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

In the Matter of **Docket No. 95-55-SP**

BELZER YESHIVA, Student Financial Assistance Proceeding
Respondent.

PRCN: 92402074

Appearances: Leigh M. Manasevit, Esq., Diane L. Vogel, Esq., and John P. Sherman, Esq., Brustein & Manasevit, Washington, D.C., for Belzer Yeshiva.

Howard D. Sorensen, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Judge Richard I. Slippen

DECISION

Belzer Yeshiva (Belzer) is a private non-profit institution offering training in Judaic and Rabbinical Studies. Belzer is located in Brooklyn, New York, and also has a branch campus in Jerusalem, Israel. On December 13, 1994, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a final program review determination (FPRD) finding that Belzer violated several regulations promulgated pursuant to 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*. Belzer's eligibility to participate in the Title IV HEA programs was terminated on March 7, 1994, because it did not qualify as an eligible institution.See footnote 1 *1*

The FPRD resulted from a program review conducted from July 20-23, 1992, January 5- 7, 1993, and February 22-23, 1993, of Belzer's Title IV compliance for the 1987-1988 through 1992-1993 award years. A program review report (PRR) was sent to Belzer in October 1994.

The PRR was returned as unforwardable to the addressee. SFAP then mailed the PRR to Belzer's representative, the law firm of Brustein and Manasevit, who stated that although they were unable to provide SFAP with the current address of Belzer's President, Rabbi Moses Moskowitz, they would forward the PRR to Belzer. Belzer never responded to the PRR. Additionally, SFAP sent Belzer a letter on April 8, 1994, detailing the actions required to be taken by Belzer due to its termination from the Title IV HEA programs. Belzer never responded to this letter.

The PRR is incorporated by reference into the FPRD. In the PRR, SFAP found that Belzer misused Pell Grant (Pell) funds in numerous ways: First, Belzer established and maintained false or inaccurate information in student files. Second, Belzer did not follow the rules for awarding and disbursing Pell funds including disbursing Pell funds to individuals who were not bona fide students, and disbursing Pell funds to students without obtaining financial aid transcripts. Third, Belzer disbursed Pell funds to students whose financial aid applications or student aid reports falsely gave the institution's address as the students' residence. Fourth, Belzer failed to meet its fiduciary standard in administering the Title IV programs. The PRR also noted that Belzer is an ineligible institution because it did not meet the definition of an institution of higher education or of a postsecondary vocational institution and was subsequently terminated as an eligible institution from the Title IV HEA programs. Additionally, the PRR found that Belzer failed to refund Pell funds within 30 days of students' withdrawal dates and required Belzer to conduct a full file review to determine the extent of this liability.See footnote 2 *2*

Due to Belzer's failure to respond to the Department's April 8, 1994, close-out letter and the PRR, SFAP stated that it was unable to determine Belzer's exact liabilities for the findings contained in the FPRD. Therefore, SFAP found that Belzer was liable for all Title IV funds disbursed during the 1987-1988 through the 1992-1993 award years.

Belzer challenges the FPRD on numerous grounds. Belzer argues that the FPRD is flawed because it introduces a claim not raised in the underlying PRR, it assesses unsubstantiated and arbitrary liabilities, and it lacks a preliminary showing of improper expenditures. Belzer also argues that the PRR is flawed because it neither provides Belzer with proper notice nor correctly assesses the PRR's liabilities.

In accordance with 34 C.F.R. § 668.112, a FPRD is issued after a program review of an institution's administration of Title IV programs. Prior to the FPRD, SFAP first issues a program review report to the institution in order for the institution to respond to and/or correct any preliminary findings. SFAP argues that there is no statutory or regulatory requirement that the FPRD be based exclusively on the PRR and thus, SFAP's inclusion of the finding that Belzer failed to comply with the close-out audit requirements listed in the Department's April 8, 1994, letter was proper. Belzer argues that SFAP's claim regarding the close-out requirements was not

raised in the PRR and that SFAP failed to follow the proper audit procedures specified in 34 C.F.R. § 668.23(c) (1990).

