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

In the Matter of	**Docket No. 07-52-SA**
INTERNATIONAL JUNIOR COLLEGE,	Federal Student Aid Proceeding
Respondent.	ACN: 02-2006-72564

Appearances: Ronald L. Holt, Esq., and David L. LeFevre, Esq., Brown & Dunn, P.C., Kansas City, Missouri, for International Junior College.

Jennifer L. Woodward, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Richard F. O'Hair, Administrative Judge

DECISION

International Junior College (IJC), a proprietary school located in Puerto Rico that offered vocational programs in the computer, cosmetology, and business fields, participated in the various federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (Title IV), 20 U.S.C. § 070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA) of the United States Department of Education (Department) administers these programs. On August 20, 2007, FSA issued a Final Audit Determination (FAD) assessing a liability of $1,365,078 on IJC for its alleged failure to meet the requirement that no more than 90% of the institution's revenues be derived from Title IV, HEA program funds for the fiscal year ending June 30, 2005. IJC filed a timely appeal of this determination on October 3, 2007.

According to FSA, on May 2, 2006, IJC submitted its compliance audit for the 2005 fiscal year. FSA charged that the institution was in violation of a provision of the regulations that provides that an institution loses its eligibility to participate in Title IV programs if it derives more than 90% of its revenue from Title IV program funds during an award year. This required computation commonly is referred to as the 90:10 ratio. 34 C.F.R. § 600.05(a)(8). To compute this ratio, the institution determines the amount of Title IV program funds it received to satisfy

its students' tuition, fees, and other institutional charges to the students. It divides this number by "[t]he sum of revenues including those from Title IV, HEA program funds generated by the institution from: tuition, fees, and other institutional charges for students enrolled in eligible programs…." 34 C.F.R. § 600.5(d). Applying this formula to its 2005 award year revenue, IJC reported that its 90:10 ratio for 2005 was 90.33%. IJC said it thought it was permissible to round down this percentage to 90%, which would indicate it was in compliance with the 90:10 ratio, but FSA informed it that there is no provision for rounding down. Additionally, FSA reported that, pursuant to the regulations, IJC must repay the Department the funds it disbursed in the 2005 award year, and it was ineligible to participate in the Title IV programs for the 2006 award year.

FSA reports that upon its receipt of IJC's audit, it performed its own review of IJC's work papers and determined that the 90:10 ratio was 90.23%, still above the limit. In response to this, IJC had a second audit performed in June 2006 and this resulted in a 90:10 ratio of 89.75%, which, if correct, would indicate compliance with 34 C.F.R. § 605. IJC explained this new, lower percentage by the fact that it included in the denominator of the ratio $12,843 of previously unreported revenue it earned for the year from tuition charged to students who attended what are called Cursos Sabatinos – Saturday Classes. As described by IJC, it has two categories of students: those that complete the academic program on either a half-time or full-time basis, and those who are working adults with limited time and resources who take only one course at a time on a Saturday. The students in the first group are eligible for and receive Title IV federal student aid, and those in the second group are not eligible for Title IV assistance, so they pay cash for their tuition.

Subsequent to IJC's submission of its second audit, FSA sent an auditor to the school site to examine the cash vouchers of students attending the Saturday Classes. Following an analysis of 55 randomly selected cash vouchers, the auditor found that $15,789 received in cash came from 34 students who attended only Saturday Classes. FSA also determined that students attending only Saturday Classes were not enrolled in an eligible program and that this cash revenue could not be included in the computation of the 90:10 ratio. Therefore, when FSA removed this amount from the denominator, it found that IJC's 90:10 ratio was 90.34%, and thus concluded that the institution was not in compliance with the regulation.* It is IJC's inclusion of this income from the students who attend only the Saturday Classes in the denominator of the 90:10 ratio that is the primary issue here. IJC believes it should be included and FSA strongly disagrees.

