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

In the Matter of **Docket No. 96-104-ST**

SYRIT COMPUTER SCHOOL SYSTEMS, Student Financial Assistance Termination Proceeding

Respondent.

Appearances:

Leigh M. Manasevit, Esq., and Michael Brustein, Esq., Brustein & Manasevit, Washington, D. C., for Syrit Computer School Systems.

Howard D. Sorensen, 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 August 2, 1996, the office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued a notice of its intent to terminate the eligibility of Syrit Computer School Systems (Syrit), located in Brooklyn, New York, to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq.*, and 42 U.S.C. § 2751 *et seq.*[See footnote 1][1] In response to that notice, on August 20, 1996, the President of Syrit appealed and requested a hearing. The parties filed briefs, made evidentiary submissions, and, on March 19, 1997, I conducted an evidentiary hearing and oral argument in this matter.[See footnote 2][2] A verbatim record was made at the hearing and a copy of the transcript was provided to each side. The parties filed timely post-hearing briefs, as authorized.

The present action had its genesis in a June 13, 1996, notice from the Accrediting Commission of Career Schools and Colleges of Technology (ACCSCT) which reported that Syrit had voluntarily withdrawn its accreditation status effective on June 5, 1996, while it was the subject of a show-cause order.[See footnote 3][3] Upon receipt of the notice, SFAP determined that under the provisions of 34 C.F.R. § 600.11(c)(2), Syrit was no longer eligible to participate in the Title IV programs, and could not reapply for eligibility to participate in those programs for 24 months. SFAP's termination notice ensued. Syrit appealed and argued that even though it had resigned from ACCSCT under circumstances as enumerated by SFAP, it should not be terminated because ACCSCT was not *its* accrediting body at that time and, as a result, the provisions of 34 C.F.R. § 600.11(c)(2) are not applicable.[See footnote 4][4]

The parties generally agree that the following series of events occurred. In 1979, Syrit became eligible to participate in the federal student financial assistance programs authorized under Title IV as a private non-profit vocational school, accredited by ACCSCT. Sometime in January 1992, Syrit applied to the New York State Board of Regents (Regents), the cognizant agency in its home state, to become authorized as a degree-granting institution[See footnote 5](#)[5]. The Regents did not act upon the application by the time Syrit's current accreditation was about to expire. Faced with that situation, Syrit chose to apply to ACCSCT for reaccreditation as a vocational school in November 1994. For the same reason, Syrit applied to SFAP for recertification as a vocational school in September 1995. In December 1995, ACCSCT notified Syrit that it had deferred action on its request for reaccreditation until its April 1996 meeting because it was concerned about, among other things, some aspects of Syrit's English as a Second Language (ESL) program and wanted to accomplish an on-site visit. Syrit kept the Regents informed about ACCSCT's concerns and forwarded to it all the correspondence relative to the issue. After considering such concerns, on March 13, 1996, the Regents issued a Charter to Syrit accrediting it as Syrit College, a degree-granting institution. Under New York law, all degree-granting institutions must be accredited by the Regents. In contrast, ACCSCT is not authorized to accredit degree- granting institutions anywhere. After some discussion with SFAP employees on how notice of this change would be transmitted, on March 31, 1996, Syrit filed an amended application for recertification in which it listed the New York Regents as its accrediting agency.

On May 21, 1996, ACCSCT issued its show-cause order and Syrit was faced with a dilemma -- should it defend itself or, since it was then a degree-granting institution, should it simply drop its ACCSCT accreditation. Syrit's President did not wish to drop its request for ACCSCT reaccreditation until he was assured that SFAP had acknowledged that Syrit's accrediting agency was now the New York Regents because he feared that he might lose Title IV eligibility if there was any lapse in accreditation. Following a visit to SFAP by Syrit's consultant, on May 30, 1996, a staff member of SFAP's Institutional Participation and Oversight (IPOS) changed Syrit's listing of accrediting agency in SFAP's Post-Secondary Educational Participant System (PSEP) and various offices within SFAP were notified of that change. According to his testimony, the staff member entered the change in the PSEP database because he was unaware of any requirement of any further review of the accrediting agency change. Subsequently, as it now claims, Syrit resigned from ACCSCT on June 5, 1996, without the knowledge that such an act could lead to its termination. After it received the termination notice, Syrit approached ACCSCT in order to contest the show-cause directive; however, Syrit was informed that since it had already resigned from ACCSCT, it would not consider the matter any further.

