UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

MICROCOMPUTER TECHNOLOGY INSTITUTE, **Docket No. 94-88-SA**[1]

Student Financial Assistance Proceeding

Respondent.

Appearances: J. David Thompson, Esq. & Christopher B. Gilbert, Esq., Bracewell & Patterson, of Houston, TX, for Microcomputer Technology Institute.

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

Before: Judge Ernest C. Canellos

DECISION ON REMAND

Microcomputer Technology Institute (Microcomputer) is a vocational education institution that in the late 1980's entered into an agreement with certain privately operated prison facilities in Texas to provide training programs for inmates. Microcomputer awarded federal student financial assistance funds to inmate-students to cover the cost of attendance, which purportedly included tuition costs, living expenses, and other associated costs for enrollment in courses offered by Microcomputer as part of its contractual agreement with the State of Texas.

In 1994, the office of Federal Student Aid (FSA)[2] brought a recovery of funds action against Microcomputer alleging that, in violation of Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1070 *et seq.,* the institution had improperly disbursed $8,139,146 in Pell Grant Program funds to incarcerated students in Texas state prisons for the period July 1, 1988, through June 30, 1993. The institution challenged the allegation in administrative proceedings before the tribunal.

At the completion of the proceedings, the tribunal issued a decision upholding FSA's findings. Subsequently, the Secretary affirmed the tribunal's decision. Microcomputer then filed suit seeking a declaratory judgment and an injunction. The United States District Court for the Southern District of Texas granted summary judgment in favor of Microcomputer, and ruled

[1] This decision was initially issued with the erroneous docket number: 94-98-SA.
[2] The office that brought the initial action was the predecessor to FSA, the Office of Student Financial Assistance Programs.

that the Department could not recover the funds at issue. In the district court's view, the Department had improperly applied a new policy retroactively. The Department appealed to the Court of Appeals for the Fifth Circuit, which vacated the district court's judgment, and advised the district court on remand to determine what portion of the total amount collected by Microcomputer was attributable to the living expenses component of the Pell Grant -- and thus must be refunded to the government -- and what portion was attributable to the tuition component that cannot be "disgorged retroactively." In other words, the Fifth Circuit ostensibly agreed with the district court on the finding regarding the institution's lawful tuition charges for cost of attendance, but rejected the district court's finding regarding the institution's charges for living expenses as a cost of attendance; those charges were improper under the Fifth Circuit's analysis. In response to the remand, the district, after oral presentation by the parties, remanded this case to the Secretary.

On October 11, 2001, the Secretary issued an order remanding the case to the tribunal to determine: "whether the doctrines of waiver, estoppel, or selective enforcement alter the portion of Pell Grant liability upheld by the Fifth Circuit." The Secretary noted that the April 27, 1998 opinion of the Fifth Circuit establishes the law of this case. The guidance provided by the Secretary's order makes it apparent that the institution's Pell grant liability is already established by the Fifth Circuit's opinion and, therefore, will not be altered by this tribunal's review unless Microcomputer prevails on its waiver or selective enforcement defenses.

It is worth noting that in addition to ruling on the merits of FSA's assessment of Microcomputer's Pell grant liability, the Fifth Circuit ruled on Microcomputer's equitable estoppel argument. In doing so, the Fifth Circuit rejected the institution's defense by holding both: [1] that the Circuit's prior decisions had never "found any situation in which estoppel would be warranted" against the federal government and [2] that the Supreme Court has foreclosed the application of equitable estoppel in cases like this one, where the disbursement of federal funds at issue were unauthorized at the outset.[3] Consequently, in applying the binding precedent of the Fifth Circuit and the Supreme Court to this case, it is firmly established that Microcomputer cannot seek harbor within the doctrine of equitable estoppel. Instead, the institution must show that the equitable doctrines of waiver or selective enforcement have some bearing on its liability.

