UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of **Docket No. 94-190-SA**

BRYANT & STRATTON BUSINESS INSTITUTE, Student Financial Assistance Proceeding

Respondent. ACN: 02-10053

Appearances:

Yolanda Gallegos, Esq., Dow, Lohnes & Albertson, Washington, D.C., for Bryant & Stratton Business Institute

Sarah Wanner, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs

Before:

Judge Ernest C. Canellos

DECISION

Bryant & Stratton Business Institute (B&S), headquartered in Buffalo, New York, is a proprietary institution of higher education offering business education training programs at a number of locations. It is accredited by the Accrediting Commission of the Association of Independent Colleges and Schools (AICS), and is authorized by the New York State Board of Regents to confer an Associate in Occupational Studies degree. B&S participates in the Federal Family Education Loan (FFEL)See footnote 1[1], the Supplemental Education Opportunity Grant (SEOG), and the Pell Grant Programs, each of which are authorized under the provisions of 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*. These programs are administered by the office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED).

An audit review was conducted at B&S by ED's Office of the Regional Inspector General (OIG), Boston, Massachusetts, covering B&S's compliance with HEA program regulations for the period July 1, 1987, through June 30, 1991. On August 30, 1994, SFAP issued a final audit determination (FAD) finding that B&S violated several Title IV regulations. By letter dated October 14, 1994, B&S appealed the following two of the findings of the FAD: failure to properly determine satisfactory academic progress (SAP), for which **$1,128,040** was demanded; and failure to properly make appropriate refunds, for which **$53,661** was demanded.

- SATISFACTORY ACADEMIC PROGRESS **-**

Pursuant to 20 U.S.C. § 1091(a)(2) and 34 C.F.R. § 668.7(a)(5) (1990)See footnote 2[2], a student must maintain satisfactory academic progress in his or her course of study in accordance with the school's standards to maintain eligibility to receive Title IV aid. Regulations require that an eligible institution establish, publish, and apply reasonable standards for measuring students' SAP. 34 C.F.R. § 668.14(e)(1). Such standards are considered to be reasonable if they comply, at a minimum, with the rules promulgated by the institution's accrediting agency.

Factors which are recognized as appropriate in determining satisfactory academic progress include grades, work projects completed, or other comparable factors which are measurable against the norm. 34 C.F.R. § 668.14(e)(3)(I). In addition, a time frame within which students must complete their program must be established. 34 C.F.R. § 668.14(e)(3)(ii). This time frame must be determined based on the student's enrollment status and divided into increments, not to exceed one academic year. 34 C.F.R. § 668.14(e)(3)(ii)(B)&(C). Institutions are also required to specify the effect that a course withdrawal or incomplete would have on SAP, 34 C.F.R.§ 668.14(e)(3)(vi), and must document mitigating circumstances if a student fails to meet minimum grade point or graduation requirements. 34 C.F.R. § 668.7(c).

B&S's policy required students to meet a minimum number of credits earned and a minimum cumulative GPA, both of which were set out in a series of tables which were published in the institution's catalog. In the 1990 catalog, B&S revised its SAP standard tables and added a new requirement that students must complete a minimum of 67 percent of the credits that they attempt, rather than the previously required 60%. Consequently, B&S argues that its SAP standards were reasonable; for the first three years covered by the audit report, they were consistent with AICS' requirements and, for 1990-91, they exceeded the AICS standards.

SFAP, on the other hand, contends that during the period at issue B&S did not properly apply its established SAP policy, and did not comply with the requirements of its accrediting agency. First, SFAP claims that B&S improperly ignored withdrawals in the quantitative measure of SAP by implementing a procedure under which it did not count course withdrawals as attempts. It even programmed its computers not to recognize a withdrawal as an attempt. This is contrary to AICS' standards which define credit hours attempted as "any such hours for which a student has incurred a financial obligation or for which any financial aid funds have been disbursed." SFAP argues that this language was meant to exclude from SAP coverage only the courses that a student never started or never received Federal funds to attend. SFAP maintains that the school's failure to consider withdrawals had a significant impact upon the calculation of SAP since students could withdraw from any course up to the eighth week of a quarter without affecting the student's academic progress.

