



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

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In the Matter of

**COLLEGE AMERICA-DENVER**

Respondent.

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**Docket No. 06-24-SP**

Federal Student Aid  
Proceeding

PRCN: 200540824515

Appearances: Glenn Bogart, Birmingham, Alabama, for College America-Denver.

Steven Z. Finley, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Richard F. O'Hair, Administrative Judge

**DECISION**

College America-Denver (Respondent), a proprietary educational institution, is a participant in the federal student aid programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* The Office of Federal Student Aid (FSA), U.S. Department of Education (ED), administers these programs. On May 11, 2006 (incorrectly dated May 11, 2005), FSA issued a Final Program Review Determination (FPRD) containing a finding that Respondent now appeals. This appeal addresses the question of the point in time when Respondent, an attendance-taking institution, was required to make its determination that a student who ceased attending classes had withdrawn from the school. This date of determination is important because it is utilized to calculate when the amount of any unearned federal student aid funds given to the institution must be returned to their sources. The FPRD concludes that refunds for students must be made within 45 days of the student's last day of academic attendance. After reviewing student records provided by the institution, FSA computed Respondent's liability for these violations to be \$8561.00.

The FPRD asserts that Respondent made late refunds to Title IV accounts because it failed to make its determination whether a student had withdrawn from the class within 14 days of the student's last day of academic attendance. As authority for this requirement, the FPRD

cites 34 C.F. R. §668.22(b)(1). This paragraph provides:

For purposes of this section, for a student who ceases attendance at an institution that is required to take attendance,...the student's withdrawal date is the last date of academic attendance as determined by the institution from its attendance records.

The FPRD continues by explaining that once an institution has made the determination that a student has withdrawn and that it owes unearned federal student aid funds to ED, or another appropriate party, the institution must make those reimbursements within 30 days of that determination.<sup>1</sup> The FPRD cites 34 C.F. R. § 668.22 (j)(1) for this authority.<sup>2</sup> This paragraph provides:

An institution must return the amount of title IV funds for which it is responsible under paragraph (g) of this section as soon as possible but no later than 30 days after the date of the institution's determination that the student withdrew as defined in paragraph (1)(3) of this section.

Respondent does not dispute the facts here, but insists that its refunds were not late. It explains that a failure to pay a refund within 45 days of the last day of attendance for a student who withdraws without notice does not violate any of the regulations FSA cited in the FPRD. Respondent points out that the regulation cited at 34 C.F. R. § 668.22(b)(1) (quoted above) does not contain a specific time table for determining a withdrawal date, but only defines a withdrawal date, for a school that is required to take attendance, as the student's last day of attendance.

Respondent admits the regulations, at 34 C.F. R. § 668.22(j)(1), require an institution to make Title IV refunds to ED no later than 30 days after the institution makes a determination that a student has withdrawn. As to the date of that determination, it explains that 34 C.F. R. § 668.22(j)(2) provides that an institution must determine the withdrawal date for a student who withdraws without notice no later than 30 days after the end of the earlier of the –

- (i) Payment period or period of enrollment, as appropriate, in accordance with paragraph (e)(5) of this section;
- (ii) Academic year in which the student withdrew; or
- (iii) Educational program from which the student withdrew.

Respondent points out that by applying these regulations to its operations, it was not bound by any 14-day rule and could appropriately make the withdrawal determination no later

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<sup>1</sup> The FPRD combines these 14-day and 30-day requirements and inexplicably summarizes them by saying the refunds must be paid within 45, not 44, days of the student's last day of attendance.

<sup>2</sup> As is discussed later in this opinion, FSA concedes that these two sections of the regulations do not impose a 45-day requirement on Respondent.

than 30 days after the completion of the payment period or period of enrollment, and then it has an additional 30 days to refund any unearned Title IV funds. Thus it believes refunds are due no later than 60 days after the end of the payment period or period of enrollment.

Respondent insists that FSA is erroneously relying on its Dear Colleague Letter, GEN-04-12 (November, 2004) for authority to impose a requirement that a withdrawal determination be made within 14 days of the last day of attendance, and that this letter cannot support that requirement. That letter provides:

In February 2004, we issued a Dear Colleague Letter (GEN-04-03) that addressed a number of issues regarding the Return of Title IV aid when a student withdraws from school, including our view that institutions that are required to take attendance are expected to have procedures to determine when a student's absence is a withdrawal. In that context, we indicated that we would expect that the date of the institution's determination that the student withdrew would be no later than one week after the student's withdrawal date. For institutions that are required to take attendance, the student's withdrawal date is the last date of academic attendance as determined by the institution from its attendance records (§668.22(b)(1)). The purpose of this letter is to announce that we are posting a revised Dear Colleague Letter GEN-04-03 to extend the one-week time frame to two weeks each time that it appeared in GEN-04-03. This change has been made in recognition of the systems that are used to monitor attendance at institutions that are required to take attendance.

