IN THE MATTER OF Muscular Therapy Institute,
Respondent.

Docket No. 94-79-SP
Student Financial Assistance Proceeding

Appearances: Leigh M. Manasevit, Esq., Brustein & Manasevit, of Washington, D.C., for Muscular Therapy Institute.

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

Before: Judge Ernest C. Canellos.

DECISION

On February 18, 1994, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a **final program review determination** (FPRD) finding that for award years 1989-90 through 1991-92 Muscular Therapy Institute (MTI) disbursed Federal student financial assistance funds in violation of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq*. The FPRD requires MTI to repay the holders of guaranteed student loans See footnote 1 $2,246,070 and repay ED interest and special allowances and Federal Pell Grant program liabilities totaling $150,507. Although the FPRD included eighteen findings against the institution, MTI only challenges four of those findings in this proceeding. See footnote 2

For the reasons stated below, I find that MTI failed to carry its burden of proof in this proceeding. Specifically, the institution failed to comply with Title IV regulations which require an institution measuring a student's academic progress in clock-hours to ensure that a student enrolled in the institution's programs maintains half-time status.

I

MTI is a proprietary institution of higher education licensed and accredited to offer postsecondary education programs within the Commonwealth of Massachusetts. According to MTI, the institution offers a muscular therapy education program that trains its students in skills that could ultimately assist individuals in recovery from injuries or in reduction in stress and muscular tension. MTI argued, and there is substantial evidence in the record to support its argument, that many of its graduates have been highly successful in achieving gainful employment as reflected in the institution's low default rates on Title IV loans disbursed to MTI's students. However, the gravamen of SFAP's allegation against the school does not involve the meritorious worth or quality of the school's programs. Instead, SFAP argues that during the

period at issue MTI was required to operate as a clock-hour institution, yet it failed to comply with Title IV regulations requiring institutions measuring student academic progress in clock-hours to ensure that a student enrolled in the institution's programs be *required* to enroll in at least the minimum number of clock-hours sufficient to enable the student to maintain half-time status. According to SFAP, for award years 1989-90 through 1991-92, none of MTI's students were enrolled in the muscular therapy program on at least a half-time basis. As such, the students were ineligible for Title IV student financial assistance pursuant to 34 C.F.R. §§ 682.200 and 690.2.

In its defense, MTI argues that the clock-hour regulations do not govern the school's participation in Title IV programs. According to MTI, the institution actually measured its students' academic progress in *credit hours* for Title IV purposes during the years at issue. In the alternative, MTI argues that it complied with the appropriate regulations by ensuring that its students enrolled in at least the minimum number of clock-hours sufficient to enable its students to maintain half-time status through classroom course work and substantial field work. See footnote 3

MTI claims that during the period at issue the pertinent regulations promulgated by the Commonwealth of Massachusetts were somewhat ambiguous regarding whether an institution, like itself, was required by state law to operate as a clock-hour institution. Not until July 1991 did the institution, according to MTI, become aware that state law required it to operate as a clock- hour institution. See footnote 4 Notwithstanding its argument that the governing state law was ambiguous, MTI concedes that the pertinent state law did, in fact, require the institution to operate as a clock-hour institution. See footnote 5 That being so, SFAP is clearly within its authority to apply the requirements governing clock-hour institutions to MTI. Simply stated, for award years 1989-90 through 1991- 92, MTI was required to measure its educational programs in clock-hours, for Title IV purposes, because the state in which the institution was licensed also required it to operate as a clock-hour institution. *See* 34 C.F.R. § 600.2 and 600.3 (1990). Accordingly, I find that the clock-hour regulations govern MTI's participation in Title IV programs during the period at issue.