There is no statutory or regulatory bar to SFAP's inclusion of the finding that Belzer failed to submit a close-out audit in accordance with 34 C.F.R. § 668.26(b)(2). The audit procedures cited by Belzer do not pertain to the failure of an institution to submit a close-out audit or any steps that the Department must follow in order to obtain the information contained in a close-out audit. Rather, this regulation discusses the requirement that an institution that currently participates in the Title IV programs have an audit performed and specifies the procedures and deadlines for performing such a compliance audit. Although no mention of Belzer's failure to submit a close-out audit was mentioned in the PRR, Belzer was earlier notified by the Department in a April 8, 1994, letter that it was required to submit a close-out audit. This tribunal has previously held that if an institution fails to submit a close-out audit, it becomes liable for all Title IV funds disbursed

for the period not covered by the last submitted audit. *In Re Macomb Community College*, Docket No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993); *In Re National Broadcasting School*, Docket No. 94-98-SP, U.S. Dep't of Educ. (December 12, 1994). Belzer has not argued or proffered any evidence that it did submit a close-out audit. Therefore, on this basis alone, Belzer is liable for all Title IV funds disbursed since the period covered in its last submitted audit.

An institution appealing a FPRD has the burden of proving that Title IV funds were properly disbursed. 34 C.F.R. § 668.116(d). 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 full 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. *In Re Pan American School*, Docket No. 92-118-SP, U.S. Dep't of Educ. (October 18, 1994). If a program review uncovers noncompliance with the administration of the Title IV HEA programs, it is incumbent upon the institution to either refute these findings or reimburse the Department for any misspent Title IV funds. *See In Re National Broadcasting School* at p. 2. If SFAP questions any expenditures made by the institution, it is the institution that must come forward with the evidence demonstrating the propriety of its expenditures. *Id*. at p. 3.

Belzer argues that the FPRD's liabilities are unsubstantiated and arbitrary because SFAP had information available in previously issued FPRDs or final audit determinations (FAD) to assess specific liabilities. Belzer also argues that the assessment of liability for the six years covered by the FPRD is inconsistent with the requirement of 34 C.F.R. § 668.25(a)(3) that an institution maintain records for only five years after its eligibility is terminated. SFAP argues that Belzer failed to identify any such FPRDs or FADs that would provide information in order to determine the exact liabilities at issue for the findings contained in the instant FPRD. Further, SFAP argues that the regulation cited by Belzer does not prohibit SFAP's review of Belzer's

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administration of the Title IV programs for a six year period and that there is no time limitation barring recovery of misspent Title IV funds.

This tribunal has held that the institution is the only one that has at its disposal the files and records to justify the expenditure of Title IV funds. *See National Broadcasting School* at p. 2 - 3. Although Belzer argues that SFAP could have specifically identified the exact liabilities for the findings of non-compliance, not only does SFAP not bear the burden of doing so, it does not have the information needed to assess these exact liabilities since they are determined by the extent of the institution's non-compliance. Further, Belzer does not identify any previous FPRD or FAD that would show what the exact liabilities are for the findings contained in the FPRD at issue. Additionally, Belzer failed to respond to the PRR to provide information regarding the exact amount of the liabilities for the findings of non-compliance nor has it presented any evidence to this tribunal regarding the exact amount of these liabilities.

The use of program review determinations creates the need for institutions to cooperate with SFAP in providing information to determine whether any, if not all, Title IV funds disbursed to the institution were spent contrary to the statutory and regulatory requirements. *See In Re Pan*

American School at p. 5. 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. *Id.* at p. 5 - 6. Consequently, Belzer's failure to respond to the PRR makes it impossible for the Department to determine the exact monetary liabilities for the FPRD's findings and undercuts Belzer's position that all Title IV funds should not be recovered. In circumstances where the institution fails to provide SFAP with the requisite data needed to determine whether, and, if so, to what extent, Title IV funds were improperly spent, SFAP has no choice other than to require the return of all Title IV funds. *Id.* at p. 6. Accordingly, SFAP may recover all Title IV funds disbursed during the program review period.

