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

In the Matter of **Docket No. 97-76-SP**

SOUTHWESTERN COLLEGE,

Student Financial Assistance Proceeding

Respondent. PRCN: 199520712190

Appearances:

Milton Kerstein, Esq., Kerstein & Kerstein, Newton, Massachusetts, for Southwestern College.

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

Before:

Richard F. O'Hair, Administrative Judge

DECISION

On April 14, 1997, the office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a Final Program Review Determination (FPRD) to Southwestern College (Southwestern). The FPRD contained a number of findings identifying discrepancies in Southwestern's operation of the student financial assistance programs authorized under 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*. Southwestern exercised its right to appeal two of the findings of this FPRD, Findings No. 1 and 4, and requested a hearing to present an argument in support of its position on these matters. Southwestern does not contest its $10,825 liability in a third finding, Finding No.10, but asks the tribunal to apply the estimated loss formula to the calculation of its liability as it relates to any Stafford and Perkins loan fund discrepancies identified in Findings No. 4 and 10.

In Finding No.1, SFAP alleges that Southwestern did not follow regulatory requirements for awarding Federal Supplemental Educational Opportunity Grants (FSEOG) to its students because it failed to prioritize the funds by first giving them to Pell Grant recipients with an exceptional need, thereby improperly awarding $48,838 in FSEOG funds for the 1992-93 and 1993-94 award years. Finding No. 4 alleges that Southwestern failed to implement a fair and equitable refund policy with regard to six students who withdrew from school prior to the completion of their study during the 1994-95 award year and, thus, owes refunds of $3,326. Southwestern denies any liability with regard to these two findings. In a proceeding such as this, the institution bears the burden of persuasion to show that its expenditures were proper and that it complied with program requirements. 34 C.F.R. § 668.116(d)(1).

The regulations, under the heading of “Selection of students for FSEOG awards,” provide the following guidance:

> In selecting among eligible students for FSEOG awards in each award year, an institution shall select those students with the lowest expected family contributions who will also receive Federal Pell Grants in that year. 34 C.F.R. § 676.10(a)(1).

The statutory basis for this provision is found in Section 413(c)(2) of the Higher Education Act, which requires that these supplemental grants be awarded to students with exceptional need (defined within the statute as students with the lowest expected family contributions at the institution), with a priority given to students who have received Pell Grants. 20 U.S.C. 1070b- 2(c)(2)(A) and (B). The expected family contribution, generally, is the amount which the student and the student's family may reasonably be expected to contribute toward the student's postsecondary education for that academic year. 34 C.F.R. § 690.2(c).

Program reviewers for SFAP discovered that for the award years under review, Southwestern applied a policy by which it reserved more than two-thirds of its FSEOG funds for students who participated in its athletic programs and who were also Pell Grant recipients. Specifically, during the 1992-93 award year, eight Pell Grant recipients with expected family contributions ranging from $146 to $1,361 received $14,315 in FSEOG awards. Meanwhile, 94 Pell Grant recipients with expected family contributions of $0 received no FSEOG awards. Similarly, in the 1993-94 award year, 36 Pell Grant recipients with expected family contributions ranging from $3 to $2,099 received FSEOG awards whereas 85 Pell Grant recipients with expected family contributions of $0 received no FSEOG awards.

Southwestern does not dispute it had a policy of making these awards to students in its athletic programs, but contends that the eligibility language contained in 34 C.F.R. § 676.10(a)(1) permitted this because it is not as definitive or precise as SFAP avers. The institution says that the interpretation which should be given to the critical word in that section, “lowest,” when referring to expected family contributions, should be one of generality; it should be viewed in a comparative sense, one that is less exact than what SFAP would have it. To hold otherwise, Southwestern argues, would amount to a prohibited implementation of a regulation without it first having been duly promulgated. Additionally, Southwestern argues that if SFAP limits it to first making FSEOG awards only to those students with an expected family contribution of $0, such a holding would be contrary to the well recognized principle that institutions are granted wide discretion in the assembling and timing of the student aid package. It says this principle is reinforced by the fact that institutions can take into consideration other financial resources that have been made available to the students, such as scholarships and grants provided by private parties, states, and the institution.

While Southwestern recognizes that the purpose of the FSEOG Program is to provide grants to exceptionally needy students, it inappropriately applies this criteria in a somewhat subjective manner without documenting the means by which it is applied or supplying any authority for doing so. The statute and implementing regulation make references to “students with an exceptional need” and those with the lowest expected family contribution amounts. From the evidence before me, when Southwestern awarded FSEOG awards to Pell Grant recipients with expected family contributions of one dollar or more and denied the same category of awards to students with $0 of expected family contributions, it did not adhere to the requirement that these awards go to students with an exceptional need, i.e., those with the lowest expected family contributions. The institution may have been aware of other financial resources, such as other grants or scholarships, that would have diminished the financial needs of its FSEOG non-recipients, in favor of those with higher expected family contributions; however, those circumstances were not presented to either the program reviewer or to me. Without any qualifiers in the language of the regulation, “lowest” is an absolute term which means there are none lower - - absolute bottom of the group. SFAP is not establishing a new standard by applying the basic meaning of the word “lowest” as it applies to expected family contributions and, therefore, has not attempted to improperly implement a new regulation as Southwestern has suggested. The statute, regulation, and departmental guidance all make this same point that FSEOG awards must be made to students with the absolute lowest expected family contributions, yet Southwestern somehow misconstrued this fairly evident concept. Southwestern should not have made FSEOG awards to students who had expected family contributions of as little as one dollar, as long as there were award non-recipients with no expected family contributions.See footnote 1[1] Accordingly, it must reimburse the Department for the $48,838 of FSEOG awards it made to the 44 students who, albeit had a financial need, cannot meet the statutory requirement that

they be students with exceptional need. 20 U.S.C. § 1070b-2(c)(2)(A) and (B).

