

IN THE MATTER OF SANTA CLARA Docket No. 94-24-SP
BEAUTY COLLEGE, Student Financial
 Respondent. Assistance Proceeding

DECISION

Appearances: Yolanda Gallegos, Esq., Dow, Lohnes & Albertson, for Santa Clara Beauty College.

 Edmund J. Trepacz, II, 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

PROCEDURAL BACKGROUND

Santa Clara Beauty College (Santa Clara) 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.* On December 13, 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 Santa Clara. The findings in the determination were based on the program review report for the 1990-91 and 1991-92 award years. Santa Clara filed a request for review on January 28, 1994. A Prehearing Order with a briefing schedule was issued to all parties by the tribunal. [See footnote 1 /](#)

DISCUSSION

SFAP contends that Santa Clara has failed to demonstrate that it applied a consistent standard for quantitatively measuring the satisfactory progress of its students, as it was required to do under 34 C.F.R. §§ 668.14(e) and 668.7(c). [See footnote 2 / 2](#) SFAP alleges that Santa Clara published what is described as a "satisfactory progress policy" found in the school's Financial Aid Students Contract, but it failed to apply this policy to certain students who were disbursed student financial assistance funds. Santa Clara responds that this was an old satisfactory progress policy used by the former owners, and that this was not the policy of the school during the 1990-91 and 1991-92 award years. Santa Clara claims that it used the policy found in its catalog and that this policy contained a quantitative element. SFAP insists that the policy set out in the catalog was deficient in that it did not contain a quantitative element and, therefore, did not meet the regulatory requirement. In either event, SFAP contends that the school has failed to demonstrate that it had the requisite administrative capability to award any Title IV program funds and, therefore, Santa Clara must return to the Department all Title IV program funds disbursed to the school during the 1990-91 and 1991-92 award years, totalling \$441,382.00.

According to Santa Clara, even if this policy is found to be lacking a quantitative element, SFAP cannot now raise that issue because it was not raised in the FPRD. Additionally, the school alleges that SFAP had no factual basis for demanding a full file review of all Title IV fund recipients. Nor, in Santa Clara's view, does SFAP have any legal basis for requiring Santa Clara to return to the Department all Title IV funds received by the school.

Both parties acknowledge that § 668.14 states that to begin and continue participation in any Title IV program, an institution must establish, publish, and apply reasonable standards for whether a student is maintaining satisfactory progress in his or her course of study. The section then specifies those standards that the Secretary considers reasonable. [See footnote 3 3](#)

The FPRD contends that Santa Clara's satisfactory progress policy was described in the "Financial Aid Students Contract." However, Santa Clara claims that that policy was not drafted by the present ownership of Santa Clara and was not in use during the 1990-91 or 1991-92 award years. Instead, Respondent asserts that its actual satisfactory progress policy is located at page 4 of its 1990-91 catalog, which provides as follows:

Students are expected to attend in accordance with the student's enrollment status. Satisfactory progress is necessary to maintain at least a "C" or better grade. If a student's grades fall below a "C" average and/or the student's attendance falls below the required minimum hours for their enrollment status in any given period, the student will be notified that he/she is being placed on probation for the following grading/attendance period. (Which is 10 weeks.) If during the period of probation the student fails to obtain a "C" or better grade the student will be notified that he/she has been determined to be ineligible for future payments of financial aid until his/her grades have been improved to a "C" or better. Possible withdrawal may result if attendance and grades are not satisfactory.

Nonetheless, if this quote comprises the entire satisfactory progress policy, as Santa Clara contends, it contains an inherent ambiguity. It states that students must attend in accordance with their enrollment status and will be put on probation if their attendance falls below the required minimum hours for their enrollment status, but it fails to identify the required minimum hours. [See footnote 4 4](#) It is logical to expect that the required minimum hours for each enrollment status will be listed either somewhere else in the school's catalog or in some other written document. However, Santa Clara, which maintains the burden of persuasion in this proceeding, has not submitted any written evidence of these minimum class attendance hour requirements other than the Financial Aid Students Contract. Although Santa Clara alleges that this document was not in use during the

time period at issue, the college admits that the program reviewers found this document in some of the student files.

