



THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

**CANNELLA SCHOOLS OF HAIR
DESIGN,**

Respondent.

Docket No. 98-72-SA & 98-73-SA
Student Financial
Assistance Proceedings

DECISION OF THE SECRETARY

In these proceedings, Cannella Schools of Hair Design ("Cannella Schools") contest final audit determinations of \$3,775 and \$14,689 against them made by the Student Financial Assistance Programs, U.S. Department of Education ("SFAP"), based on SFAP's finding that Cannella Schools improperly calculated refunds for students who withdrew from the schools. The Administrative Judge ruled in favor of Cannella Schools, and SFAP appeals. I reverse the decision of the Administrative Judge and uphold the final audit determinations in question.

In this case, students were presented with two forms when they enrolled in Cannella Schools. One form was a "Registration Contract" that listed charges for tuition and fees and referenced an attachment for equipment costs. On a separate form, headed "Equipment Acknowledgment," students agreed to have a complete set of books and equipment prior to the beginning of class. This form allowed students a choice between purchasing the materials from Cannella Schools at a specified cost or purchasing them from an outside vendor. In fact, however, all the students purchased the materials from Cannella Schools, with the purchases being made by Cannella Schools assessing the cost of the books and equipment from the students' federal student aid funds.

This case involves the proper treatment of the purchase of these materials from federal student aid funds when calculating refunds for students who withdrew from the Cannella Schools. Cannella Schools contend that they are entitled to exclude the entire cost of these materials from calculation of refunds, so that Cannella Schools would not be required to refund any portion of the amount received for these materials when a student withdraws.

The governing regulation defines a pro rata refund as:

"a refund by an institution to a student attending that institution for the first time of not less than that portion of the tuition, fees, room, board, and other charges assessed the student by the institution equal to the portion of the period of enrollment for which the student has been charged that remains on the withdrawal date"

34 C.F.R. § 668.22 (c)(1)(1995)(emphasis added).

The facts of this case fall squarely within the plain language of the regulation. Cannella Schools assessed these students specified charges from their federal student aid funds for books and equipment. The charges, thus, must be included in the refund calculations, because they are "other charges assessed the student by the institution."

Cannella Schools rely upon subsection (c)(5) of the regulation, which states in relevant part:

For purposes of this section, 'other charges assessed the student by the institution' include, but are not limited to, charges for any equipment (including books and supplies) issued by an institution to the student if the institution specifies in the enrollment agreement a separate charge for equipment that the student actually obtains"

Cannella Schools contend that their charges fall outside this subsection of the regulation, because the charges were assessed in the "Equipment Acknowledgment" form, not the "Registration Contract," which Cannella Schools contend constituted the "enrollment agreement."

First, this argument fails because it attempts to circumvent the plain language of the regulation through the labeling of forms. At the time of enrollment and prior to beginning class, the Cannella Schools students were presented with two forms, one called a "Registration Contract" and one called an "Equipment Acknowledgment." The "Equipment Acknowledgment" form specified that the student must purchase certain materials prior to beginning class and assessed charges against the students in question for the materials. The "Equipment Acknowledgment" form was part of the "enrollment agreement" within the meaning of this regulation, regardless of the label that Cannella Schools placed upon it. The school's obligation to refund federal student aid dollars and the student's right, in the case of student loans, to receive a refund cannot be circumvented by the school's decision to use two forms rather than one. On the facts of this case, the "Equipment Acknowledgment" form was part of the agreement by which a student enrolled in a Cannella School, and nothing in the regulation states that the "enrollment agreement" is limited to a single form, or that the label a school places on a form is determinative of the school's refund obligation.

Second, subsection (c)(5) by its plain language is not the exclusive definition of "other charges assessed the student by the institution." Rather, subsection (c)(5) simply sets forth instances of charges that are within the scope of that phrase. Subsection (c)(5) makes that fact clear by stating that "'other charges assessed the student by the institution" "include, but are not limited to" the examples given. As explained above, not only do the facts of these proceedings fall within the example described in subsection (c)(5), the facts of these proceedings also fall within the plain language of subsection (c)(1), because they present "other charges assessed the student by the institution."

