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

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In the Matter of **Docket No. 97-23-EA**

**AMBASSADOR BEAUTY COLLEGE**, Emergency Action Show Cause Proceeding
Respondent.

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Appearances:

James H. Zander, Esq., Burbank, California, for Respondent.

Steven Z. Finley, Esq., and Russell B. Wolff, 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

By letter dated January 3, 1997, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), notified Respondent that ED had imposed an emergency action immediately withdrawing the authority of the Respondent to obligate funds under Title IV of the Higher Education Act of 1965, as amended. By letter dated January 15, 1997, Respondent requested the opportunity to show cause that the emergency action is unwarranted. A hearing was held on March 31, 1997, in Washington, D.C., in which evidence and oral argument was presented by both parties in support of their respective positions.

For the reasons provided below, I find that the emergency action must be revoked.

## Discussion

### Introduction.

Under 34 C.F.R. § 668.83(c)(1) (1996), an initiating official, here Marianne R. Phelps, Director, Institutional Participation and Oversight Service, SFAP,[See footnote 1](#)[1] may impose an emergency action under the following conditions: 1) the official receives reliable information that a school participating in the Title IV programs is violating any applicable statutory or regulatory provision concerning Title IV; 2) the official determines that immediate action is necessary to prevent misuse of Title IV funds; and 3) the official determines that the likelihood of loss from that misuse outweighs the importance of awaiting completion of any proceeding that may be initiated to limit, suspend, or terminate an institution's participation in the Title IV programs. An emergency action expires unless a proceeding to limit, suspend, or terminate the institution's participation in Title IV is initiated within thirty days of the imposition of the

emergency action.See footnote 2[2]

The emergency action in this case was taken based on a determination by SFAP that Respondent had changed from a partnership to a sole proprietorship without providing the proper notification to ED and that Respondent had failed to renew its state license to operate for a period of approximately eighteen months. It is SFAP's position that either one of these violations, standing alone, is sufficient to impose the emergency action because the alleged violations deal with Respondent's underlying eligibility to participate in Title IV programs, causing the possibility that all Federal funds awarded by the Respondent are being misused. Although the Respondent may indeed be ultimately found ineligible, based on the evidence before me, I cannot make that determination. In addition, given the uncertain nature of the alleged violations, and the lack of any evidence that SFAP will be unable to collect any Title IV funds determined to be misused as a result of the termination proceeding,See footnote 3[3] I cannot conclude that immediate action is necessary to prevent a misuse of Title IV funds and that the likelihood of loss outweighs the importance of awaiting the conclusion of the pending termination proceeding.

**B. Alleged Dissolution of Partnership.**

In 1982 Eugene L. Milew and Mark S. Schwind entered into a partnership and opened the Ambassador Beauty College in Burbank, California. Under this partnership, Mr. Milew provided the initial capital to set up and begin the operation of the school, while Mr. Schwind was to manage the day-to-day operations of the school. Under the terms of the Partnership Agreement entered into between the partners on September 10, 1982, 50 percent of the capital contributions paid by Mr. Milew were to be paid back to him by Mr. Schwind. The net profits and losses from the school were to be distributed equally between the two partners. The agreement provided that in the event of the “death or insanity” of either partner, the other partner could buy out the partnership for no more than $50,000. The Partnership Agreement provided that Mr. Schwind would receive a salary for his management of the school, and enumerated Mr. Schwind's responsibilities. Under the agreement, neither partner had the authority to expend a sum on behalf of the partnership greater than $300. The agreement was amended on September 1, 1983, to provide for additional capital loans made to the partnership by Mr. Milew, and to reduce to $200 the authority of either partner to expend on behalf of the partnership. The partners operated under the terms of this agreement as amended until June 12, 1991, when they entered into a so-called “Dissolution of Partnership Agreement.” According to SFAP, under the terms of this agreement, the partnership between Messrs. Milew and Schwind was dissolved, and Mr. Schwind now operates the school as a sole proprietorship.

Since Mr. Schwind never informed ED of this change of ownership and control, SFAP contends that Ambassador Beauty College became ineligible to participate in the Title IV programs. However, under the terms of the “Dissolution of Partnership Agreement” the partnership was not immediately dissolved. The agreement in question, although poorly written and difficult to understand, appears to establish a process for the dissolution of the partnership at a future date when certain enumerated events take place. For example, under the Dissolution of Partnership Agreement, a procedure is established whereby Mr. Schwind would pay Mr. Milew his share of the capital investment in the school. Under the terms of the Dissolution of Partnership Agreement, Mr. Schwind's duties as the managing partner continued as described under the original Partnership Agreement, and neither party could purchase nor sell property on behalf of the partnership in excess of $100. The Dissolution Agreement continued to provide that either partner could buy out the partnership for no more than $50,000 in the event of the “death or insanity” of the other partner. Thus, on the face of the Dissolution of Partnership Agreement, although far from being a model of clarity, it appears that Ambassador Beauty College continued as a partnership until Mr. Schwind could buy out Mr. Milew. Thus, there was no change of ownership or control.

