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

In the Matter of	**Docket No. 02-49-SP**
HAMILTON PROFESSIONAL SCHOOLS,	Federal Student Aid Proceeding
Respondent.	PRCN: 200040217844

Appearances: Glenn Bogart, Higher Education Compliance Consulting, Birmingham, AL, for Respondent.

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

Before: Richard I. Slippen, Administrative Judge

DECISION

Hamilton Professional Schools (Hamilton) operated as a proprietary institution of higher education in Arroyo, Puerto Rico, with a branch campus in Juncos, Puerto Rico. Hamilton participated in the federal student aid programs 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. § 2752 *et seq*., until its participation was terminated. *See In re Hamilton Professional Schools*, Docket Nos. 01-13-EA and 01-14-ST (September 7, 2001), certified by the Secretary (January 11, 2002) (Termination Decision).

On May 2, 2002, Hamilton appealed the U.S. Department of Education (Department), office of Federal Student Aid's (FSA) Final Program Review Determination (FPRD) dated March 21, 2002. FSA seeks recovery of $1,601,815.00 based on its determination that Hamilton violated several student financial assistance program regulations, including regulations prohibiting the disbursement of funds to students ineligible for student financial assistance.

The FPRD calculated liabilities for the aforementioned findings by using an error rate calculation and projecting liability to the universe of Title IV recipients. The FPRD did, however, assess full liability for all students who were ineligible to receive Title IV funds and for all the Joint Training Partnership Act (JTPA) students who received overawards. FSA acknowledged that although it found Hamilton's Title IV documentation unreliable, it would not seek a return of all Title IV funds because Hamilton actually earned some of the Title IV funds it disbursed.

To lawfully disburse Title IV funds, an institution must comply with program regulation requirements governing its administration of the federal student financial assistance programs. 34 C.F.R. 668, Subpart H. The institution must demonstrate that that the expenditures questioned or disallowed were proper. 34 C.F.R. § 668.116. The FPRD charged that Hamilton used falsified attendance records and ability to benefit (ATB) tests to obtain Title IV funds for ineligible students and to mask ineligible disbursements, overawards, and the actual amount of refunds owed for students who withdrew from the institution.[1]

For the reasons stated below, I find that Hamilton failed to carry its burden of proof in this proceeding. Specifically, the institution failed to provide persuasive proof that it complied with Title IV requirements and that it properly expended Title IV funds.

Issue Preclusion

In this proceeding, FSA seeks recovery of funds on the basis of claims asserted against the institution in a prior proceeding. In the prior proceeding, Hamilton was terminated from its participation in the Title IV programs and fined $100,000.00 for its conduct in administering the Title IV programs. The termination proceeding was governed by regulations found at 34 C.F.R. Subpart G. In a Subpart G proceeding, the Department must demonstrate that the institution failed to meet its obligations as a fiduciary in administering the Title IV programs with the highest standard of care and diligence. 34 C.F.R. § 668.82.

Consequently, a threshold issue that must be decided is what effect, if any, does the Subpart G termination proceeding have on this Subpart H recovery of funds proceeding. In the parties' briefs, I asked them to address this issue because if the prior proceeding already decided issues of law and fact pertinent to the instant proceeding, the parties may be precluded from relitigating these matters.

FSA argues that the facts and evidence at issue in the instant proceeding arise from the same misconduct and violations of Title IV program requirements at issue in the termination proceeding. FSA states that the facts and evidence relied on by the Department were challenged by Hamilton in the prior proceeding and the dispute was resolved in favor of FSA. FSA argues that the doctrines of collateral estoppel and issue preclusion have been acknowledged and applied by this tribunal and do apply in the instant proceeding. According to FSA, the Department alleged in the termination action and the FPRD that Hamilton illegally obtained, and retained Title IV funds by falsifying ATB tests and student attendance records. Moreover, the students relevant to the termination action and the FPRD are the same.

Although the termination judge did not cite specific students in his decision, FSA contends that the termination decision makes clear that he reviewed the declarations, student documentation, and testimony when he determined that FSA's allegations of fraud were unrebutted and persuasive. FSA also argues that the termination decision found that Hamilton's falsification of attendance records and ATB tests resulted in Hamilton receiving Title IV funds to which it was not entitled. Since the underlying issues regarding Hamilton's misconduct and the resulting Title IV violations have already been determined, FSA asserts that the only issue to be decided in the instant proceeding is the amount of liability in question. In the alternative, FSA argues that if issue preclusion and collateral estoppel do not apply to this proceeding, then the termination judge's rulings should still be given full consideration as the judge presided over an evidentiary hearing involving identical issues and his decision is based on a "first hand" review of the credibility of the witnesses and the veracity of the written documentation they presented.

