



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

In the Matter of

Docket No. 11-34-SP¹

UNIVERSITY of CINCINNATI,

Federal Student Aid
Proceeding

Respondent.

PRCN: 2005-4052-4456

Appearances: Leigh Manasevit, Esq. and Erin Auerbach, Esq., Brustein & Manasevit, PLLC, Washington, DC, for University of Cincinnati.

Jennifer L. Woodward, 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

The University of Cincinnati (UC) is public four-year university offering bachelors, masters, and doctoral degrees. It participates in most of the various federal student aid programs which are 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.* The Office of Federal Student Aid (FSA) of the United States Department of Education (Department) administers these programs. On December 23, 2010, FSA issued a Final Program Review Determination (FPRD) assessing a liability of \$9,194,097.47 against UC following a review of UC's administration of the Title IV programs during the award years 2002-2003, 2003-2004, and 2004-2005. UC filed a timely appeal of this determination on February 8, 2011.

¹ This case was originally assigned Docket No. 11-29-SP; that was in error and the correct docket number is cited above.

The Department conducted a program review at UC from August 15-19, 2005, to evaluate UC's compliance with the administrative capability provisions of the statutes and regulations governing the satisfactory monitoring of academic progress and the return of Title IV program funds. The resulting FPRD contains three findings in which FSA determined UC failed to adhere to the fiduciary standards required of participating institutions, noting that an institution's failure to correctly compute and return any refunds due violates the applicable regulations and causes a financial loss to the Department and the holders of Title IV loans.

Institutions that participate in the Title IV programs are subject to the highest standards of care and diligence in administering those programs and must account to the Department for all funds received under those programs. 34 C.F.R. § 668.82. The governing regulations at 34 C.F.R. § 668.22 require that a properly calculated return of Title IV funds be performed when a student withdraws, drops out, is expelled or otherwise fails to complete a payment period or period of enrollment. To fulfill this responsibility, the institution must calculate the portion of Title IV grant or loan assistance which was or could have been disbursed to or on behalf of the student, and the portion that was actually earned by that student. 34 C.F.R. § 668.22(e). In Finding 1, FSA reports that a review of samples of student accounts receivable records and copies of UC's Return to Title IV federal student aid funds computations disclosed that the institution frequently used incorrect amounts of institutional charges in determining the amounts of Title IV funds required to be returned for students who had either dropped out or otherwise terminated their enrollments during the period covered. This resulted in an incorrect computation of the amount of Title IV funds required to be returned on behalf of those students. The Department then required UC to conduct a full file review of all students for whom a refund was due during the 2002-03, 2003-04 and 2004-05 award years and recalculate the appropriate refunds. UC completed this file review, calculated the refunds, and informed FSA its internal procedures had been updated to address this finding. The resulting liability for this finding is included in the amount required to be repaid pursuant to Finding 3.

The regulations further provide that a return of Title IV funds be paid to the original provider no later than 30 days after an institution has determined, or should have determined, that the student has withdrawn, been expelled, or otherwise terminated his or her enrollment. 34 C.F.R. § 668.22(j). In Finding 2, FSA found a number of case files in which students had withdrawn from the institution and UC had computed the refund computation, but UC was unable to provide evidence demonstrating that the required return of all relevant loan funds had been paid. Based upon this finding, UC was required to identify all Title IV loan recipients who had withdrawn during the three award years, and provide copies of all cancelled refund checks or electronic transfers which it asserted it had made. UC completed this task, identified the deficiencies, and submitted that its internal procedures have been updated to address this finding. As with Finding 1, the resulting liability for this finding is included in the demand for repayment in Finding 3.

Finding 3 addresses UC's failure to document the attendance of its students in a manner that would timely alert them that a student had withdrawn. For Pell Grant, Federal Supplemental Education Opportunity Grant (FSEOG) funds and Perkins loans, if a student withdraws, drops

out, or is expelled before his or her first day of class of a payment period, all funds paid to the student for that payment period for institutional or non-institutional costs represent an overpayment which the institution must return to the respective program. 34 C.F.R. § 668.21(a). For the Federal Family Education Loan (FFEL) program, the regulations provide that if the institution is unable to document that a registered student has attended school during the period of enrollment for which a loan is made, the institution must determine the student's withdrawal date, notify the lender of the lack of attendance, and return to the lender any proceeds credited to the student's account. 34 C.F.R. §§ 682.604(d)(4), 682.605, 682.607(c). The FPRD reports that in the sample of student files examined the reviewers found a number of students for which the student either received all non-credit grades or no academic activity was recorded on the academic transcript. UC's inability to document attendance or academic activity amounted to a failure to confirm eligibility for disbursement of Title IV funds and obligated UC to return these funds to either the Department or the lenders. FSA required UC to conduct a file review of all students for whom there was no academic activity during the three award years in review and determine the amounts of Title IV funds required to be returned for those students for which it could not demonstrate any attendance. UC performed these reviews and submitted its results to the Department. The resulting liabilities for these three findings, as set out in the FPRD, are as follows:

