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

In the Matter of

Docket No. 97-15-SP

CABOT COLLEGES,

Student Financial
Assistance Proceeding

Respondent. PRCN: 199340900052

Appearances: Wayne A. Cox, President, Del Mar, CA, for Cabot Colleges.

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 December 12, 1996, the office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a final program review determination (FPRD) finding that for award years 1991-92 and 1992-93 Cabot Colleges (Cabot) disbursed federal student financial assistance funds in violation of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq*. SFAP demanded a liability of $609,127 to be paid to ED and $1,975,927 to be paid to lenders on behalf of Cabot's students.

Cabot submitted its request for review of the FPRD findings on January 27, 1997, including its submission of a number of exhibits. On April 16, 1997, SFAP filed a Motion for Default Judgment, since Cabot had not filed a brief in accordance with the Order Governing Proceedings. Subsequently, Cabot requested that its request for review and the supporting documents be accepted in lieu of a brief. This request was granted, and SFAP's motion for default judgment was denied. SFAP then filed a timely brief.

As a preliminary matter, Cabot presents a number of broad and generalized arguments against the FPRD and the appeals process.See footnote 1[1] The institution offers scant explanation of how or why these arguments apply to its case and cites little helpful statutory, regulatory, or precedential authority to support its assertions. This hit-or-miss strategy presents a number of issues that are inapplicable to this proceeding. It is worth noting, however, that in a Subpart H proceeding the institution bears the burden of proving that its expenditures were proper and that it complied with the program requirements. 34 C.F.R. § 668.116(d) (1997). SFAP satisfies its burden of production through the issuance of the FPRD, thereby providing the institution with the factual and legal bases for the alleged violations and proposed liabilities. 34 C.F.R. § 668.112(b). To satisfy its burden of proof, an institution must then present evidence that not only rebuts SFAP's allegations, but also accounts for the institution's proper expenditure of Title IV funds during the periods at issue.See footnote 2[2]

The FPRD had its genesis in a program review report generated by SFAP's Region IX office on March 28, 1994. SFAP asserts that Cabot failed to perform the full-file reviews which were directed by Findings #3, 7, and 27, of that report and that, as a result, I should order the repayment of all Title IV funds disbursed by Cabot to its students during the relevant award years. SFAP makes no effort to quantify the specific violations it uncovered during the program review, obviously electing to pursue an "all or nothing" strategy as to those findings. Previously, I have warned of the potential problems that are occasioned by the failure of SFAP to specify the damages resulting from findings that it claims are subsumed into overall demands. *See In re Liberty Academy of Business*, Docket No. 96-132-SP, U.S. Dep't of Educ. (Interim Decision and Order, Dec. 8, 1997). Without specific references to the amounts in issue on individual findings, it is difficult, if not impossible on some occasions, to adjudicate the correct amounts that must be repaid by an errant institution.

Separately, SFAP asserts that the documentation from its on-site inquiry and from the file reviews that Cabot did perform is sufficient to resolve the liability for findings # 9, 10, 16, 20, 21, 22, 23, and 26, and allows this tribunal to ascertain the specific amount for which Cabot is liable for those regulatory violations. These liabilities would, of course, be subsumed if I were to find that full liability as demanded by SFAP above is appropriate. I will discuss all the findings *seriatim*.

FINDINGS REQUESTING BLANKET LIABILITY

Finding # 3: Failure to Produce Records

To participate in Title IV programs, an institution must comply with the accounting and recordkeeping regulations pertaining to those programs. 34 C.F.R. § 668.23(a).See footnote 3[3] This includes providing ED with access to all requested program and fiscal records. 34 C.F.R. § 668.23(e). SFAP argues that Cabot failed to produce records for the 1991-92 and 1992-93 awards years, as was required by Finding #3 of the Program Review Report. These included providing original canceled checks and fiscal records from its bank for eight students, and submitting the account ledgers for two additional students. When Cabot failed to produce satisfactory evidence related to these ten students, SFAP concluded that it had a sufficient basis to determine that the institution was liable for all Title IV funds disbursed during the two award years. As explained below, I find that SFAP's calculation of liability is unsupported by the record and inconsistent with the established holdings of this tribunal. Therefore, SFAP's position that all the funds expended by the institution during the award years in issue should be returned to the Department is rejected.

