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

In the Matter of **Docket No. 95-17-SP**

CONCORDE CAREER INSTITUTE, Student Financial Assistance Proceeding
Respondent.

PRCN: 94108041

Appearances: David H. Larry, Esq., Manatt, Phelps & Phillips, of Washington, D.C., for the Respondent.

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

Before: Judge Richard I. Slippen

DECISION

On July 28, 1994, the Office of Student Financial Assistance Programs (SFAP), through Region VIII of the United States Department of Education (ED) issued a Final Program Review Determination (FPRD) to the Respondent Concorde Career Institute (CCI) . Certain procedural irregularities then followed with Respondent claiming it filed a timely appeal which was hand-delivered on September 14, 1994, but with ED having no record. Inconsistencies followed where Respondent claimed confirmation that the appeal was with ED and proffered the date stamped cover pages for ED's receipt of its appeal (Request for Review) and its exhibits, yet ED maintained no appeal was filed. Subsequently, on November 30, 1994, ED's Region VIII reissued the FPRD, which was identical in all material respects to the first FPRD, and gave Respondent another 45 days to appeal it. The total liabilities sought were $16,367.24.See footnote 1 *1* Respondent was instructed to repay $7,958.62 for Pell and FSEOG funds and $8,408.62 to

lenders for Stafford and Plus refunds owed. Of the $7,958.62 sought by ED, reimbursement of

$1257.62 in interest and special allowances (ISA) paid to lenders, is included with the Pell and FSEOG funds which otherwise total $6701 in repayments.

A threshold procedural issue raised by Respondent concerning a dispute over jurisdiction by the tribunal, which was vigorously debated by counsel, has now been fully resolved inasmuch as the interlocutory appeal on the same issue was not granted. For disposition of this controversy, see the identical claims discussed in the Order signed by me on May 26, 1995, in the Matter of Concorde Career Institute, Van Nuys, California, Docket No. 95-76-SP. See footnote 2 *2* In that

proceeding, the undersigned judge issued two Orders which led to Concorde's Interlocutory Appeal to the Secretary, filed June 27, 1995. The May 26, 1995 Order denied Concorde's Motion to Dismiss (Final Program Review Determination for Failure of Secretary to Meet Statutory and Regulatory Deadline for Providing Notification of Date, Time, and Place of Hearing) and the subsequent June 27, 1995 Order denied Concorde's Request for Certification to the Secretary Concerning the Order Denying Respondent's Motion to Dismiss. Respondent's Interlocutory Appeal reviewed both Orders and asserted that the regulations specifically provide for interlocutory appeal of a potentially dispositive, substantive or procedural ruling, such as the judge had issued. SFAP filed its opposition to the Petition for Interlocutory Appeal and enumerated several reasons why the petition should be denied, including the lack of prejudice to SFAP to reissue the FPRD, if necessary.

The specific provisions on interlocutory appeal to the Secretary are contained in 34 C.F.R. § § 668.124. Under § 668.124(h), the request is deemed to be denied if the Secretary takes no action on a petition or certification for review within 15 days of its receipt. Inasmuch as the 15 day period elapsed without action by the Secretary, the appeal was effectively denied. Concorde's inability to obtain review of the ruling denying the Motion to Dismiss in Docket No. 95-76-SP is controlling of the identical situation in the present case. Therefore, there is no need for further discussion and I will proceed to the merits of the present case.

The pending action for recovery of refunds owed results from *pro rata* refund calculations set forth in the final program review determination letter of November 30, 1994. SFAP alleges that Respondent did not properly compute refunds due since Respondent did not review all Title IV recipients who withdrew since July 1, 1991, in accordance with the regulatory requirements of 34 CFR § 682.606. SFAP argues that Respondent had to comply with the recognized definition of *pro rata* refund that is found in 34 C.F.R. § 682.606 (c)(1) that states, ".... a refund by the school of not less than that portion of the tuition, fees, room and board, and other charges assessed the student by the school equal to the portion of the period of enrollment for which the student has been charged that remains on the last recorded day of attendance by the student, rounded

downward to the nearest 10 percent but never less than 10 percent, of that period, less any unpaid charges owed by the student for the period of enrollment for which the student has been charged, and less- (i) a reasonable administrative fee not to exceed the lesser of $100 or 5 percent of tuition, fees, room and board, and other charges assessed the student;...."

SFAP describes Respondent's obligations for making refunds as follows: The amounts sought are based on Respondent's completed file review and a computer print-out on refunds which it generated and it identified as its Appendix B. This appendix identified all students whose refund calculation resulted in a larger refund than was originally calculated. Respondent has not paid the additional refunds owed. Appendix B reflects the respective amounts of $8408.62 for the Stafford and PLUS loan programs and $6701.00 for Federal Pell and FSEOG liabilities.

