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

In the Matter of

METROPOLITAN BEAUTY ACADEMY,

Respondent.

Docket No. 02-56-SA

Student Financial
Assistance Proceeding
ACN: 04-2001-11001

Appearances: Grady A. Palmer, III, Esq., Virginia Beach, Virginia, for Metropolitan Beauty Academy.

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

Before: Richard F. O'Hair, Administrative Judge

DECISION

Metropolitan Beauty Academy (Metropolitan), the Respondent in this proceeding, participated in the federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (Title IV), as amended. 20 U.S.C. §§ 1070 *et seq.* and 42U.S.C. §§ 2751 *et seq.* These programs are administered by the Office of Federal Student Aid (FSA), U.S. Department of Education (ED). FSA alleges that because Metropolitan's eligibility to participate in these programs terminated on November 20, 2001, on the occasion of its loss of accreditation, Metropolitan was obligated to file a close-out audit for the period June 1, 2001, to November 20, 2001. When Metropolitan failed to submit this audit, FSA sent the former owners of the school a Final Audit Determination which included a demand for repayment of $62,187. This represents the amount of Federal Pell Grant Program funds Metropolitan disbursed from June 1 to November 20, 2001. Metropolitan appealed this assessment and requested a hearing.

On August 16, 2000, Mr. Hengel Mark Richardson, acting in the capacity of Chief Executive Officer of the corporation which owned Metropolitan, signed a Program Participation Agreement (PPA) with ED which contractually permitted Metropolitan to participate in the Title IV, HEA programs. On June 30, 2001, Metropolitan filed an annual compliance audit with ED, which accounted for all federal Title IV funds disbursed during the previous fiscal year. Five months later, on November 20, 2001, Mr. and Mrs. Richardson, Metropolitan's corporate owners, executed a Bill of Sale and Agreement which transferred ownership and control of Metropolitan to Greenbrier Development Services,

Inc. (Greenbrier), through its agent, Mr. Booker T. Brantley, effective November 20, 2001. Apparently, Greenbrier intended for Metropolitan to continue operating as an educational institution because the Agreement was contingent upon "Sellers [*sic*] Officers remaining with the company during the transition period to assure the training of buyer's staff throughout the reinstatement of Accreditation and transfer of Acquired license and permits." In conjunction with this transfer of ownership, as they were required to do, the Richardsons contacted both ED and the institution's accrediting agency and informed them of this transaction.

Up to that point, all was well with Metropolitan. Problems began when, in a letter dated December 10, 2001, Greenbrier notified its accrediting agency, Council on Occupational Education, that it had "decided to relinquish the accreditation as well as any entitlement to participate in Title IV funding," and the Council duly accepted the resignation. In a December 27, 2001, letter to Council, Greenbrier attempted to reverse its position with the Council stating that it never intended to relinquish its accreditation or cease participation in the financial assistance programs. The Council refused to reinstate automatically Metropolitan's accreditation, but instructed the institution that it could apply for candidate status at any time in the future. With regards to Metropolitan's relationship with ED, Greenbrier did not complete the application process to ED to continue the pre-existing Title IV eligibility that accompanied its purchase of Metropolitan.

When a private, for-profit postsecondary institution, such as Metropolitan, undergoes a change of ownership that results in a change of control, the U.S. Secretary of Education (Secretary) may continue an institution's participation in the Title IV programs on a provisional basis if the institution submits a materially completed application within 10 days of the change of ownership. 34 C.F.R. §600.31(a)(2). In the absence of a timely submitted and complete application, the institution loses its eligibility effective the date of the change of ownership. Additionally, ED's eligibility standards require that a postsecondary institution must be accredited. 34 C.F.R. §600.6(a)(5)(i).

The legal consequence of Metropolitan's new owner's failure to submit a complete and timely application for a provisional eligibility to participate in the Title IV programs, and its voluntary termination of its accreditation, effective November 20, 2001, was the loss of eligibility to participate in the Title IV programs pursuant to 34 CFR §668.26(a)(2). Simultaneously, these events triggered the institution's requirement to file a letter of engagement for an independent audit (close-out audit) for all funds received under the Title IV programs in which it participated for the period of time following its last compliance audit. In this instance that period of time was July 1 to November 20, 2001. 34 C.F.R. §668.26(b)(2)(ii). Metropolitan did not file a letter of engagement with ED and this prompted FSA to issue a Final Audit Determination which demands the return of $62,187 of the Title IV funds disbursed by Metropolitan in the five months preceding its change of ownership and for which it has not provided an accounting.

