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

In the Matter of

Docket No. 97-39-SP

TIGER WELDING INSTITUTE,

Student Financial Assistance Proceeding

Respondent.

PRCN: 199630612754

Appearances:

Glenn Bogart, Higher Education Compliance Counseling, Birmingham, AL, for Respondent.

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

Before:

Richard I. Slippen, Administrative Judge

DECISION

On February 19, 1997, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (Department) issued a final program review determination (FPRD) finding that during the 1993-94 and 1994-95 award years, Tiger Welding Institute (Tiger) violated several provisions of Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §1070 *et seq,* and its implementing regulations. The FPRD, which resulted from an on-site program review of Tiger in June 1996, contained unresolved findings that Tiger improperly prorated Federal Family Education Loan (FFEL) awards (Finding #1) and improperly disbursed Title IV funds to an ineligible student who had defaulted on student loan payments (Finding #6). SFAP assessed a liability of $7,341.92 for Finding #1 and $205.51 for Finding #6 to the Department and required Tiger to purchase the ineligible loan at issue.See footnote 1[1]

In its appeal of the FPRD, Tiger does not contest the factual basis of SFAP's allegations. Instead, Tiger responds that mitigating circumstances should relieve it of liability but that, in the event of a finding of liability, the Department's estimated actual loss formula is an inappropriate measure of damages. First, Tiger asserts that it should be held harmless for loans issued prior to a newsletter which explained how schools should prorate FFEL loans. Tiger also argues that it relied upon an example in the Department's *Federal Student Financial Aid Handbook, 1994-95* (*Handbook*), which misled it to base its proration only upon the number of clock hours in its program, and it therefore should be afforded "safe harbor." In the event of a finding of liability, Tiger requests that this tribunal discard the estimated actual loss

formula in favor of a “net loss” formula that considers post-default collections. If the estimated actual loss formula is used, however, Tiger urges this tribunal to apply its draft cohort default rate for fiscal year 1995. Finally, Tiger argues that because the initial financial aid transcript (FAT) it received for the student in Finding #6 did not inform it of the student's default, it probably would not have known of the default even if it had requested the FAT in a timely fashion and so should not be held liable.

Finding #1

The maximum federal loan amounts that a student may borrow under 34 C.F.R. § 682.204 vary according to whether a program's length is a full academic year, at least two- thirds but less than an academic year, or at least one-third but less than two-thirds. An academic year is defined in 34 C.F.R. § 668.2(b) as a period of at least 30 weeks of instructional time during which a student must complete at least 36 quarter hours or 900 clock hours in an educational program. Accordingly, the regulations define two-thirds of an academic year as a period of at least 20 weeks and 24 quarter hours or 600 clock hours, and one-third of an academic year as a period of at least 10 weeks and 12 quarter hours or 300 clock hours.

The Department noted in its FPRD that while Tiger had programs that consisted of 640 and 740 clock hours, they lasted only 16 and 19 weeks, respectively. The programs met the clock-hour requirement for two-thirds of a year, but they did not meet the minimum-weeks requirement. Thus, according to the regulations, Tiger should have prorated its loans according to the amount allowed for one-third of an academic year. Tiger, however, calculated the loan proration on the basis of two-thirds of an academic year, considering only the number of clock hours in its programs.

Tiger does not dispute that it incorrectly prorated the loans according to the above regulations, which took effect on July 1, 1994. It contests the assessment of liability for five loans which were certified and disbursed before it received the August 15, 1994, National Association of Student Financial Aid Administrators (NASFAA) newsletter that explained how to prorate federal loans disbursed on or after July 1, 1994.

The date on which NASFAA published its information is irrelevant to the question of Tiger's notice of the effective date of the regulations. Even the speculation that NASFAA “apparently did not know about the new proration requirement” until August 15 provides no exculpatory justification for a school's ignorance of regulations already in effect. As Tiger itself noted, the April 29, 1994, *Federal Register* gave notice of the new definitions of one-third and two-thirds of an academic year and their effective date. *See* 59 Fed. Reg. 82,22348 (April 29, 1994). This argument, therefore, is without merit.

Tiger's reliance on an unclear section of the Department's *Handbook* is likewise misplaced. Although SFAP's assertion that Tiger could not have been misled by the explanation of loan proration is unpersuasive in light of the literal text of the *Handbook*, an institution must look to the highest source of authority when implementing financial aid procedures. In this case, the regulations clearly required an institution to consider the length of a program both in clock hours and in weeks, a point which Tiger does not argue. Tiger cannot justify its ignorance of the law by its reliance on a confusing explanation of the regulations when the regulations themselves were clear and explicit.

