In the Matter of PHILLIPS JUNIOR COLLEGE, SALT LAKE CITY (UT) CAMPUS, Respondent.

Docket No. 94-33-SP
Student Financial Assistance Proceeding

APPEARANCES: Leslie H. Wiesenfelder, Esq., Dow, Lohnes & Albertson, Washington, D.C., for the Respondent.

Howard D. Sorensen, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Office of Student Financial Assistance Programs.

BEFORE: Judge Richard I. Slippen

DECISION

INTRODUCTION

This proceeding arises under Subpart H of the regulations governing the student financial assistance programs, 34 C.F.R. .. 668.111 et. seq., and Title IV of the Higher Education Act of 1965 (HEA), 20 U.S.C. 1070 et. seq. The Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), through its Institutional Review Branch located in ED's Denver regional office (Region VII), issued to Respondent, Phillips Junior College of Salt Lake City (Phillips), a final program review determination letter (FPRD) dated December 10, 1993. The FPRD at issue was the result of a 1989 program review and contained nineteen final determinations adverse to Phillips. By letter of January 27, 1994, Phillips sought partial review of the FPRD and urges that the FPRD be reversed.

This case was originally assigned to Administrative Law Judge Allan C. Lewis (ALJ). Due to the transfer of that ALJ from the Office of Higher Education Appeals, this matter was reassigned to me on May 3, 1994. I have reviewed all of the briefs, documents, and evidence submitted and herein render my decision in this matter.

Phillips, the former Mountainwest Computer School, was acquired by Phillips Colleges, Inc., in 1989 and is accredited as a junior college by the Accrediting Commission of the Association of Independent Colleges and Schools. The FPRD letter was generated after a 1989 program review. Three findings from that initial program review are at issue here: findings 2, 3, and 8 as well as Phillips' objection to the admissibility of SFAP's exhibits 2,4 and 5.See footnote 1 [1] Finding 2 cited Phillips for the enrollment of students in effectively ineligible programs by virtue of Phillips' contracting out for instruction in violation of 34 C.F.R. § 600.9. Finding 3 concluded that students were enrolled in flight training courses without possessing the required type of medical certificates. Finally, finding 8 determined that Phillips failed to use the payment periods required by ED regulations.

DISCUSSION

The first finding subject to review is finding number 2. Finding number 2 is predicated upon 34 C.F.R. § 600.9(d) which provides that:

(1) The ineligible institution or organization may provide up to 25 percent of the educational program of a student enrolled in the eligible institution; or (2) The ineligible institution or organization may provide more than 25 percent but no more than 50 percent of the educational program of a student enrolled in the eligible institution if

* * *

(ii) The eligible institution's nationally recognized accrediting agency or association or recognized State agency specifically determines that the institution's agreement meets the agency's or association's standards for the contracting out of educational services.

At issue is the fact that Phillips contracted with ineligible institutions to provide the "Drafting and Design" portion of its "Drafting and Design/Business Management (Minor)" and "Business Management/ Drafting and Design" programs, and the "Aviation" portion of its "Business Management/Aviation(Minor)" program. SFAP argues that Phillips has failed to provide evidence that it received approval from its accrediting agency, the Association of Independent Colleges and Schools (AICS), for its contracting of such services or that its arrangement met AICS standards for such contracting. Without that approval or evidence that AICS standards were met, SFAP asserts that Phillips can avoid liability only if Phillips shows that the cited students were enrolled in programs for which the contracted portion was provided pursuant to a written agreement and was no more than 25 percent of the total program in which the student enrolled in accordance with section 600.9(d).

My reading of section 600.9(d) indicates that the program in question and its relationship with percentages indicates not so much an emphasis on the number of contracted courses offered by a program, Per se, but on the number of such courses a student uses toward the fulfillment of his or her coursework. As a threshold finding, therefore, I find that the evidence submitted indicates that in no case was there a student receiving in excess of 50 percent of a program's coursework in contracted classes. See e.g., Respondent's Exhibit 8. Having made that finding, the question is whether Phillips has proven that AICS determined that the contracting agreement met its standards for the contracting out of educational services.

