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

In the Matter of

ADVANCED TECHNOLOGY INSTITUTE,

Respondent.

Docket No. 00-01-EA

Emergency Action
Show-Cause Proceeding

Appearances: Keith D. Diamond, Esq., of Miami, Florida, for Advanced Technology Institute.

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

Before: Judge Ernest C. Canellos

DECISION

On December 21, 1999, the United States Department of Education (ED) Office of Student Financial Assistance Programs (SFAP) imposed an emergency action against Advanced Technology Institute of Miami, Florida, in accordance with 20 U.S.C. § 1094(c)(1)(G) and 34 C.F.R. § 668.83. In response to the notice imposing the emergency action, on January 10, 2000, counsel for Respondent requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the Delegation of Authority from the Secretary 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 on March 6, 2000. According to the notice in this case, the emergency action was based upon SFAP's finding, subsequent to a program review conducted at Respondent's institution, that Respondent had abandoned its fiduciary duty by failing to provide documentation to reviewers to support a substantial number of the drawdown requests for the three award years examined by the program reviewers. In this regard, SFAP alleges that for the 1996-97, 1997-98, and 1998-99 award years, Respondent could not provide credible documentation for its expenditure of at least $1,045,460 in Pell grant funds. The additional grounds warranting imposition of the emergency action, according to the notice, include; Respondent's failure to calculate properly tuition refunds, failure to pay tuition refunds, failure to maintain accurate or reliable records, failure to comply with Title IV clock hour/credit hour conversion requirements, and Respondent's demonstrated lack of administrative capability.

To bolster the allegations contained in the notice, SFAP presented evidence, during the hearing, showing that Respondent may have submitted falsified information in its reimbursement packages, wherein the institution may have sought to obtain Title IV funds for students who never attended the institution. An institutional review specialist for SFAP testified that, in the course of his official duties, he attempted to contact 10 of Respondent's students by telephonic communication.[1] According to the witness, due to invalid or disconnected telephone numbers, he was

unable to contact 7 of those students. The 3 students that he successfully contacted each stated that they had neither attended, nor enrolled, in Respondent's institution.

In response to the allegations in the notice, Respondent argues that SFAP's review of the institution's records contains significant inaccuracies. According to Respondent, due to deficiencies in the procedures for posting Title IV funds to student accounts, the institution's records that were reviewed by SFAP's program reviewers were inaccurate.[2] Respondent argues that it could, if given sufficient opportunity, reconcile SFAP's review with its own review and, thereby, reduce the amount of funds unaccounted for by a substantial amount.[3] In addition, Respondent argues that it has met its show-cause burden in the emergency action by showing that, even assuming that it has misused substantial Pell grant funds during the award years at issue, the likelihood of future loss of Federal funds does not outweigh the importance of awaiting completion of the Subpart G, Termination and Fine proceeding, which accompanies this emergency action, since the Department's interests are suitably protected from loss by the "reimbursement" system imposed upon Respondent in May 1999. In the alternative, Respondent argues that it can sufficiently reduce the risk of loss of Federal funds during the pendency of the subpart G proceeding by "post[ing] a cash bond (certificate of deposit put up at City National of Florida) for an amount equal to any reimbursement package submitted and paid by [the] Department of Education…as collateral for a 60-day period after the reimbursement payment has been made." With regard to SFAP's allegation that Respondent submitted fraudulent reimbursement requests in July 1999, Respondent states that the requests were "an attempt to set up Advanced Technology by an ex-employee." In Respondent's view, it is "inconceivable to believe that Advanced Technology Institute would play games with the reimbursement package with a hand full [sic] of students to make $4,500.00 and jeopardize the existence of the school."

Pursuant to 34 C.F.R. § 668.83(c), an emergency action should be upheld if: 1) there is reliable information that the institution violated any provision of the HEA; 2) immediate action is necessary to prevent misuse of Federal funds, and 3) the likelihood of financial loss from the misuse of funds outweighs the importance of adherence to the procedures for limitation, suspension, and termination actions. Examples of violations that would warrant the imposition of an emergency action include the grounds charged in the notice.[4] In this show cause proceeding, Respondent has the burden of persuading me that the emergency action is unwarranted. 34 C.F.R. § 668.83(e)(4). To meet its burden, Respondent must persuade me that the emergency action is unwarranted because the grounds stated in the notice did not or no longer exists, the grounds will not cause loss or misuse of Title IV funds, or that the institution will use procedures that will reliably eliminate the risk of loss from the misuse described in the notice.