B&S, contrariwise, claims that this finding is in error because in analyzing completion rates, SFAP wrongly included all courses from which students withdrew as "attempts." B&S points out that effective in July 1989, it charged a base tuition for from twelve to eighteen credits. Thus, after 1989, any student who registered for eighteen credits, and later withdrew from one or two courses, did not incur financial obligations for the dropped courses and, as such, any such withdrawals should not be considered as attempts.

It is clear that regardless of whether a student enrolled for twelve or eighteen credits, the student incurred a financial obligation to pay the flat-rate tuition. Therefore, I find that under AICS' standards, B&S was required to consider each "withdrawal" as an "attempt" for purposes of measuring SAP, notwithstanding the fact that some students may have maintained full-time student status after subtracting the number of credits withdrawn. In a Subpart H proceeding, an institution has the burden of proving that expenditures were proper, and that it complied with program requirements. 34 C.F.R. § 668.116 (d). I find that Bryant & Straighten has not met its burden of proving that it complied with SAP regulatory requirements.

B&S raises three other issues relative to SAP. First, the FAD should be dismissed to the extent that it holds the school liable for students who meet Federal and AICS standards, but not its own, since it is unfair to hold B&S to higher standards than those of the accrediting agency. However, this tribunal has consistently recognized that an institution must apply the standards that it establishes and publishes. 34 C.F.R. § 668.14(e) requires institutions to maintain standards for measuring SAP. Although Title IV regulations do not dictate what those standards should be, once an institution establishes such standards, the institution's students must maintain SAP in accordance with those standards, despite the fact that these standards may exceed the minimum standards required by the accrediting agency. *See, e.g., In the Matter of Indiana Barber/Stylist College,* Docket No. 94-11-SP, U.S. Dep't of Educ. (March 23, 1995); 34 C.F.R. § 668.7(a)(5). *See also, In the Matter of Southeastern University*, Docket No. 93-61-SA, U.S. Dep't of Educ. (June 22, 1994) (holding that with regard to an institution's internal procedures for maintaining documentation in student files, where those procedures are more restrictive than the evidentiary minimums established by regulation, an institution need only meet the regulation's requirements in a recovery of funds proceeding.) Indeed, the fact that a school's SAP policy exceeds the minimum established by an accrediting agency has little or no impact on whether an institution complies with 34 C.F.R. § 668.7(a)(5). Notably, if the institution can show its SAP policy exceeds the requirements of its accrediting agency, it has made a presumptive showing that its policy is reasonable in accordance with 34 C.F.R. § 668.14(e). However, that fact alone does not relieve the institution of its obligation to follow the reasonable SAP policy that it has adopted. Therefore, I find that B&S is bound by its own policy. Second, B&S claims that SFAP improperly included credits from students' prior programs when measuring SAP. However, since B&S fails to identify what programs and what credits were inappropriately considered by SFAP, I find that it fails to meet its burden of proof on that claim. Finally, although B&S challenges SFAP's determination that it improperly administered its reinstatement policy, it does not present any probative evidence to the contrary. Therefore, this claim is rejected.

B&S further contends that OIG wrongly applied a 67 percent credit completion standard to the 1989-90 academic year, when that rate was neither published nor implemented until the 1990-91 year. B&S presented no evidence to establish that a 60 rather than a 67 percent required completion rate was in effect for the 1989-90 academic year. B&S had issued a Policy and Procedure statement, with an effective date of February 1, 1989, which established the 67 percent completion rate requirement. It argues, however, that it was never meant to go into effect on that particular date. I find otherwise. Clearly, the 67 percent standard was published in the 1989-90 as well as the 1990-91 catalogs, as that rate is plainly reflected in the tables. B&S's tables for both 1989-90 and 1990-91 differ from those in previous years, in that it establishes the 67 percent standard. Thus, I am persuaded that the 67 percent requirement was appropriately applied to the 1989-90 year and, therefore, OIG's revision of its spreadsheet to reflect this determination is correct.

