

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

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In the Matter of

**Docket No. 98-109-SP**

**MODERN TREND BEAUTY SCHOOL,**

Student Financial  
Assistance Proceeding  
PRCN: 199610812239

Respondent.

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Appearances: Glenn Bogart, Birmingham, AL, for Respondent.

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

Before: Richard F. O'Hair, Administrative Judge

**DECISION**

Modern Trend Beauty School, which operated beauty schools in Cheyenne, Wyoming, Brenham, Texas, and Lake Jackson, Texas, was a participant in the Federal student financial aid programs under the Higher Education Act of 1965, as amended, 20 U.S.C. §1070 *et seq.* (Title IV). On May 29, 1998, the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED) issued a Final Program Review Determination Letter (FPRD) informing Modern Trend that it was assessing a liability of \$955,520 against the school because of a finding of Title IV violations. Modern Trend exercised its right to appeal this assessment under 34 C.F.R. § 668.113.

Between December 11 – 15, 1995, SFAP institutional review specialists from ED's Denver, Colorado, regional office conducted a program review of Modern Trend's compliance with Title IV requirements at its Cheyenne location. The March 14, 1996, program review report noted that once program violations were discovered, SFAP expanded the program review to Modern Trend's two Texas locations. Following this, Modern Trend closed its Cheyenne school in July 1996 and its Brenham school in November of that same year. SFAP determined the violations discovered in the program review were serious enough to warrant the imposition of an emergency action and this was followed by a notification of its intention to terminate the eligibility of Modern Trend's last remaining school at Lake Jackson to participate further in the Title IV programs and to impose a fine of \$1,278,500. The parties thereafter entered into a settlement agreement on January 22, 1997, whereby Modern Trend agreed to forfeit its eligibility to participate in the Title IV programs and SFAP agreed not to impose its intended fine. Modern Trend further agreed to file a close-out audit for the period July 1, 1994, to January 22, 1997, the date the institution lost its Title IV eligibility, and to conduct a full file review of all students who had received Title IV aid from 1993 to 1997.

Modern Trend still had not submitted the agreed upon close-out audit and required file review by May 29, 1998, the date SFAP issued its FPRD, and this was noted in the FPRD. SFAP also documented that it had found a significant

number of Title IV violations during its program review. These violations fell primarily into the following categories: 1) improper disbursement of Title IV funds; 2) failure to make Title IV refunds; 3) untimely payment of Title IV refunds; 4) failure to properly calculate refunds; and, 5) failure to pay student credit balances. The major finding of the program review, Finding 1, was that Modern Trend had failed to submit its close-out audit. For this violation SFAP demanded that Modern Trend return \$955,520, all Title IV funds disbursed during the period of the overdue audit. Of this amount, \$924,801 was to be returned to ED and \$30,719 to holders of Federal Family Education Loans (FFEL). SFAP demanded the return of all Title IV disbursements under Finding 1; therefore, it did not make specific dollar assessments for the remaining FPRD findings summarized above, if the violations occurred within the period of the overdue audit. The issue of specific liability for each of the remaining findings did not become relevant until Modern Trend finally submitted a close-out audit in February 1999, and its full file review on September 13, 1999. SFAP's examination of the full file review disclosed discrepancies in refund amounts and an absence of many of the school's relevant accounting records. After requesting and receiving additional back-up documentation, Mr. Cary, an SFAP institutional review specialist, assembled all relevant documents and recalculated the refunds for each student. He determined that Modern Trend had outstanding refund and repayment liabilities of \$188,221. ED Exhibit 3. By this time, SFAP had accepted Modern Trend's close-out audit and, therefore, reduced its demand from Modern Trend from the original amount of \$955,520 to the \$188,221 figure computed by Mr. Cary.

