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

In the Matter of **Docket No. 96-164-SP**

NEW CONCEPT BEAUTY ACADEMY, Student Financial Assistance Proceeding
Respondent. PRCN: 199620312333

Appearances:

Steve Butler, Esq., of Arlington, Tennessee and Glenn Bogart, of Higher Education Compliance Consulting, Birmingham, Alabama, for New Concept Beauty Academy.

Denise Morelli, Esq. and Renée Brooker, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Judge Ernest C. Canellos

DECISION

On October 18, 1996, the office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (Department) issued a final program review determination (FPRD) assessing a total liability of $1,369,663 against New Concept Beauty Academy (New Concept) for violations of various program regulations promulgated pursuant to Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. ' 1070 *et seq.* and 42 U.S.C. ' 2751 *et seq*.

In the FPRD, SFAP noted that in September 1990, New Concept was placed on the Department's reimbursement system of payment. Under the reimbursement system, Title IV funds in the form of Pell Grants are provided to by the Department to an institution after the institution submits documentation supporting an accurate and true assessment that the institution is owed the funds for payments to students who are eligible to receive Federal student financial assistance while enrolled in the institution's programs.See footnote 1 According to SFAP, although New Concept was required to provide documentation supporting the disbursement of Title IV Pell Grant funds *before* those funds were released by the Department to the institution, the institution, nonetheless, was able to subvert the checks and balances of the reimbursement system by obtaining Title IV funds with the use of false documentation and awarding those funds to students who either were ineligible for student financial assistance or, ostensibly, existed as figments of the institution's imagination. In other words, in the FPRD, SFAP alleges that New Concept avoided the strictures of the reimbursement system by making fraudulent and improper claims for payment.

After its receipt of the FPRD, New Concept requested an opportunity to challenge the findings of the FPRD. On January 10, 1997, I issued an order requesting the parties to address a jurisdictional question presented by the institution concerning whether the FPRD had been issued in a manner that reflected a procedural defect sufficient to deprive the tribunal of jurisdiction to adjudicate the merits of the case. In that regard, the parties presented their respective positions as to whether SFAP's failure to issue its customary program review report prior to issuing a FPRD had a prejudicial effect upon the institution's procedural rights.See footnote 2

After examination of the parties' submissions, I issued an order on March 5, 1997, finding that New Concept had not established that SFAP's failure to issue a program review report prior to issuing the FPRD was tantamount to a

procedural defect sufficient to deprive this tribunal of jurisdiction to adjudicate the merits of this case. In addition, I noted that although SFAP had apparently followed the customary practice of ostensibly issuing interim reports before issuing its final determinations, there was no statutory or regulatory requirement obligating SFAP to issue interim reports in program review cases as there was in audit cases. Further, I determined that not only had New Concept failed to show that SFAP's issuance of the FPRD amounted to a jurisdictional procedural deficiency, but that Subpart H proceedings assured the institution of an opportunity to challenge any allegation in the FPRD in a fair and impartial hearing through the orderly presentation of arguments and evidence.See footnote 3

Subsequently, the parties requested, and I granted, several stays of the case to consider the findings of an audit of the institution's student records and to pursue settlement discussions. In October 1997, the parties submitted several motions seeking several forms of relief due to intervening events during the stay. In particular, SFAP filed a motion seeking reinstatement of the briefing schedule. On February 3, 1998, I issued an order, *inter alia,* reinstating the briefing schedule despite New Concept's opposition to such.See footnote 4

New Concept opposed SFAP's request to reinstate the briefing schedule because New Concept needed additional time to complete matters related to reconciliation of Pell Grant payments by an escrow agent. Without indicating the time required to complete the reconciliation process, New Concept contended that the completion of the reconciliation would aid the tribunal in resolving the remaining disputed issues between the parties. Given the significant lapse of time in the case thus far, I found that New Concept had obtained more than a reasonable amount of time to ensure that the escrow agent had completed his assigned task. Therefore, New Concept's request to further delay the reinstatement of the briefing schedule was denied and, as a consequence, New Concept and SFAP were ordered to file their briefs on March 5, 1998, and April 4, 1998, respectively.