Neither party disputes the conclusion that a close-out audit should have been completed following the events cited above and that, in its absence, there is a $62,187 liability to ED. The issue contested here is, upon what entity does this liability fall? FSA sent the Final Audit Determination letter to Mr. and Mrs. Richardson, the prior corporate owners of Metropolitan. Only Mr. Richardson, acting in a corporate executive capacity, signed the original, and only, program participation agreement with ED on August 16, 2000. Mr. Brantley was not an addressee of the FAD and, therefore, not having been placed on notice of these proceedings, has not entered an appearance or presented his thoughts on FSA's demand.

The Richardsons deny any and all liability by showing that they complied with all regulatory provisions when they sold Metropolitan by providing all the necessary notifications to the state, the accrediting agency and ED. They maintain that all assets, as well as all liabilities, follow the institution. Moreover, because ED's demand here arose solely from the actions or inactions of the new owner, *i.e.*, canceling Metropolitan's accreditation and failing to timely submit a request to ED to secure a provisional extension of the Title IV eligibility, ED should look to Metropolitan and its current owner for satisfaction of this debt.

As mentioned previously, it is undisputed that a close-out should have been, but was not, completed and that in its absence, Title IV funds must be repaid. FSA has elected to treat this as a personal debt of the Richardsons, thus ignoring Metropolitan as an entity and its current owner, Greenbrier. FSA also ignores the fact that the PPA was signed by an officer of the corporate owner of the institution, a situation which in most instances, protects the stock holders from personal liability for corporate debts. And lastly, FSA overlooks the fact that all responsibilities described in the

PPA fall upon the subject institution rather than on the signatory of the PPA. The issue, therefore, is whether FSA should have directed its demand solely to Metropolitan in care of its current owner, and not to a former owner. After all, Metropolitan, not the Richardsons, was the entity which received and disbursed Title IV funds and must be held accountable. If Greenbrier is ultimately held responsible for these unaccounted funds, it may have a cause of action against the sellers; however, that issue is beyond the jurisdiction of this tribunal.

The parties have cited two cases which have similar issues to those presented here. In the first case, *In the Matter of Cosmetology College*, Dkt. No. 94-96-SP, U.S. Dep't of Educ. (August 23, 1995), the institution was sold and ED was properly notified. The new owner applied for the appropriate state license, but did not apply to ED for a provisional PPA and it ultimately ceased operation six months after the sale. In response to the absence of a close-out audit, ED attempted to recover the Title IV funds from the previous owner of the institution. The tribunal refused to address the issue of the personal financial liability of the former owners and found that the College was liable for repayment of the funds. In *In the Matter of Excelsis Beauty College*, Dkt. No. 98-108-SA, U.S. Dep't of Educ. (October 4, 1999), the school was a sole proprietorship and the PPA was signed by the owner. The school was sold in September 1995, but ED did not discover this change of ownership for almost two years. When it did so, it demanded a close-out audit. In the absence of receiving the audit it sought reimbursement for disbursed Title IV funds from the former owner. Relying on the reasoning in *Cosmetology*, the tribunal determined that the issue of personal liability was not germane to that proceeding because it had no jurisdiction to make a personal assessment of liability, and found that the institution was liable for all Title IV funds disbursed.

The facts in the case before me are similar enough to those found in *Cosmetology* and *Excelsis* to convince me that the outcome here should also be the same. Metropolitan should be treated as a closed school and, therefore, its failure to provide a close-out audit which accounts for the Title IV funds it disbursed from the date of its last compliance audit necessitates its repayment of those funds. This obligation is an institutional responsibility falling on Metropolitan. If this responsibility creates personal ramifications involving the present and prior owners, those disputes remain outside the purview of this tribunal.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Metropolitan Beauty Academy pay the United States Department of Education $62,187.

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Judge Richard F. O'Hair

Dated: January 29, 2003

SERVICE

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

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