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

In the Matter of **Docket No. 98-47-SP**

DONNELLY COLLEGE, Student Financial Assistance Proceeding
Respondent. PRCN: 199720713466

Appearances: Jeanne Gorman Rau, Esq., and Joseph F. Reardon, Esq., Kansas City, KS, for Respondent.

Stephen M. Kraut, 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

Donnelly College (Donnelly) is a two-year community college located in Kansas City, Kansas. Donnelly's mission is to serve an economically and educationally disadvantaged student population. On February 11, 1998, 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 period of July 1, 1989, through March 10, 1998, Donnelly violated the institutional eligibility requirements of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. §§ 1070 *et seq*, 1088 *et seq*, and its implementing regulations.

Findings 1 and 2 are not before me, as SFAP did not seek liability for these findings. Additionally, in its reply brief, SFAP stated that Findings 5, 15, and 16 had been resolved and that no liability is now sought for these findings.

Finding No. 3: Remedial Coursework Requirements Not Met

To be eligible to receive Title IV financial aid assistance, an eligible student must be enrolled in an eligible program. 34 C.F.R. § 668.7(a)(1)(i). To be an eligible program, the educational program must lead to a degree, or be at least a two-year academic program that is acceptable for full credit towards a bachelor's degree, be at least a one year training program that leads to a certificate, degree, or other recognized educational credential that prepares a student for gainful employment in a recognized occupation. 34 C.F.R. § 668.8. Students attending an eligible program are allowed to receive Title IV assistance for remedial coursework that is a component of an eligible educational program. 34 C.F.R. § 668.20.

The FPRD charges that Donnelly's Basic Education for Life-Long Learning (B.E.L.L.) Program is an ineligible program. SFAP asserts that students enrolled in the B.E.L.L. program are not enrolled in a degree program. According to SFAP, the B.E.L.L. program is a stand-alone, remedial coursework program. Donnelly asserts that the B.E.L.L. program was established to aid students in their academic development in order to pursue courses leading to a college degree. According to Donnelly, the B.E.L.L. program offered remedial coursework for students who have been educationally and economically deprived. Donnelly argues that its B.E.L.L. program has always been an integral part of the associate degree program at the institution. Donnelly states that students enrolled in B.E.L.L. were considered students enrolled in Donnelly College and that there was no distinction between students taking B.E.L.L. courses and students taking other Donnelly courses. Donnelly also states that students take B.E.L.L. courses to develop the necessary academic skills to take credit courses.

In its 1991-92 _1995-96 catalogs, Donnelly described the program as follows:

> In the B.E.L.L. program, students will have the opportunity to develop basic skills in English, reading, and mathematics in preparation for college. Students over 18 years of age without a high school diploma or General Educational Development (G.E.D.) will have the opportunity to prepare for the G.E.D. test and develop skills for further academic study. Courses offered in this program are non-credit college prepatory [(CP)] courses. Credits for CP course work do not apply to any degree.

In its 1996-97 catalog, Donnelly changed the description of the B.E.L.L. program:

> In the B.E.L.L. program, students have the opportunity to earn college credit in computer skills, study skills, and career planning. Students also have the opportunity to increase basic skills in English, reading and mathematics in preparation for college.

Donnelly also began offering three for-credit college courses in addition to its three non-credit college basic skills courses. In the catalog description of its non-credit courses, Donnelly continues to state, as it did in prior years' catalogs, that these courses are intended to provide students with the basic skills for successful performance in college credit courses.

Donnelly's B.E.L.L. program is not, on its face, an ineligible program. Institutions are allowed to offer remedial coursework as a component of an eligible program. Further, students are allowed to receive Title IV assistance for up to 30 credits in remedial coursework. SFAP argues that since Donnelly offered additional remedial coursework other than the B.E.L.L. courses, the B.E.L.L. program's courses could not be considered the remedial component of Donnelly's eligible associates degree program. However, whether or not Donnelly offers other remedial courses does not demonstrate that the B.E.L.L. courses could not be eligible remedial courses. Clearly, Donnelly can legitimately offer several remedial courses and the fact that Donnelly has remedial non-credit courses listed in its catalog that are not B.E.L.L. courses does not demonstrate to me that the B.E.L.L. courses were not considered part of Donnelly's remedial courses for its associates degree program.

