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

In the Matter of **Docket No. 96-29-SP**
ACADEMY FOR JEWISH EDUCATION, Student Financial Assistance Proceeding
Respondent.

PRCN: 93302042

Appearances:

Nahal Motamed, Esq., George Shebitz & Associates, P.C., New York, New York, for Academy for Jewish Education.

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

Before:

Frank K. Krueger, Jr., Administrative Judge

DECISION

Background:

In 1987, the Respondent, Academy for Jewish Education (AJE), applied to the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), for participation in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended. AJE's application was approved and it began participating in the program and disbursing Title IV assistance. In 1994, SFAP imposed an emergency action in which it determined that AJE did not meet the statutory prerequisites for participation in the Title IV programs, as AJE was not properly accredited and did not meet the required definitions under the act. The emergency action was followed by an action to terminate AJE's participation in the Title IV programs.

The emergency action was upheld and, in the subsequent proceeding, termination was ordered based on conclusions that AJE did not meet the required statutory definitions; both judges, however, found that AJE met the accreditation requirements of the statute. *In re Academy for Jewish Education*, Docket No. 94-11-EA, U.S. Dept. of Educ. (March 23, 1994); *In re Academy for Jewish Education*, Docket No. 94-51-ST, U.S. Dept. of Educ. (Aug. 1, 1995), *certified by Secretary* (Nov. 22, 1995). SFAP now seeks to recover all Title IV assistance disbursed by AJE since 1987. In its Expedited Determination Letter, dated January 12, 1996, SFAP directed AJE to repay ED $14,439,593 within forty-five days. In response to information provided by AJE, this figure was reduced to $12,216,768. SFAP brief at 5.See footnote 1[1]

Issue:

Whether the decision reached in *Academy of Jewish Education,* Docket No. 94-51-ST*, supra,* that AJE does not meet the statutory definitions for participation in Title IV, should be applied retroactively to recover all Title IV assistance between the time AJE was approved by SFAP for participation in the program and the time of the emergency action in

which the approval was revoked.

Conclusion:

Between 1987, when AJE was declared eligible for full participation in the Title IV programs, and January 13, 1994, when SFAP imposed the emergency action, AJE disbursed Title IV funds in full compliance with the law. To require AJE to return the Federal assistance it disbursed during this period, in full reliance on SFAP's declaration of eligibility, would impose an undue financial hardship on AJE and constitute an abuse of discretion. *See* 5 U.S.C. § 706(2)(a) (1996).

Discussion:

To qualify for participation in the Title IV programs an institution must satisfy either the definition of an “institution of higher education” as set forth in 20 U.S.C. § 1141(a), or the definition of a “postsecondary vocational school” as set forth in 20 U.S.C. § 1088 (c). Under both sections, an institution must offer at least one program that prepares students “for gainful employment in a recognized occupation.”

AJE was founded in 1986 to assist recent Russian Jewish immigrants with acclimation into American-Jewish culture to enable them to seek employment within the Jewish culture in areas such as kosher restaurant cooks, home attendants, youth counseling, funeral home attendants, etc. In both the emergency action and the termination action, the judges concluded that the AJE programs are not driven toward a particular type of occupation; rather, they provide training that may lay the foundation for qualification toward a variety of jobs within the Jewish community. As such, AJE did not satisfy the applicable definitions found at 20 U.S.C. §§ 1088(c) or 1141 (a). SFAP now seeks to recover all Title IV assistance disbursed by AJE from 1987, when it was first authorized to participate in the Title IV programs, to its emergency action which withdrew that authorization.

In its brief, AJE attempts to take a second bite at the apple and argues that these decisions were wrong and that it does, in fact, satisfy the requisite definitions. These decisions fully resolved this issue and are *res judicata.* However, the decisions do not address the question of whether the holdings should be applied retroactively. In reviewing agency determinations dealing with the retroactive application of administrative litigation, courts have balanced a number of factors -- whether the decision represents an abrupt departure from a well-established practice or merely fills a void in the law; the extent to which the party against whom the retroactive application is sought relied on the earlier decision or rule; the degree of burden placed on a party by the retroactive application; and the statutory or public interest in applying the decision retroactively. *See* Davis & Pierce, *Administrative Law Treatise,* § 13.2 (3d ed., 1994) (discussion of retroactive application of administrative adjudication).

In applying these standards to the case at hand, I must conclude that the AJE termination decision should not be applied retroactively. From 1987, when AJE was declared eligible for Title IV participation, to January 1994, SFAP had ample opportunity to be familiar, and should have been fully familiar, with AJE's programs, and yet AJE was fully eligible. AJE relied on the SFAP 1987 eligibility determination in distributing millions of dollars in Title IV assistance. Presumable during this period, SFAP conducted and reviewed a number of program audits and received other program reports and had access to the AJE course catalogs, etc., and was fully aware of AJE's programs. The decision made in 1994, that AJE did not meet the statutory requirement to participate in the Title IV program, was an abrupt departure from the earlier decision. There is no statutory or public purpose served by retroactive application of the 1994 decision. To now go back and seek reimbursement for the millions of Title IV dollars disbursed by AJE in reliance of SFAP's 1987 eligibility determination would be grossly unfair and an abuse of discretion.

SFAP cites *In re Sara Schenirer Teachers Academy,* Docket Nos. 94-49-ST & 94-87-ST, U.S. Dept. of Educ. (June 21, 1995), *certified by Secretary* (Sept. 14, 1995) and *In re Academia La Danza Artes del Hogar*, 81 Ed. Law Rep. 1250 (1992) in support of its position. Neither case is applicable to the present situation. In *Sara Schenirer,* the judge rejected the respondent's argument that SFAP should be estopped from terminating its Title IV eligibility since its eligibility had never been questioned since it was first declared eligible in 1974. The issue here, of course, is not whether SFAP can terminate eligibility after a long period of considering an institution eligible, but whether the eligibility determination should be made retroactive.

While *Academia* is more on point, it is not controlling. In *Academia* SFAP made a mistake and issued an eligibility letter to an institution which clearly had the wrong accreditation.

When SFAP realized its mistake, it withdrew the eligibility determination and sought a recovery of all the Title IV assistance awarded by the respondent. The judge held that SFAP could recoup the funds disbursed since, under prevailing law, the SFAP official who approved the eligibility determination did not have the authority to approve the determination for an institution that clearly lacked the required accreditation. "[I]n absence of specific statutory authority, government officials may not ignore statutory requirements. [Citations omitted.] Hence, when a government agent goes beyond the ambit of his authority, the government is not bound." 81 Ed. Law Rep. at 1255. In the case at hand, there was no mistake made or alleged by SFAP, and no statutory requirement was ignored. Under the SFAP interpretation of the controlling statute, an SFAP official with full authority determined that AJE was eligible to participate. Subsequently, SFAP revised its interpretation and moved to remove AJE from the program. The present case does not deal with a mistake as much as it deals with an evolving interpretation of a statute which is open to a good faith debate over its meaning. Under these circumstances, it would be unreasonable and an abuse of discretion for ED to retroactively apply the holding in the AJE termination case.

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Frank K. Krueger, Jr.
Administrative Judge

Dated: August 23, 1996

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] *After AJE spent substantial effort in its brief noting that it was properly accredited and that this issue was specifically resolved in both the emergency action and the termination action, SFAP dropped the accreditation charge. SFAP brief at 3, n. 1.*