

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

In the Matter of

Docket No. 95-156-ST

NATIONAL COMPUTER COLLEGE, Student Financial Assistance Proceeding
Respondent.

Appearances: Denise Morelli, Esq., and Russell B. Wolff, Esq., Office of the General Counsel, U.S. Department
of Education, Washington, D.C., for the Student Financial Assistance Programs.

J. Andrew Usera, Esq., Vienna, Virginia, for the Respondent.

Before: Frank K. Krueger, Jr., Administrative Judge

DECISION

I. BACKGROUND

The Respondent, National Computer College (NCC), is a for-profit proprietary school located in Fajardo, Puerto Rico. The school is owned by its president, Mr. Antonio Cabán Miranda, who acquired the school on October 8, 1990. NCC is accredited by the Accrediting Council for Independent Colleges and Schools and offers training leading to certificates in a number of programs, including bilingual secretary, computer accounting, computer programming, dental assistance, interior design, and paralegal assistance. Approximately 99 percent of its student body receives Federal student financial assistance. During award years 1991/92, 1992/93, and 1993/94, NCC enrolled approximately 1,000 students and had sixty-two employees. The school now has approximately 250 students.

On October 13, 1995, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), notified NCC of its intent to terminate NCC's eligibility to participate in the programs authorized by Title IV of the Higher Education Act of 1965, as amended. In addition, NCC was notified of SFAP's intent to impose a civil fine of \$872,000 for the alleged regulatory violations cited in the notice. The proposed fine was subsequently reduced to \$782,000. The notice of termination and fine alleged that NCC made a number of premature disbursements of Pell Grant funds, made improper disbursements of Pell Grant funds to students who had not completed the required clock hours in a prior payment period, made improper disbursements of Pell Grant funds to students who never showed up for class, made improper disbursements of Pell Grant funds to students who withdrew from the school, failed to pay refunds on time, and failed to maintain student records.

The notice of termination and fine was based on information uncovered during a program review conducted on September 19 and 20, 1994, and a follow-up review conducted on June 14, 15, and 16, 1995. The September 1994 review was conducted by Felix Lugo of the SFAP office in Puerto Rico, and Yessyca Santana, from the SFAP Region II office in New York; the follow-up review was conducted by Betty Caughlin of the SFAP Region II office. The September 1994 review was conducted in response to information received by Mr. Lugo that several schools in Puerto Rico were drawing Title IV funds prematurely, and involved a review of students identified by NCC as "no show students." An earlier program review was conducted from February 14 to 18, 1994, in response to a complaint concerning allegations of altered documents, and a final program review determination was issued concerning that review on January 24, 1995. The February 1994 review was conducted by Brian Hickey and Yessyca Santana of the SFAP Region II office. As a result of the February 1994 review, NCC was placed on cash reimbursement and agreed to

pay ED \$29,019 in interest covering late refunds discovered as a result of the program review. All three of these reviews focused on the 1992/93 and 1993/94 award years.

NCC requested a hearing to contest the termination and fine proposed by SFAP. An evidentiary hearing was held on July 16-17, 1996, in Hato Rey, Puerto Rico. At the hearing, SFAP withdrew the allegation concerning the disbursement of Pell Grant funds to students who had not completed the required number of clock hours. In its Reply Brief (p. 7, n. 5), SFAP acknowledged that NCC at the hearing had sufficiently rebutted the allegations concerning the failure to maintain adequate records and, consequently, withdrew the charge.

II. SUMMARY

There are four SFAP allegations dealt with in this decision. First, SFAP alleged and proved that NCC disbursed Pell Grant funds to sixty-seven students three weeks before the date allowed for the disbursement of funds to students prior to the beginning of class. NCC's defense was that the premature disbursements were caused by changes in the start date for public institutions in Puerto Rico. The evidence introduced by NCC on this point is murky, however, and does not support its position. Second, SFAP alleged that NCC made improper Pell grant disbursements to thirty-eight students who never showed up for class. NCC's defense was that the regulations allow institutions to make disbursements for students "enrolled" at the school, and that there is no requirement that the students actually be present in class when the Pell disbursements are made. I find some validity to NCC's position. The regulations in question are ambiguous and I would not order termination based on this alleged violation alone. Third, SFAP alleged and proved that NCC made improper disbursements of Pell Grant funds to students after they withdrew from school. NCC's defense was that it was not always aware of when students dropped out or withdrew from its program, but that this deficiency has been corrected. In light of NCC's other violations, I do not find this defense persuasive. Finally, SFAP alleged and proved that NCC failed to make timely refunds for 255 students. The evidence introduced at the hearing demonstrates that the late refunds were part of a continuing pattern of failure to make refunds by NCC over the past several years. NCC's defense was that the refunds were caused by a number of administrative problems which have since been corrected. I find the evidence presented by NCC on this issue unpersuasive given the number and extraordinary lateness of the refunds at issue and find that NCC either intentionally failed to make timely refunds, or acted in wanton disregard for its obligation to do so.

