IN THE MATTER OF SPOKANE COMMUNITY COLLEGE, Respondent.

Docket No. 94-179-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Carole A. Ressler, Esq., and Richard M. Montecucco, Esq., Office of the Attorney General of the State of Washington, for Spokane Community College.

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

Spokane Community College (SCC), a state entity, participates in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The HEA was amended, effective July 23, 1992, by Section 484B of the Higher Education Amendments of 1992 (Pub. L. No. 102-325), codified as 20 U.S.C. § 1091b. That amendment mandated the implementation of a new "fair and equitable" tuition refund policy by all institutions which disbursed federal student financial aid. The Office of Student Financial Assistance Programs (SFAP) of the Department of Education (Department) asserts that SCC failed to comply with this new legislation and, as a consequence, underpaid refunds to 64 of its students in the amount of $6,911. SCC disagreed with that finding and requested a hearing pursuant to 34 C.F.R. § 668.113 to contest this assessment.

The institutional refund legislation at issue in this proceeding is found at 20 U.S.C. § 1091b and provides as follows:

(a) Refund policy required

Each institution of higher education participating in a program under this subchapter...shall have in effect a fair and equitable refund policy under which the institution refunds unearned tuition, fees, room and board, and other charges to a

student who received grant or loan assistance under this subchapter..., or whose parent received a loan...if the student-

(1) does not register for the period of attendance for which the assistance was intended; or

(2) withdraws or otherwise fails to complete the period of enrollment for which the assistance was provided.

(b) Determinations

The institution's refund policy shall be considered to be fair and equitable for purposes of this section if that policy provides for a refund in an amount of at least the largest of the amounts provided under-

(1) the requirements of applicable State law;

(2) the specific refund requirements established by the institution's nationally recognized accrediting agency and approved by the Secretary; or

(3) the pro rata refund calculation described in subsection (c) of this section....

20 U.S.C. § 1091b. (Emphasis added.)

A program review of SCC's administration of the Title IV, HEA programs for the period July 23, 1992 (the effective date of the new tuition refund statute), through August 1993 reported that SCC did not apply a "fair and equitable" refund policy to 64 students during that time period. The reviewers found that the institutional refund policy employed by SCC was not fair and equitable because the policy which would have provided the largest student refunds was the pro rata refund calculation found in the federal statute, not the refund policy administered by SCC. SCC did not implement the pro rata refund policy until the Fall Quarter of 1993. The difference between the amount of refunds paid by SCC between July 23, 1992, and August 1993 and the higher amount which would have resulted had it applied the pro rata policy for the same period was $6,911.

SCC is a state educational institution and, therefore, at the time § 1091b was enacted, SCC was bound by Washington State's tuition refund policy.See footnote 1 *1* Not knowing whether it should apply the new pro rata refund, and thus not comply with state law, or delay implementation of the pro rata refund until the state law could be amended, thus violating federal law, it sought assistance from the office of the Attorney General for the State of Washington. On September 24, 1992, that office requested guidance from the Secretary of Education on how the state should respond to this conflict between federal and state law. (Simultaneously, the attorney general's office drafted an amendment to the state refund statute which would eliminate this state/federal conflict, and this legislation became effective on August 3, 1993.) The attorney general's office received a written reply from a Department official which provided the state with minimal guidance. This November 16, 1992, letter explained that the interpretation of the provisions of

the amendment were subject to public involvement pursuant to the negotiated rulemaking process. Because of the amount of time this process required, the author explained that the affected "institutions are advised to consult with their legal counsel to develop a reasonable interpretation of the law." Based upon this response, the Washington Attorney General's office further reviewed the conflicting legislation and advised the state's affected educational institutions that "federal amendments did not preempt state law and that the colleges and universities were required by state law to comply with [the Washington statute]." Respondent's Exhibit 16.

SCC advances three theories to support its position that it was not required to calculate its tuition refunds on the pro rata basis until its state statute was amended. First, it asserts that the

Department is prohibited from attempting to require it to comply with the newly enacted tuition refund provisions because the legislation in question required that the Department include in all program participation agreements (PPA) the requirement that the institution will comply with the new tuition refund policy established pursuant to § 1091b and that the Department failed to do this. SCC suggests that since its PPA was not amended either before or during the audit period, the Department is without authority to compel SCC to ignore its state refund policy in favor of the new federal refund requirement.

I disagree that the Department had an obligation to amend SCC's PPA prior to requiring SCC to use a fair and equitable refund policy. I interpret this Departmental obligation to require only that all new or renewal PPA's, executed after the effective date of the legislation, include this requirement, but that Congress did not expect that all existing PPA's had to be amended immediately to include this new policy. Furthermore, SCC's PPA did not have to be amended in order to obligate the institution to comply with all relevant federal statutes. That obligation already existed by virtue of Article II of the General Provisions of the PPA which required the signatory to abide by all relevant statutes and regulations governing the operation of all Title IV, HEA programs.