According to Mr. Schwind's testimony, the Dissolution of Partnership Agreement was entered into because Mr. Milew had some recent health problems, was getting up in age, and desired to liquidate his business ventures and retire. The intent of the partners was not immediately to end the partnership, but to provide a road map for its dissolution in the future. According to Mr. Schwind, the Ambassador Beauty College is still operating as a partnership, and Messrs. Schwind and Milew are engaged in a dispute as to how much money Mr. Schwind owes to Mr. Milew and the value of the school. (Tr. at 208.) On two occasions in recent years, one in 1994 and one in 1996, Mr. Schwind represented the school as a sole proprietorship rather than a partnership.See footnote 4[4] *See* ED Exhibits 2 and 3. Mr. Schwind's

explanation was that he was told to represent the school as a sole proprietorship by Mr. Boyd Dunlap, Mr. Milew's financial secretary who prepared the documents, in anticipation of the dissolution of the partnership. (Tr. at 160-161, 163, 167.) Notwithstanding Mr. Schwind's murky explanation on this point, I still find that the balance of the evidence suggests that Ambassador remains a partnership. Nevertheless, even if it is ultimately determined during the termination proceeding that it is not a partnership, clearly there is enough ambiguity about the issue so that one cannot conclude that Federal funds are in such an immediate threat of misuse as to justify the imposition of an emergency action.[See footnote 5][5]

**C. Loss of State License.**

Beginning in 1992, the school was required to be licensed by the California State Council for Postsecondary and Vocational Education. The school secured the required license, but, through administrative oversight, it allowed the license to expire in 1994. A state inspector discovered the oversight, and the school took all the necessary steps to have its license renewed. From July 1, 1994, to February 16, 1996, Respondent was without a state license. Based on its failure to renew its license in July 1994, SFAP concluded that the Respondent was not “legally authorized” to operate as a school during this period and, consequently, had lost its eligibility to participate in the Title IV programs and imposed the emergency action in January 1997.

The regulations require that an institution participating in the Title IV programs be “legally authorized” to provide an educational program in the state in which the institution is physically located. *See* 34 C.F.R. § 600.6(a)(3) (1996). The fact that Respondent had inadvertently allowed its state license to expire for a period of eighteen months does not necessarily prove that it was not “legally authorized” to operate in California during the eighteen months in question. The limited evidence available suggests that the state did not consider Respondent ineligible during this period in that all students enrolled during this period were considered by the state to be properly enrolled and that no harm was caused to students or consumers by the gap between licenses. (*See* Respondent Exhibits 2 and 11.) Although Respondent may indeed be subject to termination from participation in the Title IV programs, again the alleged violation is uncertain enough as to prevent a conclusion that immediate action is necessary to prevent a misuse of Title IV funds and that immediate action outweighs the importance of awaiting the outcome of a termination proceeding.[See footnote 6][6]

**ORDER**

Pursuant to my authority under 34 C.F.R. § 668.83 (e)(5) (1996), the emergency action withdrawing the authority of the Respondent to obligate funds under Title IV of the Higher Education Act of 1965, as amended, is revoked.

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Frank K. Krueger, Jr.
Administrative Judge

Dated: April 15, 1997

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SERVICE

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

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Footnote: 1 [1] *The emergency action letter or notice, dated January 3, 1997, was actually signed by David L. Morgan "for" Marianne R. Phelps. It is assumed that Mr. Morgan had the authority to impose an emergency action on his own or on behalf of Ms. Phelps.*

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Footnote: 2 [2] *A termination proceeding has been initiated against Ambassador Beauty College, Docket Number 97-22-ST.*

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Footnote: 3 [3] *Although during oral argument counsel for SFAP alluded to the possibility that there was evidence that suggested a lack of financial viability or other information that could lead to a determination that SFAP would be unable to recover misspent Title IV finds (tr. at 46), no evidence on this point was ever introduced.*

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Footnote: 4 [4] *During the hearing it was revealed that Respondent's certified public accountant also represented Ambassador Beauty College as a sole proprietorship in its draft 1994 financial statement for the school. See ED Exhibit 4. Mr. Schwind's explanation is that the accountant is uncertain whether Ambassador is a sole proprietorship or a partnership, and for that reason the financial statement has never been finalized. (Tr. at 181.) As an attachment to its post-hearing brief, Respondent included an unsworn statement by the accountant in question which corroborates Mr. Schwind's testimony. Since the accountant's statement was not introduced into evidence at the hearing and was not subjected to cross-examination, it has little evidentiary weight. However, the financial statement at issue is also of little evidentiary value since it was never put in final.*

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Footnote: 5 [5] *As a result of the 1993 amendments to the Higher Education Act of 1965, a change of ownership or control no longer necessitates notice to ED if the change is a result of the retirement or death of one owner of a school to another owner who was also involved in the management of the school for the previous two years. See 20 U.S.C.A. § 1099(c)(i)(3)(A) (Supp. 1996) and 34 C.F.R. § 600.31(e)(2) (1994). Thus, under the current regulations, had the Schwind-Milew partnership been dissolved in 1994, rather than, as alleged by SFAP, in 1991, Respondent would not have been required to provide ED with notice of a change in ownership or control.*

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Footnote: 6 [6] *It should also be noted that at least since October 3, 1996, SFAP was on notice of this alleged violation and yet did not impose the emergency action until January 4, 1997. (See Respondent Exhibit 1.) If there is such an immediate threat of an irreparable loss of Federal funds, one must question why SFAP waited three month to impose the emergency action.*

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