In its submissions in this proceeding, Microcomputer asserts that in light of the Fifth Circuit opinion, the district court remanded this case to the Secretary to provide the institution with an evidentiary hearing to create a "new record" on waiver, estoppel, and selective enforcement.[4] In this regard, Microcomputer argues that it should be permitted the opportunity

[3] The Fifth Circuit's holding was based on its conclusion that a plain reading of the HEA supported FSA's argument that the institution "was never entitled to make awards based on [an inmate's living expenses] and could never reasonably have believed that it was." *See also Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

[4] Although the institution repeats and recasts its estoppel argument in each of its submissions, the institution's road to estoppel has dead-ended. The Fifth Circuit ruled on the question as a matter of law, and that holding is binding upon the parties until or unless the Fifth Circuit reconsiders it. Microcomputer makes no claim of "waiver" that is distinct from its estoppel argument. Nor is it

to "conduct discovery" in order to show that from 1988 to 1992, FSA permitted institutions that enrolled inmate-students to claim living expenses in their calculation of the institution's cost of attendance, which ultimately allowed institutions to obtain Pell grant funds to cover those costs. With the evidence it would procure from discovery, Microcomputer further argues, the institution would persuade the tribunal that the institution is entitled to relief under the doctrines of waiver or selective enforcement since the evidence would show that the institution was not permitted to calculate its cost of attendance in the same manner as other similarly situated institutions.

In response to Microcomputer's arguments, FSA argues that the tribunal should reject Microcomputer's equitable arguments because the institution has not come forward with evidence to support those claims. In addition, FSA urges that the institution's discovery request should be denied because the tribunal is without authority to grant it. Finally, FSA argues that Microcomputer's liability is determined by a stipulation entered into by the parties subsequent to the issuance of the Fifth Circuit opinion in this case; namely, that Microcomputer's improperly disbursed Pell grant funds total $2, 940, 677.25.

On the basis of these arguments, the tribunal, first, will consider Microcomputer's discovery request and, subsequently, the institution's equitable defenses.

I. Microcomputer's Request to Open the Record

A Subpart H proceeding is an administrative forum for an institution to challenge a final audit or program review determination that finds that an institution fails to meet a statutory and regulatory requirement under the HEA and, as a result, owes a liability to the federal government. Neither the HEA, nor the regulations that implement it, provide an institution with discovery. Instead, the regulations expressly deny the tribunal the authority to order discovery under Subpart H proceedings in recognition that these proceedings are not intended to mimic the often extensive and time-intensive proceedings of a civil court trial.[5]

Moreover, even if discovery were permitted in this proceeding, Microcomputer points to no rule or doctrine, and the tribunal is not aware of any, that would require ordering the discovery of documents that are pertinent to the preparation of selective-prosecution claims. Indeed, where such discovery rules are relevant, those rules apply only to the preparation of the "defense" against the government's case in chief, not to claims raised as affirmative defenses. Accordingly, the tribunal finds that it is without authority to order discovery, and were the power

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pertinent that the district court's order remanding this case to the Secretary contained the words "waiver" and "estoppel" rather than "detrimental reliance." Contrary to the claims of Microcomputer, each of these equitable defenses are recasts of the same argument that the Fifth Circuit rejected with regard to the inclusion of inmate living expenses as a cost of attendance.

[5] Section 668.117(b) provides that: "[t]he hearing official is not authorized to…compel discovery…"

to order discovery vested in the tribunal, ordering discovery would be inappropriate for the matter presented. The institution's motion to open the record for discovery is denied.

II. Microcomputer's Equitable Defenses

As noted supra, the Secretary remanded this case to the tribunal to determine whether the equitable defenses raised by Microcomputer have any bearing on the institution's liability as determined by the Fifth Circuit. It is worth noting that the tribunal's ruling on Microcomputer's discovery request does not, itself, foreclose the institution's argument that the record remanded in this case - - along with the institution's submissions in this proceeding - - constitutes persuasive evidence supporting the institution's equitable defenses.

To prevail on a claim of selective prosecution or to show that an institution has been singled out by FSA in some illicit manner, Microcomputer must, first, make a threshold showing that FSA declined to enforce the HEA against other similarly situated institutions. This is a rigorous threshold standard. A lower threshold standard would run the risk of imposing a significant barrier to the effectiveness of law enforcement by forcing the government to litigate unsubstantiated or entirely baseless claims of selective enforcement. When a regulatory body or law enforcement official exercises discretion to enforce the law, a presumption of regularity arises that, in the absence of clear evidence to the contrary, the regulatory body has acted properly in discharging its official duties.[6] In this light, the institution has not demonstrated that the law has been enforced against it in any unique or unusual manner, much less against a class of similarly situated institutions. Indeed, Microcomputer fails to present a footprint of evidence pertinent to its claim.

