IN THE MATTER OF Docket No. 94-20-SP
94-104-SA
COLORADO CAREER ACADEMY,
Student Financial
Respondent. Assistance Proceeding

DECISION

Appearances: John P. Gamlin, Esq., John P. DiFalco & Associates, of Fort Collins, Colorado, for the Respondent.

Denise Morelli, Esq., Office of the General Counsel, U.S. Department of Education, for the Office of Student Financial Assistance Programs.

Before: Thomas W. Reilly, Administrative Law Judge

BACKGROUND

The Colorado Career Academy of Lakewood, Colorado, has two campusses: the main campus in Lakewood, Colorado (Colorado School of Dog Grooming), and the branch campus in Aurora, Colorado (Aurora School of Dog Grooming and Canine Trainers). Both schools are owned by Dr. Vaios N. Athanasiou and Madeleine Athanasiou.

The Respondent, Colorado Careeer Academy (CCA or school), timely filed two appeals (January 4, 1994 and May 26, 1994) which have been consolidated in this proceeding. The first contested a Final Program Review Determination (FPRD) issued November 17, 1993, and the second contested a Final Audit Determination (FAD) issued March 12, 1993. See footnote 1 1/

The FPRD was issued by the Institutional Review Branch (IRB) of Student Financial Assistance Programs (SFAP), Office of Postsecondary Education (OPE), U.S. Department of Education (ED). The FAD was issued by SFAP's Audit Resolution Branch (ARB).

The FPRD covered award years 1988-1989 and 1989-1990. The FAD covered award years 1989-1990 and 1990-1991. Both the FPRD and the FAD described violations of requirements of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. §1070 et seq. B ased upon two Findings still in issue between the parties, SFAP has assessed liabilities of $58,849.97 for the violations alleged in the FPRD, and $20,537.12 under two Findings in issue in the FAD.

CCA's appeal was filed pursuant to 34 C.F.R. 668.113, and the appeal is governed by 34 C.F.R. Part 668, Subpart H. CCA has the burden of proving that the Title IV expenditures made and disallowed were proper and complied with program requirements. 34 C.F.R. 668.116(d).

Generally, the violations alleged in the FPRD and FAD relate to the school failing to administer and

document valid "ability-to-benefit" (ATB) tests to students requiring such tests before admission, failing to fully reconcile certain Title IV expenditures, and failing to maintain required financial aid documents in student files. There has been negotiation between the school and SFAP, and submission of further documentation resulted in reduction of some of the liabilities originally demanded in the FPRD and FAD.

The positions of the parties are set forth in their briefs and in the chain of correspondence throughout their appendices and exhibits.See footnote 2 2/ In most of the relevant documents and exhibits, the Respondent school is referred to as the "Colorado School of Dog Grooming," which is descriptive of the nature of the training the school provides.

FINAL PROGRAM REVIEW DETERMINATION

The FPRD issued November 17, 1993, was based upon an IRB December 1990 review of CCA's administration of Title IV programs for award years 1988-1989 and 1989-1990. The program review report issued February 14, 1991, set forth Title IV violations found by the reviewer (ED-1). Only FPRD Findings 1 and 4 remain in issue in this appeal, the others having been resolved between the parties.

Preliminarily, I must resolve a dispute between the parties (more accurately between the attorneys)
as to whether an already-agreed-to negotiated settlement existed wherein SFAP orally agreed to drop all proposed liability and fines relating to Finding 1 and then reneged on it (by refusing to sign the settlement document drafted by Respondent's counsel), or whether this was only a part of settlement negotiations that broke down, in which case Respondent's counsel should be foreclosed from even addressing it in this proceeding. (See Respondent's Opening Brief, at 5; ED Brief, at 14-15.) Judging by Respondent's own comments in his brief (at 5), SFAP counsel notified him that upon further review, the Chief, IRB, and his staff had misinterpreted the appropriate regulation and that, therefore, the imposed liabilities for Finding 1 must go forward. From this I conclude that after negotiating with opposing counsel, ED's attorney contacted her client and reviewed the pertinent regulations with him, and then the client decided that he could not agree to what was esssentially a proposed settlement. This being the case, it is the client's final decision that controls, not the attorney's, i.e., attorneys may propose settlements in the course of negotiating with each other, but it is the client's prerogative to decide to accept or reject the details of any proposed settlement or the entire settlement itself. I see no obligation upon an attorney for either side to attempt to compel his client to go through with a proposed settlement, no matter how carefully worked out between the attorneys themselves. This is even more important where the client is a government agency which must act in strict accordance with controlling regulations having the force and effect of law. At the same time, I see no ethical lapse here by Respondent's counsel attempting to document his sincerely held belief that the Department of Education, as it appeared to him, was guilty of a "refusal to live-up to its oral contract." However, I find that there was in fact no contract here, only a proposed settlement that broke down (in part).

