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

In the Matters of

SAMVERLY COLLEGE OF BARBER/ HAIRSTYLING,

Respondent.

Docket No. 96-144-SP
Docket No. 96-45-ST

Student Financial Assistance Proceedings

Appearances: Charles S. Johnson, Esq., Holland & Knight, Atlanta, GA, for SamVerly College of Barber/Hairstyling.

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

SamVerly College of Barber/Hairstyling (SamVerly) of Atlanta, Georgia, operated as a proprietary institution of higher education that offered programs in cosmetology. It participated in the federal 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*. The office of Student Financial Assistance Programs (SFAP) is the cognizant office within the U.S. Department of Education (ED) which administers these programs.

Between December 11-15, 1995, reviewers from SFAP's Atlanta Regional Office conducted a program review at SamVerly. On the basis of a program review report provided to SamVerly on February 7, 1996, on April 5, 1996, SFAP issued a notice of Intent to Terminate the eligibility of SamVerly from participation in Title IV programs and fine it $591,000 for the violation of various Title IV program requirements.[1] SamVerly appealed the actions contemplated in the notice. Subsequently, on September 12, 1996, SFAP issued a Final Program Review Determination (FPRD) assessing a liability of $810, 615 against SamVerly for the improper disbursement of Title IV funds during a three-year period from 1993-94 through 1995-96. SamVerly challenged the determinations in the FPRD and upon the request of the parties, I consolidated these two proceedings.

As a result of many factors, the resolution of the issues in this case has been suspended. These include: settlement discussions, seizure of documents by ED's Office of Inspector General (OIG), a federal criminal conviction of the owner of SamVerly, and the filing of a voluntary petition in bankruptcy by the owner/operator(s) of SamVerly. After I had stayed this proceeding at the request of the parties, on March 12, 1999, SFAP filed a scheduled status report requesting that I lift the stay and issue a decision on the merits. In its report, SFAP noted that as part of the criminal court proceeding, SamVerly had stipulated to the amount of the ineligible disbursements and that amount satisfied ED, so it would not seek any additional assessment for that finding. Thus, remaining in dispute are FPRD findings that SamVerly: disbursed $196,390 in Title IV funds at an ineligible campus; failed to pay $7,707.50 in refunds owed to its

students; and failed to perform a close-out audit, resulting in SamVerly's inability to establish that $810,615 was properly disbursed. Since this last liability subsumed the previous ones listed in the FPRD, no further claim is made for return of funds under the FPRD. In addition to the amount demanded in the FPRD, still before me are three proposed fines: $25,000 for improper disbursements at an ineligible campus, $40,000 for failure to perform four yearly compliance audits, and $25,000 for failure to pay refunds owed.

SamVerly opposed SFAP's request to end the stay arguing that this action is governed by the automatic stay provisions of the bankruptcy law, which, unless an exception applies, operates to stay all other concurrent actions pending the resolution of the bankruptcy proceeding.[2] SamVerly contends that the proceeding before me is an action to recover money and that no exception to the automatic stay applies to this type of action. SamVerly also argues that even if the Termination and Fine component of this consolidated proceeding fits squarely within the exception, my order consolidating the termination and fine proceeding with the separate FPRD appeal renders this exception inapplicable.[3]

In the alternative, SamVerly argues that the doctrines of *res judicata* and *estoppel* bar this litigation. In short, SamVerly urges that this proceeding cannot go forward because the criminal conviction of the owner of SamVerly was based on claims and involved parties that are substantially, if not identical, to those in this proceeding. In response, SFAP argues that the *res judicata* and *estoppel* arguments should be rejected, generally, because the elements of the doctrine are not met and, specifically, because SFAP has agreed to withdraw all allegations that are "related in any manner to the owner's criminal conviction." In furtherance thereof, SFAP withdrew findings of the FPRD and the proposed fines relative to the institution's alleged failure to disburse Title IV funds, the institution's alleged failure to perform eligibility verification, and the institution's alleged failure to "account properly" for Title IV funds. As to SamVerly's argument to stay these proceedings, SFAP points out that prior case law has considered and rejected the institution's argument. SFAP notes that the automatic stay provision of the Bankruptcy Code has no application to administrative proceedings to *determine* liabilities, but, rather, applies only to court proceedings to *collect* liabilities. *See In the Matter of Lehigh Technical School,* U.S. Dep't of Educ., Dkt. No. 94-193-SP (March 21, 1995).

