



THE SECRETARY
WASHINGTON, D.C. 20202

In the Matter of)
)
COMMUNITY COLLEGE OF PHILADELPHIA,)
)
Appellant)
)

FINAL DECISION OF THE SECRETARY

The Community College of Philadelphia (CCP) has appealed the November 8, 1989, Initial Decision of Administrative Law Judge Paul L. Cross (ALJ) in the above-captioned audit proceeding. CCP's appeal was filed pursuant to 20 U.S.C. 1094(b) and 34 C.F.R. 668.119. In the Initial Decision (ID), the ALJ determined that CCP must repay the U.S. Department of Education (ED) \$1,455,682 of Title IV of the Higher Education Act of 1965 (HEA) Program funds that CCP disbursed to students who were enrolled in its remedial programs.

I find that the ALJ erred in his analysis of this matter and, therefore, REVERSE the decision below for the following reasons.

The audit was issued in August, 1985 for the period of July, 1980 to June, 1983. The audit concluded that CCP provided Title IV, HEA Program assistance to students allegedly ineligible to receive such funds because they were enrolled in certain types of remedial programs. The audit questioned two such programs, PROJECT II and Project PLUS.

When CCP believed that a student enrolled in its undergraduate program needed remedial assistance, the student would be tested, evaluated, and, if necessary, placed in such a special, remedial program. The main program was PROJECT II. PROJECT II consisted of three academic levels (levels A, B, and C). Each level could be completed by a full time student in one semester, but nothing precluded a full time student from taking two semesters to finish a level. Each level was made up of four three-"credit" courses. None of the "credits" at levels A and B applied toward a student's degree or certificate.

This audit was concerned with only levels A and B. Level A was aimed at a verbal or math deficiency which placed a student at the third or fourth grade level. It was taught at a fourth or fifth grade level. Level B, similarly, served a need at the fifth and sixth grade levels, but was taught at the sixth or seventh grade

level and included a tutorial lab. For example, if a student was found to be in great need of remedial study in both math and verbal skills, the student would be placed in level A. Once the student finished level A, he or she would have to complete level B. On completion of level C the student could fully enroll in the school's non-remedial, postsecondary programs. The student could, however, take non-remedial courses unrelated to his or her remedial coursework at any time.

Project PLUS was comparable to PROJECT II, except it provided remedial programs in languages other than English for students whose academic skills were deficient in their native languages.

The Office of Student Financial Assistance (OSFA) found that the school improperly disbursed \$1,455,682 of Title IV, HEA Program funds to students enrolled in programs (levels A and B) that "could provide up to 3 years of elementary (not postsecondary) education" equivalent to grades 4-7. The ALJ concurred, noting the lack of a "connection" between the remedial programs and postsecondary education. Therefore, due to the lack of a nexus between the remedial course work and the undergraduate course of study, the ALJ held CPP liable for that amount.

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The purpose of Title IV is to provide financial aid to students pursuing postsecondary education. Moreover, Congress recognized that some students need remedial study. CCP interpreted the HEA as permitting students to receive Title IV aid while receiving remedial instruction complementary to their postsecondary education.

During the time covered by the audit remedial study was only mentioned in the Pell Grant statute. ED had extended that statute's policies to all Title IV programs. Section 411(a)(3) of the HEA, 20 U.S.C. 1070(a)(3) (1983), read:

"a student may receive (grants) during the period required to finish the first baccalaureate course of study being pursued Nothing in this section shall exclude from eligibility courses of study that are noncredit or remedial which are determined by the institution as necessary to help the student be prepared for the pursuit of a first baccalaureate degree. (emphasis added)

Further, the regulation pertaining to this section stated that:

"in determining a student's enrollment status, the institution and the Secretary will include any non-credit remedial course in which the student is enrolled. . . . (A) 'non-credit remedial course' is one for which no credit is given toward a certificate or degree (and is designed to help the student in his course of study.)" (emphasis added)
34 C.F.R. 690.9(a)(2) (1980)

Because Title IV programs assist students pursuing postsecondary education at an eligible institution of higher education, the remedial program cannot be an end to itself, or freestanding. It must be combined with postsecondary education.

* * * * *

The question posed by the parties in this appeal is whether CCP's interpretation of the law in effect at the time was "reasonable." CCP asserts that based on the laws in effect at the time regarding remedial study, all remedial courses were covered if 1) the institution determined them necessary to help the student toward a degree, 2) the remedial course was designed to increase one's ability to pursue an undergraduate course of study leading to a certificate or degree, and 3) the remedial course was part of a special program to target poor, culturally disadvantaged students with a potential for postsecondary education. [see, 20 U.S.C. 1070(a)(4)(c)(1980)] CCP argues that, under its construction of the applicable law, grant funds were available to its Level A and B remedial students. The ALJ found that the projects met these criteria.