On March 18, 1998, SFAP filed a motion requesting that I issue a default judgment against New Concept. In support thereof, SFAP stated that as of March 18, 1998, New Concept had neither filed its brief nor requested additional time for filing its brief as required by my previous order. In accordance with my obligation to regulate the course of this proceeding and the conduct of the parties, I ordered New Concept to *show cause* why I should not issue a decision and enter judgment against it for failure to prosecute its appeal. Submission of an appropriate response was directed on or before April 2, 1998. To date, New Concept has not responded to my order.

Although the institution has remained silent in response to my orders and has not withdrawn its appeal of the FPRD, its silence does not foreclose my authority - - indeed, my obligation - - to take whatever measures are appropriate to expedite the hearing process, including terminating the proceedings and issuing a decision against a party if that party does not meet time limits established by my orders. 34 C.F.R. § 668.117(c)(3). More important, the fact that New Concept will not substantiate its position that the findings of the FPRD are incorrect or improper through the submission of a brief ostensibly requires me to review the record as it is. In this respect, my review of the record, including the documents submitted by New Concept in its request for review of the FPRD, compels me to find that the institution has failed to carry its burden of proof.

It is well established that in Subpart H -- audit and program review -- proceedings, the institution has the burden of proof. 34 C.F.R. ' 668.116(d). Consequently, to sustain its burden the institution must establish, by a preponderance of the evidence, that Title IV funds were lawfully disbursed. *See In re National Training, Inc.,* Dkt. No. 93-98-SA, U.S. Dep't of Educ. (October 18, 1995). It is abundantly clear that under the circumstances of this case, New Concept has not met its burden of establishing that its expenditure of Title IV funds was proper. After a review of the FPRD and the evidentiary documents in the record, I am convinced that the findings contained in the FPRD sufficiently state allegations in a manner that demonstrate the existence of a *prima facie* showing that New Concept awarded Title IV funds to students who were ineligible for student financial assistance.

For purposes of calculating New Concept's liability to the Department, the FPRD proposed that New Concept repay all Title IV funds disbursed to the ineligible students during the period at issue. I find this measure of liability proper. In a Subpart H proceeding, SFAP has the authority to recover Title IV funds disbursed to ineligible students. Furthermore, upon a finding of liability, SFAP may recover, as part of its damages resulting from the institution's improper expenditure of Title IV funds, interest and special allowances (ISA) awarded to the institution by the Department.

Accordingly, I find that SFAP's determinations in the FPRD are proper and that the institution's failure to file a submission in compliance with my order warrants the termination of this proceeding.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that the hearing process initiated pursuant to the institution's request for a hearing is TERMINATED. It is FURTHER ORDERED that New Concept Beauty Academy pay to the United States Department of Education the sum of **$744,114** (as well as Interest and Special Allowance (ISA) payments as determined by the FPRD) and pay **$625,549** to the current holders of Title IV loans consistent with the determinations contained in the FPRD and in the manner as required by law.

Ernest C. Canellos
Chief Judge

Dated: April 29, 1998

SERVICE

A copy of the attached document was sent to the following:

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Footnote: 1[1] *SFAP does not indicate why New Concept was placed on the reimbursement system. Nor is it relevant to the merits of this case. However, it is noteworthy that institutions are generally only placed on the reimbursement system when the Department has determined that there is reason to conclude that Title IV funds may be subject to an elevated risk of loss at the institution if the reimbursement system is not in place.*

Footnote: 2[2] *In my order resolving this jurisdictional question, I determined that to the extent that New Concept alleges that the FPRD inadequately identifies the students at issue, the submissions in the proceedings should erase any doubt that the institution can defend itself against the findings of the FPRD. After thoughtful review of the FPRD, I find that it contained sufficient indicia of specificity that would enable New Concept to defend itself consistent with the principles of due process. Notably, the FPRD contained 12 appendices that proffered documentation of records and identification*

of students in support of the FPRD's findings. Moreover, during the course of this proceeding, SFAP filed additional documentary evidence in the form of affidavits and a Pell grant reconciliation spreadsheet, which further defined the allegations in the FPRD.

Footnote: 3[3] *Notably, by my determination, I had not made the implicit assumption that the SFAP official who reviews the program review reports does not provide institutions with a fair opportunity to resolve some or all of the preliminary findings; rather, my point was that the tribunal exists independent from SFAP and in that capacity can ensure parties of an impartial hearing.*

Footnote: 4[4] *The other forms of relief that the parties had requested were considered moot.*