SFAP's position is quite straightforward -- Syrit resigned from ACCSCT, *its accrediting agency of record*, while a show-cause order was in effect and SFAP asserts that, as consequence, Syrit is ineligible to participate in Title IV. Further, SFAP posits that for an institution to effectuate a change of accrediting agency, it must secure SFAP's approval.[See footnote 6](#)[6] Therefore, in spite of Syrit's claim to the contrary, ACCSCT was Syrit's accreditor of record since SFAP had not officially approved the change. SFAP believes that it was required to take termination action without reference to or consideration of any other factor and, as a matter of fact, it did not consider any other factor before issuing the termination notice. Clearly, SFAP, by its own admission, did not consider whether Syrit had otherwise committed any other violations of Title IV requirements in determining whether Syrit was the type of institution which Congress believed would be a peril to the federal student financial assistance program. SFAP argues that it has no discretion in this matter because Congress made loss of eligibility absolute under circumstances similar to this case -- Congress sought to effectively eliminate abuses occasioned when schools that are accredited by more than one accrediting agency are able to continue eligibility despite the fact that one of its accrediting agencies had taken adverse action against that school.

In support of its position, SFAP refers to the legislative history of the 1992 Reauthorization of the Higher Education Act, and quotes that:

> . . . [s]teps to prevent the abuse of the accreditation process. These steps include requirements for additional justification of reasons for seeking a change in accrediting agencies or associations *to prevent "accreditation hopping" situations where an institution obtains new accreditation because it is at risk of losing accreditation from another agency*. . . . (emphasis added).

S. Rep. No. 204, 102d Cong., 46 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334.

Rather than constituting “accreditation hopping,” as envisioned in the discussion of the Senate committee enumerated above, it appears to me that Syrit's actions in securing a new accreditation first, then resigning from its former accreditation, fall squarely into the statutory scheme which discourages multiple accreditations and requires institutions to justify any desire to maintain such multiple accreditations.

Syrit's position is likewise straightforward -- when it resigned from ACCSCT, it did not know nor did it have any reason to know that it was threatening its Title IV eligibility. It had a new accreditation as a degree-granting institution, it had notified ED of the change of accrediting agencies which SFAP had acknowledged, and it believed that it was a waste of its resources to pursue the matter with ACCSCT. Once it was informed of the consequences of its resignation, however, it sought to reopen the matter, but ACCSCT refused. Syrit believes that if it had been afforded the opportunity to reopen the show-cause proceeding, it would have succeeded since it had successfully responded to a previous show cause order from ACCSCT, the ESL program had been substantially modified to satisfy ACCSCT's concerns, and those areas of concern were considered by the New York Regents in their exhaustive review.

This case exemplifies the well-known concept of “Catch 22." Assuming, for the sake of this discussion that SFAP is correct in that it has no discretion in this matter and that the resignation while under a show-cause order automatically causes eligibility to be lost, then this issue was irrevocably determined by Syrit's resignation. Syrit clearly did not intend to resign its Title IV eligibility when it resigned from ACCSCT and argues that it certainly was not on notice of that effect. When Syrit belatedly sought an opportunity to address the show-cause order, it was denied by ACCSCT, even though a reading of both 20 U.S.C. § 1099b(j)(3) and 34 C.F.R. § 600.11(c)(2) indicates that such a right is inherently provided. The inability of anyone to alter that effect raises serious due process considerations.See footnote 7[7] Further, the jurisdictional question of whether ACCSCT could consider accreditation questions regarding Syrit, even if it wished to do so, given that it is now a degree-granting institution, persists. That question inexorably leads to the next -- whether ACCSCT, at the time it did so, had jurisdiction to issue an effective show cause order against the degree-granting institution in the first instance.

