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

In the Matter of **Docket No. 97-6-SP**

LORIAN COUNTY COMMUNITY COLLEGE, Respondent.

Student Financial Assistance Proceeding

PRCN: 199420500042

Appearances:

Leigh M. Manasevit, Esq., Washington, D.C., for Lorian County Community College.

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 September 10, 1996, 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 Lorian County Community College (LCCC) 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 March 1994 program review of LCCC's Title IV compliance for the award years 1992-93 and 1993-94, contained two unresolved findings, of which the institution only challenged one.See footnote 1[1] The finding at issue in this proceeding is that LCCC failed to recalculate Pell Grant awards for students whose projected enrollment status changed before the student began attendance in all of his or her classes. For this finding, SFAP gave LCCC the option of reviewing the files of all Title IV recipients for the award years at issue or reviewing a random sample of students selected by SFAP. By choosing the latter option, LCCC was informed in the program review report that any liability assessed would then be extrapolated to determine the institution's liability for each award year. SFAP found that LCCC improperly disbursed $65,855 and $48,139 in Pell overpayments in award years 1992-93 and 1993-94, respectively. Total liabilities were calculated by determining the average amount of Pell overpayments for each award year and these amounts were then multiplied by the population of Title IV recipients to determine the projected liability. Based on this formula, SFAP assessed a liability of $574,045.77 for award year 1992-93 and $424,814.58 for award year 1993-94, totaling $998,860.00 (rounded).

LCCC requested oral argument in this matter. Under 34 C.F.R. § 668.116, I may schedule oral argument if I determine that one is necessary to clarify the issues and positions of the parties as presented in the parties' written submissions. I find oral argument is not necessary to further illuminate the finding at issue in this proceeding.

Accordingly, LCCC's request for oral argument is denied. Additionally, SFAP's Motion to Strike Respondent's Exhibits 18 and 19 is denied.See footnote 2[2]

SFAP argues that LCCC had an obligation to recalculate a student's Pell award to reflect only those classes in which the student began attendance when a student failed to begin attendance in all of his or her classes for that payment period. SFAP states that this means that a student must attend at least one day in each of his or her classes. SFAP argues that the regulation governing recalculation of Pell awards is clear, as indicated by the regulation itself and by the Secretary in a 1984 Notice of Proposed Rulemaking. SFAP further states that the Department's guidance in the Student Financial Aid Handbook indicates that recalculation is required when the student failed to begin attendance in all classes. SFAP asserts that it does not allege that LCCC failed to recalculate a student's award after a student began attendance at the institution.

LCCC presents numerous arguments as to why liability should not be imposed in the instant proceeding. First, LCCC argues that the regulations do not contain a requirement to verify student attendance and that recalculation is triggered only when a student's projected enrollment status changes. According to LCCC, the regulations require recalculation of Pell awards only when projected enrollment changes before the commencement of classes. Second, LCCC asserts that SFAP has confused changes in projected enrollment status with changes between projected and actual enrollment status. Third, LCCC states that it did comply with regulatory requirements since all financial aid awards were recalculated on the eighth day of the term to capture any changes in a student's enrollment status. According to LCCC, the recalculation was based on the students' eighth day enrollment file, a computer generated program showing the nuber of hours in which the students were enrolled on the eighth day. LCCC argues that after the eighth day, only changes in actual enrollment could occur since the period of projected enrollment had expired. Fourth, LCCC states the enrollment status of students identified as having received “F”s never changed because in receiving a “F” grade, the students failed to meet the class requirements of academic performance or attendance and therefore, the students had begun attendance in these classes. Fifth, LCCC states that regulatory fairness prevents the imposition of liability because the regulation is vague and unclear as to the meaning of “projected” enrollment status and the circumstances under which attendance becomes an issue. Finally, LCCC asserts that SFAP's position reflects an interpretative rule not a substantive regulation.

