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OFFICE OF HEARINGS AND APPEALS
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In the Matter of	**Docket No. 06-01-SP**
DEMARGE COLLEGE,	Federal Student Aid Proceeding
Respondent.	PRCN: 200420623064

Appearances: Peter S. Leyton, Esq., Gerald M. Ritzert, Esq., and Dana M. Fallon, Esq., Ritzert & Leyton, P.C., Fairfax, Virginia, for Respondent.

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

Before: Richard I. Slippen, Administrative Judge.

Respondent DeMarge College ("DeMarge" or the "College") operated as a proprietary institution of higher education in Oklahoma City, Oklahoma, and, until its closure in 2004, 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. §2751 *et seq*. and administered by the Office of Federal Student Aid ("FSA" or the "Department"), U.S. Department of Education. From March 22-26, 2004, the Department conducted a program review of the Title IV Federal student aid programs administered at DeMarge College, covering the periods of July 1, 2002 to June 30, 2003 and July 1, 2003 to June 30, 2004. FSA issued the report on that review to the school on July 21, 2004. In it, FSA made 16 allegations of non-compliance with Title IV against the College.

Specifically, FSA made the following findings against DeMarge:

1) Falsification of Records;
2) Lack of Administrative Capability;
3) Inadequate Internal Controls;
4) Inaccurate Record Keeping;
5) Account Records Inadequate/Not Reconciled;
6) Improper Federal Pell Grant Calculation/Payment;

7) Returns Calculated Incorrectly;
8) Returns Not Made or Made Late To Title IV Programs;
9) Improper Clock/Credit Hour Conversion;
10) Improper Disbursement Without Valid SAR/ISIR;
11) Leave of Absence Not Properly Documented;
12) Incomplete Verification;
13) Ineligible Student -- In Default on Title IV Loan;
14) Ineligible Federal Pell Grant Disbursement;
15) Admissions Eligibility Requirements Not Followed; and
16) Return of Title IV Funds Policy Incorrect.

On September 30, 2004, DeMarge responded to the report, and on November 7, 2005, FSA issued DeMarge a Final Program Review Determination ("FPRD"). In the FPRD, FSA informed DeMarge that final determinations had been made regarding all of the outstanding findings of the July 21, 2004 program review report and identified the liabilities resulting from those findings.

Based on the College's response and other attendant circumstances, FSA decided to close out eight of the 16 charges[1]: Findings # 1, 2, 3, 8, 11, 13, 14, and 16. Left open were eight remaining charges: Findings # 4, 5, 6, 7, 9, 10, 12, and 15. Based on these allegations, FSA seeks to recover $6,080,373.00, which represents the full amount of Title IV funds (both Pell Grants and FFEL[2] funds) that were drawn down and/or disbursed by the school in the 2002-03 and the 2003-04 award years.[3] In November 2004, DeMarge ceased operation. Through counsel, DeMarge filed a timely appeal of the program review findings and liability assessment.

Procedural History

The procedural history in this case is protracted. Respondent filed its appeal of the Final Program Review Determination Letter with the Administrative Actions and Appeals Division of the Office of Federal Student Aid on December 22, 2005 per 34 C.F.R. § 668, Subpart H. That request for a hearing was forwarded to and received by this tribunal on January 12, 2006. On January 23, 2006, this tribunal issued the first Order Governing Proceedings, setting up the initial briefing schedule with Respondent's brief due on February 22, 2006, the Department's brief due on March 24, 2006, and the Reply Brief due two weeks later. In their submissions, in addition to addressing the charges, the parties were ordered to brief two issues specifically: how Respondent's submission of a close-out audit might be used to account for any of the Title IV

[1] *See*, "Final Program Review Determination Letter" (November 7, 2005) (hereafter referred to as "FPRD").
[2] Federal Family Education Loan.
[3] This figure is also the total liability sought and assessed under Finding # 4. Because the figure represents all of the Title IV funds for the two award years that were subject to the program review and FPRD, it also the maximum liability that could be assessed by FSA. Therefore, by definition, this total necessarily includes the cumulative assessments for the individual findings, other than # 4. Although FSA sought a determination for each finding as a distinct matter as alternate sources of liability, the liability assessment for each is a subset of the total amount for the two award years and cannot be assessed and collected twice. ED 3-26.

funds at issue in this proceeding[4]; and how much, if any, the alleged liabilities may be reduced based on the close-out audit.

