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

In the Matter of **Docket No. 97-94-SP**

BETH MEDRASH EEYUN HATALMUD, Student Financial Assistance Proceeding

Respondent. PRCN: 199-32020021

Appearances:

Sholom Rosengarten, Monsey, New York, for Beth Medrash Eeyun Hatalmud.

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

Before:

Ernest C. Canellos, Chief Judge

DECISION

Beth Medrash Eeyun Hatalmud (BMEH) is a post-secondary institution located in Monsey, New York, which offers programs of rabbinical study in what is known as the Lithuanian tradition. It is accredited by the Accrediting Commission for Continuing Education and Training (ACCET), and was eligible to participate in the federal Pell Grant program authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* (Title IV). BMEH's eligibility to participate in the Pell Grant program was terminated on January 27, 1997, based on a finding that it failed to satisfy the statutory and regulatory definition of an eligible institution. *In re Beth Medrash Eeyun Hatalmud*, Docket No. 94-45-ST, U.S. Dept. of Educ. (Decision of the Secretary, January 27, 1997).

On May 7, 1997, the office of Student Financial Assistance Programs (SFAP), of the U.S. Department of Education (ED), issued a Final Program Review Determination (FPRD) which found that since BMEH's programs were ineligible to participate in the Pell Grant Program, all federal funds that had been disbursed to students in those ineligible programs from the inception of its participation in the Pell Grant Program in 1988, had to be refunded. As a consequence, SFAP demanded the return of $15,949,148. On June 27, 1997, BMEH filed an appeal and requested an administrative hearing in order to rebut the findings in the FPRD.

This action is the latest in a series of proceedings between the parties which involve the question of BMEH's eligibility to participate in the federal student financial assistance programs. Two issues were originally litigated in each of the previous proceedings: (1) was BMEH properly accredited for Title IV purposes, and (2) did BMEH satisfy the definition of an eligible institution.[See footnote 1](#)[1] The question regarding appropriate accreditation was resolved adversely to SFAP; however, the second question persists and constitutes the basis for this proceeding.

To be eligible to participate in the Title IV programs, BMEH is required, *inter alia*, to offer not less than a one-year program of training which prepares students for gainful employment in a recognized occupation. 20 U.S.C. § 1141(a),

20 U.S.C. § 1088(c). BMEH has, throughout all the proceedings, consistently claimed that its programs lead to such employment while SFAP disputes that contention. The hearing official in the termination action involving BMEH ultimately decided in his Decision Upon Remand that, although "some students have found employment as teachers in the field of Orthodox Jewish education . . . , these programs were neither intended nor designed to prepare students for gainful employment in a recognized occupation." *In re Beth Medrash Eeyun Hatalmud, supra.* Based on that conclusion, he determined that BMEH did not meet the statutory definition of an eligible institution and, as a consequence, its eligibility was terminated.See footnote 2[2] An application for a Temporary Restraining Order was denied by the U. S. District Court for the Southern District of New York. *Beth Medrash v. Richard Riley*, 97 Civ. 2035 (RO), (S.D.N.Y, April 30, 1997) (the Court granted ED's motion for summary judgement).

In the present action, SFAP reasons that since BMEH's programs have remained essentially unchanged since it was first certified as eligible, it should have been ineligible to participate in Title IV programs from the inception of its certification. Therefore, it argues, all federal funds which were disbursed to its students were improperly spent and must be returned. BMEH, on the other hand, urges that I determine that it does satisfy the eligibility criteria and it was, therefore, improperly terminated. In the alternative, it posits that it is improper and unfair for SFAP to recoup federal funds which the institution disbursed to students in a good faith belief that it was eligible, and it is especially unfair to sanction this and other like institutions on the basis of an apparent retroactive application of a changed interpretation by SFAP officials.

DISCUSSION

Although it might appear that the question before me is one of straightforward interpretation, it becomes complicated by the fact that two hearing officials in two previous cases involving very similar facts and the same controlling statute have issued conflicting decisions. In *Academy for Jewish Education*, Docket No. 96-29-SP, U.S. Dep't of Educ. (August 23, 1996), the hearing official found that it would be an abuse of discretion for ED to retroactively apply the result of the termination case when SFAP sought to collect all the federal funds which were disbursed by the school under a previously approved eligibility determination. On the other hand, in *Beth Jacob Hebrew Teachers College*, Docket No. 96-77-SP, U.S. Dep't of Educ. (March 17, 1997), the hearing official found that SFAP could recover all funds expended in the ineligible program despite the delay in enforcement and the lack of intentional wrongdoing on the part of the institution. Each of the decisions was appealed to the Secretary who, noting that the two needed to be reconciled, remanded the *Beth Jacob* case to the hearing official for his further explanation. The remand decision is pending.