Hamilton concedes that collateral estoppel or issue preclusion may be applicable in this case because the termination judge sat in a hearing of competent jurisdiction, and the parties in the termination action and in this recovery of funds action, are the same. Hamilton argues, however, that the issues in the termination case were not actually and necessarily determined in the termination decision. Hamilton argues that all the termination decision actually determined was that there was fraud or extreme negligence, that Hamilton maintained inaccurate records, that it failed to properly make refunds, that it illegally disbursed Title IV funds, and that it disregarded ATB requirements. Hamilton asserts that FSA cannot invoke preclusion to justify the imposition of liabilities or to prevent Hamilton from having the opportunity to defend each and every student finding in the FPRD. Hamilton also argues that issue preclusion would apply only if the termination judge had identified specific student disbursements as ineligible, and this did not occur.

Collateral estoppel and *res judicata* are related doctrines that hold that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the parties. *Montana v. U.S.*, 440 U.S. 147, 153 (1979). The purpose of these doctrines is to preclude parties from contesting matters that they have had a full and fair opportunity to litigate and to protect against the expense and nuisance of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. *Id*. The two doctrines serve the same purpose in different ways. *Res judicata*, or claim preclusion, means that a final judgment on the merits bars the parties from relitigating issues that were or could have

been raised in the prior action. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Claim preclusion requires an identity in the causes of action. *See Montana*, 440 U.S. at 153. The doctrine of claim preclusion does not apply here because there is no identity in the cause of action between a Subpart G termination and fine proceeding and a Subpart H recovery of funds proceeding. The two types of proceedings are distinct. *See In re Leonard's Hollywood Beauty School*, Docket No. 95-131-SA, U.S. Dep't of Educ. (March 19, 1996).

Collateral estoppel, or issue preclusion, requires that once a court of competent jurisdiction decides an issue necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana*, 440 U.S. at 153; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979); *In re Career Education, Inc*., Docket No. 91-17-ST, U.S. Dep't of Educ. (August 12, 1992).

When an administrative agency acting in a judicial capacity resolves issues of fact, which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) quoting, U*nited States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, (1966); *Astoria Federal Savings & Loan Assoc.*, 501 U.S. 104, 107 (1991). An administrative determination is more likely to be given preclusive effect where the agency acted in the capacity of fact finder. *University of Tennessee v. Elliott*, 478 U.S. at 798; *United States v. Utah Construction & Mining Co.*, 384 U.S. at 422 (1966); *Fay v. South Colonie Central School District*, 802 F.2d 21 (2d Cir 1986). In *Career Education, Inc.*, this tribunal recognized a previous decision's determination of an issue and gave it effect under the doctrine of issue preclusion. The tribunal found that the parties were essentially the same, the facts were substantially, if not fully, identical, and the issues were in substance the same. *Id*.

In the prior proceeding, the parties were given a full and fair opportunity to litigate these matters. The parties briefed these matters, a five-day evidentiary hearing was held, and post-hearing submissions were filed. This tribunal's Subpart G termination proceeding provided an adequate opportunity for the parties to litigate. In making its determination, the tribunal determined issues of law and reviewed evidence in its capacity as a fact finder.

In the instant proceeding, the findings contained in the FPRD are the same charges alleged in the termination case. Determination of these findings including Hamilton's falsification of records were essential to the termination judge's decision to terminate Hamilton from participating in the Title IV programs. The circumstances of the instant proceeding are identical to the termination proceeding – the same violations are at issue regarding the same student files. In the termination proceeding, the parties actually litigated the findings now contained in the FPRD. Unlike a Subpart H proceeding, the Department bore the burden of demonstrating that Hamilton violated Title IV requirements. In the prior proceeding, the Department proved its case. Hamilton was found to have committed the violations similarly alleged in the FPRD and to have falsified records in which it had a pecuniary interest.[2] The termination judge stated that he carefully reviewed the attendance records of students and found that Hamilton made it appear that students attended many more classes than they actually did in order to claim it earned more Title IV funds than it actually earned.[3] Additionally, he stated that

Hamilton also manipulated attendance records so that it could pay Pell Grant refunds that were knowingly substantially less than required.[4]