On February 17, 2006, Respondent made a motion to stay the proceedings due to the medical condition of the main witness in its case; Respondent also requested that this tribunal allow it to propose a revised briefing schedule. After a conference call with the parties on February 22, 2006, this tribunal suspended the briefing schedule and ordered Respondent to file a status report by March 8, 2006. On March 7th, Respondent requested a continuance of 90 days to file its status report. The Department opposed the College's request for any indefinite stay and suggested it would be amenable to a new deadline of May 17, 2006 for Respondent's brief. This tribunal granted a 90-day stay in the proceedings and ordered Respondent's status report due on June 7, 2006. Respondent moved unopposed for an extension of time until June 23, 2006 on June 9, 2006, which this tribunal granted on June 16, 2006. Respondent timely submitted its status report and requested another continuance of 60 days, again citing the poor health of the College's owner and president. FSA did not oppose the motion, and this tribunal granted the stay on July 6, 2006, ordering Respondent to file its status report on August 23, 2006. On August 11, 2006, the College moved to amend the Order Governing Proceedings or, in the alternative, requested a decision on the record and submitted additional materials. On August 23rd, Respondent filed its amended status report and again requested a continuance of the briefing schedule by 90 days. FSA opposed this motion on August 30, 2006, arguing that Respondent's continued requests for stays in the proceedings amounted constructively to an indefinite stay. FSA further argued that the FPRD was not issued against the College's owner as an individual, but against the corporate entity, and therefore, the College owner's health was not determinative of DeMarge's ability to proceed with its case.

On September 21, 2006, this tribunal issued an Order Re: Further Proceedings, denying Respondent's request for an additional stay and reinstating the briefing schedule. Respondent's brief was set as due on November 21, 2006 with FSA's brief due on January 21, 2007. Respondent then had two weeks to file its Reply Brief. On November 20, 2006, Respondent filed a motion to extend the briefing schedule until January 22, 2007, which FSA opposed on December 1, 2006. FSA further moved to have a default judgment entered on the matter, arguing that the appeal should be dismissed with prejudice due to Respondent's failure to comply with this tribunal's order of September 21st reinstating the briefing schedule. Respondent's request for an extension of time was denied on December 6, 2006 and was ordered to show cause by December 19, 2006 why this tribunal should not issue a default judgment against the College. Respondent filed a timely response to the Show Cause order and requested until January 19, 2007 to submit its brief. The motion was granted, and Respondent timely submitted its Initial Brief with exhibits. Thereafter, FSA filed three unopposed consent motions on February 12, 2007, April 4, 2007 and May 8, 2007 for extensions, ultimately until May 31, 2007, to file its brief. FSA's motions were granted.

[4]As argued by Respondent in "DeMarge College Notice of Appeal and Request for Administrative Hearing" (December 22, 2005) at 23-24 (hereafter referred to as "Resp. Notice of Appeal") and at Respondent's Exhibits 24 and 25. Hereafter, all exhibits submitted by Respondent will be designated as "R", followed by the exhibit number; likewise, all exhibits submitted by FSA will be designated as "ED", followed by the exhibit number.

On May 31, 2007 FSA filed a motion for Leave to Exceed the Page Limit and timely submitted its briefs and exhibits. This tribunal granted the motion to exceed the page limit on June 5, 2007. The College's Reply Brief was due on June 14, 2007, two weeks following FSA's submission. No Reply Brief was filed, and the record in this matter is closed.

