

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

In the Matter of

Docket No. 97-2-EA

JETT COLLEGES OF COSMETOLOGY Student Financial
AND BARBERING, Assistance Proceeding
Emergency Action

Respondent.

Appearances:

Glenn Bogart, Birmingham, Alabama, for Jett Colleges of Cosmetology and Barbering.

Jennifer Woodward, Esq., and Russell Wolff, Esq., Office of the General Counsel, United States
Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before:

Judge Richard F. O'Hair

DECISION

BACKGROUND

Jett Colleges of Cosmetology and Barbering (Jett) was notified by letter dated December 23, 1996, from the Director of the Institutional Participation and Oversight Service, of the Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department), of the imposition of an emergency action withdrawing Jett's authority to obligate any Title IV funds under the Higher Education Act of 1965, as amended (HEA). On January 2, 1997, Jett requested an opportunity to show cause that the emergency action was unwarranted.

Pursuant to the Delegation of Authority from the Secretary to me 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 in Washington, D.C., on January 29 and 30, 1997. At the hearing both sides presented witnesses, offered exhibits into evidence, and concluded with oral arguments.

SFAP's main contention in this case is that an emergency action is necessary because, during a July 8-12, 1996, on-site program review of Jett's three locations, it was discovered that loan applications from an ineligible school (Southbrook Mall) were being certified utilizing a school code assigned to one of Jett's eligible school locations. As a result, 43 students improperly received FFEL funds. The reviewers also discovered that Jett failed to make proper and timely refunds; improperly awarded Title IV funds after students' last date of attendance; did not comply with ability-to-benefit requirements; failed to maintain accurate attendance records; and failed to submit timely audit reports. [See footnote 1*](#) The reviewers formalized their findings in the program review report dated October 8, 1996 (SFAP Exhibit

80). SFAP alleges that these serious and multiple claims indicate that Jett has violated its fiduciary duties (34 C.F.R. § 668.82) and indicate that Jett does not have the administrative capability to properly administer the Title IV programs (34 C.F.R. § 668.16).

In a show cause proceeding, the institution has the burden of persuading me that the emergency action is unwarranted. Pursuant to 34 C.F.R. § 668.83(e)(4), the institution has met its burden if it shows that -- (i) the grounds stated in the notice did not, or no longer, exist; (ii) the grounds stated in the notice will not cause loss or misuse of Title IV, HEA program funds; or (iii) the institution will use procedures that will reliably eliminate the risk of loss from the misuse described in the notice.

JETT'S CORRECTIVE PLAN

Jett offered a plan to protect the Department against the likelihood of future losses and insists that there is zero risk because Jett's president is willing to cover the current disputed liabilities (\$108,225) by way of offset of its Pell payments. In the alternative, he is willing to obtain a letter of credit to cover the alleged liabilities. In light of the programmatic deficiencies discussed below, I find that the financial measures Jett proposes are inadequate.

Jett also engaged the services of a reputable reimbursement agent, Global Financial Aid Services, to work with it and prevent any further problems with Jett's reimbursement requests and the supporting documentation which needs to accompany them. Finally, Jett guarantees that it can avoid the problem of delayed and late filed audits because it has engaged the services of a local Memphis CPA, Mr. Pullen, to visit its locations every other week to ensure that violations will not reoccur. It intends to continue this routine from now until the pending termination action is finally decided. SFAP questions the value of Mr. Pullen's services if he must rely on inaccurate information and points to attendance records as a specific area for concern. SFAP further notes that Jett had contracted with him in the summer of 1996, yet deficiencies and late audits continued even through that monitoring period.

Jett did not respond to SFAP's specific program concerns. Instead, Jett simply insists that the Department should not be backward looking and that the very nature of an emergency action is to be forward looking and futuristic. Jett is confident that its plan will work to avoid the likelihood of loss and provide the protections which eliminate the need for the emergency action. Jett referenced a similar plan offered in *In re New Concept Beauty Academy*, Dkt 96-58-EA, U.S. Dep't of Educ. (June 13, 1996), and submits this is the same kind of plan it would pursue. Jett asserts that if a plan offering protections against the loss SFAP fears can be accepted in one case, it is precedent for accepting it here.

