IN THE MATTER OF NEW YORK BUSINESS SCHOOL, Respondent.

Docket No. 93-81-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Leslie Wiesenfelder, Esq., and Dwayne Pugh, Esq., Dow, Lohnes & Albertson, for New York Business School.

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

Before: Judge Richard F. O'Hair

BACKGROUND

On June 10, 1993, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a Final Program Review Determination (FPRD) for New York Business School (NYBS). The findings in the determination were based on the program review report dated July 16, 1991.

NYBS filed a request for review on July 26, 1993. A Prehearing Order with a briefing schedule was issued to all parties and they have filed briefs, exhibits,See footnote 1 *1* and stipulations of fact.

DISCUSSION

The July 16, 1991 program review contained twenty-three findings. Stip. No. 5. The FPRD contained only six findings: findings 2, 4, 8, 11, 15, and 22. Whereas Finding 15 assessed an informal fine, which the Department does not seek to recover in this proceeding, no more discussion of Finding 15 is necessary. Stip. No. 7, 8. The Department has also withdrawn

Finding 8. Therefore, no more discussion of Finding 8 is necessary. Stip. No. 10. Thus, only four findings remain in issue: findings 2, 4, 11, and 22. For findings 2 and 22, the Department no longer seeks to recover the informal fine portion of those findings. Stip. No. 9.

Consequently, the total amount in dispute in this proceeding is $11,059.90. This consists of $744 for Finding 22, $6,425 for Finding 2, $614 for Finding 4, and $3,276.90 for Finding 11.

Finding 22

NYBS did not appeal Finding 22 of the FPRD which, as amended, assessed a liability in the amount of $744 against NYBS for making a second disbursement of a Federal Pell Grant to a student who failed to meet its satisfactory academic progress ("SAP") policy. Stip. No. 11. Accordingly, I uphold Finding 22. NYBS must repay $744 to the Department.

Finding 2

Finding 2 of the FPRD alleged that NYBS paid late refunds of Stafford, SLS or PLUS loans to various lenders on behalf of some of its students. Ex. E-2-3. This finding concluded, *inter alia*, that NYBS owed the Department $6,425 for interest and special allowance payments that the Department paid to lenders on these late and unpaid Stafford loan refunds. Ex. E-2-7. As to Finding 2, NYBS stated only that "[a]t this time NYBS has no legal basis upon which to refute SFAP's calculation of interest and special allowance with regard to Finding No. 2." Resp. Br. at 13. Accordingly, I uphold Finding 2. NYBS must repay $6,425 to the Department.

Finding 4

In Finding 4 of the FPRD, SFAP contends that NYBS made two Pell Grant disbursements of $307 each, totalling $614, to a student whose file did not contain a valid student aid report (SAR).

A SAR is a report provided to an applicant showing the amount of his or her expected family contribution. § 690.2 (1988).See footnote 2 *2* A *valid* SAR is a report in which all of the information used in the calculation of the applicant's expected family contribution is accurate and complete as of the date the application is signed. § 690.2 (1988). Institutions must maintain the SAR of each student applying for a Pell Grant during a particular award year for five years after that award year has ended. § 690.82(a) and (b) (1988).

As SFAP notes in its initial brief at 3, an institution may make one disbursement within an award year of a student's Pell Grant before receiving the student's valid SAR. § 690.77(a) (1988). However, if an institution chooses to make a disbursement to a student without a valid SAR, it shall be liable for that disbursement if it subsequently does not receive a valid SAR for the student

for that award year. § 690.77(c) (1988).

NYBS disbursed two Pell Grant payments to student #1 in the amounts of $307 on July 29, 1988, and $307 on September 12, 1988. Stip. No. 17. In response to the program review, NYBS previously had told the Department that it could not locate an SAR or ESAR (Electronic Student Aid Report) for student #1 and that the school was awaiting repayment instructions for this finding. Stip. No. 14 & 15.

Although NYBS has submitted Ex. R-3, which contains Part 3 of student #1's SAR for 1988-89, the remainder of student #1's SAR for that award year is still missing. As noted above, if an institution chooses to make a disbursement to a student without a valid SAR, it shall be liable for that disbursement if it does not receive a valid SAR for the student for that award year. Inasmuch

as Ex. R-3 contains only Part 3 of student #1's SAR for 1988-89, it is incomplete and therefore does not constitute a *valid* SAR as required by § 690.77 and defined in § 690.2. Consequently, pursuant to § 690.77(c), NYBS is liable for the two disbursements of $307 made to student #1 during the 1988-89 award year. Accordingly, NYBS must repay $614 to the Department.

