

the LINK

CCA
Career College Association

LINKING THE CAREER EDUCATION COMMUNITY

Winter 2006



Ex'pression College for Digital Arts

Emeryville, Calif.

The Seven Invisible Holes

*Improving our Discourse
on For-Profit Colleges*

Key to Enrollment Growth

The Silent Explosion

**CCA Convention
Registration**

Federal Court Allows Career College to Seek Compensatory Damages Against U.S. Department of Education for Breach of Contract

"Kafka-esque" and "bureaucratic bungling" were the words chosen by the U.S. Court of Federal Claims in describing the U.S. Department of Education's determination that San Juan City College, a Title IV participant, had closed and its subsequent decision to withhold Title IV funds from the school. The "bungling" involved the Department's erroneous conclusion in February 1995 that San Juan City College had ceased operations and its failure to acknowledge its error until it had deprived the school of Title IV funding for a full six months. The case is *San Juan City College v. United States*, No. 01-73C presently pending upon a remand decision from the U.S. Court of

Appeals for the Federal Circuit. The decision adds an arrow in the quiver of Title IV participating schools in defense of capricious action taken by the Department.

The case was filed against the Department by San Juan City College and its president in 2001 for breach of contract under the Tucker Act. It is the first known claim of breach of contract against the Department for failure to abide by obligations stemming from the Program Participation Agreement which all institutions must sign before they may participate in the Title IV programs. The case stems from the Department's reaction to a short academic recess taken by the College in February 1995. Having heard an erroneous report that the school had closed for good, Department officials placed the College on its "Closed School List," issued a "freeze" memorandum preventing it from receiving any Title IV

funds, demanded a "close-out audit," and treated the College in every other respect as one no longer participating in the Title IV programs.

When the College learned of the Department's actions, it took immediate action to inform Department officials of the blunder and to assure it that the College remained open for business. The College was aided in this effort by the director of Puerto Rico's college licensing agency, who wrote several letters to the Department to inform it that the College was not closed. Department officials, however, took no action to confirm the College's assertions and largely turned a deaf ear to its complaints for several months. In the meantime, the College suffered financial devastation from the deprivation of its primary source of revenue.

continued on page 31



Retain More Students Today

- When your students need individualized support, we're there with
- 24/7/365 telephone coaching from masters-level counselors
 - Face-to-face counseling & consultation
 - Online, interactive self-help tools
 - Ongoing promotion to ensure program success

Contact Student Resource Services today for Hands-on Help. Visit www.studentresourceservices.com or call 1.866.641.4777.

"The best student services decision we've ever made. Our students love it." – George Holske, President, Metro Business College

Ultimately, six months after its initial action, Department officials reversed its termination of San Juan City College's Title IV participation in response to the request of Puerto Rico's Resident Commissioner to investigate the matter. In rescinding its previous termination, the Department's Compliance and Enforcement Director acknowledged that it had learned that the school had not closed but had only temporarily suspended classes based on the documentation sent by the Resident Commissioner which College representatives had already sent to it months before. While the College ultimately had its Title IV funding reinstated, the Department's delay in remedying its error crippled the College financially and shortly after its reinstatement, the College in fact did shut its doors for good.

It was based on this record that San Juan City College filed a breach of contract action against the Department under a federal statute known as the

Tucker Act, which waives the federal government's sovereign immunity to suit for breach of contract claims. The contract at issue here, the Program Participation Agreement, is the legal agreement signed by schools and the Department in which the school agrees to abide by the regulations implementing the Title IV programs. The contract, however, is not unilateral and in it the Secretary also makes certain commitments to the school. The most significant term in this case is Article X of the PPA in which the Secretary agreed that if he were to decide to terminate the PPA, he would do so under 34 C.F.R. Part 668, Subpart G – the regulations which mandate the specific notice and hearing procedures that must be followed before a school may have its participation in the Title IV programs terminated. Article X, ¶ 3, in this regard reads:

The Secretary may terminate this Agreement or the institution's participation in one or more of

the programs covered by this Agreement under the Student Assistance General Provisions regulations, 34 C.F.R. Part 668, Subpart G, "Fine, Limitation, Suspension, and Termination Proceedings."