IJC explains that it serves a low-income population and that is why it has historically given much attention to ensuring that its Title IV funding remains below the 90% figure. Up until the award year ending June 30, 2005, it has been able to maintain this delicate balance with the inclusion of education grants from the Puerto Rican government. Those grants were not

* As a result of this sample analysis, FSA estimated that 25% of all cash revenue IJC received was paid by students attending only the Saturday Classes. It did not, however, extrapolate this figure to the entire universe of cash payments to arrive at a more definitive 90:10 ratio, but it surmised that the 90:10 ratio would be higher than 90.34% if it were to do so.

available for the year in question, but the school says those were not necessary to guarantee compliance because the cash payments from the Saturday Classes reduced the ratio to an acceptable limit. When challenged about the legitimacy of the inclusion of this revenue, IJC argues they should be included because that the Department has never explicitly defined the types of cash revenue that can be included in the denominator of the ratio. IJC states that the Saturday Classes were not programs in and of themselves, or "short term classes', but "were simply courses, taught on Saturdays, that were part of Title IV eligible programs." IJC notes that the course materials for the Saturday Classes were identical to Title IV classes taught during the week. Additionally, it reports that these classes were attended by full-time, half-time, and Saturday-only students; the only difference being that the Saturday-only students could not qualify for Title IV assistance because they could not afford to enroll in sufficient courses to qualify as at least half-time students. IJC concludes that these Saturday-only students paid tuition to attend classes that were included in Title IV eligible programs, so, therefore, the students were enrolled in Title IV eligible programs and their cash payments should be included in the denominator of the 90:10 ratio.

FSA does not challenge the quality of the Saturday classes, but rather focuses on the wording of the regulation which provides that the denominator of the 90:10 ratio consists of, among other listed items, revenue from tuition, fees, and other institutional charges <u>for students enrolled in eligible programs</u>. As FSA elaborates, during the period of notice and comment before the publication of the current rules on the 90:10 ratio, the Secretary added the above underlined wording as further clarification to address some confusion raised by interested persons regarding the types of revenue generated from certain institutional activities that might be included in denominator of the 90:10 calculation. The rationale for this inclusion was that the Secretary wanted to ensure that only revenue from activities that was necessary for the students' education or training be included. FSA says this rationale was further streamlined to mean that the revenues must come from activities conducted on campus or at a facility under the control of the campus; are performed under the supervision of the faculty; and "are required to be performed by all students in a specific educational program at the institution." *See* 34 C.F.R. § 600.5(e)(4).

With this background, FSA argues that the students who took classes only on Saturdays were not enrolled in any program, but only took a course when they had the money and time to do so. It points out that this is a fact that even IJC recognized because it made no attempt to disburse Title IV aid to any of these students. From this, FSA concludes that the Saturday-only students, with the freedom to take a class whenever it pleased them, were certainly not enrolled in a specific educational program at the institution. As such, the revenues generated from these students could not be included in the denominator of the 90:10 ratio.

As the respondent in this proceeding, IJC carries the burden of proving by a preponderance of the evidence that it properly disbursed all Title IV funds during its 2005 award year. 34 C.F.R. § 668.116(d). As such, IJC must prove by a preponderance of the evidence that no more than 90% of the total revenue it generated came in the form of Title IV program funds. In this instance, it has failed to meet this burden because I find it is unable to include in the denominator of the ratio the tuition it collected from students who attended only the Saturday

Classes. It would appear that these students were properly enrolled in the institution, having satisfied all relevant admission requirements, and they were enrolled in classes presumably in the career field of their personal interest. However, because these students could not commit themselves to, at a minimum, a half-time student status, they were not enrolled in an eligible program as envisioned by 34 C.F.R. § 600.5(d)(1), 34 C.F.R. § 668.8, and 34 C.F.R. § 668.32. The latter citation requires, among others, that an eligible program is one that prepares students for gainful employment in a recognized occupation. The random and unregulated status of the Saturday-only students precluded these students from enrolling in a program that prepares them for gainful employment in a recognized occupation. Thus, not only were these students ineligible for Title IV aid, but also their tuition payments were ineligible to be included in the 90:10 calculation. Accordingly, the $15,789 in tuition revenue generated by IJC as documented from the random sampling, must be withdrawn from the denominator of that ratio, and this results in a 90:10 ratio of 90.34%, fractionally above the limit provided by the regulation.