Finding 11

In Finding 11 of the FPRD, SFAP determined that NYBS consistently maintained bank balances that were in excess of the school's need for Federal funds. SFAP seeks the recovery of $3,276.90 in imputed interest on the excess cash balances. Ex. E-2-10.

In its briefs, SFAP contends that NYBS was required to comply with the Department's Payment Management System Users Manual (User Manual),See footnote 3 *3* which prohibits institutions such as NYBS from maintaining cash on hand in excess of an average of three days' needs. Ex. E-5-6 (User Manual at III-4). Specifically, SFAP claims that the regulations found at 31 C.F.R. Part 205 (1988) govern the withdrawal of cash from the Treasury for advances under Federal grant programs. SFAP Reply Br. at 2-3. 31 C.F.R. § 205.2 (1988) states that "The regulations in this part apply to any Federal program requiring advances to finance the recipient organization's activities in carrying out the program, whether by contract, grant, contribution, or other form of agreement." A "recipient organization" is defined as "an organization outside the Federal Government (including any State and local government, educational institution, international organization and any other public and private organization) receiving cash advances under Federal grant and other programs." 31 C.F.R. § 205.3 (1988) (emphasis added). This definition would include institutions such as NYBS. 31 C.F.R. § 205.4(a) (1988) states as follows:

(a) Cash advances to a recipient organization shall be limited to the minimum amounts

needed and shall be timed to be in accord only with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program costs and the proportionate share of any allowable indirect costs.

In addition, 31 C.F.R. § 205.8 (1988) states that "Federal program agencies shall formulate procedural instructions which specify the methods employed to carry out these responsibilities . . . ."

As a result, the Department promulgated the User Manual. As support for its position that institutions cannot maintain cash on hand in excess of an average of three days' needs, the User Manual cites Treasury Financial Manual (TFM) Volume 1, Chapter 4-2500, Treasury Financial Communications Systems Payments; TFM Volume 1, Chapter 2-6000, Cash Advances Under Federal Grant Programs; and TFM Volume 1, Chapter 6-8000, Cash Management. Ex. E- 5-4-5 (User Manual at III-3-4). The User Manual also states that Treasury Department Circular No. 1084 requires each agency to monitor the cash management practices of recipient organizations to ensure that Federal cash is not maintained in excess of immediate disbursing needs. Ex. E-5-5

(User Manual at III-4). The Department's reliance on these sources constitutes a reasonable attempt to comply with the dictates of 31 C.F.R. §§ 205.4(a) and 205.8 (1988).

While it would have been preferable for the Department to have codified its attempts to comply with 31 C.F.R. Part 205,See footnote 4 *4* these regulations effectively require the Department to limit cash advances to educational institutions and to formulate procedural instructions, such as the User Manual, that specify the methods employed by the Department to carry out these responsibilities. As a result, these regulations provide a specific legal basis for the Department's User Manual and its procedures which were designed to prevent institutions from maintaining excess cash. Accordingly, I find that NYBS was obligated to comply with the provisions of the User Manual, which prohibited NYBS from maintaining cash on hand in excess of an average of

three days' needs.

At pages 15-21 of its brief, NYBS argues extensively that SFAP has no authority to recover imputed interest, and that, instead, SFAP is attempting, unlawfully, to recover "damages." However, a recent decision squarely rejected these arguments. In *In the Matter of International Career Institute,* Dkt. No. 92-144-SP, U.S. Dep't of Educ. (July 7, 1994), the judge held that SFAP may recover imputed interest on unpaid Pell Grant funds. The judge in that proceeding cited *In the Matter of Macomb Community College,* Dkt. No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993), stating as follows:

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 to an identifiable Federal interest. Consequently, under *Macomb*, SFAP could legitimately seek to recover imputed interest in circumstances where imputed interest could be shown to be an appropriate measure of a portion of SFAP's damages.

International Career Institute at 3. The judge also relied on *In the Matter of Puerto Rico Technology and Beauty College,* Dkt. No. 92-73-SA, U.S. Dep't of Educ. (August 31, 1992) for the proposition 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." *International Career Institute* at 3.

Accordingly, SFAP may recover imputed interest on excess cash maintained by an institution.