I start my examination from the point of reference that BMEH is ineligible to participate in the Title IV programs, effective on January 27, 1997.See footnote 3[3] Further, I find that since the relevant Title IV provisions in question have remained essentially the same since the date that BMEH was first certified as eligible to participate in the Title IV programs, had BMEH's programs been reviewed originally under the current criteria, it would not have been granted eligibility recognition. Since I have assumed these two as givens, the fundamental question is: what has changed, if anything, in the intervening years to lead to two different results regarding BMEH's eligibility when applying the same statutory provisions? An ancillary factor is what consideration should be given to the fact that SFAP has admitted that BMEH has always made full disclosure of its programs and, further, that it has no evidence of fraud or bad faith on the part of BMEH?

Two possible answers to my above query are readily apparent. First, it is possible that the program official who first determined that BMEH was eligible made an error in applying the law and, therefore, mistakenly approved BMEH's eligibility. Alternatively, it is possible that the program official was correct in applying the then existing interpretation of the statute, but that the interpretation has since changed. Given this situation, I must decide whether the statute and regulations in question are clear and unambiguous and, if not, whether ED has effectively interpreted the language in the past. In addition, an overriding question is, does it comport with Due Process to seek to recover funds so many years after they were expended, especially when there was never any attempt to do so during the intervening yearsSee footnote 4[4] and SFAP cannot, even today, offer an explanation of why this occurred?

Were these provisions clear and susceptible to only one reasonable interpretation, my inquiry would end because the answer to such a question would be that the program official made a mistake when BMEH was certified as eligible.See

footnote 5[5] But here, I am convinced that the provisions which define an eligible institution, *inter alia*, as one which provides a program which "prepares students for gainful employment in a recognized occupation," are not so clear so as to foreclose reasonable debate as to its meaning.

Having found that the authorities are, indeed, unclear and, therefore, subject to varying interpretation, I must determine whether the provisions have been previously interpreted by ED in a manner which would constitute effective and binding interpretive rulemaking. During the course of this proceeding, neither party provided any direct evidence of such an interpretation of the statute at any time prior to the initiation of the action in this and the others cited herein. SFAP argues, not unexpectedly, but without reference to any document or other evidence of record, that its currently espoused interpretation has always been the same. On the other hand, BMEH evidences serious doubts that such interpretation has been consistently applied. In the absence of any such direct evidence, I must resort to available circumstantial evidence to ascertain the interpretation afforded the eligibility provisions.

I note as significant that SFAP changed its theory of the case in the termination action involving BMEH. This provides me with some indication of an evolving change of interpretation. Also, considering the well recognized theory of "presumption of regularity," it is extremely difficult for me to believe that during the intervening years, each and every decision-maker has been mistaken when approving this and similar programs -- this would be the case if SFAP's interpretation had been consistently applied throughout the period. As a consequence, I find that SFAP has not previously effectively interpreted the language in issue.See footnote 6[6]

Further, I must resolve the question of whether or not I should retroactively apply SFAP's current interpretation. ED does not address an issue of retroactivity, rather, it acts as if the return of the federal funds is a given. SFAP points out that since the decision to terminate BMEH was based on a reasonable interpretation of the statute -- that decision acts as a collateral estoppel, preventing a second litigation of the same issue in this case. Consequently, both the FPRD and SFAP's brief assume that the finding that BMEH was not eligible to participate in the Title IV programs automatically results in the authority to demand the return off all Title IV funding for the entire period of BMEH's participation.

The regulations do not speak specifically to the issue of retroactivity. They do provide, however, that if ED believes that a previously designated educational institution or program no longer satisfies the relevant statutory or regulatory eligibility requirements, it may initiate a termination action. 34 C.F.R. § 600.41 (a) and (b). Once the action becomes final, the termination is then effective. 34 C.F.R. § 600.41(c)(2). There is one instance where the decision that an institution is ineligible may be applied retroactively. Under 34 C.F.R. § 600.40(c)(1), if an institution has been designated as eligible "on the basis of inaccurate information or documentation, the Secretary's designation is void from the date the Secretary made the designation." No other provision relative to the retroactivity of a termination decision is made either in the statute or regulations.See footnote 7[7] If we follow the well known legal maxim of *inclusio unius est exclusio alterius*, we should presume that there are no other possible instances of retroactivity, otherwise, they would have been specifically provided for. Put another way, if BMEH had engaged in fraud or had provided misleading information during its eligibility process, its eligibility could be terminated *ab initio*. However, there is no evidence of such activity.

