

-----  
**In the Matter of**

**Docket No. 94-89-SA**

**Boston Architectural Center, Student Financial Assistance Proceeding**

**Respondent.**  
-----

Appearances: Jeffrey F. Jones, Esq., and Mary Ellen Alessandro, Esq.,  
Boston, Massachusetts, for Boston Architectural Center.

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

Before: Frank K. Krueger, Jr., Administrative Judge.

**INITIAL DECISION UPON RECONSIDERATION**[See footnote 1 /](#)

## **INTRODUCTION**

The Boston Architectural Center, the Respondent in this proceeding, has participated in the Federal student financial assistance programs for a number of years. On March 23, 1994, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued a Final Audit Determination regarding an audit conducted by Melanson, Greenwood & Co., Certified Public Accountants, concerning Respondent's administration of the student assistance programs for the award years 1983-84 through 1988-89. Although the program regulations require that audits be conducted every two years, this audit covered a five-year period. Respondent paid an administrative fine of \$2,000 in 1990 for its failure to conduct the required biannual audits.

The auditor made a number of specific findings which were adopted in the Final Audit Determination and are part of this appeal. The auditor was unable to locate a large number of documents necessary to validate that the Respondent was complying with ED program requirements concerning the filing of Statements of Selective Service Registration Status and Statements of Educational Purpose by students receiving aid, the determination by Respondent of satisfactory academic progress of participating students, and the verification of the half-time status of students. The auditor also found that Respondent incorrectly calculated Pell Grants resulting in some improper awards, failed to perform proper verification procedures in order to ensure that information provided by applicants for Federal student aid was accurate, and maintained some excess cash for Pell Grants. For all of the violations, SFAP determined that the Respondent must repay ED \$116,960 for improperly awarded Pell Grants, and buy back \$153,299 in outstanding balances for unauthorized Guaranteed Student Loans (GSLs).

As part of this appeal, the Respondent advances a number of factors which it believes justify the waiver of liability in this case. Alternatively, Respondent submits a number of documents which it believes demonstrate that it complied with many of the program requirements cited as violations by the auditor, and, thus, substantially reduces its liability. [See footnote 2 2](#) As discussed specifically below, the documents submitted by the Respondent justify some partial reduction in its liability.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I. Waiver of Liability**

Respondent argues that the regulations allow the Secretary of Education to waive reimbursement for noncompliance with the program requirements of the Federal student aid programs. Respondent cites a number of factors which it believes demonstrate that it is in the best interest of the United States to waive reimbursement; *e.g.*, its work curriculum, low tuition, volunteer faculty, and unique commitment to community development. Respondent also argues that principles of equity require the Secretary to waive reimbursement as, due to the passage of time, many of the records at issue cannot be found, and SFAP has recently approved audits submitted by the Respondent for the 1990-91 and 1992 award years.

Although the Secretary may have the authority to waive reimbursement, it is clear that the hearing official has no such authority. The regulations governing this proceeding, at 34 C.F.R. § 668.117(d) provide as follows:

The hearing official is bound by all applicable statutes and regulations. The hearing official may not --

- (1) Waive applicable statutes and regulations; . . . .

Even though the Secretary's Decision issued in *Baytown, supra*, provides that the hearing official may waive certain procedural requirements specified in the regulations governing audit appeals, the hearing official cannot waive substantive program requirements.

### **II. Missing Documentation.**

#### **A. Statements of Selective Service Status.**

Under 34 C.F.R. § 668.33, an institution participating in the Federal student aid programs must ensure that all participating students file with the institution a Statement of Registration Status, certifying that the student is registered with the Selective Service System or is not required to register. An institution may waive the requirement that the statement be filed for each academic year if the institution has a valid statement on file and the student's status has not changed. *Id.* at 668.33(e). According to the audit, this documentation was missing from the files

of 24 students. In its brief, Respondent contends that Exhibits 3 and 4 account for eleven of the 24 students, for a reduction in its liability in GSLs.

