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

In the Matter of

WARNBOROUGH COLLEGE,

Respondent.

Docket No. 95-146-EA

Emergency Action
Show Cause Proceeding

Appearances:
David B. Adler, Esq., Seattle, Washington, and Dr. John Walsh of Brannagh, Melbourne, Australia, for Warnborough College.

Paul G. Freeborne, Esq., and 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

By notice dated October 4, 1995, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (ED) imposed an Emergency Action against Warnborough College, Oxford, England, ("Warnborough" or "College") in accordance with the provisions of 20 U.S.C. § 1094(c)(1)(G) and 34 C.F.R. § 600.41 and 668.83. In response to that notice, on October 6, 1995, counsel for the College requested an opportunity to show cause why the emergency action was unwarranted.

Pursuant to a delegation of authority from the Secretary to conduct proceedings and issue final decisions in circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, I conducted a hearing on November 21, 1995. Evidence was submitted in the form of sworn testimony and documentary submissions, and oral argument was provided by counsel for both sides. 1 A transcript was made by a court reporter and a copy of such transcript was provided to each counsel. The parties were directed to and did submit timely post-hearing briefs.

According to the notice, the emergency action resulted from a determination by SFAP that the College was not an institution eligible to participate in the federal student financial assistance programs which are authorized under Title IV of the Higher Education Act of 1965, as amended, (Title IV), 20 U.S.C. § 1070 et seq. This determination was based upon a notice from the Education Department of the British Council, Washington D. C., dated September 29, 1995, and a notice from the Department for Education and Employment, Westminster, London, England, dated October 2, 1995, both to the effect that the College was not authorized to grant degrees in Great Britain. Since the College had applied and was certified as eligible to participate in the Title IV programs as a foreign degree granting institution, SFAP found that as a result of the information contained in the two notices, the College was not eligible. Although not pursued, the letter of notification alludes to the fact that the College is incorporated in Washington, D.C., and, therefore, should not have applied as a foreign institution in the first place.

Warnborough College raises four arguments in its defense to the emergency action. First, the emergency action is an abuse of discretion because, prior to the emergency action notice and since 1992, the institution had been continuously informed by ED that they were an eligible institution and the summary nature of the action is unfair - SFAP should be estopped from enforcing such action. Second, Warnborough claims it is a legitimate school where students earn credits which are transferable to approximately 200 colleges in the United States - these students are the beneficiaries of Title

IV aid. Third, it argues that there is no risk of loss of federal funds because, even if the College's eligibility to participate is ultimately terminated, students at the school may continue to receive Title IV student loans for the succeeding academic year. under the provisions of 20 U.S.C. § 1088(a)(2)(E), and I should order SFAP to continue to provide such funding. Lastly, it points out that 34 C.F.R. § 668.83 enumerates some specific examples of the appropriate use of emergency actions, all involving fraudulent activity, none of which are of the type of technical violation alleged here.

SFAP succinctly argues that Warnborough is ineligible to participate in the Title IV programs; providing federal student financial assistance to a student at such an ineligible school is automatically erroneous and violative of Title IV; Warnborough has failed to satisfy its burden of persuasion that the emergency action is inappropriate; and, finally, I have no authority to order continued funding under 20 U.S.C. § 1088(a)(2)(E), and, even if I did, that provision does not apply to Warnborough because the school was never eligible to participate in the Title IV programs.

During the course of this show cause hearing process, Warnborough has not disputed the fact that it is not authorized to issue degrees, nor has it presented any evidence that it was ever authorized to confer such degrees. In addition to its apparent concession that it is not authorized to grant degrees, at the November 21, 1995, hearing, neither of the College's counsel was able to explain why Warnborough's renewal Application for Institutional Eligibility, which was dated June 13, 1994, claimed that the college issued degrees in graduate, bachelor and associate degree programs, or why such claim was certified as accurate under penalty of perjury by the vice- president and registrar of the college. These unexplained discrepancies are crucial to a resolution of the issues raised in this case and surely explain ED's certification of the College as eligible. The College's protestations that SFAP failed to verify the information contained in the application as it should have, or that SFAP's action is precipitous, are absurd. 2