SFAP says this is not Jett's first experience with a servicer and cites to other servicers and the dates Jett used them. Given that Jett could not avoid past problems through the intercession of other servicers, the assurances it now makes that the new servicer, Global, will prevent mistakes and the resulting loss, is no guarantee. Because of the school's track record and its troubled relationships with past servicers, its present assurances are insufficient. Jett's plan does not give the Department any real guarantees and fails to satisfy Jett's burden of showing that these new procedures will reliably eliminate the risk of loss of future Title IV funds. Accordingly, I find that Jett's plan, as it applies to the scenario before me, does not provide adequate protections for Title IV funds.

LOAN CERTIFICATION

Jett is charged with the improper certification of loans using an incorrect Office of Postsecondary Education Identification (OPE-ID) number to certify loans for 43 students at its Southbrook Mall location, a school which was once eligible, but that lost its eligibility based on a cohort default rate disqualification. SFAP asserts that Jett fraudulently certified loans for its Southbrook students under an approved OPE-ID number which was assigned to another Jett school. SFAP claims Jett was on notice of its ineligibility to certify loans for its Southbrook students as of September 13, 1994. Moreover, SFAP contends that Jett chose not to appeal this ineligibility determination. Jett claims that its President, Mr. Holland, sent a letter disputing its loss of eligibility. However, the letter he submitted was not

considered a formal appeal because it did not comply with the appeal provisions described in the Department's notice of the cohort default rate ineligibility determination.

Jett offered the Declaration of Ms. Elizabeth Keifer to dispute the propriety of the Department's decision to find Southbrook ineligible based on its cohort default rate. Her conclusion was that all three former branches of Jett should have received and used their own exclusive FY 1991 cohort default rates. Had Southbrook not been attributed the 1991 cohort default rate of its main campus (parent), but had its own correct rate applied instead, then it would not have lost program eligibility.

SFAP disagreed with Ms. Keifer's legal conclusion and argues that, even if accurate, Jett was on notice of its ineligibility and could not ignore that or operate with disregard of that defect. Furthermore, Jett repeatedly received letters from the Department that reviewed its default rates for the given years. *See* SFAP Exhibit No. 109. Exhibit 109-11 is the July 1993 notice to the Southbrook Mall location that it is subject to its parent's default rate for FY 1991 of 61.6%.

With notice of this prohibition, Jett's behavior in freely certifying loans for its Southbrook students is incomprehensible. I find there is no need to probe the merits of the Keifer declaration. The Department's notice of ineligibility controls Jett's actions, and Southbrook was operating beyond the scope of its authority.

Next, Jett alleges the lender was the one who approved the use of the OPE-ID number now found to be improper. The parties offer conflicting versions of what one of Jett's financial aid officers was told to do and what OPE-ID number instructions the lender gave to her. In addition, the financial aid officer represented that when when she certified loans in 1995, she was unaware that any of the Jett locations were not eligible to participate. She had not seen the Department's Enclosure 3 to the emergency action until January 1977. The Department's Enclosure 3 is the ineligibility notice of November 3, 1994, stating that Jett's Southbrook Mall school could no longer participate in the FFEL program from September 13, 1994, until October 1, 1996. Jett offered a second witness, its present financial aid officer, who testified that she had no knowledge that the school codes she was using were improper. She stated that when she assumed responsibility as financial aid officer she was told to use the sample, posted on the wall, which listed one code for all loan certifications for all three schools. She further explained that it was not until she attended a seminar in August 1996 that she learned how to use school codes properly.

Jett also raised the argument that it received inaccurate information from its lender regarding use of the same OPE-ID number on all loans, and should be absolved from liability as a result. The response to this is that guidance from third parties, like the lender, does not change Jett's responsibilities. Jett remains responsible for conducting its transactions properly.