SCC's next argument is that it is exempt from liability in this instance because it made a good faith effort to comply with the pro rata refund policy even though it believed that policy did not preempt state law. For this point SCC refers to a December 22, 1993, Department letter to its accrediting agency in which the author announced a suspension of further interpretations on the refund process and that institutions would not be penalized if a good faith effort was made to comply with the statute and regulations. SCC contends that it demonstrated a good faith effort by seeking legal guidance from the state attorney general, who in turn contacted the Department. As a result of these efforts, SCC concluded that, as a state agency, it was bound by the state tuition refund statute and could not use the pro rata refund until the state statute was amended, and that did not occur until August 3, 1993. This theory is premised on the proposition that the federal preemption doctrine does not apply to the provisions of the Higher Education Act, and thus the federal legislation was rendered unenforceable under the Supremacy Clause of the Constitution. The Department presents an opposing argument. SCC and the Department have

each cited a federal district court case to support their respective views.See footnote 2 *2* Interestingly enough, both cases rely on a decision by the Supreme Court, *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 280-282 (1986), for guidance on the more general issue of how one determines whether a particular federal law preempts a state statute. In *California Federal Savings & Loan*, the Court explained that the primary goal of the parties when faced with conflicting federal and state laws is to determine the intent of Congress as to preemption by the federal law. To achieve this, the Court set out three tests for identifying congressional intent. First, Congress may state in express terms that the law preempts all state statutes. Secondly, the intent to preempt a state statute may be inferred where the language leaves no question that Congress intended to exclude the possibility of any supplementary state regulation. The third possibility for preemption occurs where state law actually conflicts with federal law; in such a case it is impossible for an entity to comply with both federal and state law. 479 U.S. at 280, 281.

Applying these tests from *California Federal Savings & Loan* to the facts before me, I find that Congress intended for the "fair and equitable" refund policy set out in the Higher Education Amendments to preempt the conflicting Washington refund policy statute. Although Congress did not expressly state its intent to cause preemption, and there is no suggestion Congress intended to exclude any supplementary state regulation which was more favorable to the students, I find that the Washington statute in question is in conflict with, and is subservient to, federal law because it provided for a less favorable tuition refund than the pro rata policy. As has been pointed out by SCC, there was no way for it to comply with both the Washington tuition refund provision in effect for the period July 23, 1992, to August 3, 1993, and the "fair and equitable" refund policy established in the Higher Education Amendments. From this analysis I find that Congress intended for its legislation to preempt the Washington statute and, thus, SCC was required to follow the tuition refund analysis described in the Higher Education Amendments.

As to its main argument, I find that SCC is unable to rely on any good faith defense because none exists. First of all, there is no provision in the Higher Education Amendment for a safe haven for institutions which, despite any good intentions, did not implement a fair and equitable refund policy on July 23, 1992. Secondly, the Department letter on which SCC relies was not written until December 1993, well over four months after August 3, 1993, the date Washington State enacted legislation which it believed permitted its institutions to begin implementing a fair and equitable refund policy. Finally, I rely on a December 14, 1993, letter to the Washington Attorney General's office from the Department's Region X office (Respondent's Exhibit 11) in which the author addresses this same refund policy issue, although the institution discussed in the letter is another Washington state college. In that letter the author concluded, as do I, that "there is no statutory authority to exempt institutions from the 'fair and equitable' refund policy requirement that was effective on July 23, 1992." The author further

stated that if the institution were entitled to any relief from the implementation of the fair and equitable policy, it could only be based on any "good faith" exercised from August 3, 1993, forward.See footnote 3 *3*

SCC's last argument is that under its interpretation of § 1091b, all three listed tuition refund policies are presumptively "fair and equitable" and that the use of the Washington policy did not violate the statute. I find this argument has no merit. The statute clearly explains that in order to be "fair and equitable" the policy must provide the largest refund of the three. From this there can be no doubt that only one policy can meet the standard. Any policy which provides a lesser amount than the other two is, by definition, not "fair and equitable." SCC's additional argument that if the state refund statute is voided by the federal regulation then the institution would have no state refund policy to use for comparison, is also meritless. If such should occur, SCC would still apply the test found in § 1091b and the result would be the same as here -- SCC must apply the pro rata policy.

In conclusion, I reject all positions advanced by SCC. I find that SCC is not entitled to relief based upon a failure of the Department to amend the existing PPA which it had with SCC to include a provision that the institution would comply with the new tuition refund policy. Secondly, I find that the federal statute preempted the Washington State law on tuition refunds

and that, for the period July 23, 1992, until August 3, 1993, SCC was not entitled to an exemption from the application of the law based on a good faith effort to comply. Lastly, I find that since the pro rata refund policy provides for a larger refund for SCC's students than that utilized by SCC, it is the only one which satisfies the test of being fair and equitable. Therefore I must conclude that SCC was obligated to apply the pro rata refund policy set out in the federal statute.

ORDER

SCC must repay the Department $6,911, which represents the amount of tuition refunds SCC should have paid to students who withdrew from SCC courses between July 23, 1992, and August 1993.

SO ORDERED.

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Judge Richard F. O'Hair

Issued: July 11, 1995
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 SCC's accrediting agency had no refund policy.*

Footnote: 2 *2 SCC relies on Tipton v. Secretary of Education, 768 F.Supp. 540, 551 (S.D.W.Va. 1991) and the Department cites Armstrong v. Accrediting Council, 832 F.Supp 419, 429 (D.D.C. 1993).*

Footnote: 3 *3 In examining this claim for a good faith exemption, I find that SCC is not entitled to any relief based on the minimal guidance it received on this issue in response to its earlier inquiries by attorneys from Washington's Attorney General. Although there may have been many aspects of the application of the new tuition refund policy which needed to be subjected to the negotiated rulemaking process, the preemption issue certainly was not one of those. The Department could have arrived at this conclusion at a much earlier date and thereby possibly averted the necessity for this hearing.*