IN THE MATTER OF MOLLOY COLLEGE, Respondent.

Docket No. 94-63-SP
Student Financial Assistance Proceeding

DECISION

Appearances: David B. Rigney, Esq, of Lankenau Kovner & Kurtz, and Elizabeth B. Heffernan, Esq., of Hogan & Hartson, L.L.P., for Molloy College.

Russell B. Wolff, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: Judge Richard F. O'Hair

Molloy College (Molloy) participates in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* These programs are administered by the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED). On January 19, 1994, SFAP issued a Partial Final Program Review Determination (FPRD) for Molloy. The findings in the determination are based on the program review report for the 1991- 92 and 1992-93 award years. Molloy filed a request for review on March 9, 1994.

SFAP contends that Molloy disbursed Title IV funds to students enrolled in an ineligible educational program. Specifically, SFAP argues that the New York State Education Department (NYSED) did not approve an off-site program offered by Molloy, and that without such State approval, this program did not qualify as a federally eligible program. As a result, SFAP claims that Molloy must refund to ED $6,892,901 in Title IV funds disbursed to students enrolled in an ineligible program.

Molloy responds that the Liberal Arts program offered at extension sites was an eligible program because NYSED's refusal to register Molloy's program was belated, non-final, procedurally irregular, and erroneous. Molloy also claims that even if the program was ineligible, the school should not be liable for repayment of funds because it made a good faith determination at the inception of the program that it was eligible, made full disclosure to proper authorities, and received no notice of problems for six years. Under 34 C.F.R. § 668.116(d),

Molloy has the burden of proving that its questioned expenditures were proper and that it complied with applicable requirements.

In order to be eligible to participate in the Title IV programs as an "institution of higher education," a school must be legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located. 20 U.S.C.

§ 1141(a)(2); 34 C.F.R. § 600.4(a)(3). 34 C.F.R. § 600.2 defines "legally authorized" as "[t]he legal status granted to an institution through a charter, license, or other written document issued by the appropriate agency or official of the State in which the institution is physically located." In addition, in order for students in an educational program to receive Title IV funds, not only must the school be legally authorized by the state, but the educational program must also be legally authorized by that state. 34 C.F.R. § 600.2 defines an "educational program" as "[a] legally authorized postsecondary program . . . ."

Therefore, a student is eligible to receive Title IV funds only if that student is enrolled in an educational program that has been legally authorized by the State in which the institution is physically located. Since Molloy is located in New York State, to be eligible to receive Title IV funds, its students must be enrolled in educational programs that have been legally authorized by New York State.

The record in this proceeding demonstrates that, beginning in 1988, Molloy contracted with other institutions such as the Academy for Jewish Education (AJE) and the Long Island Seminary of Jewish Studies for Women (LIS) to provide off-site extension courses leading to an Associate in Arts (A.A.) degree in Liberal Arts. While Molloy offered a regular on-campus A.A. program that was registered with the New York State Education Department (NYSED), and therefore legally authorized, the off-site extension courses were not separately registered and differed significantly from Molloy's regular A.A. program. These differences included the fact that while the regular A.A. program consisted of four semesters of classroom-based instruction in a non-mentored format with 64 credit hours required for graduation, the off-site extension program consisted of six semesters of non-classroom-based instruction, some of which was in a mentored format, with 74 credit hours required for graduation. Additionally, certain core courses, such as FST 101 (The College Experience), were required as part of the regular A.A. program but were not even offered in the off-site extension program; faculty were also different in the two programs. As a result of these and other differences, NYSED, through its Deputy Commissioner for Higher and Professional Education (Donald J. Nolan), notified both Molloy and ED in 1993 that the off-site extension program was not the same as the regular A.A. program and, thus, was not registered by NYSED. Thomas Sobol, NYSED's Commissioner of Education, upheld Dr. Nolan's determination that the off-site extension program was not registered with NYSED.

Molloy contends that the off-campus program was offered at "extension sites," which, unlike "extension centers," do not have to be separately registered under New York law. I disagree, based upon the discussion of applicable New York State law contained at pages 3-4 of SFAP's reply brief. NYSED's official determination, upheld by its highest official, was that the

off-campus program was different from the registered regular on-campus A.A. program and, thus, had to be separately registered by the state. In the absence of that registration, it was not legally authorized by New York State. Therefore, Molloy's arguments to the contrary notwithstanding, the off-site extension program fails to satisfy the definition of "legally authorized" contained at 34 C.F.R. § 600.2. As a result, pursuant to the statutes and regulations discussed above, the students attending this off-site extension program were not enrolled in a legally authorized program and, thus, were ineligible to receive Title IV funds.

