



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

WILLOUGHBY-EASTLAKE SCHOOL
OF PRACTICAL NURSING,

Docket No. 09-02-SP
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY

This matter comes before me on appeal by Respondent of an Initial Decision issued by Judge Richard F. O'Hair on July 1, 2009. Judge O'Hair upheld a determination by the office of Federal Student Aid (FSA) finding that Respondent failed to obtain proper postsecondary accreditation, and, as a result, was ineligible for Federal funds for the 2000-01 through 2004-05 student aid award years. On this basis, Judge O'Hair required Respondent to return to the Department \$765,403.93. For the reasons set forth below, I reverse Judge O'Hair's Initial Decision, and require Respondent to pay the Department \$50,000.

Postsecondary institutions seeking to participate in Federal student aid programs must, among other things, be accredited to offer postsecondary education by an accrediting agency recognized by the Secretary as a reliable authority on the quality of education offered by educational institutions.¹ As a result of a review of Respondent's postsecondary education nursing program, FSA determined that Respondent failed to meet this requirement for the 1998-99 through 2004-05 student aid award years.² Consistent with Title IV and the provisions under Subpart H of the Department's student aid regulations, Respondent requested an administrative hearing. Under Subpart H regulations, the administrative hearing process allows postsecondary institutions to challenge findings issued in a final audit or program review determination by bringing the challenge before an administrative judge who upon review of written submissions

¹ See Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* (Federal student aid programs are authorized under Title IV).

² During the hearing process, FSA declined to pursue its original finding with regard to the 1998-99 and 1999-2000 award years. Hence, in the proceeding before Judge O'Hair, FSA reduced the amount of liability established in the final program review determination.

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and/or oral argument issues an Initial Decision. Once the Initial Decision is issued either party may request that the Secretary review the decision and issue a final agency decision.³

In the Initial Decision, Judge O’Hair agreed with FSA that Respondent was not properly accredited. On this basis, Judge O’Hair directed repayment of all Federal funds disbursed by Respondent during the relevant award years. On appeal, the question presented to me is: whether Respondent must pay \$765,403.93 to the Department as a result of its lack of accreditation during the relevant award years.

In terms of principles of equity and fairness, Respondent argues that I should invoke my plenary authority to reverse Judge O’Hair’s finding that Respondent owes \$765,403.93 to the Department. Respondent presents its principal argument in several modes -- including waiver, estoppel and compromise -- but, ostensibly, Respondent argues that I should reduce its liability to zero because the institution’s lack of accreditation was due to a mistake, and that this mistake was due to no fault of the institution’s making. In Respondent’s view, even if it shares responsibility for its failure to obtain proper accreditation, the resulting liability is excessive because the institution relied upon both its accrediting agency and the Department when concluding that the institution’s accreditation status was proper.

The record shows that Respondent maintained secondary and postsecondary nursing programs. Prior to 2000, Respondent’s accrediting agency provided a single accreditation process that included both Respondent’s secondary and its postsecondary nursing programs. In 2000, when Respondent’s accrediting agency developed distinct accrediting processes for secondary and postsecondary programs, Respondent’s preexisting accreditation no longer applied to its postsecondary nursing program.⁴ Respondent argues that it was not informed of this change, and continued to believe that its accreditation applied to its secondary and postsecondary nursing programs. According to Respondent, not until FSA informed Respondent in 2006 that the institution was ineligible to participate in Federal student aid programs did the institution become aware that the postsecondary nursing program lacked proper accreditation.⁵

Judge O’Hair concluded that “Respondent’s equitable arguments that it acted in good faith and was not notified of its accrediting agency’s separate process for postsecondary programs are not relevant to the disposition of this case.” Going a step further, Judge O’Hair

³ Subpart H regulations provide that: “[t]o the extent that the decision of the Secretary sustains the final audit determination or final program review determination...the Department...will take steps to collect the debt at issue or otherwise effect the determination that was the subject of the request for review.” 34 C.F.R. § 68.123

⁴ Respondent applied for recertification to participate in Title IV programs in 2006, which resulted in notice from the Department that the recertification application was denied due to lack of proper accreditation. Subsequently, Respondent regained accreditation and, as a result, the Department approved Respondent’s reapplication to participate in Title IV programs.

