. The inmates in question were all enrolled in established certificate or associate decree programs. Respondent's Exhibits 25 and 26. Thus, I cannot accept Morgan's attempt to mis-characterize its Limon program as an auxiliary classroom.

In the alternative, Morgan argues that, even if its Limon program is found to be an additional location, another longstanding ED policy exempts all but a few of its Limon students from coverage by the liability incurred from not informing ED of the additional location. This policy was established by William Hudson, Institutional Review Specialist, ED-Region VII, by letter dated August 18, 1994, to the President, Pratt Community College, Pratt, Kansas. Respondent's Exhibit 21. The letter provides as follows:

As we understand it, the College taught classes in the Secretarial Certificate program at four additional locations. Students attended classes at these locations in addition to classes at the main campus, except that the program was offered in its entirety for students at the Harper and Kingman County Centers. The College maintains that it was never the intent to offer the entire program at these locations. "However, the secretarial courses were offered for a short time inadvertently in a manner in which it was possible for a student to complete the course without attending the main campus."

We consulted with the Eligibility and Administrative Analysis Branch (EAAB) regarding whether the locations were eligible. EAAB indicated that at the time the program was offered in its entirety, the locations should have been approved. Those Title IV funds disbursed to students who completed the program in its

entirety at the two locations are ineligible because the locations had not been approved. EAAB does not agree, however, that the Title IV funds are ineligible for the students who continued to attend classes at the locations as well as at the main campus and did not complete the program at the two locations. These students could receive Title IV finds because the entire programs were not completed at the two locations.

From this letter, Morgan comes up with the somewhat perverse argument that it was ED policy that only those students who fail to complete their programs at the unapproved location were ineligible to receive Federal aid. Morgan additionally argues that students who complete their program and earn a certificate or degree at the unauthorized additional location should still be considered eligible for Federal assistance if the award of the certificate or decree was possible because of a substantial number of credits earned at other institutions for which Morgan gave them credit.

My interpretation of this letter is that it does not establish any kind of national policy, but is fact specific to the case being addressed by the letter. According to the letter, the program in question was not designed so that a student could complete the program at the additional locations, but some students had completed the program during a short period when it was inadvertently possible. That is a far cry from stating, as a general rule, that students are eligible to receive Federal financial assistance if they simply avoid completion of their programs. The Morgan situation is clearly distinguishable from the Pratt situation as described by the Hudson letter, in that all of the students enrolled at Morgan's Limon location were in certificate or degree granting programs which they could complete at the Limon facility. To argue that only those students who do not complete the program should be allowed to receive Federal aid is to turn logic on its head and to, in effect, reward failure.

One of the obvious purposes of requiring institutions to seek approval for additional locations is to ensure that students receiving Federal aid are not being deceived, and are enrolling in fully accredited educational programs. Morgan argues that it was fully accredited to operate any program at any location within its service area; that its accrediting agency does not require that it seek approval for additional locations. However, when asked, Morgan's counsel could point to no document in the record which supported this position. Transcript pp. 30-32. Even if this were true, it is entirely reasonable for ED to be notified of the opening of additional locations to be able to review the program application to ensure that the program is fully accredited and authorized at the additional location.

In summary, the evidence clearly demonstrates that Morgan was operating a separate program at the Limon Correctional Facility. Although SFAP appeared to allow eligible institutions to operate auxiliary classrooms, the Limon program was clearly not an auxiliary classroom but was an "additional location" within the meaning of the regulations for which Morgan was obligated to seek a new eligibility determination.

II. Morgan-Sage Truck-Driving Program.

The Title IV regulations, at 34 C.F.R. § 600.9(d) (1993), provide that an eligible institution may contract for the provision of a part of an educational program by an institution or organization that has not been determined to be eligible to participate in the Federal student financial assistance program, so long as the ineligible institution or organization does not provide more than 25 percent of the educational program, or more than 50 percent of the program if it is not owned or controlled by the eligible institution and the eligible institution's accrediting agency specifically determines that the agreement meets its standards for the contracting out of educational services. Morgan makes no claim that the contract was specifically approved by its accrediting agency. SFAP determined that Morgan ran afoul of this regulation by contracting out its entire truck-driving program to the Sage Corp. of Pennsylvania. Morgan argues that it only contracted out its administrative responsibilities, thus it did not violate the regulation by contracting out an educational program. In the alternative, Morgan argues that it did not contract out more than 25 percent of the program.