As an alternative basis for supporting its expenditure of Title IV funds, MTI contends that it complied with the clock-hour regulations by ensuring that its students enrolled in at least the minimum number of clock-hours sufficient to enable its students to maintain half-time status through classroom course work and substantial field work. Therefore, the issue before me is 's 500 clock-hour practice massage sessions meet the definition of clock-hour and, consequently, may be used to measure a student's academic progress for the purpose of determining whether a student was eligible to receive Title IV financial assistance. The relevant provisions of Section 600.2 defines clock-hour as a period of time consisting of 50 to 60 minute class, lecture, or recitation in a 60 minute period or a 50 to 60 minute *faculty-supervised* laboratory, shop training, or internship in a 60 minute period.

MTI provided a 1200 clock-hour two-year muscular therapy program for which students attended 600 clock-hours in classroom instruction, performed 500 clock-hours in practice sessions, and received 100 clock-hours in non-classroom instruction on massage treatments. To complete 500 clock-hours in massage practice sessions, students performed massage therapy on

volunteers or friends in the home of the student or another familiar location. Faculty were not present during these practice sessions. SFAP argues that the fact that faculty were not present during the practice sessions indicates that the sessions were not faculty-supervised as required by Section 600.2. According to SFAP, after subtracting the alleged improper 500 clock-hour practice sessions from a student's program, the remaining 700 clock-hours are insufficient to qualify MTI students for half- time student status over the course of the two year program. In other words, SFAP argues that MTI students were ineligible to receive Title IV funds because MTI's program only included 700 permissible clock-hours over the course of a 24 month program. *See* 34 C.F.R. &3167; 682.200 and 690.2.

According to MTI, its students were eligible to receive Title IV funds because the 500 clock-hour practice sessions were properly included as part of the muscular therapy program for measuring a student's academic progress. In support of its position, MTI argues that its practice sessions meet the definition of clock-hour under 34 C.F.R. § 600.2. In MTI's view, since the term faculty- supervised was not defined in the regulation during the period at issue, the school should be permitted to interpret that term in a manner appropriate for the type of program offered by the school. According to MTI, it is standard practice in training programs aimed at developing a student's therapeutic skills to permit the student to conduct practice sessions without the direct supervision or intrusion of a faculty member. In this respect, according to MTI, students are able to learn to develop client/practitioner relationships and establish candor in evaluating the needs of their clients. As such, MTI does not require the presence of a faculty member or other school personnel when a student is completing a practice session. Instead, students are supervised by requiring them to submit to the school client session practice forms, which document that the session occurred and contains feedback on the student's performance from the volunteer client.

SFAP argues that MTI's interpretation of the term faculty-supervised contravenes the well-settled view of regulatory interpretation that in the absence of a regulatory definition, the words of a regulation are assumed to have their ordinary meaning. In this respect, SFAP argues that faculty-supervised means that the training session must be conducted in the presence of a faculty member. I am persuaded that the straightforward application of the plain meaning of the term faculty-supervised comports with SFAP's reading of the term. Although MTI makes much of the fact that there is no specific regulatory provision defining the term faculty-supervised, MTI points to no authority, and I know of none, that supports its position that in instances where a regulation does not define a term contained therein, specialized or narrow interpretations of the term should be preferred over the term's common and ordinary meaning. To the contrary, the weight of authority supports the position that the undefined words of a statute or regulation should be construed according to their ordinary sense, and with the meaning commonly attributed to them. See footnote 6 Indeed, absent indicia to the contrary, the very fact that a term is left undefined suggests that the drafters of the regulation intend that the terms be given their common and ordinary usage. Accordingly, I find that MTI failed to carry its burden of proof in establishing that the 500 clock- hour practice sessions conducted by its students meet the definition of clock-hour as set forth by 34 C.F.R. § 600.2. See footnote 7 Therefore, it was improper for MTI to use the 500 clock-hour practice sessions to measure its students' academic progress for the purpose of determining whether the students were eligible to receive Title IV financial assistance. In that regard, I find that for award years 1989-90 through 1991-92, MTI

students were ineligible to receive Title IV funds because the institution's students were not enrolled at least half-time in MTI's 24 month muscular therapy program.