In several cases, an institution relied on incorrect information provided by a Departmental official to its detriment and incurred liability because of it. The doctrine of equitable estoppel, however, does not apply to SFAP. *See In the Matter of Academia La Danza Artes del Hogar*, Dkt. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992), *aff'd* by the Secretary (Aug. 20, 1992); *In the Matter of Molloy College*, Dkt. 94-63-SP, U.S. Dep't of Educ. (March 1, 1995); *In the Matter of Academy for Social Action*, Dkt. No. 91-6-SP, U.S. Dep't of Educ. (April 10, 1993) (final decision). If SFAP is not bound by erroneous advice give by its own officials, then it is not bound by erroneous advice given by a third party. With Jett's receipt of actual notice of ineligibility, namely the November 3, 1994, notice, there is no basis to conclude that contrary instructions or mistaken directions by third party loan officials will relieve Jett from its ultimate responsibility.

REFUNDS

SFAP next raises Jett's alleged failure to make refunds, to make timely refunds, and to properly calculate refunds. SFAP points out the requirements are clearly set forth in the regulations. For Pell funds, an institution must repay a refund within 30 days from the student's withdrawal (34 C.F.R. § 668.22(d)); under FFEL, the institution must repay the lender within 60 days of the student's withdrawal (34 C.F.R. §§ 668.22(j)(4) and 682.607(c)). During the July 1996 program review, the reviewers found Jett failed to calculate refunds for 12 of 14 students and that refunds were not made for seven of the 14. Jett conceded that nine students were not provided timely refunds, but provided testimony that

about half of the refunds had been made at the time of the hearing. SFAP asserts that Jett's problem with refunds is an ongoing one and that, in fact, its failure to make timely refunds of Title IV funds was cited previously as a deficiency in a 1993 program review report. During cross-examination, Jett's President also admitted that it did not perform a full file review for the 1993 program review and was 115 days late in submitting its 1995-96 file review to determine if there were more late refunds. SFAP argues strenuously that the failure to pay refunds on a timely basis is a most serious violation that demonstrates an inability or unwillingness to properly administer Title IV program funds and demonstrates conduct in contravention of an institution's role and duties as a fiduciary.

DISBURSEMENTS AFTER LAST DATE OF ATTENDANCE

If an institution receives loan proceeds after a student's last date of attendance, § 682.604(e)(3)(i) requires the institution to return the loan funds to the lender within 30 days of the institution's determination that the student has withdrawn from the institution. SFAP listed nine student disbursements after the last date of attendance. During the hearing, SFAP counsel dropped three. Jett's representative conceded the validity of the other six disbursements made after the last date of attendance and the school's liability for those improperly disbursed loans. This is a repeat violation.

REIMBURSEMENT PROCESS

Jett was placed on reimbursement in April 1993. The reimbursement system is a simple one -- the Department makes reimbursement payments after reviewing and approving an institution's written request for payment and the materials submitted to support the request. The institution must show that it calculated the awards properly and that students were eligible to receive the funds. 34 C.F.R. § 668.163(a)(3)(i). The institution also must certify that the information is accurate and complete. 34 C.F.R. § 668.163(a)(3)(ii). SFAP contends that Jett's requests have been rejected many times by the Department for lack of necessary documentation.

SFAP reviewed Jett's requests submitted in May 1994, August 1994, and January 1995. All three submissions were rejected and the rejection letters explained the deficiencies. Mr. Knight, a Reimbursement Reviewer in the Atlanta Regional office, testified regarding Jett's troubled history. Knight pointed to SFAP Exhibit Nos. 84-98 as examples of repeated rejections of Jett's requests. Knight mentioned that certain reimbursements had been processed by Mr. Pullen since August 1996 and that problems remained with many of those. Finally, when asked how Jett compares to others in the reimbursement pool, Knight testified that he was familiar with a group of 40 to 50 schools in reimbursement and that Jett is one of the worst.

