IN THE MATTER OF INDIANA BARBER/STYLIST COLLEGE, Respondent.

Docket No. 94-111-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Bruce D. Brattain, Esq., and Linda B. Klain, Esq., of Brattain, Minnix & Young, for Indiana Barber/Stylist College.

Denise Morelli, 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

Indiana Barber/Stylist College (IBC) participates 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), U.S. Department of Education (ED). On April 6, 1994, SFAP issued a Final Program Review Determination (FPRD) for IBC. The findings in the determination are based on the program review report for the award years 1990-91 through 1992-93. IBC filed a request for review on May 27, 1994.

In the FPRD, SFAP contends that IBC improperly disbursed Title IV funds to an individual whose attendance cannot be documented, improperly disbursed Title IV assistance to a student who previously defaulted on an FFEL loan, improperly made a second Pell Grant disbursement to a student, improperly disbursed Pell Grant funds without a valid student aid report, made an incorrect refund calculation, improperly retained a student credit balance, failed to administer a valid ability to benefit test, and improperly certified two FFEL loans for the same academic year.

In response, IBC contests several findings on the basis that the ED program reviewer misread student time sheets or was otherwise mistaken. As to several other findings, IBC does not challenge the facts alleged in the FPRD, but raises equitable arguments as to why the school should not be required to repay the requested funds. Included in this is the fact that there has been a recent change of ownership, and all of the findings before me occurred during the previous owner's tenure. Under 34 C.F.R. § 668.116(d),See footnote 1 *1* IBC has the burden of proving that its questioned expenditures were proper and that it complied with applicable requirements. Where, as explained below, IBC is unable to prove the questioned expenditures were proper, any recourse that the institution may have must be against the former owners who committed these violations, and not against ED, which also was a victim.

Initially, I note IBC's numerous requests that I consider the small size of the institution, the

gravity of the harm to ED, and other equitable arguments in levying any "fines" against the school. I commend the current owners of IBC for the improvements that they have made at the school, as substantiated by the commendations from various state authorities contained in the exhibits. Nonetheless, the regulation cited by IBC in its discussion of "fines," § 668.92, applies only to termination and fine actions under 34 C.F.R. Part 668, Subpart G. Therefore, it is inapplicable to the current proceeding, which is a program review action governed by 34 C.F.R. Part 668, Subpart H. As a result, I must determine solely whether the questioned expenditures were proper and whether the institution complied with all program requirements. § 668.116(d). For this reason, I cannot consider other mitigating factors such as the size of the institution, the gravity of any potential harm to ED, or the other equitable arguments raised by IBC. As discussed below, however, no informal fines will be levied against IBC.

I also note IBC's request for an oral argument. Under § 668.116(g)(1), I may schedule an oral argument if I determine that one is necessary to clarify the issues and the positions of the parties as presented in the parties' written submissions. I do not find that to be the case here. Accordingly, IBC's request for an oral argument is denied.

Finding 2

SFAP claims that the $1,200 that IBC disbursed in Title IV funds to Student 10 (Appendix A)See footnote 2 *2* was improper because the school had no attendance records demonstrating that this student ever attended classes at IBC. §§ 668.7, 668.21. IBC acknowledges that no records existed for this student when the current owners acquired IBC and that the Indiana State Professional Licensing Agency had no records indicating that this student ever enrolled at IBC or took the state barbering exam. IBC requests leniency on the basis that although the current owners did not commit this violation, they will bear the financial burden of any adverse finding by this tribunal. Nonetheless, while I sympathize with their plight, my duty is to uphold the regulations of the Secretary of Education. *In the Matter of Gulf Coast Trades Center*, Dkt. No. 89-16-S, U.S. Dep't of Educ. (Decision of the Secretary) (Oct. 19, 1990). Because IBC has not proven that the $1,200 in questioned expenditures were proper, under § 668.116(d), the school must refund this amount to ED.

Finding 3

SFAP asserts that IBC improperly disbursed $2,750 in Pell funds to Student 5 (Appendix B), an ineligible student. SFAP argues that the student was in default on a Stafford loan obtained at another institution, and therefore was ineligible to receive Title IV funds at IBC. IBC admits that the student had been in default, but argues that the school believed that the default had been cured prior to IBC's disbursement of the Pell funds in question.

