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

In the Matter of

TECHNICAL CAREER INSTITUTES,

Respondent.

Docket No. 12-66-SP

Federal Student Aid Proceeding

PRCN: 200840226774

Appearances: Steven M. Gombos, Esq., and Robert B. Walker, Jr., Esq., Ritzert & Leyton, P.C., Fairfax, Virginia, for Technical Career Institutes.

Denise Morelli, Esq., Office of the General Counsel, U. S. Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Technical Career Institutes (TCI) is a proprietary institution of higher education located in New York, New York. It offers a variety of technical training courses that lead up to Associate degrees. TCI is accredited by the Commission on Higher Education of the New York Board of Regents and is certified as an eligible institution to participate in the various federal student financial assistance programs that are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). *See* 20 U.S.C. § 1071 *et seq.* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA), within the United States Department of Education (ED), administers and oversees these programs.

From September 22, 2008 through September 26, 2008, members of FSA's School Participation Team -- New York/Boston, performed a program review at TCI to examine its administration of the Title IV programs. On February 3, 2009, the team issued a Program Review Report detailing ten findings. As pertinent to the issues before me, TCI was directed to perform

two full-file reviews. First, it was directed to review the records of all students that had unofficially withdrawn during the 2007/2008 and 2008/2009 award years and recalculate the Title IV refunds due for each such student. The second involved an order to examine the records of all male Title IV recipients whose records indicated that they had been flagged as having failed to register with the Selective Service to determine if they had been properly exempted from such registration. After a series of exchanges of information between TCI and FSA, including the results of the above directed full-file reviews, on September 28, 2012, FSA issued a Final Program Review Determination (FPRD) that contained two approved adverse findings. The FPRD also found that the other findings of the program review report had been resolved.

The first adverse finding of the FPRD was that TCI incorrectly calculated the amounts of Title IV funds that it was required to refund for students that had withdrawn from TCI during the period under review. For this finding, FSA demanded that TCI return $182,735.16 to ED. In the second adverse finding of the FPRD, FSA determined that 70 male students had been improperly awarded Title IV aid without either properly registering with Selective Service, or establishing that they were exempt from such registration. As such, all Title IV aid disbursed to those students must be returned to ED. By letter, dated November 15, 2012, Respondent's counsel filed a written Request for Review of the findings of the FPRD.[1]

As the basic starting point for my analysis, it must be recognized that Title IV eligible institutions always acts as a fiduciary, thereby owing to ED the highest standard of care and diligence in administering the Title IV programs at their institutions and ensuring that federal funds entrusted to them are properly spent. *See* 20 U.S.C. § 1094, 34 C.F.R. § 668.14 and 34 C.F.R. § 668.82(a) and (b). Further, it is well established that in any Subpart H -- audit or program review -- proceeding, the institution has the burden of proving by a preponderance of the evidence that it has disbursed Title IV funds in accordance with statutory and regulatory guidelines. *See,* 34 C.F.R. § 668.116(d). If it fails to establish the correctness of its expenditure of federal funds, it must return all such funds to ED. As a corollary to the above, once the institution is given adequate notice of the demand by FSA in its FPRD, the established burdens of proof are implemented. I will discuss the two contested findings seriatim.

Refund Issue

The first issue here, the calculation of refunds, also known as "return to Title IV" (R2T4), involves the same finding that I recently decided for two previous award years at TCI. *See, In re Technical Career Institute*, Docket No. 12-65-SA, U.D. Dept. of Educ. (Oct. 6, 2014). In both of the proceedings, FSA's review had indicated that TCI failed to properly refund Title IV funds as required. Specifically, the returns were erroneous because TCI utilized an incorrect withdrawal date when determining the amounts it was required to return. The FPRD noted that the findings involved certain students who failed to notify TCI that they were withdrawing but rather just

[1] This case involves the same parties and one of the same issues as *In re Technical Career Institutes*, Docket No. 12-65-SA, U.S. Dep't of Educ. (October 6, 2014) and I had been assigned to adjudicate both. For purposes of flexibility and judicial economy, I decided to handle them together, without consolidating them.

discontinued attending. As to any such students, 34 C.F.R. § 668.22 (c) (1) governs how an institution, like TCI, that is not required to take attendance, must establish a withdrawal date for R2T4 purposes.[2] The date to be utilized as a student's withdrawal for purposes of a refund calculation must be established as the mid-point of the payment period or period of enrollment. 34 C.F.R. § 668.22 (c) (1) (iii). As an authorized alternative, schools may use as the withdrawal date, a student's last day of attendance at an academically related activity if such activity was properly documented. 34 C.F.R. § 668.22(c) (3). Contributing to the finding of erroneous R2T4 calculations, the FPRD noted that TCI had an established absence policy requiring it to withdraw a student once the student had accumulated 21 continuous absences. Apparently, TCI added 21 days to the last day of actual attendance and utilized that date for R2T4 refund calculations.