Hamilton conceded that the termination decision found fraud or extreme negligence, the maintenance of inaccurate records, failure to properly make refunds, illegal disbursement of Title IV funds, and disregard of ATB requirements. Although Hamilton characterized this as not significant in this recovery of funds proceeding, it is actually both significant and serious. These same serious violations are at issue in the instant proceeding. Therefore, I conclude that the findings raised in the FPRD have been determined and relitigation of these findings is precluded. The termination judge resolved these issues and his determination is final. Consequently, the issues left for me to resolve are whether the FPRD was properly issued and provided notice to Hamilton of what was at issue in this proceeding, and if so, what, if any, liability for the findings contained in the FPRD is appropriate.

Findings 1-a and 1-b: Students who had not completed the requisite clock hours and third disbursements for

students whose attendance did not cross over award years.

An institution that uses clock hours to measure academic progress must disburse a Pell Grant award in incremental payments based on the number of clock hours in a student's program of study. 34 C.F.R. §§ 690.63 and 690.64. In an eligible program that is measured in clock hours and is one academic year in length, there are two payment periods bisecting the academic year. 34 C.F.R. § 690.3(b)(1) An institution may not disburse a second Pell Grant payment until the student completes the requisite hours for which the first payment was disbursed. 34 C.F.R. § 690.75(a)(3)(i). For a program that is more than one academic year in length, the payment period for subsequent academic years, or fractions of academic years, is the period of time in which a student completes one-half of the academic year or the remaining hours in the student's educational program, whichever comes first. 34 C.F.R. § 690.3(b)(2). An institution that measures its academic programs in clock hours must have a minimum of 900 clock hours in its academic year. 34 C.F.R. § 600.2.

Hamilton measures its programs using a 900 clock hour academic year. During the academic years at issue, Hamilton's educational programs ranged from 900 clock hours to 1350 clock hours. For a 900 clock hour program, the first payment would be for the first 450 hours and the second payment would be in the second 450 hours. If the program exceeded 900 clock hours, a student may be eligible for a prorated Pell payment for the hours not covered under the initial Pell award. A student is only entitled to a prorated Pell payment if some or all of the additional hours are completed in a subsequent award year. These students are known as "cross-over students." 34 C.F.R. § 690.63(g)(1).

FSA charged that the students in the FPRD did not complete sufficient clock hours to earn their Pell disbursements and that Hamilton compounded its misconduct by falsifying attendance or other records for a number of students in an effort to conceal the improper disbursements.[5] In addition, for 33 students enrolled in the institution's Welding and Refrigeration Programs via the Joint Partnership Training (JTPA) office, FSA asserts that Hamilton calculated the Pell Grants for these students based on the program's 940 clock hours of instructions.[6] These 33 students received full Pell awards for the academic year and some received a prorated payment for the additional 40 clock hours due to their status as "cross-over students". [7] FSA claims, however, that attendance records for these 33 students were falsified to mask the fact that the institution did not offer the full 940 clock hour program to these JTPA students.[8] FSA asserts that their actual program lengths ranged from 600 to 714 clock hours and were not eligible for a third prorated Pell disbursement. According to FSA, Hamilton also repeatedly obtained disbursements for students who completed their programs prior to the start of the subsequent award year.[9] In the FPRD, FSA alleged that Hamilton improperly obtained third disbursements for a number of students and that attendance records were falsified to conceal that fact.[10]

The termination decision held that attendance records were falsified to secure the disbursement of additional Title IV funds. Hamilton argues that the decision did not identify specific students whose records were falsified and that the termination judge stated that the issue is not whether Hamilton's records were substantially accurate, but whether there was any falsification of records.

In this proceeding, the issue is again not whether Hamilton had some records that were accurate, but whether it has submitted credible evidence regarding the disbursement of Title IV funds to students identified in the FPRD. Hamilton's evidence regarding the students at issue was not found credible in the termination decision after the termination judge carefully reviewed the evidence and assessed witness testimony. It is this same inherently unreliable evidence that Hamilton uses to justify its receipt of Title IV funds in the instant proceeding.