Cabot did submit copies of the eight requested checks to the eight students referred to in Finding #3. Left remaining under Finding #3, therefore, is the demand that the institution provide the fiscal records of two students. Since the institution has not come forward with any such evidence, it has not met its burden of proof with regard to these two students, and must return those unaccounted for funds. It does not follow, however, that SFAP may require the institution to return *all* Title IV funds awarded or disbursed during the same award years on the basis of the institution's failure to account for two students. In support of the contrary, SFAP cites a series of the tribunal's cases, and argues that those cases stand for the proposition that when an institution fails to account for its expenditure of Title IV funds, the institution becomes liable to repay all Title IV funds disbursed during the award years in question. Although SFAP correctly summarizes fragments of this tribunal's prior holdings on liability calculations, they are inapposite to the facts of this case.

In *In re Pan American School,* (Pan Am) Docket No. 92-118-SP, U.S. Dep't of Educ. (October 18, 1994), I determined that SFAP may recover all Title IV funds disbursed by the institution during the relevant award years.See footnote 4[4] A critical factor existed in *Pan Am* that is conspicuously absent in this case; namely, in *Pan Am* the institution violated institutional eligibility requirements by administering an unapproved ability-to-benefit admission test. Here, Cabot failed to comply with its recordkeeping obligations, which, although important, does not constitute an element of "institutional eligibility" as established under Title IV regulations. As I explained in *Pan Am*, absent the institution's systematic violation of an institutional eligibility requirement, SFAP's identification of only eight students who had been improperly administered an ability-to-benefit test would not be sufficient to warrant the return of all Title IV funds spent during the relevant award years.See footnote 5[5] Moreover, in *Pan Am* I adopted the rule that it is not proper to require an institution to return all Title IV funds disbursed in a given period, which otherwise was disbursed in compliance with

Title IV, on the basis of a *de minimis* regulatory violation.See footnote 6[6]

Accordingly, SFAP may not recover *all* Title IV funds disbursed by Cabot during the award years at issue on the basis of identifying two student files for which the institution did not submit accounting ledgers as requested by SFAP. Therefore, Cabot must repay to the Department only the full amount of Title IV funds disbursed during 1991-92 and 1992-93 award years for student #6 and student #14. Although the FPRD does not identify these specific amounts, the record does reveal that student #6 was awarded $5,971 in Title IV aid ($2,400 in Pell Grants, $2,625 in Stafford loans, and $946 in Supplemental. Loan to Students). I have been unable, however, to determine from the record the Title IV aid which was disbursed to student #14 and, since it is not delineated in the FPRD, I cannot require the return of these funds.

Findings #7 and #27: Failure to Enforce Attendance Policies

The program review report identified three students for whom Cabot failed to enforce its satisfactory academic progress (SAP) policy (Finding #7) and three students for whom it failed to maintain attendance records (Finding #27). SFAP alleges that Cabot violated the provisions of 34 C.F.R. § 668.14(e) by not following its established SAP policy, of which satisfactory attendance is a part. Enforcement of a SAP policy is one prong that an institution must satisfy in order to meet ED's standard of administrative capability. *See* 34 C.F.R. § 668.14. A Subpart G proceeding presents SFAP with the appropriate forum for such violations, as it can seek either termination or the imposition of fines.See footnote 7[7] Subpart H proceedings are contractual in nature and do not extend to punitive measures. Therefore, I reject SFAP's assessment of blanket liability for Findings #7 and #27.

FINDINGS REQUESTING INDIVIDUAL LIABILITY

Finding # 9: Improper Disbursement of Student Loan Funds without Valid Student Aid Reports

The program review report identified two students from whom Cabot failed to obtain a valid student aid report (SAR). In order to receive Pell Grants, students must submit a SAR to the institution, as required by 34 C.F.R. § 690.61. Cabot conducted a file review in response to this finding and found 23 instances in which it had not obtained SARs. SFAP assessed a total individual liability for Finding #9 of $38,271. I find that Cabot improperly disbursed funds without valid SARs as found by the file review.

Finding #10: Failure to Pay Refunds to Lenders

Cabot conducted a file review in response to the program review report's identification of students for whom the institution had not calculated and paid refunds. If a student officially withdraws, drops out, or is expelled, the institution must calculate and pay a refund to ED and the lender. 34 C.F.R. §§ 668.21, 668.22(a)(1), and 682.607. The file review found that refunds had not been paid for four students. SFAP assessed a total individual liability for Finding #10 of $5,567. I find that Cabot failed to pay four refunds as found by the file review.

Finding #16: Improper Disbursement of Pell Grant Funds

The program review report identified two students to whom Cabot made early Pell Grant disbursements. Before disbursing a Pell Grant, an institution must determine if a student has completed the required clock or credit hours for which he or she has already been paid a Pell Grant. 34 C.F.R. § 690.75(a)(3). In response to this finding, Cabot conducted a file review and found that ten students had received improper disbursements. SFAP assessed a total individual liability for Finding #16 of $11,742. I find that Cabot improperly disbursed Pell Grants as found by the file review.