The final program review determination (FPRD) letter discussed the *pro rata* refund calculation as allowing a school to retain only the amount of school charges (tuition, fees, room, board, etc.) That is proportional to the portion of the enrollment period that was completed by the student.

The FPRD noted generally that if a school charges a student directly for books, supplies, or other items, (either on a term by term basis or as a one-time program charge) and requires the student to buy these items from the school, these charges are required to be included in the *pro rata* refund calculation. (FPRD, p.3) The FPRD noted specifically that CCI's enrollment agreement includes text and supplemental fees, uniforms, and physical examination charges as part of the program charges to all students. Therefore, CCI is required to review all Title IV recipients who withdrew since July 1, 1991, to the date of this report. CCI is required to calculate a *pro rata* refund on all other charges assessed students, according to 34 CFR § 682.606. As pertinent, the refund policy set forth by the regulation states:

(A) General. (1) A school shall have a fair and equitable refund policy under which the school shall make a refund of unearned tuition, fees, room and board and other charges, to a student who received a GSL or SLS Program loan, or whose parent received a PLUS Program loan on behalf of the student, if the student--

(I) does not register for the period of attendance for which the loan was intended; or

(ii) Withdraws or otherwise fails to complete the period of enrollment for which the loan was made. 34 CFR § 682.606(a).

The dispute over liability here is centered on what charges are included within *pro rata* refund calculations. The Respondent challenges that its improper for ED to seek collection of unpaid charges. SFAP contends that the Respondent is not being assessed liability for unpaid charges; instead it remains liable for "other charges" consisting of book charges, uniforms, etc., in making the pro rata refunds. SFAP describes "unpaid charges " as the unpaid amounts which schools are required to recover from students before accepting financial aid for the balance. See 34 C.F.R. § 668.22(c)(1),(c)(2), § 682.606. SFAP vigorously denies that unpaid charges are being sought here and are at issue. SFAP disputes the applicability of cases relied on by Respondent in

defending its claim that its improper for ED to seek recovery of unpaid charges . See California Cosmetology Coalition v. Riley, 871 F.Supp. 1263, 1270 (C. D. Cal. 1994) and Coalition of New York State Carrier Schools, Inc. V. Riley, 94-CV-1493 (N.D.N.Y. January 6, 1995). SFAP correctly portrays that the holdings in those cases have no bearing on *pro rata* refunds. In fact, the statute requires unpaid charges to be excluded from *pro rata* refunds, and ED has never argued otherwise. 20 U.S.C. § 1091b(c)(1).

The focus in this case belongs on "other charges" which are properly assessed as part of the *pro rata* calculations. The 1992 Amendments which govern this matter specifically include under *pro rata* refunds--"tuition, fees, room and board, and other charges assessed the student by the institution." 20 U.S.C. § 1091b(c)(1). The only deductions authorized from this provision are for "unpaid charges owed by the student for the period of enrollment for which the student has been charged" and a defined "reasonable administrative fee." Id. Respondent makes no claim that its administrative fee was denied and, the charges here are not unpaid but qualify as other charges.

Alternately, the Respondent contends that even "other charges" should have been excluded under 34 C.F.R. § 668.22(c)(5)(i).See footnote 3 *3* Respondent makes this argument on the basis that "other charges" would include books and supplies for which a separate charge is specified in the enrollment agreement and/or as to which the school refers the student to an affiliated vendor.

There is no merit to this argument because Respondent's enrollment agreement did expressly set forth separate charges for text books, uniforms, teaching supplies, health screens and insurance as among the "supplemental fees" to be assessed. See Respondent Exhibit 17. While Respondent submits that its students may have been able to buy their books elsewhere, and offers a program reviewer's affidavit to this effect, the fact that the enrollment agreement expressly set forth charges for text books keeps those charges as within covered "other charges" subject to the refund policy. No further discussion of the merits of the affidavit or what other interpretations are possible are necessary.

Finally, any argument by Respondent that it is not liable for "other charges" because institutions are excused from refunding certain unreturnable or unreturned equipment under 34 CFR 682.606(c)(5) or 34 CFR 668.22(c)(5)(ii) is not persuasive. This is so because Respondent never gave pre-enrollment notice of the return process or any period in which a return could be made. Since Respondent offers no evidence that it somehow met the criteria on unreturnable or

unreturned equipment, it can hardly claim it is now excused from liability on the claimed "other charges."