II

Finally, MTI challenges SFAP's calculation of liability. According to MTI, pursuant to *In the Matter of Chauffer's Training School*, Dkt. No. 92-113-SP, U.S. Dep't of Educ. (Sept. 9, 1994) (*Chauffer's)* and a series of cases issued subsequent to *Chauffer's*, See footnote 8 I should reject SFAP's calculation of liability and, instead, calculate the institution's liability by applying the average of MTI's five year published cohort default rate against all improperly disbursed Title IV Federal Stafford and SLS loans received by MTI's students during the period at issue. In other words, MTI argues that I should apply what is often referred to as an actual loss formula to calculate the school's liability for improperly disbursed Title IV loans.

In its assessment of liability, SFAP determined that MTI was liable to the holders of Title IV loans for all unpaid balances that remain on Stafford and SLS loans certified by MTI from August 17, 1989, through July 21, 1993; that amount totaled $743,017.00 in Stafford loans and $1,503,053.00 in SLS loans. See footnote 9 In addition, SFAP found the institution liable to ED for $83,181 in improper Pell Grant disbursements and $70,926 in interest and special allowances. See footnote 10 At oral argument, SFAP conceded that the actual loss formula provides a fair basis for determining an institution's liability under the circumstances of this case and that it is currently used in cases of this type, but rejected adopting the formula for assessing MTI's liability because the formula had not been adopted by SFAP at the time the FPRD was issued. In addition, SFAP argues that MTI's improper expenditure of Title IV funds was so egregious that its request that MTI repay all remaining balances on Title IV loans disbursed during the period at issue is warranted.

Unquestionably, the actual loss formula has been relied upon by SFAP in prior cases as an alternative assessment of liability against an institution found to have improperly disbursed Title IV loans. More importantly, the decisions of this tribunal have consistently approved SFAP's use of the actual loss formula as a fair and accurate assessment of liability. *See, e.g., In the Matter of Selan's System of Beauty Culture,* Dkt. No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994); *In the Matter of Berk Trade & Business School,* Dkt. No. 93-170-SP, U.S. Dep't of Educ. (June 27, 1994). In those decisions, this tribunal has recognized that in cases, like this one, where the procedures set forth under Subpart H -- audit and program review regulations -- govern the proceeding, SFAP is entitled to recover losses directly attributed to the institution's improper expenditure of Title IV funds. In that respect, this tribunal has consistently held that use of the actual loss formula constitutes a fair calculation of the extent of ED's losses where it is determined that an institution has improperly disbursed Title IV loans. Consequently, on the basis of the record, I see no reason to depart from the current use of the actual loss formula. Accordingly, I find that the use of the actual loss formula in this proceeding is appropriate.

The actual loss formula measures the estimated loss to ED that has or will result from ineligible loans certified by the institution. Under the formula, an institution's cohort default rate is multiplied by the total amount of ineligible loans disbursed during a given award year to yield an

estimated expenditure of defaulted loans. This estimate is added to estimated loan subsidies and special allowance payments (ISAs) made by ED during the award year to yield the actual loss formula liability. In this case, the parties do not dispute that MTI's current five- year-average cohort default rate is 2.8%. The FPRD indicates that the total amount of ineligible loans disbursed by MTI was $2,246,070.00 and that MTI's ISA liability totals $67,326.00. Consequently, MTI is liable to ED for $130,215.96 for improperly disbursed Title IV loans, as calculated under the actual loss formula, and must repay ED $83,181.00 for improperly disbursed Pell Grants. Accordingly, the institution's total liability to ED is $213,396.96.

FINDINGS

I FIND the following:

1. For award years 1989-90 through 1991-92, MTI was required to measure academic progress in its muscular therapy program in clock-hours, for Title IV purposes.

2. MTI failed to carry its burden of proof in establishing that the 500 clock-hour practice sessions conducted by its students met the definition of clock-hour as set forth by 34 C.F.R. § 600.2.