⁵ FSA does not accept Respondent’s argument. Instead, FSA prefers the view that it is “inconceivable that [Respondent’s accrediting agency] did not inform Respondent of the new process for postsecondary accreditation...in 2000” when the accrediting agency implemented its new process. Nonetheless, I find no plausible reason to doubt Respondent. FSA provides no reason why Respondent would ignore the accrediting agency’s notice and purposefully risk the loss of substantial Federal funds. I am persuaded that Respondent was relying on its existing accreditation in 2000 and would have responded to a notice of change in policy from its accrediting agency in the same manner that it did in 2006 when it promptly applied for and obtained accreditation.

concluded that under the facts of this case, “the Department is entitled to repayment notwithstanding the institution’s good faith or lack of notice,” and that the provisions of 31 U.S.C. § 3711(a)(2) restrict the Department’s authority to waive or compromise liability of any claim exceeding \$100,000.⁶

On appeal, FSA, similarly, argues that there is no legal basis to waive liability or estop enforcement of the collection of Respondent’s debt. In FSA’s view, since Respondent concedes that it lacked proper accreditation during the award years at issue, Respondent must repay those funds without regard to equitable considerations.⁷ In response to Respondent’s citations to Department case law appearing to uphold the use of equity, FSA argues that to the extent that the case law has invoked equity to mitigate liability in subpart H proceedings, those decisions are either impertinent to the issue before me or constitute “bad law.”⁸ I disagree.

First, FSA cites no judicial decision,⁹ and I know of none, that attempts to resolve the question whether the Department is authorized to compromise claims exceeding \$100,000 in

⁶ Noting that pursuant to 31 U.S.C. § 3711(a)(2), “no executive, judicial, or legislative agency has the authority to waive claims over \$100,000.00,” Judge O’Hair concluded that it was “beyond [his] authority to disallow liability based on [] equitable argument.” Section 3711(a)(2) provides, in pertinent part: “The head of an executive, judicial, or legislative agency...may compromise a claim of the Government of not more than \$100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe....”

⁷ I have some doubt that FSA means what it says regarding equity since FSA, itself, reduced the amount it originally sought to recover from Respondent by two award years. According to Judge O’Hair, “FSA reduced Respondent’s alleged liability by the amount of Title IV funds awarded during the 1998-99 and 1999-2000 award years.” Judge O’Hair noted that the reduction was made because FSA was “willing to assume that Respondent obtained recognized accreditation during those award years.” Whether this was an appropriate assumption or not FSA’s judgment clearly involved an equitable consideration based on its discretion rather than an actual determination based on its fact-finding. Indeed, FSA’s only fact-finding was to the contrary. While I generally find such considerations by FSA appropriate, they undermine the persuasive force of FSA’s arguments that equitable considerations are not permissible in these proceedings.

⁸ Compare *In Re Macomb Community College*, Docket No. 91-80-SP, U.S. Dep’t of Educ. (May 5, 1993) (recognizing that after it is established that an institution is liable for a statutory or regulatory violation, the Department may recover an amount for the misuse of Title IV funds); *Beth Medrash Eeyun Hatalmud*, Docket No. 97-94-SP, U.S. Dep’t of Educ. (June 16, 1998) (ineligible institution not required to return disbursed funds despite clear and unambiguous regulation) with *In Re Beth Jacob Hebrew Teachers College*, Docket No. 96-77-SP, U.S. Dep’t of Educ. (March 17, 1997) (the government cannot be estopped from collecting misspent funds) and *In Re Molloy College*, Docket No. 94-63-SP, U.S. Dep’t of Educ. (May 1, 1995) (upholding liability despite erroneous determination of institutional eligibility by agency).

⁹ Respondent cites *Hatalmud v. Riley*, 2005 WL 3370500 (S.D.N.Y. Dec. 9, 2005) and *Beth Jacob Hebrew Teachers College*, 73 F. Supp. 2d 262 (E.D.N.Y. Sept. 30, 1999) as two known instances where federal courts have acknowledged the reduction of liability imposed during an administrative adjudication and considered such actions within the discretion of the Secretary; Secretary Riley relieved the institution’s liability of \$16 million in the former case and of more than \$19 million in the latter case -- choosing to impose a \$50,000 fine in both instances. More explicitly, on appeal to the Second Circuit, in *Hatalmud v. Spellings*, the appeals court recognized that the Secretary acted *ex aequo et bono* by exercising equitable powers to forgive “a debt...[n]otwithstanding [the institution’s] ineligibility.” 505 F.3d 139, (Oct. 17, 2007). In neither case, however, did the court directly confront the application of section 3711(a)(2).

accordance with 31 U.S.C. § 3711(a)(2).¹⁰ In addition, an analysis of the legal question concerning the limits imposed by 31 U.S.C. § 3711(a)(2) on my authority to establish the amount of liability in a subpart H proceeding calls for more than mere recitation of the text of section 3711(a)(2). Even if FSA were correct in arguing that the Department is not authorized to compromise certain claims exceeding \$100,000, the question remains to which claims the statutory bar of section 3711(a)(2) applies.