- ESTIMATED LOSS -

B&S claims that the liability imposed by the finding on SAP is overstated. OIG applied the actual loss formula to determine B&S's liability. This formula estimates the loss which ED will ultimately suffer as a result of ineligible loans made to students of an institution. Under ED's past use of this formula, an institution's cohort default rateSee footnote 3[3] is multiplied by the amount of ineligible loans disbursed during a given award year to produce the estimated defaulted loans. This figure is added to estimated loan subsidies and special allowance payments made by the ED for those loans to yield the estimated actual loss liability. In the present case, instead of using B&S's cohort default rate in the calculation, SFAP determined the total number of students in a sample who had *actually* defaulted between 1987 and 1991, and applied that number to the number of student borrowers entering repayment during the period to arrive at a default rate. Utilizing this rate, OIG arrived at a liability of $529,566. B&S maintains that its cohort rate should be used because it is established, reasonable, and routinely applied by ED to equitably quantify its losses. B&S calculates its liability using the cohort default rate as $240,250. SFAP argues that the "modified" actual loss formula utilized by OIG in this case is superior to the unmodified formula since it "is specific to the ineligible students" and measures actual defaults on loans that B&S should not have disbursed.

As stated in previous decisons, I have an obligation to determine the loss suffered by ED so as to fully compensate it, but not to enrich it. The estimated actual loss formula has been relied upon by SFAP in prior cases, and this tribunal has upheld the use of the formula "as a fair and accurate assessment of liability." *Jett College of Cosmetology and Barbering*, Docket No. 95-21-SP, U.S. Dep't of Educ. (October 19, 1995). *See also, In the Matter of Selan's System of Beauty Culture*, Docket No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994), and *In the Matter of Southeastern University*, Docket No. 92-102-SA, U.S. Dep't of Educ. (November 13, 1995), in which SFAP estimated actual loss by applying the cohort default rate. I am persuaded that the estimated actual loss formula, utilizing B&S's cohort default rate, is the appropriate method for determining liability here. The cohort default rate is a creature of statute -- Congress has determined it to be a significant, meaningful measurement of the risk of loss in Title IV programs. 20 U.S.C. §§ 1085(a)(2) and (m). Moreover, cohort default rates consistently have been relied upon in this tribunal's past decisions as an equitable component of estimated actual loss. I find no reason to depart from the ED's consistent practice of using the cohort default rate to determine loss.

B&S also challenges SFAP's use of a dated actual loss worksheet with "inflated" interest and special allowance (ISA)See footnote 4[4] factors, instead of a purportedly more recent worksheet with lower rates, reasoning that ISA factors should be uniformly applied to institutions regardless of when the questioned loans were issued. SFAP responds that use of the ISA factors from the older actual loss worksheet is appropriate because it corresponds to the time the ineligible loans were disbursed and subsequently went into default and it was required to pay interest on the improper loans until the date of default. However, it is inappropriate to require B&S to repay ISA at rates which were significantly lowered by SFAP subsequent to the issuance of the older actual loss worksheet. Notably, SFAP does not dispute that it changed the ISA rate within one month after issuing the initial actual loss calculation. Thus, use of the more recent actual loss worksheet is the more appropriate for the calculation of B&S's liability.

- REFUNDS -

SFAP seeks repayment from B&S of $43,015See footnote 5[5] for loan refunds made late, or to the wrong party, plus $10,646 in associated ISA. In a GSL or a PLUS loan, an eligible borrower authorizes the school to pay directly to the lender that portion of a refund from the school that is applicable to the loan. 34 C.F.R. § 682.607(a). When B&S's guaranty agency, the New York State Higher Education Service Corp. (HESC), conducted a program review of B&S in 1989, it discovered that the school had issued late refunds, and also had paid refunds to borrowers, rather than to the appropriate lenders. After discovering the error, HESC directed B&S to review a sample of improperly refunded loans that were disbursed from January 1988 through August 1989 and to project the sample results to the total population of refunded loans to arrive at a total liability figure. This was accomplished and B&S paid HESC the resulting liability.

B&S argues that HESC, as the designated guaranty agency, acted as an authorized agent of ED and requiring it to pay an additional liability would constitute an "unjustified penalty." B&S points to a number of letters between itself and HESC, and claims that they constitute a binding settlement agreement that fully resolves its liability for the untimely and misdirected refunds. SFAP denies that the correspondence between B&S and HESC constitutes a binding and enforceable settlement agreement.