Nonetheless, these several factors support a finding that Santa Clara used the Financial Aid Students Contract during the 1990-91 and 1991-92 award years. For one thing, the document does not contain a date on its face, nor is there any other indication of whether or not it was in use during the time period in issue. In contrast, the school catalog is clearly labelled "1990-1991." Additionally, I note that the satisfactory progress policy set forth in the Financial Aid

Students Contract contradicts the policy set forth in the school catalog in several respects. First, the Financial Aid Students Contract states that students whose attendance falls below the required minimum hours for their enrollment status in any given *month* will be *dropped*, whereas the catalog states that students whose attendance falls below the required minimum hours for their enrollment status for any given *period* will be placed on *probation* for the following attendance period. Second, while the Financial Aid Students Contract posits its attendance requirements on a monthly basis, the catalog states that a grading/attendance period is ten weeks. Finally, Brad Gustafson, the owner of the school, indirectly stated in an affidavit that during the period in issue, the school used the satisfactory progress policy contained in the school catalog and did not use the policy described in the Financial Aid Students Contract.

For these reasons, I find that during the time period in issue, Santa Clara applied the satisfactory progress policy found in its school catalog. I further find that the evidence does not support a finding that the school simultaneously applied the satisfactory progress policy found in the Financial Aid Students Contract.

Next, SFAP argues that if Santa Clara solely used the satisfactory progress policy found in its school catalog, then the school did not "establish and publish" a quantitative attendance formula as it was required to do under §§ 668.14(e) and 668.7(c). [See footnote 5 5](#) As discussed earlier, § 668.14

states that to begin and continue participation in any Title IV program, an institution must meet certain standards of administrative capability. Section 668.14(e) requires institutions to establish, publish, and apply reasonable standards for determining whether a student is maintaining satisfactory progress in his or her course of study. The Secretary considers an institution's published standards to be reasonable if they include, among other things, a maximum time frame in which the student must complete his or her educational objective, degree, or certificate. The time frame must be determined by the institution, based on the student's enrollment status, and divided into increments, not to exceed one academic year. These published standards must include a schedule established by the institution designating the minimum percentage or amount of work that a student must successfully complete at the end of each increment in order to complete the educational objective, degree, or certificate within the maximum time frame. They also must include a determination at the end of each increment by the institution whether the student has successfully completed the appropriate percentage or amount of work according to the established schedule. § 668.14(e)(3)(ii)-(iv). [See footnote 6 6](#)

As noted above, § 668.14(e) requires Santa Clara to "publish" all of the required elements of its satisfactory progress policy. Although the regulations do not define "publish", the context of § 668.14(e) arguably requires institutions to "publish" their policy in a written format. Black's Law Dictionary defines "publish" as "[t]o make public; to circulate; to make known to people in general. . . ." BLACK'S LAW DICTIONARY 1109 (5th ed. 1979). At the very least, the regulation's use of the word "publish" required Santa Clara to make known to the public all of the required elements of its satisfactory progress policy, whether in written form or otherwise.

The published language of the school catalog does not satisfy all of the requirements of § 668.14(e) because it does not include a maximum time frame in which the student must complete

his or her educational objective. Nor does it include a schedule established by the institution designating the minimum percentage or amount of work that a student must successfully complete at the end of each increment in order to complete the educational objective within the maximum time frame. As discussed earlier, the school catalog contained an inherent ambiguity because it states that students must attend in accordance with their enrollment status and will be put on probation if their attendance falls below the required minimum hours for their enrollment status, but it fails to identify the required minimum hours. Moreover, as previously noted, the school acknowledged this deficiency in its request for review, where it stated that the

satisfactory progress policy found in its catalog contained "no specific ("quantitative element") number of hours listed for determining attendance on a month by month basis" It is logical to expect that the required minimum hours for each enrollment status were listed either somewhere else in the school's catalog or in some other written document. However, Santa Clara, which maintains the burden of persuasion in this proceeding, has not submitted any written evidence of these minimum hour requirements. The Financial Aid Students Contract contained minimum hour requirements, but Santa Clara argued, and I agree, that this document was not in use during the time period in issue.