§ 668.7(a)(7) states that, except as provided in § 668.7(e), a student is eligible to receive Pell Grant funds only if the student is not in default under various loan programs, including the GSL program. § 668.7(e)(1) provides that a student who is in default on a GSL program loan may nonetheless be eligible to receive Title IV funds if the student is otherwise eligible and one of three additional conditions is satisfied: the Secretary of Education or a guaranty agency must have determined that the student has made satisfactory arrangements to repay the loan, the loan

must have been paid in full, or the loan must have been rehabilitated and sold under section 428F of the Higher Education Act (HEA).

The evidence offered by IBC does not satisfy any of these regulatory requirements. IBC argues that it reasonably believed that the default had been cured when IBC disbursed the Pell funds in question to this student because a letter from the student's attorney to the student stated that a "substantial portion of the loan" had been refunded. Nonetheless, under § 668.7(e), the student is eligible only if the Secretary or a guaranty agency has determined that the student made satisfactory arrangements to repay the loan. A letter from the student's attorney does not satisfy this requirement. Even if it did, the letter on its face does not indicate that the loan was paid in full. It specifically states that the student is probably still indebted on this loan for approximately $200. Nor does the letter contain any assurances that the student has made satisfactory arrangements to repay the loan.

Similarly the notation in the student's file does not constitute sufficient evidence to satisfy the requirement of § 668.7(e) that the loan must have been paid in full. The note simply states "Linda White said refund of [$1,092.08] was made to Bank One 4-28." Even if I assume *arguendo* that this hearsay evidence of unknown origin is valid, the note does not state that the defaulted loan was repaid in full, and in light of the subsequent letter from the student's attorney, which was dated May 8, 1991, the evidence indicates that it probably was not.

Therefore, IBC must refund to ED the $2,750 in Pell Grant funds disbursed to an ineligible student.

Finding 5

SFAP alleges that IBC improperly disbursed a second Pell Grant payment of $1,200 to Student 4 (Appendix C) before that student had obtained the number of clock hours (450) necessary to be eligible to receive a second Pell Grant payment. IBC responds that ED's program reviewer misread the student's time sheet and that the student actually had 513 hours,

thus making the student eligible to receive the second Pell Grant payment.

Both parties agree that in order for IBC students to receive a second Pell Grant disbursement, they must have obtained at least 450 clock hours. § 690.3(a)(2). The parties also agree that, on its face, the time sheet examined during the program review does not identify this student as having obtained 450 hours before the second Pell Grant payment was disbursed on May 11, 1993.See footnote 3 *3* IBC notes that the original time sheet listed this student as having obtained 449 hours prior to the second disbursement, implying that this is "close enough" to 450. However, SFAP contends that only 440 hours are accounted for. In any event, 449 hours is not enough to satisfy § 690.3(a)(3).

The school's primary argument, however, is that the original time sheet did not list all of the hours of attendance for this student. Along with its initial brief, IBC submitted an amended time sheet for this student indicating that the student had obtained 513 hours prior to the second Pell Grant disbursement. In support of this time sheet, IBC offers several pieces of evidence. First,

the school submitted an affidavit by IBC's president, Rachel Merritt, in which she states that around April 14, 1993, the school purchased a time clock for keeping track of student attendance hours at IBC. She further states that around that same time, the school stopped the practice of manually writing attendance hours into the boxes on the time sheets, and instead began annotating attendance on time cards in student files. She asserts that the total of hours for each month was copied by an IBC employee under her direction into the right-hand margin of each time card to calculate the total hours present. Ms. Merritt declares that blank spaces on student time sheets do not indicate hours absent, and that only a capital "A" indicates hours absent. Ms. Merritt claims that she was unable to locate a time card for April 1993 for Student 4 (Appendix C) or the time cards for April or May 1993 for Student 7 (Appendix C), who will be discussed under Finding 10. Finally, Ms. Merritt states that although the time cards have been misplaced, they do exist, and that the time sheets for these students submitted with IBC's brief are a true and accurate reflection of the time on said time cards.

I do not have any evidence before me that calls into question the credibility of Rachel Merritt, and I find her affidavit to be credible. This position is bolstered by the other evidence submitted by IBC. Specifically, the school submitted the invoice for a "New Amano time clock" purchased on April 14, 1993. Additionally, IBC submitted time sheets for several other IBC students. On these time sheets, during periods after approximately April 17, 1993, hours are not manually written into the boxes, but are totaled and entered into the right-hand margin, as they were for Student 4 (Appendix C), and in accordance with the procedure explained by Ms. Merritt in her affidavit.