I am unpersuaded by the institution's position that its payment to HESC constitutes a resolution of the outstanding liability owed by B&S to lenders who were not properly paid refunds of Title IV loans. Despite the fact that both parties agree that the appropriate calculation of liability under this finding is through the extrapolation methodology used by B&S and HESC, B&S determined its liability as $24,563,See footnote 6[6] while SFAP determined it as $43,015. Consequently, the question before me is, using the agreed upon formula, what is the proper calculation of liability. Initially, despite B&S's claim to the contrary, I am not persuaded that a March 19, 1991, letter addressed to B&S's assistant controller from HESC constitutes HESC's agreement that B&S has calculated the liability correctly. The letter which states in somewhat cryptic language that "all of our concerns have been adequately addressed," does not refer to the amount of B&S's liability.

SFAP applied the agreed upon extrapolation methodology to the sample selected by B&S and determined that the institution improperly refunded $29,494 at the Syracuse, New York, location, and $51,490 at the Buffalo, New York, location. After crediting B&S for refunds the school subsequently issued, and for loan funds repaid by the institution's students, SFAP determined that B&S should pay $43,015. In contrast, B&S argues that it paid $24,567 for loan refunds made to the wrong party and does not owe any further amount under this finding. B&S neither shows how it arrived at this total, nor demonstrates that SFAP's implementation of the extrapolation methodology is flawed or unreliable. Indeed, the fulcrum of B&S's argument rests on the claim that HESC's March 19, 1991, letter constitutes an agreement that the $24,567 it has already repaid is the proper calculation of liability. Regardless of the intended purpose of HESC's letter, nothing therein refers to the amount owed or paid by B&S for improper refunds. Since B&S failed to meet its burden of proving that its calculation of liability is correct, I find that B&S owes $43,015 for improper refunds and $10,646 for improper ISA payments.See footnote 7[7]

FINDINGS

I FIND the following:

1. Bryant & Stratton failed to meet its burden of proof of showing that during the award years between 1987 and 1991, the institution properly devised and implemented its satisfactory academic progress policy.

2. The institution's cohort default rate will be applied to the estimated loss formula which, when added to the interest and special allowances equals $244,447.See footnote 8[8] When added to the $529,324 in Pell Grant Funds and $8,927 in Plus and SEOG Funds, it results in a total liability of $782,698 for the satisfactory academic progress violations.

3. Bryant & Stratton is liable for $43,015 for improper refunds, and $10,661 in ISA, for a total liability of $53,676.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Bryant & Stratton pay to the United States Department of Education the sum of $836,374.

Ernest C. Canellos

Chief Judge

Dated: September 16, 1996

SERVICE

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] *FFEL includes the Stafford Loan (formerly Guaranteed Student Loan (GSL)) and the Supplemental Loan for Students (SLS) Programs.*

Footnote: 2 [2]*Unless otherwise noted, all citations are to 34 C.F.R. (1990). The regulations, in so far as they relate to SAP, went unchanged throughout the four-year audit period.*

Footnote: 3 [3]*The cohort default rate is that percentage of student borrowers who attended a particular institution, first enter repayment on their Stafford or SLS loans during a given fiscal year, and subsequently default on one or more of those loans during that year, or the following year.*
20 U.S.C. § 1085(m)(1).

Footnote: 4 [4]*SFAP pays to lenders a portion of the interest that accrues on a Title IV loan on behalf of eligible student borrowers and, in addition, pays a percentage of the average unpaid principle balance of the loan, called a special allowance, while the student remains eligible for the benefits. The combination of these two factors is referred to as interest and special allowances (ISA).*

Footnote: 5 [5]*Using the same extrapolation method as identified by B&S, OIG estimated the principle refund amounts to be $80,985. From that determination, the auditor deducted $20,835 (the amounts the school already paid), and $17,134 (the estimated payments already made by the borrowers).*

Footnote: 6 [6]*This amount pertains to the total amount of funds owed as a result of B&S's failure to refund loans to the proper party. In response to HESC's program review, B&S also determined that it owed $28,602 to SFAP in ISA liability.*

[Footnote: 7] [7]*The ISA payment is owed as a result of applying an ISA formula to the total of improper funds. Our cases have consistently upheld SFAP's authority to recover ISA liability when loan funds are improperly spent. See In the Matter of International Career Institute, Docket No. 92- 144-SP, U.S. Dep't of Educ. (July 7, 1994).*

[Footnote: 8] [8]*See Appendix attached.*