Instead, Microcomputer makes a bare allegation that the institution has been required to comply with cost of attendance regulations in a manner that other institutions have not; who these others are is presumably left to FSA to ferret out. In direct contravention of the presumption of regularity, Microcomputer persists that upon the institution's assertion that FSA has not enforced the laws even-handedly, FSA must carry the burden of producing evidence concerning "each and every educational entity" that disbursed Pell grant funds to inmate-students over a 10-year period from 1985 through 1995. In the institution's view, FSA should be required to comply with a request that FSA produce all policy documents, all electronic mail, all agency administrative decisions, and all internal memoranda that relate to the institution's selective prosecution claim for the 10-year period deemed relevant. Of course, Microcomputer's assertion is precisely the type of barren claim that the presumption of regularity is directed to thwart. The institution has not presented a claim sufficient to rebut the presumption of regularity; rather than presenting clear evidence to the contrary of the presumption, the institution presents no evidence. To find that mere allegations are sufficient to rebut the presumption of regularity would not only create administrative burdens and inefficiencies for FSA in this case, but would risk imposing serious disruption to FSA's ability to meet its regulatory enforcement obligations in any of its cases.

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[6] *See, e.g., United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) and *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978).

Moreover, the record contains compelling evidence that if Microcomputer could rebut the presumption, it, nonetheless, would not succeed on its claim of selective enforcement. On this point, the record is clear: Microcomputer along with four other institutions - - two in Massachusetts, one in Texas, and one in Arkansas - - were assessed liability for improper disbursements of Pell grant funds in connection with educational programs directed toward inmates.[7] Moreover, FSA proffers that prior to the 1993-94 award year, it did not maintain records that segregated institutions by status of whether an institution had inmate-students. The 1993-94 award year is the only year for which FSA maintained data from which to segregate institutions receiving Pell grant funds for inmate-students. Subsequent to the 1993-94 award year, Congress amended the HEA to remove Pell grant fund eligibility for inmate-students. Even in the 1993-94 award year, where FSA can determine the number of inmate-students who received Pell grant funds, those students account for less than one percent (1%) of all Pell grant recipients.[8] In this light, there is no logical reason to conclude that FSA engaged in a scheme to selectively enforce the HEA against Microcomputer using inmate-students as a class or subset upon which to base the selective enforcement. Accordingly, the calculation of institution's Pell grant liability is governed by the holding of the Fifth Circuit opinion in this case. The equitable defenses raised by Microcomputer have no bearing on that calculation, and the parties have stipulated to that amount.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that Microcomputer Technology Institute pay to the United States Department of Education the sum of $2, 940, 677.25 in liability.

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Ernest C. Canellos
Chief Judge

Dated: May 20, 2002

[7] Although a liability was assessed against each of the four institutions, only one had been found to violate the HEA in substantially the same manner as Microcomputer. Even so, there is no reason to assume that the auditors overlooked a matter as apparent as whether the other institutions had unlawfully received Pell grant funds for the living expenses of inmates.

[8] Microcomputer makes much of the fact that a GAO report, a copy of which was submitted as an exhibit to its brief, indicates that three percent (3%) of institutions that received Pell grant funds (or 269 schools out of 9,468) enrolled inmate-students who received Pell grant funds. According to Microcomputer, this statistic "strongly indicate[s]" that nearly 269 institutions were likely similarly situated to it, and that the GAO finding bolsters its position that these schools not only relied upon FSA's advice in disbursing funds for living expenses to incarcerated students, but supports its argument that it was selectively prosecuted. The former argument is a rehash of the equitable estoppel claim, which has been authoritatively answered; the latter argument is rejected by this decision.

SERVICE

A copy of the attached document was sent to the following:

J. David Thompson III, Esq.
Christopher B. Gilbert, Esq.
Bracewell & Patterson
711 Louisiana Street
Suite 2900
Houston, TX 77002-2781

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