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

In the Matters of	**Docket No. 12-65-SA**
TECHNICAL CAREER INSTITUTES,	Federal Student Aid Proceeding
Respondent.	ACN: 02-2006-80007

Appearances: Steven M. Gombos, Esq., and Robert B. Walker, Jr., Esq., Ritzert & Leyton, P.C., Fairfax, Virginia, for Technical Career Institutes.

Denise Morelli, Esq., Office of the General Counsel, U. S. Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Technical Career Institutes (TCI) is a proprietary institution of higher education located in New York, New York. It offers assorted technical training courses leading to both certificates and associate degrees. TCI is accredited by the Middle States Commission on Higher Education and is certified as eligible to participate in the Federal Pell Grant and Federal Family Education Loan (FFEL) student financial assistance programs that are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). *See* 20 U.S.C. § 1071 *et seq.* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA), within the United States Department of Education (ED), administers and oversees these programs.

By letter dated May 19, 2008, ED's Regional Inspector for Audit, New York Audit Region, issued a Final Audit Report of its audit findings performed at TCI covering the period July 1, 2005 through June 30, 2006. After a number of exchanges of information between TCI and FSA, on September 28, 2012, FSA issued a Final Audit Determination (FAD) that contained two adverse findings. First, the FAD found that TCI improperly paid lenders of FFEL loans so as to reduce its Title IV cohort default rates for the 2005 and 2006 calendar years. However, since

there was no monetary demand included in that finding, it is not before me for adjudication.[1] Second, TCI incorrectly calculated the amounts of Title IV funds that it had to refund for students that had withdrawn from TCI during the audit period of July 1, 2005 through June 30, 2006. This refunding requirement is known to Title IV practitioners as "return to Title IV" (R2T4). For this finding, FSA demanded that TCI return $190,966 to ED, and refund $187,942 to the respective holders of the FFEL loans. By letter, dated November 13, 2012, Respondent's counsel filed a written Request for Review of the findings of the FAD.[2]

The audit report recounted that in the auditor's review of 30 student files from the audited period, 15 files indicated that TCI failed to properly refund Title IV funds as required. Specifically, the returns were erroneous because TCI utilized the incorrect withdrawal dates when determining the amounts to be returned. The report quantified the underpayment of refunds for these 15 students as $5,445, and TCI has since returned that amount to ED.

This proceeding involves numerous situations where the respective student failed to notify the institution that they were withdrawing but just discontinued attending, as opposed to a situation where a student stopped attending with a prior notice of withdrawal. For Title IV refund purposes, 34 C.F.R. § 668.22(c)(1) is the operative regulatory provision that governs how to establish a withdrawal date in a situation where a student ceases to attend an institution, like TCI, that is not required to take attendance.[3] Under that lack of prior notice scenario, the date utilized for a student's withdrawal for refund calculation must be established as the mid-point of the payment period or period of enrollment. 34 C.F.R. § 668.22 (c) (1) (iii). However, affecting this apparently clear requirement, there is a recognized alternate -- schools such as TCI may use as the withdrawal date, a student's last day of attendance at an academically related activity provided that such activity was properly documented. 34 C.F.R. § 668.22(c) (3). Separately, TCI had an established absence policy that required it to administratively withdraw a student once the student had accumulated 21 absences. Apparently, TCI added 21 days to the last day of the student's actual attendance and used that as the date of withdrawal for Title IV refund purposes.

As part of the follow-up process to resolve the audit finding, TCI was directed to perform a full-file review and recalculate the R2T4 funds with respect to all students that had withdrawn without prior notice. During this process, TCI was directed to utilize the mid-point of the payment period as the withdrawal date. TCI complied with ED's direction to perform a full-file review and calculated the correct refund that should have been paid. Based upon that full-file

[1] The FAD included a comment that a report of the violation enumerated in Finding 1 would be forwarded for possible separate action to FSA's Administrative Actions and Appeals Service Group action pursuant to 34 C.F.R. Part 668, Subpart G.

[2] In addition, on November 15, 2012, TCI's counsel filed a written request for review of a Final Program Review Determination (FPRD), dated September 28, 2012, issued by FSA. Upon receipt of counsel's request, the Office of Hearings and Appeals assigned the resulting proceeding to me for adjudication, under Docket No. 12-66-SP. Although this case involved the same parties and I had been assigned to adjudicate both, for purposes of flexibility and judicial economy, I decided to procedurally handle them together, but without consolidating them. I will, therefore, issue a separate decision in that proceeding.