In summary, I conclude that absent any evidence of fraud or misleading information, and based on the fact that the statutory provision and the regulations in question are subject to varying interpretation, it would be unfair and impermissible, and possibly a violation of substantive due process, to direct repayment of the amount in issue. This result is limited to the facts of this case and, in situations where the loss of eligibility has been occasioned by other factors, such as the failure to satisfy one of the absolute prerequisites for eligibility, a different rationale probably would apply.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Beth Medrash Eeyun Hatalmud is relieved of any obligation to repay to the United States Department of Education the sum of $15,949,148, as demanded by the FPRD.

Ernest C. Canellos, Chief Judge

Dated: June 16, 1998

SERVICE

On June 16, 1998, a copy of the initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 [1] *BMEH is one of a number of schools providing Jewish Culture type programs which are accredited by ACCET and which were eligible to participate in the Title IV programs. The eligibility of a number of these schools was questioned by SFAP on the basis of, alternatively, that their ACCET accreditation as "avocational" was insufficient, and that their programs did not qualify as eligible vocational programs. Ultimately, most of the schools were terminated from participation in the Title IV programs. The sole approved basis for termination was the schools' failure to provide an eligible program. In re Derech Ayson Rabbinical Seminary, Docket No. 94- 50-ST, U.S. Dep't of Educ. (October 4, 1994); In re Sara Schenirer, Docket No. 94-49-ST, U.S. Dep't of Educ. (June 21, 1995); In re Academy for Jewish Education, Docket No. 94-51-ST, U.S. Dep't of Educ. (August 1, 1995).*

Footnote: 2 [2] *Coincidentally, I was the Emergency Action hearing official in the case of Academy of Jewish Education, Docket No. 94-11-EA, U.S. Dep't of Educ. (March 23, 1994). There, I held that in order to satisfy the Title IV eligibility requirement of preparation of students for gainful employment in a recognized occupation, "the intended goal or result of such program [must] be preparation for gainful employment in such occupation, not that such a goal or result is potentially derived or incidentally available at the conclusion of the program." Case decisions listed above and other decisions involving BMEH have adopted this language and rationale.*

Footnote: 3 [3] *As a threshold matter, I find that BMEH's attempt to relitigate the question of its qualification for eligibility in this forum is precluded by the final decision in the termination case involving BMEH, referenced above, which is res judicata.*

Footnote: 4 [4] *It is indeed disconcerting that this case involves the demand for the return of millions of dollars from what is on the facts, apparently, a "blameless" institution -- a figure which was surely exacerbated by the unexplained failure to more timely determine and announce their ineligibility. In fact, BMEH asserts that if it is required to pay the amount in issue, it will be forced to close, students could not complete their programs, and yet that amount can never be collected. It is to avoid situations like this that the law generally makes provision for the defenses of statutes of limitation and laches. Although not necessary to my adjudication of the merits of this case, it is of interest to ponder the application of those concepts to the scenario as is enumerated above.*

Footnote: 5 [5] *This is not to say that by my holding I am foreclosing SFAP's ability to recover funds from an institution where the institution challenges SFAP's interpretation of a regulation. It is axiomatic that ED could never draft regulations that are consistently susceptible to only one interpretation or that may facially cover all circumstances. Consequently, in instances where an institution merely articulates an opposing interpretation -- albeit a reasonable one -- that interpretation would not be sufficient to hinder ED's enforcement efforts. In that respect, my holding is narrowly limited to the unique circumstances of the case before me.*

Footnote: 6 [6] *I make this determination with full recognition that SFAP contends that the regulation is clear on its face. Nonetheless, I have determined that the regulation is ambiguous. It is worth repeating that this determination does not bind ED only to enforcing regulations that have been previously authoritatively interpreted. Undoubtedly, a rule to that effect would unnecessarily frustrate an agency's ability to recover misspent funds. Instead, this decision limits ED's arbitrary recovery of funds in instances where the balance of equities warrant binding ED to its previous -- albeit de facto -- interpretation of law which the institution has relied upon.*

Footnote: 7 [7] *I am not unmindful of the provisions of 34 C.F.R. § 600.40(a)(1)(i) that an institution loses its eligibility on the date that it fails to meet any of the eligibility requirements. I believe, consistent with the discussion above, that this provision does not constitute authority to apply the termination decision retroactively under the circumstances.*