Exhibit 3 contains a Registration Verification form from the Selective Service System which shows that four students were registered with the Selective Service System -- J.E.D. (#7), J.A.S. (#29, #174), M.S.K. (#228), and M.P.K. (#260). [See footnote 3 3](#) The audit work paper summaries

submitted with Respondent's Reply Brief indicate that the four students received GSLs in the amount of \$10,325. J.A.S. (#174) also received a Pell Grant for \$750. Respondent contends that it should have no liability for these students. However, the regulatory requirement of 34 C.F.R. § 668.33 is that participating institutions have copies of Statements of Registration Status for all participating students, not that students are registered with the Selective Service System. The fact that these four students were registered is irrelevant to whether Respondent was in violation of 34 C.F.R. § 668.33. Asking the hearing official to reduce liability for these students is, in effect, asking the hearing official to waive the requirements of the regulation which, as discussed above, is specifically proscribed by 34 C.F.R. § 668.117(d). Although the hearing official may be able to waive certain procedural requirements in the interest of fairness in conducting an audit review, section 668.117(d) makes it clear that the hearing official lacks the necessary discretion to waive substantive program requirements. In addition, the Pell Grant awarded to J.A.S. (#174) was also questioned by the auditor since Respondent did not have a Statement of Educational Purpose on file for J.A.S. for that award year. Consequently, even if Respondent is excused for not having a Statement of Registration Status on file for this student, Respondent would still be liable for the Pell Grant because of the absence of a Statement of Educational Purpose.

Respondent claims that additional records submitted as part of Exhibit 3 show that six additional students whose records were found wanting of the required Statement of Registration Status were not required to register. However, the records offered are illegible and it is not intuitively obvious how the records prove that students were not required to register and Respondent provides no explanation. Thus, these records must be rejected.

Exhibit 4 is a Financial Aid Report issued by ED for R .S. (#272), whose file was reviewed by the auditor, and found to be without a Statement of Registration Status. R. S. received a GSL for \$1,282 in 1988-89. The Financial Aid Report contains a valid Statement of Registration Status signed by this student. Respondent is in compliance with section 668.33 with respect to R.S., and thus has no liability for R.S.'s loan.

## **B. Statements of Educational Purpose.**

Under 34 C.F.R. § 668.32, in order for a student to be eligible for Federal aid, the student must file with the participating institution a Statement of Educational Purpose, certifying that the student will use the funds received solely for educational expenses at the institution where the student is enrolled. The certification must be filed for each award year. *Id.* The auditor was unable to find this required certification for 23 students receiving Federal aid. Respondent submits several exhibits which it contends should reduce its liability for eight students.

Exhibit 5 contains files for two students which include the Statement of Educational Purpose. Exhibit 5 demonstrates that C. M. D. (#222, #255), who received GSLs for Award Years 1987-88 and 1988-89 for \$1,500 each year, signed a valid Statement of Educational Purpose on August 31, 1987. Thus, Respondent is not liable for the 1987-88 GSL. Since there is no certification for award year 1988-89, Respondent remains liable for that loan. Exhibit 5 also demonstrates that M. T. (#206, #238), who received GSLs for 1986-87 and 1987-88 for \$2,500 each year, signed a valid Statement of Educational Purpose on August 15, 1987. Thus, Respondent is not liable for the 1987-88 GSL. Since there is no Statement for award year 1986-87, Respondent remains liable for the loan awarded for that year.

Exhibit 6, presumably, contains loan applications for six students who provided the required certification on their applications. However, three of the applications are almost totally illegible and five do not contain the certifications. Concerning the latter five, Respondent's brief explains (footnote 5, page 11) that the lending institution which made the loans only kept the first pages on the loan applications on microfiche, but that an officer of the company confirmed that the second pages contained the required Statements of Educational Purpose. It is not clear from the brief whether the loan company officer "confirmed" that the second pages contained the form for the required Statement, or that the students who completed the applications actually signed the Statement. In any event, this exhibit cannot be given probative value based on this secondhand representation by counsel in their brief.

