APPLICATION OF AMERICAN CENTER FOR TECHNICAL ARTS AND SCIENCES, Applicant.	Docket No. 04-52-SP Federal Student Aid Proceeding

DECISION

Appearances: Glenn Bogart, Birmingham, AL, for the American Center for Technical Arts and Sciences

Jennifer L. Woodward, Esq. of Washington, D.C., Office of the General Counsel United States Department of Education for the Office of Federal Student Aid

Before: Chief Administrative Law Judge Allan C. Lewis

This is an action initiated by the Office of Federal Student Aid of the U.S. Department of Education (FSA) to recover $1.6 million, the sum of all Title IV funds paid to the students who withdrew early from educational programs offered by the American Center for Technical Arts and Sciences (ACTAS) during the award years 2000-01, 2001-02, and 2002-03. It is based upon a Final Program Review Determination (FPRD) issued on October 8, 2004 which asserted, *inter alia*, that ACTAS's records regarding withdrawn students were incomplete and unreliable and, therefore, it was not possible to conclude the extent to which refunds of Title IV funds were owed by ACTAS to the Department, lenders, or students. As a consequence, FSA sought the recovery of all Title IV funds disbursed to the withdrawn students.

Since ACTAS filed its appeal of the FPRD, the parties have been engaged in settlement negotiations that spanned approximately seven years and, ultimately, resolved most of their differences. The parties agree that ACTAS owes refunds of approximately $47,000 in Pell Grant funds and $58,000 of FFEL loan proceeds to approximately 450 students. There remains for resolution a determination of the amount of refunds, if any, due to three students. There is also a dispute whether ACTAS is liable for interest on refunds that were paid late or remain unpaid of

Pell Grant funds and FFEL loan proceeds.

I. OPINION

The primary dispute between the parties in this litigation focused on the determination of the Title IV refunds due to the Department, lenders, and students as the result of withdrawals by students from ACTAS's programs under 34 C.F.R. § 668.22 (2000).

The refund determination is made pursuant to a calculation commonly referred to as R2T4. In general, the amount of the financial aid earned by the student is the sum of the amount of the awarded aid that is disbursed and could have been disbursed during the period multiplied by a ratio of the number of days from the start of the payment or enrollment period to the date of the student's withdrawal over the number of calendar days in the period. For purposes here, the parties agree that the R2T4 calculation uses the payment period method for all students in ACTAS's programs except the Nursing Assistant program.

As noted above, the parties agree on the amount of ACTAS's liability regarding all students except three.[1] Its liability for these three students is addressed below.

With regard to the student Lyndsy C., ED seeks to recover $1,097 in principal of a Pell Grant and $274.64 in interest thereon. She was enrolled in the Surgical Technician Evening program that comprised five terms. Each of the first three terms was 16 weeks and each of the last two terms was six weeks. She began the program July 30, 2001 and by early March 2002 had completed the first three terms. In June 2002, she apparently began the extern aspect of the program. Her withdrawal date or last day of attendance was July 24, 2002. Her refund must be computed under the payment period method.

ACTAS's calculation focused on the financial aid received during for the first three periods and, therefore, its calculation used, incorrectly, either the period of enrollment approach or was based on financial aid data that was not pertinent with respect to the payment period in issue.

FSA's calculation properly employs the payment period method. It uses a start date of July 15, 2002, an end date of August 23, 2002, and a withdrawal date of July 24, 2002. Given a Pell disbursement of $1,416, FSA's calculation results in a recovery of $1,097 in Pell Grant funds. The interest attributable to this recovery, according to FSA, is $274.64. The tribunal

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1 On brief, ACTAS conceded the amount in dispute for the fourth student Michael H. ACTAS is liable for a refund in the amount of $875 for a FFEL subsidized loan distribution on February 15, 2001 plus interest thereon. In addition, it owes the Department $19.38 for interest paid by the Department that is attributable to the refund of the $875 distribution.

adopts FSA's calculation as it is based upon the facts. The Department may recover $1,097 in Pell Grant funds for Lyndsy C.

With respect to the student Bernice B., the parties have no dispute that she was entitled to a refund in the amounts of $1,225 for a subsidized loan and $1,372 for an unsubsidized loan. The dispute centers on whether ACTAS paid these amounts.

According to FSA's, program reviewer, Ms. Della Vecchia, this student's name came to her attention during the audit because she was included on a roster listing approximately 43 students for whom ACTAS paid refunds via check # 002523 in the total amount of $49,102.55. Ms. Della Vecchia contacted the guarantor agency, AES/PHEAA, to determine if the refunds were indeed made. AES/PHEAA's response (ED Ex. B, Bernice B.-10), indicates no refund was received for Bernice B. On brief, FSA trumpets the fact that all of the evidence submitted shows that the refund has never been paid including the exhibit of the check which includes only a copy of the front of the check and is made payable to "Neuman Institute of Technology and SLSC." This payee, according to FSA, is "an unknown and unexplained party."[2] Lastly, FSA adds that a loan history for Bernice B. provided by the National Student Loan Data System indicates no evidence of a reduction in her outstanding loan principal due to a payment by a party.