The argument SamVerly presents is not novel. In fact, the issue is well settled in our case law; Subpart H and Subpart G proceedings come under the exception to the automatic stay provision of 11 U.S.C. § 362(a).[4] On August 21, 1997, the institution filed a petition seeking relief under the Bankruptcy Code with the United States Bankruptcy Court for the Northern District of Georgia. Under the Bankruptcy Code, when such a petition is filed, most litigation and similar proceedings are automatically stayed under section 362(a) of the Bankruptcy Code. Under that section, any judicial, administrative, or other action or proceedings against a debtor that was or could have been commenced before the commencement of the bankruptcy case, or actions to recover a claim against the debtor that arose before the commencement of the bankruptcy case, are automatically stayed. The Bankruptcy Code, however, contains several exceptions to this stay provision. One exception, pertinent to the issue here, exempts government agencies regarding proceedings against a debtor concerning the government's exercise of its police or regulatory powers. *See* 11 U.S.C. § 362(b)(4). In any such proceeding, ED is not a typical creditor attempting to obtain possession of, or to exercise control over, the institution's property, but rather, is an agency acting to enforce its regulatory power.[5] In this regard, our case law recognizes that a school, as a recipient of federal funds, acts in the capacity of a fiduciary holding these funds in trust for students and the government. That status prevails, in both Subpart H and Subpart G proceedings which both have the aim and focus of enforcing the regulatory power of ED.[6] Therefore, I find that the stay of these proceedings that I previously imposed may be lifted and I do so by my adjudication of the merits of this dispute.

Similarly, I find SamVerly's *res judicata* argument unpersuasive. This tribunal has held that criminal proceedings do not have a preclusive effect on these administrative proceedings. *See, In the Matter of Huston-Tillotson College*, Dkt. No. 99-2-SP, U.S. Dep't of Educ. (February 20, 2000). A criminal proceeding against an owner of an institution is clearly distinct from an administrative proceeding to enforce the requirements of Title IV. This is no less true simply because the parties in the criminal case are in privity with those in the civil case or because the issues are substantially similar in both proceedings. Even where a court orders criminal restitution, ED cannot be precluded from obtaining the full recovery of its loss. *Teachers Insurance and Annuity Association v. Green*, 636 F. Supp. 415 (1986) (a criminal defendant ordered to pay criminal restitution could also be pursued for civil liability). Moreover, to the

extent that there is an actual risk of double recovery, there is no reason why the institution cannot exercise its right to an appropriate remedy. As noted previously, SamVerly does not directly contest the essential facts as alleged by SFAP regarding the merits of the disputed issues.

Finding #1 of the FPRD

Under Finding #1, SFAP alleges that SamVerly disbursed Title IV funds at its ineligible campus in Decatur, Georgia. SFAP has determined that the liability for this finding is $196,390. SamVerly does not dispute this finding, but, in its defense, argues that it is excessive to recover funds for this finding and to impose a $25,000 fine for the same conduct.[7] This argument is without merit. The law is abundantly clear that institutions receiving Title IV funds may not disburse those funds to ineligible campuses. The institution did so and, therefore, must repay those funds. The evidence shows that SamVerly failed to provide notice to the Department, as it is required, that the Decatur campus has been established and that the institution desires approval to disburse Title IV funds to the students enrolled at the campus. Instead, SamVerly disbursed funds from 1993 through 1996 without authorization and without filing an audit showing those expenditures. In this regard, I am convinced that the institution's conduct warrants the imposition of a fine in addition to a recovery of the improperly disbursed Title IV funds.

Finding #4 of the FPRD

Under Finding #4, SFAP alleges that SamVerly failed to pay refunds owed as a result of students withdrawing from SamVerly's programs, as required. SFAP determined that the liability for this finding is $7,707.50, and it seeks a $25,000 fine for the same violation. The institution argues that it could "offset" a refund payment by subsequently "drawing down a reduced amount" for currently eligible students. This argument misses the point. The institution's "offset" practice permitted it to retain Title IV funds past the time period it was eligible to do so. An institution must follow the strict requirements of 34 C.F.R. § 668.22(e)(5) to ensure that limited Title IV funds are available to other eligible students at the earliest time period.

Under 34 C.F.R. § 668.22(e)(5) (1993), unearned Pell Grant funds credited to a student's account must be returned to the Pell Grant account within thirty days from the date a student withdraws or the institution determines that the student has unofficially withdrawn. Under section 668.21(b), if an institution is unable to document the student's attendance at any class during the payment period, the student is considered to have withdrawn before his or her first day of class. When a student withdraws without notifying the institution, the withdrawal date is the last recorded date of class attendance by the student. SamVerly cannot comply with these requirements by waiting until a subsequent drawdown of funds. Moreover, the evidence SFAP presents from Federal Pell Grant ledgers casts doubt on SamVerly's argument that even the offset was made. There is no evidence in the record showing that SamVerly correctly calculated refunds for the students cited in the FPRD. Consequently, as a matter of law and fact, the institution's position is not sustainable and the return of funds and a fine are appropriate.

Close-out Audit Finding

Under an unnumbered finding in the FPRD, SFAP alleges that SamVerly failed to perform a closeout audit. SFAP has determined that the liability for this finding is $810,615.[8] SamVerly argues that the recovery of all Title IV funds for its failure to file a closeout audit is "patently unwarranted" because some of the students graduated and obtained gainful employment "in the profession for which SamVerly trained them." For its part, SFAP agrees that the liability sought here is for the three-award year period from 1993-94 through 1995-96. It is apparent that SFAP made this demand for full recovery because the institution has not come forward with evidence and documentation accounting for its expenditure of Title IV funds during the period at issue.

