

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

IN THE MATTER OF

FLAVIO BEAUTY COLLEGE,

Respondent.

Docket Number 93-71-SA

Student Financial
Assistance Proceeding

Appearances:

J. Andrew Usera, Esq., Vienna, Virginia, for the Respondent.

Edmund J. Trepacz, II, Esq., Office of the General Counsel, U.S. Department of Education, for the Office of Student Financial Assistance Programs.

Before:

Judge Ernest C. Canellos

DECISION

PROCEDURAL HISTORY

Flavio Beauty College (Flavio) is part of a for-profit beauty school chain located in the greater Los Angeles, California, area. It is accredited by the National Accrediting Commission of Cosmetology Arts and Sciences (NACCAS). Flavio participates in the Pell Grant and Perkins Loan programs, both authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). These programs are administered by the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED).

During the period in question, ED'S regulations required institutions participating in Title IV programs to submit compliance audits every two years. 34 C.F.R. § 668.23(c)(4)(i), (ii). ED reviewed a compliance audit report of Flavio covering a five year period ending June 30, 1989. This compliance audit was performed by Barry Glasser, CPA, between April 10, 1990, and March 31, 1991.

Under 34 C.F.R. § 668.14 (e), schools participating in Title IV programs are required to determine if students are making satisfactory academic progress toward completion of a program of study. Failure to do so creates an institutional liability for any Title IV funds disbursed without a progress review. Glasser's compliance audit tested a sample of 25 files for

documentation of academic progress review. In 6 of the 25 files, Glasser determined that there was no documentation of a progress review. The audit also tested a sample of 125 files for documentation of qualitative measurement (i.e. grade average). Glasser found no qualitative measurement in 53 of the 125 files tested.

On February 10, 1992, SFAP's Audit Resolution Branch (ARB) issued a Final Audit Determination (FAD) based upon a review of Glasser's compliance audit report. On the basis of the finding that Flavio failed to properly determine whether its students were maintaining satisfactory progress, ED determined Flavio's audit sample liability to be \$53,504 in Pell Grant and Perkins Loan funds.

On April 7, 1992, ED requested Flavio to perform a total file review in order to determine the full liability. As of April 26, 1993, ED had not received from Flavio any further information or auditor's comments with regard to the finding. ED then statistically projected the audit sample liability to the total population, resulting in a total liability of \$119,769.

On June 15, 1993, Glasser supplied ED and Flavio with a certification regarding the findings of his initial audit ("Glasser certification"). Flavio maintains that this certification cures the majority of issues raised by ED's finding, leaving only an unresolved amount of \$4,148. Flavio claims a subsequent projected liability of \$4,540, for a total liability of \$8,688.

Therefore, the threshold issue in this proceeding is whether the Glasser certification may be considered by me and, if so, whether it is an appropriate response to the FAD issued by SFAP on February 10, 1992. The ultimate question is whether the certification supports a reduced liability against Flavio.

DISCUSSION

Under 34 C.F.R. 668.113(b), an institution must file its request for a review and any admissible records or materials no later than 45 days from the date it receives a FAD. The Glasser certification was submitted more than a year after SFAP issued its FAD. Nonetheless, Flavio contends that it must be considered in determining any Pell Grant and Perkins loan liabilities. ED claims, however, that the regulations bar any possible reduction of the audit sample liability based on the certification.

Institutions receiving Title IV funds are required to determine if students are making satisfactory academic progress toward completion of a program of study. 34 C.F.R. § 668.14(e). Failure to do so creates an institutional liability for any Title IV funds disbursed without a progress review. In the original compliance audit, there was no documentation of an academic progress review before the second Title IV disbursement for 6 of the 25 files tested. Additionally, there was no qualitative measurement (i.e. no grade average) for 53 of 125 files tested. ED's finding and liability assessment were based on these deficiencies. However, if after-the-fact evidence or documentation exists to support a reduction of Flavio's liability, it will be accepted if it is reliable and convincing. See In the Matter of Baytown Technical School, Inc., Docket No. 91-40-SP (Decision of the secretary) (April 12, 1994).

