

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

In the Matter of **Docket No. 94-30-SA**

FUNDACION EDUCATIVA ANA G. MENDEZ, Student Financial Assistance
Proceeding

Respondent. ACN: 02-10016

Appearances: Leslie H. Wiesenfelder, Esq., and Sherry Mastrostefano, Esq., of Dow, Lohnes and Albertson, Washington, D. C., for Fundacion Educativa Ana G. Mendez.

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

Before: Judge Ernest C. Canellos

DECISION

Fundacion Educativa Ana G. Mendez, Inc. (Fundacion), is a private non profit educational institution incorporated in the Commonwealth of Puerto Rico. It operates three degree granting institutions, the Universidad Metropolitana (UMET), Colegio Universitario del Este (formerly Puerto Rico Junior College) (PRJC), and Universidad del Turabo (Turabo). These institutions are separately licensed by the Council of Higher Education of Puerto Rico (PRCHE) and they are accredited by the Middle States Association of Colleges and Secondary Schools (Middle States). Each of these schools participates in the Pell Grant, the College Work Study, the Supplemental Educational Opportunity Grant, and the Perkins and Stafford Loan programs, authorized under Title IV of the Higher Education Act of 1965, as amended, (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*

On November 18, 1993, the Acting Chief, Audit Resolution Branch, Institutional Monitoring Branch, Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a final audit resolution determination (FARD) to Fundacion. The FARD was based upon a final audit report, dated May 27, 1992, which was issued by the Department's Office of Inspector General (IG). Field work was carried out by IG auditors at the three schools between April 1991 and August 1991, and examined Fundacion's administration of the student financial assistance programs authorized under Title IV for the period July 1, 1989, to June 30, 1991. On January 10, 1994, Fundacion timely appealed the two adverse findings of the

FARD and requested a hearing. After briefs were filed by both parties, an oral argument was held on March 22, 1995.

The audit report, FARD, and request for hearing all involve the same two findings. First, Fundacion is alleged to have operated the Programa Servicios Educativos Especiales (PROSEE) program at ineligible off-campus sites, resulting in those programs being ineligible to participate in the Title IV programs. For this violation, the audit report recommended the return of \$27,100,673 (the total amount of Title IV funds awarded to students in this program from its inception) to the Department; however, upon review of additional information, SFAP reduced its claim to \$1,712,540. [See footnote 1 /](#) Second, UMET offered a televised series of courses, known as the External University Education System (SEDUE), which allegedly were ineligible to participate in Title IV programs because they did not lead to a degree or certificate, as required. The audit report determined that \$209,996 in Pell Grants were improperly provided to students in that program during the two award years under review. In addition, the audit report estimated that \$578,000 in Pell Grants were erroneously awarded between 1986-1989, making the total demand for this finding \$787,996. The FARD adopted the total figure as its demand.

- I -

As to the first issue, SFAP alleges that Fundacion operated PROSEE programs through its institutions at approximately sixty remote sites throughout Puerto Rico beginning in 1982. Fundacion claimed that the PROSEE courses were the same as those offered at the main campuses, the faculty was equally qualified, the academic calendar was the same, and all administrative functions were carried out at the main campus. In 1985, UMET, PRJC, and Turabo each filed an ED Form 1059, Request for Institutional Eligibility for Programs, with the Department as a prerequisite to becoming eligible to participate in the Title IV student financial assistance programs. In each of these applications, the institutions listed as their address only the post office box, city, and zip code of its main campus. Although many of the PROSEE sites were in existence at that time, they were not identified in any way. Section 5b of ED Form 1059 requested that if the institution offered programs at any other location, that location should be listed. The institutions each entered the notation "N/A" to that question on their respective applications. In reliance on the information contained in the requests, SFAP issued eligibility letters to each institution. [See footnote 2 2](#) These formatted eligibility letters provided:

. . . eligibility applies only to the institution at the address or addresses cited above. If the institution changes its name, address or level of offering, or if it offers educational programs at other locations, please notify us at once to assure continued eligibility status.

In 1988, the Department promulgated 34 C.F.R. § 600.10(b)(3), [See footnote 3 3](#) which provided that:

Eligibility does not extend to any location that the institution establishes after it receives the eligibility designation. If an eligible institution seeks to establish eligibility for a new location, the institution shall apply under [34 C.F.R.] §600.20.

Fundacion's defense against the finding relative to the PROSEE sites is based on three arguments. First, prior to the implementation of 34 C.F.R. § 600.10(b)(3), there was no authoritative requirement that an institution notify the Department of new branches or seek permission for their establishment. [See footnote 4 4](#) Second, even after that date, the requirement cited above only applied to new sites, thereby grand-fathering their PROSEE sites because they predated the regulation. Third, although not conceding that such a requirement exists, each and every PROSEE site was accredited by Middle States and licensed by PRCHE and, therefore, each was acceptable under the criteria established by the IG and adopted by the FARD.