In addition, Cannella Schools cite the a portion of the preamble to the final regulations in question:

Comments: One commenter suggested that the definition of "other charges assessed by the institution" not include the documented cost for services provided by the institution as a convenience to the student. For example, a book charge would not be an institutional charge if the institution permitted the purchase of the books as a convenience and the book charge was not included in the enrollment agreement.

Discussion: The Secretary notes that, consistent with policy under the previous FFEL program regulations, an institution is required to include the full amount of charges for equipment in the calculation of a pro rata refund if a separate charge exists for the equipment by the institution or if the institution requires the student to purchase the equipment from a certain vendor. If an institution does not have a separate charge for equipment and the student has the option of purchasing the equipment from more than one source, the institution would not have to include the equipment charge n the pro rata refund calculation.

59 Fed. Reg. at 61163.

However, this passage does not lead to the conclusion, as Cannella Schools urge, that the audit determinations are invalid. First, as explained above, the plain language of the regulations themselves support the audit determinations. Second, the facts of these proceedings do not fall within the language of the preamble discussion. In this case, Cannella Schools plainly had "a separate charge" for the materials in the Acknowledgment Form. This is not a situation where a school did not have a separate charge for books and materials, simply made them available for purchase, and allowed the student to choose freely whether to purchase them from the school or from other sources.

Finally, it should be noted that the regulations provide for due consideration of schools' financial concerns. For example, with appropriate disclosure, a school may exclude the documented cost of unreturnable equipment issued to the student, and the school may also retain a *pro-rata share of the profits up to the time when the student withdraws*. 34 C.F.R. § 668.22. Also, this case does not present the situation where a school in fact disbursed federal student aid funds to students in a timely way so that they could choose to purchase books and other materials from a range of sources, including the school and unrelated vendors.

Cannella Schools make three additional arguments in support of their position. First, they contend that their practices complied with the guidance in the 1995-96 Federal Student Financial Aid Handbook, which stated that usually "if the student purchases the item in question from the school it's an institutional cost." The Handbook continued that the Department "has determined that if the student has a real and reasonable opportunity of obtaining the items (such as books) elsewhere, and only chooses to get them at the school as a matter of convenience, the cost is a noninstitutional charge."

At the outset, the regulation is the governing authority. As set forth above, the charge assessed by the Cannella Schools is a "charge assessed the student by the institution" within the

meaning of the regulation and thus must be taken into account in calculating a refund. In addition, the facts of this case do not present a situation where students had “a real and reasonable opportunity” for purchasing the equipment elsewhere and only “[chose] to get them at the school as a matter of convenience.” Instead, here the school required students to purchase equipment prior to classes, provided for an assessment against the students’ federal student aid for the equipment, and did not routinely distribute funds to the students so that they could “choose[] to get them at the school” or elsewhere “as a matter of convenience.”

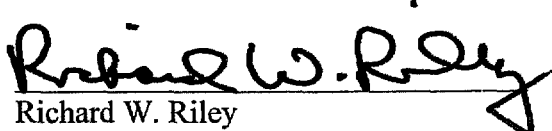
In addition, Cannella Schools contend that they cannot be held to make the required refunds because OSFA did not make the same determination as to another school. This decision sets forth the correct and binding interpretation of the regulations; any contrary prior determination was mistaken. Estoppel cannot prevent the application of the correct meaning of the governing regulations, or remove the schools’ obligation to make proper refunds of federal student aid funds. See, e.g., Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

Finally, Cannella Schools argue that they are protected from the imposition of a penalty under the Department’s “safe harbor” doctrine. That doctrine has no application to this case, however, because the final audit determinations do not impose a penalty; instead, they require that Canella Schools repay money to which they were not entitled and should have refunded. In the Matter of Southwestern College, Dkt. No. 97-76-SP (May 12, 1998).

For these reasons, the decision of the Administrative Judge is reversed and the final audit determinations are upheld.

So ordered this 12th day of December, 2000.

Washington, D.C.


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