As indicated above, TCI was directed to perform a full-file review of R2T4 recalculations of all students that had withdrawn without prior notice during the 2007-2008 and 2008-2009 award years utilizing the mid-point of the payment period as the withdrawal date. Based upon that review, FSA determined that TCI owed an additional $182,735.16 in refunds. Similarly to the previous audit case involving TCI, referenced above, the parties seem to agree as to the figure representing the shortages resulting from TCI's erroneous R2T4 calculations. I find that $182,735.16 is the correct shortage resulting from the erroneous R2T4 calculations at issue.

Likewise, during the full-file review in the current proceeding, TCI determined it had, in certain instances, returned more Title IV funds than it would have if it utilized the correct withdrawal date. TCI asserts that the overpayment amounts for students whose recalculated refunds were less than they actually received came up to a total of $95,839.58. Consequently, TCI argues that in fairness, it should be allowed to receive credit for this amount from the additional amounts demanded by the FPRD for the overpaid funds. TCI complains that FSA "cherry-picked" only those instances in the full-file review where TCI recalculations indicated a liability exists and disregarded those instances where there was an overpayment and, consequently, FSA unfairly gains a windfall at its expense. FSA does not present any evidence disputing the amount of the suggested credit but it argues in opposition that there is no such windfall, because the excess amounts have already been applied to the respective student's account. Inherent in that argument, is the concept that TCI should be somehow punished, i.e. overpayments by TCI to the student or to ED are excused, even though clearly a "windfall" to them, whereas a shortfall or underpayment must be paid by TCI.

FSA also argues that TCI made a conscious decision to calculate refunds in the manner it chose instead of utilizing the process provided for in the regulations. Rather than repeating my discussion of this common issue, I hereby adopt my analysis in *In re Technical Career Institutes, supra*, as dispositive here and apply an offset. *See generally, In the Matter of Nettleton Junior College*, Docket No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994), and 20 U.S.C. § 1094 (c) (7). I find that applying a $95,839.58 crediting offset to an established $182,735.16 shortfall results in a net finding of $86,895.58, for the refund calculation issue.

[2] Any eligible institution must determine the appropriate withdrawal date and return the refund amount as soon as possible but no later than 30 days after the institution determines that a student withdrew. 34 C.F.R. § 668.22(j) (1) and (2).

Selective Service Registration

To receive Title IV federal student financial assistance, a male student who is subject to register with the Selective Service, must do so. 34 C.F.R. § 668.37 (a). As part of the processing of a male student's application for Title IV aid, ED is required to ascertain through coordination with the SS whether the student has registered with Selective Service and report the result to the student and the institution. 34 C.F.R. § 668.37 (b). If such student has not registered, the institution may determine that the student may still be eligible to receive Title IV aid if the student can submit clear and unambiguous evidence that he falls within certain exceptions provided in the regulations. *See*, 34 C.F.R. § 668.37 (d) and (e).

As indicated above, TCI performed a full-file review of all the 303 male students who were flagged for not registering in the award period under review. Upon completion of that review, TCI claimed that it had resolved the issue for all but three of those students. However, upon initial scrutiny by FSA, it was determined that there were actually 148 cases of unresolved selective service registry. During a further exchange of information between the parties, FSA reduced its claim to erroneously providing Title IV aid to 70 male students[3] despite the fact that they were not registered with Selective Service and did not prove they were, otherwise, exempt from such registry. In its defense before me, TCI argued that since ED has delegated to institutions the decision-making authority to determine the efficacy of a claim for exemption from registry, it had hired an experienced compliance officer to validate the exemption status of its students. TCI claims that he had examined each flagged instance of failure to register and determined that the students fit one or more of the exceptions to registry. TCI claims that the compliance officer utilized FSA's Handbook, had rejected many of the students based on his determination that the students did not qualify under the then minimum guidance on the subject and, that FSA is now second guessing those decisions well-after the events occurred, and with reasoning not apparent at the time. Finally, TCI argues that it provided a valuable service in educating these students and should not be penalized for its reasonable exercise of discretion.