Burden in Subpart H Proceedings

Under 34 C.F.R. § 668, Subpart H, it is clear that the Respondent carries the burden of proof that its expenditures under Title IV were proper and that it complied with the program requirements.[5] Thus, it falls to DeMarge to demonstrate that the expenditures questioned by FSA were indeed allowable and that the College complied with program requirements in disbursing the Federal funds. Should DeMarge fail to carry its burden of proof on any finding, it shall be liable to reimburse the Department for the full amount of money under that finding, as identified in the FPRD by the Department.[6]

Discussion

As noted above, this case involved numerous continuances before the record was closed. Oral argument was not requested by Respondent. Accordingly, this case is decided based on the evidence in the record. In the FPRD, FSA states that it determined that eight of the 16 original charges were considered closed and therefore are not subject to this appeal.[7] Subsequently, FSA declined to pursue one further charge, Finding # 5.[8] Therefore, there remain 7 findings in dispute and subject to this appeal.

Close-out Audit as a Substitute for a Required File Review

Before proceeding to the outstanding findings in dispute, one threshold issue must be addressed first: whether the close-out audit may serve as a substitute for the required file reviews. Respondent, in its Notice of Appeal and Request of Administrative Hearing, argues that in lieu of the several full file reviews demanded by FSA, a close-out audit could be an acceptable means by which to assess an institution's liabilities[9], thus eliminating the need for the file reviews. Having submitted a close-out audit that was prepared after the school ceased operation[10], DeMarge seemingly concludes that the close-out audit is a sufficient response to address the various findings in the FPRD, to refute the alleged liabilities assessed by FSA and to render them unsupportable.[11]

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[5] *See*, 34 C.F.R. § 668.116(d).
[6] *In re: Metropolitan Career Institute*, Dkt. No. 94-06-SP, U.S. Dep't of Educ. (August 23, 1995).
[7] Findings # 1, 2, 3, 8, 11, 13, 14 and16. ED 3.
[8] "Brief of the Department of Education's Federal Student Aid" (May 31, 2007), at 20 (hereafter referred to as "FSA Brief").
[9] *See*, Resp. Notice of Appeal, at 23-24.
[10] *See*, R-24.
[11] Resp. Notice of Appeal, at 23-24.

The issue underlying to the question of when and how a close-out audit may be substituted for a file review revolves around the institution's responsibility to the Department as a fiduciary and whether a close-out audit contains sufficient information and integrity to address the concerns that resulted in the Department's request for a file review. It is undisputed that an educational institution participating in Title IV, HEA programs serves as a fiduciary and must account for the Federal funds it receives. This is done ordinarily through annual compliance audits and reports but also through full file reviews in response to program reviews by FSA. It is clearly an institution's fiduciary duty to provide the Department with documentation of its expenditures of Title IV funds, and therefore, a failure to comply with this requirement is a failure of that institution's fiduciary responsibility.

This fiduciary duty is central to the viability of the relationship between the Department and the educational institutions that receive its funding. A breach of the fiduciary duty may result in fine against or loss of eligibility to participate in Title IV, HEA programs by the school, among other repercussions. Indeed, the failure of a school to account for its expenditure of programmatic funds is deemed so serious that, in the case of a program review, "when an institution fails to submit a full file review… the Department may be entitled to recover all Title IV funds disbursed to that institution during the time period covered by the program review, but only if the school has not provided relevant data with which to measure the actual loss [to the Department]."[12] Thus, it is clear that, one, a school must comply with a request for a full file review by FSA or risk being held liable for all the Title IV funds it received during the relevant period; and two, the Department must consider "relevant data" in assessing the school's actual liability. An example of such relevant data would be the specific information provided in a close-out audit.