In the alternative, LCCC argues that even if the tribunal finds that the students' projected status changed, the change occurred after students began attendance and, therefore, no recalculation was required. LCCC states that according to 34 C.F.R. § 668.22(j), attendance is assumed when a student officially withdraws from the institution. LCCC states that every student listed as “W” filed a formal withdrawal sometime after the seventh day of class. Therefore, according to 34 C.F.R. § 668.22(j), these students are considered to have attended classes up until the date of the withdrawal or a later date if specified by the student.

LCCC also argues that SFAP ignored substantial evidence demonstrating students' attendance including withdrawal forms and other notations on class rosters and grade books. LCCC also asserts that the specific withdrawal forms submitted by the institution indicate prior class attendance due to the reasons given for the withdrawals and/or the dates of the withdrawal forms. LCCC states that due to the high level of responsibility of students who would officially withdraw, it is reasonable to assume that these students would attend class before withdrawing. For three students listed as “W” who were prisoners who had received earned credit, LCCC asserts that the evidence indicates that these students attended class since they would have to have attended 75% of their classes in order to receive earned credit.

Section 34 C.F.R. 690.80(b) sets out the parameters for determining when recalculation of a Pell Grant award is required based on a change in a student's enrollment status. If a student's enrollment status changes from one academic term to another term within the same academic year, the institution shall recalculate the Pell Grant award for the new payment period. 34 C.F.R. § 690.80(b)(1) (1992). If a student's projected enrollment status changes during a payment period after the student has begun attendance in all of his or her classes for that payment period, the institution may but is not required to establish a policy under which the student's award for the payment period is recalculated. 34 C.F.R. § 690.80(b)(2)(i) (1992). If a student's projected enrollment status changes during a payment period before the student begins attendance in all of his or her classes for that payment period, the institution shall recalculate the student's enrollment status to reflect only those classes for which the student actually began attendance. 34 C.F.R. § 690.80(b)(2)(ii) (1992).

The regulation clearly states that when a student fails to begin attendance in all of his or her classes, the institution is required to recalculate the student's award to reflect only those classes for which he or she began attendance. LCCC's argument that the regulation only applies to “projected”, as opposed to “actual”, enrollment status is based on the premise that any changes in enrollment status only apply to a time when the enrollment status is projected (i.e. up until the start of the academic term). This argument is, at best, convoluted. An institution may make a payment of a Pell award to a registered student up to ten days prior to the first day of classes or it may credit a registered student's account up to three weeks before the first day of classes under 34 C.F.R. § 690.78(b) (1992). These payments are made based upon what the student's projected enrollment for the academic term will be. If the student drops some of his or her credits before beginning class, the institution must recalculate the Pell award. Clearly, the change contemplated is the difference between what is projected and what actually occurs (i.e. does the student begin attending classes). The change is not based on a change in enrollment that occurs prior to the commencement of the academic term. Recalculation is required due to changes in enrollment status that occur prior to the start of the academic term and are contemplated under 34 C.F.R. § 690.80(b)(1) (1992).

An analytic distinction can be made, however, between the requirements of 34 C.F.R. § 690.80(b)(2) and how the institution fulfills this requirement. This provision makes a distinction between students who have begun attending classes and those students who have not. According to SFAP, an institution would be required to demonstrate that the student actually attended at least one day of class in each of the classes for which the student registered, in order for the institution not to be required to recalculate Pell awards. If the regulation were applied as the Department argues, the institution would be required to monitor attendance for an indefinite period, conceivably past the drop/add period, to make sure that he or she actually attended at least one day in all his or her classes. This appears to be unduly burdensome. For example, a student drops class(es) at the end of the institution's add/drop period, if the student has actually sat in the class(es) one day, the institution would not have to recalculate the Pell award but, if the student never sat in on the class, the institution would have to recalculate the Pell award.See footnote 3[3] Applying the regulation in the manner articulated by SFAP seems strained. In fact, the Secretary stated that purpose of 34 C.F.R. § 690.80(b)(2)(ii), which allows the institution the discretion to recalculate Pell awards after a student has begun attendance in all classes, was intended to alleviate the administrative burden of tracking student attendance throughout the academic term.See footnote 4[4]