Even though there are a variety of other categories of exemption, here the categories of students in issue as having failed to register fell into three well-defined categories of exception to registry. Two of these categories are clear while the third raises substantial questions. First, it is clear that an individual, who entered the United States on a valid non-immigrant visa and remained in the United States on that visa until their 26th birthday, is exempt. There are four students in this category in dispute -- FSA asserting that there was no visa evidenced for those students while TCI claiming that ED's guidance at the time did not require the presentment of the actual visa. Upon my review, three student files contained Certificates of Naturalization, and one showed a request for political asylum. It is abundantly clear that these documents fail to establish that any of the four students were in the United States on valid non-immigrant visas until their 26th birthdays so as to excuse their failure to register. TCI's argument in defense of its failure to have a copy of the visa, that is so clearly required, is totally unpersuasive. Therefore, I find that TCI must return, $111,454.00, all the Title IV aid disbursed to those four students.

[3] During the briefing process, FSA accepted that three of these students, 36, 37, and 143, were exempted from registration leaving 67 students at issue for this finding.

The next category of exemption from registry excuses a male student that demonstrates by submitting **clear and unambiguous evidence** that he is over 26 and between ages 18 and 26 he did not **knowingly and willfully** fail to register. 34 C.F.R. § 668.37 (d) and (d) (2) (i). To add to the imprecise nature of this standard, in a somewhat confusing regulatory provision, in order to satisfy this exception, the student must present to the institution an advisory opinion from the Selective Service that such student did not knowingly and willfully fail to register. Further, to add to the confusion regarding this line of inquiry, the regulations provide that despite having this certificate, the institution must not have uncontroverted evidence that the student knowingly and willfully failed to register to then validly disburse Title IV aid. 34 C.F.R. § 668.37 (e) (1) and (2). Finally, if a student is denied Title IV funding by the institution as a result of its determination of non-registry, the student may seek a hearing from the Secretary in order to prove his compliance with the registry requirements of the Military Selective Service Act. 34 C.F.R. § 668.37 (f).

Before assessing TCI's compliance with ascertaining Selective Service registry or excusal thereof on this basis, I must make some general observations. First, and most important, I must ask who really knows whether or not a particular student knowingly and willfully failed to register. Of course, it is that particular student. To excuse his non-registry and gain Title IV funding, the student must submit clear and unambiguous evidence of his claim. As a start-off point for review, I must ask how he can do so. Because this question involves a student's state of mind, a sworn statement from the student should be strong evidence of compliance. TCI has claimed from the beginning that it hired an experienced compliance officer who interviewed each student and, after assessing their credibility, was convinced that their claims were correct. In addition, TCI proffered a variety of evidence it utilized in deciding to excuse non-registry in this category and disbursing Title IV aid to 31 students. In support of its position on this issue, FSA argues that the need for males to register with Selective Service is publicized in high schools, post offices, unemployment offices, and other public places and, as such, there should be a presumption that males know of the registry requirements. Surely, FSA must be arguing at least that this is a rebuttable presumption -- how it can be rebutted is not discussed. If not capable of being rebutted, a Constitutional issue of due process is surely implicated. I note in closing that if such a presumption really does exist it would seem to indicate that the entire process of determining whether a failure to register was not knowing and willful would always be a futile exercise. As a general principle the law abhors situations where legislative pronouncements do not have impact to some degree. With that background, I will discuss the evidence relative to the 31 students included in this category.

In addition to his statement, the student must submit to TCI an advisory opinion from the Selective Service that does not dispute the student's claim of exemption. As pertinent to this issue, the record indicates that in the case of 16 students, the Selective Service reported that they had not sent notices to those students requesting that they register; in four other cases such notices were sent and not returned as undeliverable. In addition, the record indicates that in the case of five students, there is no letter from the Selective Service included in TCI's files; in the case of four students, there are no signatures on their supposed statements; and in the case of two students, who claim that they thought they had registered, there was no evidence of such actions.