This tribunal has found that "an accurate and timely submitted closeout audit that covered all of the issues raised in the audit or program review" could substitute for a full file review.[13] Thus, DeMarge's assertion that a close-out audit may serve as an appropriate substitute has merit. However, for this substitution to be valid, the audit necessarily must be accurate and reliable (*e.g.*, prepared by an independent certified public accountant)[14], be submitted in a timely manner[15], cover the period under scrutiny[16], and address all of the issues raised in the FPRD.[17] Accordingly, should the close-out audit fail to meet any of the above criteria, it cannot substitute for a full file review.

To assess the validity of the close-out audit as a substitute for the required file review in this case, this tribunal, in its Order Governing Proceedings issued on January 23, 2006, ordered both parties to brief the issue and to address specifically the extent to which the liabilities assessed against DeMarge might be reduced based on information provided in the close-out audit. I found both parties' briefs on this issue to be disappointingly devoid of substance.

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[12] *In re: Empire Technical Schools*, Dkt. No. 92-11-SP, U.S. Dep't of Educ. (August 15, 1995).
[13] *Id.*
[14] *In re: Pan American School*, Dkt. No. 92-118-SP U.S. Dep't of Educ. (Oct. 18, 1994), at 5-6.
[15] 34 C.F.R. § 668.26(b)(ii).
[16] That is, the close-out audit must cover the full period between its last compliance audit and the date the institution ceased participating in Title IV, HEA programs. *See*, *In re: Long Beach College of Business*, Dkt. No. 94-78-SP, U.S. Dep't of Educ. (August 30, 1995), and *Hair Interns School Of Cosmetology*, Dkt. No. 98-81-SP, U.S. Dep't of Educ. (November 5, 1998).
[17] *See*, *In re: Empire Technical Schools.*

DeMarge submitted its Initial Brief on January 18, 2007. The College reiterates and relies on the arguments originally made in its Notice of Appeal and provides some supplemental information.[18] Specifically, DeMarge submits as evidence a close-out audit, performed by Knutte & Associates, PC (CPA), covering the period between January 1 and November 15, 2004, the date the institution closed. This audit is dated January 20, 2005 and was submitted to this tribunal along with Respondent's other exhibits on January 12, 2007. Despite the requirement that a close-out audit be submitted within 90 days of a school's closure[19], nothing in the record indicates when or if the close-out audit was submitted to FSA prior to the instant action. Thus, the issue of timeliness remains unanswered.

As to the breadth of the close-out audit, the College asserts that it "complied with its obligation to account for the Title IV funds disbursed since its last complete audit"[20] in accordance with 34 C.F.R. § 668.26(b). Here, Respondent fails to provide any citation whatsoever to support its claim. No documentation of previous compliance audits and the periods they covered are contained in the record. As stated above, a school is required to submit a close-out audit covering the period from its last submitted audit to the date of closure, within 90 days after the date the school's participation in the Title IV programs end. Given that the FPRD covered the periods of July 1, 2002 to June 30, 2003 and July 1, 2003 to June 30, 2004, the College must either perform full file reviews as requested by FSA or provide audit reports that cover these periods. A school cannot decline to perform a full file review while providing audit information for less than the full period in question. This is antithetical to the school's fiduciary responsibility and renders the close-out audit deficient.

Regarding the substance of the close-out audit, DeMarge argues that the close-out audit "revealed that the College complied with the specified compliance requirements" and that the close-out audit "covers all of the findings at issue here."[21] Respondent cites Ex. 24, R-293 as support for its assertion. The College further asserts, "With respect to FSA['s] allegation that the records are inaccurate or falsified, the auditor does not identify any circumstance or indicate any suspicion that the College's records are unreliable or suspect in any way."[22] Beyond this, the College makes no further effort to demonstrate how the close-out audit directly addresses the issues raised in the FPRD. It is Respondent's burden to demonstrate that its submissions are adequate to support its arguments. A school that fails to provide the fact-finder with an adequate explanation of its submissions does so at its peril.[23]