Effective with an April 29, 1994, change to the regulations, all institutional participants in Title IV programs were required to establish a fair and equitable refund policy. Pursuant to this policy the institutions must issue a refund of unearned tuition, fees, and other charges to a student who received Title IV assistance if the student did not register for the period of enrollment for which it was charged, withdrew, dropped out, was expelled, or otherwise failed to complete the program on or after the first day of the program. 34 C.F.R. § 668.22(a)(1). Apparently these new refund provisions were somewhat confusing and burdensome to institutions and many were not complying. This prompted the Secretary, in his comments with regard to the change to § 668.22, to explain to participating institutions that in determining whether the Department would pursue administrative sanctions against an institution that failed to pay refunds in accordance with the new regulations, the Department would examine the facts and make a determination of whether such an institution could demonstrate a good faith effort to comply with these new provisions or whether the institution sought to avoid making the refunds by ignoring the required calculations. 59 Fed. Reg. 61,161 (November 29, 1994).

Southwestern made appropriate revisions to its refund policy following advice given during the program review and it re-calculated all refunds. It concedes that out of its 700 students for the 1994-95 award year, it was required to compute a refund for 30 students, and of that group it owed a refund to only six students. The total amount of the refund liability is $3326; only $100 is due the Department and the remainder is a liability owed to lenders for Federal Family Education Loans secured by students. Southwestern explained that in attempting to implement the regulation, it changed its refund policy three times after consulting Department materials and personnel, and it truly believes that this evidences its exercise of a good faith effort to comply with the new provisions. Accordingly, Southwestern explains that this exercise of good faith entitles it to a "safe harbor" status which would prevent the Department from demanding the payment of refunds of $3326 on behalf of the six students in question.

Southwestern has no legitimate defense to the non-payment of these refunds. When the Secretary expressed the view that in deciding whether to initiate sanctions against an institution the Department would take into consideration whether an institution had demonstrated a good faith effort to implement a fair and equitable refund policy, the sanction the Secretary referenced was whether or not the Department would initiate a fine, limitation, suspension, or termination proceeding pursuant to Subpart G of Title 34, Part 668. It is unreasonable to suggest that the Department would consider forgiving the indebtedness which resulted from the application of the refund policy. I believe it is clear from reading the comments in the Federal Register that the Secretary proposed to exercise leniency only with regard to the decision of whether to seek administrative sanctions against the institutions for their failure to pay refunds, and not whether the institution was required to pay any refunds it calculated under its revised refund policy. The requirement that an institution repay a confirmed refund debt, by itself, cannot be considered to be a departmental sanction. See footnote 2[2] Southwestern is not being punished for its prior misapplication of its fair and equitable refund policy by a decision now that it must pay refunds of $3326.

In the final of its three contested issues, Southwestern asks that the Department compute the amount of its FPRD liabilities to lenders by means of the estimated loss formula. This tribunal previously has determined that this formula will not be applied to liabilities stemming from Perkins loans, and that decision will not be disturbed here. *In re Christian Brothers University*, U.S. Department of Education, Dkt. No. 96-4-SP (Jan. 8, 1997). As to the liability originating from the remaining loans, it is well-settled that the formula will not be used to assess liability for fewer than ten loans. *In re Parks College*, U.S. Department of Education, Dkt. No. 95-92-SP (Nov. 7, 1995). In the present case we are dealing with less than ten specifically identifiable loans. Therefore, Southwestern should be ordered to purchase these loans from the current holders, rather than attempting to calculate an estimate of the loss to the Department.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Southwestern College:

a) Refund $48,838 to the Department for improperly awarded Federal Supplement Equal Opportunity Grants (Finding No.1);

b) Refund $100 to the Department for a Pell Grant; refund $3226 to the current holders of six promissory notes (Finding

No. 4);

c) Refund $2400 to the Department for a Pell Grant; refund $1800 to the Department for a Perkins Loan; and refund $6240 to the current holders of two promissory notes (Finding No. 10).

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Judge Richard F. O'Hair

Dated: May 12, 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] *Although not a factor in my decision, but one I find unsettling is that the majority of the improperly awarded FSEOG funds went to students who previously had been awarded an institutional grant which was later replaced by an FSEOG award. This means the students did not benefit from the FSEOG, as the dollar amount of their financial aid package remained the same. Only the institution benefitted because it was able to recoup the amount of the grant and save it for another occasion.*

Footnote: 2 [2] *See In re Travel University International, U.S. Department of Education, Dkt. No. 94- 99-SP (Feb. 3, 1995).*