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

In the Matter of	**Docket No. 00-56-SP**
WRIGHT BUSINESS SCHOOL,	Student Financial Assistance Proceeding
Respondent.	PRCN: 199940716644

Appearances: Ronald L. Holt, Esq., Watkins, Boulware, Lucas, Miner, Murphy & Taylor, Kansas City, Missouri, for Wright Business School.

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

Before: Judge Ernest C. Canellos

DECISION

Wright Business School (Wright) is a private, non-profit institution of higher education located in Overland Park, Kansas, offering courses leading to diplomas in a number of administrative fields. Wright is accredited by the Accrediting Council of Independent Colleges and Schools and it participates in the various federal student assistance programs that are authorized under the provisions of Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq*. The office of Student Financial Assistance Programs (SFAP) is the cognizant office within the United States Department of Education (ED) administering these programs.

On August 23 - 27, 1999, reviewers from SFAP's Kansas City Regional Office conducted an on-site program review to verify Wright's compliance with Title IV requirements for funding for the 1996-97, and 1997-98 award years. After the issuance of a report of the errors discovered during the review and considering Wright's comments thereon, SFAP issued a final program review determination (FPRD) on August 17, 2000, finding that Wright improperly calculated refunds for students who had withdrawn from Wright prior to completion of their respective programs. SFAP demanded that Wright return $151,950 to ED for this violation.[1] By letter dated April 3, 2000, Counsel for Wright filed an appeal.

In this proceeding, Wright has the burden of proving that its expenditures of Title IV funds were correct. 34

C.F.R. § 668.116(d). The sole issue that I must resolve in this proceeding is, whether Wright properly treated the cost of books and equipment purchased from its bookstore when it calculated refunds for students who had withdrawn prior to the completion of their program. Wright treated such book charges as non-institutional charges and, as a consequence, excluded their costs when it calculated the refunds due. SFAP, to the contrary, claims that such book charges are institutional charges and must be included when calculating refunds.

During the 1996-97 and 1997-98 award years that were in question during the program review, 20 U.S.C. § 1091b (c) provided, in part:

> [T]he term "pro-rata refund" means a refund by the institution to a student attending such institution for the first time of not less than that portion of the tuition, fees, room and board, and *other charges assessed the student by the organization* equal to . . . . (Emphasis added)[2]

At the same time, 34 C.F.R. § 668.22 was the operative regulation governing refunds. It required an institution to establish a fair and equitable refund policy under which it must refund unearned tuition, fees, room and board, and other charges when a student withdraws prior to completion of his/her educational program. In order to qualify as fair and equitable, the refund policy must afford the largest of the amounts arrived at by application of: the requirements of state law; the standard established by the institution's accrediting agency; or the amount resulting from the application of a pro-rata refund calculation. 34 C.F.R. § 668.22(b). In the present action, there is no dispute between the parties – the proper refund in this case is the pro-rata refund and, except for the treatment of book costs, the refunds as calculated by Wright were, apparently, correct.[3]

The evidence of record indicates that Wright operated a bookstore at the school where students could purchase their required books. Wright's published book return policy was that once purchased and used, the books could not be returned.[4] Wright asserts that the purchase of books from its bookstore was a matter of convenience for the students; the students could purchase books from alternate sources; such sources were readily available; some students purchased their books elsewhere or got them from previous students and they were not charged book fees by Wright; and, the prices Wright charged were competitive, if not less than the alternate sources. On the bases of such factual presentation, Wright claims that since the books were provided to students as a convenience, the regulations and SFAP's previous guidance allowed the resulting costs to be treated as non-institutional charges and exempt from the refund calculation. Wright's argument also relies on the specific wording of the regulation governing pro-rata refunds, 34 C.F.R. §668.22(c)(1). Therein, the institution is required to refund a portion of tuition, fees, room, board and other charges "assessed" the student. Wright argues that the word "assessed" connotes a forced situation, whereas, here the student voluntarily incurred the expenditure for books for the student's own convenience.

In its own presentation, SFAP does not dispute the premise that if a student chooses to purchase books from the school solely as a convenience then the book charge does not have to be included in a pro-rata refund calculation. However, SFAP insists that the institution must prove that the student had a real and reasonable opportunity to purchase the books elsewhere and that such evidence must be included in the student's file. Included therein is the requirement that the students be notified in writing that books were available elsewhere and that such books could be purchased there. Wright, vehemently objects that such a requirement applies to this case because proof that a student was advised that the purchase of books from the school was optional and that such books were reasonably available did not previously exist and was only added as a requirement by an SFAP letter distributed in September 1999. Clearly, that date post-dates all of the findings in this proceeding. Wright also claims that when it initiated its policy regarding the treatment of books, it contacted a member of SFAP's staff and received advice to the effect that their treatment of book costs was allowable. Although that official claimed that he did not remember such a conversation, Wright was able to provide copies of written advice from SFAP to other schools that were contemporaneous with and mirrored the advice it had received. Wright received the letters recently from SFAP as part of a request under the Freedom of Information Act. It claims the letters bolster its claim that the advice they relied upon earlier was the consistent advice provided by SFAP at the time and that SFAP's newly announced interpretation of the subject is different.