The issue then is how the school fulfills the requirement of 34 C.F.R. § 690.80(b)(2)(ii). It is certainly evident that if an institution had attendance records or grade reports for classes taken that academic term, that student had begun attending classes. However, as stated by LCCC, in a community college such as LCCC, there is no uniform system for keeping attendance nor is there any requirement that an institution have a uniform system of monitoring attendance. Further, the method by which an institution must document that a student began attending classes as discussed in 34 C.F.R. § 690.80(b)(2) is not specified in the regulations. Therefore, I would consider probative any evidence that would demonstrate that a student began attending classes for the academic term. Consequently, it becomes important to lay out LCCC's procedures regarding recalculation of financial aid awards as well as the institution's withdrawal policy.

According to LCCC, its financial aid office initially calculated a student's financial aid award based on the student's enrollment status at the time of registration. The financial aid office then recalculated this award on the eighth day of the term to capture any changes in a student's projected and actual enrollment up until the eighth day of the term. LCCC's recalculation was based on the student's eighth day enrollment file, which is a computer generated program showing the number of hours in which the student was enrolled on the eighth day. However, LCCC also somewhat contrarily states that it recalculated awards on the eighth day of the term to adjust for changes in projected and actual enrollment status whether or not the student began class.

At LCCC, to register for classes for the upcoming term, a student would fill out a plan sheet. If the student dropped a class after registration but before the term began, the student filled out a schedule adjustment form. If a student wanted to drop a class during the first seven days of the term, the student was required to use the institution's drop/add process. The student's transcript would then not reflect the class that had been dropped. A student dropping a class after the seventh day was required to officially notify the institution of the withdrawal and that withdrawal would be reflected on the student's transcript with a “W”. Students whose transcript reflected an “F” meant that the student could have either earned that failing grade for unsatisfactory work and/or poor attendance.

An examination of LCCC's eighth day recalculation policy reveals that this policy alone does not demonstrate that its students began attending classes. This policy does not take into account students who both do not begin attending classes and do not notify the institution that they are withdrawing from some or all of those classes. LCCC concedes this in its Initial Brief when it states that it recalculated awards regardless of whether the student began attending class.

I next looked at whether LCCC's withdrawal policy would demonstrate that a student began attending his or her classes. At LCCC, a "W" would only be recorded on a student's transcript if they officially withdrew from a class on or after the eighth day of the term. LCCC's argument that 34 C.F.R. § 668.22(j) states that attendance is assumed for students who officially withdraw is a misreading of that regulation. Although LCCC cites this regulatory provision, I must first state that due to the implementation of a new refund requirements, 34 C.F.R. § 668.22 was significantly revised. 34 C.F.R. § 668.22(j) was added, and subsequently revised in 1994.See footnote 5[5] Therefore, this provision was not in effect for the program review period. Prior to 1994, the regulatory section dealing with the treatment of refunds merely defined drop out date, not withdrawal date. *See* 34 C.F.R. § 668.22(d) (1992) and (1993). Therefore, on this basis alone, LCCC's argument fails. Assuming *arguendo* that section 668.22(j) applies, it contemplates withdrawal dates for the express purpose of calculating refunds. Additionally, 34 C.F.R
§ 668.22(j) merely states that for students who officially withdraw from the institution, their withdrawal date will be either the date that the student notifies the institution or the date of withdrawal specified by the student. Nowhere does this regulation state that attendance is presumed up until the date of withdrawal and LCCC's argument that SFAP's treatment of "W" students in the instant proceeding is inconsistent with this regulatory provision is rejected.

