IN THE MATTER OF Beth Medrash Eeyun Hatalmud,
Respondent.

Docket No. 95-79-EA
Emergency Action Show-Cause Proceeding

DECISION

On May 10, 1995, the United States Department of Education (ED) Office of Student Financial Assistance Programs (SFAP) imposed an emergency action against Beth Medrash Eeyun Hatalmud (Beth Medrash) of Monsey, New York, in accordance with 20 U.S.C. § 1094(c)(1)(G) and 34 C.F.R. §§ 600.41 and 668.83. In response to the notice imposing the emergency action, on May 11, 1995, counsel for Beth Medrash requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the 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 through the submission of posthearing briefs and by oral argument held on May 22, 1995. In this proceeding, Beth Medrash was represented by Leigh M. Manasevit, Esq. and Diane M. Vogel, Esq., of Washington, D.C. SFAP was represented by Jennifer L. Woodward, Esq. and Renee Brooker, Esq., from the ED Office of the General Counsel.

I

According to the notice in this case, this emergency action is based upon Beth Medrash's failure to satisfy the definition of an eligible institution because its programs neither lead to a bachelor's degree or its equivalent nor prepare students for gainful employment in a recognized occupation. This emergency action follows a prior emergency action, which was subsequently withdrawn, involving the same parties and accompanying the same termination action. Although the prior emergency action was based on two distinct grounds, this emergency action is based on only one of those grounds. In this respect, Beth Medrash argues that 34 C.F.R. § 668.83(g) bars this second emergency action.

According to Beth Medrash, Section 668.83(g) authorizes subsequent emergency actions after expiration, modification, or revocation of a previous emergency action based on issues other than those presented in the prior emergency action. As such, according to Beth Medrash, the implied negative of Section 668.83(g) bars the present action; namely, this action is barred because it is based on one of the same grounds raised in a prior emergency action involving the same parties that was withdrawn. Beth Medrash relies on a canon of statutory construction -- *expressio unius est exclusio alterius*, which instructs that if a statutory provision directs an act to be done in a particular form or manner, it excludes every other manner. Although the rule is undoubtedly a familiar principle of statutory construction, often it has been declared a notoriously unreliable

maxim when made to do the work of a conclusive presumption. Courts have recognized that the maxim rests on the frequently fallacious assumption that all omissions in legislative or regulatory drafting are deliberate. *See*, *e.g.*, *Custis v. U.S.*, 114 S.Ct. 1732 (1994) (citing Posner, Statutory Interpretation--in the Classroom and in the Courtroom, 50 U.Chi. L. Rev. 800, 813 (1983)). Notably, Beth Medrash's argument rests on the same assumption; one that may or may not be fallacious, but which is clearly unsupported with corroborating evidence of the drafter's intent. Consequently, I am unpersuaded that in the context of this case the rule of *expressio unius est exclusio alterius* provides a reliable indicium of ED's intent in promulgating Section 668.83(g).

More important, in the context of this case adopting Beth Medrash's interpretation of the regulatory provision in the is not necessary to safeguard institutions from the burdens that the school envisions would accompany a determination permitting this action to go forward. According to Beth Medrash, its interpretation of Section 668.83(g) ensures that both SFAP and the institution will vigorously address issues at a show-cause hearing and will also give efficacy to the show-cause official's decision. However, those precautions are not applicable here because the prior emergency action was voluntarily withdrawn, and no show-cause decision was ever issued. Consequently, I am unpersuaded that the regulatory provision's silence on the appropriateness of the instant action should be construed as an essentially implied preclusion of the action. SFAP's position, that Section 668.83(g) permits a subsequent emergency action involving the same parties and based on the same or similar grounds, although upon reliance on new evidence and brought after a prior emergency action was withdrawn, is undeniably a reasonable interpretation of the regulation. Accordingly, I find this action properly before me under the requirements of 34 C.F.R. § 668.83(g).

II

As a prerequisite to lawful participation in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. § 1070 et seq., an institution must offer an eligible program, as defined by 34 C.F.R. § 600.4(a) or 34 C.F.R. § 600.6. To satisfy the regulatory requirements and pursuant to 34 C.F.R. § 668.83(e)(4), Beth Medrash must meet its burden of persuading me that an intended purpose or aim of its program is consistent with the statutory requirement that the focus of its program is the preparation of students for gainful employment in a recognized occupation. However, in conjunction with the institution's evidentiary burden in a show-cause proceeding, SFAP must demonstrate, as a preliminary matter, that it has made a prima facie showing meeting the three-pronged test for imposition of an emergency action. In other words, under 34 C.F.R. § 668.83(c), SFAP must demonstrate that: 1) there is reliable information that the institution violated provisions of Title IV, 2) immediate action is necessary to prevent misuse of Federal funds, and 3) the likelihood of financial loss outweighs the importance of adherence to the procedures for limitation, suspension, and termination actions. Although SFAP argues that the three-prong test has been met in this case, I do not agree.

According to SFAP, as a result of new evidence acquired by ED in the form of post-graduate job placement records, a revised mission statement, and a market-needs-analysis, urgent conditions have been created that require ED to impose the extraordinary remedy of withholding Title IV

funds through emergency action. SFAP argues that the threat or risk that Beth Medrash may close it doors prior to the adjudication of the termination action demonstrates that ED should not wait until the outcome of that proceeding, notwithstanding that SFAP has not attempted to seek an expedited hearing before the judge in the termination action, which has been pending for over 15 months.

I am not persuaded that SFAP's neglect or omission to seek an expedited hearing in the termination action accompanying this case should be vindicated by permitting SFAP to achieve the same ends in a forum necessarily limited in its scope and purpose. To the contrary, the pertinent regulations are abundantly clear that an emergency action may *only* be instituted if the initiating official determines that *immediate action* is necessary to prevent the misuse of Title IV funds. 34 C.F.R. § 668.83(c)(1)(ii). SFAP makes no such showing in this case. At oral argument, counsel for SFAP was unable to provide an articulable reason supporting SFAP's claim that immediate action is necessary on the basis of the new evidence recently obtained by SFAP. It is axiomatic that SFAP's prima facie showing is a threshold matter that if not met, requires the revocation of the emergency action. Accordingly, having found that the three- pronged test for imposition of an emergency action has not been met, I hereby **DISAPPROVE** and **SET ASIDE** the emergency action.

Judge Ernest C. Canellos
Designated Deciding Official

Issued: May 26, 1995
Washington, D.C.