92-144-SP
(3)

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

IN THE MATTER OF
International Career Institute,

Respondent.

Docket No. 92-144-SP
Student Financial
Assistance Proceeding

DECISION

Appearances: David H. Larry, Esq., Manatt, Phelps & Phillips of Washington, D.C., for International Career Institute.

Howard Sorensen, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: Judge Ernest C. Canellos.

BACKGROUND

On October 23, 1992, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a final program review determination finding that during the 1988-89 and 1989-90 award years, International Career Institute (ICI), in violation of 34 C.F.R. §§ 682.607 and 682.610, failed to make timely refunds of Stafford loans and Supplemental Loans to Students (SLS) to lenders and, in violation of 34 C.F.R. § 668.61, failed to make timely refunds to ED of unspent Pell Grant funds.[1] In addition, SFAP determined that ICI should reimburse ED $15,287 for excessive interest and special allowances (ISA) paid by ED to lenders for Stafford and SLS loans that, in fact, should have been refunded. Finally, SFAP determined that ICI should reimburse ED $81,707 for "imputed" interest on the unspent Pell Grant funds that should have been timely returned to the Federal Government. In all, SFAP seeks recovery of **$731,701**: $634,707 in unspent Pell Grant funds, $81,707 in imputed interest on the Pell Grant funds, and $15,287 in ISA funds.[2]

[1]Although the final program review included several additional findings against the institution, ICI's request for review only challenges the determinations involved in this finding.

[2]In addition, SFAP determined that ICI must pay $29,026 to current holders of Stafford loans.

DISCUSSION

I

Notwithstanding the exceptions noted below, ICI does not dispute SFAP's determination that the institution, in violation of 34 C.F.R. §§ 682.607 and 682.610, failed to make timely refunds of Stafford and SLS loans to lenders and, in violation of 34 C.F.R. § 668.61, failed to make timely refunds to ED of unspent Pell Grant funds during the periods at issue. Instead, ICI challenges SFAP's regulatory authority to recover the liability noted in the final program review and SFAP's calculation of that liability.

ICI argues that the methodology used by SFAP to calculate the $634,707 liability for unpaid Pell Grant repayments is flawed. According to ICI, because the sample size used by SFAP as a basis to project liability differs from the sample size used by ICI's CPA firm, Donald E. Talbot & Company, the calculation of liability must be incorrect. ICI's argument strains credulity. Although SFAP actually bases its finding that ICI failed to make refunds of unspent Pell Grant funds on a report submitted to SFAP by the CPA firm, the mere fact that the sample sizes used by ICI's accountants and SFAP officials may have differed does not support an inference that the sample size used by SFAP in calculating liability is faulty or statistically unsound. In fact, the $634,707 liability that SFAP is seeking to recover for unpaid Pell Grant repayments is the same amount that ICI's accountants determined ICI was liable for in their report. Accordingly, I find that SFAP has shown a sufficient basis for its calculation of liability for the Pell Grant repayment, and that ICI should pay $634,707 in unpaid Pell Grant refunds owed to ED.

II

ICI also urges that SFAP does not have statutory or regulatory authority to recover the imputed interest on Pell Grants that were not refunded to ED. SFAP's position is that it is fully entitled to recover imputed interest as a form of damages flowing from ICI's breach of its Program Participation Agreement (PPA).[3] According to ICI, however, to the extent that SFAP can recover funds on the basis of the PPA, that right does not include a right to recover imputed interest. To support its position, SFAP relies on In the Matter of Macomb Community College, Dkt. No. 91-80-SP, U.S. Dep't of Education (Final Decision June 28, 1993) (Macomb) and In the Matter of California State University and Colleges System, Dkt.

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[3]Section 487(a)(3) of the Higher Education Act of 1965 (**HEA**), as amended, 20 U.S.C. § 1094(a)(3), requires all eligible institutions to enter into a Program Participation Agreement with the Department. The PPA conditions the eligibility of institutions to receive HEA, Title IV program funds upon compliance with the agreement and with program regulations. See 34 C.F.R. § 668.12(b)(1). Consequently, according to SFAP, ICI's failure to make refunds of unspent Pell Grants violates program regulations as well as the PPA.

No. 89-13-S, U.S. Dep't of Education (Final Decision June 22, 1990) (California).

Although ICI is correct in pointing out the limited application of California,[4] the relevance of Macomb to the issues in this case is obvious, and more importantly, In the Matter of Puerto Rico Technology and Beauty College, Dkt. No. 92-73-SA, U.S. Dep't of Education (Final Decision October 9, 1992) (Puerto Rico) is controlling. In Macomb, the administrative law judge (ALJ) determined that despite the lack of a clear regulatory mandate, the enforcement of the PPA is in the nature of an action to recover damages for breach of contract, and therefore, in a Subpart H proceeding, SFAP was not without authority to recover Federal funds spent contrary to the terms of the PPA. Significantly, the ALJ did not limit SFAP's recovery to just misspent program funds, but determined that upon a finding of liability by the ALJ, SFAP could recover, as part of its damages, improperly disbursed Title IV funds and any interest or other earnings thereon and any funds calculated as harm caused to an identifiable Federal interest. Consequently, under Macomb, SFAP could legitimately seek to recover imputed interest in circumstances where the imputed interest could be shown to be an appropriate measure of a portion of SFAP's damages.