SFAP counters LCCC's argument by asserting that according to 34 C.F.R. § 668.21(b), an institution has an affirmative duty to document a student's attendance and when it cannot do so, the student is presumed to have withdrawn before his or her first day of class. This section, however, deals with the treatment of Pell funds for a student who withdraws, drops out, or is expelled from the institution entirely before his or her first day of class. This section is not dispositive of the issue before me in this proceeding since it does not answer the question of what would constitute compliance with a method of demonstrating that a student began attendance for purposes of 34 C.F.R. § 690.80(b)(2).See footnote 6[6]

I am convinced that LCCC's withdrawal policy indicates that a student began attending classes for that academic term. According to LCCC's policy, a "W" would not be recorded on a student's transcript if the student had dropped the class prior to the commencement of the term. A student, at his or her own initiative, would have had to withdraw from the class sometime after the seventh day of the academic term. Therefore, I find that LCCC has met its burden under 34 C.F.R. § 668.116(d) regarding all its "W" students.

As well as my finding that for all "W" students LCCC has demonstrated these students attended class, I also note that the supplemental evidence LCCC submitted as to some of these students was credible. LCCC submitted the actual withdrawal forms or class rosters and/or grade reports for some students who were identified as "W" students. Among the list of reasons for withdrawing from class contained on these forms, some indicate that the students dropped the class because it was too difficult, they were academically overloaded, or that the student decided he or she didn't need the class. The dates for these forms also indicate that they were filed well into the academic term. Additionally, LCCC's evidence of rosters/grade books that indicate some attendance by 28 students is also persuasive.See footnote 7[7] Although SFAP states LCCC has not demonstrated that these students were in the sample of students reviewed, these students are listed in the FPRD's sample of students.See footnote 8[8] Finally, LCCC submitted credible evidence that three of the students included in the sample were prison inmates who received "earned credits" at the institution. In order to receive earned credits at LCCC, an inmate must attend 75% of the prison classes.

For all of these aforementioned students, I am persuaded that these students began attending their classes and, therefore, LCCC was not required under 34 C.F.R. § 690.80 to recalculate their Pell awards. LCCC submitted a revised calculation of liability for the 1992-93 and 1993-94 award years, if the tribunal found that attendance was proven for all "W" students. LCCC used the same extrapolation formula used by SFAP in its assessment of liability in the FPRD. Given that I have accepted LCCC's evidence regarding these students, I also adopt LCCC's proposed recalculation of liability. LCCC's recalculation of its extrapolated liability totals $89,949.00 for 1992-93 award year and $74,119.00 for the 1993-94 award year.See footnote 9[9]

ORDER

On the basis of the foregoing, it is hereby ORDERED that Lorian County Community College pay to the U.S. Department of Education the sum of $164,068.00.

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Judge Richard I. Slippen

Dated: July 22, 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]*LCCC did not appeal Finding # 10 which held that the institution failed to resolve discrepant information in a student's application for financial aid prior to the disbursement of Title IV funds to that student.*

Footnote: 2 [2]*See In re Baytown Technical School, Inc., Docket No. 91-40-SP (January 13, 1993) (affirmed by the Secretary, April 12, 1994).*

Footnote: 3 [3]*Resp. Ex. 19 (SFAP Advisory on Recalculation of a Federal Pell Grant Award dated March 30, 1997) illuminates this conundrum. In this advisory, SFAP states that it is changing its guidance regarding the discretionary recalculation of Pell awards under 34 C.F.R. § 690.80(b)(2)(i). Now, an institution will be able to include a provision that it will recalculate only if the change in enrollment status occurs before a set point in time (e.g. end of the add/drop period).*

Footnote: 4 [4]*See 50 Fed. Reg. 10710 at 10713 (March 15, 1985).*

Footnote: 5 [5]*See 59 Fed. Reg. 61180 (November 24, 1994).*

Footnote: 6 [6]*I note that SFAP has not alleged that LCCC failed to make refunds for students who withdrew entirely from the institution.*

Footnote: 7 [7]*See Resp. Ex. 16 (revised).*

Footnote: 8 [8]*See ED Ex 1.*

Footnote: 9 [9]*These amounts are rounded up to the nearest whole dollar.*
