

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

In the Matters of

**Docket Nos. 01-42-SA; and
01-43-SA**

**SOUTHERN COLLEGE, and
SOUTHEASTERN ACADEMY,**

Student Financial
Assistance Proceeding

Respondents.

Appearances: David L. Peoples, President, for Southern College and Southeastern Academy.

Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education,
Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Southern College, and Southeastern Academy were proprietary institutions of higher education. Other than their common ownership, the interrelationship between the two schools is unknown. Each school participated in the various federal student financial assistance programs authorized under the provisions of 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.* The office of Federal Student Aid (FSA) is the cognizant office within the United States Department of Education (ED) that administers these programs. The Respondents' participation ended when, on approximately May 31, 2001, both schools closed and ceased providing educational instruction.

One of the consequences of eligible schools closing is that the affected schools are required to file closeout audits within prescribed time frames. In the present case, when the audit report was not submitted within the time frame required, FSA issued a Final Audit Determination (FAD) on September 27, 2001. In that FAD, FSA demanded that Southern return \$5,555,682.46 and Southeastern return \$5,069,550.00, to ED. Each of these sums comprised the total of the federal student assistance that each school had drawn down during the 1999-2000 and 2000-2001 award years, the periods, which were required to be covered by the closeout audit. By letter dated November 16, 2001, the Respondents' President filed an appeal.

In this proceeding, the Respondent has the burden of proving that its expenditures of Title IV funds were correct.

See 34 C.F.R. § 668.116(d). In that vein, 34 C.F.R. § 668.26. provides: that upon ceasing to provide educational instruction, a school which participated in the federal student assistance programs must engage an auditor to carry out an independent audit; a letter of engagement for such audit must be provided to the Secretary within 45 days; and the requisite audit report must be submitted within 45 days of the engagement letter. Since it had not received the audit report within the specified time, FSA issued the FAD at issue.

In a nutshell, Respondents' argument is that it has no funds with which to pay for an audit because FSA has unreasonably refused to honor its reimbursement request in the sum of \$148,000, which was pending at the time^[1]. Respondents allege that they had timely contracted for the closeout audit, but the audit had to be cancelled because of the lack of funds. Despite this fact, Respondents claim that their past record supports their contention that federal funds were properly expended during the period in issue.^[2] The only other evidence presented by the Respondents was two formatted letters from FSA reporting that according to the Respondents' filings, the Direct Loan accounts for the two institutions were in rough balance for the 2000-2001 award year.

FSA's position, as enunciated in its brief, is quite straightforward. A closeout audit was required -- failing to submit such an audit equates to the inability to account for federal funds for the period since the last periodic audit. As a consequence, the Respondents must return all the federal funds they received for the award years since the last audit. Although the record is silent as to when the last periodic audit was filed by the Respondents, there is some evidence that no such audit was ever filed covering the 1999-2000 and 2000-2001 award years.

I have recently been presented with a somewhat analogous case for disposition. See, *In re SamVerly College of Barber/Hairstyling*, Docket Nos. 96-144-SP & 96-45-ST, U.S. Dep't of Educ. (June 21, 2000) *affirmed by* (Sec. Dec., Jan 3, 2001). There I reaffirmed the long-standing rule that it is a participating school's obligation to provide FSA with proof that it expended federal funds in an appropriate manner. Failing to do so would result in FSA's recoupment of such funds. I believe that it is fair to postulate that not all the funds drawn down by the Respondents were erroneously spent -- probably a great majority of such funds was properly expended. Yet, SFA claims the return of all funds drawn down during the last two award years. This anomaly results from the fact that the Respondent is a fiduciary as to the federal funds; as a fiduciary, it has a duty to account; and it has utterly failed to do so either by filing a closeout audit or submitting some acceptable alternate proof of its expenditures. Most importantly, FSA, as the responsible federal agency, is left with no other alternative than to consider all such funds as improperly accounted for.

FINDINGS

The circumstances of this case lead me to the inescapable conclusion that Respondents have failed to satisfy their burden of establishing that their expenditures of federal funds were correct. Specifically, I FIND that based on the totality of the evidence, the Respondents failed to file the required closeout audits. Further, I FIND that they provided no other bases for me to determine that they properly accounted for the 1999-2000 and 2000-2001 award year federal funds, which they had drawn down.

ORDER

On the basis of the foregoing findings and conclusions of law, it is hereby ORDERED that Southern College and Southeastern Academy repay to the United States Department of Education the sum of \$5,555,682.46 and \$5,069,550.00, respectively, as demanded in the FAD.

Ernest C. Canellos
Chief Judge

Dated: April 29, 2002

SERVICE

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

David L. Peoples
President
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[\[1\]](#) It should be noted that I have no jurisdiction to adjudicate or, otherwise, resolve the dispute between the Respondents and SFA regarding the reimbursement request.

[\[2\]](#) As an attachment to their brief, Respondents provide a copy of my decision in *In re Southeastern Academy*, Docket No. 00-07-SP, U.S. Dep't of Educ. (June 15, 2001) in an attempt to persuade me that they properly accounted for federal funds. I note, however, that the periods covered by this decision are award years 1996-1997 and 1997-1998, and that it turns on a very narrow issue, therefore, the decision is not relevant to the award years at issue in this proceeding.