Having settled the primary issue before me, I must now address several ancillary issues that IJC has raised on appeal. First, IJC alleges that pursuant to 5 U.S.C. § 556(d) and 34 C.F.R. § 668.116(d), FSA failed to meet its burden of production to establish a *prima facie* case against IJC. In this regard, it says that FSA does not provide a specific amount by which IJC exceeds the 90% limit, but instead relies on an estimate. In support of its argument IJC points to *In the Matter of Empire Technical School*, Dkt. No. 91-53-SP, U.S. Dept. of Educ. (December 13, 1993) which concludes that a FAD does not automatically, and by itself, meet FSA's burden of production. IJC contends that it successfully challenged the 90:10 ratio in the FAD when it submitted its second audit, and that the Department's auditor acknowledged this compliance with the 90:10 ratio in October 2006. It further argues that it was improper to use an extrapolation of the audit of the 55 sample files to support the FAD – that this does not establish a *prima facie* case against IJC. It insists FSA should have computed IJC's exact 90:10 ratio.

FSA challenges this allegation and denies that its auditor agreed with IJC's conclusion that its second audit provided an 89.75% ratio. FSA explains that under the regulation, it met its burden of production with the results of its sample audit which show that at least 25% of the Saturday class revenue was inadmissible, thus bringing the ratio above 90%. I agree with FSA's position. As restated in *Empire*, an agency has met its burden of production of a *prima facie* case when the evidence it presents is sufficient to enable a reasonable person to draw from it the inference sought to be established. In this instance, once having determined that it was impermissible to include in the denominator all revenue from the students attending only the Saturday classes, the sample estimate clearly states an allegation that provides *prima facie* evidence that IJC's 90:10 ratio was above 90%. *See In the Matter of King's Career College*, Dkt. No. 02-26-SA, U.S. Dep't of Educ. (July 15, 2003). Accordingly, I find that FSA met its burden of production with the submission of the FAD.

Next, IJC insists that FSA should be estopped from pursuing this recovery of Title IV program funds because FSA acted in a manner that was arbitrary, capricious, and utterly without explanation when it failed to promptly provide certain requested information to Advancer, a community development organization interested in purchasing IJC. IJC reports that while audits and FSA reviews of its 90:10 ratio were being conducted, it continued to participate in the Title

IV programs until late 2006 when the Department initiated a termination proceeding against it. At that time, IJC ceased operation, but attempted to find a buyer. When Advancer became a prospective purchaser, it was aware it would have to pay the liability for any 90:10 violation, but wanted assurances there were no other Title IV liabilities for which it would be responsible. IJC says it sought assurances from FSA that there were no other pending liabilities, but that after six months of numerous unsuccessful inquiries to FSA, in August 2007 Advancer withdrew its letter of intent to purchase IJC. IJC argues that the prolonged inaction by the Department on this liability issue amounted to arbitrary and capricious misconduct from which it suffers. FSA rebuts this argument by citing *O.P.M. v. Richmond*, 496 U.S. 414 (1990) and *United States v. Walcott*, 972 F.2d 323 (11th Cir. 1992) which hold that estoppel does not lie against the United States acting in its sovereign or governmental capacity when seeking to recover public funds. Furthermore, FSA points out there must be a finding of affirmative misconduct by the government. I find that IJC has not made such a showing of misconduct by any representative of the Department in regards to its attempt to limit any future liability that Advancer might inherit. *See also In the Matter of Academia La Danza Artes Del Hogar*, Dkt. No. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992). Accordingly, I find that FSA is not estopped from pursuing its recovery of the Title IV funds in question.

Finally, IJC asserts that if this tribunal finds the FAD liability is enforceable, it requests that this liability be offset by amounts it should have received from the Department for classes it provided up until the time of its closure. As has been oft repeated, this tribunal does not have the jurisdiction to order FSA to offset funds allegedly owed the institution by virtue of having been placed on a heightened cash management or other reimbursement status. *See* 34 C.F. R. § 668.118; *In the Matter of Modern Trend Beauty School*, Dkt. No. 98-109-SP, U.S. Dep't of Educ. (March 14, 2001).

ORDER

On the basis of the foregoing, it is hereby **ORDERED** that International Junior College pay $1,365,078 to the U.S. Department of Education.

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Judge Richard F. O'Hair

Dated: September 24, 2008

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested, to the following:

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