Santa Clara has not demonstrated that it published its satisfactory progress policy elsewhere. At pages 5 to 10 in its initial brief, Santa Clara argues that its satisfactory progress policy contained a quantitative element because the school multiplied each student's course length by 150% to determine the maximum period of time in which a student could complete a program while maintaining satisfactory progress. Although this formula contains a quantitative element, it was not contained in the portion of the school's catalog submitted by Santa Clara, and it first appeared only as part of the arguments of counsel. The only evidence in support of this argument is contained in an affidavit by Brad Gustafson, which stated as follows:

Under the penalties of perjury, I, Brad Gustafson, owner, operator, and financial aid director of Santa Clara Beauty College, hereby affirm that I have read the Brief of Santa Clara Beauty College (SCBC), submitted to the Office of Hearings and Appeals of the U.S. Department of Education (ED) on June 30, 1994 and that the facts asserted in the brief are true and correct to the best of my personal knowledge. Specifically, pages 5 to 10 of the Brief accurately describe the satisfactory academic progress policy applied by SCBC during the years reviewed by the ED program reviewers, 1990-91 and 1991-92 and currently.

This after-the-fact statement by the owner of the school does not satisfy the requirement of § 668.14(e) that the school publish a satisfactory progress policy that includes a quantitative element.

Santa Clara also notes that the Satisfactory Academic Progress Policy of its accrediting agency, NACCAS, stated that the maximum time frame that member institutions could set for course completion could not exceed one and one half times the course length. However, NACCAS set this only as the maximum length, and specifically stated that the maximum time frame for course completion "shall be established by the school." In any event, such statements by the school's accrediting agency cannot satisfy the mandate of § 668.14(e)(3)(ii) that the school

publish a maximum time frame in which a student must complete his or her educational objective, degree, or certificate.

In sum, Santa Clara has not provided any evidence indicating that all of the required elements of its satisfactory progress policy were published, as required by § 668.14(e). Consequently, I find that Santa Clara has failed to satisfy its burden of persuasion to demonstrate

that it established, published, and applied a quantitative satisfactory progress policy in accordance with § 668.14(e). Section 668.14 specifically states that satisfying these standards of administrative capability is a prerequisite for beginning and continuing participation in any Title IV, HEA program. Therefore, because Santa Clara did not meet this institutional eligibility requirement, it must return all Title IV funds that it received during the 1990-91 and 1991-92 award years, totalling \$441,382.

Santa Clara's argument that such a determination can be made only under proceedings governed by Subpart G is rejected. Section 668.111(c)(2) (1993) states that Subpart H applies to a final program review determination when an institution fails to qualify for certification to participate in the Title IV, HEA programs because it does not meet the administrative standards set forth in Subpart B (which includes § 668.14). See *In the Matter of Phillips College of Atlanta*, Dkt. No. 91-96-SA, U.S. Dep't of Educ. (February 28, 1994), at 13-14 (analogous discussion as to application of Subpart H to final audit determination that institution fails to meet the statutory definition of an eligible institution because it employs or uses commissioned salesmen to promote the availability of GSLP or PLUS program loans).

Santa Clara argues that if the tribunal determines that the school did not apply its satisfactory progress policy during the time period in issue, the tribunal should not require the school to repay all Title IV funds. Instead, Santa Clara urges the tribunal to require either a full file review to determine Santa Clara's liability or extrapolate the school's liability from the audit sample. Because I have found that Santa Clara did not publish its satisfactory progress policy, however, I have no basis upon which to order a full file review or extrapolate Santa Clara's liability. As stated above, the school's failure to publish this policy in accordance with § 668.14 constitutes a violation of an institutional eligibility requirement.

Accordingly, Santa Clara must return all Title IV funds that it received during the 1990-91 and 1991-92 award years, totalling \$441,382.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that Santa Clara refund to the Department of Education all Title IV funds that it received during the 1990-91 and 1991-92 award years, totalling \$441,382.

