IN THE MATTER OF MARY HOLMES COLLEGE,
Respondent.

Docket No. 94-32-SP
Student Financial Assistance Proceeding

Appearances: David J. Figuli, Esq., of Evergreen, Colorado, for the Respondent.

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

Before: Judge Ernest C. Canellos

DECISION

Mary Holmes College (MHC) is a private, non-profit, Historically Black College, with a campus located in West Point, Mississippi. It is accredited by the Southern Association of Colleges and Schools (SACS) and is eligible to participate in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). Title IV Programs are administered by the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED).

Program Reviewers from SFAP's Region IV in Atlanta, Georgia, conducted a program review of MHC's Title IV compliance for the period July 1, 1990, to June 30, 1992. A program review report was issued on August 17, 1992, and contained 25 adverse findings. A Final Program Review Determination (FPRD), issued on November 16, 1993, and reissued on December 17, 1993, affirmed seven of these findings and noted that MHC had taken corrective action on the remaining 18 findings. For the seven findings which were affirmed, SFAP sought repayment of $827,383. In addition, SFAP sought an informal fine of $10,000. MHC filed a timely appeal as to three of

the seven findings.See footnote 1 As a consequence of the appeal, the informal fine was not pursued and a formal fine proceeding under Subpart G, 34 C.F.R. § 668.81, et seq. was, apparently, not initiated.

DISCUSSION

The three findings which were appealed and the recovery sought for each, which are before me for adjudication include: offering an ineligible program - $707,503; failure to maintain documentation for students selected for verification - $108,905; and disbursement of student aid

in excess of statutory limits - $184,285 (this amount is included in the $707,503 total of the first finding).

As to the first finding, SFAP alleges that MHC disbursed Title IV funds to students enrolled in an ineligible program, its Entrepreneurial/Truck Driving Program. In its FPRD, SFAP claims that this program was ineligible for Title IV funding for two reasons: the program was not accredited by its accrediting agency, SACS, and it was improperly administered through two contractors. During the briefing process, SFAP added a third basis, that the program was ineligible because MHC had not sought approval from the respective states where the courses were taught. The students in this program applied for admission to MHC and received Title IV funding through MHC, but the part of the program dealing with the actual driver training was accomplished by two contractors at two separate locations far away from MHC's Mississippi campus: Trans Union Truck Driving School in Tacoma, Washington, and Freeway Truck Driving School in Albuquerque, New Mexico.See footnote 2

Initially, SFAP claims the program was ineligible because it was not properly accredited. In its defense, MHC asserts that it did not need specific program approval from its accrediting agency. Through its evidentiary submissions, MHC established that: it has had institutional accreditation from SACS continuously since 1973; such accreditation includes all programs and locations of MHC; and, SACS does not require an application for approval of program changes. MHC claims, further, that the Entrepreneurial/Truck Driving Program was a simple and appropriate expansion of existing programs and, as such, was an eligible program. SACS confirmed in

writing that it did not require MHC to resubmit an application to gain its approval of this programmatic change, and that it was in the process of reviewing the Entrepreneurial/Truck Driving Program as part of their cyclical reaccreditation of MHC when the program was discontinued by MHC.

Since the evidence of record indicates that MHC was validly accredited at the time the program in question was offered and there was no requirement to obtain SACS' approval for the addition of that program, I find that the first prong of SFAP's claim is not meritorious.

Next, SFAP asserts that MHC failed to notify the Secretary of Education (Secretary) of the establishment of the written agreements with the contractors, as it was required to do. It is clear from the record that no such notification was made. The parties differ on whether such a requirement existed in this situation. SFAP claims that such a requirement exists in 34 C.F.R. § 600.30 (a)(5).See footnote 3 MHC argues that this requirement is inapplicable to it because the courses it added through contract did not change its eligibility application. This argument requires an extremely narrow reading of the regulation. Here there was a clear change in the manner in which MHC carried out its program and the regulation requires that such change be reported to the Secretary. MHC also refers to the SFAP's Federal Student Financial Aid Handbook, in which it advises schools that they are not required to forward copies of contracts if 25% or less of the training is provided under those contracts. This certainly does not alter the requirement to report such agreements to the Secretary.

I find that MHC failed to report its contracting arrangement, as required. Its failure to report may lead to adverse action against it, including the loss of its eligibility. 34 C.F.R. § 600.30(d). Since this is a Subpart H proceeding under 34 C.F.R. § 668.111, et seq., I do not have the jurisdiction to determine whether MHC's eligibility to participate in Title IV programs should be terminated - that action can only be accomplished under Subpart G proceeding.

