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

In the Matter of	**Docket Nos. 01-13-EA and 01-14-ST**
HAMILTON PROFESSIONAL SCHOOLS,	Student Financial Assistance Proceedings
Respondent.	

Appearances: J. Andrew Usera, Esq., of Vienna, Virginia, for Hamilton Professional Schools.

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

Hamilton Professional Schools (Hamilton) is a proprietary institution of higher education located in Arroyo, Puerto Rico, with a branch campus in Juncos, Puerto Rico. Hamilton is accredited by the Accrediting Commission of Career Schools and Colleges of Technology (ACCSCT), and participates in the Pell Grant Program, as authorized under the provisions of Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* The office of Student Financial Assistance Programs (SFAP), of the United States Department of Education (ED), administers and provides oversight for these programs.

On April 5, 2001, the Director of SFAP's Administrative Actions and Appeals Division, issued a Notice informing Hamilton that SFAP was: (a) imposing an emergency action against it, in accordance with 20 U.S.C. § 1094(c)(1)(G) and 34 C.F.R. § 668.83; (b) intending to terminate Hamilton's eligibility to participate in the Title IV programs, in accordance with 34 C.F.R. § 668.86; and (c) intending to fine Hamilton $726,000, in accordance with 34 C.F.R. § 668.84. At the joint request of both parties, I consolidated these proceedings and, after the parties exchanged briefs and evidentiary matter, I conducted an evidentiary hearing from July 16, 2001, through July 20, 2001, in Washington D.C.[1] During the hearing, Hamilton raised repeated challenges to SFAP's allegedly untimely introduction of documentary evidence during the presentation of its case-in-chief and during its rebuttal. Hamilton claimed that by submitting new and additional evidence at the hearing, SFAP had deprived it of an adequate opportunity to rebut.[2]

According to the notice in this case, these proposed actions were based upon SFAP's finding, subsequent to a program review conducted at the institution between August 23 – 28, 2000, that Hamilton had abandoned its fiduciary duty by allegedly drawing down Title IV funds to which it was not entitled.[3] Specifically, it is alleged that Hamilton falsified certain student attendance records so as to indicate that the respective students had attended more class-hours than they had actually. As a result, Hamilton is alleged to have knowingly drawn-down Title IV funds that it had not earned. In addition, it was alleged that Hamilton failed to establish a valid ability-to-benefit test program as required

and students who did not possess either a requisite high school diploma or its equivalent GED were improperly made eligible and were disbursed Title IV aid. *See* 34 C.F.R. § 668.32. Further, according to the notice, the Respondent failed to calculate properly and pay tuition refunds. This failure was facilitated by Hamilton's inability to maintain accurate or reliable records or worse, its falsification of those records. Finally, SFAP alleged that Hamilton often misrepresented to students the elements of its educational program, the assistance it would render, and its financial charges.[4] I will discuss the remaining issues seriatim.

ISSUES

Falsification of Records

During the on-site program review, the lead reviewer became suspicious that Hamilton's record keeping was questionable. She based this suspicion on her past experience reviewing other institutions, as well as the fact that the records were "overly neat" to be active records. In addition, school officials commented that they had spent a great deal of time making sure that all the records were in order. Based on these factors, the review team decided to interview students to verify those students' records. From these interviews, information was discovered that cast serious doubt that the records were correct. The primary problem dealt with attendance records. In many cases, students reported that someone had overstated their hours in their records. After analyzing this information, SFAP determined that the potential effects of these added hours were threefold. First, since in a clock hour school a student earns federal financial assistance upon completion of certain hours of study, the misreported hours allowed for an accelerated earning of tuition. Second, by indicating more hours attended, a school could establish a higher level program with its attendant higher federal aid entitlement – in some cases, it could authorize a third disbursement of Pell Grant funds. Finally, as indicated below, if attendance records overstate attendance, then any refund of tuition would be less than, otherwise, required.