Based on the totality of the evidence and the persistent nature and magnitude of the violations, I conclude that NCC's participation in the Title IV program should be terminated and impose a fine of \$68,000.

III. DISCUSSION

A. Premature Disbursements Of Pell Grant Funds.

During the period covered by this case, an institution could not credit Pell Grant funds to a student's account prior to twenty-one days before the first day of classes. 34 C.F.R. § 690.78(b)(1) (1993). [See footnote 1](#)¹ SFAP found that NCC drew-down Pell Grant funds for sixty-seven students approximately six weeks before the start of classes, rather than the three weeks allowed by the regulations. [See footnote 2](#)² Sixty-six of the draw-downs were taken on July 6, 1993, and one was taken on July 16, 1993. By examination of the student ledger cards, enrollment agreements, and the student catalog, SFAP concluded that the expected start dates for these students was August 16 and 17, 1993. NCC argues that the dates appearing on the student ledger cards are actual start dates, rather than expected start dates. Mr. Cabán testified that the scheduled start date of August 16, 1993, was changed to coincide with the start date of July 27, 1993, established for all public institutions in Puerto Rico, and was changed back to August 16, 1993, when the Puerto Rican Department of Instruction realized that the July start date would unduly conflict with vacations. NCC introduced several pieces of correspondence (*see* Respondent Exhibit 296) which purport to be examples of letters sent to NCC students notifying them of the change of the start date. Mr. Cabán also noted that the Puerto Rican authorities had changed start dates in the past and that this was not an uncommon practice. Tr. at 301-303. Mr. Cabán also testified that this issue came up during the earlier program review which was conducted in February, 1994, by Brian Hickey and Yassyka Santana of the SFAP Region II office in New York. Mr. Cabán testified that he explained the date discrepancy to Mr. Hickey who, apparently, was satisfied since the issue never appeared in Mr. Hickey's final report. Tr. at 304-305. Mr. Hickey had no specific recollection of this conversation. Tr. at 148-149.

The evidence supports the SFAP conclusion that NCC took these draw-downs prematurely. [See footnote 3³](#) NCC's rebuttal evidence is inconclusive. The letters, which supposedly document Mr. Cabán's testimony that the start date was changed from August 16 to July 27 and then changed back to August 16, only notify students of a start date of August 16 which is the date used by SFAP and the date which appears in the NCC catalog. The letters at issue make no mention of a change from an earlier change as testified by Mr. Cabán. In addition, it is not clear why NCC would change its published start date to be consistent with the start date for public institutions in Puerto Rico. The fact that Mr. Hickey, during his program review, never concluded that there were premature disbursements is again inconclusive. Mr. Hickey's testimony and his final program review report make it clear that program review determinations are not intended to be inclusive. Tr. at 157; ED Exhibit 274 at 3. The fact that Mr. Hickey never reached the conclusion that there was a violation does not preclude SFAP from a subsequent determination that there was a violation.

In addition, the regulation in question, 34 C.F.R. § 690.78 (b)(3) (1993), reads as follows:

The earliest an institution may credit a registered student is three weeks before the *first day of classes* of a payment period. [Emphasis added.]

Thus, as noted by SFAP, the relevant date of a Pell Grant disbursement is the “first day of classes,” not the “expected” first day of classes. Given the clarity of the regulation, to the extent that NCC's expected first day of classes was subject to change as testified by Mr. Cabán, it took advanced draw-downs at its own risk.

