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

In the Matter of **Docket No. 96-131-SP**

Center for Advanced Studies on Puerto Rico and the Caribbean, Student Financial Assistance Proceeding

Respondent. PRCN: 199520200062

Appearances:

José A. Ortiz Daliot, Esq, Santurce, Puerto Rico, for Respondent.

Alexandra Gil-Montero, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before:

Frank K. Krueger, Jr., Administrative Judge

DECISION

The Respondent provides graduate education in Puerto Rican and Caribbean studies. Pursuant to a program review concerning Respondent's administration of the Federal Family Educational Loan (FFEL) program for the 1992/93, 1993/94, and 1994/95 award years, on August 21, 1996, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued a final program review determination assessing a liability against the Respondent for $15,620. By letter dated October 4, 1996, Respondent appealed that determination. Based on information provided by the Respondent during the course of the appeal, SFAP reduced the liability determination to $7,914. For the reasons noted below, I find in favor of SFAP.

DISCUSSION

According to SFAP, during the award years covered by the program review, Respondent improperly disbursed FFELs to six students for whom the institution had not obtained financial aid transcripts from schools previously attended by those students. Using the estimated loss formula,See footnote 1[1] this finding resulted in a liability of $8,303. With its request for appeal, Respondent provided financial aid transcripts for four of the six students in question. As a result, SFAP reduced its determination on this liability to $2,651. Subsequently, by motion dated April 22, 1997, Respondent submitted the financial aid transcript for one additional student; SFAP again reduced its lability determination to $1,177 to cover the remaining student, student # 23.

SFAP also determined that Respondent improperly certified FFEL applications because of incorrect calculations concerning the estimated family contributions and costs of attendance for loan applicants and its failure to include other financial aid which the applicants received. According to SFAP, Respondent was unable to provide documentation for the source of its calculations or with a copy of the student budgets used for certifying the FFEL applications. At the request of SFAP, Respondent recalculated all of its FFEL applications using correct information, and determined that it

over awarded FFEL funds to nine students (numbers 10, 11, 13, 16, 20, 22, 35, 36, and 55). Using a cohort default rate of 5.7 percent, SFAP estimated the actual loss to ED for these loans at $7,317. In its brief, Respondent protested the use of the 5.7 percent default rate and noted that its most recent rate is 3.2 percent. SFAP accepted the lower rate and recalculated the amount due as $6,747.

A. Failure to Secure Financial Aid Transcript.

In order to ensure that students do not receive more Federal financial assistance than they are entitled, and that the students are not in default on other Federal loans incurred while attending other institutions, one of the conditions for participating in the Title IV programs is that a participating school obtain financial aid transcripts from institutions which a student previously attended. 34 C.F.R. § 668.19 (1992, 1993, 1994). Under the regulations, an institution should not release FFEL proceeds to a student until it receives all financial aid transcripts (*id.* at 668.19(a)(3)(i.v.)); the institution may not hold FFEL proceeds for more than forty-five days pending the receipt of a financial aid transcript (*id.* at 668.19(a)(4)(i)); and if the financial aid transcripts are not received within the forty-five days, the loan proceeds must be returned to the lender (*id.* at 668.19(4)(i)). Notwithstanding, Respondent disbursed FFEL proceeds to student #23 without receiving her financial aid transcript from the University of Alaska.

Respondent argues that it has requested the financial aid transcript in question and that the University of Alaska is not responsive. On May 29, 1997, Respondent submitted a sworn statement by student # 23 stating that she never received any financial assistance from ED while a student at the University of Alaska. This statement does not satisfy the regulatory requirement that FFEL proceeds not be released to a student until a financial aid transcript is received from all previous postsecondary institutions attended by the student. Acceptance of sworn statements by student-aid applicants in lieu of financial aid transcripts could lead to misrepresentation on the part of the applicants.

Respondent also argues that it provides important and quality educational services and that it cannot afford to satisfy the SFAP liability determination; therefore, any liability should be waived under 34 C.F.R. § 682.609(c) (1996). Section 682.609(c) provides that "the Secretary [of Education] may waive the right to require repayment of funds or repurchase of loans by a school if, in the Secretary's judgement, the best interest of the United States so requires." Although the Secretary may waive repayment, it is not clear whether the hearing official may do so. *See* 34 C.F.R. § 668.117 (d)(1) (1996). The hearing official's responsibilities are quasi-judicial and limited to making findings of fact and conclusions of law and, as such, should not engage in the executive function of waiving or settling claims. *Cf. French Fashion Academy*, 69 Ed. Law Rep. 1358, 1359 (U.S. Dept. of Ed. 1990). Moreover, even if the hearing official had the authority to waive a liability determination supported by law and fact, I would not waive Respondent's liability because it is not in the best interest of the United States to do so. Although Respondent represents that payment of the liability determination would result in a financial hardship to the school, possibly jeopardizing its continued ability to operate, and that it provides excellent educational services, there is nothing in the record to support these claims except the self-serving statements by its counsel and president. In addition, under the Title IV programs, participating schools act as fiduciaries for ED and certify Federal loans with minimal control by ED. *See* 34 C.F.R. § 668.82 (1992, 1993, 1994). Thus, it is absolutely essential that participating schools follow the SFAP disbursement rules precisely and disburse FFEL funds only to those applicants entitled to the funds under the Title IV regulations. *See Emperor's College of Traditional Oriental Medicine*, Docket No. 96-48-SP, U.S. Dept. of Educ. (July 12, 1996), at 2-3. Failure to insist on precise compliance could result in widespread abuse and possible fraud.

