

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

In the Matter of

Docket No. 97-161-SP

MAGIC TOUCH BEAUTY INSTITUTE,
Respondent.

Student Financial

Assistance Proceeding

PRCN: 199740213924

Appearances:

Ralph Antonelli, President, Brooklyn, N.Y., for Magic Touch Beauty Institute.

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

Before:

Richard I. Slippen, Administrative Judge

DECISION

On September 30, 1997, the office of Student Financial Aid Programs (SFAP), U.S. Department of Education (Department) issued a Final Program Review Determination (FPRD) to Magic Touch Beauty Institute (Magic), finding that Magic 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.* The violations detailed in the FPRD include failure to notify immediately the Secretary of Education (Secretary) of the school's closure, failure to submit a letter of engagement for an independent audit of all funds received by Magic under Title IV, and failure to submit a close-out audit within the prescribed time of 45 days after the school ceases its participation in a Title IV, HEA program. [See footnote 1¹](#)

Under 34 C.F.R. § 668.112, FPRDs are defined as written notices of a determination issued by a department official which result from a program compliance review of an institution's participation in any or all of the Title IV, HEA programs. The FPRDs serve several functions: 1) to assess the liability due from the institution in regulatory violation; 2) to notify the institution of its right to appeal; and 3) to close the review process. In this case, SFAP has assessed the liability for funds received by Magic at \$359,019. This amount includes the 1992- 1993 award year which was not included in the FPRD. SFAP explains that it mistakenly omitted the 1992-93 award year from the FPRD. The liabilities, however, identified in the FPRD are correct, although their award years are mislabeled. SFAP acknowledges this oversight and alternatively assesses liability at \$337,067, should this tribunal believe a *prima facie* case has not been made regarding the omitted award year. [See footnote 2²](#)

Previously, on February 18, 1997, SFAP initiated termination proceedings and a fine action for Magic's failure to

submit audit compliance reports for the 1992-93 and 1993-94 award years and for failure to submit a close-out audit covering July 1, 1994, through July 17, 1997. Audit reports generally detail the school's administration of the Title IV programs as stipulated by 20 U.S.C. § 1094(c)(1)(A)(i) and regulated by 34 C.F.R. § 668.23(c). SFAP discontinued pursuit of these proceedings when Magic later submitted the two compliance audits on April 24, 1997. These audit reports were incomplete, but SFAP expected that Magic would submit revised, acceptable audits for the years in question. In view of the fact that Magic has since closed, SFAP now seeks only a refund for the unaccounted Title IV funds, and no fine is imposed.

In accordance with 34 C.F.R. § 668.26(b)(2), an institution is required to submit a close-out audit within 45 days after the date that the school's participation in the Title IV programs ends. On July 30, 1997, SFAP sent Magic a letter reminding the school of its obligations to submit a close-out audit. This letter also notified Magic that SFAP had not received audits from Magic for the last five years. To date SFAP has not received either a close-out audit, nor an engagement letter, as required under 34 C.F.R. § 668.26(b)(2)(ii).

According to SFAP, since unacceptable audits were submitted for both 1992-93 and 1993-94 award years, Magic cannot account for its Title IV funds for those years. SFAP argues that Magic has the burden of proving that it complied with program requirements and made proper Title IV expenditures under 34 C.F.R. § 668.116(d), and therefore, Magic should have submitted a close-out audit and acceptable compliance audits for prior award years. SFAP also alleges that Magic failed in its fiduciary duty under 34 C.F.R. § 668.82, which outlines the required high duty of care in administering Title IV, HEA programs. SFAP believes that because Magic agreed to abide by Title IV and the implementing regulations when it entered into a participation agreement with the Department [See footnote 3³](#) in March 1993, the school had adequate notice of its obligations to submit regular audits, as well as close-out audits once the school no longer received Title IV funds. As a result, SFAP asserts that all Title IV funds received from July 1, 1992, through July 17, 1997, should be returned to the Department because there is no accurate way to determine how the funds were disbursed by the school.

In response to the current proceeding, Magic submitted documentation which entailed a letter from the school's President, Mr. Ralph Antonelli, referencing his health condition and subsequent hospitalization. Mr. Antonelli also noted that, "most records are in the hands of the state Educational Department except a few that were [sic] destroyed in our robbery [sic] that is on record at the 62nd precinct [sic] Brooklyn N.Y." SFAP notes that Magic did not seek additional time to complete the necessary close-out audit, but instead seeks complete relief of its regulatory responsibilities.

It has been well established by this tribunal that in the absence of a close-out audit, unless a school can otherwise account for the federal funds it received, the school is liable for all Title IV funds received since the last audit submitted. *See, e.g., In re Interamerican Business College*, Dkt. No. 96-20-SP, U.S. Dept. of Educ. (May 28, 1997); *In re Belzer Yeshiva*, Dkt. No. 95-55- SP, U.S. Dept. of Educ. (June 19, 1996); *In re Long Beach College of Business*, Dkt. No. 94-78- SP, U.S. Dept. of Educ. (August 30, 1995); *In re Calvinade Beauty Academy*, Dkt. No. 93-151- SA, U.S. Dept. of Educ. (March 21, 1995); *In re National Broadcasting School*, Dkt. No. 94-98- SP, U.S. Dept. of Educ. (Dec. 12, 1994). Magic did not submit acceptable audit reports for the 1992-93 and 1993-94 award years, nor did it submit a close-out audit covering the period since the 1992-93 award year. As a result, Magic is responsible for all federally disbursed funds for the time period of July 1, 1992, through July 17, 1997, when the school closed and therefore was no longer a participant in Title IV programs.