In response to the allegations regarding attendance records, Respondent argued that the institution's records were substantially accurate and it can now reconcile SFAP's review with its own review and, thereby, reduce the amount of funds in dispute to $21,000, which it agrees to pay. Further, even assuming that it had made administrative mistakes, the likelihood of future loss of Federal funds is low since the Department's interests are suitably protected from loss by the "reimbursement" system imposed upon Respondent. It is clear, however, that the issue here is not how accurate Hamilton's records are, but whether there was any falsification of records. As noted more fully below, my review of the evidence of record leads me to conclude the answer is clearly yes.[5]

Refunds Violation

Under the provisions of 34 C.F.R. Sec. 668.22, unearned Pell Grant funds must be returned to the Pell Grant account within 30 days of a student's withdrawal from school. If a student withdraws without notifying the school, the student is considered to have withdrawn as of the last recorded date of class attendance by the student. Of course, it goes without saying, that when calculating a refund, the institution must apply the last day of attendance.

Many of Hamilton's students testified either in person or through an affidavit that the attendance records that Hamilton claimed were theirs were incorrect. There was also bolstering evidence presented. One student had an accident and never returned to class afterwards, yet the attendance records indicated attendance for three months afterwards. Another withdrew in March and had a notebook that ended then, yet the attendance records reveal school attendance in April, May, and June. In response, a Hamilton official testified that she interviewed 90 students and showed them their files. Most executed statements, which disclaimed any errors. Also, some students testified that their attendance records were correct. One stated that students were required to sign attendance sheets on a daily basis and could sign for each other when they were busy. This was an attempt at an explanation as to why signatures were apparently different on the attendance sheet. Aside from the testimony relative to attendance, I have carefully reviewed the attendance records of the students. Based on that review, it is clear to me that the records of attendance were not recorded on a daily basis as alleged by Hamilton. These records, in substantial part, are too identical to be accomplished over periods of time. Entire months entries are indistinguishable – they are exact in size, shape, and position as well as writing instrument. The only possible explanation is that all the entries for a particular month were done at the same time. In one particular case, the student's attendance record reveals the student initialed with three letters on every

month but one. In that odd month that student initialed with two letters. You do not have to be a forensic scientist to realize that these attendance records seem dubious.

Clearly, the only entity which had access to all the attendance records with a duty to maintain them accurately and which had a pecuniary interest in overstating attendance is Hamilton. The confluence of those two factors when coupled with the other evidence of record convinces me that Hamilton falsified attendance records as alleged. The evidence of record further convinces me that Hamilton has violated the provisions relative to refund payments. Through the artifice of manipulating the attendance records of students, Hamilton has made it appear, of record, that students attended many more classes than they actually did – the net effect is that Hamilton claimed it earned substantially more Title IV funds than in actuality. As a consequence, Hamilton calculated and paid refunds to the Pell Grant account that were knowingly substantially less than required.

Ability-to-Benefit Violation

Under section 484(d) of Title IV, 34 C.F.R. Sec 668.141 *et seq.*, a student applicant who does not possess either a high school diploma or its recognized equivalent is ineligible to receive Title IV funds unless such student demonstrates an ability-to-benefit from the education or training offered by achieving a passing score on an independently administered test approved by the Secretary.[6] In its original presentations, Hamilton claimed that it had complied completely with the rules governing ability-to-benefit. It argued that: the Spanish Assessment of Basic Education, Level 6, (SABE) test was given to all students who did not possess a high school diploma or G.E.D., the SABE was an authorized ability-to-benefit test, only students who passed the test were given Title IV aid, and Dr. Ramon Vasquez Rosado was authorized by the publisher to administer the test and he did so according to the publisher's instructions.

The evidence adduced at the hearing, however, revealed quite the contrary. Many of the students denied that they had taken an entrance exam of any type. Also, many of the students claimed that the signature on their ability-to-benefit certifications were not theirs. The General Counsel of McGraw-Hill Educational Publishing Co., the publisher of the SABE, reported that Dr. Vasquez was not authorized by them to administer the SABE. In addition, the referenced exam allegedly utilized was the obsolete SABE I, however, the exam sheets maintained by the school were for the SABE II, which would be incongruent with the tests. Apparently in recognition of the persuasiveness of SFAP's evidence regarding the ability-to-benefit violations, near the close of the hearing, Hamilton changed its position relative to ability-to-benefit and adopted what I have characterized as the "rogue employee" defense. Under that theory, Dr. Vasquez was really at fault – he defrauded everyone including Hamilton. Hamilton is innocent of any wrongdoing. Of course, since the hearing was held in Washington, D.C., Dr. Vasquez was absent; therefore, he was not available to contribute anything to the ability-to-benefit discussion.