In their respective briefs, the parties initially dispute the meaning of the word "new" in § 600.10(b)(3). Fundacion claims the word implies that the section applies only to sites created after the implementation date of the regulation while SFAP argues that the clear import of the word is that the regulation applies to all sites, including those created after the date of the respective eligibility designation. [See footnote 5 5](#) After reviewing the regulation in question, I find that, when read in context, the rule enunciated therein applies to any locations which were established without notice to the Department.

This issue is also affected by two separate pronouncements of the Department. First, SFAP annually issues and distributes a Student Financial Aid Handbook (Handbook) to all participants in the Title IV programs. Page 2-19 of the 1985-86 edition of the Handbook provides:

The eligibility of an institution and its programs does not automatically include separate locations, branches and extensions. If educational services are provided at other locations such as separate campuses, military bases, or other towns or cities, and these locations are not listed in the institution's Eligibility Letter, the institution must document the eligibility of these separate locations. [See footnote 6 6](#)

Fundacion argues that the Handbook is not a properly promulgated regulation and, therefore, it cannot be used as the basis for the demand of return of Title IV funds. Alternatively, even if this provision is applicable, it is contrasted and modified by a July 29, 1991, letter from SFAP's Director, Division of Eligibility and Certification to Fundacion's counsel which provided that although an institution was required to notify the Department whenever there was a change in the locations of the institution, there was no requirement that the institution file an application and secure the Department's permission if the additional location did not offer a complete program (one leading to a degree, vocational certificate or other recognized educational credential). [See footnote 7 7](#) The essence of that argument is that even though the letter postdates the event in question, the letter truly confirms SFAP's practice during the period in issue and is, therefore, probative. Despite this argument, I note that the audit report indicates that some of the PROSEE sites offered Bachelor and Associate degrees, yet Fundacion neither rebuts such an assertion nor offers any explanation why such a program should be considered, nonetheless, as eligible.

In that connection, SFAP apparently requested no additional information and asked no questions regarding the PROSEE sites, when those sites were included in Fundacion's 1991 applications for recertification -- the Department routinely issued eligibility notices to Fundacion's three institutions. Fundacion claims that the clear import of these factors is that it was not required to file an application to establish eligibility of the PROSEE sites -- at most, it was only required to notify the Department of the sites. Further, since the Department took no action when it was eventually notified of the existence of the sites, and did not even inquire about them, any possible error in not so notifying the Department is, at most, a harmless one. [See footnote 8 8](#) Contrariwise, SFAP argues that notification is an important step in its oversight of the Title IV programs, and that such notice could have generated a timely inquiry into the appropriateness of funding such sites. In a retort, Fundacion argues that regardless of SFAP's protestations to the contrary, their normal practice is not to inquire into the status of sites when they receive notice of their existence.

Upon review of the facts of this case, I find that Fundacion erred in not notifying SFAP of the PROSEE sites when its institutions sought eligibility in 1985. Although Fundacion argues that there was no authority requiring such action, it is clear that they were on notice that such information was required. It is also abundantly clear that SFAP was well within its authority to request such information so that it could make an informed judgement as to eligibility. Fundacion's protestations that it did not know that the information was requested or that the Department waived the request for it is, at best, disingenuous. Fundacion's argument that it was not required to inform SFAP of the PROSEE sites in 1988 because they were preexisting is, likewise, dubious. Having determined that Fundacion erred in not reporting, I must determine what, if any, adverse action should result. I have previously held that failure to notify the Department of certain required information may be deemed only a technical violation if it appears clear that the Department would have taken no adverse action against the institution based on that information. *See In re Mary Holmes College*, Docket No. 94-32-SP, U. S. Dep't of Educ. (March 30, 1995)(*certified by Secretary's Decision*, September 18, 1995). There, I held that if a violation is deemed to be only technical in nature, it is one which does not warrant, absent other aggravating circumstances, the extreme remedy of declaring the program to be ineligible.

Here I reach the same conclusion. The record of this proceeding is reasonably clear - SFAP took no action when it was belatedly notified by Fundacion that they were providing training at remote sites. Consequently, I find that the failure to notify the Secretary of the existence of the remote sites is a technical violation, as the term is described above. [See footnote 9 9](#) This determination does not end my evaluation of the eligibility of the remote sites question. The real issue -- was the training given at these remote sites authorized to be funded under Title IV -- is still before me irrespective of the notice issue. In that regard, Fundacion has the burden of showing that the students in question were eligible and that they were attending an eligible program at an eligible institution. For purposes of this dispute, SFAP has agreed to accept as eligible those PROSEE programs which Fundacion could show were both accredited by Middle States and licensed by PRCHE. In so far as accreditation is concerned, Middle States has indicated that they consider the institutions as entire units for accreditation purposes, including their respective sites, even though they admit that they were not fully aware of the sites and never visited any of them. The record reveals, however, that PRCHE apparently was never

apprised of the full extent of the PROSEE program and that they questioned the adequacy of the training given at some of the sites. Eventually, PRCHE caused Fundacion to close all but ten of those sites. As indicated above, another problem is that Fundacion did not establish which of these sites issued degrees or certificates. It must be recognized that Fundacion was required to file an application to establish the eligibility of each such site which then was required to be approved by the Department. My review of the record in this case reveals that Fundacion has not met its burden of showing that the \$1,712,540 in issue was provided to students in a program which qualifies under the above criteria. As a consequence, I find that Fundacion owes that amount for finding No. 1.