ACTAS replies that the check and its deposit slip and the copy of its transmittal instructions demonstrate that the refunds for this student were made. It adds that, according to 34 C.F.R. §§ 668.22(j)(1) and 668.173(b), a refund is "made" no later than the date the refund check is canceled by the receiving bank.

Initially, the face or front of the check was copied before it was negotiated. This is evident because the amount of the check does not appear in print immediately below the signature line. Nevertheless, there is more than sufficient evidence to conclude that the check was, in fact, negotiated and that Bernice B.'s account should have been credited with the refunds.

The same page of AES/PHEAA's business record that contains the loan information for Bernice B. also contains the same information for seven other students. By happenstance, three of these students (Kimberly H., Tonya B., and Nyra C.) were students who withdrew from ACTAS and were due refunds. Like Bernice B., they were part of the 43 students whose refunds were included within the $49,102.55 check. As to these three students, the business record of AES/PHEAA indicates that their respective refunds were paid and credited against their loan amounts in exactly the amounts dictated by ACTAS's transmittal instructions. Hence, it is readily apparent that the $49,102.55 check was negotiated. Therefore, the tribunal concludes that ACTAS paid the refunds attributable to Bernice B. The Department may not recover the

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2 Neuman is a computer school operated by the owner of ACTAS. SLSC stands for Student Loan Servicing Center, a division of PHEAA . It processes repayments and is responsible for remitting the repayments to the individual lenders.

amounts of the principal payments sought, the related interest in the amount of $517.63, and the $19.78 of interest paid by the Department on her subsidized loan.[3]

With respect to the student Brandy B., she was enrolled in the Nursing Assistant program. Under this program, financial aid was disbursed to students in two equal payments over the enrollment period. During the first payment period, Brandy B. received disbursements of a Pell Grant grant and a subsidized FFEL loan before withdrawing during this payment period on November 14, 2001. The parties agree that the calculation of her refund should be made using the period of enrollment method.

The dispute between the parties focuses on the amount of the financial aid component in the refund calculation. Under 34 C.F.R. § 668.22(e)(1)(ii), the amount of the financial aid component consists of the actual amount of aid disbursed and the amount of aid that "could have been disbursed" during the period of enrollment.

The issue is whether the undisbursed financial aid payments for the second payment period are aid that "could have been disbursed" and, therefore, are included within the financial aid component.

The Department addressed this issue on two occasions – first, in GEN-00-24 (December 2000) (ACTAS Reply Br. Ex. C) and, second, in GEN-04-03 (February 2004 as revised November 2004 in the attachment at 3-4) (ACTAS Reply Br. Ex. D at 5-6). In GEN-00-24, schools were instructed that second or subsequent disbursements of financial aid were not included as "could have been disbursements" if the student withdrew during the first payment period. Four years later in GEN-04-03 as revised, the Department reversed its interpretation and set forth its current construction – the second or subsequent disbursements of financial aid are included as "could have been disbursements" if the student withdrew during the first payment period.

In FSA's view, the appropriate interpretation accorded this phrase depends upon the time frame of the transaction. Since Brandy B. withdrew in November 2001, the amount of the financial aid component in her refund calculation is governed by GEN-00-24 and includes only the aid disbursed in the first payment period.

ACTAS argues that Brandy B.'s refund calculation should be made using the interpretation of GEN-04-03 as revised and, therefore, the amount of the financial aid component in the calculation includes the actual disbursements from the first payment period and the potential disbursements from the second payment period. ACTAS asserts that it is unfair, today, to require a refund calculation for a transaction in 2001 to be computed using an admittedly

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3 The tribunal urges FSA to seek a correction of this error in the records of the guaranty agency and NSLDS and to have Bernice B.'s account fully credited with these amounts as this might affect her credit rating.

incorrect interpretation of law by the Department simply because that was the way the Department ordered it to be done back then.