B. Improper Disbursement of Pell Grant Funds to Students Who Never Attended Class.

In general, students who are enrolled or accepted for enrollment in an approved program may be eligible for Pell Grant funds. 34 C.F.R. § 668.7(a)(1) (1993, 1994, 1995). SFAP found that NCC disbursed Pell Grant funds to thirty-eight students [See footnote 4⁴](#) who were ineligible under this regulation because they never showed up for class. Most of the draw-downs for these students were taken either three or four days after the expected start dates, but some were taken as much as three or four months after the expected start dates. [See footnote 5⁵](#) SFAP's findings assume that to be enrolled means that the student must actually be present and attending class. NCC contends that a student may be enrolled and not actually attend class, and that the only requirement for enrolled students is that, after the school determines that the student will not be attending, a refund be made within thirty days of such determination. Thus, for most of the students at issue, the draw-downs taken were in full compliance with the regulations.

There is merit to NCC's argument. The term “enrolled” is ambiguous. It would appear that a student could be enrolled and not actually attend the first day of class. Such an interpretation is supported by the fact that, as discussed above, the regulations allow Pell Grant disbursements before the start of classes. Standing alone, this allegation would not support a termination or a fine; in fact, it may not even support an audit liability determination. However, as will be noted below, for each of the students in question, NCC did not refund the Pell Grants for these “no show” students within a reasonable time after it became clear that the students had in fact dropped out, but held onto the money in some cases for a over a year. As will be further discussed below, NCC's conduct with respect to these students was part of an overall pattern where NCC drew-down Pell funds as soon as possible and held onto those funds as long as possible.

C. Improper Disbursements of Pell Grant Funds to Students after the Students Withdrew from School.

The termination and fine notice alleged that NCC improperly awarded Pell Grant funds to thirty-eight students after these students withdrew from school. At the hearing, SFAP reduced this figure to eighteen. As will be noted in the next section, NCC presented much testimony to the effect that during most of the period covered by the reviews in this case, NCC's system for tracking students was rudimentary and accounted for much of the delays in making refunds. NCC incorporates that evidence in defense of this allegation.

As will be discussed below, I do not find the evidence presented by NCC in defense of its late refunds persuasive. I find that defense even less persuasive for this cluster of students. For most of the eighteen students in question, the draw-downs were not taken within a few days of the students last date of attendance, but were taken between one and six months after the students' last date of attendance. And again, rather than refunding the money improperly disbursed

“ASAP,” NCC held onto the money in many cases for up to one year after it was improperly disbursed. Although only eighteen student accounts were involved, the total value of the interest-free loan which NCC gave itself was \$20,935. Again, if this were an isolated violation a very modest fine may be the only action appropriate. However, this was not an isolated instance, but part of a pattern whereby NCC either intentionally or through wanton negligence misappropriated a substantial amount of Federal funds for its own use.

D. Late Payment of Refunds.

Under 34 C.F.R. § 668.22(e)(5) (1993), unearned Pell Grant funds credited to a student's account must be returned to the Pell Grant account within thirty days from the date a student withdraws or the institution determines that the student has unofficially withdrawn. If an institution is unable to document the student's attendance at any class during the payment period, the student is considered to have withdrawn before his or her first day of class. *Id.* at 668.21(b) (1993). When a student withdraws without notifying the institution, the withdrawal date is the last recorded date of class attendance by the student. *Id.* at 668.22(d) (1993).

The SFAP termination and fine notice alleged that NCC paid refunds late for most of the “no show” students for which it took premature disbursements and disbursements after the students failed to show up for class. The SFAP notice also alleged that NCC made late refund payments for students who withdrew from the school before completion of their programs. Ms. Caughlin testified that of the 267 files reviewed during the September 1994 and June 1995 reviews, NCC made refunds late in 255 instances. Tr. at 97-114; 253-260. The approximate amount of the late refunds was \$190,000. As a result of the Brian Hickey program review conducted in February 1994, NCC was required to have a Certified Public Accountant conduct a review of all files concerning students who withdrew from the program prior to completion for award years 1991/92, 1992/93, and 1993/94. As a result of this review, it was uncovered that NCC had over 1100 additional late refunds, most of which were six to eight months late; although four were paid on-time, the rest were between two month and two years late. The total dollar value for the late refunds was approximately \$1.2 million dollars, with \$22,000 owed in interest. Respondent's Exhibits 276 and 277. Since the CPA audit dealt with all students who withdrew from the school prior to completion, and the Hugo/Santana/Caughlin reviews dealt with all “no/show” students, and given the magnitude of the number of refunds involved, approximately one-third of the entire student body, it appears that NCC virtually never made refunds on time. Mr. Cabán admitted as much on cross-examination. Tr. at 365.

