



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

In the Matter of

HOWARD COMMUNITY COLLEGE,

Respondent.

Docket No. 08-21-SP

Federal Student Aid
Proceeding

PRCN: 200830326624

Appearances: Michael S. Molinaro, Esq., Reese & Carney, LLP, Columbia, Maryland, for
Howard Community College.

Denise Morelli, 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

On April 14, 2008, the Office of Federal Student Aid (FSA) of the U.S. Department of Education (Department) issued a Final Program Review Determination (FPRD) to Howard Community College (HCC). This FPRD was generated because of a noted discrepancy in HCC's administration of the federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* More specifically, the FPRD alleged that HCC had over-awarded campus-based federal student aid funds in the amount of \$148,262.82 for the 2004-05, 2005-06, and 2006-07 award years, and which FSA seeks to recover. HCC has exercised its appeal rights found in 34 C.F.R., Part 668, Subpart H.

Campus-based federal student aid funds are distributed to an institution based upon an analysis of the entire enrolled student population and the overall financial need of those students. *See*, 34 C.F.R. Parts 675 and 676. FSA utilizes a school-generated report called a Fiscal Operations Report and Application to Participate (FISAP) to make a determination of the amount of funds an institution receives each year.

According to its brief, HCC is one of approximately 700 postsecondary institutions that used a software developed by Datatel Corporation to create its FISAP during the three years addressed here. In May 2007, HCC notified FSA that it had discovered that errors had been made in its award calculations that were attributable to the application of this software. FSA confirmed the FISAP contained errors and then re-examined the institution's FISAPs for the 2004-05 and 2005-06 award years where it found additional errors of the same nature. The errors resulted in the institution overstating the number of enrolled students. As a result of this analysis, FSA determined that HCC had been awarded \$211,446 more than it was entitled to for the three award years examined; however, since HCC had not obligated all of its campus-based funds for these years, FSA deducted these unobligated funds from the amount of the overpayment, leaving a balance of \$148,262.82 due to FSA.

HCC explained that in mid-2006 it first discovered discrepancies in the number of enrolled students reported on its FISAPs and it contacted the Datatel Corporation to discuss the problem. HCC financial aid personnel and Datatel executives and staff members met frequently in early 2007 to analyze HCC's FISAP results. Thereafter, Datatel's technical and financial staff manually audited HCC's student financial aid data for the three prior years. At the conclusion of these efforts, Datatel, in a May 29, 2007 memo from its client practice manager, formally acknowledged HCC's "concern" and agreed to work to "update the content of the Datatel documentation to improve instructions" for the use of their software product by all of its customers. *See*, Resp. Ex. 1, Atch. 5. As a result of this interaction with Datatel, HCC reports that it discovered that it was an absolute requirement that it utilize a "saved list" function when operating this software to ensure that all ineligible students are removed from the FISAP that is submitted to FSA.

HCC also says that after it experienced what it calls "software failures" and brought these to the attention of FSA, it discovered that FSA's John Brooks, a senior program operations manager for the Application, Operations and Delivery Services office for FSA, also spent a considerable amount of time exploring HCC's complaint with Datatel personnel. Although HCC was not a party to these discussions, it argues that it is inconceivable that Mr. Brooks could explain in an August 8, 2007, letter to HCC that FSA finds Datatel's instructions are adequate and does not believe "there is a potential for considerable impact to the Datatel user community regarding this matter." HCC further asserts that it cannot comprehend how Mr. Brooks could reach this conclusion regarding Datatel's software instructions since HCC is aware that two other institutions in Maryland that use Datatel have encountered problems associated with what HCC believes were incomplete instructions regarding its use.

HCC reports that it feels justified in its allegation of the existence of a software instructional error because Datatel significantly modified its instructions for this software in August 2007. Prior to the modification, the instructions categorized the use of the "saved list" function as being optional:

"you can use a saved list name to select students for the FISAP Eligible Aid Applicants Report."

See, Resp. Ex. 1, Atch 8, p. 40.

After the modification, HCC notes that the instructions used much stronger language:

“Before running the EAAP report, Datatel strongly recommends that you create a “saved list” of all enrolled students. If you decide not to create a “saved list” of all enrolled students, you’ll need to manually examine the report to exclude students who are not enrolled.”

See, Resp. Ex. 1, Atch 10, p. 45.