In Finding 1, the reviewer found that the school used an institutionally-developed test to determine if prospective students who had no high school diploma or a GED would have the ability to benefit from the training provided. SFAP also found that this test was not approved by the school's accrediting agency. Accordingly, SFAP found that the test did not meet Title IV ATB test requirements and, therefore, students who had been admitted solely on the basis of that test were ineligible for the Title IV funds they received.

CCA argues that their ATB test should have been accepted and cannot be the basis for assessing monetary liability because the test met the regulatory criteria for "industry-developed" tests, having been developed by the school's owner who is a recognized expert in the field of veterinary science. It should be noted that ATB tests were not required to be "nationally recognized" until October 1989 (NATTS Team Summaries, Resp. A & B, Appeal Request), and that Respondent began administering that test in November 1990 (Resp. Brief, at 3; ED Brief, at 2, note 2). Respondent argues that the ATB test requirements are described in the disjunctive, i.e., that the test must be "nationally-recognized" or "standardized" or "industry-developed", and not all three or even two out of three.

Admission criteria under the ability-to-benefit standard are described in Title IV. In order to qualify for Title IV assistance, a student who does not have a high school diploma or its equivalent (General Equivalency Diploma or "GED"), must pass a valid ATB test. 20 U.S.C. §1091(d). Section 1091 states that such student must:

> ... be administered a nationally recognized, standardized or industry developed test, subject to criteria developed by the appropriate accrediting association, measuring the applicant's aptitude to complete successfully the program to which the applicant has applied; ....
>
> --- 20 U.S.C. §1091(d)(3)(A)

In publishing the final regulations containing the ATB criteria, the Department of Education stated that:

> The test must be a "nationally recognized, standardized, or industry-developed test." The test must also meet the criteria of the nationally recognized accrediting agency or association that accredits the institution or its eligible programs.
>
> --- 52 Fed. Reg. 45,713 (1987).

The Department's regulations reiterate those ATB requirements. 34 C.F.R. 668.7. But the school here continued to use a test created by the school's owner, and did so after the above ATB requirements went into effect. The school clearly admits that "(p)rior to the enactment of the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, the Academy utilized ATB tests prepared by the Institution in comparison with other ATB tests and based on the needs of its students." (CCA letter appealing FPRD, at 4, and see Resp.J.) But the school argues that its ATB test did meet the criteria because it was "standardized" in that at least 16% of candidates taking the test were rejected, it was "nationally recognized" in that "it was recognized by a nationally-recognized accrediting agency", and it was "industry-developed" in that it was developed under the supervision of a leader in the animal care industry (the school's owner, veterinarian Dr. Vaios

Athanasiou). (Resp. Reply Brief, at 4-5; Resp. Opening Brief, at 13-19.) Simply put, after reviewing the relevant documents, I cannot agree that Respondent's own internal aptitude test qualifies under any of the three ATB test criteria. This is also apparent from an examination of the test itself. (See Resp. J.) CCA argued that its test was nationally-recognized because it was approved by its accrediting agency, the National Association of Trade and Technical Schools (NATTS). However, although NATTS provided some guidance to its members concerning ATB tests, it expressly disavowed any endorsement of a specific test. (See Resp. Y.) There is also no convincing credible evidence that there was an established passing score for the test (to support the school's argument that its test was "standardized"). None of the school's publications document this assertion.

