UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of FRENCH FASHION ACADEMY, Respondent	Program Review Proceeding Under 34 CFR Part 668, Subpart H

DECISION OF THE SECRETARY

The Office of Student Financial Assistance, U.S. Department of Education (Petitioner), has appealed the Initial Decision of Administrative Law Judge Paul S. Cross (ALJ) in the above-captioned audit proceeding. Petitioner'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 the French Fashion Academy (Academy) was not licensed and its programs were not approved for specified periods of time, but excused the Academy's liability for Federal funds received during those periods, noting an alleged policy of the U.S. Department of Education (ED) of waiving de minimis defaults.

The ALJ further found that no liability should be imposed for funds received by the Academy pursuant to its use of semester or credit hours in its application to ED for grant eligibility, despite its prior use of clock or instructional hours in its application for course of study approval by the New York State Education Department (NYSED). The ALJ dismissed the resultant financial discrepancy by stating that the approval of such a practice by the Academy's accrediting agency was sufficient to justify the procedure used and the increased amount received.

I find that the ALJ erred in his analysis below and, therefore, REVERSE the decision below.

For an institution to participate in the Pell Grant program, it must qualify as an eligible proprietary institution of higher education. For an institution to participate in the Guaranteed Student Loan (GSL) program, a school must qualify as an eligible vocational school. In each case, eligibility depends on whether the institution is authorized to provide postsecondary vocational education programs in the State of New York. 20 U.S.C. 1085(c), 1088(b)(2), and 1141(a)(2). Under the statutes and regulations of New York, in order for an institution, such as the Academy, to offer postsecondary vocational education programs in New York, it must be (1) licensed by the NYSED, and (2) each program it offers must be approved by NYSED. See, ID at 12-14.

Regarding the first prong of the above-stated test, the ALJ found that the Academy was not licensed by New York State for the month of October, 1985. On reexamination of exhibits G-2 and G-9, however, I find no gap in the continuity of license # 732. Therefore, it is my determination that the license remained in effect throughout that month of October.

Whether the Academy was duly authorized now hinges on whether the programs were continuously approved by NYSED. The ALJ found that they were not. I agree.

The Academy was not an eligible institution between October 1, 1984, and November 1, 1985, by virtue of its failure to reapply in a timely manner prior to the expiration of its courses on September 30, 1984 until August, 1985. While the NYSED approved the courses on May 14, 1986, retroactively to November 1, 1985, the result was a one year period of unapproved status. Moreover, it failed to properly examine the eligibility of its students before making its Pell Grant disbursements, violating provisions 34 CFR 690.4 and 690.75(a). Therefore, because the overpayment to the Academy of $330,202 of Pell Grant funds occurred because of its failure to comply with the applicable grant regulations, it is now responsible for its repayment. 34 C.F.R. 690.79(a)(2).

Similarly, during this time period, the Academy certified on the GSL applications of its students applying for loans that they were eligible students enrolled in an eligible school. As noted above, the Academy was not eligible from October 1, 1984, through October 31, 1985. Therefore, such incorrect certifications which caused lenders to make $36,500 of GSL loans to ineligible students must similarly be repaid.

Despite what should have led to $366,702 in liability, the ALJ apparently waived the amount for several reasons. First, the ALJ states that "ED does have discretion to excuse highly technical defaults." ID at 24. Whether or not that is true, I do not find the failings here to be of a highly technical nature. The ALJ provides further excuses indicating that the school was confused. None, however, explains why, in spite of a timely preliminary notice, the Academy continued to disregard three subsequent reminders of its need to seek reapproval of its courses, eventually failing to complete the application process for nearly a year. In light of all of the provisions which can truly be argued as such, I do not find the maintenance of a license and of course approvals to be "highly technical." Instead, I find them to be basic, yet important, administrative prerequisites.

Moreover, the ALJ asserts that "ED as a matter of regular administrative practice, waives, as it should 'de minimis' defaults." ID at 24. First, I do not believe that defaults amounting to a combined sum well in excess of $300,000 to be <u>de minimis</u>. Furthermore, while ED has the power to waive Pell Grant

liability under 31 U.S.C. 3711(a)(2), ED can only waive such liability if it concerns a sum of $20,000 or less. As for GSL sums, while ED may compromise claims under 20 U.S.C. 1082(a)(5) and (a)(6), here, ED chose not to prior to the issuance of its final program review determination. That was ED's prerogative, and not an option that should be retroactively instated by an ALJ.

Finally, the ALJ notes that New York State has not chosen to impose sanctions against the the Academy. Whether New York has that ability or whether it has exercised it is irrelevant. While it may provide insight as to how a state views the conduct and accountability of its educational institutions, it does not control the acts of ED.

For the foregoing reasons, I find the Academy liable for the sums discussed above and REVERSE the ALJ's findings on those issues.

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The 1981 course of study application to NYSED approved each course for a specific quantity of education. This quantity was stated in clock hours, as is required by New York for vocational schools. The subsequent application approved on May 14, 1986, retroactively in effect on November 1, 1985, approved each course in "instructional hours." When the Academy submitted its eligibility application to ED (ED form 1059), however, it calculated the Pell Grant awards of its students on the basis of semester (ie. credit) hours instead of in clock or instructional hours.

The Academy appears to have applied this inconsistency on what it assumed were the dictates of ED through its accrediting agency, the National Association of Trade and Technical Schools (NATTS). This was not, however, a policy or practice of ED. Policies of an accrediting agency, moreover, cannot be automatically imputed upon ED; that is not part of its function. See, 34 C.F.R. 602.1.

It has been both the policy of the Secretary and of ED that a school apply to ED in the same terms that it used when providing applications to its state authorities. See, e.g., 34 C.F.R. 600.3. The Pell Grant Program is administered uniformly across the country. Such uniform administration provides that any institution in a State that legally authorizes programs of postsecondary education in clock hours only must measure those programs in clock hours for purposes of determining Pell Grants. Moreover, to permit inconsistent usage of the terms describing the quantity of education an institution provides could lead to overawards simply by the juggling of hours and credits. Therefore, I REVERSE the decision below as to the Academy's liability for the overawards received due to this inconsistent use.

In conclusion, therefore, I REVERSE the ALJ below in part and find that the Academy is liable for the overpayment of $330,202 of Pell Grant funds and for the $36,500 of GSL loans for the reasons stated above. Furthermore, I REVERSE the ALJ's decision not to find liability for the Academy's inconsistent use of the type of academic hours offered.

This DECISION and ORDER signed this 30th day of March, 1990.

Lauro F. Cavazos

Washington, DC