Finding #20: Failure to Obtain a Statement of Selective Service Registration

The reviewers found one student from whom Cabot had not obtained a statement of Selective Service Registration status. An institution must have on file a student's statement of registration status, which includes whether he is registered with Selective Service, before disbursing Title IV funds to that student. 34 C.F.R. § 668.33(a)(1), (2). Cabot

admitted that it failed to obtain this statement and SFAP assessed a total individual liability for Finding #20 of $2,400. I find that Cabot failed to obtain the required statement of the status of Selective Service Registration.

Finding #21: Failure to Determine Citizen Status

The program review report identified one student from whom Cabot did not obtain documentation of citizenship status. An institution may only disburse Title IV funds to a student who is a U.S. citizen or national or meets other regulatory requirements, as delineated under 34 C.F.R. § 668.7(a)(4). Cabot admitted that it failed to obtain this documentation. SFAP assessed a total individual liability for Finding #21 of $1,200. I find that Cabot failed to obtain the required documentation of citizenship status.

Finding #22: Failure to Obtain Financial Aid Transcripts

The program review report identified three students to whom Cabot disbursed Title IV funds without requesting or obtaining financial aid transcripts (FATs). An institution must determine if a student has previously attended another eligible institution and, if so, must request a FAT from each such institution. 34 C.F.R. § 668.19(a). The institution may only disburse Pell Grant funds to a student from whom it has not received a FAT for one payment period. *Id.* SFAP agrees to accept Cabot's identification of students for whom it claims to have not obtained FATs. The total liability assessed by SFAP for Finding #22 is $52,289. I find that Cabot failed to satisfy the requirement to obtain FATs in the instances alleged by SFAP.

Finding #23: Failure to Make Contributions to the SEOG Program Fund

Cabot did not make matching contributions to the Federal Supplemental Educational Opportunity Grant (SEOG) Program, according to the program review report. An institution must provide a contribution to the SEOG program. 34 C.F.R. § 676.21(a)(4). Cabot admitted its failure to pay its matching share. SFAP assessed a total liability for Finding #23 of $7,468. I find that Cabot failed to pay its matching share to the SEOG program.

Finding #26: Failure to Reconcile the Length of Stated Program Offerings with Student's Actual Attendance Records

SFAP urged liability for Finding #26 in its brief, despite the fact that the FPRD stated that Cabot's closure resolved this finding and that Acompliance with instructions given in the program review report are no longer needed." Because the institution bears the burden of proof after receipt of adequate notice, and as SFAP's brief was the final pleading in this case, I find that the brief does not constitute adequate notice of the issue. *See Goldberg v. Kelley*, 397 U.S. 2545 (1970); *In Re Liberty Academy of Business*, Docket No. 96-132-SP, U.S. Dep't of Educ. (Interim Decision, December 8, 1997). Therefore, Finding #26 and the corresponding $21,425 liability is rejected.

Overall, Cabot urges that any assessment of liability be based upon ED's estimated actual loss formula. SFAP does not appear to have calculated its loss as to guaranteed student loans according to this method even though it has been repeatedly accepted in Subpart H cases. *See, e.g., In Re Christian Brothers University*, Docket No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997); *In Re Southeastern University*, Docket No. 92-102-SA, U.S. Dep't of Educ. (November 13, 1995). As some students will pay back their loans, the formula ensures that an institution need not pay ED for funds that have been or will be repaid, thereby constituting an unjust enrichment in a process which is based on contractual principles. I note, however, that since I have disapproved liability based on the return of all Title IV funds disbursed during the relative award years, most of the findings relate to the return of Pell Grant funds, which are not subject to the application of the estimated actual loss formula. In addition, the students who are at issue in those findings dealing with student loans are easily ascertainable. As a consequence, I find that the estimated actual loss formula need not be applied to calculate Cabot's liability.

FINDINGS

1. Cabot violated 34 C.F.R. § 668.23 by failing to produce accounting ledgers for the 1991-92 and 1992-93 award years, as requested, for student #6 and #14 as enumerated in Finding #3.

2. Except as provided in Finding 1 above, Cabot is not liable for all Title IV funds disbursed during the 1991-92 and

1992-93 award years on the basis of Findings #3, #7, and #27 of the FPRD.

3. Cabot violated 34 C.F.R. §§ 690.61 (Finding #9); 668.21, 668.22(a)(1), and 682.607 (Finding #10); 690.75(a)(3) (Finding #16); 683.33(a) (Finding #20); 668.7(a)(4) (Finding #21); 668.19(a) (Finding #22) and 676.21(a)(4) (Finding #23).