- \$3,671,990.59 to the Department for Federal Pell Grant funds
- \$86,300 to the Department for FSEOG funds
- \$2,281,027.16 to the holders of unsubsidized FFEL funds
- \$2,008,437.24 to the holders of subsidized FFEL funds
- \$460,604.48 to the holders of PLUS funds
- \$276,528 to its Federal Perkins Loan account
- \$409,210 to the Department for the cost (interest) of these unpaid FFEL refunds

UC readily admits many of its refund calculations were either not computed, incorrectly computed, or properly computed but not timely paid. However, it submits that these deficiencies were not the result of fraud or a willful disregard of program regulations and requirements, but rather the result of miscalculations and misunderstandings. It reports that 88% of the 2424 students identified by the findings in the FPRD received a credit balance refund, thus demonstrating that it did not inappropriately benefit from the miscalculated refunds. UC objects to FSA's assertion that it failed to make any refunds during these award years.² It has submitted evidence that it paid refunds to either the students or the Department via its lender or loan servicer in 2004 and 2005. After this period, its refund payments were delayed because it was informed by the Department that the calculations were incorrectly performed. Following the completion of its full file reviews, UC agreed its internal procedures for identifying, calculating and returning Title IV funds were deficient. It says it immediately revised and updated its internal procedures to ensure this problem was eliminated.

As a result of its recognition it was responsible for the improper calculations and payments for refunds, on January 27, 2011, UC reimbursed the Department \$3,942,050.59 for all

² UC's Motion for Leave to File a Reply Brief and to Late File an Additional Exhibit is granted.

grants disbursed under the Pell and FSEOG programs which should have been refunded earlier, plus the costs of those funds. However, with respect to the Department's demand that it return all unearned loan funds, UC asks that this demand be modified and it be required to return only the estimated actual loss to the Department incurred because of these unpaid refunds. In this case that figure would be 3.5 % of the loan funds, which is the amount of its average loan cohort default rate for the years in question, plus a prorated cost of those funds. UC maintains that repayment of all loan funds would impose a burden on the university and unfairly disadvantage its students. This is because under UC's return of funds policy, it cannot repay these loan funds to the lenders without simultaneously requiring these students to reimburse the institution in the same amounts. It explains that its refund policy provides that once the university returns funds to the Department or a lender, an offset/receivable is recorded on the affected student's account for that amount. Any non-payment of these receivables by those students will have adverse effects on the students in any future dealings with the university, as well as subject them to collection action by the Ohio Attorney General if the funds are not repaid. UC says that under their proposed plan there will be minimal loss to the lenders because a majority of these students will continue to repay these loans. This is because the university has a very low cohort default rate of only 3.5%, compared to the national average of 7%.

UC explains there is precedent for the Department to be flexible in its action to recover these funds, and cited the case of another institution which it says had an enormous liability as a result of unresolved audits and unreturned loan funds. Apparently the Department entered a settlement agreement with that institution which involved a payment of much less than that initially demanded. UC would like the same treatment here.

UC's second reason for requesting a negotiated settlement of its debt is that these loans are so old it will be almost impossible to locate the student lenders to return these funds. This is because a number of the original lenders have exited the student loan market and sold their loans to other unknown lending institutions. Consequently, it says it would be prohibitively expensive in time and money to determine the ownership of these loans. It previously complained to FSA about this situation and UC was advised to consult the National Student Loan Data System (NSLDS) for the name of the current holder of all loans. UC says it used this information for a sample of 100 loans presumably held by one bank and found that 37% were not held by that bank. A sample of 114 loans at a second bank resulted in a finding that three were not owned by that bank. From this exercise, UC says that use of the NSLDS will not significantly reduce the excessively heavy burden of tracking down the holders. Additionally, UC complains that this search is compounded by the amount of time that has elapsed since these loans were allocated. They report that these loans were dispersed between 2002 and 2005; the program review occurred in August 2005; the program review report was issued in January 2006; UC provided the requested data to FSA in December 2006 and June 2007; in April 2010 UC was asked to resubmit data to FSA in an Excel format; and the FPRD was issued in December 2010. UC says this significant period of time from the disbursement of loan funds until the present complicates and makes more burdensome the awesome task of locating the holders of all of these loans.

In conclusion, UC suggests that, because these loans are from six to nine years old and a majority of them will be repaid by the borrowers, it be required only to pay the average cohort default rate for the years in question, plus the cost of those funds associated with the default rate payment.

FSA characterizes UC's failure to identify all student withdrawals, properly calculate refunds, and make appropriate payments to the Department or the lenders as a blatant, willful disregard of the regulations, including those requiring an institution to act as a fiduciary for the Department. As to UC's claim that it was acting in good faith, FSA says this is simply not relevant in a 34 C.F.R. Part 668, Subpart H proceeding such as this one is. *See, In the Matter of Marshalltown Community College*, Dkt. No. 98-148-SP, U.S. Dep't of Educ. (May 27, 1999).

