IN THE MATTER OF EDUCATION MANAGEMENT SYSTEMS, INC. D/B/A CHENIER, Respondent.

Docket No. 94-31-SA
Student Financial Assistance Programs

DECISION

INTRODUCTION

Educational Management Systems, Inc. d/b/a Chenier (Chenier) appeals a determination of the Audit Resolution Branch (ARB) of the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (Department). On September 20, 1993, ARBSee footnote 1 [1] assessed liabilities totalling $5,541,665 against Chenier in connection with student financial assistance funds provided to Chenier by SFAP under Title IV of the Higher Education Act (HEA) of 1965, as amended, 20 U.S.C. § 1070 et seq. and 42 U.S.C. § 2751 et seq.See footnote 2 [2] The assessment of liabilities is based on ARB's review of a July 31, 1992 audit report issued by the Department's Office of Inspector General (OIG) and comments received from Chenier in response to that report. ED Ex. 1. The audit by the Department's OIG covers Chenier's administration of the student financial assistance programs authorized under HEA for the period between July 1, 1990, and March 31, 1992. Id. at 2.

SFAP and Chenier submitted briefs addressing the ARB assessment.

SFAP establishes that the costs of attendance (COA) used by Chenier in computing so-called Pell Grant eligibility for inmates incarcerated at Mineral Springs and Bridgeport, Texas, prison preparole facilities include a tuition component that is not chargeable to Chenier's students and also that there is an overstated amount for expenses incurred by the students. When the amounts which do not represent student costs are subtracted from the amount claimed by Chenier, the resulting costs incurred by the prison inmates are below the minimum amount necessary to qualify the inmates for receipt of Pell Grants. Pell Grant disbursements by Chenier at the pre-parole facilities, thus, are liabilities of Chenier and must be fully repaid by Chenier to SFAP.

SFAP also shows that Chenier disbursed Pell Grant funds to students at Mineral Springs and Bridgeport prison pre-parole sites through an Orange, Texas, cosmetology school, before SFAP approved those sites as eligible locations of Chenier. Chenier must repay Pell Grant funds disbursed to students at Mineral Wells and Bridgeport prior to the time that it was authorized to disburse Pell Grants at those locations.

II
FACTS

On July 3, 1990, Educational Management Systems, Inc. (EMS), purchased Chenier, which was then a small cosmetology school. ED Ex. 3, item 5. The Department approved the change of ownership. EMS then used the existing eligibility of Chenier as a basis to participate in the Title IV programs. Chenier, thereafter, began to offer vocational programs at pre-parole prison

locations at Mineral Wells and Bridgeport. ED Ex. 40, letter at 1. Chenier's offering of vocational programs at these locations was done under a contract with a private operator of the facilities, Concept, Inc. (Concept),See footnote 3 [3] an entity which itself is not eligible to participate in the Title IV programs.

Inmates at the Mineral Wells and Bridgeport pre-parole facilities were entitled to receive educational services from Concept at no cost, under a contract between Concept and Texas authorities which previously operated the prison. ED Ex. 4, page 10 of each contract. Concept was paid to provide housing, food, and other essentials including education to the inmates. Id., pages 10-16 of each contract. Further, an exemption from state licensure obtained by Chenier required that the instruction be conducted in a closed facility and be financed by local, state, or Federal funds. ED Ex. 3, item 4; R. Ex. 3.

On July 30, 1990, Concept contracted with Chenier for the provision of job skills training programsSee footnote 4 [4] to the inmates at the Mineral Wells and Bridgeport pre-parole facilities. ED Ex. 3, item 2. Until March 1991, inmates signed registration contracts which specifically provided:

The applicant agrees that he/she is not responsible for any of the above charges. All cost of education is funded by Education Management Systems d.b.a. Chenier and/or Title IV funds. ED Ex. 6. In March 1991, Chenier ceased using registration contracts and instead used a course placement enrollment application form which did not discuss the cost of education. ED Ex. 7.

In establishing a COA so that it could obtain Pell Grants, Chenier used $3,280 as the tuition component. See ED Exs. 11, 8, and 9. This amount represented an averaging of the nominal "tuition" established for its 9 and 15 week programs. ED Ex. 11. Chenier used $720 as the amount of other expenses incurred by the inmates. ED Exs. 8, 9 and 14. The auditors determined that no tuition was in fact charged to the inmates and that the inmates incurred only approximately $115 in other expenses. ED Ex. 16.

