IN THE MATTER OF The Art of Beauty College,
Respondent.

Docket No. 94-205-EA
Emergency Action Show-Cause Proceeding

DECISION

On November 4, 1994, the United States Department of Education (ED) Office of Student Financial Assistance Programs (SFAP) imposed an emergency action against the Art of Beauty College (the College) of Leesville, Louisiana, in accordance with 20 U.S.C. § 1094(c)(1)(G) and 34 C.F.R. §§ 600.41 and 668.83. In response to the notice imposing the emergency action, on November 15, 1994, counsel for the College requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the Delegation of Authority from the Secretary to conduct proceedings and issue final decisions in circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, I conducted the hearing through the submission of briefs and by telephonic oral argument held on February 7, 1995. In this proceeding, the College was represented by Jack L. Simms, Esq., of Leesville, Louisiana, while SFAP was represented by Denise Morelli, Esq., from the ED Office of the General Counsel.

According to the notice in this case, the emergency action was based upon the College's failure to satisfy the definition of an institution of higher education, as set forth at 20 U.S.C. § 1088(a)(4)(A). Satisfaction of the definition is a prerequisite for eligibility to lawfully participate in the student financial assistance programs authorized under the Higher Education Act of 1965, as amended (HEA). The pertinent facts are not in dispute. On April 21, 1994, the institution filed a petition seeking relief under Chapter 13 of Title 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Louisiana. Subsequently, the institution converted its petition for relief to a Chapter 11 filing. On September 2, 1994, SFAP issued a notice of intent to terminate the College's eligibility to participate in HEA programs based on grounds unrelated to this proceeding. On November 4, 1994, SFAP amended the September 2, 1994 notice to include the College's bankruptcy filing as grounds for terminating the school's eligibility designation, and contemporaneously initiated the emergency action.

According to the College, the Bankruptcy Code provides that an entity that has filed a petition in any bankruptcy proceeding is entitled to an automatic protective order staying administrative

proceedings like the imposed emergency action. In addition, the College argues that to the extent that the Bankruptcy Code's automatic stay provision does not apply to emergency actions, I should, nonetheless, revoke the emergency action so as not to frustrate the purposes of bankruptcy law, which include the prohibition of discriminatory action against a debtor solely on the grounds that the debtor has petitioned for relief under the Bankruptcy Code. This is in

keeping with the purpose of the Bankruptcy Code, which is to allow a debtor time to attempt repayment of debts or implement a reorganization plan that could result in the debtor resuming operations once the reorganization plan is implemented.

Under the Bankruptcy Code, when an entity files for bankruptcy, most litigation and similar proceedings are automatically stayed under a section of the Bankruptcy Code which stays all judicial, administrative, or other actions or proceedings against a debtor that was or could have been commenced before the commencement of the bankruptcy case, or actions to recover a claim against the debtor that arose before the commencement of the bankruptcy case. The Bankruptcy Code, however, contains several exceptions to this stay provision; one exception, pertinent to the issue here, exempts the Secretary of Education regarding proceedings against a debtor concerning the eligibility of the debtor to participate in programs authorized by the HEA. See, 11 U.S.C. § 362(b)(16).

It is uncontroverted that the basis of SFAP's emergency action against the College is its contention that the institution is not eligible to participate in programs authorized by the HEA. As such, the law is settled: administrative proceedings concerning an institution's eligibility to participate in programs authorized by the HEA come under the exception to the automatic stay. Section 1088(a)(4)(A) provides that an institution shall not be considered to meet the definition of an institution of higher education, if the institution has filed for bankruptcy. Pursuant to 34 C.F.R. § 600.41, if a previously designated eligible institution files for bankruptcy, the institution no longer satisfies the statutory requirements that define that institution as an eligible institution and, on that basis, ED may terminate the institution's eligibility designation. Accordingly, I find that the College, by virtue of filing for bankruptcy, fails to satisfy the definition of an institution of higher education, and as a consequence, is not eligible to participate in HEA programs.

I am unable to address the College's argument that the HEA exemption noted above is at odds with the purposes of the Bankruptcy Code's implicit prohibition against discriminatory treatment of an entity solely on the basis that the entity has petitioned for relief under the Code. The institution's argument challenges legislative choices made by Congress through its enactment and amendment of the Bankruptcy Code. As such, the school's dispute is more appropriately resolved through legislative means rather than in an executive agency administrative proceeding. While the institution presents a palpable argument addressing the possible cross-purposes of bankruptcy law and an agency's desire to ensure that the future risk of loss of Federal funds disbursed to a debtor is ostensibly eliminated, I have no jurisdiction to consider that issue. I am constrained by the clear and unambiguous language of the governing statute.

In this show cause proceeding, the institution has the burden of persuading me that the emergency action is unwarranted. See, 34 C.F.R. § 668.83(e)(4). Pursuant to 34 C.F.R. § 668.83(c), an emergency action should be upheld if: 1) there is reliable information that the institution violated any provision of the HEA; 2) immediate action is necessary to prevent misuse of Federal funds, and 3) the likelihood of financial loss from the misuse of funds outweighs the importance of adherence to the procedures for limitation, suspension, and termination actions. In light of my finding that the College has failed to meet its burden of showing that the institution satisfies the statutory definition of an eligible institution, I must also find that a violation of the HEA occurred. As such, permitting the College to continue to participate in the HEA program

would, *ipso facto*, lead to further misuse of Federal funds. Section 34 C.F.R.§ 600.41(a) plainly provides that ED may withhold HEA funds through the use of an emergency action, if an institution violates the standards of institutional eligibility by filing for bankruptcy. Moreover, given the fact that all student financial assistance disbursed by an ineligible institution violates the HEA, the likelihood of financial loss of Federal funds clearly outweighs the importance of awaiting completion of a proceeding to limit, suspend, or terminate the participation of the College in HEA programs.

Having found that the three-pronged test for imposition of an emergency action has been met, **I AFFIRM** the emergency action.

Judge Ernest C. Canellos
Designated Deciding Official

Issued: February 10, 1995
Washington, D.C.