Based on the evidence submitted, it appears as if Magic would like a complete reprieve from the close-out audit requirements. Under 34 C.F.R. § 668.117(d) the institution's responsibilities cannot be waived by a hearing official. [See footnote 4⁴](#) While the circumstances affecting Mr. Antonelli are certainly unfortunate and make compliance with these regulations a challenge, they do not absolve him of his responsibility to account for federal funds that were disbursed to his school. In addition, Mr. Antonelli cites medical problems that seem to have worsened in the past year culminating in hospitalization and surgery. This does not, however, explain the incomplete audit reports for the 1992-93 and 1993-94 award years, indicating a history of non-compliance that originates earlier than the cited period of illness. Further, even if relevant, there is no verification of a robbery because the form submitted by the school concerns only lost property and does not include an official's signature. Magic has not offered any documentation evidencing the school's compliance with the regulations by otherwise accounting for the federal funds received, nor evidence demonstrating an

error in SFAP's computation of liability. The school was aware of its responsibility to submit audits because this information was contained in the Participation Agreement^{See footnote 5⁵} signed by the school. Also, a letter, dated February 18, 1997, notified the school of SFAP's termination proceedings based on the failure to submit audit reports for the 1992-93 and 1993-94 award years. Over nine months prior to this letter, the Audit Resolution Branch of the Institutional Monitoring Division sent Magic a warning letter, dated May 8, 1996. This letter concerned possible administrative action if these audit reports were not submitted. The Department records confirm that this letter was received by Magic on May 16, 1996. Indeed, Magic had notice that the responsibility to submit these audits rested with the school. The required audits were eventually submitted, but SFAP later notified Magic that the audits were incomplete and therefore unacceptable. As a result, these audits cannot be used by SFAP to account for funds disbursed during those award years.

CONCLUSION

Based on the facts presented in this case, SFAP has established a *prima facie* case that Magic did not adequately account for its Title IV funds, as required by 34 C.F.R. § 668.116(d). The amount of liability, as assessed by SFAP, is \$359,019 and covers the 1992-93 award year through the date of the school's closing on July 17, 1997. Magic had ample notice that compliance audits were required. Multiple reminder letters included statements that appropriate administrative action involved a return of all Title IV funds disbursed. Mr. Antonelli's declining health and circumstances are unfortunate, but they do not absolve him of his burden of proving that the school made proper Title IV expenditures, which is demonstrated through the required audit submission. Audit reports enable the Department to ensure that federal financial assistance programs are properly implemented. Finally, the requirement that all funds be returned when they are not properly accounted for is well established by previous decisions of this tribunal.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Magic Touch Beauty Institute pay to the United States Department of Education the sum of \$359,019.

Judge Richard I. Slippen

Dated: July 2, 1998

SERVICE

A copy of the attached decision was sent by certified mail, return receipt requested to the following:

Ralph Antonelli
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Footnote: 1 ¹See 34 C.F.R. § 668.26(b)(2)(i) and (ii).

Footnote: 2 ²It may seem, on the one hand, counter-intuitive that an appeal of a Final Program Review

Determination, which is usually issued after an initial program review of an institution's administration of Title IV programs, should include an award year not specified in the final determination. However, prior to the FPRD, SFAP sent letters on July 30, 1997, and August 6 and 29, 1997, detailing Magic's responsibilities in submitting compliance audits and a close-out audit. While these reminder letters focused on the close-out audit procedures, SFAP also stated in the letters that according to their records, Magic had not submitted an audit within the past five years, which would include the 1992-93 award year.

[Footnote: 3](#) ³See 34 C.F.R. 668.14(b)(1997).

[Footnote: 4](#) ⁴See *In re Interamerican Business College*, Dkt. No. 96-20-SP, U.S. Dept. of Educ. (May 28, 1997) (stating that despite numerous excuses for not submitting the audit, the school could not rely upon these as a defense, nor did they shield the school from a regulatory violation).

[Footnote: 5](#) ⁵Participation Agreements require the school to agree that it will “comply with the statutory and regulatory requirements applicable to the Title IV, HEA programs...” Magic, therefore, must follow the regulations stipulating the submission of audit reports as outlined in 34 C.F.R. § 668.23(c)(3) which states, “The institution or servicer, as applicable, shall submit its audit report to the Department of Education within six months of the end of the institution's or servicer's fiscal year...” In addition, § 668.23(d) states that procedures for audits are contained in audit guides developed by the Office of Inspector General. As a result, Magic should not have been unaware of the nature of the audits that were required to be submitted to SFAP.