An addendum to the written contract between Chenier and Concept states that Concept would pay Chenier the difference between the tuition charged by Chenier and the amount of financial aid received by students. ED EX. 3, item 2, addendum. That difference amounted to approximately $4.7 million during the audit period. In addition, the contract provided that Chenier would pay Concept $212,800 per year in rent for the prison training facilities and its pro-rata share of utilities. No billing occurred under these contract provisions from July 30, 1990, the date the contract was signed, until at least September 30, 1991, after the OIG auditors began asking questions about the enforcement of the contract. ED Ex. 40. The matter now is in litigation between Chenier and EMS in two States, Kentucky and Texas.

Nineteen months after the effective date of the contract, Concepts had paid a total of approximately $200,000 to Chenier of the $4.7 difference between Chenier's nominal tuition and its financial aid receipts. However, as noted above, Chenier and Concept are suing each other.

During the audit period, Chenier disbursed $4.3 million in Pell Grants, $4.2 million for 3,122 inmates at the pre-parole facilities and approximately $100,000 for 76 cosmetology students at Orange.

Chenier's Departmental eligibility was extended to the prison pre-parole locations on May 21, 1991 (Mineral Wells), and July 12, 1991 (Bridgeport). ED Ex. 43. Prior to these dates, Chenier already had disbursed $971,487 of Title IV funds to inmates at these locations. ED Ex. 41.

III

CONCLUSIONS

Chenier created a cost of attendance for inmates in pre-parole facilities who in fact incurred no obligation to pay for tuition, room, board, or other expenses, except for approximately $115. Because the tuition charges and other undocumented expenses in excess of $115 are not proper charges to the student, they cannot be included in the cost of attendance for Pell Grant purposes. By including these charges in the COA, Chenier and Concept cannot be allowed to transfer such costs to the Federal government. These are not student costs and they cannot be paid with Pell Grants.

Chenier even began using Pell Grants to cover the costs of educating prisoners before the prison pre-parole sites were determined by SFAP to be eligible locations of Chenier. Chenier, thus, must repay SFAP all Pell Grants disbursed to students at ineligible locations prior to the date that the locations became eligible. Detailed conclusions next follow:

The Federal Pell Grant Program provides grants to financially needed students to assist them in paying the costs of postsecondary education.

The COA for the Federal Pell Grant Program was defined in 20 U.S.C. § 1070a-6(1990)See footnote 5 [5] during the audit period. None of the inmates were dependents with children living with their parents and all were at least half-time students. Thus, the applicable COA was that described in subsection (5) of § 1070a-6:

(5)(A) the tuition and uniform compulsory fees normally charged a full-time student at the institution at which the student is in attendance for any award year, plus

...(B)(ii) an allowance for room and board costs, books, supplies, transportation, and miscellaneous expenses incurred by the student which shall not exceed $2300...See footnote 6 [6]

Under these provisions, tuition can be included in the COA only if it is "normally charged a full-time student." Similarly, the expenses described in 20 U.S.C. § 1070a-6(5)(B)(ii) can be included in the COA only if these expenses are "incurred by the student." If such costs are charged to or incurred by an entity other than the student, they are not proper elements of the COA.

The question thus is whether the inmates at the Mineral Wells and Bridgeport prison pre-parole facilities who participated in Chenier programs assumed an obligation to pay tuition to Chenier. The evidence shows that they did not.

The state law exemption from licensure obtained by Chenier, the contract between the TDCJ/PPD and Concept governing the operation of the prison pre-parole facilities, the contract between Concept and Chenier, and the student registration contracts used by Chenier up until March 1991 all establish that there was no tuition charged to the inmates.

