

In the Matter of Docket No. 95-139-ST

ELDORADO COLLEGES and ORANGE Student Financial Assistance
COUNTY BUSINESS COLLEGE, Termination and Fine Proceeding

Respondents.

Appearances:

Thomas Hylden, Esq., Baker & Hostetler. Washington, D.C., for Eldorado Colleges and Orange County Business College.

Paul G. Freeborne Esq., and Russell B. Wolff, 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

On August 18, 1995, the office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued a notice of intent to terminate the eligibility of Eldorado College, located in Oceanside, California, and its branch campuses located in West Covina, San Diego, and Escondido, California, (College) to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended, (Title IV) 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The notice also included a proposed fine of \$226,000. In response to that notice, on September 11, 1995, counsel for the College appealed and requested a hearing.

On March 8, 1996, SFAP notified the College that it was adding as a respondent to the termination and fine action an associated institution, Orange County Business College, Anaheim, California. The College agreed to the addition and, on April 1, 1996, I issued an order which consolidated the cases. [See footnote 1](#)¹ The parties filed briefs and made evidentiary submissions and, on October 4, 1996, I conducted an oral argument in this matter. [See footnote 2](#)² A verbatim record was made at the hearing and a copy of the transcript was provided to each side.

As the bases for the proposed termination and fine action against the College, SFAP claims that from January 1, 1990, to the date of the notice, the College failed to provide for a fair and equitable refund policy in compliance with 34 C.F.R. § 668.22. SFAP also asserts that from April 1, 1994, the College failed to make any refunds to students, lenders, the State of California, and ED also in violation of 34 C.F.R. § 668.22. Finally, SFAP claims that the College violated one of the standards of financial responsibility under 34 C.F.R. § 668.15(b)(3)(i) by failing to properly pay refunds. The notice also alludes to the fact that the College persisted in failing to fulfill its refund obligations even after SFAP and agencies of the State of California had notified it of its erroneous refund policy, and that the College failed to cooperate with SFAP in its inquiry.

The present action had its genesis in a March 4-8, 1991, on-site program review at the College by SFAP's San Francisco regional office. During the review, it was determined that the College was not applying a fair and equitable refund policy. [See footnote 3](#)³ This finding was confirmed by the Program Review Report, dated November 22, 1991, which identified four students receiving improper refunds. The College was directed to provide a list of all students who had withdrawn since January 1, 1990, a calculation of the proper refund for each student, and any documentary evidence that a refund had been made. After a number of subsequent requests from SFAP, the College provided this information on March 9, 1994.

In the interim, the California Student Aid Commission (CSAC), the designated guaranty agency for California in the Guaranteed Student Loan Program, issued an audit report which found non-compliance with California's *pro rata* refund requirement. Also, on June 23, 1994 the College's Certified Public Accountant issued a two-year compliance audit for the years ending June 30, 1993, in which a finding was made of non-compliance with refund requirements. Then, on August 8-9, 1994, the Council for Private Postsecondary and Vocational Education (CPPVE), the agency established by California to oversee post-secondary issues, including refunds, conducted an audit of the College's procedures and determined that the College was currently incorrectly applying the State's *pro rata* refund requirements. SFAP reviewers made another on-site review between September 27-29, 1994, and confirmed CPPVE's findings. As a consequence, on November 14, 1994, SFAP requested a new list identifying all of the students who had failed to complete their programs from January 1, 1990, to the then current time, as well as documentation of any refunds. A reconstruction was submitted by the College on March 3, 1995, which indicated that the College had underpaid refunds to 113 former students.

To participate in Title IV programs, an institution must have in effect a statutorily defined fair and equitable" refund policy. Under this policy, the institution must refund unearned tuition, fees, room and board, and other charges to students who received Title IV assistance, if the student withdraws or otherwise fails to complete the period of enrollment for which the assistance was provided. 20 U.S.C. § 1091b(a). In support of the termination action, SFAP, citing 34 C.F.R. §668.22, argues that in order to constitute a fair and equitable refund policy, an institution must provide for a refund of at least the largest of the amounts provided under (1) the refund requirement of state law, (2) the refund standards of its accrediting agency, or (3) a *pro rata* refund. [See footnote 4](#)⁴ It is uncontroverted that for institutions in California, the State's refund policy provides for the largest possible refund. SFAP argues that since the evidence showed that the College did not satisfy the refund requirements promulgated by California, the College's refund policy was not fair and equitable." and, in view of the aggravating fact that the College persisted in violating the refund requirements after being warned since 1991 by SFAP and state officials of the violation, the College should be terminated and fined.

The College defends itself by arguing that at all times it acted reasonably and in good faith in its refund obligations. It points out that the California refund rules were "in a state of change and confusion" during the period. At one time, CSAC issued a notice that the refund rules in issue here only applied to students who withdrew on or after September 1, 1990. Later, this policy was changed so the refund rules applied retroactively to January 1, 1990, but only to the students who were enrolled after that date. The school was in a constant state of negotiations with CPPVE regarding what rules were to be applied -- eventually some of the College's positions were

accepted. while other issues were conceded by the College. Finally, the College and CPPVE agreed to a final sum of refunds owed: the College proposed a payment schedule, put money in escrow, and sought approval from ED as to the amounts to be repaid and the terms of repayment. [See footnote 5](#)⁵ In essence, the College argues that although it agrees that it owes over \$300,000 in refunds, it is totally unfair to terminate the school given it "calculated and paid refunds in accord with its reasonable. good faith interpretation of the refund policy."