The Respondent makes a facially-attractive argument (Opening Brief, at 15-16) that since of the ten lowest scoring applicants in a group of thirty-one students, half of them graduated, and this matches or exceeds the success of our nation's universities and community colleges, ergo this is proof that the internally-devised aptitude/admission test must have some validity and effectiveness, and the further fact that all thirty-one students later passed the ED-accepted ATB test showed that the school's original test successfully forecast

actual ability to benefit. There is some logic to this, but I decline to rest upon a results-oriented See footnote 3 3/ analysis to re-write regulations (and a statute) that establish clearcut, specific criteria for ATB tests. There is no evidence that the school's internal aptitude test was ever ever subjected to any kind of formal "validation" process, as that term is used among testers generally, so its ad hoc apparent success with a small, limited sampling is not sufficient to exempt the school from regulatory criteria for ATB tests. It cannot be said that this internally-developed test is in any way "standardized", "nationally-recognized" or "industry-developed". The school's owner, Dr. Athanasiou, the test creator, is in an industry, but he does not constitute or represent the entire industry so as to transform his creations into something "industry-developed".

The Respondent also attacks SFAP's citation of the Pan American School See footnote 4 4/ opinion, asserting that that case is inapposite because there the school "placed all of its eggs in one basket" and never did argue that the school's own institutionally-developed "Pan American Test" was a valid nationally-recognized, standardized, or industry-developed ATB test; but rather relied on the other test used, the "Michigan Test", which was accepted as a nationally-recognized, standardized test. But a reading of that opinion leads to the conclusion that Pan American chose to rely on the Michigan Test precisely because it was aware that its own internally-developed test would not pass muster under the required ATB criteria. In that case, Pan American lost on the ATB test issue only because evidence showed that the school did not use the Michigan Test as an admission test, but only as a placement test for use after a student had been admitted (using the internal Pan American Test for admission purposes).

In the instant case, since the students in issue were admitted without a high school diploma or GED and were not given a valid ATB test during the relevant award years, it follows that they were ineligible for the Title IV assistance they received. (See 20 U.S.C. §§1088(b), 1091(d), 1141(a); 34 C.F.R. 668.7; ED-1, ED-2, ED-3.) I conclude that SFAP's assessment of liabilities for students admitted under the school's internally-developed ATB test was warranted in

accordance with Finding 1 of the FPRD, except that the amount has been further reduced by a recent adjustment based on documents from Respondent's counsel verifying the identity of "Student #18" (source of the hitherto "illegible signature" referred to in ED's Brief, at 4, n.4). The liability related to that student ([student name]) was $2816.98 See footnote 5 5/ , which, when deducted from the assessed $50,628.97, leaves a balance remaining of $47,811.99 under Finding 1.

With regard to Finding 4 of the FPRD, the school violated Title IV requirements by failing to properly account for certain Pell Grant funds disbursed during the subject award years, and as required by the regulations. (34 C.F.R. 690.81(a)(2).) The school had been directed to submit documentation for $22,595 in Pell Grant funds. The school did submit additional documentation, but there was still a gap between the $75,257 in Pell Grant funds withdrawn by the school in this period and the school's payment ledgers which showed disbursements of only $67,036 to students. Accordingly, there is a balance of $8221 in improperly withdrawn funds from the school's Federal Pell Account, which must be repaid to the Department.

The liability assessed under Finding 1 ($47,811.99), when added to the liability established under Finding 4 ($8221), comes to a total outstanding liability of $56,032.99 under this FPRD.

FINAL AUDIT DETERMINATION

The FAD issued by ARB on March 12, 1993 (ED-6), was based upon an independent auditor's report received by the Inspector General on March 31, 1992 (ED-5). For the relevant award years (1989-1990 and 1990-1991), the auditor found that the school failed to maintain required Title IV documentation for all students receiving financial aid (Finding 6), and failed to maintain evidence that a Federally-approved ATB test had been administered to five students requiring such test (Finding 8). Only Findings 6 and 8 remain in issue, the others having been resolved by the parties after the audit.

Finding 6 of the FAD was originally the basis for the Department assessing liabilities totalling $49,813 for several specific violations relating to failure to obtain or maintain certain required financial aid documen- tation. However, a subsequent review by the auditor disclosed that the school had obtained some of the required documentation. A still outstanding liability of $15,125 remains, based upon the school's failure to notify lenders of enrollment changes for five students. (ED-9, at 1; ED-10, at 3.) Respondent argues (Reply Brief, at 13-14) that failing to inform a lender of a student's change in status does not render the loan unenforceable nor make the borrower ineligible for the loan. However, the reliability of loan system docu- mentation and required notifications to lenders is important to the integrity of the system and facilitates collection and lender confidence, and cannot be dispensed with simply because in some particular cases no harm was done.