Subpart G of these regulations set out a detailed process that the Department must follow when it seeks to terminate a school's participation in the Title IV programs. For example, a termination may be initiated only by a Department official that the Secretary specifically designates with such authority. This designated official must inform the school of his intent to seek termination by means of written notice which must be sent by certified mail, return receipt requested and must identify the alleged violations that form the basis of the intent to terminate. The notice must also inform the school that it has the right to request a hearing. The

continued on page 32



**A new school, a new city and new friends.
It can be overwhelming for new students.
Finding a place to live shouldn't be.**

**Take the hassle out of *housing*.
Call Collegiate Housing Services.**

We provide housing programs for colleges, universities and technical schools throughout the United States. Our partner schools are able to maximize their student start potential and student retention by offering a high-quality, yet affordable housing program that is professionally managed by CHS.

- On-campus housing construction and management
- Off-campus overflow management and housing coordination

Call us today for more information!

The fact that CHS put our students - and their needs - FIRST has made all of our jobs easier. Obtaining an affiliation with Collegiate Housing Services is one of the better decisions we have made in the past several years.

**Bruce Shields
School Director
CHS Partner School**

1-800-U MOVE IN, ext. 2022 ■ www.housingservices.com

Department carried out none of these procedural requirements in this case.

The College asserted the Department breached Article X when its officials terminated the College's participation from the Title IV programs without giving it notice that it intended to terminate, why it intended to terminate, and the opportunity for the College to seek and obtain an administrative hearing before a hearing officer to defend itself against the claim that it had closed.

After extensive discovery, both parties moved for summary judgment – the Department maintaining that the contract was not breached as a matter of law and the College contending the opposite. The Department's position was that its officials had the authority to make a determination that the school closed without providing notice and hearing under Subpart G because regulations state that an institution's participation in the Title IV programs

ends on the date that the "institution closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution or the institution's students." The College's position was that the PPA obliged Department officials to make no determination of a regulatory violation, *i.e.*, that San Juan City College had either closed or stopped providing educational programs without affording the College the opportunity to explain to a hearing official that it had done neither. The College further maintained that even if it were assumed for the sake of argument that the College had either closed or stopped providing educational programs, had it been provided its contractual right to a hearing, the hearing officer would have had the discretion to find that termination was not warranted. Thus, the Department's failure to provide a hearing to SJCC was not merely a technical deviation from procedure but a deprivation of a material contractual entitlement.

Having heard the arguments of both parties, the U.S. Court of Claims largely ignored the Department's arguments but nonetheless ruled in its favor. In its decision, *San Juan City College v. United States*, 58 Fed. Cl. 26 (2003), the Court acknowledged the Department's negligent handling of the matter invoking the image of Kafka's Joseph K. The Court also concluded that the College had made a "compelling case that DOE had breached the agreement" by terminating the College for six months without providing the College with a Subpart G hearing. The Court noted that the College had made a "powerful argument" that even though the Department ultimately reinstated the College to the Title IV programs that the termination "foreseeably caused dramatic economic consequences to plaintiffs – to wit, closing of the school." However, the Court ultimately determined that it did not matter whether the Department breached its

continued on page 33



SMOOTH, COLD-FILTERED, FULL-SERVICE MARKETING AND ADVERTISING

WITH NO BITTER AFTERTASTE



- AUDIO/VIDEO PRODUCTION
- INTERACTIVE DESIGN
- COLLATERAL DEVELOPMENT
- PRINT DESIGN
- RE-CIRC MAIL AND E-MAIL
- LEAD RELATIONSHIP MANAGEMENT PROGRAM
- DIRECT MAIL
- PUBLIC RELATIONS
- ADMISSIONS TRAINING
- LEADS2STARTS.COM
- BUDGET PLANNING

- MEDIA PLACEMENT
- ADVERTISING RESOURCE MANAGER
- SEARCH4CAREERCOLLEGES.COM
- GUARANTEED COST-PER-LEAD PROGRAM
- SEARCH ENGINE OPTIMIZATION
- COLLEGE SEARCH SITES
- CAREEREXPLORER.NET
- OUTBOUND TELEMARKETING
- KEY MAGAZINE