ATTENDANCE RECORDS

SFAP asserts that Jett failed to maintain accurate attendance records. The institution is required to have an adequate system of internal controls and maintain adequate and verifiable student and financial records. 34 C.F.R. §§ 668.16, 668.23(h). The program reviewers discovered many discrepancies in reported attendance hours. Jett attributed the problem to the fact that it had to convert its method of keeping attendance records from tenths of hours to quarter hours to satisfy a Department requirement. SFAP asserts that Jett, in fact, was maintaining two sets of attendance records for the very same students which reflected different hours for the same students for the same class days. Additionally there were other discrepancies and notations on the records which brought their accuracy into question.

AUDITS

SFAP contends Jett failed to submit audit reports or to submit timely audit reports. Under regulations found at 34 C.F.R. § 668.23, as of July 1994 Jett is required to submit annual compliance audits acceptable to the Department; prior to July 1994, Jett was required to submit these audits on a biennial basis. Jett did not file its audit reports for the 1994-95 award year, which were due to the Department by June 30, 1996, until January 13, 1997. Although Jett consulted with the auditors regarding the delays, it explained it had no recourse but to wait for them to complete the work.

In addition, the Department notified Jett and its three branches by letters of May 8, 1996, that it had not received audit reports for the 1992-93 and 1993-94 award years, although they were due on June 30, 1995. These audit reports for this 2-year period were finally received by the Department on July 12, 1996. A qualifying statement in the audits, prepared by the auditor, addresses Jett's failure to file appropriate corrective action plans with the biennial audits.

SFAP describes Jett's failure to file or timely file audits as a very serious matter inasmuch as the Department has no way to properly monitor funds without benefit of the periodic audits which Jett, like all recipients, must file. Without audits, the Department has no independent way of verifying whether the school is complying with all requirements.

CONCLUSION

This record reveals that Jett wrongfully certified loans for students at its ineligible Southbrook Mall location and was on notice that loans to students at that location would be ineligible. I find that Jett's conduct is inexcusable and does not reflect that of an institution which is responsive to administrative standards or is meeting its duties as a fiduciary. Jett's claim that it thought it could use another OPE-ID number is simply untenable. In addition, the other findings which show violations of Title IV regulations concerning making refunds, keeping accurate records, disbursing funds after students' last attendance date, filing timely and accurate audits, and properly processing reimbursement requests are cumulative. I find that Jett has not satisfied its burden of persuasion as enumerated in § 668.83(e)(4) in refuting any of these Title IV regulatory violations.

Jett has offered a plan to ostensibly protect against further Title IV losses. This was discussed earlier in this decision and it has been determined to be insufficient. In any event, given the poor state of Jett's records, it is doubtful that any plan would eliminate the risk of loss of Title IV funds. Accuracy and reliability of records are critical to ensuring that funds are being properly accounted for. Without these, the Department cannot perform its monitoring function.

The holder of federal funds, such as student grants and loans, acts as a fiduciary. I find that Jett has failed in its regulatory obligation to adequately account for such funds. Disregarding an ineligibility notice while continuing to certify loans for students at the affected location is not in keeping with Jett's obligation to its fiduciary responsibilities. As such, permitting Jett to continue to participate in the Title IV programs could lead to the misuse of Federal funds. Regulation 34 C.F.R. § 600.41(a) provides that the Department 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.

Accordingly, the emergency action imposed against Jett Colleges of Cosmetology and Barbering is affirmed.

SO ORDERED.

Judge Richard F. O'Hair
Designated Deciding Official

Issued: February 24, 1997

SERVICE

A copy of the attached initial decision was sent to the following:

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*[Footnote: 1](#) * At the hearing SFAP dropped allegations concerning Jett's failure to pay credit balances on a timely basis and its failure to comply with ability-to-benefit requirements.*