In the tribunal's view, the Department published an interpretation of 34 C.F.R. § 668.22(e)(1)(ii) in 2000 that was determined, within a short period of time thereafter, to be inconsistent the regulatory scheme. This interpretation was replaced with a broader construction of 34 C.F.R. § 668.22(e)(1)(ii) that apparently eliminated these problems. This view has remained the Department's position for almost a decade. FSA has not advanced any legal argument that convinces the tribunal to disown the current interpretation by the Department and impose a previously rejected interpretation especially where, as here, the current interpretation reflects the plain meaning of the regulation.[4] Accordingly, the computation of refund for Brandy B. shall include the disbursements of financial aid made during the first payment period and the potential disbursements in the second payment period.[5]

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4 In its reply brief, FSA states that the change in its interpretation represents a change in policy and is not a correction or clarification. However, FSA never articulated the policy that was purportedly changed or why that change, in turn, justifies the usage of a construction inconsistent with the plain meaning of the regulation.

5 For Brandy B., ACTAS owes a refund of $408.56 in Pell Grant funds computed as follows:

$10,669.60	aid disbursed and could have been disbursed
x .174	ratio of 37 days attended over 213 days of the enrollment period
$ 1,856.51	refund
x .582	percentage allocable to Pell
$ 482.56	
-- 74.00	prior refund
$ 408.56	actual refund

ACTAS owes a refund of $346.58 in FFEL loan proceeds ($1,856.51 times .418 [allocation percentage] = $346.58).

For purposes of the interest computation, ACTAS's date of determination of her withdrawal is November 14, 2001.

Next, FSA seeks imputed interest on refunds that were paid late or remain unpaid of Pell Grant funds and interest on refunds that were paid late or remain unpaid of FFEL loan proceeds. On a refund that was paid late, the interest period begins on the return due date of the repayment and continues until the date of its payment. On a refund that is due but remains unpaid, the interest period begins on the return due date of the repayment and continues until the conclusion of this administrative process. According to FSA, the return due date is 60 days (or 30 days for refunds due after October 7, 2000) after the date the institution determines that the student has withdrawn.

Initially, imputed or prejudgment interest is non-statutory interest whose origin lies in the common law governing debts to the Federal Government—

> the longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money.
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> West Virginia v. United States, 479 U.S. 305, 310 (1987) (citing Royal Indemnity Co. v. United States, 313 U.S. 289, 295-97 (1941)).

Imputed interest is considered part of the recovery for a breach of a contract and represents "damage for delay in payment of the principal." Royal Indemnity Co., 313 U.S. at 296. In addition, "courts have discretion to adjust the rate of interest or deny interest altogether." In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1334 (7th Cir. 1992).[6]

ACTAS challenges the imposition of imputed interest. It asserts a due process argument, namely, that the absence of notice in the FPRD that interest was payable on late or unpaid refunds of Pell Grant and FFEL funds precludes the assessment of interest. Next, it argues that no interest is due after the issuance of the FPRD because the Department's demand for the repayment of $1.6 million was a bad faith claim. Lastly, it urges that no interest should accrue after December 2008, the month in which this matter was suspended pending the criminal prosecution of the owner of ACTAS on matters directly and indirectly related to the audit in this case.

With regard to the due process argument, the development in the case is relevant. Initially, the FPRD sought the return of $1.6 million which represented the total amount of all financial aid received by the approximately 450 students who withdrew early from their programs. This was based, in part, on incomplete and unreliable records. Following ACTAS's

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6 In its brief, FSA cites the Debt Collection Act of 1982 as one authority for collecting interest in this matter. This is in error. Interest under the Debt Collection Act of 1982 does not begin to accrue until the amount of the debt has been ascertained. 31 U.S.C. § 3701(b)(1). Here, the amount of the debt is not determined until the administrative review process is completed. *Cf*. In re Willoughby-Eastlake School of Practical Nursing, Dkt. No. 09-02-SP (Sec Dec Nov. 12, 2010) at 4-5.

appeal of the FPRD, the parties began settlement discussions that focused on a different basis to determine liability based on the amount of schooling provided each withdrawn student. This approach used the R2T4 calculation to determine ACTAS's liability for each student. After many discussions over several years, a complete file review by ACTAS, and the gathering of other information, the parties were ultimately able to agree upon ACTAS's liability with respect to all of the withdrawn students except four. At some point in the process, and most likely in May 2010, FSA raised the matter of ACTAS's liability for imputed interest on late and unpaid refunds as it is a collateral matter of the R2T4 calculation. *See* City of Milwaukee v. National Gypsum Co., 515 U.S. 189, 196 (1995) (imputed interest "is merely an element of just compensation."). Thus, the nature of the remedy morphed due to the presentation of additional information. In this context, the absence of notice in the FPAD regarding ACTS's obligation to pay interest is understandable and proper and such absence does not present a due process problem under the Fifth Amendment. Accordingly, this aspect of ACTAS's argument is rejected.

Next, the parties recognize (FSA Reply Br. at 16; ACTAS Reply Br. at 4) that imputed interest may not accrue on a debt during a period of delay in its collection or prosecution which is caused unilaterally by the party claiming the debt citing West Virginia v. United States, 479 U.S. 305, 310 (1987).