However, I must determine what sanction/recovery, if any, I should order in this proceeding for this failure to report. To do so, I must review the underlying transaction in the context of the regulations. It is abundantly clear that an eligible institution may contract with another institution to provide some or all of a program without a loss of its eligibility. 34 C.F.R. § 600.9(a). If the contractor is not, itself, an eligible institution, as is the case here, then the contractor cannot provide more than 25% of the educational program. 34 C.F.R. § 600.9(d)(1991). The evidence of record indicates that MHC's contractors provided 25% of the program and, as a result, the contracting arrangement is one that could have been qualified under the regulations. With that as a background, it appears that the failure to notify the Secretary is a technical violation, one not warranting, by itself, the imposition of the extreme remedy of treating the program as ineligible.See footnote 4

More troubling, however, is the allegation made subsequent to the issuance of the FPRD that MHC failed to establish one of the threshold program eligibility requirements, i.e. that it was authorized by the state to provide the program. SFAP claims that MHC did not seek the approval of either the States of Washington or New Mexico for the program and, as a consequence, the program was ineligible for Title IV purposes. For its part, MHC argues that I should not consider this allegation because it was not on notice of such a claim and Due Process would dictate that ED cannot belatedly add such an allegation.

It is abundantly clear that to be eligible, a program must be legally authorized by the state. In the Matter of Molloy College, Docket No. 94-63-SP, U.S. Dep't of Educ. (Mar. 1, 1995). However, the specific question that must be answered here is: in a case where an institution contracts out a portion of its program in a manner consistent with Title IV requirements, must the institution also seek authority from the state to implement it, even though the contractor who is providing that portion of the program is

authorized by the state to carry out such a program? Certainly, there are many examples of students taking portions of their academic program at schools, other than their home school, through consortiums and reciprocal arrangements, and it is difficult to imagine that the state must approve such an arrangement. Also, if the state has already approved a particular course, why is it necessary to have it approved again merely because credits from that school will be transferred to another school as part of a contractual agreement. Based on the above, I am not convinced that MHC was required to seek the permission of the authorities in Washington and New Mexico for this contracting arrangement.

As to the second finding, SFAP alleges that MHC failed to maintain appropriate documentation, as required. In particular, many student files did not contain required tax information, others lacked verification worksheets, while still others contained conflicting tax and household information. MHC defends its action by claiming that SFAP should have assisted it in securing

the information, and its failure to do so precluded it from collecting against MHC. Since there is no doubt that the required information was not included in the student files, I find that the full liability of $108,905 must be remitted to ED. There is no basis for excusing MHC's recordkeeping failures by transferring fault to SFAP.

Finally, SFAP alleges that MHC disbursed SLS Loans in excess of statutory limits for 187 students enrolled in the Entrepreneurial/ Truck Driving Program. SFAP calculates the maximum SLS Loan as $1,500 for the program on the basis of its length (one semester), as indicated in the loan applications processed by MHC. MHC argues that the course is really part of a two-year program and, as a result, the maximum SLS Loan is $4,000. 34 C.F.R. § 682.204(e).

It is readily apparent that the SLS Loans in question were meant to cover the students' participation in the truck driving phase of the program. When calculated based on either on the length of that portion of the course or the credits applicable, that portion of the course equates to one-half an academic year. The maximum SLS Loan for that period of time is $1,500. Therefore, I find that MHC disbursed excess SLS Loan funds to the 187 students in question, totalling $184,285. Ultimately, MHC has the burden of proof as to compliance with regulations and whether it owes the questioned funds here. 34 C.F.R. §668.116(d). Its proof on this issue falls short of meeting such burden.

FINDINGS

I FIND the following:

Mary Holmes College's Entrepreneurial/Truck Driving

Program was not an ineligible program for Title IV purposes;

Mary Holmes College failed to maintain back-up documentation, as required, and must repay $108,905.00, to ED.;

Mary Holmes College awarded SLS funds in excess of statutory limits, and must repay $184,285.00, to ED.;

Mary Holmes College's liability amounts to $293,190.00.

ORDER

On the basis of the foregoing it is hereby--

ORDERED, that Mary Holmes College, repay to the United States Department of Education the sum of $293,190.00.

Ernest C. Canellos

Issued: March 30, 1995
Washington, D.C.

Footnote: 1 *MHC did not appeal finding #15, which demanded the return of $10,975, therefore, it is not before me for adjudication. In addition, the three other findings which were not appealed were non-monetary and, therefore, not subject to this appellate process.*

Footnote: 2 *MHC provided evidence to the effect that this geographically separated course was a temporary situation and, in due time, the course would be incorporated into its home campus offerings.*

Footnote: 3 *§600.30 Institutional changes requiring review by the Secretary.*

(a) . . . an eligible institution shall notify the Secretary in writing, . . . of any change in the following information provided in the institution's eligibility application:

. . . .

(5) The establishment of written agreements with other institutions or organizations. . . .

Footnote: 4 *I recognize the inference raised in this proceeding that the program was really a truck driving training course and the additional components were rarely, if ever, to be carried out. Certainly, some evidence would indicate this: the geographic separation of the schools and MHC, the enrollment of students from the locale of the other schools, the contract provision of waiver of any fees over and above the Title IV aid available, and the applications for SLS Loans which covered only the truck driving program. I choose to believe, however, MHC's claim that it acted in good faith in establishing a two-year program. There is evidence that MHC was encouraged by the National Transportation Consortium of Minority Colleges and Universities to assist minority students in entering the transportation field and MHC responded by establishing the subject program.*