In Finding 8, ED originally assessed liability predicated upon documentation being missing that five students had taken required "Federally-approved" ATB tests. The auditor's subsequent review disclosed, however, that the school was missing such documentation for only one student. Accordingly, liability was reduced to $5412 for Finding 6. (See exhibits ED-6, at 14; ED-10, at 4; ED-9.) Respondent's argument (Opening Brief, at 27) is well-taken that the "Federally-

approved" requirement did not become effective until after the enrollment period in issue in Finding 8 of the FAD (and this is conceded by SFAP counsel, Brief, at 12) ; however, the school is left in a position of having its "ATB" test still failing to comply with the earlier ATB test criteria for Title IV funds already discussed under Finding 1 of the FPRD above.

The total remaining assessed liabilities for Finding 6 and Finding 8 is $20,537.

FINDINGS AND CONCLUSIONS

After reviewing the briefs and documents of record, I find and conclude that SFAP has produced sufficient evidence to establish that the charged violations of Title IV did occur and that the remaining assessed liabilities discussed above under both the FPRD and the FAD were fair, reasonable and justified, and that the Respondent, Colorado Career Academy, failed to carry its burden of proving that the expenditures questioned and disallowed were proper and complied with program and regulatory requirements.

In summary, the combined total assessed liabilities affirmed here under the FPRD ($56,032.99) and the FAD ($20,537) come to a grand total of $76,569.99.

ORDER

The Respondent, Colorado Career Academy, is ordered to repay to the United States Department of Education the sum of $76,569.99.

_____
Thomas W. Reilly
Administrative Law Judge

Issued: June 1, 1995,
Washington, D.C.

S E R V I C E

A copy of the attached DECISION was sent to the following parties by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, on June 1, 1995:

John P. Gamlin, Esq.
John P. DiFalco & Associates, P.C.
1136 Stuart Street, Suite 4102
Fort Collins, Colorado 80525-1194.

Denise Morelli, Esq.
Office of the General Counsel
U.S. Department of Education
Rm. 5215 -- FB-10B
600 Independence Ave., S.W.
Washington, D.C. 20202-2110.

Footnote: 1 *1/ SFAP issued amended FADs on July 19, 1993, January 7, 1994, and May 11, 1994. The May 11th amended FAD contains the same findings as the January 7th FAD, but it was re-issued to advise the school of its appeal rights.*

Footnote: 2 *2/ SFAP's exhibits are numbered ED-1 thru ED-11. Respondent's exhibits are lettered "A" thru "Z" (attached to the Request For Review), with additional and different exhibits marked "A" thru "E" attached to Respondent's Opening Brief, new exhibits "F" and "G" attached to Respondent's Reply Brief, new exhibits "H" and "I" attached to Respondent's Supplement and Amend- ment to Reply Brief, and new exhibit G-2 attached to counsel's May 30, 1995 letter. (Respondent's exhibits are referred to as "Resp. A", "Resp. B", etc.) The record also includes copies of the FPRD and the FAD, which contain their own exhibits.*

Footnote: 3 *3/ Similarly, one cannot logically conclude, after the fact, that since all 31 students who took the school's internal aptitude/admission test scored at least 60%, ergo, that there "must have been" an established passing grade of 60%.*

Footnote: 4 *4/ In the Matter of Pan American School, Docket No. 91-94-SA, U.S. Dept. Of Education (ALJ decision, Feb. 25, 1994).*

Footnote: 5 *5/ See letter of May 31, 1995, from ED counsel, wherein SFAP now accepts the GED certification for [student name] (misspelled "[student name]"). Per Exhibit ED-4, at 2, the SLS amount for Student #18 was $1170, the GSL amount was $1214.06, and the interest amount was $432.92. (See also letter from Respondent's counsel dated May 30, 1995, with four-page Respondent's Exhibit G-2 attached.)*