As the termination judge stated in a footnote to his decision, the accuracy of some attendance records do not rebut the allegations regarding the falsification of entirely different records, although it may be probative of liability in a recovery of funds proceeding. In this proceeding, FSA brought forth the same attendance records at issue in the termination proceeding. If FSA had challenged records not before the judge in the termination proceeding, the accuracy

of these records would be at issue in the instant proceeding. FSA did not, however, use the evidence of falsification and fabricated documents to bootstrap a demand for all Title IV assistance awarded during the program review period. Clearly, FSA has acknowledged that Hamilton actually earned some of the Title IV funds it received during the period at issue by not assessing liability for all Title IV funds for this period. In effect, FSA has already taken into account the termination judge's acknowledgment that the accuracy of some attendance records may be probative of liability in a Subpart H proceeding and limited the FPRD to the same students and the same findings identified in the termination proceeding.

Finding 2: Illegal Retention of Unearned Tuition

An institution is required to have a fair and equitable refund policy. 34 C.F.R. § 668.22(a)(1)(ii). If a Title IV recipient withdraws, drops out, is expelled, or otherwise fails to complete the program on or after the first day of classes, an institution must provide a fair and equitable refund. An institution must pay a refund to the Pell Grant program within 30 days of the date the student officially withdraws, or when the institution determines that the student has unofficially withdrawn. 34 C.F.R. § 668.22(h)(2)(iv).

FSA states that Hamilton failed to include students who had withdrawn on its withdrawal list. To cover up its failure to calculate refunds for these students, FSA further alleges the institution falsified the hours used in the refund calculations to claim that no refunds or smaller refunds were owed on the students' behalf. In the FPRD, FSA charges that Hamilton falsified the number of clock hours completed in its refund calculations for some students.[11] FSA also asserts that Hamilton failed to properly withdraw and calculate refunds for students and again, attempted to mask this misconduct by falsifying hours for some of these students.[12]

Hamilton argues that it believed only minimal actual liabilities occurred with regard to this finding. In its May 2, 2002, request for review, Hamilton agreed that errors were made in calculating refunds for five students.[13] Hamilton now argues that none of the other cases under this finding present liability problems. Hamilton also argues that several students at issue in this finding signed certifications attesting to the accuracy of their attendance records.[14]

The termination decision found that falsification of attendance records occurred in order to retain more Title IV funds that it was allowed. In the termination decision, the judge stated:

> Clearly, the only entity which had access to all the attendance records with a duty to maintain them accurately and which had a pecuniary interest in overstating attendance is Hamilton. The confluence of those two factors when coupled with the other evidence of record convinces me that Hamilton falsified attendance records **as alleged**. (emphasis added)[15]

The judge considered the physical appearance of the records as well as student testimony and affidavits. Additionally, the judge found Hamilton's rebuttal evidence unpersuasive. Therefore, Hamilton's assertion that refunds were miscalculated in only a handful of cases is rejected.

Finding 3: Pell Overawards

To be eligible for Title IV funds, a student must be enrolled in a program at least 15 weeks in length and 600 hours of instruction. 34 C.F.R. § 668.8(d). The amount of a student's Pell Grant is calculated by using the guidelines established in the Title IV regulations. 34 C.F.R. §§ 690.62 and 690.63. For a program offered in clock hours, an institution should focus its calculations on the number of hours and number of weeks required to complete the student's program of study. 34 C.F.R. § 690.63.

For JTPA students enrolled in Hamilton's Welding and Refrigeration Programs, the Department states that these students did not actually attend the 900 clock hours necessary to earn a full award year of Pell funds. As in the previous finding, FSA maintains that the students' actual program length ranged from 600 to 714 clock hours based on the actual attendance records or the maximum clock hours that could have been completed during the period the student was in school. According to FSA, Hamilton paid overawards to a number of students and falsified attendance records were

found in many of these students' files.[16] In addition to the JTPA students, FSA found another student whose attendance it claims was falsified.[17] As FSA was able to determine that all of the JTPA students and one additional student received overawards, it calculated the exact liability for this finding. Hamilton argues that only three of the students identified by FSA were paid overawards.[18]

As already established in the termination decision, Hamilton was found to have falsified attendance records to secure unearned Title IV funds including exaggerating the number of hours attended by students. FSA's method of calculating full liability for these students is upheld. Here, FSA could determine the exact number of students enrolled in the program at issue and assessed the liability accordingly. Moreover, FSA was correct in then excluding these students from any projection of liabilities associated with this finding.