HCC believes that although Datatel never specifically admitted culpability, its significant changes to its instructions prove that Datatel recognized that its original instructions were erroneous. HCC asserts that its failure to properly calculate its students’ FISAP was the direct result of Datatel’s software instructional errors and/or the corporation’s lack of adequate guidance. Furthermore, HCC argues that it acted in good faith and FSA should not single it out and punish it for alerting FSA to the problems with the FISAP reporting. In recognition of its 40 years of compliance with Title IV regulations governing federal student aid, HCC asks that FSA waive the liability on the liability for fiscal years 2004-05 and 2005-06, and be satisfied with recovery of the unobligated campus-based funds for 2006-07.

HCC also challenges the FPRD by contending that FSA did not conduct a full and complete program review, but rather engaged in an arbitrary decision process. The foundation for this allegation is that FSA did not issue a preliminary program review determination that would have afforded it the opportunity to submit additional information and explanations for FSA’s consideration prior to it issuing a final program review determination. Additionally, HCC argues that the FPRD incorrectly relied on what it considers to be Mr. Brooks’ erroneous conclusion regarding the adequacy of the instructions Datatel issued for use with its software.

Prior to an institution participating in the various Title IV student aid programs, it must enter into a program participation agreement with the Department that delineates the various obligations the institution must meet. 34 C.F. R. § 668.14. Inherent in all these obligations is the theme that the institution acts in the nature of a fiduciary for the administration of those funds. As such, it must comply with all Title IV statutory and regulatory requirements. 34 C.F. R. §§ 668.14, 668.16. If the Department challenges the propriety of Title IV fund disbursements, the institution has the burden to establish that these payments were proper and that the institution complied with the relevant Title IV program requirements. 34 C.F. R. § 668.116(d).

In this instance, HCC admits that it did not comply with the program requirements with respect to the FISAPs it submitted for the 2004-05, 2005-06, and 2006-07 award years and that this resulted in an award of \$211,446 in campus-based funds above its entitlement. Fortunately, HCC suspected that its FISAPs were incorrect and were reporting an excessive number of enrolled students, and it sought assistance from both its software supplier, Datatel, and from FSA. After what appears to be a fairly thorough analysis by all three parties, FSA determined

that HCC had not taken advantage of a “saved list” function when utilizing the software for the preparation of the FISAPs, and by not doing so, its numbers of enrolled students included students who were not enrolled. Datatel has not admitted that either its software or its instructions for use of the software were flawed, but did acknowledge that in the future it would ensure that its written instructions and its technicians give more attention to the use of the “saved list” function.

I find that HCC’s allegation that FSA acted arbitrarily in its conduct of the FPRD process to be without support. The pertinent regulations do not require that FSA issue a preliminary program review; apparently, the preliminary report is dispensed with when it is deemed unnecessary. *See*, 34 C.F.R., Subpart H. In cases where such a preliminary report is not prepared, the institution is still offered the opportunity to appeal the FPRD and request a formal hearing as was conducted in this proceeding.

While it is unfortunate that HCC relied upon this software to its detriment in this occasion, whether as the result of deficient software and/or instructions, or operator error, it is commendable that HCC recognized its fiscal responsibility to bring these incorrect FISAPs to FSA’s attention. In fact, I wonder if FSA would have ever discovered these over-awards if HCC had not raised them itself. Despite this, however, I cannot hold that it should be relieved of liability. Neither FSA nor any other party mandated that Datatel’s software be utilized to create and analyze the FISAPs. Therefore, when HCC elected to use Datatel’s product, it assumed the responsibility that the product chosen would perform the tasks correctly. Whether HCC believes there was a breach of contract between it and Datatel is an issue to be addressed in another legal system. In the case before me, however, I find that HCC was awarded \$211,446 in campus-based Title IV funds in excess of its entitlement. After deducting campus-based funds that it had not drawn down from the Department’s financial account, I find that HCC must return \$148,262.82 to the Department.

HCC has asked that the Department waive this debt in recognition of its long history of compliance with the Title IV regulations, its voluntarily bringing this matter to the Department’s attention, and the fact that the students were the only beneficiaries of the overawards. As deserving as its case may be, as correctly pointed out by FSA, because of the amount of the overpayment, the Department does not have the independent authority to waive this claim against HCC, but must forward this request to the Department of Justice for further collection action. *See*, 31 U.S.C. § 3711.

ORDER

On the basis of the foregoing, it is hereby **ORDERED** that Howard Community College pay \$148,262.82 to the U.S. Department of Education.

Judge Richard F. O'Hair

Dated: December 4, 2008

SERVICE

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

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