Although Morgan retained a certain amount of administrative control, it clearly contracted out its truck-driving program. The contract provided that Morgan shall be responsible for the overall

assessment of the quality of the program and shall retain the overall authority to admit and dismiss students into and from the program. However, Sage was responsible for practically everything else associated with the program. All of the faculty were Sage employees. Transcript, pp. 68-70. Although some of the faculty worked for Morgan before it entered into the Sage contract, some were hired initially by Sage for this contact. *Id.* at 70. Although Morgan had the authority to approve decisions, the authority to hire, compensate, and supervise employees associated with the contract was that of Sage. Sage was responsible for the placement of all students, for the preparation of all financial aid applications, for representing the college in all industry related conferences and activities, for the marketing and advertising of the program, for securing and maintaining the trucks, and for securing the truck-driving range. Although Morgan was to make office and classroom space available for the program, it charged Sage rent for the space. Sage received well over 80 percent of the tuition payments received for the program. *See* Respondent's Exhibit 23.

Morgan cites several affidavits in the record to demonstrate that the contract was not enforced as it reads; that is, that Morgan retained much more control over the program than contemplated by the actual contract. Although 34 C.F.R. § 600.9(d) can be read as allowing an eligible institution to enter into an agreement wherein the ineligible institution provides all of the educational program, so long as in actual practice the ineligible institution only provides 25 percent of the program, I find such a reading extremely strained and illogical. The sounder reading, and the one I accept, is that an institution is in violation of the regulation if the agreement with the ineligible institution on its face violated the regulation, no matter what the actual practice is. Thus, the affidavits become irrelevant to the issue at hand. However, even if I accept the theory that it was the actual practice which was important, the affidavits are of little help. The affidavits merely state that certain Morgan officials attended many meetings with Sage employees

and attempted to monitor the program closely. However, the evidence still demonstrates that the program was run almost totally by Sage.

III. Equity and Fairness.

Respondent argues that I should follow the principles established in the following decisions in arriving at a calculation of liability: *In re United Education Institute,* Docket No. 93- 59-SP, U.S. Dep't of Educ. (Initial Decision, June 8, 1994); *In re Baytown Technical School, Inc*., Docket No. 91-40-SP, U.S. Dep't of Educ. (Decision of the Secretary, April 12, 1994); and *In re Flavio Beauty College*, Docket No. 93-71-SA, U.S. Dep't of Educ. (Initial Decision, July 25, 1994). According to Morgan, these cases stand for the proposition that there are certain types of program violations which are technical in nature and may be waived in the interest of fairness and equity.

In the *United Education* case, the administrative law judge decided that the remedy available to ED in a Subpart H program review appeal proceeding, that the institution remit all Federal funds improperly awarded, was inappropriate and instead imposed a fine. Subsequent to the filing of briefs in this case, the initial decision on this issue was reversed by the Secretary. *In re United Education Institute,* Docket No. 93-59-SP, U.S. Dep't of Educ., (Decision of the

Secretary , May 18, 1995); Petition for Reconsideration Denied (September 11, 1995). Thus, it is clear that the hearing official in a Subpart H proceeding lacks the authority to adjust the dollar amount of proved liability to correspond to his or her sense of fairness. *See also* 34 C.F.R. § 668.117(d). The *Flavio* and *Baytown* cases stand for the proposition that the hearing official may waive procedural requirements to insure a fair hearing. *But see In re Gulf Coast Trades Center,* Docket No. 89-16-S , U.S. Dep't of Educ. (Decision of Secretary, October 19, 1990). Thus *Flavio* and *Baytown* are inapposite to the present case.