Neither party has provided evidence, explicitly or implicitly, as to how AICS regularly manifests approval of a contracting agreement. SFAP generally relies upon the lack of any explicit reference approving a contract. Phillips, however, in its defense, asserts that two letters from AICS approving new programs, Respondent's Exhibits 3 and 9, establish that AICS implicitly approved of the contracting arrangement. With regard to AICS approval of new programs, there is some guidance on AICS' practices found in AICS' Evaluation Standards, Respondent's Exhibit 4, which states:

An institution initiating new programs must notify the Commission. Supporting data and information must be submitted on forms supplied by the Commission. The information required covers the general areas of student enrollment, program and general objectives, instruction,

instructional resource materials, facilities and equipment, admissions, graduation and placement, and publications.

It is true that neither of these letters from AICS make explicit reference to any contracting for instruction or to the contract at issue. However, in the absence of any evidence regarding AICS regular practice with regard to such agreements, it is not illogical to conclude that the information garnered on the Commission generated forms would reveal that instruction was being afforded by contract. Moreover, AICS, as a recognized accrediting agency, is aware of both the Department's regulations and its obligations to the Secretary, and, therefore, I find it highly likely that AICS regularly makes provision to assure that its form packages cover training by contract. As such, and in the absence of any evidence by SFAP to refute Phillips' proof, I believe that AICS was made aware of the contracting arrangement during the process of initiating new programs and tacitly approved the agreement. Therefore, I find that Phillips has met its burden in establishing that the agreement to contract out educational services met the standards of AICS

Finding 3 is controlled by 34 C.F.R. § 682.201(g)(4) which requires that in order for a student attending flight school to be eligible to participate in such loan programs, the "student must-...(h)old at least a Class II medical certificate." Finding 3 found that 19 students in Phillips' Aviation Program were ineligible because they did not hold Class II medical certificates and were therefore ineligible to receive Federal Family Education Loan program funds (FFEL). Four of those students were deemed ineligible because they possessed only Class III medical certification and 15 students lacked substantiation regarding any medical certification.

The evidence clearly shows that the majority of the students at issue were neither Class II nor I certified and, thus, were ineligible. Despite this, Phillips argues that the difference between Class II and Class III medical certification criteria, as defined by Federal Aviation Administration (FAA) regulations, is minor and, therefore, no liability should be found for those students holding Class III certification.See footnote 2 [2] See 14 C.F.R. § 67.15 and 14 C.F.R. § 67.15. The Department's regulations, however, are quite explicit in that they mandate a clearly defined minimum qualification with regard to certification. Regardless of whether the distinction between Class II and Class III is minor, I am constrained to follow the regulations as written, and 34 C.F.R. § 682.202(g)(4) dictates that a student must hold at least a Class II medical certificate. Therefore, I am unpersuaded by Phillips argument and affirm the FPRD with regard to the issue of liability.

As to the amount of the liability, however, I do not agree with the FPRD. Phillips has shown that five of the students cited for lacking documentation of medical certification are, in fact, Class I or II certified. Respondent's Exhibit 12. SFAP agrees to a limited extent, but notes that the record also reveals that three of those students were examined for medical certification well after their loans were disbursed and were therefore ineligible at the time of disbursement. Further, the record indicates that a fourth student, Student H., was examined on July 29, 1988 and received a second GSL disbursement of $1312 on October 26, 1988. The record also reflects that a fifth student, Student R., was examined on July 1, 1988 and received a second GSL disbursement of $1312 on February 16, 1989. Respondent's Exhibit 13. Since it appears that SFAP has taken the position that disbursements that occurred after examination dates are valid, Phillips' liability

should be reduced by the $1312 amounts received by both Students H. and R.See footnote 3 [3] SFAP also raises no objection to Phillips' assertion that the FPRD overstates by $1312 the total of FFEL funds for the students for whom it could not locate documentation of medical certificates. Respondent's Initial Brief at 15. As such, I find Phillips is liable for the $101,952 sum assessed, less $3936 which represents the valid disbursements to Students H. and R. and the FPRD's overstatement of FFEL funds discussed above.