Respondent points out that at the time of the program review it was complying with the procedure set out in the regulations at §668.22(j)(2) by making its determination of withdrawal no later than 30 days after the end of the payment period or period of enrollment. Respondent maintains that FSA is improperly attempting to impose a new 14-day requirement on it that is based, not on an enforceable regulation, but solely on the language found in the Dear Colleague Letter GEN-04-12. The school argues that this type of sub-regulatory guidance is not enforceable, citing previous language from this Tribunal:

This tribunal is obliged to finding violations of law, not violations of statements of policy. While a statement of policy may assist the tribunal in interpreting the law, policies and procedures, it, without more, cannot carry the weight of law. The existence of a statutory violation may be appraised against the backdrop of published policy statements or published bulletins but these indicia of policy cannot stand alone as the basis of a regulatory violation. *In the Matter of Baytown Technical School*, Dkt. No. 91-40-SP, U.S. Dept. of Educ. (Jan. 19, 1993).<sup>3</sup>

Relying on *Baytown*, Respondent argues that an institution's failure to meet FSA's

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<sup>3</sup> The Secretary affirmed that finding of the initial decision on April 12, 1994.

expectation as to the timing of the determination of a student's withdrawal as set out in the Dear Colleague letters cannot serve as the basis for FSA's demand for the payment of liabilities because they are not enforceable; it says they amount to nothing more than an inadequate substitute for proper rulemaking. Respondent concludes by asserting that if FSA believes the regulations are too lax regarding the timing of the withdrawal determinations, it should amend the regulation rather than resorting to unenforceable Dear Colleague letters.

FSA concurs with Respondent's position that the regulations at 34 C.F. R. § 668.22(j) require that when a student stops attending, the institution must return all unearned federal student aid funds as soon as possible, but no later than 30 days after the institution's determination that the student withdrew. It also agrees that the FPRD is incorrect in its assertion that the authority for requiring that an institution make a determination of withdrawal within 14 days of the last day of attendance is not found in the regulations. FSA concedes that the regulations permit an institution to make a withdrawal determination no later than 30 days after the end of the payment period. In defense of the FPRD, however, FSA says that an institution has an obligation to make a determination of withdrawal as soon as it becomes aware of student's absence. Under the heading: "date of the institution's determination that the student withdrew", the regulation provides:

For a student who did not provide notification of his or her withdrawal to the institution, the date that the institution becomes aware that the student ceased attendance.

34 C.F. R. § 668.22(l)(3)(ii).

FSA says that this provision obligates an institution to make a determination of withdrawal as soon as it becomes aware the student has ceased attendance, and for an institution that is required to take attendance, this could be a date well before a point 30 days after the end of the payment period or period of enrollment. To answer questions that have been raised by institutions regarding the timing of this determination, and to further assist institutions with their obligation, FSA explains that it issued Dear Colleague Letter GEN-04-03 in February 2004. This was later modified in November of that year by Dear Colleague Letter GEN-04-12. The pertinent portion of Dear Colleague Letter GEN-04-03 provides:

Date of the institution's determination that the student withdrew—  
Institutions that are required to take attendance

Institutions are expected to have procedures to determine when a student's absence is a withdrawal. Institutions that are required to take attendance are expected to have a procedure in place for routinely monitoring attendance records to determine in a timely manner when a student withdraws. Except in unusual instances, at an institution that is required to take attendance, we would expect that the date of the institution's determination that the student withdrew would be no later than a week after the student's withdrawal date—the last date of academic attendance as determined by the institution from its attendance records (§668.22(b)(1)).

If a student provides notification to the institution of his or her withdrawal prior to the date that the institution normally would determine that the student withdrew, the date of determination is the date of the student's notification. If an institution follows a policy that states when absences will be treated as withdrawals, the date of determination would be no later than the date specified in the policy, as long as that date is not later than one week after the student's withdrawal date. For example, an institution with a procedure that provides that five consecutive unexcused absences will be treated as a withdrawal would never have a date of determination of withdrawal that is beyond the fifth unexcused absence.

As pointed out previously, this seven-day period was lengthened to 14 days in the Dear Colleague Letter GEN-04-12. With this history, FSA acknowledges that the FPRD was incorrect when it described this 14-day requirement as being regulatory, but it says this letter represents FSA's guidance on when an institution that is required to take attendance would be expected to know that a student has ceased attending and thus has withdrawn. FSA says this should be read in conjunction with the provision in § 668.22(1)(3)(ii) which defines the date of the institution's determination that the student withdrew as the date that the institution becomes aware that the student ceased attendance. FSA's position is that while the Dear Colleague Letters do not create a legal requirement with which the schools must comply, the guidance contained in them provide "context and meaning to the requirements in the regulations."