Respondent also cites *In re Mary Holmes College,* Docket No. 94-32-SP, U.S. Dep't of Educ. (March 30, 1995). In the *Mary Holmes* case, the judge found that the Respondent was in violation of the regulations for failure to notify ED of contracts that it had entered into with ineligible institutions to provide services related to its Entrepreneurial/Truck Driving Program. The judge in that case found that, since they appeared to be for 25 percent or less of the overall program, the contracts would probably be approved had they been submitted for review as required. Thus, the judge determined that the failure to notify ED was a mere technical violation, not warranting a finding that the entire program was ineligible for Federal student aid. However, in the case at hand, Morgan had essentially contracted out the entire operation of its program. The Morgan program, unlike that in the *Mary Holmes* case, would never have been approved by ED had it been submitted. Although Morgan has subsequently entered into a contract with Sage which had been approved by SFAP (Respondent's Exhibit 24), that contract clearly provides that Morgan is running the program with some logistical and administrative support from Sage. Under the new contract it appears that Sage is providing somewhat less that 25 percent of the program.

In addition, although the violations in this case may be technical, they are important.

Eligible institutions disburse millions of dollars in Federal money to their students. The rule prescribing notification of additional locations satisfies an obvious governmental interest of ensuring that participating students are receiving an accredited and state-approved educational program. The rule proscribing eligible institutions from contracting out their programs to ineligible institutions has the obvious purpose of again preventing student receiving Federal assistance from receiving educational services which are not approved or accredited. The integrity of the student financial assistance program depends, to a great extent, on participating institutions following these somewhat technical rules, and would not be furthered if full liability is waived whenever a Respondent could come forth with an "equitable" reason to excuse its failure to comply.

Finally, Respondent argues that, rather than being required to purchase the loans improperly made to students participating in the Sage program, it be held to a liability as calculated using SFAP's "actual loss formula." The actual loss formula is used by SFAP as an alternative to requiring an institution to purchase unauthorized loans where there is a large number of loans in question, and when it is difficult to actually identify all of the students who were awarded unauthorized loans. Thus, SFAP calculates an estimate of the actual loss to ED using cohort default rates for that institution. However, in this case, the students in question are specifically identified; thus, it is logistically possible to purchase all of the loans at issue.

Morgan's position on this matter makes sense. The regulations do not specify how the specific liability should be calculated. Although the students receiving the loans in the present case are known, it makes little sense to require the Respondent to purchase those loans from lenders. The only loss to the taxpayers for unauthorized loans is interest subsidies and special allowances paid by ED for those loans, and any sums provided by ED to cover repayment defaults on the loans. Since defaulting students will not be identified for several years, a reasonable method to estimate the loss to ED is to multiply an average default rate by the total amount of the unauthorized loans. In addition, lenders of student loans may not want to have their loans bought out; the students may be repaying their loans on a regular basis and the lenders may be earning a profit. Thus, there appears to be little reason to require an institution to purchase unauthorized loans, except, perhaps, to punish the institution. In many cases, requiring a total purchase of all unauthorized loans could bankrupt the school in question. In this case, it would be particularly unreasonable to require the specific purchase of all unauthorized loans, as the default rates for Morgan over the past six years has been low, ranging from 14.6 percent to 7.3 percent. *See* Respondent's Supplemental Exhibit 4. Thus, I have arrived at Morgan's liability by averaging its default rates for the past six years that are available and multiplied that percentage by the total dollar amount of unauthorized loans made to students participating in the Sage program (.11 x $85,158 = $9,367.38).

Respondent's final liability is as follows, all payable directly to ED:

Unauthorized Limon Program

$380,417 -- Pell Grants

Unauthorized Sage Program

$30,531 -- Pell Grants

9,367 -- Estimated actual loss to ED for defaulted Stafford and SLS loans.

1,383 -- Interest and special allowances paid by ED for unauthorized loans.

