UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of

NATIONAL EDUCATION CENTER, BRYMAN CAMPUS,

Respondent

Docket Number 94-95-SP
Student Financial Assistance Proceeding

DECISION OF THE SECRETARY

This matter comes before the Secretary on appeal by the United States Department of Education (Department), Office of Student Financial Assistance Programs (SFAP) of the initial decision issued by the administrative law judge (ALJ) on November 30, 1995. Based upon an April 21, 1994, final program review determination (FPRD) issued to National Education Center's Bryman Campus (NEC) and submissions related thereto, the ALJ concluded, among other things, that two of the four disputed FPRD findings were in fact correct. The ALJ Decision (ALJ Dec.) at 7-8. Consequently, the ALJ ordered NEC to remit to the Department those disallowed funds associated with the foregoing FPRD findings. Id. at 8.

SFAP timely filed an appeal on January 26, 1996, asking the Secretary[1] to reverse the ALJ's ruling regarding a specific FPRD finding. SFAP's Appeal Brief (Brief) at 6-7. On March 11, 1995, NEC filed a timely response to SFAP's appeal, asking the Secretary to affirm the disputed FPRD finding. Oppostion of NEC to SFAP's Appeal to the Secretary (Reply) at 22. For the reasons outlined herein, I remand the ALJ's decision to the tribunal below for clarification of certain matters.

BACKGROUND AND PROCEDURAL HISTORY

NEC is part of National Education Centers, Inc., a subsidiary of National Education Corporation. ALJ Dec. at 1. NEC has campuses located in Brookline, Massachusetts and Detroit, Michigan. Id. at 1, n.1.

On January 11-19, 1993, SFAP conducted a program review at NEC. Id. at 1. The program review uncovered numerous problems with NEC's Title IV programs; many of which the school eventually corrected. Id. However, certain problems were not resolved to

[1] On February 8, 1996, I granted SFAP's motion to file its appeal on this date.

SFAP's satisfaction and, later became the subject of NEC's appeal to the ALJ. Id.

First, NEC appealed SFAP's finding that the school failed to administer pro rata refunds in accordance with Section 484B of the Higher Education Act of 1965 (HEA), as amended on July 23, 1992. Id. Second, NEC appealed SFAP's allegation that the school improperly certified Federal Stafford Loans. Id. at 1-2. Third, NEC appealed SFAP's allegation that the school failed to resolve outstanding (i) record-keeping issues and (ii) repayment liabilities. Id. at 2. Fourth and finally, NEC appealed SFAP's allegation that the school retained a student's Stafford Loan too long, and maintained conflicting student data in its files. Id.

The ALJ rejected the first and second allegations, but upheld the third and fourth. Id. at 7-8. Now, SFAP appeals the ALJ's ruling regarding the first allegation.

With respect to that ruling, the ALJ held SFAP improperly sought to impose the July 23, 1992, amendment to Section 484B upon all students who withdrew after the foregoing date. Id. at 2-3. As amended, Section 484B provides that, effective July 23, 1992, a Title IV institution shall disburse fair and equitable refunds, which include pro rata refunds when appropriate, to its first time students who withdraw from the institution.[2] 34 C.F.R. § 668.22(c) defines a first time student as a student "who has not previously attended at least one class at the institution or received a refund of 100 percent of his or her tuition and fees under the institution's refund policy for previous attendance at the institution."

NEC's refund policy stated that pro rata refunds would only be disbursed to those students who enrolled either on or after July 23, 1992, (i.e., the effective date of the amendment). Id. at 2. After considering the merits of the disputed FPRD finding, the ALJ ruled:

> "SFAP's interpretation of those refund policy amendments as applying to all students who withdrew on or after July 23, 1992, regardless of when their enrollment began, is plainly incorrect, since that would include many students who had previously enrolled and who had attended numerous classes at NEC-Bryman before July 23, 1992."

Id. In its appeal, SFAP takes issue with the above statement.

[2] See Sections 484B and 485(a) of the HEA of 1992, Pub. L. 102-325, 106 Stat. 619.

DISCUSSION

SFAP argues the ALJ's ruling pertaining to NEC's refund policy is erroneous because it conflicts with departmental precedent. Brief at 3. SFAP recalls that the Secretary certified an initial decision wherein the hearing official ruled an institution must base its decision to disburse fair and equitable refunds upon the date a student withdraws, as opposed to the date he or she enrolls. Id. at 3-6; see In the Matter of Blaine Hair School (Blaine), Docket No. 94-129-SP, U.S. Dept. of Educ. (Initial Decision, January 31, 1995),(Secretary's Certification, August 15, 1995).