Between September 1999 and August 2000, the parties engaged in further negotiations in an attempt to settle the dispute as to Modern Trend's remaining liabilities for improper disbursements, late and unpaid refunds, and unpaid student credit balances. For the most part, Modern Trend concedes liabilities in these general areas, and the parties have reduced the spread between their respective dollar amounts of those liabilities after a series of exchanges of information. Mr. Cary revised ED Exhibit 3 and his final analysis results in a school liability of \$177,444, versus Modern Trend's position that \$137,887 is the amount it owes.<sup>[1]</sup> A secondary dispute between them, however, addresses how this institutional liability is to be satisfied. Modern Trend insists that the bulk of these liabilities can be quickly satisfied by means of an offset of Title IV monies it asserts that SFAP owes to Modern Trend in satisfaction of reimbursement requests it has submitted to SFAP for funds Modern Trend advanced to its students. SFAP has refused to honor those reimbursement requests absent the submission of additional, supporting documentation. Modern Trend asks this tribunal to order SFAP to apply the offsets and the latter maintains the tribunal has no authority to do so. This issue will be addressed below.

### Program Review Liabilities

The program review found that Modern Trend violated a number of regulatory provisions by failing to make refunds to FFEL lenders and SFAP for loans and Pell Grant payments on behalf of students who withdrew from Modern Trend prior to completing their programs. Title IV regulations require institutions to have a fair and equitable refund program which provides for a refund of unearned tuition, fees, room and board, and other charges to a student who has received Title IV program assistance if the student withdraws, drops out, is expelled from the institution, or otherwise fails to complete the program. 34 C.F.R. § 668.22(a)(1)(ii). This refund policy is considered fair and equitable if the refund is the larger amount provided under the requirements of either: 1) applicable state law; 2) Federal pro rata refund policy for students attending for the first time; 3) Federal pro rata refund policy for students not attending for the first time; or 4) the institution's refund policy. 34 C.F.R. § 668.22(b). The regulations provide further guidance in determining the student's actual withdrawal date and what items must or must not be included in the refund calculations. 34 C.F.R. §§ 668.21(b); 668.22(c), (d), (h), and (j). After a refund has been calculated, there are specific timeframes within which the refund must be paid. 34 C.F.R. §§ 682.607(c); 682.605(b); and 685.306; and. If the institution receives Title IV funds which are in excess of the student's cost of attendance, those excess funds must be returned to the student, unless the student agrees the institution may retain those funds and apply them toward future costs. These refunds to students are labeled credit balances. 34 C.F.R. § 668.65(b).

In addition to finding that Modern Trend failed to make, or made late, refund payments, SFAP also found Modern Trend committed computational errors by awarding Title IV funds to students prior to their having completed the requisite number of class hours or making payments after the students had withdrawn. Rules governing the eligibility of Title IV student aid require the student to be a regular student enrolled in an eligible program of instruction. 34 C.F.R. § 668.7(a). If the institution measures its academic year in clock hours, it is required to disburse

Title IV aid in incremental payments which coincide with the number of clock hours the student has completed in the program of instruction. 34 C.F.R. §§ 690.63; 690.64; 690.3(b)(1); 690.75(a)(3); 20 U.S.C. §§ 1078-7(a)(1), (2). The regulatory violations described in the program review show that Modern Trend disbursed Title IV funds to students who had not completed sufficient class hours to be entitled to receive additional disbursements and to students who had withdrawn from the institution.

SFAP explained that one reason for the difference between the \$177,444 claimed by SFAP and the \$137,887 conceded by Modern Trend can be partially explained by a number of instances where it refused to give Modern Trend credit for refunds the school claimed it made because the school could not appropriately document those payments. In those instances, Modern Trend attempted to support its claim of having made a refund payment with nothing more than a copy of the front side of the purported refund check which did not contain a bank payment stamp in the right corner. SFAP was willing to accept as proof of negotiation a copy of the front side of the checks which contains a bank payment stamp, or a copy of the back side of the check which contains the appropriate endorsements. Without evidence of this nature, or any other banking records which would support Modern Trend's position that the refund check had been negotiated, SFAP refused to give Modern Trend credit for having made those refunds.

The required full file review of refunds which Modern Trend submitted was prepared by its auditors and Mr. Cary duplicated this effort by recalculating the refunds for the approximately 169 students at issue. His work product was recorded in a spreadsheet which lists, among other items, the amount of the refund for each student as computed by Modern Trend's auditor and the refund amounts as computed by Mr. Cary, the amount Modern Trend reported it had paid as a refund, the amount Mr. Cary determined remained unpaid, a listing of the exhibit numbers for the exhibits he used in computing each student's refund, and frequently, the reason for the difference in refund amounts. In his recalculation, Mr. Cary found that Modern Trend owed refunds of \$177,444 while Modern Trend's auditors found the debt to be \$137,887. The main distinction between the two is that Modern Trend's submission included only the specific dollar refund for each of its students in question, while Mr. Cary also submitted as exhibits the relevant payment documents for each student, plus the Pro Rata Refund Calculation Worksheet and the Withdrawal Record. Both of these documents are essential work papers for the calculation of any refund owed on behalf of a student.