The tribunal already has traveled the route of Respondent's initial argument, that the reimbursement system sufficiently protects the government from risk of loss, and Respondent offers no reason to chart a new course. The reimbursement system does not eliminate or reduce the risk of loss of Federal funds where, as is the case here, the Department has raised persuasive and unrebutted allegations that the documentation submitted by Respondent lacks reliability or trustworthiness. Under the reimbursement system, the institution must demonstrate that it is entitled to Federal funds by complying with program requirements for awarding and disbursing institutional funds to eligible students who are enrolled in and attending eligible programs. When the institution has demonstrated that it has expended these funds in accordance with Title IV requirements, SFAP reimburses the institution for funds expended.[5] In this regard, the funds are usually requested through a reimbursement agent who analyzes the information provided by the institution rather than verifying the information based on a firsthand review of the documentation. Therefore, while the reimbursement system provides additional assurances that actual liabilities to the Secretary may be reduced, it does not eliminate the potential that the liability may accrue as a result of inaccurate information provided by the institution. Moreover, since the reimbursement agent presumes that the documentation submitted by institutions is trustworthy, the reimbursement system cannot eliminate the risk of loss of Federal funds if the documentation submitted by the institution is untrustworthy. Respondent's contention, that a disgruntled former employee caused the institution to submit apparently fraudulent reimbursement requests that could financially benefit the institution, but not the employee, is implausible and unpersuasive. Given the serious and comprehensive nature of the allegations in this proceeding, I am not convinced that the procedures[6] implemented by Respondent or the reimbursement system, itself, would reliably eliminate or reduce the risk of loss of Federal funds.

In addition, Respondent's offer to post a cash bond or "certificate of deposit put up at City National of Florida" for an amount equal to any reimbursement package is insufficient to reduce or eliminate a risk of loss of substantial Federal funds. Although Title IV regulations do not specifically provide that institutions may obtain relief from an emergency action by posting a bond or presenting a letter-of-credit, an analogous regulation prescribes that an institution, which would otherwise pose significant risk of loss of Title IV funds by its continued participation in Title IV programs because it fails to satisfy the general standards of financial responsibility, may continue participation in Title IV programs if it submits an irrevocable letter-of-credit equal to one-half the Title IV funds it received during the last award year. 34 C.F.R. § 668.15(d)(2)(i).[7] Even if the application of that standard would be appropriate to this case, Respondent's certificate of deposit fails to meet that test.[8]

Respondent's proffer is unavailing for two additional reasons. First, unrebutted, persuasive allegations of fraud are clearly sufficient to warrant the imposition of an emergency action. In addition, even if fraud was not alleged, Respondent's proposal lacks the requisite specificity required under the circumstances. In stark contrast to the usual terms of a letter-of-credit, the terms of Respondent's proposal is not presented in a manner that could assure SFAP that those terms would cut off Respondent's right to revoke a claim to the funds during the 60-day period provided to SFAP to evaluate the reimbursement package. Also, I note that, based on the evidence raising serious doubt as to the reliability of any submission by the Respondent, the 60-day period of the offer is clearly inadequate on its face. Consequently, the risk of loss of Federal funds is not sufficiently reduced by Respondent's proffer. Accordingly, I find that Respondent failed to meet its burden showing that the imposition of an emergency action against it is not warranted. In light of my determination that Respondent has failed to meet its burden of showing that the institution would reliably eliminate a risk of loss of Federal funds, it is clear that the likelihood of financial loss of Federal funds clearly outweighs the importance of awaiting completion of a proceeding to limit, suspend, or terminate the participation of Respondent in Title IV programs.

Having found that the three-pronged test for imposition of an emergency action has been met, **I AFFIRM** the emergency action.

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Ernest C. Canellos
Chief Judge

Dated: March 31, 2000

SERVICE

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

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[1] According to SFAP, the 10 students contacted were selected from Respondent's reimbursement package submitted in July 1999.

[2] Respondent contends that it has implemented a tracking form procedure that will reduce or eliminate the deficiencies in its present system.

[3] Respondent concedes that at the time of the hearing it still could not account for approximately $345,000 in Title IV funds.

[4] 34 C.F.R. § 668.83(c)(2)(ii) (fiduciary duty, administrative capability).

[5] *In the Matter of New Concept Beauty Academy*, Dkt. No. 96-164-SP, (April 29, 1998).

[6] As noted supra, Respondent implemented a form tracking procedure. Assuming that this procedure has relevance to the alleged regulatory violations regarding Pell grant drawdowns, it is enough to observe that these internal procedures would fall far short of fraud prevention.

[7] It should not go unnoted that the formalities of a letter of credit offer a safeguard that is not apparent in Respondent's offer of a certificate of deposit. As the federal courts have made plain, the "whole purpose of a letter of credit would be defeated by examining the merits of the underlying contract dispute to determine whether the letter should be paid." *Centrifugal Casting Machine Co. Inc., v. American Bank & Trust Co., 966 F.2d 1348, 1352* (10th Cir. 1992). The relevant inquiry is whether the documents presented "strictly comply with the terms in the letter." *In The Matter of Phillips Colleges, Inc.,* Docket No. 94-27-ST (March 24, 1994) (citing *Breathless Associates v. First Savings & Loan Association of Burkburnett, 654* F. Supp. *832* (N.D. Texas 1986)). Under the circumstances of this case, wherein the government alleges that the documents are not credible, the traditional inquiry would not sufficiently protect the Federal government from a risk of loss.

[8] SFAP has cast doubt on the acceptability of a performance bond. *See, e.g.,* 59 Fed. Reg. 22381.