In response to the 1991 program review and subsequent discussions with the Department, NYBS conducted a self-study "to determine the amount of excess cash on hand it maintained for more than four (4) working days. . . . [T]he imputed interest liability was based on the amount of

excess cash determined. . . . The amount of interest liability came to $3276.90." Ex. E-6-3. A chart identifying the calculations that led to this result is contained at Ex. E-6-4.

Nonetheless, NYBS argues that the funds in issue were placed in a federal funds account, so that "there is no material difference between the federal funds that SFAP describes as 'excess cash' when they are sitting in NYBS' Federal Funds Account and when they are sitting wherever they sit before being transferred into a Federal Funds Account." Resp. Br. at 23. However, the distinction between these two accounts is that before being transferred to the NYBS account, the

funds were held by the Federal Government, upon which it could earn interest.See footnote 5 *5* Once these funds are transferred to the NYBS account, the Federal Government is no longer earning interest on these funds. They are held by NYBS as trustee for the intended student beneficiaries and the Secretary. §§ 668.16, 674.19(a)(2), 675.19(a)(3), 676.19(a)(2), 690.81(c) (1988). This loss of interest ("imputed interest") is the reason for the requirements contained in 31 C.F.R. § 205.4(a) (1988) and the User Manual. Therefore, I reject Respondent's implied argument that the funds in issue were placed in a federal funds account, resulting in no harm to the Federal Government.

Nor am I persuaded by NYBS's other arguments concerning the calculation of imputed interest and outstanding checks. As SFAP notes at page 8 of its reply brief, it was NYBS itself that performed the calculation of imputed interest. Ex. E-6. As for the issue of outstanding checks, even assuming *arguendo* that I were to adopt Respondent's arguments, NYBS has not provided any evidence indicating that it did in fact hold outstanding checks. In sum, NYBS has not satisfied its burden of persuasion under § 668.116(d) (1993).

For the above reasons, I find that Finding 11 is supportable. Accordingly, NYBS must repay $3,276.90 to the Department.

FINDINGS

1. I uphold Finding 22. NYBS must repay $744 to the Department.

2. I uphold Finding 2. NYBS must repay $6,425 to the Department.

3. I uphold Finding 4. NYBS must repay $614 to the Department.

4. I uphold Finding 11. NYBS must repay $3,276.90 to the Department.

ORDER

On the basis of the foregoing, it is hereby ORDERED that NYBS shall refund to the U.S. Department of Education the sum of $11,059.90.

Judge Richard F. O'Hair

Issued: July 22, 1994
Washington, D.C.

S E R V I C E

A copy of the attached initial decision was sent by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED** to the following:

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Footnote: 1 *1 All exhibits will be admitted, with their weight to be determined as necessary in the discussion section of this decision. See In the Matter of Baytown Technical School, Inc., Dkt. No. 91-40-SP, U.S. Dep't of Educ. (Decision of the Secretary) (April 12, 1994), at 3.*

Footnote: 2 *2 Unless otherwise noted, all citations are to 34 C.F.R.*

Footnote: 3 *3 The User Manual was published in December 1985. Ex. E-5. According to SFAP, the User Manual was replaced in April 1989 by the Recipient Guide to the Payment Management System, which was virtually identical to the User Manual. SFAP Reply Br. at 3 n.1.*

Footnote: 4 *4 Although the Department has not codified its attempts to comply with 31 C.F.R. Part 205 (1988), the Program Participation Agreement (PPA) signed by NYBS on July 22, 1991, required the institution to use funds provided to it in advance only in accordance with the User Manual. Ex. R-2-2; see also SFAP Reply Br. at 4-5. Recent decisions have affirmed this*

requirement in cases involving other PPAs. See, e.g., In the Matter of Draughon College, Dkt. No. 93-4-ST, U.S. Dep't of Educ. (November 5, 1993). Nevertheless, the PPA governing the relevant time period in the instant case did not require NYBS to comply with the User Manual. Ex. E-4. In this PPA, NYBS agreed to use funds advanced to it under any Title IV, HEA program, plus any interest or other income earned on those funds, only in accordance with the statutes and regulations governing that program. Ex. E-4-2 (Article II, para. 2). Because the PPA at issue in the present case did not require NYBS to use funds advanced to it in accordance with the User Manual, the recent decisions based on the newer PPA are not applicable to the instant proceeding.

Footnote: 5 5 While it is possible that the Federal Government may have had to borrow these funds, and thus pay interest, it is still true that once the Government has obtained these funds, it could earn interest on them until it transfers them to the NYBS account.