In its second line of defense, Molloy asserts that NYSED's decision that the Liberal Arts program offered at extension sites was not registered was belated, procedurally irregular, and erroneous. Nonetheless, I am not inclined to question the timeliness, regularity, or accuracy of NYSED's ruling. Previous decisions by the Secretary of Education have declined to inquire into the propriety of decisions of the state education agency in matters similar to these. See *In the Matter of Gulf Coast Trades Center*, Dkt. No. 89-16-S, U.S. Dep't of Educ. (Decision of the Secretary) (Oct. 19, 1990), at 2-3. Even if I were inclined to inquire into these matters, this would not help Molloy. Molloy questions NYSED's timeliness, arguing that both ED and NYSED knew of and questioned its off-campus A.A. program in 1989, yet did not inform the school that the program was not legally authorized until 1993. However, Molloy's judgment is also subject to question, given that it knew as early as 1989 that both ED and NYSED were questioning the program, yet continued for several years to request federal funds to enroll students in this program. Moreover, Molloy's argument that ED was authorizing its off-campus A.A. program by issuing an institutional eligibility notice in 1990 is incorrect. As that notice specifically states, "[t]he eligibility of an institution or school to participate in a Federal assistance program DOES NOT APPLY TO ANY EDUCATIONAL PROGRAM OFFERED BY THE INSTITUTION WHICH DOES NOT MEET ALL STATUTORY AND REGULATORY REQUIREMENTS FOR ELIGIBILITY." As for the regularity and accuracy of NYSED's decision, I note that the decision was made by the appropriate authority within NYSED and that NYSED's highest official affirmed that ruling. I also note that, despite Molloy's repeated assertions that the off-campus program was the same as the main campus program, the evidence supports NYSED's conclusion that there were substantial differences between these two programs.

Molloy also argues that SFAP is attempting to make each and every detail of state regulation a pre-condition of eligibility. That is not the case here. Molloy's compliance with state regulations generally is enforced by NYSED, not by SFAP. However, compliance with certain state regulations, such as legal authorization by the state, is mandated by federal law as a required pre-condition to receive Title IV funds. Molloy's failure to obtain legal authorization from NYSED for its off-site extension program is fatal to the Title IV eligibility of students enrolled in that program.

As for Molloy's claim that NYSED's decision was non-final because the school is attacking this ruling collaterally both in court and before the New York State Comptroller, I agree with SFAP that the fact that an agency ruling is being attacked in the courts does not make it any less final. I also reject Molloy's contention that the decision by Dr. Nolan was non-final.

This decision was upheld by the highest official of NYSED, the Commissioner of Education, as NYSED's final determination. Molloy's action before the Comptroller involves the state's demand for Molloy to repay several million dollars in state higher education assistance funds disbursed to ineligible students enrolled in the off-site extension program and is a direct result of NYSED's ruling that this program was not registered. The New York State Comptroller does not have any authority to determine whether or not an educational program is legally authorized. That authority is granted solely to NYSED. N.Y. Comp. Codes R. & Regs. tit. 8, § 52.1(b) (1991). In fact, the letter from the President of the New York State Higher Education Services Corporation (HESC), a state agency that acts in conjunction with the Comptroller in determining

Molloy's liability for state higher education assistance funds, to Molloy specifically states that while the President of HESC has discretion to grant an administrative hearing to Molloy, he "does not have authority to review matters within the sole jurisdiction of the State Education Department, and such matters will not be considered in any administrative dispute." Moreover, Molloy's argument that NYSED did not follow the proper de-registration procedure misses the point. The issue here is not whether NYSED followed the proper de-registration procedure, but whether Molloy's off-campus A.A. program was ever registered in the first place.

Under 34 C.F.R. § 600.10(c)(3), if an institution incorrectly determines that its educational program satisfies all applicable statutory and regulatory provisions, the institution must repay to the Secretary all Title IV, HEA program funds received by or on behalf of students who were enrolled in that educational program. For this reason, Molloy's claims that the school should not be liable for repayment of funds because of its good faith, full disclosure, and lack of notice are irrelevant. However, because 34 C.F.R. § 600.10(c)(3) became effective with the 1988-89 award year, Molloy argues that it is not applicable to the 1987-88 award year and, therefore, ED has no authority to recover funds disbursed for that award year. This argument, too, is without merit. Previous decisions have held that the Department is entitled to repayment of Title IV funds received by a school if that school was not an eligible institution at the time that it received those funds, regardless of the date of the award year, the school's good faith, full disclosure, or lack of notice. In *In the Matter of Academia La Danza Artes del Hogar*, Dkt. No. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992), aff'd by the Secretary (Aug. 20, 1992) , the tribunal ruled that the Department was entitled to repayment of Title IV funds from the school even though it was the Department, itself, that was grossly negligent in erroneously determining that the school was an eligible institution. That holding was even broader than the situation here, where it was the school, rather than the Department, that erroneously determined that its program was eligible. Therefore, Molloy must refund all Title IV funds expended on students enrolled in the ineligible off-site extension program during award years 1987-88 through 1992-93. See also *In the Matter of Pan American School*, Dkt. No. 91-94-SA, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 12, 1995), at 3.

In conclusion, Molloy has failed to satisfy its burden of proving that its questioned expenditures were proper and that it complied with program requirements. 34 C.F.R. § 668.116(d) .

ORDER

Based on the foregoing, it is hereby--

ORDERED, that Molloy College must refund to the U.S. Department of Education the $6,892,901 requested in the Partial Final Program Review Determination.

_____

Judge Richard F. O'Hair

Issued: March 1, 1995
Washington, D.C.

S E R V I C E

A copy of the attached initial decision was sent by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED** to the following:

David B. Rigney, Esq.
Lankenau Kovner & Kurtz
1740 Broadway
New York, NY 10019

Elizabeth B. Heffernan, Esq.
Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth St., N.W.
Washington, D.C. 20004-1109

Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Avenue, S.W.
Washington, D.C. 20202-2110