SFAP next charges that B.E.L.L. students could not have been admitted to Donnelly College's eligible program because they were not high school graduates or had not received their G.E.D. certificates. However, Donnelly's general admission policy states that students may be admitted to Donnelly on the basis of an ATB test for students participating in the B.E.L.L. program. Donnelly stated that students admitted to B.E.L.L. were considered admitted to Donnelly. Further, Donnelly asserted that although successful completion of the G.E.D. served as evidence that a student was prepared to take credit classes at Donnelly, this was not used as a criterion for admission to Donnelly's programs as Donnelly was authorized to admit students on three bases: high school diploma, G.E.D., or ATB.See footnote 1

I have no reason to dispute the institution's reasonable articulation of its admission policy. The B.E.L.L. program was intended to assist students in the successful pursuit of college credit coursework. To that end, Donnelly's B.E.L.L. program served a high-risk educationally disadvantaged student population. Although SFAP states that it is evident from the low number of students that did not continue on to receive associate degrees at Donnelly that the program was not an eligible program, I do not find this to be the case. It seems reasonable to me that serving a high-risk student population, as Donnelly does, may meet with limited success. Nor do I find the space on student applications where students indicate whether they plan to pursue a degree at Donnelly particularly probative. Many students checked that they did not know, some checked that they were pursuing degrees at Donnelly, and others answered no.See footnote 2 It is clear that the myriad of responses identified by SFAP cannot be used to determine the purpose of Donnelly's B.E.L.L. program as students may have been conveying some other intention such as the fact that they planned to complete their degrees elsewhere, or that they were unsure of their future plans. Nor do notations on a student's file that he or she is a B.E.L.L. student indicate anything other than that the student was taking remedial coursework.

In a case similar to the instant proceeding, SFAP charged that a junior college was offering an ineligible

program titled “6-BA” in which the institution enrolled students without high school diplomas or the equivalent in order for those students to qualify for acceptance into the armed services by taking six credits of college courses. *See In re Parks College*, Docket No. 95-92-SP, U.S. Dep't of Educ. (November 7, 1995). Parks College asserted that the “6-BA” program was a component of one of its associates degree programs. The institution's admission policy stated that it admitted students based upon a high school diploma, GED certificate, or a placement test. The tribunal found that this program was eligible since students were taking six courses in a fully accredited and approved program. The tribunal rejected SFAP's argument that the 6-BA students were not eligible because most if not all of them were not high school graduates as students could be admitted to the institution based upon a placement test.See footnote 3

As this tribunal did in Parks College, I too reject SFAP's argument. Donnelly was permitted to enroll students on the basis on an ATB test. Further, Donnelly articulates that students were considered admitted to Donnelly College and were treated as regular students. It was only at oral argument that counsel for SFAP touched on what may have been a more important allegation by articulating that students admitted to Donnelly's B.E.L.L. program were ineligible because they could not qualify for admission to Donnelly's eligible associates degree program.See footnote 4 Therefore, I do not think it fair to Donnelly that SFAP altered the nature of its finding at such a late date. More importantly, I have determined that Donnelly has met its burden in demonstrating that its B.E.L.L. students were considered admitted to Donnelly's eligible program

It is important to note that the B.E.L.L. program does not qualify as an eligible stand-alone program. In its 1996-97 catalog, Donnelly changed its description of the B.E.L.L. program to a one-year certificate program. The B.E.L.L. program does not, however, qualify as a one year training program that leads to a certificate, degree, or other recognized educational credential that prepares a student for gainful employment in a recognized occupation. 34 C.F.R. § 668.8(c)(3). This tribunal has previously held that a program that is structured to prepare students for gainful employment in a recognized occupation should prepare students for gainful employment in a specific occupation. *In re Beth Medrash Eeyun Hatalmud*, Docket No. 94-45-ST, U.S. Dep't of Educ. (Decision Upon Remand) (Apr 23, 1996). Donnelly's B.E.L.L. program offers courses in remedial reading and remedial math as well as one computer class that students can take for credit. The program does not prepare students for employment in a specific occupation; it merely lays the foundation for college credit courses. Therefore, the B.E.L.L. program does not qualify as a stand-alone eligible vocational program.