The regulation at 34 CFR § 668.22(b) provides that "an institution's refund policy is fair and equitable if the policy provides for a refund of at least the larger of the amounts provided under" the three methods (state requirement, accrediting agency standard, or *pro rata* refund). This comports with the statutory language at 20 U.S.C. § 1091b(b)(1)-(3), which requires that the school use the method that will give the student the "largest" refund. This very principle was the subject of a recent decision in which the judge found that the school's reliance on the state's tuition refund policy was not fair and equitable since it did not provide the largest student refunds which would have resulted from the *pro rata* refund calculation found in the federal statute. The school was obligated to apply the *pro rata* refund policy and had to repay tuition refunds for the applicable period in accord with the policy which yielded the largest refund. See In the Matter of Spokane Community College, Docket No. 94-179-SP, U.S. Dep't of Educ. (July 11, 1995). Accordingly, Respondent's arguments that the use of the *pro rata* policy caused artificially-inflated results is not persuasive. Nor is Respondent's generalization that use of the state law refund would provide a larger refund proven or supported. Respondent appears to argue that the Secretary has incorrectly rewritten what is "fair and equitable" under § 1091b(b) and violated statutory language. Yet, the result in this case follows the correct legal application of the largest refund yield in Spokane, supra.

There is reason to review the identified Pell grants outlined in Appendix B for possible reduction of liabilities if the award year clearly precedes July 23, 1992, the effective date of the 1992 Amendments . This is so because the impact of the Amendments was to clearly shift priorities on refund calculations. Before the Amendments, the regulations discussed refund calculations in terms of return of the lesser of certain amounts, not the yield of the largest refund which now applies in the post-Amendment period. The 1992 Amendments actually require *pro rata* refunds to include "tuition, fees, room and board, and other charges assessed the student by the institution." 20 U.S.C. § 1091b(c)(1) (emphasis added). Therefore, for first application to the Pell refund area, Respondent should get the benefit of the doubt and credit for those refunds arising from the 1991/92 award years in Appendix B. A review of Appendix B for refunds resulting

from pre-1992 awards identifies the following students and refund amounts: Student G.B., refund date 4/92 for $270 (Pell); Student C.L., refund date 4/92 for $270 (Pell); and Student T.S, refund date 6/92 for $297 (Pell). Accordingly, these amounts will be deducted from the total Pell liabilities.

Respondent's other arguments are neither persuasive or dispositive. Respondent claims it is improper for the Department and, in turn the involved Regional office and Regional personnel (Region VIII), to rely on an initial investigation and analysis of Respondent's refund practices conducted by the Colorado Student Loan Program (CSLP) in bringing the refund liability claim against it . Respondent charges that ED exceeded its authority in doing this and in using the CSLP review, which was adverse to Respondent, as the basis or springboard for the subsequent

program review report and FPRD letter.See footnote 4 *4* Respondent contends that ED cannot rely on any determination other than a determination which results from a program compliance review. Respondent further challenges that it is not aware of another case in which an FPRD has resulted from a review that was not performed by Department of Education personnel. Respondent insists that such a procedure exceeds the Department's statutory authority. Respondent's assertions on this are simply incorrect.

In this case, the Department did not just take the CSLP review, done in March 1993 and reported out in April 1993 with an adverse determination, adopt it, and do nothing more. The Department conducted two on-site program reviews on February 22-26, 1993, and December 13- 16, 1993, and sent in its reviewers both times. For the February 1993 review, Linda Olsen and Norm Edgington reviewed Respondent's files, and for the December 1993 review, Dan Whiting was the reviewer who issued the program review report. Respondent's Exhibits, Vol. II at Nos. 14 and 15 reflect program reviewers workpapers. Further, the record reflects Respondent's active role in filing responses to the program reviews. See, eg., Respondent's Ex. 8 (CCI's Response to Program Review Report, March 8, 1994) and Ex. 11 (CCI Response letter of June 15, 1994, which gave a finding by finding response and included attachments at R-150 through R-164). It is clear that the FPRD issued by Harry C. Shriver, Chief Institutional Review Branch Specialist, on November 30, 1994, did comply with the requirements of 34 CFR § 668.112 inasmuch as it was a written notice of determination issued by a designated ED official which resulted from a program compliance review. The determination by the guarantor agency CSLP was an interim step, but not the culmination of the process. The FPRD did result from Department personnel review. From all indications, the FPRD was properly issued following normal procedures and Respondent's criticisms are without merit.