### **C. Academic Progress.**

According to the audit report, twenty-eight student files lacked the necessary documentation to ascertain whether the Respondent had determined whether the students were making satisfactory academic progress as required by the regulations. In response, the Respondent contends that four of the students whose files lacked the necessary determination actually graduated and submits, as part of Exhibit 7, transcripts for four students. Exhibit 7 demonstrates that three students -- D. R. H. (#14), E.T. (#158), and T.M. (#45) -- graduated. However, 34 C.F.R. § 668.7(c) requires that participating institutions make a determination that participating students are making satisfactory educational progress, not that the students actually graduate. The fact that the students graduated is irrelevant to this audit finding. Exhibit 7 also contains a document represented as a transcript for C.C. (#4, #128), but the so-called transcript lists no courses, grades, or credits. Thus, the evidence concerning this student is rejected as irrelevant and as unreliable.

In addition, Respondent argues that the regulations at 34 C.F.R. § 668.7(c)(2) require that the determination of academic progress be made only after the completion of a student's second academic year of attendance at the institution, and that three of the students at issue had not completed their second years before the end of the award year in question. In support, the Respondent proffers Exhibit 8, which contains transcripts for three students -- S.M., P.E.S. (#30), and J.P. (#197, #234). However, S.M. does not appear on the list of students whose files were reviewed by the auditor. Although the transcript for P.E.S. shows that he had just completed his freshman year when the auditor found that his file lacked evidence of a determination of academic

progress, the auditor also found that P.E.S. had not filed a Statement of Registration Status as required by 34 C.F.R. § 668.33; thus the Respondent remains liable for the GSL (\$2,500) awarded to this student for 1983-84.

The auditor questioned the file for J.P. for two award years -- 1986-87(#197) and 1987- 88 (#234). J.P.'s transcript shows that for the 1986-87 award year, he had just started his second year at the Boston Architectural Center, although he had transferred a large number of credits from community college. Under 34 C.F.R. § 668.7(c)(2), Respondent was not required to make a determination of academic progress because J.P. had not yet completed two academic years at the Boston Architectural Center. Respondent is not, therefore, liable for J.P.'s GSL for the 1986-87 award year (\$2,500). However, Respondent should have made a determination for the 1987-88 award year, and remains liable for J.P.'s GSL for the 1987-88 award year (\$2,500).

### **E. Half-time Students.**

Under 34 C.F.R. § 668.7(a), in order for a student to be eligible for a GSL, the student had to be enrolled in a course of study on at least a "half-time" basis (six credit hours at the Boston Architectural Center). The auditor found that the half-time status of thirteen students was not documented, as required by the program regulations. Respondent argues that Exhibit 9, which is a student transcript and class roster, verifies that at least one student found to have lacked verification as half-time was, in fact, half time. The transcript appears to show that D.R. (#152) completed three credit hours in the Fall of 1985 and six credit hours in the Spring of 1986. The class roster shows that D.R. attended six of thirteen classes in another course not appearing on his transcript; he apparently dropped out of this course after attending six classes. From this Respondent argues that D.R. was a half-time student at the beginning of the Fall of 1985, when he was awarded the GSL questioned by the auditor, because he was enrolled in six credit hours of courses -- three credit hours from the course appearing on the transcript, and three credit hours for the course that he dropped. Although the class roster is labeled "Fall," it is not otherwise dated or verified. Again counsel seeks to have the hearing official rely on their unsworn and unqualified testimony in Respondent's brief. This evidence must be rejected, and Respondent remains liable for D.R.'s GSL.

### **III. Failure to Obtain Financial Aid Transcripts.**

Under 34 C.F.R. § 668.19, an institution must determine whether a student who is applying for assistance under the student aid programs has attended any other eligible institution. Before a student who has attended another eligible institution may receive aid, the institution or the student must request that each previously-attended institution provide a financial aid transcript to the institution the student will attend. The auditor found that for fiscal years 1984, 1985, and 1986, the Respondent did not have procedures in place to do this. In defense, Respondent argues that the regulations requiring this determination did not take effect until February 3, 1988, and thus its liability should be reduced accordingly. However, as noted by SFAP in its brief, the same requirements existed in the program regulations in effect during this period, *i.e.*, 34 C.F.R. §

668.14(1984, 85, and 86). Thus, the Final Audit Determination concerning the failure of the Respondent to fulfill these regulatory requirements is affirmed.