Finding #4: Ability to Benefit Testing Requirements Not Met

Section 484(d) of the HEA states that to be eligible to receive Title IV assistance, a student who does not have a high school degree or its recognized equivalent, shall take an independently administered examination and shall receive a score, specified by the Secretary, demonstrating that such student can benefit from the education or training being offered. 20 U.S.C. § 1091(d)(2) (1992). Section 484(d) was enacted in the Higher Education Technical Amendments of 1991, and became effective in 1992.

In the FPRD, SFAP charges that Donnelly improperly administered ability to benefit (ATB) tests. More specifically, SFAP asserts that the test was not independently administered by a test administrator; that certain students had ATB scores older than 12 months before they received Title IV assistance; that certain student files did not contain ATB documentation; that some tests lacked dates; and that one student had a test score below the cutoff for Title IV eligibility.

Donnelly asserts that the regulation promulgated under the Higher Education Technical Amendments were not in effect until the 1996-97 award year. Although the Secretary published a notice in 1990, which provided guidance for the administration of ATB tests, Donnelly argues that this notice did not define “test administrator” or the term “administer.” Donnelly argues that its testing center, although it employs Donnelly staff, is independent of its admissions office. Donnelly argues that it complied in full with the instructions offered in the Department's 1990 Notice and is thereby entitled to “safe harbor”. Donnelly also states that the regulation requiring students to achieve a passing score within 12 months before the date the student initially received Title IV assistance was not effective until 1996. According to Donnelly, the Department cannot assess liability for any

periods prior to the 1996-97 award year. Finally, Donnelly asserts that even if it violated duly promulgated regulations, its violation was *de minimus* and does not warrant the imposition of liability.

SFAP went through several revisions to its assessment of liability under this finding. SFAP now seeks recovery for Students 1, 6, 14, and 29 for the 1993-94 award year, for Student 12 for the 1994-95 award year, for Student 6 for the 1995-96 award year, and Students 4 and 8 for the 1996-97 award year.See footnote 5 SFAP alleges that Donnelly failed to provide documentation of ATB scores for these remaining eight students and asserts that a total of $5,156.00 was misspent under Finding # 4.

As an initial matter, I find that Donnelly College was subject to the ATB requirements prescribed by statute. Although the Title IV regulations were not revised to reflect the changes in the law until 1996, Donnelly was still obligated to follow the statutory requirement. Further, Donnelly does not claim it was unaware of the requirements of ATB testing as it was communicated to institutions via various Departmental notices. Donnelly seeks a waiver of its liability for failure to fully comply with the 1991 amendments claiming its violations were *de minimus*. I lack the authority to grant a waiver or otherwise excuse this liability. Therefore, Donnelly remains liable for its failure to document the ATB scores of the students at issue in this finding.

Finding #6: Failure to Use Most Fair and Equitable Refund Policy

As of July 23, 1992, an institution that participates in the Title IV programs is required to utilize a fair and equitable refund policy. 20 U.S.C. § 1091b(a); 20 U.S.C. § 1088. To be fair and equitable, an institution's refund policy must provide a refund in an amount that is the largest of (1) the requirements under State law; (2) the requirements of the institution's approved accrediting agency; or (3) the *pro rata* refund formula for first-times students as provided in 20 U.S.C. § 1091b(b).