In assessing the adequacy of the close-out audit as a substitute for the file reviews, this tribunal thoroughly and repeatedly examined the evidence submitted. Specifically, I reviewed Respondent's exhibit 24 (the close-out audit) and am troubled that I cannot fathom what Respondent's "R-293" citation references. Further, this tribunal was unable to discern how the information contained in the close-out audit responds to the FPRD, despite DeMarge's assertions

[18] "Respondent's Initial Brief" (January 18, 2007), at 3 (hereafter referred to as "Resp. Init. Brief").
[19] 34 C.F.R. § 668.26(b)(2)(ii).
[20] Resp. Init. Brief, at 3.
[21] *Id*.
[22] *Id*.
[23] *See*, *Hair Interns School of Cosmetology*.

that it covers *all* of the findings.[24] While several of the findings addressed in the close-out audit *may* correspond to the issues raised in the FPRD, it is unclear that the close-out audit fully addresses them.[25] Moreover, several of the findings in the FPRD are seemingly not addressed at all by the close-out report.[26] If the close-out audit fails to even mention several of the concerns raised in the FPRD, then it certainly cannot cover "all of the findings at issue".

Clearly, the onus is on the College to explain how its evidence relates to the charges with sufficient clarity to allow the tribunal to make a determination. Indeed, FSA, in its response to DeMarge's statement that the auditor failed to find that the College falsified student records, makes this same point: "…there is no evidence that … these auditors examined the records of [the student at issue], or… any of the other students discussed in this finding."[27] In its defense, DeMarge argues that "not all files that contained discrepancies resulted in liabilities or were material errors" and that the "College has met its burden of proof that not all of DeMarge's records are inaccurate" (emphasis in original).[28] DeMarge thus concludes that it cannot be held liable for the full amount assessed by FSA because "This Tribunal has found that when evidence supports that some portion of the disbursement is properly made, it is inappropriate to assess a liability against the school for 100% of the disbursed aid."[29] While this may be true, DeMarge has failed to demonstrate with any specificity what evidence supports a reduction in liability and to what extent. The College cannot rely on broad, unsubstantiated assertions alone to refute the allegations. Therefore, based on the lack of explanation of how the findings in the close-out audit report relate to the findings raised in the FPRD, I am unable to determine how the close-out audit report would reduce the liabilities assessed in the FPRD.

Finally, DeMarge admits that the close-out audit found that the College failed to comply with a number of requirements.[30] Indeed, the close-out audit notes several "reportable conditions"[31]

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[24] The close-out audit includes the following "schedule of findings and questioned costs": reporting requirements, incorrect filing of student status confirmation reports, underawa[r]ded family subsidized loans, underawarded Pells, exceeded annual loan limits, unpaid credit balance, late determination of withdrawal date, late refunds, unpaid refunds. R-24.

[25] The close-out audit finding "Reporting Requirements" might arguably address FPRD Finding # 4: Inaccurate Recordkeeping; "Underawarded Pells" may overlap with FPRD Finding # 6: Improper Federal Pell Grant Calculations/Payments; "Unpaid Refunds" for FPRD Finding # 7: Returns Calculated Improperly; and "Incorrect filing of student status confirmation reports" for FPRD Finding # 12: Incomplete Verification. However, DeMarge fails to show how the close-out audit relates to the findings in the FPRD.

[26] I am unable to determine how FPRD Finding # 9 (Improper Clock/Credit Hour Conversion) and # 15 (Admissions Eligibility Requirements Not Followed) are even addressed in the close-out audit.

[27] FSA Brief, at 4. Further, this tribunal notes that the accounting firm, in the close-out audit, provides the following caveat: "Our consideration of internal controls over compliance would not necessarily disclose all matters in internal control that might be reportable conditions and, accordingly, would not necessarily disclose all reportable conditions that are considered to be material weaknesses." R-24, at 3. Thus, I must concur with FSA that the DeMarge's claim that the close-out audit exonerates them of liability regarding the finding of falsified student records – or any of the other findings in the FPRD, for that matter – is completely baseless given that the accountants themselves state that their audit would not necessarily disclose all problematic findings.

