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

In the Matter of **Docket No. 95-42-SP**

LINCOLN TECHNICAL INSTITUTE, Respondent.

Student Financial Assistance Proceeding

PRCN: 93402077

Appearances: Stanley A. Freeman, Esq., and Joel M. Rudnick, Esq., Powers, Pyles, Sutter & Verville, P.C., Washington, D.C., for Lincoln Technical Institute.

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

Before: Judge Richard I. Slippen

DECISION

On December 29, 1994, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a final program review determination (FPRD) finding that Lincoln Technical Institute (Lincoln) violated several regulations promulgated pursuant to 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*.

The FPRD, which resulted from a August 30 - September 4, 1993, program review of Lincoln's Title IV compliance for the 1991-1992 and 1992-1993 award years, contained seven findings.See footnote 1 *1* In its brief, Lincoln appealed only Finding # 1 of the FPRD which stated that Lincoln disbursed Title IV funds to students whose Selective Service registration status was not verified

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after the institution received conflicting information regarding the students' registration status on Electronic Student Aid Reports (ESAR).See footnote 2 *2*

To be eligible to receive Title IV assistance, a student must certify that he has filed a Statement of Selective Service registration status in accordance with the requirements of 34 C.F.R. 668, Subpart C. 34 C.F.R. § 668.7(a)(8) (1991). Until a student files a statement certifying that he has registered with Selective Service, the institution may not disburse Title IV funds or certify the institutional portion of a Title IV loan application. 34 C.F.R. § 668.33(a) (1991). An institution that accepts a Statement of Selective Service registration status from a

student is liable for any Title IV aid provided to a student who was required to register, but who did not register, if the institution has information that conflicts with the student's statement and the institution's acceptance of the student's representation was not reasonable in light of all the available information. 34 C.F.R. § 668.33(g) (1991). Additionally, to participate in any Title IV program, an institution must develop and apply an adequate system to identify and resolve discrepancies in the information it receives from different sources with respect to a student's application for Title IV assistance. 34 C.F.R. § 668.14(f) (1991).

SFAP argues that Lincoln had a clear responsibility to verify its students' registration status once it received conflicting information that the students were not registered with Selective Service. According to SFAP, 34 C.F.R. § 668.33(g) applies at the time the institution accepts the statement and at the time it provides Title IV assistance. Further, SFAP argues that Lincoln's responsibility to verify Selective Service information is consistent with the requirement that an institution develop a system under 34 C.F.R. § 668.14(f) to resolve discrepancies in a student's application for Title IV assistance prior to the disbursement of funds. Also, SFAP argues that Lincoln's actions are contrary to Departmental guidance on this matter contained in a Dear Colleague letter issued in July 1988.

Lincoln argues, first, that it was only required to determine if there was any conflicting information at the time it received a student's certification of his Selective Service registration status and, second, that the regulations do not mandate that the institution monitor information received subsequent to the student's self-certification. According to Lincoln, once an institution receives or "accepts" a student's certification of his Selective Service registration status, it no longer has to concern itself with the truth of that certification. In its brief, Lincoln supports this argument in two main ways. First, Lincoln asserts that the operative language in 34 C.F.R. § 668.33 is "has information" and "acceptance of the student's representation ... was not reasonable in light of all the available information" which indicates that the regulation only meant to apply to information the institution has at the time it receives the student's certification. Second, Lincoln uses examples of conflicting information given in the preamble to 34 C.F.R. § 668.33 contained in the June 28, 1995, Federal Register. According to Lincoln, these examples demonstrate that this regulation was intended to focus only on conflicting information known by the institution prior to or contemporaneous with the making of the student certification.

Lincoln also argues that since ESARs are generated from the students' financial aid applications which contain the Selective Service Status certification, the institution could not have been viewed as having conflicting information in its possession at the time the self-certifications were made. Additionally, Lincoln argues that its reliance on students' self-certifications is consistent with the Department's use of student self-certification for other Title IV eligibility requirements.