In a nutshell, Wright's real argument is that ED's interpretation of the term "assessed" is a changing and

evolving one that was not clear before 1999. Hence, it argues that there is a due process deprivation because such definitive guidance is being applied retroactively. I do not believe that Wright challenges ED's view of the statutory provision containing the word "assessed." Instead, Wright says that the interpretation is not an apparent one and that ED did not make it clear until after the period in issue.

During the briefing process, in an attempt to satisfy SFAP's concerns relative to proof that students had a real opportunity to purchase textbooks elsewhere, Wright presented sworn statements from individuals who acted as Admissions Counselors during the review period, attesting to the fact that they advised students during their admissions interview that they could purchase books from any of the available sources. These statements were consistent with other evidence that was included in the record. It is significant to note that, although, SFAP argued that Wright's evidence as to this issue was insufficient, it presented no evidence itself to rebut such claims.

It is abundantly clear that the refund policies required by the Title IV regulations seek to return to the student, or the government if it provided the funds, a portion of the funds paid to the institution to educate an eligible student. The institution retains the amounts that it earned but must return the unearned portion to the appropriate party. Within this scheme, each party is treated fairly and neither is obliged to pay a penalty. It is against this backdrop that I must decide the issues in this case. Of primary importance it seems to me is the question of whether the student had a real option as to where he/she purchased books. SFAP points out that almost all the students purchased their books from the school, therefore, there was no real option available. It seems to me that such argument is specious. If books are available from various sources, one of which is the school, and the prices charged are competitive, then by virtue of the convenience factor alone, I would be surprised if any student purchased books elsewhere.[5] I don't believe that it is the intent of the regulations to, in any way, discourage such conveniences. It is interesting to note, however, that, although SFAP is dissatisfied with Wright's evidence that books were available from alternate sources at competitive prices, it could provide no evidence to the contrary.

The Secretary has recently been presented with an analogous case for his disposition. *See, In re Canella Schools of Hair Design*, Docket Nos. 98-72-SA & 98-73-SA, U.S. Dep't of Educ. (Sect Dec., Dec. 12, 2000). SFAP argues that this decision is clear authority over this case and requires that I find that Wright must treat books as an institutional charge that is subject to a refund calculation. Wright, on the other hand, argues that the Secretary's Decision is wrong and should not be followed. Although I am bound to follow the decisions of the Secretary, after reading and analyzing the Secretary's Decision in *Canella*, I find that it is clearly distinguishable from the instant case. In *Canella*, the Secretary determined, on the facts, that the cost the equipment at issue was an institutional charge that was required to be included in the refund calculation. He declared, however, that if equipment (books) is not returned by the student, and the return policy of the school is disclosed, then the costs of the items might be excluded when calculating refunds. In the present case, as mentioned earlier, the students never returned the books that they had purchased and the book return policy was well known.[6]

Canella, is also distinguishable because the Secretary, apparently, did not consider whether the rule announced was being retroactively applied to facts that clearly pre-date ED's earliest regulatory guidance on the statutory interpretation of an assessed institutional charge for pro-rata refund calculation purposes.

FINDINGS

The circumstances of this case leads me to the inescapable conclusion that none of the students involved would have any claim for the return of the cost of books while, at the same time, retaining possession of those books. Otherwise, they would be unjustly enriched at the expense of the institution. Additionally, I conclude that it follows that ED should be in no better position in a conflict with Wright. Therefore, I FIND that based on the totality of the evidence, Wright has met its burden of establishing that it properly treated the books in issue as non-institutional charges. Its decision to exclude the book costs from the pro-rata refund calculations is allowable.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Wright Business School be relieved of liability to repay to the United States Department of Education the sum of $151,950, as demanded in the FPRD.

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Ernest C. Canellos
Chief Judge

Dated: February 7, 2002

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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[1] Separately, the FPRD found that Wright had failed to reconcile its accounting records and, as a result, it owed

$82,241 to ED. This finding was settled during the course of this proceeding and was not considered in my disposition of this case.

[2] Congress rewrote this section in Public Law 105-244 § 485, removing any reference to the terms tuition, fees, room and board, and other charges assessed the student, and now requiring a refund of a portion of the "institutional charges" incurred by the student.

[3] Both parties requested permission to file additional submissions regarding the institution's return policy. On October 18, 2001, I denied those requests and the parties requested that I reconsider. I find that the record is abundantly clear on the institution's return policy, therefore, the parties' requests for reconsideration are denied.

[4] During a colloquy with SFAP counsel during oral argument, counsel agreed that such a return policy was consistent with the applicable regulations. However, in her Post Argument Brief, counsel distances herself from such concession.

[5] In addition, a student might be able to borrow books from a relative or friend – in such a case Wright would not have assessed a book charge.

[6] The liability question raised in this proceeding is troublesome. If a book charge is an assessed charge under the regulations, it seems odd to conclude that an institution must determine what portion of a book it "earned" under the refund policy, if it no longer possesses the book. This is especially so because the statute does not require this result or even require that books be included in the refund calculation as an assessed charge, at all.