



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

In the Matter of

Docket No. 07-57-SF

HDS TRUCK DRIVING INSTITUTE,

Federal Student Aid Proceeding

Respondent.

Appearances: Douglas A. Prall, President, Tucson, Arizona, for HDS Truck Driving Institute.

Brian P. Siegel, Esq., of the Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

HDS Truck Driving Institute (HDS) is a proprietary institution located in Tucson, Arizona. It is eligible to participate in the Federal student financial aid programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* Within the U.S. Department of Education (ED), the office of Federal Student Aid (FSA) is the organization that has cognizance over and administers these programs.

On August 28, 2007, FSA issued a notice of its intent to fine HDS \$14,000 for its failure to file four surveys which are part of the Integrated Postsecondary Education Data System (IPEDS), as required by 34 C.F.R. § 668.14(b)(19). HDS's timely appeal of that notice, dated October 25, 2007, is the subject of the current proceeding. The appeal does not contest the fact that the surveys in question had not been timely submitted, rather HDS claims that it did send the surveys after coordination with the responsible office within FSA. In essence, HDS claims that after discussions with a member of the IPEDS help desk, HDS was given until 5:00 p.m. on May 18, 2007 to file the overdue reports by FAX and that HDS complied. In its defense, HDS claims it was never late in filing the required reports in the past, it promised it will never be late in filing future surveys, and the proposed fine is excessive.

As is common in most litigation, determination of the underlying facts surrounding the dispute is critical in reaching a final decision -- often, many of the facts are agreed to while others are disputed. That situation is apparent here. As to the undisputed facts, I find that: (a) HDS was required to submit four surveys to IPEDS by April 18, 2007, which it failed to do, and (b) after conversations between representatives of the parties, it was agreed that HDS could submit the surveys by FAX prior to 5:00 p.m. on May 18, 2007.¹ The evidentiary dispute arises as to whether the later agreement was complied with. HDS asserts that it complied and sent the surveys on May 18, 2007, while FSA asserts that it never received the surveys then. In their respective briefs, each party seeks to bolster their cases. In addition to its argument regarding the events, HDS provided a notarized affidavit from its former financial aid officer who claimed that she prepared the surveys and faxed them to FSA on May 18, 2007. Further, HDS claims it has never failed to file previous IPEDS surveys on time. For its part, FSA claimed that on May 21, 2007 it left a message on HDS' answering machine reporting that they had not received the surveys, yet HDS never responded. HDS retorts that it never received, or more correctly, it has no record of this message. In not subtle language, FSA implies that based on the circumstantial evidence it doubts that the surveys were sent, as claimed. Both parties agree, however, that the surveys were attached to HDS' appeal at the time it was filed -- HDS claiming it was an additional notice while FSA claiming it was the first receipt of the surveys.

The procedures for fining an institution are enumerated in 34 C.F.R. § 668, Subpart G. In accordance with 34 C.F.R. § 668.84 (a)(1), the Secretary is authorized to impose a fine of up to \$27,500 for each violation of program regulations. In any such proceeding, FSA has the burden of persuasion. 34 C.F.R. § 668.88(c)(2). When considering the amount of the fine, the provisions of 34 C.F.R. § 668.92 are instructive. Generally the fine should be set after due consideration is given to the gravity of the violation and the size of the institution. It has been consistently held that an institution's small size is a mitigating factor in any fine case.

In the present case, I must consider that, although HDS admittedly violated its IPEDS reporting requirements, it is clear that no federal funds were placed in jeopardy. Further, it is equally clear that I must consider the mitigating factor that HDS is a small school. Contrariwise, I must consider FSA's argument that it never received the surveys as claimed by HDS and the failure to file the required surveys is a serious violation for which the \$14,000 fine is appropriate. Based on the application of the appropriate burden of proof, and on my responsibility and authority to determine the credibility of evidence presented during the hearing process, I accept the unqualified notarized affidavit of the former financial aid advisor that HDS faxed the surveys on May 18, 2007. Also, because I have no reason to doubt that the surveys did not arrive on May 18, 2007, I accept that proffer as well.

The only way I can resolve the conflicting evidence in this case is to find that, even though the surveys did not arrive on May 18, 2007, on the basis of the limited facts of this case, that this attempt is at least a mitigating factor to be considered along with the mitigating factor of HDS' small size. In assessing the amount of a fine, I must be ever mindful of the purpose served

¹ Complicating my deliberations, it is not at all clear whether this agreement, if complied with, was meant to excuse the lateness of the submission. Of interest, HDS does not make that claim.

by a fine in our society. A fine is a pecuniary punishment that is imposed by a lawful tribunal. It is generally accepted that punishment must be tailored to fit the violation and the perpetrator and should serve the purpose of retribution, rehabilitation or deterrence. Without doubt, it is subject to the principles of Constitutional Due Process. Given the uncontroverted facts of this case that the surveys were not submitted by April 18, 2007, and applying the principles enunciated above, I find appropriate only a mitigated fine of \$1,000 for the admitted failure to file the surveys on time. Based upon my determination that FSA has not met its prescribed burden of proof as to that issue, I specifically do not include any factor for the possibility that the surveys were not faxed on May 18, 2007.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ORDERED that HDS Truck Driving Institute pay to the U. S. Department of Education a fine of \$1,000 for its admitted failure, under the circumstances, to complete and submit in a timely manner four required surveys in the Integrated Postsecondary Education Data System.

Ernest C. Canellos
Chief Judge

Dated: February 1, 2008

SERVICE

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

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