

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

In the Matter of

Docket No. 98-110-SA

CONTEMPO SCHOOL OF BEAUTY

Student Financial Assistance Proceeding

Respondent. ACN: 09-95-64084

Appearances: Thomas J. Spratt, Jr., Esq., Pomona, California, for Contempo School of Beauty.

Russell B. Wolff, 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

Contempo School of Beauty (Contempo) of Inglewood, California, is a proprietary institution which offers postsecondary programs in cosmetology. It is accredited by the National Accrediting Commission of Cosmetology Arts and Sciences, and participates in federal student financial assistance programs, which are authorized under 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.*

On June 16, 1998, the Area Case Director, Southwest Case Management Division, Institutional Participation and Oversight Service, Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department), issued a final audit determination (FAD) to Contempo. The FAD took action on the findings of an audit performed by Arthur Andersen, LLP, Certified Public Accountants, dated December 15, 1995, which Contempo submitted to the Department in satisfaction of its annual Title IV audit requirement mandated by 34 C.F.R. § 668.23. The Arthur Andersen review had examined Contempo's administration of the federal student financial assistance programs for the period July 1, 1994, to June 30, 1995. On July 11, 1998, Contempo timely appealed the adverse findings of the FAD and requested a hearing. The parties submitted evidence and their respective briefs, after which I took the case under advisement.

The audit report, FAD, and request for hearing involve two adverse findings. First, it is alleged by SFAP that Contempo made late payments of certain refunds and failed to establish that two of its students were eligible for the Title IV aid they had received, resulting in a \$3,709 demand. During the briefing process, the parties agreed that \$2,640 is owed by Contempo for this finding. Since there is no issue in dispute remaining, I find that Contempo is liable for the return of \$2,640 for this finding.

In the second finding, SFAP alleged that Contempo erroneously calculated refunds due to 23 students who had

withdrawn prior to the completion of their program. Although there were a number of errors originally alleged in the refund calculations, the dispute between the parties relative to this finding has been narrowed. Now, the only issue is whether Contempo can offset a \$230 charge for certain equipment and supplies for each of the 23 students. SFAP determined in the FAD that since the school could not document that these students had received the equipment and supplies, it could not deduct anything from the refund calculation for these items. Sometime after the issuance of the FAD, Contempo provided documentation to SFAP which established that such equipment and supplies had been received by each of the students. After receipt of that evidence, however, SFAP altered the basis for its claim relative to this finding. It argued, in its brief for the first time, that the 23 refunds were incorrectly calculated for a new and independent reason. SFAP points out that 34 C.F.R. § 668.22(c)(5)(ii) requires that in order to be able to deduct the cost of equipment and supplies from any refund calculation, such items must have been either not returned by the student or unusable, even if returned. SFAP counsel argued that Contempo did not satisfy its burden of proof as to this issue because nowhere did Contempo establish that the respective equipment or supplies fit either of these categories. Rather, Counsel points out in his argument that all that Contempo showed was that equipment and supplies were signed for by the students.[See footnote 1](#)

In an appeal of a finding in a FAD, the respondent institution has the burden of proving that the Title IV funds in question were lawfully disbursed. 34 C.F.R. § 668.116(d). Before I can reach that ultimate issue, however, I must decide a threshold question of whether, on the facts of this specific case, the burden of proof has been effectively placed on Contempo. Specifically, I must determine whether SFAP can, in its brief, effectively change its theory of recovery from that which was asserted in the FAD. The significance of such a question is whether there was adequate notice so as to satisfy the constitutional standard of due process required in any administrative proceeding. *See generally, In re Liberty Academy of Business*, Docket No. 96- 132-SP, U.S. Dep't of Educ. (Interim Decision and Order, Dec. 8, 1997.) It is an established principle of administrative law that adequate notice is a precondition to the imposition of the burden of production upon the respondent in administrative adjudicatory proceedings. Failure of such notice, likewise, has been determined to constitute a violation of constitutional due process.

In the present proceeding, Contempo was notified in the FAD (at page 7) that its calculation of the refunds for 23 students was incorrect because it

. . . was able to provide only five files [out of 28 in the sample] in which the student actually signed and acknowledged receipt of the supplies and equipment. Absent documentation of receipt of the equipment and supplies by a student, there is no adequate documentation of equipment issued to a student. Accordingly, the institution may not deduct such undocumented costs from the refund owed for Title IV.

Since SFAP had already accepted the deduction for equipment and supplies for the 5 students in the sample who the school could prove had acknowledged receipt of those items, Contempo reasoned that to prevail on this issue, it needed to provide evidence that the other 23 students had received the equipment and supplies. After having provided the certifications to that effect for those students to SFAP, Contempo fully expected to prevail on this issue, and it stated so in its brief. It was only after Contempo had filed its brief that it was informed by SFAP in its brief of the new basis for its claim.[See footnote 2](#)

It seems abundantly clear that Contempo has successfully rebutted the finding in the FAD relative to the deductibility of the equipment and supplies. Out of the sample of 28 refunds made by Contempo, the FAD found fault with 23, while accepting the deduction for 5 students. The sole difference between the two groups was proof of receipt for the equipment and supplies. If such proof was available, the deduction was acceptable; if such proof was unavailable, such as in the cases of the 23 students, the deduction was denied. The demand in the FAD, therefore, is centered solely on the lack of evidence of receipt. The respondent is entitled to rely on such a demand, and provide the evidence necessary to rebut it. Having fulfilled that obligation, the Respondent is entitled to a finding in its favor. To assure finality in the administrative process, I should not have to ponder, in retrospect, whether the Respondent could have provided evidence to satisfy SFAP's new theory of the case if it had been timely put on notice of that position. In addition, given the fact that there was over a two-year period between the time that the audit was performed and the FAD was issued, during which the parties

apparently exchanged information, it appears quite late in the process to now require a new submission from Contempo. Therefore, on the facts of this case, Respondent is relieved of liability for the demand for the return of \$230 per student for the 23 students, as alleged in the second finding.

FINDINGS

1. Contempo School of Beauty has failed to meet its burden of proof in establishing that a student was entitled to the Title IV aid provided and, as a result, must return \$2,640 to the U.S. Department of Education.

2. Contempo School of Beauty College is relieved of any obligation to return any sum for the demand relative to improper calculation of refunds.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Contempo School of Beauty repay to the U.S. Department of Education the sum of \$2,640.

Ernest C. Canellos, Chief Judge

Dated: February 3, 1999

SERVICE

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

Thomas J. Spratt, Jr., Esq.
445 N. Garey Avenue, Suite 4
Pomona, California 91767

Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110

Footnote: 1 I note that prior to the issuance of the FAD, SFAP officials had agreed to accept the deductibility for equipment and supplies for 5 students out of the 28 students in the original sample for this finding because there was evidence that these students had acknowledged receipt for the equipment and supplies they received. Inherent in this finding is that the program official concluded that the equipment and supplies were either unreturned or unusable, even if returned. Although, in his brief, Counsel agrees to be bound by such earlier concession by his client, he urges that I impose liability for the other 23 students in the sample, inferring that the concession was based on a faulty premise.

Footnote: 2 The briefing schedule provided that the Respondent would file its brief first, followed by the responsive

brief of SFAP. Although the Respondent was afforded the right to request an opportunity to file a Reply brief, it chose, for whatever reason, not to do so.