3. For award years 1989-90 through 1991-92, MTI students were ineligible to receive Title IV funds because the institution's students were not enrolled in at least 12 clock-hours of instruction per week over the course of MTI's 24 month muscular therapy program.

4. The use of the actual loss formula in this proceeding is appropriate.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that Muscular Therapy Institute pay to the United States Department of Education the sum of **$213,396.96.**

SO ORDERED:

Ernest C. Canellos
Chief Judge

Issued: July 14, 1995
Washington, D.C.

Footnote: 1 *The Title IV loans disbursed by MTI include the Stafford Loan and the Supplemental Loan for Students, authorized by 20 U.S.C. § 1071, 1078-1 and 1078-2.*

Footnote: 2 *According to MTI, its appeal is limited to the issues included under Findings 2 (ineligible program), 3 (inadequate recordkeeping), 4 (ineligible students), and 7 (failure to*

monitor satisfactory academic progress). At oral argument, SFAP conceded that the ultimate issue before me involves Finding 4. Apparently, SFAP withdrew Finding 2, and Findings 3 and 7 assess the same liability noted in Finding 4.

Footnote: 3 *As part of a student's field work, students completed 500 clock-hours of their program by participating in practice therapy sessions held in the student's home or other similar environment outside of MTI's Student Therapy Center. During these sessions, students practiced muscular therapy treatment techniques on volunteers, friends, and others. Once a session was completed, students were required to have the participant complete a Practice Session Client Form, which provided comments about the practice session. The form was then submitted by the student to a member of MTI's staff.*

Footnote: 4 *In 1993, Massachusetts revised its law governing proprietary institutions and permitted those institutions to operate as clock-hour or credit-hour institutions.*

Footnote: 5 *I am unpersuaded by MTI's argument that its reliance upon the advice of a financial aid consultant excuses the institution's failure to comply with the law of the State in which it is licensed to operate. More importantly, I am unconvinced that the regulation, to which the school refers, is ambiguous. The regulation states, in pertinent part, that the length of all courses of study must be defined in terms of instructional hours or clock-hours. See MTI Opening Br. at 7 n.8. Consequently, it seems obvious that the regulation requires MTI to measure course length or academic progress in terms of clock-hours. Moreover, if the regulation were ambiguous, MTI declined to explain the ambiguity.*

Footnote: 6 *See, e.g., Peoples Drug Stores, Inc. v. Dist. of Columbia, 470 A.2d 751, 753 (D.C. 1983).*

Footnote: 7 *In this proceeding, the institution has the burden of proving that the questioned expenditures were proper. 34 C.F.R. § 668.116(d); see also In the Matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dep't of Education (Decision of the Secretary) (September 26, 1991). Consequently, to sustain its burden, the institution must present a compelling showing that its students enrolled in a program that required completion of a sufficient number of clock-hours that meet the requisite regulatory requirements.*

Footnote: 8 *Chauffer's is currently on Appeal to the Secretary.*

Footnote: 9 *Although the underlying program review conducted by SFAP only covered a three year period from July 1, 1989, through June 30, 1992, the FPRD assessed liabilities up through July 21, 1993, based on information received from the institution in response to the program review. In addition, the FPRD imposed liabilities against MTI for improper Title IV loans disbursed subsequent to July 21, 1993. However, the record contains no indication whether, or in what amount, MTI made Title IV loan disbursements during this subsequent period. Consequently, I decline SFAP's invitation to uphold the liability it has assessed against MTI for Title IV disbursements that may have been made after July 21, 1993.*

Footnote: 10 *Interest and special allowances (ISA) are recoverable from an institution even though ISA payments are made to a third-party Title IV program participant. 34 C.F.R. § 682.609. Under the ISA benefit, ED pays lenders a portion of the interest that accrues on a Stafford or GSL on behalf of eligible student borrowers, and also pays a percentage of the average unpaid principal balance of the loan -- called a special allowance -- while the student remains eligible for the ISA benefits. See 34 C.F.R. Part 682, Subpart C.*