Finding #4: Disregard of Student Eligibility Requirements

To be eligible to receive Title IV funds, a student must have the ability to benefit (ATB) from the program of instruction (*i.e.* be academically qualified). 20 U.S.C. § 1091; 34 C.F.R. § 668.32. In this regard, a student must have a high school diploma, a general education development certificate (GED), or be beyond the age of compulsory school attendance and pass an independently administered ATB test prior to receiving Title IV funds. 20 U.S.C. § l091 (d) and 34 C.F.R. § 668.32. A number of Hamilton students who did not have a high school diploma or GED, were required to take an independently administered ATB test.[19] Many of these students were allegedly administered a Spanish Assessment of Basic Education (SABE) as their required ATB test.

According to FSA, Hamilton falsified these tests in order to illegally obtain Title IV funds. FSA asserts that the test administrator was not qualified to administer the test, the questionnaire and answer sheet do not correspond to the same test version, and that a number of these students claimed they never took a SABE test.[20] FSA used lists provided by Hamilton to identify students whose tests were administered by an unqualified administrator and assessed liability for all Pell funds received by these students. Liability for this finding totals $937,471.00.[21] Although Hamilton argues that no liability should be assessed for the ATB students who graduated from their programs of study, FSA counters that these students were never eligible to receive Title IV funds and no exemption from the ATB eligibility requirement should be granted.

Hamilton argues that the entirety of the ATB rule does not apply to foreign-language ATB testing. Hamilton cites a letter signed by an FSA employee, in which the writer states that the entirety of the ATB rule, 34 C.F.R. 668 Subpart J, does not apply to foreign language ATB tests.[22] Hamilton argues that this letter must be applied as Departmental policy, and that no liability can attach as long as the institution used an approved test and independent test administrator. Hamilton argues that the SABE test was used to determine whether students could qualify for Title IV student aid. It was not an admissions test so, if students said they did not take an admissions test, it does not demonstrate whether or not these students took the SABE test. Hamilton also states that it obtained notarized statements from 37 of these 48 students, in which they stated that they had taken the SABE test. In two cases, Hamilton argues that an ATB test, allegedly falsified, was not necessary as these two students had either a high school diploma or a GED.[23] In another case, Hamilton argues that one student took and passed the Wonderlic ATB exam.[24] Hamilton argues that the only reasonable conclusion is that most of the tests were not falsified. Hamilton admits to some mistakes in the administration of the Title IV programs; it is convinced, however, that no employee ever deliberately falsified anything.[25]

Hamilton also argues that the answer sheet to the SABE I test could be used with the SABE II test.[26] Thus, Hamilton argues that the SABE II test was the same as the SABE I test, except that SABE II had some additional questions that were not used for test purposes. If this tribunal is precluded from revisiting this issue, Hamilton requests that this tribunal specifically state that the termination judge was mistaken in his ruling that the use of a SABE I answer sheet with the SABE II test was not incompatible.

Many of Hamilton's arguments are attempts to revisit the determination that Hamilton falsified tests. The

termination decision held that ATB tests were falsified. Although Hamilton argues that some of the students did not understand FSA's questions when interviewed and that some have provided contrary signed statements to Hamilton, the termination judge considered these arguments and found them unpersuasive:

> …[T]he evidence convinces me that many students did not take the even the unauthorized test and that Hamilton, most probably intentionally, or at best, through utter disregard for its fiduciary responsibilities, erroneously recorded that they had done so. I cannot imagine a clearer case of a failure to comply with Title IV.[27]

Although Hamilton argues that the SABE test is exempt from regulatory requirements that govern ATB tests, this argument misses the point. Hamilton is not exempt from the statutory requirement that students without high school diplomas or GEDs must take an approved ATB test administered by an independent test administrator. In the prior proceeding, there was evidence that tests were falsified not only because students admitted they never took such a test, but also because an independent tester did not administer the test, as required by statute. All of this evidence points to the falsification of ATB tests. Again, the termination judge ruled on the ATB finding and Hamilton is precluded from relitigating the substance of this finding.

If a student was never eligible to receive Title IV funds, the fact that the student graduated does not cure his or her ineligibility to receive funds. The Secretary has held that passing an ATB test is a strict criterion of student eligibility. *See In re Pan American School*, Docket No. 91-94-SA, U.S. Dep't of Educ., (Decision of the Secretary) (January 12, 1995). This tribunal has also held that students' ultimate completion of their academic program does not mitigate the fact that an institution awarded Title IV assistance to students who were ineligible to receive the assistance under the standards measured by Congress. *See In re Umpqua Community College*, Docket No. 96-159-SP, U.S. Dep't of Educ. (August 7, 1997). Therefore, Hamilton's argument that no liability should be assessed for students who graduated is rejected.