Judge Richard F. O'Hair

Issued: November 14, 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 SFAP submitted a motion to strike evidence, which Respondent opposed. SFAP requests the tribunal to strike the exhibits submitted with Respondent's supplemental brief on the basis that they are untimely under 34 C.F.R. § 668.116(e). In his motion, counsel for SFAP acknowledges the Secretary's decision in *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), that the tribunal has the discretion to accept exhibits submitted outside the time limits imposed by § 668.116(e), but points out that SFAP has petitioned the Secretary for reconsideration of the Baytown decision. Nonetheless, the Secretary's ruling in Baytown is still controlling. Moreover, as Respondent notes, following Baytown, this tribunal has accepted untimely exhibits on several occasions. See *In the Matter of Flavio Beauty College*, Dkt. No. 93-71-SA, U.S. Dep't of Educ. (July 25, 1994) at 2-4; ***In the Matter of Derech Ayson Rabbinical Seminary, Dkt. No. 94-50-ST, U.S. Dep't of Educ. (October 4, 1994) at 1 n.1; ***In the Matter of New York Business School***, Dkt. No. 93-81-SP, U.S. Dep't of Educ. (July 22, 1994), at 1 n.1. Therefore, all exhibits will be admitted, with their weight to be determined as necessary in the discussion section of this decision.*

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

Footnote: 3 3 § 668.14(e) also states that these satisfactory progress standards must meet or exceed the standards of § 668.7. That section requires a school to review each student's academic progress at the end of each academic year and determine that the student is making satisfactory academic progress at the end of that student's second academic year of attendance either because the student is maintaining at least a C average or academic standing consistent with the school's graduation requirements or because the student's failure to maintain at least a C average was caused by the death of a relative of the student, an injury or illness of the student, or other special circumstances. § 668.7(c) also states that if a student is not making satisfactory academic progress as described above, the school must determine that the student is making satisfactory academic progress if, at the end of a subsequent grading period, that student obtains academic standing consistent with the institution's requirements for graduation.

Footnote: 4 4 The school admitted as much in its request for review, where it stated that the satisfactory progress policy contained in its catalog contained "no specific ("quantitative element") number of hours listed for determining attendance on a month by month basis" Notwithstanding Santa Clara's assertions to the contrary at pages 5-6 of its reply brief, the surrounding language in the request for review did not negate this admission. While the request for review alleged that the satisfactory progress policy in the school catalog required students to "maintain a 70% average (pertaining to GPA/attendance)," nowhere in that portion of the school catalog does it require students to attend at least seventy percent of their classes. Nor does it even equate a C to a 70% average. While it does state that "[s]atisfactory progress is necessary to maintain at least a 'C' or better grade," it does not quantitatively define satisfactory progress, but merely states that a student will be placed on probation "[i]f [that] student's . . . attendance falls below the required minimum hours for their [sic] enrollment status in any given period."

Footnote: 5 5 In its reply brief, Santa Clara argues that SFAP first raised this issue in its initial brief and was barred from doing so on due process grounds because the issue was not raised in the FPRD. I must disagree. In discussing the correspondence between Santa Clara and the Department following the program review report, the FPRD quotes language from a March 8, 1993, letter from SFAP to the school, including the following: "There is no quantitative element to the SAP [satisfactory academic progress] policy described in the institution's catalogue. . . ." In addition, the FPRD specifically referenced the very regulations at issue in this proceeding, namely §§ 668.14(e) and 668.7. Therefore, Santa Clara cannot now claim that it had no notice of SFAP's allegation that the satisfactory progress policy in its school catalog did not contain a quantitative element. As a result, the cases cited by Santa Clara are not applicable here. I further note not only that Santa Clara was allowed to submit a reply brief after SFAP's initial brief despite the fact that the Order Governing Proceedings did not authorize such a reply, and that the tribunal exercised its discretion to allow Santa Clara to submit untimely exhibits. Those exhibits supported Santa Clara's position that its satisfactory progress policy was contained solely in its school catalog and not in the Financial Aid Students Contract as the FPRD had alleged. For these reasons, Santa Clara cannot now preclude consideration of the school catalog's compliance with the regulations on due process grounds.

Footnote: 6 6 In addition to these federal regulations, Santa Clara's accrediting agency, National Accrediting Commission of Cosmetology Arts and Sciences (NACCAS), also requires

member institutions to include these requirements in their satisfactory academic progress policies. NACCAS requires member schools to publish the satisfactory progress policy in a written document, compiled under a separate heading identifying it as a satisfactory progress policy. The accrediting agency allows institutions to establish separate standards for each course.