Under statutes governing institutional eligibility to participate in the HEA programs, an institution must be legally authorized to provide a program of education beyond secondary in the state in which it is located. 20 U.S.C. §§ 1141(a)(2), 1088(b) and (c). Chenier is authorized to operate in Texas by virtue of an express exemption from licensure issued pursuant to Section 32.12(b) of the Texas Education Code. That section of law exempts schools on the following conditions:

Schools offering a course or courses of special study or instruction financed and/or subsidized by local, state. or federal funds or any person. firm. association, or agency other than the student involved, on a contract basis and having a closed enrollment may apply to the Administrator for exemption of such course or courses from the provisions of this Chapter and such course or courses may be declared exempt by the Administrator where he finds the course or courses to be outside the purview of this Chapter. (Emphasis added.) ED Ex. 3, item 5. Chenier qualifies for this exemption only because it does not charge tuition to its students in the prison pre-parole facilities at Mineral Wells and Bridgeport. In a letter dated October 31, 1990, granting the exemption, the Texas Education Agency said that the exemption was granted upon an understanding that Chenier qualified for the exemption because "... the instruction is financed by local, state, or federal funds on a contract basis..." R. Ex. 3. This exemption was critical to Chenier's claimed eligibility to participate in the Title IV programs during the audit period because without the exemption, Chenier would not be legally authorized to provide a program of education beyond secondary education in Texas. At the same time, because Chenier's legal authorization to offer training at the prison pre-parole sites is dependent on its not charging the inmates tuition, Chenier cannot, for the purposes of Title IV programs, characterize its charge to Concept as a tuition charge to the inmates.

The contract between TDCJ/PPD and Concept provides that tuition is not to be charged to the inmates at Mineral Wells and Bridgeport. This contract states:

The contractor shall provide at no cost to the client:

> 1. Vocational and/or academic curriculum that addresses the needs of the client and will aid in obtaining gainful employment.

Emphasis added.) ED Ex. 4 at contract page 10. TDCJ-PPD agreed to pay Concept $32.75 per client per day, less the amount paid by clients with a gross monthly income from that income, for providing all of the services and facilities required by the contract. Id., at contract page 14 (provision 2.03) and page 18 (provision 3.04(e)). Thus, the state of Texas was funding the cost of

education for the inmates at the prison pre-parole sites, and the contract between the TDCJ/PPD and Concept did not provide a basis for charging tuition to the inmates for the education provided. Concept and Chenier entered into a contract on July 30, 1990. ED Ex. 3, item 2. The original contract contained no mention of tuition. The contract merely stated that Chenier would assist students in applying for federal or state financial aid "when and if obtainable." Id. at contract page 2, paragraph 4. On September 1, 1990, Chenier and Concept executed an addendum to the contract which provided that Concept "'agrees to pay Chenier on a quarterly basis the difference between the amount of tuition charged per student (15-week program - $4,100.00; 9-week program $2,460.00) and the amount of financial aid received by the student, if any." Id. addendum. The existence of this contract term does not support Chenier's inclusion of a tuition component in the COA for the inmates.

Chenier was obligated to enroll all of Concept's inmates under the contract. ED Ex. 3, at contract page 2, paragraph 2. Also, the inmates were not required to assume any tuition obligation under this contract. In fact, as noted above, Chenier was precluded from charging them tuition under both its exemption from state licensure and the TDCJ/PPD contract. This provision of the contract establishes that Concept, not the inmates, incurs the obligation to pay tuition to Chenier and that tuition thus is charged to Concept, not to the inmates.

Chenier's student registration contracts in use until March 1991 also demonstrate that the inmates were not charged tuition. These contracts expressly state that the applicant (inmate) "is not responsible for any of the charges" listed on the contracts, including tuition. ED Ex. 6. Since the inmates were not responsible for the charges, including tuition, it follows that they assumed no obligation to pay tuition and were not being "charged tuition," as that term is used in 20 U.S.C. § 1070a-6(5).

Subsequent to March 1991, the inmates did not sign any contractual agreements with Chenier, but instead signed course placement enrollment applications which contain no mention of tuition. ED Ex. 7. In the absence of a legally binding contract to pay tuition, and in light of the circumstances of their enrollment, inmates enrolled subsequent to March 1991 assumed no obligation to pay tuition to Chenier and were not charged tuition by Chenier

Thus, because Chenier did not normally charge students tuition,See footnote 7 [7] it could not properly include tuition as an element of its COA.