As to each of these 31 students, FSA argues that TCI failed to meet its evidentiary burden of establishing the student's exemption from registration for selective service. Mainly, FSA disputes the student's claim that they were unaware of the requirement to register given that such a requirement is readily available through many sources. As indicated above, this argument would render this aspect of the exemption from registry process a nullity. Further, FSA argues that there is no significance to the fact that no notices were sent by Selective Service to the16 students, pointing out there is no requirement that they do so. I disagree that a failure to send such a notice can act as evidence that a student knows that he has to register. As to those notices that were sent and not returned, however, this is further proof that those students were on notice of the registration requirement.

As discussed above, here the standard of knowing and willful is to be tested in the negative. That is to say, a student may be excused from non-registering if his failure was not knowing or willful. The usual evidentiary burden of affirmatively proving knowledge or intent of a person is reasonably well-established -- the burden of proving the lack of knowledge or willfulness is something else. As indicated in FSA's brief, although the Selective Service provides status information letters, a determination of aid eligibility of a man who failed to register should be based on a financial aid administrator's review of all the evidence presented by the student to determine, by a preponderance of the evidence, that the failure was neither willful nor knowing. See, ED Ex. 4, Brief of Federal Student Aid, July 28, 2014.

Upon review, I find that in the case of the four students (#54, 58, 68 and 84) who were sent notices by SS of the requirement to register and which such notices were not returned, TCI failed to establish that the students' respective failures were not unknowing or unwilling. I find the same for: the seven students (#63, 67, 76, 77, 83, 102 and 111) in whose records no status information letter from Selective Service is included; the two students (#73 and 88) whose statements do not contain their signature; and the two students (# 82 and 94) who claimed they thought they had registered. This finding is based on the fact that TCI did not exhaust all reasonable avenues of inquiry prior to excusing the students' non-registry. As to the group of 16 students (#23, 43, 44, 46, 52, 55, 56, 62, 64, 66, 89, 91, 105, 106, 107, and 112) in whose files appear status information letters from Selective Service stating that no notice to register were sent and whose files contain each student's statement that he did not know of the registry requirement, I find the weight of the evidence is that these students did not knowingly or willfully fail to register. Specifically, TCI did all that was reasonably possible, under the circumstances, to verify the students' claim for exemption from registry, therefore, those students were entitled to the Title IV aid that they received. In finding 4 C. of the FPRD referenced above, FSA demanded the return of $686,056.00, for the improper Title IV funding of 31 students in the above category. Based upon my finding relative to the 16 students, I have determined that the amount is issue for those students is $419,700.00, and the finding must be reduced accordingly. See, ED Ex 1 at 45 and 47, Brief of Federal Student Aid, July 28, 2014.

The third category of excused exemption from registration is that a student need not register with Selective Service if the student entered the United States after their 26th birthday. As to the 32 students implicated in this finding, TCI defends that these students were provided Title

IV aid on the basis of the date of issuance of the respective Resident Alien Card (green card). Further, TCI argues that during the times at issue, FSA did not provide any guidance suggesting that the Alien Registration Card was insufficient to establish the date of entry into the U.S. However, FSA points out that in a notice to financial aid officers, the Selective Service directed that proof of entry into the United States requires a showing of the entry stamp on a passport, or a letter from the U.S. Citizenship and Immigration Service indicating the date of arrival in the U.S. Further, that notice states that the Resident Alien Card is not valid as proof of the date of entry into the U.S. This exemption is clear and explicit and, considering the significance of the actual date of entry into the United States and the caution from the Selective Service, TCI's reliance on the Resident Alien Card to prove the actual date of entry is clearly error. I find that as a result of such erroneous action, TCI must return $652,764.00, all the Title IV aid it erroneously disbursed to those 32 students.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ordered that Technical Career Institutes repay to the United State Department of Education the following: $ 86,895.58 for the improper refund issue; $111,454.00 for the first category of the Selective Service failures to register; a net of $266,356.00 for the second failure to register category, and $652,764.00 for the third type of registry failure.

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Ernest C. Canellos
Chief Judge

Dated: December 16, 2014

SERVICE

A copy of the attached document was sent by Certified U.S. Mail, Return Receipt Requested, to the following:

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