As this tribunal often has noted, an institution's cooperation in providing SFAP with documentation of its expenditure of Title IV funds is consistent with its fiduciary duty to account for the disbursement of Title IV program funds. *See, e.g., In the Matter of Selan's System of Beauty Culture*, Docket No. 93-82-SP, U.S. Dep't of Educ. (Dec. 19, 1994). An institution's failure to provide SFAP with the data requested regarding the institution's documentation and accounting for its expenditure of Title IV program funds sharply undercuts the institution's position that Title IV funds should not be recovered in the amount requested by SFAP. In this regard, SamVerly failed to perform compliance

audits for four award years and failed to submit a closeout audit. That notwithstanding, SFAP must calculate an institution's liability in a Subpart H proceeding in a manner that reflects the Department's loss under the circumstances of the proven regulatory violations. This tribunal's prior decisions have strongly discouraged SFAP from attempting to recover all Title IV funds disbursed by an institution if the institution has provided SFAP with some degree of relevant data to more appropriately calculate the Department's loss. To this end, it is noteworthy that SFAP has consented to reducing the liability of $810,615 by $117,729, which is the amount SamVerly's owner is criminally liable to repay the Department. Accordingly, I uphold SFAP's calculation of liability under this finding for $692,886.

Calculation of Fine

The Secretary has the authority to impose a fine on an institution of up to $25,000 for each violation of a statutory or regulatory provision. 34 C.F.R. § 668.84(a). In assessing a fine, the gravity of the violations should be considered, as well as the size of the school. 34 C.F.R. § 668.92(a). The seriousness of the violations in this case clearly warrants the imposition of a fine. Indeed, SFAP could have sought the maximum fine in instances where it did not. I find fines of $25,000 for disbursement of Title IV funds at an ineligible campus and $40,000 for failure to perform compliance audits for four award years supportable by the nature and multiplicity of these regulatory violations. Instead of the proposed fine of $25,000 for failure to pay less than $8,000 in refunds, however, I find that a fine of $5,000 is more appropriate for that violation.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that SamVerly College of Barber/Hairstyling repay to the United States Department of Education the sum of $692,886. Further, it is ORDERED that SamVerly pay to the United States Department of Education the sum of $70,000 in fines.

Ernest C. Canellos
Chief Judge

Dated: June 21, 2000

SERVICE

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

Charles S. Johnson, Esq.
Holland & Knight, LLP
One Atlantic Center
1201 Peachtree Street, NE
Suite 2000
Atlanta, GA 30309-0433

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

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[1] After the commencement of these proceedings, SamVerly lost its accreditation and, as a result, it lost its eligibility to participate in Title IV programs. As a consequence, SFAP withdrew the termination issue as moot on May 8, 1996.

[2] SamVerly has not presented arguments challenging the merits of the allegations presented by SFAP. Although SamVerly noted in its request for a hearing that the institution disputed the merits of SFAP's findings, the linchpin of its arguments was a promise to provide an evidentiary basis for its challenges after the institution recovered its files from the custody of the Office of Inspector General. To date, the institution has not come forward with its proffer.

[3] I have the power to adjudicate these cases separately and independently. As set forth below, however, this consolidated case can be resolved without severing them.

[4] *See, e.g., In the Matter of First School for Careers*, Dkt. No. 89-60-S, U.S. Dep't of Educ. (January 29, 1990), wherein it was found that the automatic stay provision does not apply to ED's efforts to determine whether an educational institution is liable for violations of Title IV. It was reasoned that the proceeding related primarily to the government's enforcement of its police or regulatory powers, rather than the protection of the government's pecuniary interest in the debtor's property. In such proceeding, ED is pursuing a congressional mandate to promote the general welfare by providing oversight of student financial assistance programs and insuring a proper utilization of federal funds. This analysis is equally applicable to the instant case.

[5] *See, e.g., Board of Governors of the Federal Reserve System v. MCorp Financial Inc*, 502 U.S. 32 (1991), wherein the Supreme Court refused to apply the automatic stay provisions to ongoing administrative proceedings initiated to determine whether the defendant corporation had violated statutory and regulatory provisions.

[6] See *In the Matter of CareerCom College of Business*, Dkt. No. 94-159-SP, U.S. Dep't of Educ. (May 4, 1995), where it was recognized that section 362(b)(16), when read in context with section 362(b)(4), evidenced that Congress did not intend to put Subpart H proceedings within the reach of the automatic stay. The prevailing view of the federal courts is that administrative proceedings to determine, but not enforce, a liability are exempt from the automatic stay provision of the bankruptcy code.

[7] The institution also argues that the Decatur campus disbursed Title IV funds within the "spirit and purpose" of the HEA. This argument may have been presented to highlight SamVerly's position that it did not engage in intentional wrongdoing. Even so, the argument offers no defense to the regulatory violation and the multiplicity of regulatory violations supported by the evidence undermines SamVerly's argument that it acted within the purpose of the HEA.

[8] The liability under this finding includes all others. There is no evidentiary challenge to the proposed fine of $40,000 for the alleged failure to perform compliance audits. SamVerly, instead, argues that it supplied reports to SFAP, and it was unaware of the audit requirement.