Under 20 U.S.C. § 1070a-6 (5)(B)(ii)(1990), an institution may include in its COA an allowance for expenses other than tuition and fees, including any room and board costs, books, supplies, transportation, and miscellaneous expenses incurred by a student. Chenier included in its COA an allowance of $720 for other expenses. ED Ex. 14. However, the inmates at Mineral Wells and Bridgeport, at most, incurred expenses averaging only $115 over the award year. At most, the COA should have been limited to $115.

To "incur" a cost is to have a liability imposed upon one for, or become subject to, payment of the cost. Black's Law Dictionary, 6th ed. at 768. Costs that persons or entities other than the inmates were obligated to pay were not costs incurred by the inmates.

Most of the inmates' needs were provided for by the State of Texas. For example, the TDCJ/PPD-Concept contract required Concept to provide to inmates at no cost housing, food, clothing (for indigent inmates), laundry facilities and detergent, medical care, linens, storage space, transportation, and education. ED Ex. 4, pages 6-11 of each contract.

Moreover, the inmates at Mineral Wells and Bridgeport were required to place all of their funds in the prison's bank and were allowed to spend no more than $40.00 per week. ED Exs. 13, and 15. The inmates were not allowed to make purchases outside the facilities in which they were incarcerated, but rather were restricted to making purchases in the prison commissary. ED ex. 15. These restrictions eliminated any possibility that the inmates would incur expenses in excess of $40.00 per week during the nine and fifteen week courses provided by Chenier. Given these restrictions, the maximum amount of expenses the inmates theoretically could have incurred during these time periods was substantially less than $720 .See footnote 8 [8]

The state's contract monitor for the TDCJ/PPD-Concept contract stated that the inmates incurred $0 in living expenses. ED Ex. 13. She explained that all supplies such as books, paper, and pencils were provided to them by Concepts or Chenier. Id. Thus, the only possible expenses that could be included as other expenses in the COA are expenses associated with the inmates' commissary purchases. Therefore, the auditors reviewed the average daily withdrawals from the prison bank by inmates and multiplied those withdrawals by the number of days in the award year. ED Ex. 16. On the basis of these withdrawals, they concluded that the other expense component of the COA could not have exceeded approximately $115. Id. This itself appears excessive.

Since this $115 is the only conceivable element of the COA, the auditors calculated whether or not inmates incurring only $115 in costs were eligible for a Pell Grant which may not exceed sixty percent of the COA. Thus, the maximum Pell Grant for an inmate with a COA of $115 would be $69. However, 20 U.S.C. § 1070a(b)(5)(1990) precludes the awarding of Pell Grants to students who qualify for a Pell Grant of less than $100. Accordingly, the inmates were not eligible to receive any Pell Grants, and Chenier must repay to SFAP the funds awarded and disbursed in their names.See footnote 9 [9] Chenier seeks to add weekend passes or furlough expenditures of the inmates, but I reject this as unfounded.

Chenier applied to the Department for a designation of institutional eligibility on September 19, 1990. In its eligibility application, Chenier stated that it operated a cosmetology program at Orange. Chenier did not mention the vocational programs offered at the Mineral Wells and Bridgeport prison pre-parole facilities. The Department designated Chenier an eligible institution on October 19, 1990, effective September 25, 1990. ED Ex. 42, at 3.

In January 1991, Chenier submitted an eligibility application to the Department for approval of its programs at the Mineral Wells and Bridgeport locations. The Department approved the Mineral Wells location effective May 20, 1991, and the Bridgeport location effective July 12, 1991. ED Ex. 43. Prior to the effective dates of eligibility of these locations, Chenier had awarded and disbursed almost $1 mill on in Pell Grants in the names of inmates at those locations. ED Ex. 41.

Under 34 CFR 600.20(b)(1990), an institution is required to apply for eligibility on the form prescribed by the Secretary and provide all information and documentation requested. If the Secretary determines that the applicant institution is eligible, the institution is considered to be an eligible institution as of the date that the Secretary received all information necessary to make the eligibility determination. 34 CFR 600.10(a)(1990). If the Secretary determines that the entire institution satisfies the requirements for eligibility, the eligibility determination includes all educational programs and locations identified on the institution's application for institutional eligibility. 34 CFR 600.10(b)(1990). Eligibility does not extend to any location that an institution establishes after it receives its eligibility designation. The institution must reapply for an eligibility designation for any such location. 34 CFR 600.10(b)(3).