The Glasser certification purports to show that Flavio was able to provide responses to nearly all of the issues raised by the finding. ED has introduced no contrary evidence to rebut the certification. ED argues generally that the certification is a partial and incomplete document which reflects only a review of a handful of files which served as the original basis for its finding. Although ED seeks to have the certification excluded as untimely, it was submitted within a 45-day period from the further audit determination letter of April 26, 1993, in which ED notified Flavio of what its projected liability was and the basis for the projection.

ED's brief acknowledges that the Glasser certification may reduce the projected liability, but that such a reduction would have no impact upon the original audit sample liability because it was fixed upon expiration of the 45-day FAD appeal period. Therefore, ED submits that I may consider the certification for one purpose, but not for another. While the regulations are very specific as to the timing of evidentiary submissions, I also have a responsibility to ensure a fair and impartial proceeding in the course of this administrative process. Baytown, supra, at 3. My decision regarding the Glasser certification must therefore be based on principles of fairness, rather than a simple application of rigid regulations. These principles dictate that I accept or reject the certification in toto, and not in such a selective manner as ED would suggest.

While not representative of a total file review, the Glasser certification is very much on point in addressing the satisfactory progress issue. That issue formed the very basis for Flavio's original liability. The certification specifically notes that for 5 of the 6 cases cited in the FAD, documentation, including master attendance records and grade transcripts, was provided by Flavio as evidence that the students were making satisfactory academic progress. In the case of the 53 files which lacked qualitative measurement (i.e. no grade average), Flavio supplied grade point documentation for 51 of the students. Hence, the Glasser certification apparently cures the majority of issues on which Flavio's original liability was calculated.

Flavio contends that unusual circumstances prevented it from providing the above documentation in a timely manner. According to Flavio, a consolidation of files from various facilities was taking place at the time of the audit, and there was no means of determining the location of individual files. They add, if this proceeding is to be an equitable one, these unique and coincidental circumstances cannot be disregarded.

I must acknowledge as significant that the certification was performed by the same individual who performed the original audit on which SFAP's findings were based. In fact, Mr. Glasser performed this certification specifically to determine the reasonableness of Flavio's reply to ED. Nonetheless, ED would have me exclude the certification in the name of strict enforcement of its regulations. However, I find that the Glasser certification is relevant to my consideration of this issue. As expressed by the Secretary in Baytown, and posited in Flavio's brief, this process should not apply "form" over "substance." Accordingly, I cannot justify the exclusion of reliable evidence which mitigates more than 90 percent of Flavio's original liability.

I also accept the projected liability proposed by Flavio based on its reduced audit sample liability. Flavio's projection to the universe is statistically consistent with the original projection calculated by ED. Flavio has the burden of proof as to its compliance with ED's regulations and

whether it owes the amount of Title IV funds at issue. 34 C.F.R. § 668.116(d). The Glasser certification is sufficient documentation to meet that burden in this proceeding.

FINDINGS

I FIND the following:

The June 15, 1993 certification by Barry Glasser, CPA, is an appropriate response to the disputed finding of SFAP's June 7, 1992 Final Audit Determination.

Flavio's proper audit sample liability, under SFAP's finding is \$4,148, as reflected by the Glasser certification.

Flavio's projection of an additional \$4,540 flows directly from representative student numbers under SFAP's finding, and is supported by the record. Flavio's consequent total liability is \$8,688.

ORDER

On the basis of the foregoing it is hereby

ORDERED, that Flavio Beauty College repay to the United States Department of Education the sum of \$8,688.

Judge Ernest C. Canellos

Issued: July 25, 1994
Washington, D.C.

SERVICE

On July 25, 1994, a copy of the attached document was sent to the following:

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