Section 411(a)(3) specifically states that nothing excludes a student's receipt of grants because of noncredit or remedial studies as long as the institution deems the coursework necessary. Should a student be enrolled at one point exclusively in remedial study or partially so, CCP maintains that Section 690.9 allowed any non-credit remedial work that promoted the student's course of study to apply toward enrollment. Moreover, CCP argues that there was neither an articulated restriction imposed on the length of a remedial program, nor a threshold level of remedial aid if it was determined by the school to be beneficial to the student in his or her course of study. CCP further argues that since these courses were aimed at the underprivileged and minorities, they met current policy directives by providing remedial assistance to socio-economically disadvantaged students who have been excluded from higher education and by "bridging the gap" in assisting otherwise unprepared high school graduates.

OSFA states, and the ALJ found, however, that there must be a "reasonable relationship" between the remedial course work and the intended degree. OSFA further argues that there are constraints on how elementary such work can be and limits on how long the program may last. CCP rejects OSFA's assertions.

CCP states that OSFA's standards are being retroactively applied since this was not the state of the law at the time, nor a policy directive publicly articulated by ED during the audit period. CCP demonstrates that no rulemaking process to incorporate such a "reasonable relationship" requirement was started until December, 1984, a year after the audit period. Moreover, CCP notes that Congress did not add any such requirements until 1986 (in addressing the remedial level, but not the length of study). Furthermore, correspondence has been introduced indicating that

ED's Regional office at the time indicated that the program was eligible and, finally, that the first time such a requirement was articulated by ED was in internal memoranda generated shortly after CCP's audit was completed.

OSFA concedes that there was nothing in print prior to the audit constraining the open language contained in the Pell Grant section, but concurs with the ALJ's determination that "something other than literal strict interpretation of the section was needed to make sense of the provision." OSFA maintains that the remedial programs' objective was to "raise the student's skills only" and provide "long term presecondary education." Therefore, OSFA asserts that the remedial program was merely freestanding. Therefore, OSFA concludes that a "reasonable relationship" requirement regarding the programs was inherent in the law of the time, and that, overall, CCP's interpretation of the law was not reasonable.

* * * * *

To determine what was, or was not, reasonable, we must examine the law and circumstances of that time. The applicable laws were broadly written, undefined, and the Department's interpretation and/or policy seemingly unknown. OSFA's asserted interpretation and policy, although formulated prior to this audit, does not seem to have been properly conveyed to the public. While "something other than literal strict interpretation" may have been needed to clarify the sections, there is no solid argument that the sections were per se ambiguous. Moreover, there has been no showing of fraud or bad faith by CCP; indeed, its intentions seem to have been well motivated and in compliance with its interpretation. Therefore, under these particular facts, I do not find the school's asserted interpretation of the law to be unreasonable.

In the absence of some indication that ED would predicate audits and disbursements on the basis of some unannounced test ("reasonable relationship," "length of remedial study," "applicability of credits," etc.), it is improper for me to now impose liability retroactively on such a basis.

Aside from the question of whether the CCP's interpretation is reasonable, none of the findings of fact by the ALJ are necessarily fatal to CCP, except one. The ALJ correctly states that "(the) remedial program cannot be an end to itself. It cannot be 'freestanding.' It must be combined with postsecondary education." ID at 19. Pursuing this question, the ALJ noted that most of the students did pursue non-remedial courses and that placement into a program was done only after the students were accepted into a baccalaureate program and, later, tested and evaluated as having remedial needs. The ALJ found, however, that:

postsecondary education occurred but it was minor compared to the huge investment of time and money in the remedial courses. Thus, remedial A and B

levels, while not totally freestanding were virtually so. The students enrolled were not engaged primarily in postsecondary education, but instead were involved in completing elementary school.

ID at 21.

Despite this finding, the ALJ concluded that "there can be no disagreement with the determination that . . . Levels A and B . . . were necessary to help the students preparation for a postsecondary degree. . . . However, the need for remediation is only one aspect. . . . there is also the issue (of) whether there was a connection between the program and postsecondary education." ID at 23.

I find the ALJ's conclusions erroneous. First, "time and money" was not a stipulated determining factor. Moreover, the ALJ determined that the remedial programs were necessary for the student's preparation for a degree, but then indicates that they were freestanding programs. These findings conflict with his conclusion that there was no connection between the remedial study and the postsecondary program.

I find CCP's interpretation to not be unreasonable. Its discretion in requiring remedial study, where it deemed necessary, must be given great weight within its interpretation of the law and in the absence of direction from ED. If CCP's discretion controlled what was necessary for a student to further his or her postsecondary course of study leading to a degree or certificate, the remedial programs were not necessarily freestanding. If I adopt the position that CCP's interpretation is not unreasonable and that the ultimate goal of the college was the certificate or AA degree, CCP neither seems to have undermined the law of that era nor jeopardized taxpayers' funds, but appears to have furthered commendable policies. Finally, this conclusion is not, in fact, inconsistent with OSFA's position. OSFA concedes that if a degree is the ultimate goal, then the programs were proper.

I conclude that CCP's interpretation of the law during the time covered by the audit was not unreasonable. Moreover, I find that the remedial programs were not only permissible at the time, but were not freestanding. Therefore, I REVERSE the decision below.

This decision is signed this 12th day of March, 1990.



Lauro F. Cavazos

Washington, DC