NCC concedes to most of the late refunds at issue, while offering a number of excuses. Various administrative officials from NCC testified that part of the problem in the past was that there was not sufficient communication among the various offices within the school so that the office responsible for refunds was not always aware that students had dropped out. These officials testified that there have been internal changes made to ensure better communication in the future; that the school has computerized its record-keeping system to enable it to better track students; that the school is presently engaged in a campaign to attract older and more mature students so that the drop-out rate should be reduced, and that the size of the institution has been reduced from 1000 students to 250 students, which will result in fewer drop-outs and better communication. *See* testimony of William García Navarro, tr. at 165-168; testimony of Isabell Morales Méndez, tr. at 178-189; testimony of Claribel Lóbez Carmona, tr. at 201-212; testimony of Angel García Vierra, tr. at 216-249.

I find this testimony unpersuasive. NCC may have been disorganized and I am sure that the school is more efficient now than it was from 1991 to 1994. However, it would be incredulous to conclude that delays caused by poor communication within NCC, with a total staff of only sixty-two employees, which presumably includes faculty as well as administrative staff, would cause virtually every refund to be late for a period of from two months to over two years. It is clear that NCC officials were aware of the legal requirements to make refunds within thirty days. Mr. Angel García, NCC comptroller, whose office was responsible for paying refunds, and Mr. Cabán both testified that they have years of experience in student financial aid and demonstrated a thorough knowledge of the Title IV refund requirements. *See* tr. at 253-260; 338-340. In addition, NCC was repeatedly told by its auditors that it was not paying refunds on time and that it needed to take corrective action. In its compliance audits for award years 1991/92 and 1992/93, NCC was cited for late payment of refunds and directed by its auditors to take the necessary steps to ensure that it did not repeat the violation. In response to both reports, NCC represented that procedures would be implemented to ensure that refunds were paid on time. *See* ED Exhibit 281 at 8, 15 (award year 1990/91); ED Exhibit 282 at 12 (award year 1991/92); and

ED Exhibit 283 at 3, 5 (corrective action plan for 1992/93). In response to the SFAP program review report for the February 1994 review, NCC represented that, from the time that it was placed on reimbursement in February 1994, it was paying all refunds on-time. Respondent Exhibit 275 at 9. However, SFAP continued to find late refunds in NCC's December 1994 reimbursement request and during a reimbursement review conducted in February 1995. See ED Exhibits 286-288. From this overwhelming evidence, one must conclude that the delays were intentional, in an effort to hold onto Federal funds, or were done with a wanton disregard of any obligation to make the refunds within a reasonable amount of time.

E. Remedy.

SFAP has requested that NCC be terminated from participation in the Title IV programs and that a fine of \$782,000 be issued. SFAP proposes a fine of \$1,000 per violation for the sixty- seven student accounts for which Pell Grant funds were drawn-down in advance of the twenty- one days permitted by regulation and of \$2,500 for each of the other violations. After noting my previous reluctance to impose a fine in addition to a termination, [See footnote 6⁶](#) SFAP argues that termination is not a punitive remedy, but is a prospective remedy used to avoid the continued endangerment of Federal funds. A fine, on the other hand, is designed to punish an institution for past misconduct and to serve as a warning to other institutions. NCC concedes that a “reasonable” fine should be levied, but argues that termination is not appropriate since it contends that all of the problems causing the late refunds have been corrected, and that NCC no longer takes Pell Grant draw-downs until eligible students are actually present in the classroom.