Also implicated is the concept of action based on “form over substance.” SFAP's assertion that it has absolutely no discretion in this area is quite puzzling. Courts have often recognized a general presumption that an agency has absolute discretion not to take an enforcement action. *See Heckler v. Cheney*, 470 U.S. 821 (1985); *United States v. Batchelder*, 442 U.S. 114 (1979); *United States v. Nixon*, 418 U.S. 683 (1974). Further, the presumption of agency discretion can only be rebutted by clear statutory guidelines which preclude that discretion. Although SFAP is charged with the obligation of upholding applicable statutes, without the imposition of arbitrary discretion, the circumstances of this case do not seem to contradict that interest. In fact, the governmental interest of “ensuring that qualified programs do not have their eligibility cut off without due consideration -- for the cutoff itself may close down the school and deprive students of the educational opportunity the H.E.A. was designed to afford them,” would be furthered. *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990).

Congress enacted the provisions of 20 U.S.C. § 1099b(h), (i), and (j) to avoid the inherent dangers to the Title IV program caused by schools engaged in “accreditation [s]hopping.” Without doubt, any process which allows an institution to avoid the scrutiny of an accrediting agency by merely switching to another accrediting agency is deplorable and should be curtailed.

However, as indicated by the facts of this case, institutions do change accrediting agencies for legitimate purposes and SFAP's claimed inability to distinguish between these two situations is extremely troubling. I am confident that Congress did not intend that 20 U.S.C. § 1099b(j)(3) would be applied to automatically remove the eligibility of an otherwise eligible institution which had changed its accrediting agency because it was being elevated to a degree-granting status after a prolonged review process; which had become accredited by an arm of the State of New York; which had resigned from a previous accrediting agency while under a show cause order when it did not realize that such action might jeopardize its status under Title IV; and which was denied the opportunity to litigate the show cause order by the former accrediting agency after it had requested the right to do so. Assuredly, ED has been endowed with discretion when overseeing the federal student financial assistance programs and, except where such discretion has been clearly circumscribed by statute, the degree of discretion is as expansive as necessary to accomplish the purposes of the

statute. To self-limit its authority and, thereby, fail to avoid a clearly unexpected result, is even more troubling.

As for the procedures for terminating the eligibility of an institution to participate in the Title IV programs, they are enumerated in 34 C.F.R. § 668, Subpart G. The Secretary may terminate the eligibility of an institution if the institution violates any statutory or regulatory provision applicable to Title IV. 34 C.F.R. § 668.86(a)(1). It is axiomatic that if an institution loses its eligibility, it is subject to a termination action. In any termination proceeding, SFAP has the burden of persuasion. 34 C.F.R. § 668.88(c)(2).

Syrit's evidence indicates that it has participated in the Title IV programs over time and that it has always operated within program requirements. It has been audited during that period with only minor writeups. SFAP did not contest that information and provided no evidence which would indicate that Syrit was in violation of any Title IV regulatory requirements which would otherwise be relevant to or support a termination action. My review of the record convinces me that there is no other possible basis for the termination action against Syrit. As to Syrit's alleged violation of 34 C.F.R. § 600.11(c)(2), I find that it is clearly erroneous to terminate an institution on the basis of its resignation from its former accrediting agency:

- when that institution has become a degree-granting institution;
- when the former accrediting agency is not authorized to accredit such a degree-granting institution;
- when that institution is presently accredited by a nationally recognized accrediting agency which is required by state law to accredit degree-granting institutions in that state;
- when the institution was unaware of the fact that its resignation from its former accrediting agency could adversely affect its eligibility;
- when the former accrediting agency refused to consider its concerns, even though requested to do so by the institution; and
- where SFAP, the agency with jurisdiction over the matter, claims it has no discretion over this happening and takes no action, whatsoever, to attempt to ameliorate this situation other than to say “gotcha” and then institute “automatic” termination action.