Both Tiger and SFAP reference a case in which this tribunal found that an institution could rely on the defense of a safe harbor provision for its improper disbursement of Pell grants. *See In Re Travel University International*, Docket No. 94-99-SP, U.S. Dep't of Educ. (February 3, 1995). Tiger's analogy to this case is untenable for a number of reasons. Most significantly, in *Travel University* there were no regulations or detailed explanations on how to calculate Pell grant awards for periods of less than 30 weeks, and all institutions were told by the Department that they would be held harmless for overawards as long as they made a reasonable attempt to comply. Furthermore, the institution made numerous unsuccessful attempts to confirm the correct procedure with regional Department officials. As previously noted, Tiger has not argued that the regulations themselves are unclear, only that the *Handbook* was misleading. Tiger did not suffer from Departmental confusion and lack of published guidance, as did the institution in *Travel University*. Regardless of whether the *Handbook* was in fact misleading, there were clear, published regulations concerning the proration of federal loans.See footnote 2[2]

Estimated Actual Loss Formula

SFAP bases its assessment of liability on the estimated actual loss formula. This tribunal has accepted this formula as a reasonable method of liability calculation. *See, e.g., In Re Christian Brothers University*, Docket No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997); *In Re Southeastern University*, Docket No. 92-102-SA, U.S. Dep't of Educ. (November 13, 1995). SFAP developed the formula to provide institutions with an alternative to purchasing ineligible loans. By its very definition, the estimated actual loss formula cannot be exact, but it is tailored to compensate the Department for its specific losses in default costs and interest and special allowances.

Tiger challenges the use of the cohort default rate in the calculation of loss. It cites a Department press release which stated that the Department's net default costs for fiscal year 1992 were approximately one-tenth of the gross default claims paid in that year. Tiger then uses these figures to assert that the Department should recover only ten percent of the estimated defaults, as this ten-percent figure is the true loss to the Department.

The total amount of defaulted student loan collections in a given year has no connection to the Department's actual loss in a case of improperly disbursed loans. In addition, basing the formula on the cohort default rate does not result in a double collection by the Department, for it is impossible to predict the success of future collection efforts, the amount of money that must be spent in such efforts, or the dollar value of funds collected years later. The estimated actual loss formula is a method by which the Department can attempt to assess its present and future losses in a particular case with relative accuracy.

Tiger has argued that, if this tribunal accepts the estimated actual loss formula, its liability under the estimated actual loss formula should be assessed by using its draft cohort default rate, and SFAP has agreed in this case. Because Tiger does not yet have a published cohort default rate, the Department would normally apply the preceding fiscal year's national average cohort default rate for proprietary schools with programs of less than two years. Tiger's fiscal year 1995 draft rate of 12.5%, however, is approximately half the national average. Both parties believe that the draft rate is more accurately representative of Tiger's liability to the Department.

The Department has limited its use of the draft cohort default rate because its sole purpose is to provide an institution with the opportunity to challenge the rate before an official rate is issued. This case, however, presents no danger of the Department using an unofficial rate against a school before it can challenge it. The draft cohort default rate provides a fair means of computing liability in this specific instance in which SFAP is willing to reformulate the assessment of liability, and the institution has acquiesced to the use of the 12.5% rate in its liability calculation and does not yet have a published rate.

Finding #6

Tiger's final challenge to the FPRD hinges on its claim that, although it did not request a FAT until after disbursing loans to the student in Finding #6, it could not have known that the student was ineligible. Although it admits to violating 34 C.F.R. § 668.19(a)(2), Tiger argues that "in all likelihood" any transcript received earlier would also have contained incorrect information. This point is debatable, but it is nonetheless clear that Tiger did, in fact, commit a violation of the regulations by not requesting the FAT prior to disbursement. The issue of whether an institution would be liable for unknowingly disbursing federal funds to an ineligible student after following the proper procedures is not at issue. As a loss resulted to the Department, Tiger cannot be excused from its failure to follow the regulatory requirement.

FINDINGS

1. Tiger violated 34 C.F.R. § 682.204 by improperly prorating FFEL awards and 34 C.F.R. §§ 668.19 and 668.32 by disbursing Stafford loan funds to an ineligible student during the 1993- 94 and 1994-95 award years as detailed in Findings #1 and #6.

2. Tiger remains liable for the prorated awards (Finding #1) and the ineligible loans (Finding #6).

3. The estimated actual loss formula will be used to calculate Tiger's FFEL liability for Finding #1.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Tiger Welding Institute pay to the United States Department of Education the sum of $7,547.43 and purchase the ineligible Stafford loans.

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Judge Richard I. Slippen

Dated: July 2, 1998

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]*SFAP recalculated its original FPRD assessment of liability, conceding that the student included in Finding #6 was also included in Finding #1. The Department removed this student from the Finding #1 calculation so as to avoid duplication of liability.*

Footnote: 2 [2]*Although Tiger did certify four loans prior to the effective date of the regulations, the loans were disbursed after July 1, 1994. The regulations explicitly state that they apply to loans disbursed after this date, so the dates of certification are irrelevant.*