SFAP charges that Donnelly used the refund policy of its accrediting agency, the North Central Association of Colleges and Schools. SFAP contends that Donnelly failed to receive approval by the Secretary to use its accrediting agency's refund policy. According to SFAP, Donnelly's file review uncovered liabilities of $50,455 in Pell funds, and $1,462 in SEOG funds. SFAP further states that liabilities were reduced to a total of $35,144 because liabilities for some of the students at issue in Finding #6 were assessed under other findings in the FPRD. Donnelly states that it made a good faith effort to comply with the Department's complex and changing *pro rata* refund requirements.

This tribunal has held that the *pro rata* refund requirements are clear and unambiguous. *See In re Blaine Hair School*, Docket No. 94-129-SP, U.S. Dep't of Educ. (Jan. 31, 1995). Donnelly admits it failed to comply with these requirements because it used an accrediting agency's refund policy that was not approved by the Secretary. Donnelly states that its error was inadvertent and done without ill motive and asked that it be relieved of liability. Although Donnelly asked to be excused for its error, the purpose of Subpart H proceedings is to assess liability for misspent Title IV funds. Subpart H proceedings are not intended to punish schools. Consequently, Donnelly's motive in committing this violation of Title IV statutory requirements is irrelevant to my determination of liability for this finding. *See In re Delta Beauty College*, Docket No. 95-46-SP (Nov. 22, 1995). Therefore, Donnelly remains liable for its failure to implement a fair and equitable refund policy.

Finding #7: Incorrect Refund Calculation

An institution is required to calculate refunds in accordance with the *pro rata* refund policy. 20 U.S.C. § 1091b(a); 20 U.S.C. § 1088. SFAP and Donnelly agreed that almost all of the liability for this finding duplicated liabilities assessed under Finding #6, except for $61.00 assessed for one student. Accordingly, there is no dispute related to this finding. Thus, Donnelly remains liable for $61.00.

Finding #9: Pell Grant Expenditures Differ From Program Authorization

Under 34 C.F.R. § 690.83(a), an institution must submit to the Secretary all student aid report payment vouchers for a given award year by September 30th following the end of the award year. Donnelly admits that it

failed to submit its payment vouchers in accordance with this regulatory requirement. Therefore, Donnelly remains liable for $699 assessed for this finding.

Finding # 12: Accounting Records Not Reconciled

An institution is required to maintain current financial records which reflect all Title IV program transactions. 20 U.S.C. § 1094(a)(3); 34 C.F.R. §§ 668.14(b)(4), 675.l9, 676.19, 690.81. Under this finding, SFAP charges that during the 1993-94 award year Donnelly reported $7,426 in Title IV expenditures and for 1995-96 award year, $1,915 in Title IV expenditures, that it could not document. Donnelly does not dispute that it incorrectly reported Title IV expenditures. Rather, Donnelly asserts that its violations were *de mimimus*. Additionally, Donnelly asserts that as SFAP admits that Donnelly under reported $1,181.00 in expenditures for the 1993-94 and 1995-96 award years, the assessment of liability for this finding should be reduced by that amount.

Donnelly's failure to maintain proper fiscal records violates Title IV requirements. Without documentation of its expenditures, the Department has no means of verifying the appropriateness of such expenditures. This tribunal had long held that an institution is required to repay Title IV expenditures that cannot be documented. *See In re Macomb Community College, Docket No. 91-80-SP (May 5, 1993)*. However, this tribunal has also held that an institution is only liable for the actual harm its violations have incurred. *Id.* Although SFAP reduced Donnelly's liability in the FPRD because Donnelly did not claim all of the administrative cost allowance to which it was entitled, it did not reduce its liability for the expenditures the institution under reported. I see no reason why Donnelly's liability for this finding should not also be reduced by the amount it under reported. Therefore, Donnelly remains liable for $8,160.

