IN THE MATTER OF
Selan's System of Beauty Culture, Docket No. 93-82-SP
Student Financial
Respondent. Assistance Proceeding

Appearances: David S. Dordek, Esq., Dordek, Rosenburg & Associates, P.C., of Lincolnwood, Illinois, for Selan's System of Beauty Culture.

Cathy L. Grimes-Miller, Esq., and James D. Gette, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: Judge Ernest C. Canellos.

DECISION

On June 7, 1993, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a **final program review determination** (FPRD) finding that during the 1986-87, 1987-88, 1988-89, 1989-90, and 1990-91 award years, Selan's System of Beauty Culture (Selan's) failed to account for whether refunds were made for unattended payment periods and failed to monitor and implement a reasonable satisfactory academic progress policy as required under Title IV of the Higher Education Act of 1965, as amended. See 20 U.S.C. § 1070 et seq. Several additional findings were included in the FPRD, however, they are not within the scope of this appeal. By letter, dated July 21, 1993, Selan's filed a timely appeal of the FPRD. Due to the illness of the administrative law judge initially assigned to this case, Judge Paul J. Clerman, this case was reassigned to me.

SFAP seeks recovery of **$709,494.00**: $549,352.00 in estimated losses to ED for subsidy and default expenses in the Federal Stafford Loan (GSL) and Federal Supplemental Loan for Students (SLS) programs, and $160,142.00 in the Federal Pell Grant and Supplemental Education Opportunity Grant (SEOG) programs.

I

Pursuant to 34 C.F.R. § 682.606, institutions which disburse GSL or SLS program loans to students must refund unearned tuition, fees, and other charges to a lender, on behalf of the student, if the student does not complete a period of enrollment for which the loan was made. The FPRD alleged that Selan's failed to present evidence that the institution paid refunds to the appropriate lenders on behalf of students who had withdrawn or otherwise failed to complete an enrollment period.

After an on-site review by the program reviewers, which revealed problems with refunds, SFAP issued a program review report on June 26, 1991, that required Selan's to perform a complete review of its student files for the 1986-87, 1987-88, 1988-89, 1989-90, and 1990- 91 award

years. In addition, the school was required to submit copies of the front and back of canceled checks for any refunds paid by the institution along with a report identifying the school's students and the students' lenders. Attached to its appeal letter, Selan's submitted material it claims satisfies SFAP's request.

Selan's concedes that some GSL and SLS refunds are still outstanding, but challenges SFAP's calculation of liability. According to Selan's, only $19,763.88 is owed in unpaid GSL and SLS refunds, and work sheets attached to its appeal letter support the school's conclusion. SFAP disagrees on the basis that the work sheets do not indicate whether refunds were actually made. The work sheets in a few instances indicate whether a GSL or SLS refund was submitted to a student's lender, but does not include this information for each of the students listed. In only one instance does the school's evidence include a copy of a canceled check. As I have indicated in other decisions, copies of canceled checks showing that GSL or SLS funds have been refunded is the most compelling documentation demonstrating that refunds have been paid. See In the Matter of International Career Institute, Dkt. No. 92-144-SP, U.S. Dep't of Educ. (July 7, 1994). I am persuaded that the evidence presented by Selan's is insufficient to support the school's conclusion that *only* $19,763.88 is owed in unpaid GSL and SLS refunds. Accordingly, I find that Selan's failed to meet its burden of proving that timely and accurate refunds were made during the periods at issue.

II

To begin and continue participation in Title IV programs, an institution must establish, publish, and apply a reasonable standard for measuring whether a student is maintaining satisfactory progress in his or her course of study. 34 C.F.R. § 668.16(e) (1987); 34 C.F.R. § 668.14(e) (1990). The Secretary considers an institution's standards reasonable if the standards include a maximum time frame in which the student must complete his educational program. Although the maximum time frame is determined by the institution, the time frame must be based on the student's enrollment status and divided into increments, not to exceed one academic year. Id. In addition, at the end of each increment, an institution must determine whether a student has successfully completed a minimum percentage of academic work in his or her course of study.