The Departments of Justice and Treasury share responsibility for administering the Federal Claims Collection Act (FCCA). Consistent with that role, the Department of Justice, Office of Legal Counsel (OLC), issued a legal opinion squarely addressing a question similar to the one at issue here.¹¹ In advising the Department of Interior (DOI) on the application of section 3711, the OLC concluded that the DOI could compromise or settle a claim exceeding \$100,000 without obtaining the approval of the Justice Department because the restrictions set forth in section 3711(a)(2) do not apply until a “final determination is made and the amount of the claim is established by the agency.”¹²

The OLC based its conclusion on reasoning that I find equally compelling in this case. First, the OLC noted that the express language of section 3711 does not reduce or diminish the separate statutory authority possessed by some federal agencies to settle or compromise certain claims.¹³ Second, the OLC reasoned that the applicability of the FCCA initially depends upon whether the amount sought by the Federal government constitutes a “claim” or “debt” within the meaning of section 3701(b)(1).¹⁴ In this regard, the OLC concluded that whether a claim or debt comes within section 3711 turns on whether the claim or debt amount is the result of a

¹⁰ See Debt Collection Improvement Act of 1996 (DCIA) (amending the Federal Claims Collection Act (FCCA)), Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321. Regulations establishing the standards under the FCCA, known as the Federal Claims Collection Standards (“FCCS”), have been jointly promulgated by the Attorney General and the Comptroller General. The FCCS requires that agencies refer to the Department of Justice for approval any intent to compromise certain debts in excess of \$100,000. See 31 C.F.R. Parts 900 – 904 (2008).

¹¹ Opinion of the Office of Legal Counsel, *Administrative Settlement of Disputes Concerning Determinations of Mineral Royalties Due the Government*, 1998 OLC LEXIS 32 (July 28, 1998).

¹² *Id.*

¹³ See 31 C.F.R. Parts 900-904. Those regulations provide, in pertinent part:

Nothing in [the Collection Standards] precludes agency disposition of any claim under statutes and implementing regulations other than [the FCCA] and the[se] Standards In such cases, the laws and regulations that are specifically applicable to claims collection activities of a particular agency take precedence over parts 900-904 of this chapter.

Id. § 900.4. As such, some claims by the Department are never subject to section 3711(a)(2). See, e.g., 20 U.S.C. § 1234a(j) (establishing a unique restriction on the Department’s authority to compromise the amount of a claim under the General Education Provisions Act).

¹⁴ The statutory definition of a “claim” under the FCCA (codified at 31 U.S.C. § 3701(b)(1)), provides in relevant part:

The term ‘claim’ or ‘debt’ means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency.

conclusive determination of a finding. Therefore, according to the OLC, a disputed finding is not conclusively established by the agency until the administrative appeal has been exhausted.¹⁵

I am convinced that the reasoning applied by OLC is directly applicable here. Like the royalty settlements considered in the OLC opinion, the proceedings here occur “before there is a final administrative decision.” The appeal review process is “an element in the exercise of the Secretary’s authority to assess penalties.” Applying the OLC reasoning to this case, it follows that disputed assertions regarding whether a proposed recovery is valid or whether the amount of recovery is appropriate does not become a claim for purposes of the FCCA until a final administrative determination has been made by the operation of law, issuance of an administrative judge’s decision, or, in a case where a party appeals the Initial Decision, issuance of my decision.

The Initial Decision on appeal does not constitute claims subject to the requirements of the FCCA until a final determination of the amount due has been made by me.¹⁶ In this proceeding, it is my decision alone that upon issuance may give rise to a claim covered by the FCCA. Of course, since I have determined that in this matter Respondent must pay to the Department \$50,000, section 3711(a)(2) is not implicated. More generally, should the Department decide to compromise a pertinent claim exceeding \$100,000 after my decision is issued, approval by the Department of Justice is required by section 3711(a)(2).