Addressing UC's request that it be permitted to pay only the estimated actual loss of these loan funds rather than fully reimbursing the current holders of those notes, FSA correctly points out that this approach would inappropriately shift the responsibility to repay these loans from the institution to the student and permit UC to improperly retain refunds which should have been made at the times of the student withdrawals. The regulations clearly require the institution to return all unearned Title IV assistance and it must be credited to outstanding balances on Title IV loans made to the students. 34 C.F.R. §§ 668.22(g) and (i). Additionally, FSA notes that the cohort default rate cited by UC is misleading because it covers only a two-year period, and that the lifetime default rate for UC's students is much higher. FSA says UC's argument that its return of funds would cause a disadvantage to its students because of the resulting offset on the students' accounts should be discounted because it is within the institution's discretion to waive the existing refund policy with regard to these loans and thus leave the students with no account debit.

FSA has little sympathy for UC's claim that it is prejudiced in its ability to locate the holders of the outstanding student loans because of the excessive amount of time between the date of the program review in August 2005 and the issuance of the FPRD in December 2010. FSA points out that even though not specifically raised, UC, in essence, is suggesting a defense of laches. Recognizing that laches is rarely available against the United States³, FSA maintains there was no conduct committed by the Department which would warrant a deviation from this well-established position. FSA maintains that UC is itself accountable for some of this five-year period because during this time it conducted extensive full file reviews requested by FSA, plus it had to respond to additional requests from FSA for clarification and re-submission of data in a different format. On its part, FSA defends its lengthy review process by explaining that during this period it experienced unusually high staff turmoil, had to train replacements, performed an office relocation, and had the complex task of analyzing a large volume of student data covering three years and preparing the program review report. The team leader responsible for this FPRD says this was the most complicated review in his many years of experience. With respect to the difficult task UC indicates it will have finding the holders of the loans, FSA is confident that it

³ *Herman v. South Carolina Nat'l Bank* 140 F.3rd 1413, 1427 (11th Cir. 1998) *cert denied*; *Fickling v. Herman*, 525 U.S. 1140 (1999); *United States v. Alavardo*, 5 F.3d 1425, 1427 (11th Cir. 1993).

has provided UC with sufficient resources to enable it to locate the holders of the loans in question without the burden about which it has complained.

UC has the burden of proving that the expenditures questioned or disallowed were proper and that it complied with all Title IV program requirements. 34 C.F.R. § 668.116(d). UC admits it failed in carrying out its fiduciary responsibility to document student non-attendance, timely recognize student withdrawals, properly calculate the grant and loan refunds, and subsequently make those refund payments to the appropriate entity. Admirably, it has reimbursed the Department for the relevant grant refunds and associated grant fund costs, but it balks at repaying the loan funds. It argues that the loans are so old it cannot easily locate the holders, and it blames the Department for what it believes is an unreasonable length of time that elapsed from the date of the program review to the issuance of the FPRD. I find neither argument persuasive. A good portion of this time was allocated to UC's efforts to conduct the necessary file reviews and provide the Department with requested information in a usable format. That time, plus the immensity and complexity of the data involved here, do not suggest to me that the Department was lax or inattentive while evaluating the data and assessing a liability for UC.

As to UC's request that it be permitted to refund only an amount which represents the estimated actual loss to the holders of the loans based on an estimate of the number of loans which will go into a default status, I must refuse. I find it distressing that UC would suggest that a student borrower who withdrew from the institution without the benefit of receiving a full term of educational training be required to continue paying a loan for funds which should have been returned to the lender within 30 days of the date the student withdrew or the date the institution should have known of its withdrawal. Additionally, as pointed out by FSA, the estimated actual loss rate UC has suggested should be applied is only an estimate of the student default rate for a two-year window. The true number of defaults is certainly larger, and still produces only an estimate of the Department's loss. To grant UC's request to use an estimated loss figure would permit it to retain funds which were unearned and should have been refunded to the lender. The only certain method of placing the lenders in the financial position they would have been placed if it had complied with the regulations is for UC to return the unearned funds to the lenders. Accordingly, the FPRD is affirmed and UC is obligated to return \$4,750,068.88 to the holders of the FFEL and PLUS student loans identified in the FPRD, \$276,528 to its Federal Perkins Loan account, and \$409,210 to the Department for the costs of the funds associated with the FFEL liabilities.

ORDER

On the basis of the foregoing, it is hereby **ORDERED** that the University of Cincinnati pay to the holders of FFEL and PLUS loans \$4,750,068.88, its Federal Perkins Loan account \$276,528, and the U.S. Department of Education, \$409,210.

Judge Richard F. O'Hair

Dated: August 30, 2011

SERVICE

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

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