Citing *In the Matter of Lincoln Technical Institute*, Dkt. No. 95-42-SP, U.S. Dept. of Educ.(May 17, 1996), FSA says these Dear Colleague Letters can assist the tribunal in interpreting the law, policies, and procedures in issue; they provide "context" to existing regulatory requirements. Countering Respondent's argument that the regulations already provide a time period for making the determination that a student has withdrawn, i.e., no later than 30 days after the end of the payment period, FSA says this interpretation is unreasonable and artificial. It is FSA's position that an institution that takes attendance would be expected to know a student has withdrawn long before "30 days after the end of the payment period" because the attendance records should alert the institution that the student has ceased attending. It concludes by saying that the 14-day window for making the determination of withdrawal is a reasonable period of time for an institution to act to make the regulatory determination that the student has withdrawn and that the Dear Colleague Letters serve a valuable purpose in explaining FSA's expectation.

In proceedings such as this, Respondent has the burden of establishing that the questioned expenditures were proper and that it complied with program requirements. *See* 34 C.F. R. § 668.116(d). Toward that end, Respondent has highlighted the appropriate regulations that identify its responsibilities when a student ceases attending classes. To summarize, for a school that is required to take attendance, if a student ceases attending classes, the regulations require the school to make a determination of the withdrawal on "the date that the

institution becomes aware that the student has ceased attendance”<sup>4</sup>, but no later than 30 days after the end of the payment period or period of enrollment.<sup>5</sup> I interpret this to mean that a school has an obligation to make a determination of withdrawal at the earliest possible point in time that it becomes aware a student has withdrawn. This certainly does not mean that an institution has the latitude in every case to purposely wait until the 30<sup>th</sup> day after the end of the payment period to make a determination of withdrawal. Actual knowledge of a student’s withdrawal before the 30<sup>th</sup> day should trigger the mechanism for making the determination.

FSA has not argued that Respondent became aware that its students ceased attendance prior to a date 30 days after the end of the payment period or period of enrollment, but rather FSA is relying on the 14-day standard set out in the two Dear Colleague Letters mentioned above which significantly shorten the time period for making the withdrawal determination. Respondent does not make the argument that this time period was insufficient. It only says that Dear Colleague Letters GEN-04-03 and GEN-04-12 do not rise to the level of being enforceable laws; they only serve as “guidance” to the schools, as is pointed out repeatedly in the text of the first of these two letters. It argues that its alleged failure to comply with this sub-regulatory guidance cannot be treated as a violation of a regulation, which leaves FSA with a limited basis for recovery under this FPRD, and I agree.

*Baytown*, cited above, appears to be dispositive here. FSA is not relying on the Dear Colleague letters to interpret any laws, policies, or procedures. It is improperly relying on these letters to amend an already existing, unambiguous set of time standards found in the regulations. FSA’s position that these Dear Colleague letters provide guidance to the schools as to when they should be aware that a non-attending student has withdrawn is refuted by language found in the August 6, 1999, Notice of Proposed Rulemaking (64 FR 43024) for amendments to sections of 34 C.F.R. Part 668 addressed here. In those proceedings, it was clearly the intention of the drafters that, for a student who ceases attending classes, a school would have 30 days from the earlier of the end of the payment period or period of enrollment to make a determination of the withdrawal date. In endorsing this time period, the committee explained that these proposed regulations “recognize that some institutions may not know about drop-outs until the institution checks its records at the end of an academic period.” 64 FR 43024 at p. 27. The committee extended further leeway to institutions when it explained that the proposed definition of the date of the institution’s determination that the student withdrew captures the point when an institution could reasonably be expected to know that a student has ceased attendance. 64 FR 43024 at p. 29.

Based on the above, I find that FSA has no authority to collect liabilities from Respondent on the basis that it violated a Dear Colleague Letter policy issued by FSA. During the negotiated rulemaking process, the committee clearly established the time in which an institution must make a withdrawal determination that is well beyond the 14-day period FSA attempts to enforce. If that office believes the issue of the timeliness of a determination of a student withdrawal warrants shortening to 14 days, it behooves it to make the appropriate

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<sup>4</sup> 34 C.F. R. § 668.22(1)(3).

<sup>5</sup> 34 C.F. R. § 668.22(j)(2).

changes to the governing regulations. Without these changes, FSA must accept the procedures currently on the books, regardless of how reasonable or necessary the guidance found in the Dear Colleague letters may seem.

FSA, however, may collect the liabilities assessed in the FPRD that are identified in a document identified as Attachment B to Respondent's appeal to the FPRD in instances where Respondent either made determinations of withdrawal more than 30 days after the end of the payment period or period of enrollment (34 C.F. R. § 668.22(j)(2)), or its refunds were made more than 30 days after the date of determination of withdrawal (34 C.F. R. § 668.22(j)(1)).

**ORDER**

On the basis of the foregoing, it is hereby **ORDERED** that College America – Denver must pay to the United States Department of Education and to the holders of FFELs only those liabilities showing of a violation of either 34 C.F. R. § 668.22(j)(2) or 34 C.F. R. § 668.22(j)(1).

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Judge Richard F. O'Hair

Dated: April 3, 2007

SERVICE

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

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