Next, Respondent's charges that in the course of making and defending Finding 1 on the refund liabilities, various Departmental personnel misstated or misrepresented the requirements and

effects of applicable statutes and regulations, and engaged in other arbitrary or capricious conduct rendering that finding unlawful. Specifically, Respondent faults the instigation of ED's chief Institutional Review Branch Specialist Harry Shriver of the guaranty agency program review in order to obtain a finding and contends his action is an improper and inexplicable departure from regulation and standard agency practice. Respondent claims that it is "arbitrary and capricious" for an agency to allow exceptions to a rule or to exercise its discretion in varying

ways without providing a cogent or rational explanation for the variation in enforcement. See , e.g., Green Country Mobilephone , Inc. V. F.C.C. , 765 F.2d 235,237 (D.C. Cir. 1985) (failure to provide a "rational explanation" for permitting exceptions to rule is arbitrary and capricious); International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 815 (1983), appeal after remand 733 F.2d 920 (D.C. Cir. 1984), cert. denied Breen v. International Ladies' Garment Workers Union, 469 U.S. 820 (1984) (failure to "cogently explain" why discretion was exercised in a given manner is arbitrary and capricious). Respondent faults Shriver's FPRD as offering no explanation as to why, after the first program review yielded no exit conference on refunds and no proposed findings on that issue, he went to an outside entity (CSLP) to obtain the finding on which his FPRD is based.

The Department's use of a guaranty agency to aid it in monitoring or accounting for Title IV funds is neither improper, nor does it exceed any authority. The fact of the matter is that the use of the guaranty agency was only one step in the cumulative process which resulted in the FPRD. The record here reflects compliance with necessary regulations in the issuance of the FPRD, as above detailed. Respondent does not accurately relate all the facts when it insists that the FRPD is based solely on CSLP's guaranty agency review. Respondent's claims here are overzealous and fail to account for the further action of program reviewers who undertook on-site visits, issued reports, and gave Respondent further opportunity to respond thereto. Respondent's contentions on misstatements and misrepresentations allegedly made by Department representatives are unpersuasive and merit no further consideration, whether they apply to the named individual or others. There is no evidence to support Respondent's claims of impropriety.

FINDINGS

Respondent failed to meet its burden of proof that the *pro rata* refund calculations were properly made and, therefore, owes the amounts calculated in the FPRD. Respondent must pay directly to the lenders the refunds owed on the Stafford and Plus loans. Respondent must pay the Pell and FSEOG liabilities on the same basis, with a deduction of the identified amounts for the 1991/92 loans. The adjusted amount is now $5864 based on the subtraction of $837 from the $6701 total.

The interest and special allowance charges in the amount of $1257.62 are due and owing. A long line of cases supports the ability of ED to seek reimbursement of ISA on payments due to lenders. See In the Matter of Painter's Colleges, Inc, Docket No. 91-60-SP, U.S. Dep't of Educ. (August 18, 1993); In the Matter of Hi-Tech Institute of Hair Design, Docket No. 92-129-SA,

(Final Dec. April 18, 1995); Metropolitan Career Institute, Docket No. 94-6-SP, U.S. Dep't of Educ. (August 15, 1995).

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED, that Concorde Career Institute repay to the appropriate lenders $8,408.62 for Stafford and PLUS refunds owed and repay to the Department $7121.62 for Pell and FSEOG funds, inclusive of interest and special allowances.

SO ORDERED.

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Judge Richard I. Slippen

Dated: February 1, 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 Finding 1 liability amounts were the same for both FPRDs. A higher liability amount in the first FPRD covered additional Findings 2 and 3 which were resolved by August 9, 1994, before re-issuance of the FPRD.*

Footnote: 2 *2 All pleadings relevant to the interlocutory appeal in Concorde, supra., are incorporated by reference herein, whether or not previously included in counsel's exhibits.*

Footnote: 3 *3 The provision states: For purposes of this section "other charges" assessed the student by the institution" include, but are not limited to, charges for any equipment (including books and supplies) issued by an institution to the student if the institution specifies in the enrollment agreement a separate charge for equipment that the student actually obtains or if the institution refers the student to a vendor operated by the institution or an entity affiliated or related to the institution.*

Footnote: 4 *4 ED's Region VIII personnel did arrange for CSLP, the guarantor agency, to conduct an initial review of Respondent's practices. While Respondent criticizes this action, it is*

not a violation of any regulations and, in fact, may actually be called for at times because it is closer to the source and directly involved with the recipient. The CSLP review was conducted by Marie Vigil which resulted in CSLP's April 1993 report. One of the findings of the CSLP review was that CCI did not apply pro rata calculations to other charges assessed the students by the school to determine the student's refund as required in 34 CFR § 682.606(c)(1), and 34 CFR § 668 Appendix D. CSLP required CCI to apply pro rata calculations to all charges assessed the students by the school to determine the student's refund, and remit any outstanding refunds that may result from the recalculation. The file review was required for students who received FFEL's for the 1991-92 and 1992-93 award years. See Whiting Program Review Report (Report)following on-site program review, December 13-16, 1993, at pages 2-3 for discussion of CSLP review and conclusions. (Ex. R-7).