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

In the Matter of

Docket No. 98-4-SP

TRUCK DRIVING ACADEMY,

Student Financial Assistance Proceeding

Respondent.

PRCN: 199730914004

Appearances:

Charles P. Nemeth, Esq., Rosslyn Farms, PA, for Respondent.

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

Before:

Richard I. Slippen, Administrative Judge

DECISION

On August 21, 1997, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (Department) issued a final program review determination (FPRD) finding that during the 1995-96 and 1996-97 award years, Truck Driving Academy (TDA) violated the institutional eligibility requirements of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. §§ 1070 *et seq*, 1088 *et seq*, and its implementing regulations. The FPRD, which assessed a total liability of $174,009.00, resulted from a review of TDA's Recertification Application for Approval to Participate in Federal Student Financial Aid Programs.See footnote 1[1] The Department notified TDA on May 21, 1997, of the denial of recertification and the termination of its provisional eligibility.

In its appeal of the FPRD, TDA focuses its challenge upon SFAP's decision to terminate its eligibility. The institution argues that it should have been afforded a Subpart G termination hearing because the denial of its recertification application deprives it of a fundamental property interest. TDA also contends that it does in fact offer eligible graduate or professional programs, that it cannot be categorized as undergraduate, that SFAP acted arbitrarily and capriciously in the termination process, and that the Department retroactively applied its requirements.

SFAP responds that a truck driving school cannot claim to offer graduate or professional programs within the meaning of the regulations, and that TDA should correctly have categorized itself as an undergraduate institution.

However, since its programs would not have met the eligibility criteria for undergraduate training, SFAP claims that TDA's attempt to pass itself off as a graduate institution is little more than a "post hoc rationalization" for its failure to fulfill the clearly written regulatory standards. TDA's arguments against the termination decision are ultimately misplaced, SFAP contends, because this tribunal does not have the authority to hear these issues in a Subpart H proceeding.

I

The first question in this proceeding concerns the proper scope of this tribunal's jurisdictional authority. TDA asserts that a hearing should be afforded under 34 C.F.R. § 668, Subpart G,See footnote 2[2] when the Department terminates an institution's SFAP program participation eligibility. TDA correctly points out that Subpart G applies neither to a failure to qualify for an initial certification of institutional eligibility, nor to a decision not to grant initial or provisional certification to participate in Title IV because of a failure to meet the financial responsibility and administrative capability requirements contained in Subpart B. 34 C.F.R. § 668.81(c)(1), (2). However, the institution fails to note that Subpart G also does not apply to a determination that "a participating institution's or a *provisionally certified* institution's period of participation, as specified under § 668.13, has expired". 34 C.F.R. § 668.81(c)(3) (emphasis added). An institution's Title IV participation under § 668.13 is predicated upon its eligibility. Provisional certification is granted to an institution on a month-by-month basis until the Department issues a decision on the application for recertification. 34 C.F.R. § 668.13(b)(2). As TDA's participation was merely provisional, SFAP's decision not to allow it to continue does not constitute the full-fledged termination envisaged in the Subpart G regulations.

SFAP argues that TDA appealed the FPRD pursuant to 34 C.F.R. § 668, Subpart H, and therefore the institution may only challenge the imposition of liability, not the termination itself. The Subpart H proceeding "applies to any participating institution or third-party servicer that appeals a final audit determination or final program review determination." 34 C.F.R.
§ 668.111(b). Accordingly, the regulations specifically state that Subpart H does not apply to proceedings governed by Subpart G. 34 C.F.R. § 668.111(c). As TDA appealed the November 19, 1997, FPRD in a timely fashion on December 19, 1997, and entitled its appeal as "Request for Review of a Final Determination Letter," there can be little doubt that the institution was initiating a Subpart H proceeding. TDA's continued assertions that this tribunal has authority under Subpart G represent a misunderstanding of the applicable regulations.

The institution also argues that it has due process rights since the termination of its eligibility denied it "a fundamental property interest." The Department's refusal to recertify an institution, however, does not constitute the kind of termination which TDA alleges requires full due process. The institution cites *Career College Ass'n v. Riley*, which specifically distinguished the due process rights necessary for provisional certification from those for termination, a differentiation which does not support TDA's argument. 74 F.3d 1265 (D.C. Cir. 1996). Although *Career College* addressed termination for excessive cohort default rates, it is worth noting the court's statement that "institutions subject to provisional certification . . . as initial or renewal applications are not entitled to the notice and hearing and the appeal requirements. Such applications are not 'participating' in a Title IV program and do not possess any current 'eligibility' that can be lost." *Id.*, at 1274. As TDA itself notes, due process requirements for provisional certification are minimal. The very process of applying for recertification suggests that there is no "'entitlement' to certification" or continued eligibility. *Id.*

For these reasons, TDA is only entitled to a Subpart H hearing. As jurisdictional authority under Subpart H is limited to the FPRD, this tribunal will make no judgment on the merits of SFAP's decision not to recertify TDA as an eligible institution. The sole issues before me in this proceeding concern SFAP's finding that TDA offered an ineligible program and its subsequent assessment of liability.

II

The regulations enumerate the criteria that must be met for the three program categories that satisfy eligible participation in Title IV programs. These categories include the 15 week/600 hour vocational program, the 10 week/300 hour graduate or professional program, and the 10 week/300 hour high-performing vocational program. *See* 34 C.F.R. §

668.8(d) - (g). In its recertification application, TDA claimed to offer “graduate or professional” programs, as delineated under 34 C.F.R. § 668.8(d).