Title IV funds should only be disbursed to eligible students. 34 C.F.R. § 668.7 (1991). Any person who is required to be registered with the Selective Service and fails to register shall be ineligible for any form of Title IV assistance. 50 U.S.C. App. § 462(f)(1). Institutions that participate in Title IV programs are required to administer these programs in accordance with all statutory and regulatory provisions applicable to the Title IV programs. 34 C.F.R. § 668.16(a). If an institution learns that Title IV funds will be disbursed to an ineligible student before such

disbursement, it is obligated not to disburse those funds. Lincoln's construction of 34 C.F.R. § 668.33(g) would release itself of any concern regarding conflicting information which arose after a student submitted his self-certification; hence, Lincoln's interpretation of that section constructively renders the regulation meaningless. Under Lincoln's interpretation, a student who admits that he did not register with Selective Service a few days after he certified that he had, would not form the basis for conflicting information under 34 C.F.R. § 668.33(g). Further, despite Lincoln's assertion, there is no basis for finding that the examples given in the preamble to the June 28, 1995, final regulations demonstrate that the provision on conflicting information did not apply to information received after the student made his certification. It is not reasonable that an institution could ignore conflicting information received on an ESAR that directly impacts on a student's eligibility and, thus, the proper use of Title IV funds, because that report is not generated until after the student's certification of his registration with Selective Service is made.

Lincoln is also required to develop and apply an adequate system to identify and resolve discrepancies with respect to a student's financial aid application. 34 C.F.R. § 669.14(f) (1991). In determining whether the system is adequate, the Secretary considers whether the institution obtains and reviews all student aid applications, Statements of Registration Status, or any other factors relating to a student's eligibility for Title IV assistance. Id. The requirement to verify conflicting information before an institution disburses Title IV aid bolsters the requirement under 34 C.F.R. § 668.33(g) that an institution is liable for Title IV funds disbursed to students for whom there was conflicting information regarding their Selective Service registration status.

The ESARs were an important source of conflicting information. The Department's July 1988 Dear Colleague letter informed Lincoln that if a certain notation appeared on a student's ESAR, it meant that the student was a suspected non-registrant. (ED Exhibit 3). The Dear Colleague letter then prescribed steps that an institution's financial aid administrator should take

regarding this conflicting information. (ED Exhibit 3). This tribunal has previously held that while Dear Colleague letters cannot stand alone as the basis for a regulatory violation, it may assist the tribunal in interpreting the law, policies, or procedures. *See In Re Baytown Technical School, Inc.*, Docket No. 91-40-SP, U.S. Dep't of Educ., (December 13, 1993). In the instant case, the Department's Dear Colleague letter is consistent with the provision contained in 34 C.F.R. § 668.33(g). Although Lincoln is correct in arguing that a Dear Colleague letter does not have the authority of statute or regulation, the letter at least clarifies any unfounded assumption that could be drawn from the examples given in the preamble to 34 C.F.R. § 668.33. The Dear Colleague letter clearly states that conflicting information may appear in a student's ESAR which, as Lincoln notes, an institution does not receive until after it receives the student's certification. The Dear Colleague letter also demonstrates that Lincoln was made aware of the fact that the ESAR was a possible source of conflicting information regarding a student's Selective Service registration status.

In an appeal of an FPRD, the institution bears the burden of proving that Title IV funds were lawfully disbursed. 34 C.F.R. § 668.116(d). For some students, Lincoln was able to demonstrate that they were registered for Selective Service and, therefore, eligible to receive Title IV assistance. (Respondent's Exhibit 3). Since Lincoln does not proffer evidence that the remaining

students for whom liability is assessed in FPRD Finding # 1 were registered with Selective Service, the institution has failed to meet its burden of proof under 34 C.F.R. § 668.116(d). Therefore, Lincoln remains liable for all Title IV funds disbursed to these students.

FINDING

1. Lincoln improperly disbursed Title IV funds to students who certified they had registered with Selective Service after the institution received conflicting information.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Lincoln Technical Institute pay to the U.S. Department of Education $86,981.67.

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Judge Richard I. Slippen

Dated: May 17, 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 The FPRD miscounts or misnumbers the number of findings as eight.*

Footnote: 2 *2 Lincoln argues the SFAP did not provide regulatory support for FPRD Finding # 1. As Lincoln admits, SFAP cited 34 C.F.R. § 668.7 and § 668.33. Therefore, I find that SFAP set forth references to the applicable regulatory authority for this finding.*