Adequate Notice

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. *See Mullane v. Central Hanover Trust*, 339 U.S. 306, 314 (1950); *In re Contempo School of Beauty*, Docket No. 98-110-SA, U.S. Dep't of Educ. (February 3, 1999). In the FPRD, FSA must provide adequate notice of its claim. *See In re Page's University of Cosmetology*, Docket No. 98-113-SA, U.S. Dep't of Educ. (September 20, 1999). It is also incumbent upon this tribunal to decide whether the FPRD issued by the Department is supportable. 34 C.F.R. § 118(b).

Hamilton argues that it was not given notice of what specifically was being charged in the FPRD. Hamilton asserts that it is not clear what exactly in its attendance records was falsified. As a result, Hamilton contends that the FPRD is flawed because it does not give specific enough information as to which students and which hours of attendance are being questioned, Hamilton contends that the FPRD is flawed. Consequently, FSA did not state its allegations with enough specificity to enable Hamilton to determine what FSA believes are wrong with its records. Hamilton argues that the burden of proof does not shift to the institution unless and until FSA has made allegations specific enough to put the institution on notice as to exactly which hours are being questioned. Therefore, Hamilton claims that it received inadequate notice to defend itself in these proceedings.

FSA argues that Hamilton's claim should be rejected. According to FSA, the FPRD set forth specific violations in detail and identified the students involved in each finding. Contrary to Hamilton's assertion that it did not have notice of what specifically was at issue in the FPRD findings, FSA contends that the evidence produced at the termination hearing including student testimony, student declarations, and the like were in Hamilton's possession for at least a year before the FPRD was issued. FSA argues that the declarations submitted by Hamilton to counter FSA's student declarations should be ignored because they were obtained by school officials and were not credible. FSA noted that the statements were notarized in preparation for the termination proceeding and not when the students allegedly signed these statements. Further, FSA interviewed some of these students and a number of these students testified that their

signatures were falsified, or that Hamilton officials did not explain what the documents were, or, in fact, did not show them the requisite attendance records and ATB tests.

I find that Hamilton did have adequate notice to defend itself in this proceeding. The FPRD, as did the termination notice, explicitly identified the alleged violations and what students were at issue under each finding.[28] For example, under Finding #1a, FSA described the alleged violations in detail:

> For example, student 8 began in the cosmetology program in September 1999, and stopped attending the institution at the end of March 2000. At the time the student stopped attending, she had completed only 395 clock hours of instruction…Student 8 is not an isolated incident. Hamilton also illegally obtained Pell funds for students 2, 12, 25, 38, 45, 47, 48, 54, 55, 68, 69, 75, 86, 87, 98, 101 and 115, who had not completed sufficient clock hours to earn the disbursements. Hamilton compounded its misconduct by falsifying attendance and/or other records for students 2, 12, 38, 45, 47, 48, 54, 69, 98, 101, and 115 in an effort to hide the improper disbursements.[29]

The FPRD contains a similar amount of detail for all of the findings contained therein. The FPRD also contains an appendix listing every student at issue. Further, the FPRD states "[t]hese students were also cited in the emergency/termination/fine action…"[30] Moreover, in the Final

Determination section located at the end of each finding, FSA identifies the termination decision as specifically affirming the Department's determination of this finding.[31]

Hamilton's argument that FSA is required to identify the specific hours it believes were falsified is rejected. Hamilton had specific knowledge of the student files in which falsification was alleged and the type of data that was falsified – either attendance records or ATB tests. In a situation where there are falsified records altered by the institution itself, it was sufficient for FSA to identify the student files and the type of data it believed were falsified. Further, much of the evidence establishing falsification came from outside sources such as student declarations or witness testimony that provided even more information as to the data in question. For example, for some students, Hamilton recorded attendance after the date these students stopped attending to either mask their withdrawal or to minimize the students' refunds.[32] Therefore, at the very least, Hamilton would have known that any attendance recorded after a withdrawal date was allegedly falsified. Furthermore, these files were in Hamilton's custody and control. Therefore, FSA has satisfied its burden of production through issuance of the FPRD, thereby providing the institution with the factual and legal bases for the alleged violations and the proposed liabilities.