According to SFAP, no plausible reading of the applicable regulations would lead to a definition of TDA's truck driving program as “graduate or professional.” TDA awarded Federal Pell Grants to its students, although Pell Grants may only be awarded to students who have not yet received a baccalaureate or professional degree. 34 C.F.R. § 690.75(a)(2). A graduate or professional student is defined under 34 C.F.R. § 682.200(b) as one enrolled in a program above the baccalaureate level or a program leading to a first professional degree. Such a student also has completed at least three academic years of full-time study at an institution of higher education and is not receiving Title IV aid as an undergraduate during the same period of enrollment. *Id.* An undergraduate student, on the other hand, has not yet earned a baccalaureate or first professional degree and is participating in an undergraduate course of study. 34 C.F.R. § 690.2. TDA not only stretches credulity by arguing that its truck driving program could fit under these regulations as a graduate program, but it also conveniently ignores the 34 C.F.R. § 690.6 requirement that only undergraduate students may receive Pell Grants.

Furthermore, as TDA's programs are 16 weeks and 330 clock hours in length, SFAP charges that the institution does not meet the length requirements necessary under 34 C.F.R.
§ 668.8(d)(1) for a vocational program to participate in the Federal Pell Grant program. Since the institution does not meet the requirements of a vocational or graduate training program, it must qualify under the only other remaining category_as a high-performing vocational program, which requires it to present evidence that it has completion and placement rates of at least 70%. TDA, however, failed to conduct a placement study to satisfy this requirement. Moreover, this category only applies to Federal Family Education Loan program participation, as such schools cannot receive Federal Pell Grants, which TDA did in fact receive. 34 C.F.R. § 668.8(d)(3), (f) and (g). SFAP argues that students may only be considered eligible to receive Title IV funds if the institution and its programs are eligible. In a Subpart H proceeding, the institution has the burden of proving that its disbursements of Title IV funds were proper, and SFAP asserts that TDA did not meet this burden. *See* 34 C.F.R. § 668.116(d).

TDA, on the other hand, claims that the Department's categorical determination is unnecessarily rigid, that an institution can have programs of “multiple designation.” The institution focuses on SFAP's assertion that it provides vocational, or “undergraduate,” training. TDA argues that because it could not fulfill the threshold requirements for eligibility as an undergraduate program, it must therefore not *be* an undergraduate program. This is a peculiar leap of logic, for TDA's failure to meet the requirements of one category cannot be used to prove that it does not belong in that category.See footnote 3[3] The institution asserts that it chose this designation based on the plain language of the regulation, that it is “clearly . . . a *proprietary and vocational school* of higher education offering a *professional program of study*.” (emphasis in original) However, the institution does not explain why this is so obvious.

TDA seems to suggest that the definitions of undergraduate and graduate study and the requirements included for each should be ignored in favor of a its “good faith interpretation of the regulations.” The institution's acceptance of Pell Grants, however, negates this argument, for § 690.6 is quite clear in stating that “a student is eligible to receive a Federal Pell Grant for the period of time required to complete his or her first undergraduate baccalaureate course of study.” TDA does not address the fact that it accepted Pell Grants, but it could not receive them and yet be a graduate institution.

The regulations, when read as a whole, do not leave any doubt that TDA did not fulfill the requirements of any of the three program categories. TDA cannot be a graduate or professional program because the institution accepted Pell Grants; it cannot be a vocational program because it does not fulfill the length requirements; and it cannot be a high-performing vocational program because it failed to perform a placement study.

The institution makes a final argument that SFAP has retroactively applied its requirements. According to TDA, the application of the placement study requirement is arbitrary and capricious. TDA does not provide much support for this claim, however, aside from its from its assertions that this tribunal need not be deferential in the face of irrational administrative decisionmaking. As noted above, however, SFAP's attempt to categorize TDA into one of the three regulatory categories does not represent an abuse of discretion. An institution must only conduct a placement study if it wishes to fit within the high-performing vocational school category. Quite simply, TDA did not fulfill the requirements

for any of the categories.

Although TDA did not articulate a clear argument for estoppel, the institution did challenge SFAP's assessment that it is "liable for retroactive sums." It is therefore worth noting that the Department cannot be estopped from collecting misspent funds. "SFAP is entitled to repayment of Title IV funds if the institution was not eligible to receive those funds regardless of the institution's good faith or lack of notice." *In re Beth Jacob Hebrew Teachers College*, Docket No. 96-77-SP, U.S. Dep't of Educ. (March 17, 1997) at 4. Although it is not clear whether TDA's original certification was the result of mistake or negligence, the Department "should never be precluded from enforcing its regulations, even though there may have been gross negligence or a previous lapse in such enforcement." *Id.* at 5. *See also In re Academia La Danza Artes Del Hogar*, Docket No. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992), aff'd by the Secretary (August 20, 1992) at 10. It is also worth noting again that the Department's certification was only provisional. Therefore, I find that SFAP may recover all Title IV funds expended by TDA during the 1995-96 and 1996-97 award years.

FINDINGS

1. TDA did not fulfill the institutional eligibility requirements under 34 C.F.R. § 668.8.

2. TDA remains liable for all Title IV funds expended during the 1995-96 and 1996-97 award years.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Truck Driving Academy pay to the U.S. Department of Education the sum of $174,009.

_____
Judge Richard I. Slippen

Dated: August 10, 1998

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]The liability determination includes $66,737.00 for the repayment of 1995-96 and 1996- 97 Federal Pell Grant funds and $107,272.00 in estimated actual loss to the Department. See generally In Re Christian Brothers University, Docket No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997).*

Footnote: 2 *[2]All references to the Code of Federal Regulations are to the 1995 edition.*

Footnote: 3 *[3]TDA also claims that the regulations, if read literally, would not allow law or medical schools to fulfill the graduate program requirements, because they are not, among other things, only 300 clock hours and 10 weeks long. This is an empty argument, for § 668.8(d) states that this is a minimum, not a maximum.*