Termination is a very serious remedy to be used when an institution has consistently violated the Title IV regulations and attempts at voluntary resolution have failed, or where the violations are “sufficiently” egregious. *In re Yorktowne Business Institute*, 85 Ed. Law Rep. 1265 (U.S. Dept. of Educ., 1993). Termination and fines are alternative and complementary sanctions. As noted by SFAP, termination serves the non-punitive purpose of protecting students and the government from future harm, while fines are punishment for past conduct. Thus, termination may be used separate from a fine, in conjunction with a fine, or a fine may be used by itself. *In re Electronic College and Computer Programming*, Docket No. 91-7-ST, U.S. Dept. of Educ. (*Decision of the Secretary*, July 10, 1992). In deciding whether to levy a fine and in deciding the amount of the fine, the hearing official must consider the gravity of the offense and the size of the institution. 34 C.F.R. § 668.92(a) (1995). However, “a decision regarding the appropriateness of a fine will be made on the merits of each individual case.” *In re Dean's Westside Beauty College*, Docket No. 95-73-ST, U.S. Dept. of Educ. (November 8, 1995).

Although NCC may have improved communication among its offices and have taken other corrective action to ensure that refunds are issued promptly, such improvements will not ensure against further abuse of Pell Grant funds in the future. The evidence in this case is so overwhelming as to lead to the conclusion that NCC either intentionally misused Title IV funds or did so in wanton disregard for regulatory requirements. NCC's violations of the Title IV regulations have been constant and attempts to remedy the situation have failed; in addition, the violations are egregious. In order for the Title IV programs to work effectively, wherein participating institutions hold Title IV funds in trust for SFAP and students, it is essential that participating institutions be trusted. I do not believe that NCC can be trusted not to abuse Federal funds. Consequently, its participation in the Title IV programs must be terminated.

Although the purpose of termination is not punitive, it does in fact have a punitive impact. There are probably few proprietary trade schools which can survive without Title IV eligibility. Ninety-nine percent of NCC's students receive Federal student aid. So, it is with extreme reluctance that I impose a fine. Under the circumstances, a fine is appropriate. Termination is punishment, but not punishment enough given that NCC misappropriated approximately \$1.3 million over a three-year period. However, a fine of the magnitude requested by SFAP is not appropriate given that NCC has paid back all refunds owed, most with interest. Termination alone may result in NCC going out of business; a fine of the magnitude requested by SFAP, in addition to termination, would probably guarantee that it does so. Thus, I have imposed a fine of \$68,000, as follows:

67 Premature disbursements.

18 Disbursements to students after the students never showed up for class.

255 Late refunds for “no show” students (139) and withdrawn students (116).

[Footnote: 1](#) ¹ This has been reduced to ten days. 34 C.F.R. §§ 690.78(a) and 668.165(c)(2)(i) (1995).

[Footnote: 2](#) ² The termination and fine notice listed sixty-eight students under this violation. At the hearing, SFAP reduced this to sixty-seven students.

[Footnote: 3](#) ³ SFAP argues that this was a repeat violation and cites ED Exhibit 285, which is NCC's institutional compliance audit for award year 1993/94. See SFAP Post-Hearing Brief, at 12-13. To contend that an alleged violation is a repeat violation would suggest that it occurred in a prior award year. However, the draw-downs at issue were taken in July 1993 during the 1993/94 award year. Thus, these was not a "repeat" violation, although the student accounts cited in the institutional audit appear to be different from those in the termination and fine notice. Compare Respondent Exhibit 285-48 with ED Exhibit 277.

[Footnote: 4](#) ⁴ The termination and fine notice listed thirty-seven students under this violation. At the hearing this was increased to thirty-eight students. See ED Exhibit 278.

[Footnote: 5](#) ⁵ Twenty-eight draw-downs were taken within four days, three were taken within three days, two were taken within nine days, one in sixteen days, and the remaining four within one and one-half months and three and one-half months.

[Footnote: 6](#) ⁶ See *In re Chris Logan Career College*, Docket No. 95-126-ST, U.S. Dept. of Educ. (March 26, 1996), certified by Secretary (June 25, 1996).

[Footnote: 7](#) ⁷ It is not clear why SFAP based its termination and fine notice only on the September 1994 and June 1995 program reviews. The specifics concerning the February 1994 review came out at the hearing as part of NCC's case-in-chief. Since the February 1994 review was not relied on in the termination and fine notice, I have not included the late refunds discovered as a result of that review in calculating the fine, but have only relied on it as corroborative evidence supporting the allegations contained in the termination and fine notice.