As the OLC noted in its opinion, it is particularly relevant whether the accuracy of a determination arises from an administrative appeals process in which an initial determination may be subject to significant revision as parties move through the various levels of the proceedings. The Department’s cases provide abundant evidence that during the Department’s administrative appeals process, an initial determination may be subject to significant revision as parties move through the various levels of the proceedings. Certainly, as is true of the instant appeal, a claim established by a final agency decision may be less than the liability proposed or sought by FSA in its final audit determination or final program review determination.

Like the administrative appeal procedures at issue in the OLC opinion, the Department has established in subpart H proceedings a carefully layered process of administrative review that is consistent with the Department’s mandate to develop enforcement practices that ensure that Title IV funds are expended in accordance with program requirements. The significance of

¹⁵ Apparently, this is a long-standing position of the OLC. In 1975, the OLC considered a similar issue concerning the FCCA’s applicability to non-final administrative determinations by the Department of Interior (DOI). In that circumstance, a mine operator requested a hearing before DOI’s Office of Hearings and Appeals to challenge a health and safety assessment. Prior to the administrative hearing, a settlement was reached. In reviewing DOI’s authority to settle the amount assessed, the OLC noted that the issue was “whether such a compromise is subject to the Claims Collection Act.” The OLC concluded that the FCCA did not apply because the effect of the settlement was to terminate the proceeding before there was a final administrative decision. Letter for Rollee Lowenstein, Esq., Assistant General Counsel, General Accounting Office, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Oct. 21, 1975).

¹⁶ Consistent with the Administrative Procedure Act, the Department’s long-standing rule applicable to administrative appeals is that a final determination has not been made until the final agency decision is issued. *See, e.g., In the Matter of Beth Medrash Eeyun Hatalmud*, Dkt. No. 97-94-SP, Initial Decision (June 16, 1998), Decision of the Secretary (April 1, 1999).

the administrative appeal procedures is also reflected in the institution's opportunity to be heard by an administrative judge who issues a written decision, which may be appealed to me. Pursuant to 34 USC § 1094, in order to discharge the statutory responsibility to provide institutions with an opportunity to challenge the findings of an audit or program review determination, the Secretary has promulgated regulations that provide notice and opportunity for a hearing. During this administrative process, parties attempt to resolve disputed issues.

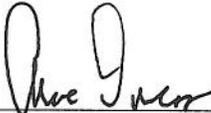
These layers are significant in that at each step the amount of the liability may be challenged, and the institution's obligation to pay is generally not enforced during the pendency of the administrative appeal. Indeed, the administrative appeals process necessarily includes the authority to resolve disputed issues during the administrative process in a manner determined to be in the Government's best interest, including the authority to collect amounts less than those initially assessed by the program office when such action is warranted. Accordingly, since a conclusive determination of a disputed finding has not been rendered until administrative appeals have been exhausted, my authority to waive or compromise Respondent's liability or otherwise reduce the liability sought in the final audit or program review determination, notwithstanding that the amount at issue exceeds \$100,000, is not restricted by section 3711(a)(2).

Moreover, the case law favors the Department's practice of invoking equitable considerations in establishing the appropriate amount of recovery in Subpart H proceedings. Like the equities established in *Beth Medrash Eeyun Hatalmud, supra*, I find it appropriate to invoke my discretion to set the amount of recovery. Notwithstanding that there is no doubt that the institution lacks eligibility, this case does not warrant the imposition of a \$765,403.93 financial liability. In light of the aforementioned, Respondent must pay the Department \$50,000.00.¹⁷

ORDER

ACCORDINGLY, the Initial Decision issued by Administrative Judge Richard F. O'Hair on July 1, 2009, is REVERSED; Respondent shall pay the U.S. Department of Education the sum of \$50,000.

So ordered this 12th day of November 2010.



Arne Duncan

Washington, D.C.

¹⁷ See, *In the Matter of Beth Medrash Eeyun Hatalmud*, Dkt. No. 97-94-SP, Decision of the Secretary (April 1, 1999). Respondent should pay a penalty because the lack of accreditation is a fatal impairment to an institution's eligibility to participate in Federal student aid programs, and it remains the obligatory duty of postsecondary institutions to ensure that proper accreditation is secured.

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