The respondent in these 34 C.F.R. Part 668 Subpart H appeals procedures for program review determinations has the burden of proving that it properly disbursed the questioned Title IV funds. 34 C.F.R. § 668.116(d). In this instance, I find that Modern Trend has not met that burden. Although Modern Trend concedes it owes refunds, the amount it asserts as its liability is almost \$40,000 shy of that reported by SFAP. Both parties' liability calculations were prepared by professionals whose occupation requires that they operate in this medium on a regular basis. Other than the bottom line, both sets of refund calculations differ markedly in the nature of the completeness of this analysis. Modern Trend's report contains the names of the students and the single amount of each student's refund. SFAP accounting goes well beyond that and provides the background documents by which each refund can be independently computed and verified. Additionally, Modern Trend cannot adequately prove it made some of the claimed refund payments by submission of only the front of a purported refund checks without the appropriate bank notations. Without some proof that the check has been negotiated, these copies of the front of the check are useless. *See In re Ganaye Academy of Cosmetology*, Dkt. No. 97-54-SP, U.S. Dep't of Educ. (Feb. 4, 1998).

The quality of the evidence submitted by the parties is an integral factor to be considered by a fact-finder when engaging in the process of weighing the evidence submitted by the parties. I find the evidence submitted by Respondent lacks the weight to satisfy its burden of persuasion in this instance. Accordingly, I find the amount of Modern Trend's refund liability to be

\$177,444, the amount computed by Mr. Cary. [\[2\]](#)

#### Reimbursement Offset

As a result of finding serious deficiencies in Modern Trend's administration of the Title IV program, SFAP placed the institution on the reimbursement system of payment on March 18, 1996. Thereafter, Modern Trend was required to submit periodic reimbursement claims to SFAP for the Title IV disbursements it made on behalf of its

students. Modern Trend asserts that SFAP is holding unpaid reimbursement claims and it asks this tribunal to offset those unpaid claims against the refund liability arising out of the program review. In support of its position that this tribunal has the authority to order such an offset of liabilities, it cites several previous decisions from this tribunal including an order stemming from *In re New Concept Beauty Academy*, Dkt. No. 96-58-EA, U.S. Dep't. of Educ. (October 29, 1996)(Order Denying Respondent's Motion to Compel and for Sanctions). As I stated in that Order and I repeat now, this tribunal does not have jurisdiction to order SFAP to offset funds allegedly owed to an institution by virtue of reimbursement claims against funds owed to ED by the institution as a result of a program review or audit review. My authority is limited to determining whether the final program review determination is "supportable, in whole or in part." 34 C.F.R. § 668.119. This position is further supported by the finding in *New Concept Beauty Academy v. United States Department of Education et al.*, No. 97-CV-7939, E.D. Pa (October 29, 1998), which upheld my decision that the tribunal was without authority to order ED to release Pell Funds to the institution in satisfaction of reimbursement requests.

## ORDER

On the basis of the foregoing, it is hereby ORDERED that those portions of the Final Program Review Determination not withdrawn by Student Financial Assistance Programs are affirmed, and Modern Trend Beauty School is further ORDERED to remit \$177,444 in satisfaction of its liabilities identified in ED Exhibit 3.

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Judge Richard F. O'Hair

Dated: March 14, 2001

## SERVICE

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

Mr. Glenn Bogart  
Higher Education Compliance Counseling  
1149 Sixteenth Avenue South  
Birmingham, AL 20006

Ms. Denise Morelli, Esq.  
Office of the General Counsel  
400 Maryland Avenue, SW  
Washington, DC 20202-2110

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[1] Revised ED Exhibit 3 was attached to SFAP's Surreply which was filed on December 4, 2000.

[2] Although it is not within my jurisdiction of review, I fully expect that SFAP will review all of Modern Trend's requests for reimbursement and will make offsets as it believes appropriate.