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IN THE MATTER OF EMPIRE                      Docket No. 92-11-SP  
TECHNICAL SCHOOLS,                      Student Financial  
Respondent.                      Assistance Proceeding

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DECISION

Appearances:     David H. Larry, Esq., and Gregory P. Schaffer, Esq., Manatt, Phelps & Phillips, for Empire Technical Schools, Inc.

Russell B. Wolff, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before:     Judge Richard F. O'Hair

Empire Technical Schools, Inc., (Empire) participated in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* These programs are administered by the Office of Student Financial Assistance Programs (SFAP), [See footnote 1 / U.S. Department of Education \(ED\)](#). On November 13, 1991, SFAP issued a Final Program Review Determination (FPRD) for Empire. The findings in the determination were based on the program review report for the 1989-90 and 1990-91 award years. The FPRD found that Empire improperly admitted students who did not demonstrate an ability to benefit from the educational program, made incorrect and untimely refunds, failed to properly verify certain students, made an improper determination of cost of attendance, failed to resolve conflicting information in certain student files, made improper disbursements of GSL funds, and drew down excess Title IV funds for certain students. Empire filed a request for review.

The FPRD and the underlying program review report were based upon a sample of 32 students. Because the program review identified a number of findings of noncompliance by Empire, it required Empire to conduct a full file review in order to determine the school's actual liability under these findings. When Empire did not do so, the FPRD assessed liabilities in the amount of all Title IV funds received by Empire during the period in question. In 1994, more than three years after the school closed, Empire submitted a closeout audit. Empire requests that the closeout audit be considered as a substitute for a full file review.

SFAP alleges that Empire should be required to refund all Title IV funds that it disbursed during the time period at issue because the school did not perform the requested full file review. SFAP claims that the closeout audit submitted by Empire was not only untimely and incomplete, but also identified substantial liabilities of the institution.

Empire responds that SFAP may seek reimbursement only of Title IV funds that were improperly disbursed by an institution and that there is no legal authority for ED's position that

the school must refund all Title IV funds disbursed because of its failure to perform a file review. Empire asserts that the closeout audit is the best evidence available as to the school's actual liabilities.

Empire's arguments to the contrary notwithstanding, previous decisions of this tribunal have held that when an institution fails to submit a full file review in response to a program review, SFAP may be entitled to recover all Title IV funds disbursed to that institution during the time period covered by the program review, but only if the school has not provided relevant data with which to measure the actual loss to SFAP. In *In the Matter of Selan's System of Beauty Culture*, Dkt. No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994), the judge stated as follows:

Although [the institution] may have had a reasonable explanation for failing to provide SFAP with the requested documentation, it is well established that the nature of the enforcement of Title IV programs, through the use of program review determinations, creates the need for institutions to cooperate with SFAP by providing the agency with complete file reviews when that information is needed to determine whether any, if not all, Title IV funds disbursed to the institution were spent contrary to statutory and regulatory requirements. More fundamentally, an institution's cooperation in providing SFAP with documentation of its expenditure of Title IV funds is consistent with its fiduciary duty to account for the disbursement of Title IV program funds.

Under the circumstances of this case, the school's failure to provide SFAP with the data requested . . . undercuts the school's position that Title IV funds should not be recovered. In fact, SFAP has little choice other than to require the return of *all* Title IV funds disbursed during the period at issue when an institution fails to provide SFAP with an accounting of its expenditure of Title IV funds.

*Selan's* at 5 (emphasis in original). See also *In the Matter of Pan American School, Inc.*, Dkt. No. 92-118-SP, U.S. Dep't of Educ. (Oct. 18, 1994), at 5-6; *In the Matter of Illinois Medical Training Center*, Dkt. No. 93-87-SA, U.S. Dep't of Educ. (May 9, 1994), at 9; *In the Matter of Phillips Colleges, Inc.*, Dkt. No. 94-4-SP, U.S. Dep't of Educ. (Nov. 2, 1994), at 3; *In the Matter of Santa Clara Beauty College*, Dkt. No. 94-24-SP, U.S. Dep't of Educ. (Nov. 14, 1994), at 7.