If SFAP's actions were correct under the circumstances, it would exemplify why government is often viewed by the public unfavorably and its operations are often viewed with suspicion.

I find as a matter of fact and law, that in enacting 20 U.S.C. § 1099b(j)(3), Congress never intended that provision to be applied to situations such as that before me so as to affect the eligibility of an institution which changed accrediting agencies for wholly legitimate educational purposes, and which resigned from its former accrediting agency under a show-cause order as was occasioned in the case of Syrit. I further find that SFAP impermissibly interpreted 34 C.F.R. § 600.11(c)(2) in this case in such a manner so as to read out the significance of the word “its” when it claims that ACCSCT is still Syrit's accrediting agency -- it seems quite clear that SFAP has, in effect, substituted the word “any” in its interpretation.[See footnote 8][8] Under the unique circumstances of this case, I find that Syrit's resignation from ACCSCT while its show-cause order was, by its terms, still in effect, is not violative of the proscription imposed by the statute and regulation cited above. Moreover, it does not support the imposition of the most serious form of sanction, that of termination. As a consequence, I find that SFAP has failed to meet its statutory burden of proof of showing that termination is appropriate. Because of the above determination, I need not reach the Constitutional question of whether the statute and regulation, if applied as proposed by SFAP, would violate the Fifth Amendment of the U. S. Constitution, as the taking of property without due process of law.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the eligibility of Syrit Computer School Systems to participate in the federal student financial assistance programs not be terminated.

Ernest C. Canellos, Chief Judge

Dated: June 4, 1997

SERVICE

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

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Footnote: 1 [1] *The notice also provided that the Emergency Action initiated by SFAP on July 9, 1996, would continue during the pendency of this action. Subsequently, the Show Cause Hearing Official assigned to adjudge that matter revoked that Emergency Action after raising serious questions as to whether Syrit fell within the purview of 34 C.F.R. § 600,11(c)(2) when it resigned from its accrediting agency. In re Syrit Computer School Systems, Docket No. 96-123-EA, U.S. Dep't of Educ. (November 18, 1996).*

Footnote: 2 [2] *My September 5, 1996, Order Governing Proceedings directed that, based on the narrow scope of the issues, the case would be handled by the submission of briefs without an evidentiary hearing. Syrit subsequently moved that I order an evidentiary hearing claiming it was necessary to the effective presentation of a defense. SFAP objected and argued that the question to be resolved was a legal one and no material issues of fact were in dispute. After an exchange of briefs, the parties separately requested an opportunity to present evidence at an evidentiary hearing. Therefore, on January 28, 1997, I ordered such a hearing.*

Footnote: 3 [3] *ACCSCT is a nationally recognized accrediting agency which has been approved by the Secretary under the provisions of 20 U.S.C. § 1099b.*

Footnote: 4 [4] *§ 600.11(c)(2) provides that:*

An institution may not be considered eligible for 24 months after it has withdrawn voluntarily from its accreditation or reaccreditation status under a show-cause or suspension order issued by an accrediting agency, unless that agency rescinds that order.

Footnote: 5 [5] *The New York State Board of Regents is a nationally recognized accrediting agency which has been approved by the Secretary under the provisions of 20 U.S.C. § 1099b.*

Footnote: 6 [6] *It is of interest to note that the staff member of IPOS referenced above, testified that he was unaware of that approval requirement even though he has been employed at IPOS for over two years and that office is responsible for processing changes in accreditation.*

Footnote: 7 [7] *See, e.g., Continental Training Services, Inc. v. Cavazos, 893 F.2d 877 (7th Cir. 1990) (holding that an*

institution has a recognized property interest and, therefore, due process requirements are mandated whenever ED seeks to terminate the eligibility of that institution which has previously been deemed eligible in all other respects and has participated in the Title IV programs).

Footnote: 8 [8] *Clearly, where ED determines that an institution's withdrawal from accreditation status comes within the conduct for which Congress enacted 20 U.S.C. § 1099b(j)(3), enforcement of 34 C.F.R. § 600.11(c)(2) would be appropriate, if not required.*
