UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 202027

In the Matter of	**Docket No. 17-57-SP**
AMERICAN BEAUTY ACADEMY (MD)	Federal Student Aid Proceeding
	PRCN: 201440328763
Respondent	

DECISION

On October 25, 2017 the undersigned received a written Request for Review in the above-styled proceeding from Edward Gillespie, President of American Beauty Academy ("ABA"). ABA challenges the findings presented in a Final Program Review Determination provided with an enclosed letter, which was issued by the U.S. Department of Education, Federal Student Aid (FSA) office. The Request was filed pursuant to 34 C.F.R. § 668.113 (a). The appeal procedures for these proceedings are set forth in 34 C.F.R. Part 668, Subpart H. ABA has a number of separate actions concerning its participation in the Title IV, HEA program. Those actions include the November 17, 2015 revocation of ABA's Program Participation Agreement ending ABA's participation in Title IV based on ABA's failure to comply with the 90/10 rule, and also the imposition of liability assessed by FSA due to ABA's failure to submit a close-out audit after its Title IV participation was revoked. This appeal also references the Title IV revocation issue for another school of Mr. Gillespie's named the "Antonelli Medical & Professional Institute". All of those matters have separate review procedures apart from this appeal. The close-out audit liability also is presently before this tribunal in a separate appeal (Office of Hearings and Appeals Docket Number 17-64-SA). The only action contested in this decision is FSA's Final Program Review Determination dated August 2, 2016, which imposes a liability on ABA of $5,566,319.92.

Proprietary schools participating in Title IV are subject to the 90/10 rule, which places a cap of 90 % on how much of a school's revenue can come from Title IV funds. 20 U.S.C. §1094(a)(24) states:

> In the case of a proprietary institution of higher education (as defined in section 1002(b) of this title), such institution will derive not less than ten percent of such institution's revenues from sources other than funds provided under this subchapter and part C of subchapter I of chapter 34 of title 42, as calculated in accordance with subsection (d)(1), or will be subject to the sanctions described in

subsection (d)(2).

The liability in this appeal is from ABA's failure to meet the 90/10 rule for fiscal years 2012, 2013 and 2014. When a school fails to meet the rule for two successive years, it is automatically ineligible for Title IV funds for any subsequent years. 20 U.S.C. §1094(d)(2)(A and B). The FSA imposed liability for funds ABA received after ABA became ineligible for Title IV. FSA seeks a return of Title IV, HEA program funds totaling $5,566,319.92, including the funds and the cost of funds. The returned funds were for the Award Years of 2012/2013, 2013/2014, and 2014/2015.

In its September 20, 2017 request for review of this liability, ABA asserted several defenses to the liability. ABA first broadly disputes "any and all liabilities based upon the 90/10 calculations." ABA also states it was denied procedural due process. The remainder of ABA's assertions in its request for review center on the fact that it was not notified each year of its ongoing violations of the 90/10 rule.

Upon receipt of ABA's request for review at the Office of Hearings and Appeals, the undersigned was assigned to conduct the hearing for this appeal, and issued an Order Governing Proceedings. ABA's review request was filed pursuant to 34 C.F.R. § 668.113 (a). The appeal procedures for these proceedings are set forth in 34 C.F.R. Part 668, Subpart H.

ABA has the burden of proof in this proceeding. *See* 34 C.F.R. § 668.116 (d). On October 26, 2017, ABA was ordered to file its brief and supporting evidence by November 29, 2017.

ABA did not file any further pleadings after it filed its request for a review. ABA did not comply with the Order Governing Proceedings to file its initial brief by November 29, 2017. On December 26, 2017, counsel for FSA filed a motion for default judgment based on ABA's failure to file its brief. In response, on December 27, 2017, this Tribunal entered an order on FSA's motion for default judgment, directing ABA to show cause why the record should not be closed and giving ABA one final opportunity to comply. That order was sent to ABA by email scan delivery with received receipt.[1] ABA did not comply by the final deadline, and on February 15, 2018, FSA renewed its motion for default judgment.

Because ABA has not provided any filing after being given repeated opportunities to do so, the administrative record in this appeal is ordered closed. The Respondent has abandoned its appeal. ABA has failed to meet its burden of proof.

34 C.F.R. §668.117(c)(3) provides in relevant part that:

> The hearing official shall take whatever measures are appropriate to expedite the proceedings. These measures may include terminating the hearing process and issuing a decision against a party if that party does not meet time limits established by the hearing official.

[1] Receipts confirming email delivery to ABA for the Order Governing Proceedings, the Show Cause Order and for this Decision have been placed in the file record for this appeal.

Since ABA failed to provide its brief and supporting evidence, this decision must be based on a review of the administrative record as it exists.

ABA's Contesting of Liability for the 90/10 Rule Violation

The record shows the liability for this appeal is based on ABA's failure to comply with the 90/10 rule for two successive years. The supporting regulation for the 90/10 rule is 34 C.F.R. §668.114(b)(16), which provides that

> For a proprietary institution, the institution will derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds, as provided in § 668.28(a) and (b), or be subject to sanctions described in § 668.28(c);

Both 20 U.S.C. §1094(d)(2) and 34 C.F.R. § 668.28(c) state that after two years of an institution failing to meet the 90/10 rule, the institution loses eligibility to participate in the Title IV, HEA programs.

While the revocation of eligibility is not directly on appeal in this case, FSA's November 17, 2015 Revocation Notice ("Revocation Notice") has been entered into evidence. The Revocation Notice provides details of the underlying 90/10 rule violations that generated the liability in this appeal. Much of FSA's focus on the 90/10 rule was based on ABA's treatment of materials it called "Kits and Books".