WWW.PLATTFORMAD.COM

CONTACT BRAD GIBBS
500 N. ROGERS ROAD
OLATHE, KS 66062

@ 913-254-6061

BRADG@PLATTFORMAD.COM

contract with SJCC because the contract is composed largely of regulations and that the PPA “did no more than make the regulations applicable to the school.” Accordingly, the Court held that when the Department “executed the agreement . . . it agreed to do no more than abide by the law” and did not agree to traditional contract remedies, such as consequential damages including lost profits that the College seeks in this case. In other words, the Court decided that even if the Department did breach the PPA by failing to give the College an opportunity for a hearing and even if that breach caused economic devastation to the College, the kind of damages sought in this case are unavailable to the College as a matter of law so the case should be dismissed because the requested remedy for the breach was unavailable to the College.

The College appealed this decision to the U.S. Court of Appeals for the Federal Circuit. In questioning counsel for the government at oral argument, the appellate court described the Department’s actions as cavalier and sloppy and challenged the Department’s position that it should be provided protection from consequential damages regardless of any breach of its contractual obligations under the PPA. Ultimately, the Federal Circuit reversed the decision of the Court of Claims and held that the lower court should have ruled on the issue of whether the Department’s actions constituted a breach of contract and that if a breach is found the College should be awarded any damages it could prove:

“We see nothing in either the Agreement itself or in the governing statute or regulations that supports the Court of Federal Claims’ view that the parties understood that damages would not be available in the event of breach. Normally contracts do not contain provisions specifying the basis for the award of damages in case of breach, with the exception of provisions governing damages in particular

situations, such as liquidated damages for delay or other specified breaches.

The fact that this contract covers government financial grants does not warrant a different standard. If the government has breached the Agreement, the College is entitled to seek whatever damages it is entitled to receive. As this Court has stated, “in the area of government contracts, as with private agreements, there is a presumption in the civil context that a damages remedy will be available upon the breach of an agreement. Indeed, as a plurality of the Supreme Court noted in *United States v. Winstar Corp.*” damages are always the default remedy for breach of contract.”

San Juan City College v. United States, 391 F3d 1357, 1360-61 (2004). Thus, the Federal Circuit reversed and remanded the case back to the lower court with instructions that if it finds a breach to allow the College to prove its damages including lost profits.

This decision is the first known decision in the country holding that a Title IV participant may seek compensatory damages for breach of the Department’s duty to provide a regulatory hearing before terminating its participation in the Title IV programs. While the case remains pending before the Court of Federal Claims awaiting a decision on the issue of breach, it stands out as the only opportunity for a school to collect consequential damages in the face of Departmental neglect of its regulatory duties to institutional participants.

The decision is made all the more significant in light of other legal impediments to such compensation. For example, most cases where participants seek relief from Department of Education’s statutory and regulatory violations are brought under the Administrative Procedure Act. However, this statute provides only equitable relief such as a declaration that the

Department has acted contrary to a statute, rather than monetary relief in the form of damages. While schools used to have the ability to seek fees and expenses for frivolous administrative actions brought by the Department of Education, that right was eliminated in 1992, with the deletion of three small words from Title IV of the Higher Education Act, when Congress took away schools’ right to a hearing “on the record.” In doing so, Congress made inapplicable to Title IV participants a federal statute that awards “fees and expenses” incurred by a party who prevails against an agency in an adjudication.

For this reason, whether San Juan City College is ultimately successful in convincing the U.S. Court of Federal Claims that the Department of Education breached the PPA in this case, the Federal Circuit decision remains available to other institutions with claims of improper interruption of full participation in the Title IV programs.

Summary judgment briefing is expected to be completed in the Spring of 2006. ☉

Yolanda R. Gallegos is the attorney representing San Juan City College in this litigation. She is with Gallegos Legal Group.



For more information, contact Katie Calabrese, at katiec@career.org or (202) 336-6757.