SFAP claims that during the period at issue, Selan's satisfactory progress policy did not comply with the regulatory requirements set out above. According to SFAP, although Selan's policy required part-time students to complete their programs within four years, the policy also permitted part-time students to attend as little as 40% of the student's required

clock hours each month. This policy, ultimately, permitted part-time students to maintain satisfactory progress over the course of four years, notwithstanding the fact that at this reduced level of attendance, a student could not complete his or her course of study within Selan's maximum time frame of four years. Consequently, a student enrolled part-time in a 1,500 clock hour program that had a maximum time frame of four years would result in a student having only completed 1,152 clock hours at the end of a four year period if the student only completed 40% of his required clock hours each month (or 24 clock hours). Stated plainly, Selan's satisfactory progress policy was not reasonable because the school's standard for measuring satisfactory

progress did not include an enforceable maximum time frame for which part-time students must complete their educational program.

For its part, Selan's argues that SFAP's program reviewers based their conclusions about the school's satisfactory progress policy on an outdated policy that was not in effect during the years at issue. In support of its argument, Selan's submits a copy of several revised versions of its satisfactory progress policy. These indicate that the satisfactory progress policy was revised on July 1, 1989, and that revision brought the policy into compliance with the regulatory requirements. Based on the school's evidence of the existence of its revised policy, I am persuaded that the school's satisfactory progress policy complied with the requisite regulatory requirements during the 1989-90 and 1990-91 award periods. Selan's, however, presents no probative evidence that its satisfactory progress policy complied with the regulatory requirements prior to July 1989. Accordingly, I find that during the 1987-88 and 1988-89 award years, Selan's satisfactory progress policy violated the regulatory mandates requiring institutions to establish a reasonable standard for measuring whether a student is maintaining satisfactory progress in his or her course of study.

III

As I noted supra, in SFAP's calculation of liability under the GSL and SLS refund issue, SFAP required Selan's to repay ED $549,352.00 in estimated losses to ED for subsidy and default expenses. SFAP calculated the liability by applying an actual loss formula to the total amount of GSL and SLS loan funds disbursed by Selan's during the award years at issue.See footnote 1 *1* This loss formula was used in lieu of requiring Selan's to both repurchase the total amount of its undocumented loan expenditures and to repay ED the total amount of interest and

special allowances paid by ED on the undocumented loan expenditures.See footnote 2 *2* Although I must uphold SFAP's calculation of liability because Selan's failed to provide SFAP with the requisite data required to measure precisely the school's liability, I recognize that in cases in which the school provides SFAP with some degree of relevant data, the actual loss formula should be applied in a manner that reflects SFAP's loss clearly associated with the proven regulatory violation.

In other words, SFAP should be entitled to recover the losses directly attributed to Selan's failure to pay refunds to lenders. If the evidence is available to determine the extent of that loss, that amount will constitute the extent of SFAP's recovery. Notably, SFAP has elected to bring this case under the procedures set forth under Subpart H -- audit and program review -- regulations. In that respect, the remedies available to SFAP in such proceeding are contractual in nature and allow only for recovery of proven compensatory damages.See footnote 3 *3* See, e.g., In the Matter of Phillips Junior College, Melbourne, Dkt. No. 93-90-SP, U.S. Dep't of Educ. (November 23, 1994).

In the case before me, Selan's submitted evidence on the number of students who completed its programs during the award years in question. SFAP did not dispute the reliability of Selan's evidence with regard to this issue. By definition, an institution cannot owe an outstanding GSL or SLS loan refund on behalf of a student who has graduated or otherwise completed his course

of study. Therefore, the school's evidence accounts for some of the loans disbursed during the period at issue. As such, the school should not owe a liability calculated on the basis that *all* loan disbursements are undocumented expenditures.

Although the record shows that as many as 45% of the school's loan recipients graduated in a given award year, there is incomplete evidence on the amount of GSL and/or SLS loans disbursed to those students. Clearly, the issue was raised by SFAP in its FPRD and, as a result, Selan's had the burden of proof on this issue. Consequently, on the basis of the record, I am unable to measure ED's loss more precisely than the calculation offered by SFAP.See footnote 4 *4* Accordingly, under the circumstances, I must uphold, as reasonable, SFAP's

calculation of liability regarding the GSL and SLS refund issue. Selan's owes a liability to ED for $549,352.00 for failure to refund GSL and SLS program loans.