4. Cabot may not be assessed liability for Finding #26 because of lack of notice.

5. Cabot's liability need not be recalculated in accordance with the estimated actual loss formula.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Cabot Colleges pay to the U.S. Department of Education the total amount of improperly disbursed funds in accordance with this Decision.

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Ernest C. Canellos
Chief Judge

Issued: October 30, 1998
Washington, D.C.

SERVICE

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

Wayne A. Cox
President
Cabot Colleges
1141 Luneta Drive
Del Mar, CA 92014

Renée Brooker, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Avenue, S.W.
Washington, D.C. 20202-2110

Footnote: 1 [1]*For example, Cabot claims that the FPRD is void, as it contains no evidence to support the disallowance of funds; is an arbitrary and capricious abuse of administrative discretion; does not accord with regulatory policy or law; contains inadequate and incorrect research and factual documentation, and contradicts federal and state law and the standards of Cabot's accrediting agency. In addition, Cabot argues that ED is estopped from asserting liabilities; the FPRD violates the Freedom of Information Act to the extent it imposes retroactive policy interpretations and sanctions without notice; the institution's Asafe harbor@ rights have been violated; ED lacks legal authority to require payment of liabilities, and the findings violate the General Education Provisions Act to the extent they were not published or proposed in accordance with its requirements. None of these arguments are novel challenges to Subpart H proceedings and each has been resoundly rejected by previous decisions. See, e.g., In re Macomb Community College, Docket No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993) (recognizing the Department's ability to seek liabilities for*

misuse of Title IV funds); In re Beth Jacob Hebrew Teachers College, Docket No. 96-77-SP, U.S. Dep't of Educ. (March 17, 1997) (the government cannot be estopped from collecting misspent funds); In re Beth Medrash Eeyun Hatalmud, Docket No. 97-94-SP, U.S. Dep't of Educ. (June 16, 1998) (retroactivity is not a concern when regulatory provisions are clear and unambiguous); In re Tiger Welding Institute, Docket No. 97-39-SP, U.S. Dep't of Educ. (July 2, 1998) (safe harbor rights do not apply when published regulations are clear).

Footnote: 2 *[2]Cabot did not explain the relevance of most of its exhibits, which are numerous and unorganized. As I have noted previously, an institution that does not provide the fact-finder with adequate explanation of its submissions does so at its own peril. See In re Clark Atlanta University, Docket No. 93-106-SP, U.S. Dep't of Educ. (Decision on Remand II, Dec. 22, 1997).*

Footnote: 3 *[3]All citations to the Code of Federal Regulations henceforth are to the 1990 edition unless otherwise noted.*

Footnote: 4 *[4] SFAP also relies on In re Selan's System of Beauty Culture, Docket No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994), wherein I determined that, on the basis of the record before me, I was unable to measure the Department's loss more precisely than the calculation offered by SFAP. Although the evidence clearly demonstrated that the institution had not failed to refund Title IV funds to students who had graduated from the institution's programs, the institution failed to show the precise number of these students. More importantly, I found SFAP's calculation of liability reasonable under the circumstances. Selan's is not on point with the case at bar. SFAP's calculation of liability in this case is unreasonable.*

Footnote: 5 *[5] Notably, SFAP has elected to bring this case pursuant to the procedures set forth under Subpart H - - audit and program review - - regulations. In that respect, the remedies available to SFAP are contractual in nature and allow only for recovery of proven compensatory damages. See, e.g., In re Phillips Junior College, Melbourne, Docket No. 93-90-SP, U.S. Dep't of Educ. (November 23, 1994). Subpart H proceedings differ from Title IV's counterpart Subpart G proceedings in several procedural respects. The relevant difference in this instance is that the remedies available to SFAP in Subpart H proceedings do not include the possibility of imposing a fine, termination, or some other form of punitive action against the institution. An action under Subpart H is more in the nature of an action to collect a debt owed to the Federal government for the amount of funds misused by an institution. See Selan's, supra; In re Macomb Community College, Docket No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993).*

Footnote: 6 *[6] By this determination, I do not propose to support the proposition that recordkeeping requirements are de minimis in importance. Rather, my finding is limited to setting forth the appropriate basis for the calculation of liability in a Subpart H proceeding, wherein the institution has come forward with evidence of its proper expenditure of Title IV finds for many of its students, but not all of them - - and whether this failure should result in the recovery of all Title IV funds disbursed by the institution when the basis of the finding in the FPRD relies on evidence from only two student files.*

Footnote: 7 *[7]The fact that Cabot has closed since the issuance of the program review report would seem to foreclose any Subpart G proceedings.*