$421,698-- Total owed to ED

FINDINGS AND CONCLUSIONS

I. Limon Correctional Facility.

1. From January 1991, until June 30, 1994, Respondent provided a complete educational program at the Limon Correctional Facility. Respondent offered courses leading to an Industrial Technology Certificate, an Associate of Arts degree, and an Associate of General Studies degree. The program was designed so that students could complete the requirements for the certificate or degrees by taking all of the required courses at the Limon Correctional Facility.

2. The program offered by Respondent at the Limon Correctional Facility was not part of the eligibility determination made by the Secretary in determining that Respondent was eligible to

participate in the Federal student financial assistance program authorized under Title IV of the Higher Education Act of 1965, as amended.

3. Respondent never notified the Secretary of its operation of the additional location at the Limon Correctional Facility as required by 34 C.F.R. §§ 600.30 (1991, 1992, 1993) and 600.32 (1992, 1993). Thus, all Federal student financial assistance awarded by the Respondent to students attending courses at the Limon Correctional Facility was unauthorized.

4. During the period in question, a total of $380,417 in Pell Grants was awarded by Respondent to students attending the unauthorized program at the Limon Correctional Facility. Respondent is required to reimburse ED for these unauthorized Pell Grants.

II. Morgan-Sage Truck-Driving Program.

5. From July 1, 1993, until June 30, 1994, Respondent contracted out the operation of virtually its entire truck-driving program to the Sage Corp. of Pennsylvania in violation of 34

C.F.R. § 600.9(d) (1993).

6. As a result, all Federal student financial assistance awarded by Respondent to students participating in the Morgan-Sage truck-driving program during this period was unauthorized. Respondent is legally responsible to pay ED $30,531 as reimbursement for unauthorized Pell Grants, $9,367 in estimated losses to ED for defaulted Stafford and SLS loans, and $1,382 in interest subsidies and special allowances paid by ED for these unauthorized loans.

ORDER

ORDERED, that Respondent pay ED $421,698 .

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Frank K. Krueger, Jr.

Date: September 28, 1995 Administrative Judge

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 Counsel for Morgan does state in his Initial Brief (p.22) that the SFAP assessment of liability is "inflated." However, this appears to be a reference to SFAP's demand that Respondent return to ED all Pell Grants which SFAP alleges were unauthorized, rather than imposing a reduced assessment of liability to more accurately reflect what Respondent argues is a minimal violation. See Section III of Discussion infra.*

Footnote: 2 *2 Section 600.32 does not appear in the Code of Federal regulations until 1992. However, the other regulatory provisions outlined above standing alone make it clear that an eligible institution has to notify the Secretary of additional locations. The addition of section 600.32 makes the obvious more obvious. In any event, all but a handful of the Limon students received their Pell Grants before July 1, 1992, the date of the revised Code of Federal Regulations. See*

Respondent's Exhibit 25.

Footnote: 3 *3 Morgan contends (Initial Brief, p.17) that it informed its accrediting agency of the Limon facility since the annual reports it submitted to its accrediting agency (Respondent's Exhibit 9) indicated that Morgan was offering off-campus locations. The Limon Correctional Facility was not specifically mentioned. Checking boxes on a standardized form indicating that Morgan had off-campus locations hardly constitutes the notice contemplated by the Moore letter.*

Footnote: 4 *4 At oral argument, Morgan's counsel put forth a slightly different twist to the argument made in his briefs that the Limon program was simply an auxiliary classroom; namely, that the regulations define an "additional location" as a school and that the Limon program was less than a school. This argument is based on 34 C.F.R. § 600.21(a)(1), which provides that the Secretary, after receiving an application for either initial eligibility or for an additional location, will notify the institution whether it qualifies under 34 C.F.R. §§ 600.4 through 600.7, which deal with determining whether the institution is one of the types of schools which qualify to participate in the program. I find this argument fallacious, as the sections in question also deal*

with state approvals and accreditation. Also section 600.21 clearly contemplates occasions when additional locations and programs, rather than entire schools, will not be approved.