If the Secretary designates an institution as an eligible institution on the basis of inaccurate information or documentation, the designation is void from the date it was made. 34 CFR 600.40(b)(1990).

Disbursements made to inmates at Mineral Wells and Bridgeport before those locations were determined to be eligible are thus recoverable. First, Chenier provided inaccurate information on its initial eligibility application by failing to disclose the two prison locations and the various programs offered at those locations.See footnote 10 [10] Therefore, its eligibility designation was granted based on inaccurate information and was void ab initio. 34 CFR 600.40(b)(1990).

Second, assuming arguendo that the initial eligibility designation was valid, it covered only the offering of a cosmetology program at the Orange location. 34 CFR 600.10(b)(1990). Chenier was free to add additional programs at the Orange location at its own risk. However, under 34 CFR 600.10(c)(1990), it could not expend Pell Grant funds in connection with any program at a location other than its Orange location without first applying for, and obtaining, a designation of eligibility pursuant to 34 CFR 600.10(b)(3)(1990), and obtaining certification for those locations and entering into a new program participation agreement with the Secretary pursuant to 34 CFR 668.12(1990). See 34 CFR 600.10(e)(1990). Because it did so, its expenditures were improper and must be returned to SFAP.

Chenier is liable for repayment of $971,487 under this finding. ED Ex. 2 at 4, Ex. 41.

In summary, Chenier improperly inflated its COA by including a tuition component when in fact there was no tuition charged to its students and by using a figure of $720 for other expenses, when its students at most incurred only $115 in expenses. Because its actual COA did not exceed $115, and the applicable statute governing payment of Pell Grants contained restrictions (1) limiting the amount of a Pell Grant award to sixty percent of the COA, and (2) proscribing payment of Pell Grants to students whose Pell Grant entitlement was less than $100, Chenier's students were not eligible to receive Pell Grants.

Chenier also disbursed Pell Grant funds to inmates at prison pre-parole sites before those locations were designated as eligible locations by the Department. The Pell Grants disbursed prior to the effective date of eligibility for these locations must be returned to SFAP. Chenier broadly states that what happened here is common practice for all incarcerated students

throughout the United States. However, I find no evidence supporting the broad claim of Chenier.

Based on the foregoing conclusions, I uphold the findings of ARB made on September 20, 1990, Chenier must repay SFAP $5,541,665.

Dated this 22nd day of June, 1994.

Paul S. Cross
Administrative Law Judge
Office of Higher Education Appeals
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-3644

Footnote: 1 [1] *1 The assessment-determination letter was re-mailed twice, once on October 21, 1993, and once on November 18, 1993.*

Footnote: 2 [2] *2 Citations are to current statutes and regulations, unless otherwise indicated.*

Footnote: 3 [3] *3 Concept, in turn, had a contract with the Texas Department of Criminal Justice, Pardon and Paroles Division (TDCJ/PPD), to operate the prisons.*

Footnote: 4 [4] *4 The programs provided were automotive mechanics, building trades, horticulture, electronics, word processing, and food service.*

Footnote: 5 [5] *5 In discussing the COA, reference is made to the 1990 United States Code. The 1991 provisions were substantially identical except that the amount of allowable expenses was increased by $2400.*

Footnote: 6 [6] *6 The subsection was identical for each year of the audit period except that the amount of the allowance set forth in subsection (5)(B)(ii) increased to $2400 in 1991.*

Footnote: 7 [7] *7 As noted, except for a relatively small number of cosmetology students at Orange, Chenier's students were prison inmates. The practice of Chenier at Mineral Wells and Bridgeport is controlling for those locations.*

Footnote: 8 [8] *8 The maximum amount of expenses the inmates theoretically could have incurred for the nine week program was $360; for the fifteen week program, the maximum amount of expenses the inmates theoretically could have incurred was $600.*

Footnote: 9 [9] *9 ARB adjusted the liability amount to be repaid based on this finding downward to reflect the fact that some of the same funds were subject to recoupment under a different theory of liability under finding 2 of the final program determination. See ED Ex. 2 at 3.*

Footnote: 10 [10] *10 No cosmetology program was offered at either location.*