Finding #13: EDPMS Cash On Hand Not Documented

An institution that participates in the Title IV programs must provide documentation of its cash on hand in its Department of Education Payment Management System (EDPMS). 34 C.F.R. §§ 668.23, 675.19, 690.83. According to SFAP, the Department monitors an institution's cash on hand through the Education Payment Management Summary (EDPMS) report and the Monthly Electronic Expenditure Reporting System (MEERS) report. SFAP alleges that Donnelly has failed to provide documentation to support a $42,477 cash on hand balance in its EDPMS account from March 1991 through January 1997.

Donnelly states that prior to August 13, 1991, it consistently had received documentation from the Department confirming that it maintained no excess cash and the institution's own audits, conducted by outside auditors, also did not identify a cash on hand problem. Then, on August 13, 1991, Donnelly received a letter from the Department indicating that it had a cash on hand balance of $56,204.20. Donnelly asserts that the Department did not explain how the discrepancy arose and that the Department had no idea in which Title IV program the excess cash occurred. Donnelly argues that although it has the burden of proving that it properly expended Title IV funds, it is the Department's obligation to establish the liability amount under 34 C.F.R. § 668.116(d). Further, Donnelly argues that the original $56,204.20 balance was inexplicably reduced to $42,477.93, the amount at issue in the FPRD. Finally, Donnelly asserts that this matter was resolved due to an agreement with SFAP to disburse the excess $42,477.93, with the proviso that SFAP would adjust the institution's cash on hand balance in the event Donnelly could locate documentation of any expenditure errors.

SFAP counters that Donnelly has failed to provide any supporting documentation that it disbursed its excess cash. SFAP previously stated that even if Donnelly has disbursed these excess funds in other programs, a violation of Title IV regulations had occurred and liability should be assessed. At oral argument, however, SFAP stated that if Donnelly provided documentation of the legitimate expenditure of the excess cash in other programs, the cash on hand problem would disappear.See footnote 6 SFAP states that Donnelly has failed to provide such documentation.

The record shows that in a January 13, 1997, letter, the Department suspended Donnelly's ability to draw down funds pending a resolution of the excess cash situation.See footnote 7 This letter stated in order for Donnelly to

have the hold removed, Donnelly should submit a statement that the excess cash balance reflected on line 6 of the EDPMS 272 report had been disbursed or refunded. On February 5, 1998, Donnelly submitted a letter to the Department indicating that it had altered line 6 on its EDPMS 272 report and that the $42,477.93 in excess cash had been disbursed. Donnelly also submitted a copy of said report to this tribunal.See footnote 8 At some subsequent point, the Department removed the hold on Donnelly's ability to draw down federal funds. Given the fact that the Department placed a hold on Donnelly's account pending the resolution of this matter (i.e. the disbursement of the excess cash), and that this hold was lifted, and that SFAP has made no other allegation regarding the propriety of this disbursement, I find that Donnelly has met its burden of demonstrating that it disbursed these funds appropriately.

FINDINGS

1. Donnelly's B.E.L.L. program is an eligible component of its associates degree program.
2. Donnelly failed to document ATB scores for eight students during the program review period.
3. Donnelly failed to implement a fair and equitable refund policy.
4. Donnelly incorrectly calculated a refund for one student.
5. Donnelly failed to properly maintain fiscal records.
6. Donnelly met its burden in demonstrating that it properly disbursed its excess cash on hand.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Donnelly College pay to the U.S. Department of Education the sum of $49,220.

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Judge Richard I. Slippen

Dated: May 4, 1999

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 See Resp. Ex. 4 at 3.

Footnote: 2 See SFAP Exs. 3 and 4.

Footnote: 3 The judge also found that it was unfair to the institution as SFAP failed to raise this allegation in the FPRD.

Footnote: 4 See Transcript of Oral Argument at p. 52.

Footnote: 5 SFAP resolved liabilities for students 1through 16 for the 1995-96 award year, and for students 1 through 17 for the 1996-97 award year

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Footnote: 6 See Transcript of Oral Argument at p. 64.

Footnote: 7 See Resp. Ex. 173-1.

Footnote: 8 See Resp. Ex. 173-2.