- II -

As to the second finding, SFAP alleges that Fundacion, through UMET, awarded federal Pell Grant program funds to students who were not enrolled in an eligible program, in violation of 34 C.F.R. § 668.7(a)(1). Specifically, these students were enrolled in a series of televised courses known as the SEDUE program, which was not eligible for Pell Grant funding because it did not lead to the awarding of a degree or certificate. The courses offered included: Basic Spanish 101, 102; English 101, 102; Humanities 101, 102; Social Science 101, 102, and Bilingual Education Courses consisting of the cultures of the United States and Puerto Rico. Unlike other students at UMET who are enrolled in an undergraduate degree program, the SEDUE students were enrolled solely in SEDUE and were not required to declare a departmental affiliation or major.

Fundacion asserts that SEDUE is not a separate program but, rather, is merely an educational delivery system utilizing telecommunications. Further: each of the students was enrolled in UMET; each of the SEDUE courses is credible to any degree conferred by UMET; each SEDUE student was required to matriculate and attend classes at the main campus and to declare a major in their second semester; some students at the main campus were enrolled in SEDUE courses; and, it was merely for an internal administrative convenience that SEDUE students were separately listed and coded as such.

Evidence of record indicates that when UMET became aware that its coding of SEDUE students was a cause for concern, it altered its record system. Although insisting that it was not required to do so by statute or regulation, it began requiring each SEDUE student to declare a major upon enrollment and then double-coding them in their computer system. These two actions apparently obviate SFAP's concern regarding the SEDUE students and would appear to remove the question of those students' eligibility to participate in Title IV programs. Nothing essential has changed. Such an artificial distinction, as that raised by SFAP's position on this issue exemplifies the concept of "form over substance." This should not result in the loss of Title IV eligibility! Consequently, I find that Fundacion has met its burden of proof that the students attending the SEDUE program were students of UMET and that they were eligible to participate in the Pell Grant Program.

FINDINGS

1. Fundacion Educativa Ana G. Mendez has failed to meet its burden of proof in establishing that the students attending PROSEE sites were participating in an eligible program. As a consequence, it must return \$1,712,540 to the Department of Education.

2. Fundacion Educativa Ana G. Mendez has met its burden of proving that students taking SEDUE courses were enrolled in an eligible program.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Fundacion Educativa Ana G. Mendez repay to the U.S. Department of Education the sum of \$1,712,540.

Judge Ernest C. Canellos

Dated: December 15, 1995

SERVICE

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 The audit report recommended that the liability could be reduced by the amount of awards made to students at PROSEE locations which Fundacion could establish were properly licensed and accredited at the time of the original application for eligibility in 1985. Apparently the reduction in liability enumerated above was based upon this consideration.

[Footnote: 2](#) 2 Fundacion initially argues that the Secretary's granting of eligibility based on applications listing only a post office box rather than an address without inquiring about the physical location of the institutions, constituted a waiver of that requirement and resulted in the approval of the entire institution including the PROSEE sites. I reject this argument out-of-hand.

[Footnote: 3](#) 3 Applying the procedural rule enunciated in 20 U.S.C. § 1089(c), this provision became effective on July 1, 1989.

[Footnote: 4](#) 4 Fundacion argues that attempting to fix liability in absence of a regulatory or statutory violation is inconsistent with the Program Participation Agreement with the Secretary, which binds it to comply with all statutes and regulations governing the operations under Title IV.

*[Footnote: 5](#) 5 SFAP, citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), urges that I give substantial deference to its interpretation. However, it has been held that in appeals from decisions of the Secretary in administrative proceedings, deference is owed by courts to pronouncements of the Secretary, however such deference does not apply to interpretations by SFAP in proceedings such as this one. *In re Technical Career Institute*, Docket No. 92-91-ST, U.S. Dep't of Educ. (October 8, 1993), (affirmed by Secretary, November 23, 1994).*

[Footnote: 6](#) 6 Similar language regarding new locations and extensions appears in each edition of the Student Financial Aid Handbook issued from 1986-87 through 1990-91.

[Footnote: 7](#) 7 The same general provisions were adopted by the Department and have been promulgated as 34 C.F.R. §§ 600.10(b)(3) and 668.12(c)(1)(I).

[Footnote: 8](#) 8 The respective 1991 applications to renew eligibility each stated, "[t]he institution offers a variety of extension classes at various locations throughout the Commonwealth."

[Footnote: 9](#) 9 Although declaring the program to be ineligible is not appropriate here, SFAP is free to take whatever other sanction which is appropriate for program violations, i.e. fine, limitation, etc.