Although Macomb answers the question presented, I need not rely solely on that decision because Puerto Rico is directly on point with the issue involved here. In Puerto Rico, the ALJ held that SFAP may recover imputed or prejudgment interest as an essential element of damages to compensate for the loss of the use of money from the time ED's claim accrues until judgment is entered. Id. at 4 (citing Departmental Policy on Recovery of Interest in Audit Resolution Process: Appendix 6, Department of Education Audit Resolution Handbook; West Virginia v. United States, 479 U.S. 305 (1987)). Accordingly, I find that SFAP may recover $81,707 in imputed interest on ICI's unpaid Pell Grant funds.

III

ICI also challenges SFAP's authority to hold the institution liable for interest and special allowances (ISA) calculated on the basis of a formula other than the one mandated by the HEA. ED pays lenders a portion of the interest that accrues on a Stafford or Guaranteed Student Loan (GSL) on behalf of eligible student borrowers, and also pays a percentage of the average unpaid principal balance of the loan -- called a special allowance -- while the student remains eligible for the ISA benefits. See 34 C.F.R. Part 682, Subpart C. According to ICI, SFAP is precluded from using any formula not authorized by the HEA in

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[4]In California, the Secretary, in reversing the administrative law judge's decision, recognized that it is axiomatic that interest accumulated on deposited or invested Federal grant funds prior to expenditure may be recovered by the Federal Government. Consequently, California differs from the case at bar in that the issue in California involved the propriety of recovering *earned* interest. Here, the interest sought to be recovered is more in the nature of imputed or prejudgment interest most commonly recovered as damages.

calculating ICI's ISA liability. See 20 U.S.C. §§ 1077a, 1078(a)(3)(A), and 1087-1(b) (setting out the statutory formula).

Notably, the issue before me is not whether excess ISA payments can be recovered by SFAP; undoubtedly, under 34 C.F.R. § 682.609, SFAP has the regulatory authority to recover improper ISA payments from the institution even though those payments were made to a third-party Title IV program participant. See also, Macomb, supra. Rather, the issue before me is whether SFAP has the legal authority to calculate ICI's ISA liability by using a formula other than the one set forth in the applicable provisions of the HEA. In that regard, I find that SFAP's calculation of ISA liability is not permitted. See In the Matter of Berk Trade and Business, Dkt. No. 91-5-SP, U.S. Dep't of Education (Decision of the Secretary March 19, 1993) (Berk).[5]

In Berk, the Secretary set out a narrow exception to the general rule that SFAP must calculate excess ISA liability in accordance with the statutory formula. In order to recover ISA funds from an institution through the use of an alternative formula to quantify recovery, SFAP must make "a factual demonstration that the simplified formula is an accurate estimator of actual liability." Id. at 2. SFAP fails to present any demonstration that its alternative calculation of ISA recovery accurately determines excess ISA liability.[6] Accordingly, I find that SFAP may not recover the excess ISA payments imposed in the final program review determination.

IV

Finally, ICI argues that the liability imposed on the institution by SFAP for unpaid GSL refunds is inappropriate because ICI has now repaid a portion of those refunds. In the final program review, SFAP determined that ICI owed a liability of $29,026 to the holders of GSLs. In its opening brief, SFAP concedes that the unpaid GSL liability was satisfied to the extent that ICI had submitted in evidence canceled checks showing that the GSL refunds had been made. Toward that end, the record reveals that ICI has refunded $24,996 to the appropriate lenders. Accordingly, I find that ICI's liability for unpaid GSLs is reduced from $29,026 to $4030, the amount for which the institution has not submitted appropriate

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[5]Although the Secretary's decision was issued after SFAP commenced proceedings in this case, SFAP was undoubtedly put on notice of the Secretary's decision, and subsequently could have complied with the standard announced in Berk. The Secretary's decision was issued prior to the date SFAP filed its opening brief, and the decision is cited by ICI in its reply brief. More important, over a year has past since the Secretary decided Berk, and SFAP has not sought leave of this tribunal in order to comply with Berk.

[6]In the final program review determination, SFAP informs ICI that the institution must calculate its excess ISA liability by using the following formula: $ amount of refund x # months outstanding x .0075 = ISA.

documentation that the GSL refunds have been paid.

FINDINGS

I FIND the following:

ICI, in violation of 34 C.F.R. §§ 682.607 and 682.610, failed to make refunds of Stafford and Supplemental Loans to Students to lenders and, in violation of 34 C.F.R. § 668.61, failed to make timely refunds to ED of unspent Pell Grant funds during the 1988-89 and 1989-90 award years.

SFAP may recover imputed interest on Title IV funds spent contrary to the terms of an institution's PPA or the Title IV program regulations.

SFAP has the legal authority to calculate an institution's excess ISA liability by using a formula other than the one set forth in the applicable provisions of the HEA in cases where SFAP makes a factual showing that the alternative formula is an accurate estimator of actual liability. However, SFAP has not met its burden in this case.

ICI has an obligation to pay GSL lenders refunds absent a showing, by the submission of appropriate documentation to SFAP, that the refunds have been paid.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that the International Career Institute pay to the United States Department of Education the sum of **$716,414** and pay to the current holder(s) the balance of **$4,030** in unpaid GSL refunds.

Ernest C. Canellos
Chief Judge

Issued: July 7, 1994
Washington, D.C.

SERVICE

A copy of the attached document was sent by certified mail to the following:

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