When a student enrolled with ABA, the student was required to execute an enrollment agreement on the Kits and Books. The agreement stated the student could buy them either with an ABA voucher or on the open market, and also states that the voucher is "an advance on my financial aid in excess (that is in addition to my [sic]) of my tuition and fee charges." *Revocation Notice, p. 3-4.*

Regardless of where the student chose to buy the Kits and Books, ABA "disbursed" Title IV funds for the student and entered a credit entry in the students account. At the same time, ABA entered a matching "Refund to Student" in the amount of the Kits and Books price. That posted refund was not actually refunded to students. In no case did any student ever receive a credit balance for the so-called "Refund to Student" entries. Instead of a credit balance back to the student, the student's balance with ABA actually *increased.*

All of the "Refund to Student" entries were then included in ABA's calculation *as non-Title IV revenue* when performing the 90/10 calculation. As the Revocation Notice states:

> Title IV funds served as the sole funding source of the kits purchased by ABA students. As documented by each student-signed ABA kit voucher, all funds associated with the per-student kit cost are Title IV funds. The Title IV funds associated with the kit cost are not delivered to the student, cashed-out or otherwise transferred to the student; the funds maintain their clear and continuous

Title IV identity. Accordingly, the revenue allocated for the student kits cannot be represented as non-Title IV revenue in the 90/10 calculation. *See 34 C.F.R.* § 668.28(a)(4). *Revocation Notice, p. 5.*

Despite the ledger entries to the contrary stating that the students received credits for the amounts, the funds always remained with ABA, and in fact remained completely Title IV funds. Their subsequent inclusion as non-Title IV funds was erroneous.

None of the exhibits or correspondence submitted by ABA contradicts the above determination. The record establishes ABA has been given repeated opportunities to provide this tribunal with its supporting proof. The record contains no other evidence that contradicts the liabilities as established. ABA has failed to meet its burden of proof to show it did not violate the 90/10 rule and has not shown that the resulting liabilities should be set aside.

ABA's Due Process Arguments

34 C.F.R. § 668.111-124 provide for the required due process for institutions appealing liability determinations by FSA. ABA has been provided the procedural safeguards in those regulations. Those safeguards include information on how and when an institution is to make a request for a review, notification of the parties by the hearing official of the schedule for the hearing, prehearing conference procedures, hearing procedures, evidentiary standards, the right for a party to be represented by counsel, appeals to the Secretary of the hearing official's decision, and interlocutory appeals to the Secretary. Because those safeguards have been provided to ABA in this hearing process, ABA has been given the appropriate procedural due process, even though ABA has chosen not to use that process to submit evidence disputing the liability.

ABA also disputes two other matters relating to due process more specifically, with the first being lack of notice to ABA of the Final Program Review Determination dated August 2, 2016 which forms the basis for this liability. It is unclear whether ABA provided address changes to FSA during this period. What is clear is that ABA was not served with the FPRD until over a year later, on August 22, 2017. ABA asserts that because it was not served, it was "unable to appeal the liabilities owed as it was not made aware due to the Department's lack of communication." ABA's appeal rights were delayed by lack of service, but once ABA was served in August of 2017, ABA was provided the appeal rights and required due process. The statement that ABA was unable to appeal the liabilities is not accurate, since those very liabilities have been appealed and are the subject of this appeal process.[2]

The second more specific due process concern raised by ABA is that because it was not subject to separate review and audit processes for each year, it cannot be held responsible for the successive years of violation of the 90/10 rule. ABA contends that FSA is required to conduct

[2] In its request for review, ABA also states that "If you have any questions, please email me at: todonegal@msn.com. All correspondence regarding this matter should be sent to the address listed below in addition to the email address listed above, at a minimum. This decision has been sent by certified mail to the mailing address specified, and by email, return receipt requested, to the email address ABA provided.

audits and reviews of each year finding violations before ABA can be held responsible for subsequent violations. Neither 20 U.S.C. §1094(d)(2) nor 34 C.F.R. § 668.28(c) contain any such mandates imposed on FSA, and the entire administrative landscape is populated with similar regulatory schemes. The Internal Revenue Service, for example, accepts taxpayer returns for multiple years, but is not precluded by procedural due process from determinations of liability for back taxes if it does not conduct an audit each year. In the absence of any such specific language, ABA is not entitled to annual audits and notice before facing liability for subsequent years of violation.

ORDER

It is unknown why ABA chose to enter the above-described ledger treatments for the "Kits and Books" which formed the basis of FSA's determination that ABA violated the 90/10 rule. The entries were factually incorrect, and the result was a clear misrepresentation of Title IV funds as non-Title IV. While ABA has asserted violations of procedural due process, this proceeding has offered up the exact process which is due, only to have ABA fail to respond to the briefing order and fail to provide any evidence or brief to support its appeal. ABA has been given a more than reasonable period of time to comply with the order governing proceedings and the order to show cause, both of which were issued to give ABA an opportunity to submit evidence in support of its appeal. Under 34 C.F.R. § 668.116(d), ABA has failed to meet its burden of proof, and the evidence of record strongly supports FSA's liability determination for ABA's violation of the 90/10 rule.

On the basis of the above findings, it is ordered that ABA pay to the U.S. Department of Education the sum of $5,566,319.92, including interest, as demanded in the Final Program Review Determination.

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Robert G. Layton
Judge

Dated: March 23, 2018

SERVICE

This order has been sent via US Postal certified mail and email, with confirmation delivery receipt, to:

Edward L. Gillespie, President
American Beauty Academy
5870 Lantern Court
Sarasota, FL 34243
(emailed to: todonegal@msn.com)

And to:

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