In SFAP's calculation of liability concerning the satisfactory progress issue, SFAP required Selan's to repay ED $160,142.00, one-half of all Title IV funds (excluding GSL and SLS loans) disbursed during the 1987-88 through 1990-91 award years. SFAP proposed this liability because Selan's failed to provide SFAP with appropriate documentation detailing the application of the school's satisfactory progress policy during the years at issue. Although Selan's may have had a reasonable explanation for failing to provide SFAP with the requested documentation, it is well established that the nature of the enforcement of Title IV programs, through the use of program review determinations, creates the need for institutions to cooperate with SFAP by providing the agency with complete file reviews when that information is needed to determine whether any, if not all, Title IV funds disbursed to the institution were spent contrary to statutory and regulatory requirements. More fundamentally, an institution's cooperation in providing SFAP with documentation of its expenditure of Title IV funds is consistent with its fiduciary duty to account for the disbursement of Title IV program funds.

Under the circumstances of this case, the school's failure to provide SFAP with the data requested regarding the school's satisfactory progress policy undercuts the school's position that Title IV funds should not be recovered. In fact, SFAP has little choice other than to require the return of *all* Title IV funds disbursed during the period at issue when an institution fails to provide SFAP with an accounting of its expenditure of Title IV funds. To its credit, SFAP attempted to strike a balance between its dual role of enforcing the statutory requirements of Title IV and of ensuring the protection of public funds by proposing that Selan's repay ED only one-half of all of the Title IV funds at issue. That notwithstanding, as noted supra, in a Subpart H proceeding, SFAP must calculate an institution's liability in a manner that reflects ED's loss under the circumstances of the proven regulatory violation. Consequently, if the school had provided SFAP with some degree of relevant data, the liability under this finding should have been limited to the amount of Title IV funds disbursed to part-time students who did not complete their course of study within four years during the 1987-88 and 1988-89 award years.

Nonetheless, since the record neither contains indicia of the enrollment status of the school's students, nor reveals an appropriate basis for determining how many students who received Title IV funds were enrolled as part-time students during the 1987-88 and 1988-89 award years, I am unable to determine the school's liability more precisely than the calculation offered by SFAP.

Accordingly, I uphold SFAP's calculation of liability for the 1987-88 and 1988-89 award years. Selan's owes a liability to ED for $90,971.00 for failure to establish a

reasonable standard for measuring whether a student is maintaining satisfactory progress in his or her course of study.See footnote 5 *6*

FINDINGS
I FIND the following:

1. Selan's, violated 34 C.F.R. §§ 682.606 and 682.607, by failing to make timely refunds of GSL and SLS loans to lenders and students during the 1986- 87, 1987-88, 1988-89, 1989-90, and 1990-91 award years.

2. Selan's failed to meet its burden of proof of showing that during the 1987- 88 and 1988-89 award years, the school's satisfactory progress policy established a reasonable standard for measuring whether a student is maintaining satisfactory progress in his or her course of study.

3. Selan's met its burden of proof by showing that during the 1989-90 and 1990-91 award years, the school's satisfactory progress policy established a reasonable standard for measuring whether a student is maintaining satisfactory progress in his or her course of study.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that Selan's System of Beauty Culture pay to the United States Department of Education the sum of $640,323.00.

SO ORDERED:

Ernest C. Canellos
Chief Judge
Issued: December 19, 1994
Washington, D.C.

Footnote: 1 *1 The actual loss formula measures the estimated loss to ED that has or will result from the ineligible loans certified by the institution. Under the formula, an institution's cohort default rate is multiplied by the total amount of loans disbursed during a given award year to yield an estimated expenditure of defaulted loans. This estimate is added to estimated loan subsidies and special allowance payments made by ED during the award year to yield the actual loss formula liability.*

Footnote: 2 *2 As noted infra, SFAP could have required the return of all Title IV funds disbursed during the period at issue due to the failure of the school to comply with SFAP's reasonable request to document its GSL and SLS refunds.*

Footnote: 3 *3 Subpart H proceedings differ from Subpart G proceedings in several procedural respects. The relevant difference in this instance is that the remedies available to SFAP in Subpart H proceedings do not include the possibility of imposing a fine, termination, or some other form of punitive action against an institution. An action under Subpart H is more in the nature of an action to collect a debt to the Federal Government for the amount of funds misused by an institution.*

Footnote: 4 *4 Under Subpart H procedures, the school's failure of proof must be held against it since that party has the burden of proof.*

Footnote: 5 *6 The FPRD indicates that one-half of all Title IV funds (excluding GSL and SLS loans) disbursed by Selan's for the 1987-88 award year totaled $37,191.00 and for the 1988- 89 award year totaled $53,780.00.*