

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

---

In the Matter of

**Docket No. 98-108-SA**

**EXCELSIS BEAUTY COLLEGE,**

Student Financial  
Assistance Proceeding  
ACN: ARB 98-00003

Respondent.

---

Appearances: Matthew L. Lalli, Esq., and Daniel E. Garrison, Esq., Snell & Wilmer, Salt Lake City, UT for Respondent.

Howard D. Sorenson, 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 June 5, 1998, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (Department) issued a final audit determination (FAD) finding that Excelsis Beauty College had failed to submit a close-out audit report, as required by 34 C.F.R. § 668.26(b)(ii). In the FAD, SFAP stated that on March 31, 1996<sup>[1]</sup>, due to a change in ownership of the school, Excelsis became ineligible to participate in the student financial aid programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. §§ 1070 *et seq.*, 1088 *et seq.*, and its implementing regulations. However, Title IV funds continued to be disbursed by Excelsis until April 1, 1997. SFAP found that Excelsis must reimburse the Department for all Title IV funds expended by the school since January 1, 1995, the date of its last submitted audit. The FAD assessed liability for \$29,900 in Federal Pell Grant funds, and \$34,886, in Federal Family Education Loan (FFEL) funds<sup>[2]</sup>.

The facts of this case are not in dispute. On September 1, 1995, Excelsis was sold by Ms. Lynn Kinghorn to one of her employees, Ms. Pam Hawker. Ms. Kinghorn subsequently ceased to be involved with Excelsis. Ms. Kinghorn owned Excelsis as a sole proprietorship. Excelsis was, under her ownership and control, an approved Title IV, HEA school. At the time of the school's sale, Excelsis last submitted a compliance audit covering the period of time from its initial disbursement through December 31, 1994. The Department never granted the school continued eligibility to participate in the Title IV programs under its new owner. Despite its ineligibility, Excelsis continued to disburse Title IV funds<sup>[3]</sup>. On June 5, 1998, the Department issued its FAD assessing liability for failing to submit a close-out audit after the change in ownership and control of Excelsis that terminated the school's Title IV eligibility. Ms. Kinghorn states that the Department has informed her that it also considers her personally and jointly liable for the amounts assessed against Excelsis<sup>[4]</sup>. Since the FAD was issued, Ms. Kinghorn provided the Department with compliance audit reports for the period from January 1, 1995, through August 31, 1995, which is the last date before the sale of Excelsis to Ms. Hawker.

SFAP states that it reviewed the compliance audits submitted by Ms. Kinghorn, as well as additional material submitted outside the record of this proceeding, and has determined that the audits provide a sufficient accounting for

the period up to August 31, 1995, the last day Ms. Kinghorn owned the school<sup>[5]</sup>. SFAP argues that no acceptable audit has been submitted for the period of September 1, 1995, through April 1, 1997. SFAP argues that Ms. Kinghorn, as Excelsis' owner of record with the Department, must bear full responsibility for ensuring the accounting of Title IV funds disbursed to the school. SFAP states that since Excelsis was a sole proprietorship, Ms. Kinghorn was the contracting party who signed the program participation agreement with the Department. SFAP asserts that until a new owner submits an application for approval of a change of ownership, or unless the Department is otherwise notified of the change, it has no notice that the participation of the institution has terminated. SFAP states that Ms. Kinghorn presented no evidence that she had informed the Department of the change in ownership so that the Department could have taken steps to ensure that federal funds did not continue to be disbursed to a terminated school. SFAP also rejects Ms. Kinghorn's argument that she cannot be held personally liable for any funds misspent after she sold Excelsis, stating that the question of a prior sole proprietor's personal liability is outside the jurisdiction of this tribunal<sup>[6]</sup>.

Ms. Kinghorn argues that she is legally responsible only for Excelsis' compliance with Title IV regulations during the period of her ownership and control. Ms. Kinghorn asserts that the Title IV regulations only impose obligations upon institutions, not on the individual principals of the institution. Ms. Kinghorn also asserts that Excelsis' program participation agreement (PPA) does not impose any personal or guarantor obligation on her. As the PPA automatically terminated on the date of sale, Ms. Kinghorn argues that she ceased to have any prospective obligations to the Department under the PPA. Ms. Kinghorn states that she has fulfilled her legal obligation to the Department by providing a compliance audit to the Department for the period up to the date of sale of the school and asserts that this tribunal's decision, *In re Cosmetology College*, Docket No. 94-96-SP, U.S. Dep't of Educ., certified by the Secretary (November 27, 1995) (*Cosmetology College*), squarely supports this proposition.

The purpose of this proceeding is the review of an appeal by an institution from a final audit determination. 34 C.F.R. § 111(a). As an initial matter, it is undisputed that Excelsis failed to submit a close-out audit for the period from September 1, 1995, through April 1, 1997. An institution is required to submit a close-out audit covering the period from its last submitted compliance audit to the date of closure. 34 C.F.R. § 668.26(b)(ii). It is also well established by this tribunal that in the absence of a close-out audit, unless a school can otherwise account for the federal funds received, the school is liable for all Title IV funds received since the last submitted audit. *In re Magic Touch Beauty Institute*, Docket No. 97-161-SP, U.S. Dep't of Educ. (July 2, 1998), appeal to the Secretary currently pending; *In re Belzer Yeshiva*, Docket No. 95-55-SP, U.S. Dep't of Educ. (June 16, 1996); *In re Calvinade Beauty Academy*, Docket No. 93-151-SA (March 21, 1995). Therefore, I find that Excelsis failed to submit a close-out audit for the period from the date of the last submitted audit, September 1, 1995 through April 1, 1997, and remains liable for all Title IV funds disbursed during this period.