For these reasons, I find that Student 4 (Appendix C) had at least 513 attendance hours prior to the second Pell Grant disbursement on May 11, 1993. Accordingly, IBC is relieved of

any liability under Finding 5.

Finding 6

SFAP avers that IBC improperly disbursed Title IV funds to students 7, 9, and 15 (Appendix A) and student 14 (Appendix B) without obtaining valid student aid reports (SARs) or electronic student aid reports (ESARs). IBC claims that it had valid SARs in its possession prior to disbursing Title IV funds to these students.

Generally, in order to receive a Pell Grant, students must submit a valid SAR. § 690.61. A valid SAR is one that is signed by the student. § 690.2. If the student is dependent, the SAR must also be signed by one of the student's parents. *Id.*

The FPRD found that the files of students 7, 9, and 15 (Appendix A) contained only an unsigned and undated award letter, but no SAR. The FPRD found that the file of student 14 (Appendix B) contained an unsigned and undated ESAR. IBC contends that it always had SARs and ESARs for these students (although they were being held by the former owner's financial aid management company for awhile), but inadvertently failed to submit them with the school's response to the FPRD. IBC submitted complete SARs for Student 15 (Appendix A) and Student 14 (Appendix B) with its initial brief. IBC submitted the complete SARs for Student 7

(Appendix A) and Student 9 (Appendix A) with its reply brief and flatly denies that these documents were fabricated for the purposes of this proceeding. The SARS for all four students are signed and dated, thus satisfying the regulatory requirements for a valid SAR. Given the problems created by IBC's former owner, I accept the school's explanation for its disorganization and failure to submit these documents with its response to the FPRD. Therefore, I find that IBC had obtained valid SARs prior to disbursing Title IV funds to these four students, and thus is not required to refund the $4,775 sought by ED under Finding 6.

Finding 8

SFAP contends that IBC incorrectly calculated FFEL refunds for Student 14 (Appendix B). IBC admits that an incorrect refund calculation was made by its financial aid management company, but argues that due to IBC's good faith reliance upon the calculations of this company, the school should not be required to refund the $143.33 in interest and special allowance (ISA) payments being sought.

Previous decisions have held that SFAP has the authority to recover ISA payments in situations similar to this. See *In the Matter of Phillips Junior College (Birmingham)*, Dkt. No. 93-83-SP, U.S. Dep't of Educ. (Nov. 16, 1994). Therefore, IBC must refund $781.31 in additional funds to the appropriate lender and $143.33 in ISA payments to ED.

Finding 9

SFAP alleges that IBC improperly maintained a credit balance of $1,314.44 for Student

16 (Appendix B) as of July 2, 1992, even though the student's last recorded date of attendance was March 20, 1992. IBC notes that it paid $4,949 to ED on October 30, 1992, for improper retention of cash balances, but states that neither IBC nor ED can determine what portion of that payment reflected the $1,314.44 credit balance for this particular student.

Institutions are required to refund unearned charges to a student once that student withdraws or drops out. § 668.22. If the student received Title IV funds, the institution must refund at least a portion of those unearned charges to the applicable Title IV programs.
§ 668.22(f). For purposes of this refund, when a student drops out of the institution without notifying the institution, the withdrawal date is the last recorded date of class attendance by the student. § 668.22(i)(1)(A). Thus, for Student 16 (Appendix B), who received Title IV funds, the withdrawal date was March 20, 1992. As a result, IBC was required to refund to ED unearned charges that accrued after this date.

Although IBC does not contest SFAP's allegation as to the credit balance of $1,313.44 for Student 16 (Appendix B), the school argues that the $4,949 payment to ED on October 30, 1992, may have included this amount. However, as IBC notes, neither ED nor the school can determine what portion, if any, of the $1,313.44 credit balance for this student was included in that $4,949 payment. Since IBC has the burden of persuasion as to this issue, it must refund $1,313.44 to ED.

Finding 10

As in Finding 5, SFAP claims that IBC improperly disbursed a second Pell Grant payment to Student 7 (Appendix C) before that student had obtained the number of clock hours (450) necessary to be eligible to receive a second Pell Grant payment. IBC again responds that ED's program reviewer misread the student's time sheet and that the student actually had 456 hours, thus making the student eligible to receive the second Pell Grant payment.