Liability

FSA projected liabilities for non-JTPA ineligible students for the disbursement and refund findings. FSA excluded the ATB and JTPA students from the projection because full liabilities were assessed for these students. FSA then determined an error rate for the ineligible disbursement and refund findings for each award year. The error rate was applied to the total universe of FSA recipients for each award year to determine the projected liability for each violation.[33]

Hamilton argues that the liability should be rejected on two grounds. First, Hamilton contends that it was not given the option of performing a full file review. Hamilton argues that this tribunal has allowed an institution to perform a full file review even when there is evidence of falsification of records. Second, Hamilton contends that since reviewers did not initially obtain a statistical sample, the Department cannot project liabilities. Hamilton also argues that FSA did not use a statistically valid sample to project liabilities to the universe of students and charges that FSA did not tell the institution how the sample was selected.

Under circumstances where an institution fails to comply with a request for a full file review and/or fails to get independent certification of its file review, this tribunal has found extrapolation a reasonable method for calculating liability. *See In re National Beauty College,* Docket No. 95-16-SA, U.S. Dep't of Educ. (May 3, 1996); *In re*

L'esthetique Cosmetology Corporation, Docket No. 96-12-SA, U.S. Dep't of Educ. (July 1, 1996). FSA's methodology takes into account that some of the Title IV funds received by Hamilton were properly spent. It would have been improper to request blanket liability for the review period despite the presence of falsified documents if FSA recognized that some Title IV funds were appropriately allocated and spent by the institution. FSA used a straight error projection to calculate liability.

Given that Hamilton falsified data in response to the program review and in preparation for its appeal of the termination proceeding, it is unreasonable to rely on the institution to review its own files. FSA alleged and this tribunal found that the falsification of records was pervasive in the files reviewed. Hamilton argues that this tribunal has allowed an institution to perform a full file review when there was evidence that a small percentage of student files were defective.[34] That case, however, is easily distinguishable from the circumstances present in the instant proceeding. There, only 17.5 percent of the files were found to be defective and the tribunal ruled that this percentage was not high enough to give rise to a presumption that all the institution's files were unreliable. Here, falsification was alleged in a significant percentage of student files and this tribunal held that these records were falsified. Further, this tribunal found the institution's explanations regarding the questionable appearance of its attendance records not to be credible. As the veracity of documentation submitted by Hamilton is questionable at best, and at worse, fraudulent, utilizing extrapolation rather than allowing Hamilton to perform a full file review was a fair and reasonable method for calculating liability for the violations contained in the FPRD.

Error rate projection involves determining the percentage of students reviewed who received federal student aid funds in violation of Title IV requirements. The error rate is then applied to the total universe of Title IV recipients for each award year.[35] This tribunal and a federal court have upheld extrapolation of liability as a method for calculating liability. *See In re Chauffeur's Training School*, Docket No. 92-113-SP, U.S. Dep't of Educ. (November 23, 1999) (Decision on Remand); *Chauffeur's Training School v. U.S. Dep't of Educ.*, 967 F.Supp. 719, 728 (N.D.N.Y. 1997). The use of an error rate to project liability has also been upheld. *See In re Chauffeur's Training School*; *Michigan Dep't of Educ. v. U.S. Dep't of Educ*., 875 F.2d 1196 (6th Cir. 1989). FSA does not bear the burden of specifically identifying the exact liabilities for the findings of non-compliance, nor does it have the information needed to assess exact liabilities since they are determined by the extent of the institution's non-compliance. *See In re Belzer Yeshiva*, Docket No. 95-55-SP, U.S. Dep't of Educ. (June 19, 1996). If an institution fails to perform a full file review, using an error rate projection (i.e. extrapolating liability from a sample of student files) is a well-established method for assessing the amount of Title IV liability. Similarly, this method of calculating liability is well-suited to a situation where the institution's files are compromised by evidence of falsification and fraud. *See Yorktown Medical Laboratory, Inc. v. Perales*, 948 F.2d 84, 90 (2d Cir. 1991).

An institution is the only entity that has at its disposal the files and records to justify the expenditure of Title IV funds. *See In re Belzer Yeshiva, supra*. Here, there is evidence that the institution, the entity that had custody and control of the files and records, cannot be relied upon to conduct a full file review. Hamilton has significantly and deliberately altered files to secure more Title IV funds than it was entitled to receive. Consequently, FSA's use of an extrapolation method is a fair and reasonable. This method returns federal funds that were improperly received by Hamilton at the same time it recognizes that Hamilton properly earned some of the Title IV funds it received. Therefore, FSA's method of calculating liability for the findings contained in the FPRD is upheld.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Hamilton Professional Schools pay to the U.S. Department of Education the sum of $1,601,815.00.