ACTAS argues that it is not liable for imputed interest on late or unpaid refunds after the issuance of the FPRD because its monetary demand was outrageous and reflected intentional misconduct or extreme negligence on behalf of the Department. This demand effectively terminated ACTAS's on-going process of recalculating and repaying its refund liabilities to these students and prevented the school from continuing to pay refunds in the future. This demand was the root cause that required seven years to conclude this matter. In its view, the nature of the misconduct is self evident given that FSA agreed, ultimately, that ACTAS's liability was limited to only $106,000 of the $1.6 million sought by the FPRD. ACTAS believes that the payment of interest should be denied; otherwise, interest becomes a reward for such misconduct.

As explained earlier, there was a reasonable basis for the Department to request the return of $1.6 million in the FPRD. Due to the subsequent presentation of additional information and further discussions between the parties, it became possible to refocus the remedy aspect of the dispute and that ultimately led to an agreement regarding ACTAS's liability for refunds involving approximately 450 students. Under these circumstances, there is no basis to deny an award of interest.

Lastly, this litigation was suspended on December 17, 2008, at the joint request of the parties due to the pending Federal criminal prosecution of the owner of ACTAS on matters directly and indirectly related to the audit in this case. There was a subsequent bench trial and the Federal district court found on April 15, 2010, that the Government failed to establish, beyond a reasonable doubt, the owner's guilt as to the criminal charges brought pursuant to the indictment. Thereafter, the parties resumed their settlement negotiations in May, 2010, and ultimately resolved virtually all their differences in a stipulation filed on February 3, 2011.

ACTAS asserts that the 16-month suspension was a delay in the proceeding that was due solely to the Government's non-meritorious prosecution of its owner. Citing West Virginia, ACTAS argues that interest may not accrue to the debt holder where the debt holder is responsible for the delay. FSA responds that the request for a suspension was a joint request by both parties and interest may continue to accrue during a period of a delay for which both parties are responsible. Hence, FSA argues that interest continues to accrue during the period of the suspension in this matter.

The tribunal agrees with FSA. Each party made a voluntary and knowing decision to request a joint suspension of the proceeding. In this situation, each party was responsible for the subsequent delay in this proceeding. Imputed interest cannot be abated in this circumstance.

In conclusion, ACTAS is liable for a refund of Pell Grant funds and/or FFEL loan proceeds for the student Michael H. and Lyndsy C.. It is not liable for a refund of FFEL loan proceeds for the student Bernice B. as those amounts had been previously paid by ACTAS. The computation of the refund for the student Brandy B. shall utilize the Department's current interpretation of the financial aid component. In addition, the parties stipulated that ACTAS owes $47,194 in Pell Grant refunds to the Department and owes $58,383.56 in FFEL refunds. ACTAS is liable for imputed interest on all refunds of Pell Grant funds and for interest on the FFEL loan proceeds in the manner prescribed above.

II. ORDER

On the basis of the foregoing findings of fact and conclusion of law, and the proceedings herein, it is HEREBY ORDERED that the American Center for Technical Arts and Sciences immediately and in the manner provided by law pay—

1. To the United States Department of Education, the sum of $5,091.93 representing the imputed interest due and owing on refunds of Pell Grant monies that were previously repaid by ACTAS, but paid late;

2. To the United States Department of Education, the sum of $48,699.94 representing the refunds due and owing of Pell Grant monies based upon FSA's Ex. A and the decision herein, plus imputed interest thereon to accrue from the student return due dates through October 31, 2011, and computed in an manner consistent with the calculations in FSA's Ex. A[7];

7 This designated date provides FSA with ample time of 30 days in which to perform the student-by-student calculation of the interest components in this Order.

3. To the United States Department of Education, the sum of $949.47 representing the subsidized interest previously paid by the Department that is attributable to refunds of FFEL loan proceeds that were previously repaid by ACTAS, but paid late;

4. Interest due to the students set forth in FSA's Ex. A, their lenders, or their loan assignees or successors in interest as provided by law in the total amount of $10,907.07 that is attributable to refunds of FFEL loan proceeds that were previously paid by ACTAS; and

5. Refunds of FFEL loans proceeds to the students as set forth in FSA's Ex. A and as determined under this decision, their lenders, or their loan assignees or successors in interest as provided by law in the total amount of $58,792.12, plus interest thereon to accrue from the student return due dates through October 31, 2011, and computed in a manner consistent with the calculations in FSA's Ex. A.

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Allan C. Lewis
Chief Administrative Law Judge

Issued: September 30, 2011
Washington, D.C.

SERVICE

A copy of the attached decision was sent on September 30, 2011, by certified mail, return receipt requested to the following:

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