[28] Resp. Init. Brief, at 4.

[29] *Id*.

[30] Resp. Init. Brief, at 3.

[31] A "reportable condition" involves matters relating to significant deficiencies in the design or operation of internal control that could adversely affect the College's ability to administer Federal student financial aid programs in accordance with the applicable requirements of laws, regulations, contracts and grants. The accounting firm cited reportable conditions in five (5) findings. R-24, at 3.

and "material weaknesses"[32], both of which conditions undermine a school's ability to administer Federal student financial aid programs in accordance with applicable regulations and statute. Thus, for the foregoing reasons, I am unable to draw the same conclusions as Respondent that the close-out audit adequately addresses the issues raised by FSA in the FPRD.

As stated above, for a close-out audit to be an acceptable and appropriate substitute for a full file review, it must meet certain criteria. In the instant case, I find that the close-out audit is acceptable on one point: it was prepared by an independent certified public accountant and is, for that reason, deemed reliable. As to the remaining requirements, the close-out fails on all accounts. Nothing in the record indicates whether it was submitted to the Department in a timely manner or that it covered the entire period under scrutiny. Even giving the benefit of the doubt to DeMarge that it submitted the close-out audit in a timely manner and covered the relevant period, this tribunal finds that the College failed to make its case of close-out audit as substitute for file reviews in the most important respect: substance. Respondent's mere assertions that the close-out audit addresses all of the issues raised in the FPRD, absent further explanation and clear documentation, are insufficient for this tribunal to determine how the close-out audit might substitute for a final audit. Therefore, I find that DeMarge failed to carry its burden as to the sufficiency of the data contained in the close-out audit as a substitute for the full file reviews. The onus remains on the College to demonstrate through the requested file reviews that it acted as a responsible fiduciary. Moreover, DeMarge's response was insufficient for this tribunal to determine the school's liability more precisely than the calculation offered by FSA.[33] For this reason, I find no basis for reducing the liabilities assessed against the College by FSA.

Finding # 4: Inaccurate Recordkeeping

Federal regulations require Federal student aid recipient institutions to maintain comprehensive and accurate program and fiscal records related to their use of Title IV program funds. 34 C.F.R. § 668.16. These records must demonstrate that the institution is capable of meeting the administrative and fiscal requirements for participating in these programs and must show a clear audit trail for all Title IV expenditures.

In the instant proceeding, the Department asserts that DeMarge failed to keep comprehensive and accurate records related to its use of Title IV program funds, in accordance with program regulations under 34 C.F.R. § 668.14(b)(4) and 34 C.F.R. § 668.24(a)-(d). Specifically, under Finding # 4, the Department cites five students who were also identified in Finding # 1[34] and a sixth student[35] and alleges that these students' files contain inaccurate records. Because FSA's program review report found erroneous attendance records and other inconsistent information in

[32] A "material weakness" is a condition in which the design or operation of one or more of internal control components does not reduce to a relatively low level the risk that noncompliance with the applicable requirements of laws, regulations, contracts, and grants that would be material in relation to the Federal student financial aid programs being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions. The auditors found five (5) items to constitute material weaknesses. R-24, at 3.

[33] *In re: Selan's System of Beauty Culture*, Dkt. No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994).

[34] Although FSA determined that Finding # 1 (falsification of records) was closed in the FPRD, the Department maintained the charges related to the same students for Finding # 4 and submitted its documentation accordingly.

[35] The student records at issue under Finding # 4 include # 25, 26, 27, 29, 30 and 34.

the student files at an error rate of greater than 10% in the sample reviewed, the Department required DeMarge to review all of the files for all Title IV recipients for the 2002-03 and 2003-04 award years to determine if the students were eligible for the funds received and whether the funds were disbursed properly.