SFAP's program review covering six award years was also proper. There is no statute of limitation or regulation barring SFAP's recovery of funds in this matter.See footnote 3 *3* The regulation cited by Belzer, 34 C.F.R. § 668.25(a)(3), only specifies that an institution that closes or loses its Title IV eligibility must maintain its records from the previous five years. Although Belzer is an institution whose participation in the Title IV programs has ended, and, consequently, it was not required to maintain records older than five years from the date of its termination, the institution did maintain

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earlier records at the time of SFAP's program review which occurred before Belzer's eligibility was terminated. Therefore, it was well within SFAP's purview to review these records at that time.

It is well established that an institution has the right to notice of what the government's allegations are in an administrative hearing. *See In Re Bais Fruma*, Docket No. 93-171-ST, U.S. Dep't of Educ. (March 9, 1995) at p. 2. Generally, notice is sufficient if it enables the affected party to prepare an informed response. *Id*., citing Administrative Procedure Act, 5 U.S.C. § 554(b); *NLRB v. Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968). SFAP argues that the PRR was not flawed because it provided sufficient notice to Belzer of what was wrong in each student file and that Belzer has the burden of proving that Title IV funds were properly disbursed. Belzer argues that because the FPRD does not specifically identify the inaccurate elements in each student file, SFAP did not provide proper notice to Belzer of what was wrong. This tribunal has held that the identification of what student files are at issue constitutes sufficient notice. *See Bais Fruma* at p. 2. SFAP does not have to state which specific documents or data elements it believes are falsified or inaccurate. *Id*. On the basis of the identification of the student files, the institution can check the documents for accuracy. *Id*. SFAP properly identified the student files involved. See Respondent's Exhibit 1. Therefore, SFAP's notice to Belzer in the PRR was sufficient.

An institution is required to determine if a student previously attended another institution in order to be eligible to receive Title IV assistance. 34 C.F.R. § 668.19(a)(1) (1990). If a student previously attended another institution, the current institution or the student shall request a financial aid transcript. 34 C.F.R. § 668.19(a)(2) (1990). An institution may disburse the first payment of a student's Pell Grant without a financial aid transcript but it remains liable for the Title IV funds if it later fails to obtain a financial aid transcript. 34 C.F.R. § 668.19(a)(3)(i) (1990). To receive Title IV funds, a student must also be a regular student enrolled for the

purpose of completing a certificate offered by the institution to prepare the students for employment in a recognized occupation. 34 C.F.R. § 668.2 and § 668.7(a)(1)(i) (1990).

SFAP argues that numerous inconsistencies were discovered in Belzer's student files. These inconsistencies were evident in a comparison of internal documents as well as when SFAP compared some students' files with their files at other institutions. As a result of these inconsistencies, SFAP argues that Title IV funds were disbursed to students whose attendance at other institutions of higher education was not verified and for whom Belzer did not receive financial aid transcripts. SFAP also contends that these inconsistencies indicate that Belzer disbursed Title IV funds to students who were not regular students enrolled for the purpose of obtaining a certificate to prepare them for employment and that some of these students may not have attended Belzer at all. SFAP argues that since Belzer bears the burden of proof in this proceeding, the institution must demonstrate that its Title IV disbursements were proper given these inconsistencies. Belzer argues that SFAP provides no evidence for its allegations that the institution knowingly did not include information in the student files. Belzer also argues that SFAP improperly relies on other institutions' files and that the students may be the source of any falsified or inaccurate information.

The Secretary has held that the presence of falsified documents in an institution's student files may give rise to a presumption that the documents were falsified by the institution. *See In Re Romar Beauty Schools*, Docket No. 90-90-ST, U.S. Dep't of Educ. (September 7, 1994). This tribunal has also held that this presumption is insufficient to carry SFAP's burden of proof in a Subpart G termination proceeding. *See Bais Fruma* at p. 3; *In Re Northeast Center for Judaic Studies*, Docket No. 94-55-ST, U.S. Dep't of Educ. (May 2, 1995). In a Subpart H proceeding, however, the institution bears the burden of proving that it complied with Title IV HEA program requirements. 34 C.F.R. § 668.116(d). SFAP must only meet a burden of production in a Subpart H proceeding. SFAP meets its burden of establishing a prima facie case if it presents sufficient evidence that when considered alone would enable this tribunal to infer that a violation has occurred. *In Re Sinclair Community College*, Docket No. 89-21-S, U.S. Dep't of Educ., (Decision of the Secretary) (September 26, 1991).