Here, the evidence clearly establishes that Hamilton failed to assure that only eligible students were disbursed Title IV funds. First, the test administrator that Hamilton selected was not qualified. Second, the test that was allegedly administered and its corresponding answer sheet could not exist together so as to qualify as an authorized test. Finally, the evidence convinces me that many students did not take even the unauthorized test and that Hamilton, most probably intentionally, or at best, through utter disregard for its fiduciary responsibilities, erroneously recorded that they had done so. I cannot imagine a clearer case of a failure to comply with Title IV.

DISCUSSION

To bolster its position and as further proof of the allegations contained in the notice, SFAP presented evidence during the hearing showing that Respondent most probably submitted falsified information in its reimbursement packages. An institutional review specialist for SFAP testified that she contacted the Department of Education of the Commonwealth of Puerto Rico who informed her that four GED certifications that were submitted by Hamilton in support of a reimbursement package were not verifiable by any records in their possession. Upon review, it is quite apparent that these certifications were fabricated -- the clear inference is that Hamilton was the responsible party. With

regard to the allegation that it submitted fraudulent reimbursement requests, Hamilton claims that it is inconceivable to believe that it would play games with the reimbursement package to realize a small profit and jeopardize the existence of the school.

The Department has the right to presume that documentation submitted by Hamilton is reliable and trustworthy. 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. This is accomplished by accepting information provided by the institution rather than by verifying the information based on a firsthand review of the documentation. As a result, the reimbursement system does not eliminate the potential that the liability may accrue as a result of inaccurate information provided by the institution, since reimbursement presumes that the documentation submitted by institution is trustworthy. Given the serious and comprehensive nature of the allegations in this proceeding which persisted while the reimbursement system was in effect, I am not convinced that the procedures allegedly implemented by Hamilton after the program review to tighten up its record keeping system or the reimbursement system, itself, would reliably eliminate or reduce the risk of loss of Federal funds.

During the presentation of its rebuttal case, Hamilton presented documentary evidence and testimony of students relative to its record keeping, attempting to establish that such record keeping was proper. In addition, Hamilton's owner testified that he was committed to the school and the training of disadvantaged students, that the school had expanded greatly in the past year to accommodate the needs of students, and that he had invested a great deal of money and effort to make the school a success. He added that at the program review exit interview he was informed that the review was routine and there were only minor findings. It was a total surprise, he asserted, when the current actions were served because he had yet to receive a program review report and he had not been contacted at all by SFAP seeking any further information or explanation. Also, officials and local citizens testified as to Hamilton's positive effect on the community. Finally, the owner and school consultants testified that Hamilton was an excellent school that had just been reviewed by ACCSCT and that review determined that the school was in total compliance of accreditation standards. This was done in an obvious effort to bolster Hamilton's reputation before the tribunal. In rebuttal, however, SFAP presented evidence that after an unannounced accreditation team visit to Hamilton on June 5, 2001, ACCSCT issued a show-cause notice to Hamilton, requiring it to satisfactorily respond to a number of enumerated items of concern or risk loss of its accreditation.

It is abundantly clear that the unrebutted and persuasive allegations of fraud are clearly sufficient here to warrant the imposition of an emergency action as well as the follow-on termination and fine actions. In addition, even if fraud were not established, Respondent's failures here can, at best, be characterized as extreme negligence that is clearly serious enough to establish a violation of the Respondent's fiduciary duty relative to the protection of federal funds. Even if I were to accept the argument that sloppy bookkeeping and inattention to ability-to-benefit testing caused the problems and not fraud, the egregious nature of such failings is sufficient to support an emergency action, and termination from the Title IV programs as well as an appropriate fine.