DeMarge provides a response for the six students, argues that it refutes the Department's charges with respect to the students identified in Finding # 1 and also contends that it demonstrates that the information used by the Department for Students # 25, 27 and 30 is inaccurate. Accordingly, DeMarge argues that the error rate in the sample was below the threshold 10%, and therefore, the College was not required to conduct a 100% file review[36], which it did not. Further, the College asserts that the close-out audit that was performed in compliance with Title IV regulations for the period between January 1, 2004 and November 15, 2004 revealed that the College complied with the relevant regulations and did not "identify any circumstance or indicate any suspicion that the College's records are unreliable or suspect in any way."[37] DeMarge concludes that it had "met its burden of proof that not all of [its] records" were inaccurate (emphasis in original).[38] Therefore, FSA's assessment of 100% liability for Title IV funds disbursed in award years 2002-03 and 2003-04 was excessive and that this tribunal could instead rely on the findings in the close-out audit to assess liability.[39]

The Department did not find DeMarge's responses persuasive and notes that the College failed to conduct the required file review. Accordingly, the Department seeks recovery of all Title IV funds that were drawn down and/or disbursed by the school in the 2002-03 and 2003-04 award years.

Upon review of the record, this tribunal notes that four[40] of the six students whose records serve as the basis for FSA's finding of inaccurate recordkeeping were the subject to a prior proceeding before this tribunal.[41] The prior proceeding was a fine action taken by FSA against the College, where the former asserted that the latter "falsified numerous documents".[42] The same four students were identified in that action. Indeed, the facts and circumstances cited for the four students were the same as in the present proceeding. In that prior proceeding, this tribunal upheld the charge of "fictitious attendance records" for Students # 29, 30, and 34[43] and "fictitious enrollment agreement" for Student # 25.[44]

Consistent with this tribunal's decisions in earlier cases with the same circumstances[45], I find it unnecessary to re-evaluate the previously-adjudicated findings. Thus, the finding of inaccurate recordkeeping is upheld for Students # 25, 29, 30 and 34, as per the holding in the earlier fine

[36] Resp. Notice of Appeal, at 6-7.
[37] Resp. Init. Brief, at 3.
[38] *Id*, at 4.
[39] *Id*.
[40] Students # 25, 29, 30 and 34.
[41] *In re: DeMarge College*, Dkt. No. 04-49-SF, Dep't of Educ. (July 19, 2010), at 4.
[42] *Id*.
[43] In the prior proceeding, these students were identified as Students # 32, 33 and 34 respectively.
[44] Identified as Student # 35 in the prior proceeding.
[45] *See*, *In re: Hamilton Professional Schools*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003).

case.[46] I have also examined the evidence submitted for Students # 26 and 27. These students' records are, at best, internally inconsistent on their face. Evidence of internal inconsistencies in the student files is considered probative corroborating evidence supporting the allegation of falsification.[47] As stated earlier, the burden is on the College to refute the charges, and DeMarge's submissions regarding these students' files are insufficient to overcome the weight of evidence proffered by FSA.[48] Furthermore, FSA makes the point that DeMarge admits that its records contained inaccuracies by ascribing them as being "simply data entry error".[49] This tribunal concurs that data errors entered into the financial tracking, attendance and other institutional systems do, by definition, constitute "inaccurate recordkeeping".

For the above reasons, DeMarge's contention that it was not required to submit a full file review because it adequately refuted the Department's charges and demonstrated that the error rate was below the threshold 10% is without merit. The College had the obligation to submit a full file review as requested by FSA. It did not. As stated earlier, the close-out audit report is insufficient as a substitute. For these reasons, I find in favor of the Department on this matter and assess liability, as determined by FSA, at the full amount of Title IV funds for 2002-03 and 2003-04, for a total of $6,080,373.00.

Finding # 5: Account Records Inadequate/Not Reconciled

Federal program regulations require educational institutions to maintain financial records which reflect all program transactions on a current basis and that those transactions, including financial aid records, be reconciled in accordance with accepted accounting procedures. 34 C.F.R. § 668.24(a), (b). In the FPRD, FSA determined that DeMarge failed to provide adequate documentation for its Common Origination and Disbursement ("COD") account in violation of the regulations and assessed liability at $108,716.77.[50] However, in its brief, the Department subsequently determined that this matter was closed.[51] Accordingly, this charge is dismissed.