Judge Richard I. Slippen

Dated: June 11, 2003

SERVICE

A copy of the attached document was sent to the following:

Glenn Bogart
Higher Education Compliance Consulting
1149 Sixteenth Avenue South
Birmingham, AL 35205

Denise Morelli, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2111

---

[1] The award years at issue are 1998-1999, 1999-2000, and 2000-2001.

[2] *See* Termination Decision at 3, 4, 5, and 7.

[3] *Id*. at 4.

[4] *Id*.

[5] At issue are students 2, 8, 12, 25, 38, 45, 47, 48, 54, 55,68, 69, 75, 86, 87, 98, 101, and 115. Of these students, FSA found falsified attendance records for students 2, 12, 38, 45, 47, 48, 54, 69, 98, 101, and 115.

[6] The JTPA students are listed in footnote #16 on page 8 of this decision.

[7] At issue are students 33, 35, 39, 40, 59, 66, 68, 76, 80, and 94.

[8] FSA interviewed the JTPA students. In those interviews, the JTPA students indicated that regular classes ended at least two hours earlier than scheduled and that “additional hours” listed in the students’ attendance records were not, in reality, ever completed.

[9] FSA based its finding on evidence obtained through student interviews and/or student file documentation.

[10] At issue are students # 3, 7, 10, 21, 29, 36, 64, 67, 81, and 105. Of these students, FSA identified falsified records for students # 3, 21, 29, 36, and 67.

[11] At issue are students 8, 28, 38, 52, 86, and 96.

[12] At issue are students 1, 11, 12, 18, 31, 42, 74, 79, and 101. Of these students, Hamilton falsified records for students 1, 12, 18, 42, and 101.

[13] These five are students 8, 11, 12, 38, and 101.

[14] Hamilton identifies these as students 8, 18, 28, 52, 96, and 101.

[15] *See* Termination Decision at 3.

[16]At issue are JTPA students 6, 22, 23, 24, 26, 33, 34, 35, 37, 39, 40, 43, 50, 57, 58, 59, 62, 66, 68, 72, 76, 78, 80, 82, 89, 94, 103, 106, 108, 109, and 112. Of these students, FSA identified falsified records for students 6, 26, 35, 39, 43, 57, 59, 94, 108, 112.

[17] Student 45.

[18] *See* Resp. Ex. 4. From my review of this exhibit, it is unclear which three students Hamilton concedes received overawards.

[19] At issue are students 1, 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 19, 25, 26, 27, 29, 30, 32, 44, 46, 47, 48, 49, 51, 53, 55, 56, 60, 61, 63, 65, 70, 73, 74, 77, 83, 84, 85, 86, 87, 88, 90, 91, 95, 100, 102, 104, 105, 110, 113, and 114.

[20] At issue are students 1, 4, 7, 8, 9, 12, 13, 14, 15, 16, 19, 25, 27, 29, 30, 32, 46, 47, 48, 49, 51, 53, 55, 56, 60, 61, 63, 65, 70, 73, 74, 77, 83, 84, 85, 86, 87, 88, 90, 91, 95, 100, 102, 104, 105, 110, 113, and 114.

[21] FSA states that since full liabilities were assessed for the ATB students, these students were excluded from the liability calculations for all other findings to ensure that duplicate liabilities were not assessed.

[22] *See* Resp. Ex. 54-1.

[23] *See* Resp. Ex. 5-72 and 5-232.

[24] *See* Resp. Ex. 5-163-174.

[25] At the termination hearing, however, Hamilton contrarily changed its position and argued that the ATB administrator defrauded everyone including Hamilton. *See* Termination Decision at 4.

[26] *See* Resp. Exhibit 54-37 – a letter from an employee of McGraw Hill, the test publisher.

[27] *See* Termination Decision at 4.

[28] *See* ED Exs. 130 and 131.

[29] *See* ED Ex. 130.

[30] *Id*.

[31] *Id*.

[32] These students include 1, 8, 12, 38, 44, 95, 96, and 101. *See* ED Brief at 16 and ED Ex. 130.

[33] *See* ED Ex. 130.

[34] *See In re Evergreen Beauty College*, Docket No. 98-153-SP, U.S. Dep't of Educ. (August 10, 1999).

[35] *See* ED Ex. 131.