In Blaine, SFAP rejected the disputed school's claim that, despite denying students who enrolled before July 23, 1992, pro rata refunds, its refund policy complied with the amendment to Section 484B because students who enrolled and withdrew on or after the above date were issued refunds in accordance with the amendment. Blaine at 3. The hearing official likewise rejected this argument, holding "the operative date for determinations relative to refunds is the date a student withdraws." Id.

SFAP contends the ALJ, in contravention with Blaine, effectively imposed an enrollment-date limitation on the July 23, 1992, amendment by ruling that those students who enrolled at NEC before the aforementioned date (but withdrew after it) were exempt from the amendment. Brief at 5. According to SFAP, the Blaine decision supports its contention that, notwithstanding a student's date of enrollment, the amendment applies to any student who withdraws on or after the amendment's effective date. Id. at 6.

NEC argues pro rata refunds must be disbursed to a student attending an institution for the first time. Reply at 20-21. NEC then states that a first time student, according to 34 C.F.R. § 668.22(c)(7)(i)(A), is a person who has not previously attended at least one class at an institution. Id. Given its various arguments, NEC concludes: 1) Section 484B only applies to students who had not previously attended at least one class at NEC prior to July 23, 1992; and 2) any student who attended at least one class at NEC prior to July 23, 1992, is not entitled to a pro rata refund under the 1992 HEA amendments. Id. at 21. I disagree with NEC's conclusion.

NEC correctly states an institution must administer a fair and equitable refund policy, which includes the disbursement of pro rata refunds to first time students if necessary. Moreover, NEC correctly sets forth the definition of a "first time student." However, as evidenced by its refund policy, NEC mistakenly interprets that definition to mean a "first time student," for purposes of receiving a pro rata refund, is a person who has not previously attended at least one class at the institution on or after July 23, 1992. Such an interpretation is incorrect and unfounded.

34 C.F.R. § 668.22(c)(7)(i)(A) reads as follows:

> "For purposes of this section, a student attending an institution for the first time is a student who -- [ ] has not previously attended at least one class at the institution. . . ."

This regulation neither states nor implies that a pro rata refund is contingent upon a student's enrollment date in relation to the amendment's effective date.

NEC fails to acknowledge that a first time student, as defined above, can be a person who (i) enrolled at NEC prior to July 23, 1992 and (ii) never attended at least one class at the school. To illustrate, if student X, who never attended a class at NEC, enrolled at the school on April 1, 1992, and later withdrew on August 1, 1992, student X would still be entitled to a pro rata refund from NEC because that student is a first time student given that he or she never attended a class at NEC prior to April 1. Conversely, if student Y, who attended classes at NEC in 1991 and later withdrew in that same year, once again enrolled at the school on April 1, 1992, only to withdraw from classes on August 1, 1992, student Y would not be entitled to a pro rata refund because that student is not a first time student given that he or she had previously attended classes at the school. Thus, NEC's refund policy, as set forth in the ALJ's decision,[3] is invalid because it fails to provide the "greatest degree of protection to students in their refund returns." Blaine at 2-3.

The remaining question is whether the ALJ affirmed NEC's pro rata refund policy when he ruled in the school's favor. The ALJ correctly rejected SFAP's argument that the amendment to Section 484B applied to all students who withdrew on or after July 23, 1992. Section 484B unequivocally states that first time students, as opposed to all students, are entitled to pro rata refunds. Thus, the ALJ's ruling in this regard is proper. However, the question still remains whether he also affirmed NEC's refund policy. As articulated in Blaine, the operative date when deciding if a student is entitled to a pro rata refund is the date that a first time student withdraws, regardless of the student's enrollment date. See Blaine at 3. I, therefore, must remand this portion of the ALJ's ruling to the tribunal below for clarification as to whether the ALJ condoned NEC's refund policy when arriving at his decision.

ORDER

In light of the foregoing discussion, I remand this matter to the tribunal below for clarification of the matter identified

[3] See ALJ Dec. at 2.

above. Accordingly, I reserve my certification of the ALJ's decision pending the ruling of the tribunal below.

So ordered this 3rd day of April 1996.

Richard W. Riley

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