The issue being argued by the former owner of the school is her personal liability for Title IV violations committed after a change in ownership. An institution that undergoes a change of ownership that results in a change of control ceases to qualify as an eligible institution. 34 C.F.R. § 600.31. An eligible institution is required to notify the Department in writing within 10 days after a change of ownership, if that ownership results in a change of control. 34 C.F.R.

§ 600.30. It is undisputed that the sale of Excelsis to Ms. Hawker resulted in a change of ownership and control. If Ms. Kinghorn had notified the Department of the Excelsis' ownership change, as required by regulation and the PPA that she signed as sole proprietor of Excelsis, Title IV funds could have been cut off from the now ineligible school, and any potential liability imposed upon Ms. Kinghorn may have been avoided. Instead, Title IV funds continued to flow to Excelsis for over a year and a half after the school lost its eligibility. It is the responsibility of a sole proprietor, on behalf of the school, to comply with its regulatory and contractual duties. It is clear that Ms. Kinghorn did not and that this failure should serve as a caution to others that selling a school may not absolve the former owner(s) of their obligations, contractual or otherwise, to the Department. To the Department, Ms. Kinghorn was the owner of record and it was under her ownership alone, that Excelsis was granted eligibility to participate in the Title IV programs.

As for determining a former owner's personal liability, this tribunal previously found the question of the personal liability of a former owner for the school's failure to submit a close-out audit after an ownership change and its subsequent closure, not within its jurisdiction. *In re Cosmetology College* at 3. The tribunal stated that the ultimate question regarding personal financial liability owed to the Department is a matter to be resolved between the respective

contestants. *Id.* Ms. Kinghorn incorrectly interprets a footnote to the *Cosmetology College* decision to mean that a sole proprietor's duty to the Department ceases once he or she sells the institution. The footnote in question merely states that the former owner, at the date of sale, had a duty to file an audit covering the period up to this sale date<sup>[7]</sup>. It was not the holding of this tribunal that a former owner is absolved of liability for any violations committed after the sale date; in fact, the *Cosmetology College* decision stands inapposite to Ms. Kinghorn's characterization of that case.

The statements in *Cosmetology College* are unambiguous; the personal liability of a former owner is not a matter within the jurisdiction of this tribunal. While the question of the personal liability of the parties is certainly germane to any future collection attempts by the Department, it is not relevant to this proceeding and to my determination that Excelsis failed to submit a close-out audit and is liable for all Title IV funds disbursed from September 1, 1995, through April 1, 1997. If any apportionment of the liability between the two owners is to occur it is between these parties<sup>[8]</sup>.

The second question regarding liability is the amount that is at issue for the aforementioned period of time. Due to SFAP's acceptance of satisfactory audit documentation up to September 1, 1995, the FAD's calculation of liability is now overstated. As SFAP failed to honor its stated intent to resubmit a reduced calculation of liability and I am unable to reconstruct Excelsis' liability from the record before me, SFAP is instructed to recalculate the school's liability for the Pell Grants and Federal Family Education Loans (FFEL) for the period at issue. SFAP is further instructed to once again use the estimated loss formula, as it did in the FAD, to calculate the school's FFEL liability.

### **FINDING**

1. Excelsis failed to submit a close-out audit for the period covering September 1, 1995, through April 1, 1997.

### **ORDER**

On the basis of the foregoing, it is hereby ORDERED that Excelsis Beauty College pay to the U.S. Department of Education an amount in accordance with this decision.

---

Judge Richard I. Slippen

Dated: October 4, 1999

### **SERVICE**

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

Matthew L. Lalli, Esq.  
Daniel E. Garrison, Esq.  
Snell & Wilmer  
111 East Broadway, Suite 900  
Salt Lake City, UT 84111

Howard D. Sorenson, Esq.  
Office of the General Counsel  
United States Department of Education  
400 Maryland Avenue, S.W.

[1] Excelsis was, in fact, sold on September 1, 1995.

[2] SFAP calculated the school's FFEL liability using the estimated loss formula.

[3] Excelsis no longer exists as a going concern.

[4] See R-5, Affidavit of Lynn Kinghorn.

[5] In its brief, counsel for SFAP states that he will separately submit a calculation as to the amount the liability can be reduced. In fact, counsel failed to submit a separate calculation of liability.

[6] See *In re Cosmetology College*, Docket No. 94-96-SP, U.S. Dep't. of Educ. (August 23, 1995), certified by the Secretary (November 27, 1995).

[7] It is instructive to note that the decision states that as the school's participation was based upon a PPA executed by its former owner, that former owner was responsible for the proper administration of all federal funds drawn down by the school.

[8] It does not seem as if SFAP attempted to include Ms. Hawker in the prosecution of its FAD, nor does it seem as if Ms. Hawker has been offered an opportunity (i.e. given notice) to participate in this proceeding. Rather, SFAP has inadvisably chosen to exclude Ms. Hawker from its efforts to seek a judgment against Excelsis for reasons not known to this tribunal, although perhaps it was due to Ms. Hawker's apparent filing for bankruptcy protection.