In the instant case, SFAP establishes that numerous inconsistencies existed in Belzer's student files. Moreover, this tribunal has held that even in proceedings where SFAP bears the burden of proof, evidence of internal and external inconsistencies may satisfy this burden if sufficiently probative. *See Northeast Center for Judaic Studies* at p. 3 - 5. Although Belzer argues that the inconsistencies are based on other institution's files which may also be considered suspect and that the students may have falsified this information, it does not present any evidence to this tribunal to support these allegations or to refute the substantive FPRD findings that the institution improperly disbursed Title IV funds to students whose files were incomplete, or who were not bona fide students, or to students for whom the institution did not receive financial aid transcripts.

SFAP also argues that Belzer improperly instructed students to use the institution's address on their financial aid applications. Belzer responds that the conflict that exists between the Application for Student Financial Assistance which specifies "mailing" address and 34 C.F.R. § 690.12(b) (1990) which specifies "residential" address, makes a breach of either the

Department's instructions or regulation unavoidable. While this tribunal notes that mailing address and residential address may constitute two separate addresses for a student, this possible conflict is not at issue here since Belzer fails to offer any evidence that the students used the institution's address for either a mailing address or residential address. Further, the use of the institution's address for a vast number of the students listed in the Pell Grant Payment Summaries contained in ED Exhibit 6 raises the inference that Belzer improperly instructed students to use its address. However, as noted in *Northeast Center for Judaic Studies* at p. 12, "this tribunal has consistently held that fact-finding determinations must be based on factual disputes related to an alleged regulatory violation for which SFAP seeks a relevant remedy." In this case, there was no indication that Title IV funds were misspent as a result of the use of Belzer's address on the students' applications for financial aid.

Additionally, Belzer argues that the FPRD improperly included the finding that Belzer is an ineligible institution. According to Belzer, the finding that the institution is ineligible to

participate in the Title IV HEA programs is irrelevant in a Subpart H proceeding. SFAP argues that satisfying the eligibility requirements is fundamental to an institution's participation in the Title IV programs and, thus, is directly relevant to an appeal of a FPRD. I find that Belzer's argument is without merit. An institution's designation as eligible to participate in the Title IV HEA programs is integral in determining whether an institution is properly administering Title IV funds. Therefore, the inclusion of this finding in the FPRD was proper. As there is no dispute as to whether Belzer is ineligible to participate in the Title IV HEA programs and has, in fact, been terminated for this reason, the FPRD is affirmed as to this finding.

FINDINGS

1. Belzer failed to meet its burden of proving that its administration of the Title IV HEA programs complied with Title IV HEA requirements.

2. Belzer failed to submit a close-out audit in accordance with 34 C.F.R. § 668.26(b)(2).

3. Belzer failed to refund Pell funds within 30 days of the students' withdrawal dates.

4. Belzer failed to meet the requirements of an institution eligible to participate in the Title IV HEA programs.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Belzer Yeshiva pay to the U.S. Department of Education $6,977,511.

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Judge Richard I. Slippen

Dated: June 19, 1996

SERVICE

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 Belzer failed to timely appeal its termination from the Title IV HEA programs. See In Re Belzer Yeshiva, Docket No. 95-35-ST, U.S. Dep't of Educ., (March 28, 1995).*

Footnote: 2 *2 Belzer did not address specifically this finding in its appeal of the FPRD.*

Footnote: 3 *3 This tribunal has held that the statutes of limitation set forth under 28 U.S.C. § 2415 and 20 U.S.C. § 1091a are inapplicable to a Subpart H student financial assistance proceeding. In Re Platt College, Docket No. 90-2-SA (Initial Decision on Remand) (October 31, 1991) at p. 4 - 6. Although there is no statute of limitations barring SFAP's actions, this tribunal has held that a laches defense was available to an institution appealing a final audit determination. Id. at p. 9. Belzer, however, has neither asserted such a defense nor offered any evidence regarding the merits of a laches defense in the instant case.*