
IN THE MATTER OF NATIONAL Docket No. 94-98-SP
BROADCASTING SCHOOL, Student Financial
Respondent. Assistance Proceeding

DECISION

Appearances: Todd Shipper, for National Broadcasting School.

Edmund J. Trepacz, II, 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

National Broadcasting School (NBS) is a proprietary trade school that participated in various student financial assistance programs 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), U.S. Department of Education (ED). On April 15, 1994, SFAP issued a Final Program Review Determination letter (FPRD) that identified numerous findings of non-compliance regarding NBS's administration of Title IV student assistance programs. Additionally, the FPRD noted that on April 6, 1993, NBS lost its eligibility to participate in Title IV programs, an event that required NBS to procure a closeout audit of all student financial aid program funds it had received subsequent to the institution's last audit.

SFAP conducted a program review of NBS from July 7 - 10, 1992, following which the reviewers documented 20 findings of non-compliance with applicable federal regulations in a program review report dated February 25, 1993. NBS was invited to review and respond to this report but did not do so; therefore, on April 15, 1994, the FPRD was sent to NBS. This letter documented 18 findings, plus the failure of NBS to conduct a closeout audit. The FPRD explained that because the institution did not respond to the program review, all applicable Title IV funds which the institution had received since its last accepted and resolved audit (June 30, 1990) were determined to be institutional liabilities. In addition, liability for the same funds was supported by the institution's failure to conduct a closeout audit. The FPRD concluded with a demand for institutional liabilities of \$4,519,819, which represents the amount of Title IV funds the school received, or had access to, following the last received and accepted audit, which was

for the period beginning July 1, 1990, and ending with NBS's loss of eligibility on April 6, 1993. This liability is composed of \$979,662 owed to ED and \$3,540,257 owed to the holders of student loan notes.

NBS filed a timely written request for an administrative hearing pursuant to the provisions of 34 C.F.R. Part 668, subpart H, on May 10, 1994. NBS simultaneously requested ED to reimburse

it for funds it maintains are due the institution because of NBS previously having been placed on a system of reimbursement. [See footnote 1 /](#) Both parties have filed submissions to this tribunal in response to the Order Governing Proceedings.

Although NBS has acknowledged its understanding that the decision to transfer NBS to the reimbursement system of payment is not an appealable issue, NBS has done so, nonetheless. Almost exclusively, NBS has devoted its many submissions to this tribunal to the subject of its reimbursement status and the perceived negative financial repercussions of that status. More specifically, NBS alleges that ED continues to owe funds to NBS for previous payments the institution made to, and on behalf of, its former students. NBS contends that it made these payments in good faith, expecting to be reimbursed by ED at a later time, but that this has not occurred. NBS maintains that because of this deficit, it had to cease all operations and thereafter was financially unable to procure the closeout audit which serves as one of the two bases for this pending administrative liability.

An institution that requests a review of an FPRD has the burden of proving that questioned or disallowed expenditures of Title IV funds were proper and that the institution complied with program requirements. [See footnote 2 2](#) ED, as a federal instrumentality, has been tasked with the statutory responsibility to dispense and oversee the expenditure of federal student assistance funds to ensure that institutions perform their roles in accordance with the appropriate regulations. One of the means of ensuring compliance is the conduct of periodic program reviews of these institutions. If a program review uncovers findings of noncompliance with federal regulations, it is incumbent upon the institution to either refute these findings or reimburse ED the amount of the allegedly improperly disbursed funds. Another means of ensuring compliance is the conduct of a closeout audit by the institution when it closes. The closeout audit provides the same manner of program review to the institution's final expenditure of funds. In both circumstances, program reviews and closeout audits, only the institution has at its disposal the files and other records to justify every dollar of federal funds it expended. Therefore, if ED questions any of these

expenditures through program reviews or, if the institution ceases to exist, it is the institution which has the burden of coming forward with justifications/audits which evidence the propriety of its expenditures. In the absence of such, the institution should be prepared to reimburse ED for the amounts properly allocated to the finding(s) of noncompliance. ED would be seriously shirking its own fiduciary responsibilities were it not to oversee the expenditure of these federal education funds in this manner.

By virtue of NBS's failure to defend its operational procedures by responding to the program review or submitting substantive responses to the FPRD currently before this tribunal, it has failed to meet its burden of proving that its expenditures were proper or that NBS had complied with all program requirements. I find the FPRD is fully supportable and, without rebuttal by the institution, must be affirmed in whole. Having done so, ED suggests that I find an institutional liability for all Title IV funds received during the period covered by the program review: July 1, 1990 to June 30, 1992. For the reasons stated below, that finding is unnecessary because of my finding with regard to the absence of a closeout audit.

The failure of NBS to complete a closeout audit in compliance with 34 C.F.R. § 668.25 is what I rely upon to create the basis for institutional liability. Although this liability has the same inception period as the FPRD, in that it begins on July 1, 1990, with the period of the two year program, it continues until the institution's loss of eligibility, April 6, 1993. ED argues that departmental policy provides that the failure to submit a closeout audit authorizes an assessment of a liability equal to the amount of Title IV funds the institution received following the last approved audit and cites *Montgomery County Maryland v. Department of Labor*, 757 F.2d 1510, 1513 (4th Cir. 1985), as authority for this institutional liability. That case, however, is not directly applicable here. In *Montgomery County*, the Fourth Circuit stated that the pertinent statute expressly provided for the repayment of grant funds if a recipient failed to comply with any provision of the statute. SFAP has not cited any similar language in the statutes or regulations governing Subpart H proceedings, nor is the tribunal aware of any.

I have found authority in our own decisions to support the recovery of funds from NBS for its failure to properly document, pursuant to a closeout audit, the Title IV funds it expended. In *In re Macomb Community College*, Dkt. No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993), the administrative law judge held that the failure to properly document Title IV funds expended (by failing to comply with certain recordkeeping requirements) authorizes SFAP to recover those funds from an institution in a Subpart H proceeding.

Accordingly, I find NBS is liable for all Title IV funds it received, or had access to, between July 1, 1990, and April 6, 1993, and NBS is ordered to repay ED the amount of \$979,562 and to repay the lenders of federal student loans the amount of \$3,540,257.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that National Broadcasting School refund to the Department of Education \$979,562 and refund to the lenders of federal student loans \$3,540,257.

Judge Richard F. O'Hair

Issued: December 12, 1994
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 NBS also submitted requests to ED for additional documents and other relief that are not within the jurisdiction of this administrative proceeding and will not be addressed further. In conjunction with these, however, NBS has asked for a continuance until such time as ED complies with these requests. Such matters are beyond my jurisdiction, and the request for a continuance is denied.

[Footnote: 2](#) 2 34 C.F.R. § 668.116(d).