My review of the record in this case reveals that Warnborough applied to ED for certification as an eligible foreign institution on the basis of its degree granting status. The evidence is abundantly clear - the College is not authorized to grant degrees and, therefore, it is not eligible to participate in the Title IV programs. A previous designation of eligibility by the Secretary based on erroneous information is void ab initio. 34 C.F.R. § 600.40(c)(1). Further, although fraudulent activity is clearly a basis for emergency action, there is authority supporting the imposition of an emergency action in a situation where a previously designated eligible school is determined to be no longer eligible. See 34 C.F.R. § 600.41(b). I find, therefore, based on the record before me, that Warnborough College has failed to establish that it is an eligible institution.

In a show cause proceeding, the institution has the burden of persuading me that the emergency action is unwarranted. 34 C.F.R. § 668.83(e)(4). Pursuant to 34 C.F.R. § 668.83(c), an emergency action should be upheld if: (1) there is reliable information that the institution is violating a provision of Title IV; (2) immediate action is necessary to prevent the misuse of federal funds, and (3) the likelihood of loss from the misuse outweighs the importance of adherence to the procedures for termination actions. In light of my finding that the College has failed to meet its burden of showing that it satisfies the statutory definition of an eligible institution, I find that a violation of Title IV has occurred. As such, permitting the College to continue to participate in the Title IV programs would lead to the misuse of federal funds. 34 C.F.R. § 600.41(b) plainly provides that ED may withhold Title IV funds through the use of an emergency action, if an institution violates the standards of institutional eligibility. Moreover, given the fact that all student financial assistance disbursed by an ineligible institution violates Title IV, the likelihood of loss of Federal funds clearly outweighs the importance of awaiting the completion of the termination action.

Pursuant to 20 U.S.C. § 1088(a)(2)(E), Warnborough urges me to provide it some limited relief by allowing it to continue to make Title IV loans to students who are currently enrolled. Specifically, the College points to 34 C.F.R. § 668.83(e) and argues that I have the inherent authority to order SFAP to authorize such funding as a "modification" of the emergency action. SFAP, to the contrary, argues that I have no such power and that my authority is limited to evaluating whether or not Warnborough has satisfied its burden of persuasion as it is enumerated in 34 C.F.R. § 668.83(e)(4).

I find that SFAP's position is correct regarding my jurisdiction over the implementation of 20 U.S.C. § 1088(a)(2)(E). To adjudicate whether funding should continue under that section is clearly more than modifying the emergency action. It would entail making a decision on the administrative consequence of the emergency action - that is an administrative function under the purview of the Assistant Secretary for Postsecondary Education, who will independently ascertain

whether the provision may be applicable to Warnborough's students pending the termination action.

ORDER

On the basis of the foregoing, it is hereby ORDERED that the emergency action imposed against Warnborough College is AFFIRMED.

Judge Ernest C. Canellos

Dated: December 6, 1995

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

David B. Adler, Esq.
1001 Fourth Avenue Plaza, Suite 3200
Seattle, WA 98154

Paul G. Freeborne, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Avenue, S.W.
Washington, D.C. 20202-2110

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1 At the hearing, SFAP provided evidence that on November 2, 1995, Warnborough was notified that the department had initiated a termination action against it under the provisions of 34 C.F.R. Part 668, Subpart G, and that under the provisions of 34 C.F.R. § 668.83(t)(1), the emergency action would continue until the completion of the termination proceedings.

2 Warnborough raises the defense of estoppel without establishing the elements of that affirmative defense. It is clear that estoppel is not applicable against the Federal Government on the same terms as other litigants. Heckler v. Community Health Services, 467 U.S. 51(1984). In order to assert such a defense, a litigant must show, in addition to the traditional elements of estoppel, that the acts of the Government's agents amounted to affirmative misconduct beyond negligence and constituted a deliberate lie or pattern of false promises. See generally, Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Morgan v. Heckler, 779 F.2d. 544 (9th Cir. 1985). Measured against this standard, the defense of estoppel clearly does not lie.