#### **IV. Other Issues Not Contested.**

The following additional violations were cited by the auditor: that Respondent incorrectly calculated some Pell Grant awards; that Respondent failed to perform the required procedure to verify information provided by applicants for student aid; and that Respondent had maintained an excess of cash for Pell Grants. Other than its argument that the Secretary should waive liability for all of the audit findings, Respondent makes no effort to contest these particular findings. In addition, Respondent makes no effort to contest the dollar calculations put forth in the Final Audit Determination. Therefore, the Final Audit Determination concerning these additional areas is affirmed.

#### **ORDER**

ORDERED, that the Pell Grants and GSL interest payments and special allowances for the violations identified in the Final Audit Determination be paid back to ED. It is further ordered that the remaining balances for the GSLs improperly awarded and identified in the Final Audit Determination be bought back from the lending companies, except that Respondent has no liability for the GSLs awarded to the following students: R.S. (#272, award year 1988-89, \$1,282); C.M.D. (#222, award year 1987-88, \$1,500); M.T. (#238, award year 1987-88, \$2,500); and J.P. (#197, award year 1886-87, \$2,500).

Issued: July 3, 1995

Washington, D.C.

\_\_\_\_\_  
Frank K. Krueger, Jr.

Administrative Judge

---

#### **S E R V I C E**

---

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

Jeffrey F. Jones, Esq.  
Mary Ellen Alessandro, Esq.  
Palmer & Dodge  
One Beacon Street  
Boston, MA 02108

Howard D. Sorensen, Esq.  
Office of the General Counsel  
U.S. Department of Education  
600 Independence Ave., S.W.  
Washington, D.C. 20202-2110

---

*Footnote: 1 1 On May 25, 1995, an initial decision was issued in this case. By letter dated June 13, 1995, the Respondent, through counsel, requested that the hearing official reconsider the May 25 decision to take into account the information submitted with its Reply Brief, dated November 28, 1994, which, for reasons not entirely clear, was never received by the Office of Hearings and Appeals. By order issued on June 15, 1995, the hearing official withdrew the May 25 decision in order to consider Respondent's Reply Brief.*

---

*Footnote: 2 2 Since the documents attached to the Initial Brief were proffered without any proof that the students covered by the records were the same students whose files were examined by the auditor, the hearing official rejected those records in the initial decision issued on May 25, 1995. As indicated in footnote 1, that decision was withdrawn in order to consider the information submitted with Respondent's Reply Brief. As an exhibit to its Reply Brief, Respondent submitted summaries of the audit sampling work papers which demonstrate that some of the student records submitted with Respondent's Initial Brief cover the same students whose files were reviewed by the auditor. Although the work paper summaries were not submitted in accordance with the rules governing these proceedings, see 34 C.F.R. § 668.116(e), in the interest of justice, and in the absence of any objection from SFAP, the summaries of the audit sampling were considered. See *In Re Baytown Technical School, Inc.*, Docket No. 91-40-SP, Decision of Secretary (April 12, 1994) (dealing with the admission of exhibits not conforming to the strict requirements of 34 C.F.R. § 668.116(e)). But see *In Re Gulf Coast Trades Center*, Docket No. 89-16-S, Decision of Secretary (October 19, 1990) (dealing with decision of administrative law judge to admit evidence not conforming to requirements of section 668.116(e), the creation of a requirement that witness testimony be heard as a matter of course, and disregarding 34 C.F.R. § 668.116(h) which provides that oral proceedings in audit appeals be held in Washington, D.C.).*

---

*Footnote: 3 3 Out of respect for personal privacy, individual students are referred to in this decision by their initials, with a cross-reference to the numbers appearing along side of their names on the summaries of the audit sampling work papers submitted with the Respondent's Reply Brief. If a student had his or her file reviewed for several award years, they will have a number for each year.*