Both the applicable law and the evidence as to IBC's timekeeping practices are identical to that contained in the discussion under Finding 5, and I adopt my analysis and conclusions contained therein. The evidence as to the number of attendance hours for Student 7 (Appendix C), however, is somewhat different from the evidence relating to Student 4 (Appendix C), as discussed under Finding 5. Specifically, even as calculated based upon IBC's contentions, the time sheet for Student 7 (Appendix C) demonstrates only that this student had obtained 456 attendance hours through May 28, 1993. The second Pell Grant disbursement for this student, however, is dated May 26, 1993. As IBC itself states, "450 hours were required to be completed prior to disbursing additional Title IV funds on May 26, 1993." Without the missing time cards discussed by Rachel Merritt in her affidavit, I have no way of determining whether this student had obtained the requisite 450 hours on May 26, 1993. As a result, IBC has failed to satisfy its burden of persuasion as to Finding 10 and must repay to ED the $1,200 Pell Grant payment disbursed to Student 7 (Appendix C) on May 26, 1993.

Finding 11

The FPRD found that IBC failed to apply its attendance policy to two students who had excessive absences and received Pell Grants. IBC acknowledges that Student 17 (Appendix B) had more than the maximum number of absences allowed, but claims that it granted her an exception, which was authorized under the school's attendance policy.

Section 668.14(e) (1992) required IBC to maintain standards for measuring satisfactory progress, including a maximum time frame in which a student must complete his or her educational program. This time frame must be established by the institution. Under § 668.7(a)(5) (1992), a student had to maintain satisfactory progress according to the institution's standards of satisfactory progress.

IBC has submitted exhibits indicating that the school maintained standards for measuring satisfactory academic progress, including a maximum time frame in which a student must complete his or her educational program. Specifically, IBC students were required to complete their programs of study within 150% of the normal time frame for completion. IBC states that Student 17 (Appendix B) was given leeway because of personal problems but still qualified for Title IV assistance under the school's "exceptional circumstances" exception to its 150% time frame requirement. The addendum that describes this policy, however, specifically states that, "in no instance will students be eligible to receive Title IV assistance past the maximum time frame for completion." Therefore, because this student did not qualify for Title IV assistance under IBC's own standards for academic progress, IBC must refund to ED the $400 Pell Grant received by the student.

In addition, the FPRD discusses Student 4 (Appendix C), who was also at issue under Finding 5, but does not assess any liability for this student under Finding 11. For the reasons given in the discussion of Finding 5, IBC has no liability for this student.

Finding 12

The FPRD sought a $250 informal fine for Finding 12. However, this proceeding, governed by 34 C.F.R. Part 668, Subpart H, does not permit the assessment of fines. See *In the Matter of Kane Business Institute*, Dkt. No. 94-70-SP, U.S. Dep't of Educ. (Oct. 21, 1994), at 2 n.2. Therefore, IBC is not required to pay the proposed informal fine.

Finding 16

SFAP contends that IBC failed to administer a valid ability to benefit (ATB) test because the person hired to administer the Wonderlic Personnel Test (an ATB test) did not have the proper certification from Wonderlic until February 18, 1994, well after the students at issue received Title IV assistance. IBC does not deny the allegation, but argues that there was no harm to ED because all nine students were subsequently retested by a certified administrator and passed.

Section 668.7 states that a student who is admitted to an institution as a regular student on the basis of that student's ability to benefit from the institution's education or training program remains eligible for Title IV assistance only if the student, before admission, is administered a nationally recognized, standardized, or industry-developed test that measures the student's aptitude to complete successfully the educational program to which he or she has applied, and demonstrates that aptitude on that test. Previous decisions of this tribunal have held that "when an institution chooses to use the Wonderlic exam (Exam), this choice necessarily encompasses all of the procedures prescribed by Wonderlic." *In the Matter of Long Beach College of Business*, Dkt. No. 92-132-SP, U.S. Dep't of Educ. (July 14, 1994), at 4. See also *In the Matter of Phillips College of Atlanta*, Dkt. No. 91-96-SA, U.S. Dep't of Educ. (Feb. 28, 1994), at 28 n.20. Therefore, IBC was required to follow the procedures prescribed by Wonderlic.

SFAP has submitted evidence demonstrating that Wonderlic required all institutions that used Wonderlic test materials to qualify students to receive Title IV assistance on or after January 1, 1991 to register their independent test administrator (ITA) with Wonderlic. The evidence in this proceeding indicates that IBC's ITA was not registered with Wonderlic until February 18, 1994. IBC's arguments concerning the fact that these students were subsequently retested after the school's ITA was registered are of no avail because, under § 668.7, in order to be eligible for Title IV assistance, students must be administered the proper ATB test before admission. Similarly, IBC's arguments concerning the lack of harm to ED are irrelevant. Under this Subpart H proceeding, the school is not being "fined," as IBC alleges; rather, ED is seeking recovery of Title IV funds disbursed to ineligible students.