[3] Any eligible institution that is not required to take attendance must determine the appropriate withdrawal date and return the refund amount as soon as possible but no later than 30 days after the institution determines that a student withdrew. 34 C.F.R. § 668.22(j) (1) and (2).

review, FSA determined that TCI owed an additional $378,909.09 in refunds. My review of the uncontroverted evidence in this proceeding presented by both TCI and FSA in their briefs and my own review of the evidence in the file, clearly indicates that the resulting $378,909.09 is the correct calculation of the shortages resulting from the erroneous refund calculations at issue in this proceeding, and I so find.

Although the parties seem to agree as to the figure representing the shortages in the R2T4 calculations at issue, one complicating factor was discerned during the full-file review. That is that in the case of some students, TCI had returned more Title IV funds than it would have if it utilized the correct withdrawal date. TCI claims that these overpayment amounts for students whose recalculated refunds were less than they actually received amounted to a total of $178,205.87. As a consequence, TCI argues that in fairness, FSA should allow it to receive credit for this amount from the additional amounts demanded by the FAD for the overpaid funds that TCI returned under its initial determinations. TCI complains that FSA "cherry-picked" only those instances in the full-file review where TCI recalculations indicated a liability exists and disregarded those instances where there was an overpayment and, consequently, FSA unfairly gains a windfall at its expense. Even though FSA does not present any evidence disputing the amount of the suggested credit as claimed by TCI, it argues in opposition that there is no such windfall, because the excess amounts have already been applied to the respective student's account. Finally, FSA points out that TCI made a conscious decision to calculate refunds in the manner it chose rather than utilizing the process provided for in the regulations. This argument brings to mind the age-old maxim that "you can't have your cake and eat it at the same time." As such, an institution can be forced to pay more in some refund situations but not allowed to recover for excess amounts it paid under the same regulatory requirements.

The requirement that an institution, like TCI, fix the withdrawal rate of a student that withdrew without prior notice as the mid-point of the award year and calculating the appropriate refund utilizing that as a basis, is quite clear. However, refusing to allow the institution to receive credit in those situations where applying this formulation results in a situation where the institution has made an overpayment to some students, is something else. TCI claims that under these circumstances, FSA gains a windfall if it were not allowed to claim such credit. The concept of offsetting credit in Title IV cases has been the subject of discussion by this tribunal in the past. *See, In the Matter of Nettleton Junior College,* Docket No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994). There, the Judge found that "The College is entitled to net or offset against any over-awards … any under-awards." *See also,* 20 U.S.C. § 1094 (c) (7) -- the statute that authorizes the application of the offsetting principle in Title IV audit proceedings, for newly discovered claimed entitlements to reimbursement, similar to the ones before me.

In retrospect, it is clear that to gain the right to be considered for an offset, an institution must be determined to have acted in good faith and not in a way that intentionally attempted to avoid the dictates of the law and regulations. Here, I find that such good faith is readily apparent by virtue of the substantial incidences where TCI's system of establishing the withdrawal dates for R2T4 calculations resulted in a lower earning to it as opposed to applying the system directed by FSA. As a consequence, I will apply an offset in this proceeding. I do this despite the fact

that FSA objects that this offset will somehow adversely affect the respective students' Title IV entitlements. How this might be so is not articulated by FSA other than by some generalized claim. I do note that the audit period that this proceeding covers is July 1, 2005 thru June 30, 2006. It is hard to imagine how an offset today could adversely affect those students at this late date – this is especially true where the refund issue involves the Pell Grant program. In that situation, I cannot fathom how denying an offset is, somehow inequitable. In so far as the current procedure is concerned, FSA's arguments relative to an offsetting credit are unpersuasive.[4]

Finally, TCI requests that I order FSA to "apply its Estimated Actual Loss Formula to any loan-related liability amounts sought from TCI." Without belaboring the point, this tribunal has consistently held that the application by FSA of such Estimated Actual Loss Formula is discretionary on its part and should not be applied in refund liability cases. *See, In the Matter of Helma Institute of Massage Therapy*, Docket No. 11-83-SP, U.S. Dep't of Educ. (March 21, 2013) and the cases cited therein. I see no reason to hold otherwise in this proceeding.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ordered that Technical Career Institutes repay to the United State Department of Education the sum of $378,909.09, as demanded in the FAD, less an offset of $178,205.87, for a net return of $200,703.22.

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Ernest C. Canellos
Chief Judge

Dated: October 6, 2014

4 The IG Audit Report indicated that TCI provided documentation of written and verbal guidance from ED that appeared to support TCI's policy of using the 21 day period of non-attendance as the withdrawal date. However, the report further indicated that TCI erroneously relied on the provisions of 34 C.F.R. § 668.22 (c) (1) (iv) for such practice, even though that provision is limited to cases involving "illness, accident, grievous personal loss, or other such circumstance beyond the student's control."

SERVICE

A copy of the attached document was sent to the following:

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