The procedures for terminating the eligibility of an institution to participate in the Title IV programs and fining it are enumerated in 34 C.F.R. § 668. Subpart G. The Secretary may terminate the eligibility of an institution. if the institution violates any statutory or regulatory provision applicable to Title IV. 34 C.F.R. § 668.86(a)(1). Also, the Secretary may fine an institution up to \$25,000 for each violation of Title IV program regulations. 34 C.F.R. § 668.84(a)(1). In both fine and termination proceedings, SFAP has the burden of persuasion. 34 C.F.R. 668.88(c)(2).

Based upon my review of the evidence in this case, considering the arguments of counsel. and applying the statutory burden of proof, I find that the College did, in fact, violate the regulatory provisions regarding the establishment of a fair and equitable refund policy and the timely payment of refunds. In addition, I find that. on the facts of this case, although the failure to properly pay refunds can be a factor in determining financial responsibility, such a violation is subsumed in my previous finding. It has been previously held that when a failure to pay refunds is pervasive and overwhelming, the institution may be terminated even though it subsequently pays the overdue refunds. *See in the Matter of Chris Logan Career College* Docket No. 95-126-ST. U.S. Dep't of Educ. (March 28, 1996). In the present case. however. I find that, even though the failure to properly pay refunds is a serious violation. the College's actions are clearly not pervasive and overwhelming. Under the unique circumstances of this case. I am convinced that imposition of the most serious form of sanction. that of termination. is not appropriate. [See footnote 6](#)⁶ I will. however impose an appropriate fine.

SFAP requests that I order. in addition to a termination of eligibility, a fine of \$226,000 for the 113 instances of refund violation. I find, however, that a fine of \$25,425 is appropriate for the failures relating to refunds. I am required to treat each failure to properly pay a refund as a separate violation for fine purposes, therefore. I order a fine of \$225 per violation. When multiplied by the 113 violations, it results in a fine of \$25,425. *See generally In the Matter of Bnai Arugath Habosem*, Docket No. 92-131-ST. U.S. Dep't of Educ. (Decision of the Secretary) (August 24, 1993). I have determined the fine to be appropriate after considering the nature of the offenses and their circumstances. *See generally, In the Matter of Puerto Rico Technology and Beauty College, and Lamec, Inc.*, Docket No. 90-34-ST, U.S. Dep't of Educ. (June 11, 1993). [See footnote 7](#)⁷ I also note as significant that there was no evidence of fraud or intentional wrongdoing. Finally. I give the benefit of the doubt to the College by accepting its uncontroverted explanation of why it delayed in finally settling its refund obligations.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Eldorado Colleges and Orange County Business College, immediately and in a manner prescribed by law, pay a fine in the amount of \$25,425 to the United States Department of Education.

Judge Ernest C. Canellos

Dated: November 8, 1996

Footnote: 1 ¹ By motion, dated April 24, 1996, the College requested that I order an evidentiary hearing. I determined, however, that an evidentiary hearing was neither required nor necessary for a fair and complete hearing and that the proceeding would be conducted on the basis of written submissions. See 34 C.F.R. § 668.89.

Footnote: 2 ² During the course of the hearing process' a number of procedural matters in addition to those dealing with an evidentiary hearing and addition of a new party, enumerated above, were raised by the parties. These include numerous joint motions for enlargement of time to file, a motion in limine seeking to exclude certain matters as settlement negotiations, and motions to supplement the record.

Footnote: 3 ³ The College's refund calculation procedure was found to be in non-compliance in the following three particulars: the College used the contracted cost of instruction rather than the actual cost paid by the student; the College used weeks of instruction rather than hours of instruction; and the College retained an administrative fee of \$75, which was the maximum authorized by law, despite the fact that it only charged the students 525. SFAP determined that the first two violations resulted in no change of refund liability.

Footnote: 4 ⁴ These requirements originally applied only to the Stafford, SLS and PLUS Loan Programs. However, under the 1992 Amendments to the Higher Education Act, the refund requirements were made applicable to all Title IV Programs. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 485(a), 106 Stat. 619.

Footnote: 5 ⁵ The College claims that when reviewing its records, if it discovered that any required paperwork was missing, it conceded full liability even though it might have continued to dispute the claim -- this may explain why the figures arrived at during the College's two reconstructions do not track absolutely.

Footnote: 6 ⁶ I am confident that the College will satisfy its outstanding refund obligations in an expedited manner -- if it fails to do so, SFAP should be able to quickly rectify that situation through a speedy termination proceeding. I also note that the College is on Pell reimbursement and I assume it will remain in such status until at least the time it pays its liabilities.

Footnote: 7 ⁷ Since the gravamen of the offense here is the school's failure to implement and execute a fair and equitable refund policy, I believe that, based on the facts of this case, it should

be considered as a single violation. If treated as a single violation, the maximum fine that I could have imposed is \$25,000.