As noted above, however, *Selan's* and other cases have held that the institution's liabilities should be less than the total amount of Title IV funds disbursed where the institution can provide data proving that such a reduction is warranted. In *Selan's*, the judge stated as follows:

Although I must uphold SFAP's calculation of liability because [the institution] failed to provide SFAP with the requisite data required to measure precisely the school's liability, I recognize that in cases in which the school provides SFAP with some degree of relevant data, the actual loss formula should be applied in a manner that reflects SFAP's loss clearly associated with the proven regulatory violation.

In other words, SFAP should be entitled to recover the losses directly attributed to [the institution's] failure to pay refunds to lenders. If the evidence is available to determine the extent of that loss, that amount will constitute the extent of SFAP's recovery.

*Selan's* at 3-4. Since the school had not provided such data, the judge stated that, under the circumstances of that case, "I am unable to determine the school's liability more precisely than the calculation offered by SFAP."

To summarize, *Selan's* and the other cases stand for the proposition that when an institution fails to submit a full file review in response to a program review, SFAP may be entitled to recover all Title IV funds disbursed to that institution during the time period covered by the program review, but only if the school has not provided relevant data with which to measure the actual loss to SFAP. Nonetheless, that data must be accurate and reliable. See, e.g., *Pan American School* at 5-6 (judge rejected file review offered by the school because it had not been performed by a certified public accountant). This requirement is in accord with the institution's burden of persuasion under 34 C.F.R. § 668.116(d). Thus, an accurate and timely submitted closeout audit that covered all of the issues raised in the audit or program review could be an acceptable substitute for a full file review. In the instant case, however, the closeout audit submitted by Empire three years after the fact does not satisfy that requirement. Under 34 C.F.R. § 668.25(a)(3)(ii) (1990), Empire was required to submit to the Secretary of Education a letter of engagement for a closeout audit within 45 days of its closure in November 1990. Empire admits that it did not do so, blaming its failure on lack of financial resources (a ground that was rejected in *Pan American School*). Three and a half years later, in August 1994, Empire finally submitted a closeout audit to ED, but this audit cannot be considered to be an accurate and reliable substitute for the full file review that was requested by SFAP. At numerous places, the auditors state that because of the delay, records could not be obtained, no former employees of the institution were available to assist in the preparation of the audit, and the institution's internal controls could not be tested. As a result of the substantial amounts of missing information identified by the closeout audit, Empire is not relieved of its duty to provide the full file review requested by the program review report.

Even if the closeout audit could be considered accurate and reliable, I note that the auditors specifically discussed the findings of the program review and confirmed the existence of most of these deficiencies. Specifically, the auditors confirmed deficiencies for findings 3

(incorrect and untimely refunds), 4 (incomplete verification), 6 (unresolved conflicting information), and 10 (unauthorized use of Title IV funds). Additionally, the auditors stated that, as to finding 5, "the underlying assumptions and calculations which determined cost of attendance were not available to the auditors for this audit." Although the closeout audit submitted by Empire identified specific dollar amounts for the 19 areas of noncompliance with ED regulations by Empire that it separately identified, it did not discuss the specific dollar amounts for the actual loss to SFAP resulting from the deficiencies that it confirmed for findings 3, 4, 6, and 10 of the FPRD. As a result, under the circumstances of this case, Empire has not satisfied its burden of persuasion because the closeout audit does not provide the relevant data necessary to substitute for the full file review requested by SFAP.

For these reasons, I affirm the FPRD.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that Empire shall refund to the U.S. Department of Education all Pell Grant, Supplemental Educational Opportunity Grant (SEOG), and College Work-Study (CWS) funds disbursed by the institution during the final two years of recorded operations (fiscal year 1989 and 1990), totaling \$2,433,875. It is further ORDERED, that Empire shall repurchase from the current holders of Federal Family Education Loans (FFELs) \$3,595,726 disbursed during these years.

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Judge Richard F. O'Hair

Issued: April 24, 1995  
Washington, D.C.

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S E R V I C E

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A copy of the attached initial decision was sent by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED** to the following:

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*Footnote: 1 1 SFAP was formerly known as the Office of Student Financial Assistance (OSFA).*