FINDINGS

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. Clearly, the establishment of fraud or extreme negligence, as in the present case, would warrant the imposition of an emergency action. Based on the facts of this case, I find that the emergency action was appropriately imposed and continued throughout the hearing process

The procedures governing the termination of eligibility of an institution to participate in Title IV programs and fining it are set forth in Subpart G, 34 C.F.R. § 668.81 *et seq.* During any such proceeding, SFAP has the burden of proof. 34 C.F.R. § 668.88 (c)(2). The Secretary may terminate the eligibility of an institution to participate in any Title IV program if the institution violates any provision of Title IV or any regulation or agreement implementing Title IV. 34 C.F.R. § 668.86 (a). The record is clear and convincing. I find that SFAP has met its burden of proof and has

established that the Respondent is subject to termination of its eligibility to participate in Title IV programs.

In addition, the Secretary may impose a fine of up to $25,000 per violation if an institution violates any provision of Title IV or its implementing regulations. 34 C.F.R. § 668.84. I find that SFAP has met its burden of proof and has established that the Respondent: maintained inaccurate records, failed to properly make refunds of tuition when students withdrew, illegally disbursed Title IV funds, and disregarded the ability-to-benefit requirements of Title IV. I find further that each of these failings is serious and clearly violative of the Respondent's fiduciary duties and, as a consequence, I will impose an appropriate fine. I hereby determine that the fine shall be $25,000 for each of the four violations noted above, for a total fine of $100,000. In assessing this fine, I have taken into consideration the seriousness of the violations and the size of the institution.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the eligibility of Hamilton Professional Schools to participate in the federal student financial assistance programs, authorized under the provisions of Title IV of the Higher Education Act of 1965, as amended, is terminated. It is FURTHER ORDERED that Hamilton Professional Schools pay a fine of $100,000 to the United States Department of Education.

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Ernest C. Canellos
Chief Judge

Dated: September 7, 2001

SERVICE

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

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[1] Hamilton moved that the hearing be held in Washington, D.C., while SFAP requested that it be held in Puerto Rico. Since our past practice dictates that the hearing official should give great weight to the wishes of a Respondent in the selection of the situs of a hearing, I acceded to those wishes even though SFAP had, through agreement with Hamilton, the burden of persuasion on the merits of both the emergency action and the termination and fine proceedings.

[2] In view of Hamilton's complaint and to assure the parties were given every opportunity to make their positions known, I authorized the parties to file post-hearing briefs, which they did. In addition, they submitted a series of motions requesting that I strike the opposing party's submissions in whole or in part. In response to numerous motions, on August 10, 2001, the parties were informed that all evidence would be viewed in the light that I deemed appropriate.

[3] During the course of the proceeding, Hamilton objected to the fact that no Final Program Review Determination (FPRD) had ever been issued; rather SFAP initiated the present actions immediately upon completion of an internal review. In essence, Hamilton claims that the issuance of such an FPRD is mandated by the Title IV regulations and, under the circumstances, SFAP's failure to provide one deprived it of an important procedural right. There is no regulatory authority to support Hamilton's assertion. Indeed, SFAP retains discretion to issue an FPRD or a notice of termination, as it did here. Unless Hamilton can show that SFAP's exercise of discretion is arbitrary or capricious, which it did not do, SFAP's decision does not constitute a deprivation of the institution's procedural rights.

[4] At the hearing, no credible evidence in support of this of this allegation was presented and, as a consequence, I find that SFAP has failed to meet its burden of production as to this allegation. Therefore, I hereby dismiss such allegation. I will not discuss this issue any further.

[5] To the extent that Respondent's argument assumes that this proceeding should lead to a determination of its Title IV liability, such argument is misplaced. Arguments concerning the accuracy of some attendance records do not directly rebut SFAP's allegations regarding the falsification of entirely different records. Those arguments may be probative of the total funds that SFAP should recover in a recovery of funds proceeding under Subpart H. As this tribunal has pointed out in a series of prior cases, a termination and/or fine proceeding – also known as a Subpart G proceeding – is a punitive measure that is not intended to resolve the calculation of liability for improper disbursement of Title IV funds. Hence, the Respondent's liability is not at issue here.

[6] The obvious purpose of requiring that ability-to-benefit tests be independently administered is to remove any temptation on the part of participating institutions to admit unqualified students in order to collect their tuition.