Accordingly, IBC must refund to ED the $15,125.00 in Pell Grant funds disbursed to these nine students. Additionally, for the $2,625.00See footnote 4 *4* in Stafford Loans disbursed to ineligible students , IBC must refund this amount to the current holders of the promissory notes.

Finally, the school must refund to ED $584.14 for interest and special allowance payments to the lenders of these loans.

Finding 17

SFAP asserts that IBC disbursed second FFEL loans to two students before they had obtained the required 900 hours to begin their second academic year. In response, IBC admits that neither student had the needed 900 hours, but argues that one of the students was very close, and that neither student ultimately received more funds than he or she was entitled to.

Because IBC's academic year consisted of 900 clock hours, it could not certify Stafford loans for periods of less than 900 hours. §§ 682.603(f)(1)(ii); 682.204. As a result, the school could not certify a second Stafford loan for Students 8 and 15 (Appendix A) until each of them had obtained 900 clock hours. Since IBC admits that neither student had reached 900 clock hours when the school certified second Stafford loans for them, the school violated the above- cited regulations. Again, IBC's equitable arguments are of no avail in this Subpart H proceeding, where the only issues are whether the expenditures questioned or disallowed were proper and whether the school complied with program requirements . Therefore, IBC must refund to the current holders of these promissory notes an amount totaling $5,250. In addition, IBC must refund to ED $1,168.28 in interest and special allowance payments on these two loans ($584.14 for each loan).

Finding 18

The FPRD sought a $1,000 informal fine for Finding 18. As discussed above under Finding 12, this proceeding does not permit the assessment of fines. Therefore, IBC is not required to pay the proposed informal fine.

Finding 21

The FPRD stated that IBC disbursed Title IV funds to a student whose file contained numerous inconsistencies. IBC does not deny the allegations, but blames them on the former owner of the school.

IBC has the burden of proving that expenditures questioned or disallowed were proper and that the institution complied with program requirements. § 668.116(d). Although IBC claims that the file for Student 4 (Appendix B) contained a valid SAR, the school does not deny the other alleged inconsistencies in this student's file, but blames them on the former owner of the school, citing his "reckless failure to comply with the regulation at issue here." Nonetheless, while I sympathize with the current owners' plight, the regulations governing this Subpart H proceeding require me to find against the school if it does not satisfy its burden under § 668.116(d). That being the case here, I find that IBC must refund to ED the $1,200 Pell Grant disbursed to this student. In addition, the school must refund to the current holder of the note the $1,312.00 Stafford loan disbursed to the student. Finally, IBC must refund to ED the $291.94 in interest and special allowance payments made on this loan.

Finding 23

Finding 23 of the FPRD alleged that IBC had not submitted a timely biennial audit and stated that this failure had been reported to the Audit Resolution Branch of ED's Institutional Monitoring Division. Since the FPRD did not seek any recovery for this finding, I will take no action as to this finding.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that IBC must refund to the U.S. Department of Education $25,376.13 (consisting of $23,188.44 for Pell Grants disbursed to ineligible students and $2,187.69 in interest and special allowance payments on Stafford loans disbursed to ineligible students). It is further ORDERED, that IBC must refund to the current holders of federal Stafford Loan promissory notes the total of $9,968.31.

_____
Judge Richard F. O'Hair

Issued: March 23, 1995
Washington, D.C.

S E R V I C E

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 Unless otherwise noted, all citations are to 34 C.F.R.*

Footnote: 2 *2 All references to students numbers and appendices refer to the appendices and student numbers contained and discussed in the FPRD.*

Footnote: 3 *3 SFAP's allegation that this disbursement was made after the student had dropped out was not contained in the FPRD. Therefore, it will not be further addressed in this decision.*

Footnote: 4 *4 IBC insists that this amount should be $2,454.37 because SFAP did not explain the discrepancy contained in the FPRD, which listed the lower amount in the discussion of Finding 16, but listed $2,625 in the conclusion for that finding. IBC, however, which maintains the burden of proof in this proceeding, has not offered any evidence on this issue either. For this reason, and because the other Stafford Loan amounts discussed in the FPRD and listed in Attachment A are for $2,625, I find that $2,625 is the proper amount here.*