Finally, there remains the issue of finding number 8, the finding both parties emphasize as the pivotal area of dispute. Finding 8 concerns funds paid using allegedly incorrect payment periods pursuant to 34 C.F.R. § 668.22, which describes the distribution formula for institutional refunds. The FPRD asserted that, at the time of the review, Phillips measured academic progress in credit units and used an academic quarter system calendar of classes, but defined its academic year and payment periods for Title IV purposes as though it was an institution using credit units without terms to measure student progress. Thus, the FPRD concluded that Phillips had two payment periods per academic year, instead of one each quarter as required, which resulted in overpayment in the second half of the second quarter for some Title IV programs. The FPRD also maintained that overpayment resulted in the first quarter and that there could be underpayment of second quarter Pell Grant program funds. The FPRD concluded that Phillips must immediately begin treating each quarter as a payment period and disburse accordingly.

Phillips asserts that, for purposes of 34 C.F.R. § 668.22, it was not a term school and, therefore, the FPRD mischaracterized it with regard to the regulations. Phillips argues that it operated on a non-traditional calendar; had multiple admission periods in excess of those provided by quarter term schools; charged tuition not by quarters, but by program; conducted overlapping sessions; and followed a similar basis of administration in such matters as other branches of Phillips Colleges, Inc. which has been thoroughly examined in In re Edmondson Junior College, Docket No. 93-7-SP, U.S. Dep't of Education (Initial Decision)(June 4, 1993)[hereinafter Edmondson I] and affirmed on April 5, 1994, by Decision of the Secretary [hereinafter Edmondson II]. See Respondent's Initial Brief at 29-43.

I have reviewed the evidence and arguments presented by the parties in this matter and, specifically, examined them in light of the facts and reasoning set forth in both Edmondson I and Edmondson II and find them virtually indistinguishable. Therefore, I reverse the FPRD's finding 8 on that basis and incorporate the rationale of the Edmondson decisions by reference herein.

FINDINGS

I FIND the following:

Phillips has met its burden of proof in demonstrating that its nationally recognized accrediting agency accepted its contracting out of educational services in a manner consistent with 34 C.F.R. § 600.9;

Phillips enrolled students in flight training courses who did not possess the required prerequisites, as mandated by 34 C.F.R. § 682.202(g)(4), but that the amount of liability imposed must be diminished by offset as explained in this decision;

Phillips status as a non-term school, consistent with the Edmondson decisions, refutes the allegation that it failed to use prescribed payment periods pursuant to 34 C.F.R. § 668.22.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that Phillips Junior College of Salt Lake City repay to the United States Department of Education the sum of $101,952 less the amount discussed in this decision's discussion of Finding 3.

Richard I. Slippen
Administrative Judge

Issued: November 16, 1994
Washington, D.C.

Footnote: 1 [1] *1 Phillips presents arguments challenging the admissibility of SFAP's exhibits 2,4 and 5. Recognizing that the admission of evidence does not carry with it any indicia of how much probative weight the tribunal should give to the evidence, the exhibits are admitted into evidence. In accordance with the Secretary's decision in In the Matter of Baytown Technical School Inc., Dkt. No. 91-40-SP, U.S. Dep't of Education (April 12, 1994), and consistent with my obligation to provide the parties with a fair hearing, I find no grounds for concluding that the submissions of SFAP should not be duly considered in this case.*

Footnote: 2 [2] *2 Phillips also notes, citing to 14 C.F.R. § 67.19, that the FAA regulations grant the Federal Air Surgeon discretion to grant Class II certificates in cases where Class II standards are not met. There is no evidence presented by Phillips, however, that the Federal Air Surgeon exercised this discretion as to the students at issue and I am incapable of finding that the Class II certificates should have been granted.*

Footnote: 3 [3] *3The actual names of Students H. and R. have been omitted to protect their identity.*