B. Improper Certification of FFEL Applications.

A school must certify that the information it provides to a borrower in an FFEL application is complete and accurate. 34 C.F.R. § 682.603(a) (1992, 1993, 1994). Among other things, a school is required to certify a students's expected family contribution, the cost of attending the institution, and any other financial aid received by the student. *Id.* at 682.603(d). An institution is required to maintain a copy of the data used to determine a student's expected family contribution and cost of attendance for five years after the student's attendance at the school. *Id.* at 682.610(b) and (d).

SFAP found that, for a number of students in its sample, Respondent used cost of attendance and family contribution figures which maximized the amount of FFEL funds for the students and which appeared to have no basis in reality. When the reviewer requested that school officials provide a copy of the backup documentation, the school was unable to

comply. The school was required to recalculate the FFEL proceeds for all its students and, as a result, identified over awards totaling $27,913.

Respondent's only defense is that SFAP has never precisely identified the sections of the regulations in which the SFAP calculations are required and that, again, the liability should be waived as in the interest of the United States. As stated in the final program review determination, Respondent is required to certify the accuracy of all information it is required to provide on student FFEL applications and to maintain the backup data upon which the information is based. *See* 34 C.F.R. §§ 682.200; 682.603; 682.610 (1992, 1993, 1994). The FFEL applications require that the Respondent provide the student's expected family contribution, the cost of attendance, and any other financial assistance received by the student. When SFAP reviewed Respondent's applications it found that the information provided was inaccurate. When SFAP requested the back-up data, Respondent was unable to comply. Thus, Respondent was in clear violation of the above regulations, and, as noted in section A above, it is not in the best interest of the United States to waive Respondent's liability.

C. Remedy.

Respondent may satisfy its liability for the FFELs at issue by paying ED the SFAP calculated estimated loss for those loans. Respondent appears to question the authority of SFAP to use the estimated loss formula and states that Respondent should be given the opportunity to recover unauthorized FFEL funds from the students.See footnote 2[2] The estimated loss formula has been relied on by SFAP as an alternative remedy to having a school purchase unauthorized loans.See footnote 3[3] This tribunal has consistently held that this formula constitutes a fair calculation of the extent of ED's losses where it has determined that an institution has improperly disbursed Title IV loans. *See, e.g., Christian Brothers, supra,* note 3, and the many cases cited therein. .

Respondent may also satisfy its liability by purchasing the loans at issue and reimbursing ED for any special allowances and interest payments made by ED for these loans.See footnote 4[4] In addition, it may be at least theoretically possible for Respondent to satisfy its liability with respect to those loans to those students for which it overestimated FFEL proceeds by purchasing that portion of the FFELs for which the students were ineligible. *See* 34 C.F.R. § 682.609(a) (1996). However, the individual promissory notes for these loans must be examined to ensure that such partial purchase is possible. Again, if partial purchase is possible, Respondent must also reimburse ED for any special allowances and interest payments paid on the excess portion of the loans.

ORDER

Ordered, that Respondent do one of the following:

a. Pay ED $7,914.

b. Purchase the loans for students 23, 10, 11, 13, 16, 20, 22, 35, 36, and 55, and reimburse ED for special allowances and interest payments made for these loans.

c. Purchase the entire loan for student 23, and, if possible, purchase the excess portions of the loans which were unauthorized for students 10, 11, 13, 16, 20, 22, 35, 36, and 55, and reimburse ED for special allowances and interest payments made on all of the above loans.

Frank K. Krueger, Jr.
Administrative Judge

Dated: June 2, 1997

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 estimated loss formula approximates the loss to ED which will result when unauthorized loans go into default. Under the formula, an institutions's cohort default rate is multiplied by the total amount of ineligible loans disbursed during a given award year to yield an estimated expenditure which ED will have to pay lenders on defaulted loans. This estimate is added to estimated loan subsidies and interest paid by ED on the unauthorized loans.*

Footnote: 2 [2] *Respondent also states that the estimated loss liability for student #23 is $733.22, rather than the $1,177 calculated by SFAP. However, Respondent fails to include the interest and special allowances ED is required to pay to lenders over the life of FFEL loans. These payments are intended to compensate lenders during the period when payments from subsidized borrowers are deferred and to ensure a reasonable rate of return on these loans. See Christian Brothers University, Docket No. 96-4-SP, U.S. Dept. of Educ. (Jan. 8, 1997) at 8.*

Footnote: 3 [3] *However, according to SFAP's stated policy, in cases involving a small number of loans the estimated loss formula is not to be used. See Christian Brothers, supra, at 4; see also Fisk University, Docket No. 94-216-SP, U.S. Dept. of Educ. (Oct. 5, 1995) at 6 and Emperor's College, supra p. 3, at 3 (judges declined to apply estimated loss formula in cases dealing with small number of loans). Although it is bothersome that SFAP has deviated from its stated policy without any explanation, such deviation will not harm the Respondent since, as explained in the text, it also has the option of purchasing the loans.*

Footnote: 4 [4] *It has been my experience that participating institutions prefer using the estimated loss formula rather than purchasing the unauthorized loans since institutions are usually unwilling to extend the necessary funds to purchase the loans. Of course, once the loans are purchased, the institution may recoup these expenditures by collecting payments on the loans.*