Finding # 6: Improper Federal Pell Grant Calculation/Payment

DeMarge is a non-term credit hour institution with an academic year of 24 credits and 30 weeks, resulting in a payment period of 15 weeks, which is half of its academic year. To calculate the amount of student aid that should be drawn down during a payment period, the College uses Formula 4 [52], as defined by the Department.[53] Under this formula, institutions pro-rate Pell Grants for students enrolled in programs of less than an academic year in length. 34 C.F.R. §

[46] Although the charges in the two cases are not exactly the same, it is this tribunal's belief that the prior charge of "falsification" of documents carries a higher standard of proof than "inaccurate recordkeeping". For this reason, the holding in the prior case is applicable.
[47] *See*, *In the Matter of Romar Beauty Schools*, Dkt. No. 90-90-ST, U.S. Dep't of Educ. (September 7, 1994).
[48] For example, regarding Student # 27, DeMarge submitted an attendance sheet, handwritten and initialed by the instructor, to establish the student's attendance. R-2-5. However, this evidence is not adequate to refute the declaration signed by the student, attesting to the student's last date of attendance. ED 6-1.
[49] Resp. Init. Brief Appendix 1, at 9.
[50] ED 3-9.
[51] FSA Brief, at 20.
[52] R-15, ¶ 13.
[53] *See*, 2002-03 Federal Student Aid Handbook, Vol. 3, Ch. 2, at 3-41.

690.63(e). Students enrolled in full academic year programs must complete 15 weeks of instruction before they are eligible to receive a second/subsequent student aid disbursement.

In this finding, FSA alleges that DeMarge calculated Pell Grant and/or FFEL awards based on payment periods shorter than the requisite 15 weeks or 12 credits, which could result in either an over-award of aid or a premature second/subsequent disbursement. To support its position, FSA cites Students # 2, 25, 26, 27, 30 and 33. All of these students received at least half of their scheduled Federal student aid awards, but during the program review, FSA determined that their awards were based on payment periods of less than half of the defined academic year.[54] The amount of student aid that is disbursed must correspond to the payment period; a student may not receive more aid than she or he has earned. Therefore, disbursing fully half of a student's annual award of Federal student aid for a period shorter than half of the academic year is an improper payment.

During the program review, FSA determined that the error rate in the files reviewed exceeded the 10% threshold, so FSA required DeMarge to conduct a full review of all Title IV recipients for the 2002-03 award year to determine if the students were eligible for the funds they received based on the amount of time in the program they had completed. Further, the Department required DeMarge to provide two documents: a written definition of the payment periods for each of its academic programs, and its written policy regarding the proper payment of Federal Pell Grant funds to its students.[55] DeMarge submitted its policy on Pell Grant payments.[56] It failed to conduct a file review or provide its definitions of payment periods for each program.

In its Notice of Appeal, DeMarge concedes that a 14-week payment period had been used in error for some students and explains that the College, acting in good faith, applied the shorter payment period figure based on a recommendation that came from the Department's staff during a site visit.[57] Subsequently, DeMarge discovered the mistake and claims that it correctly employed the 15-week payment period in its calculations from that date forward.

Regarding the student files cited in the FPRD as containing errors, the College asserts that no improper payments were made because those students attended programs that were a full academic year; the College disbursed 100% of aid for which each student was eligible during the first payment period; and no pro-rating was required.[58] DeMarge does not address the allegations surrounding each student individually but instead relies on general statements. As to the required file review, DeMarge claims that it was unnecessary because the school resolved the question of student eligibility, rendering the purpose of the review moot. DeMarge states that because no students were enrolled in programs that were less than a full academic year, there was no violation of the requirement to pro-rate payments.[59] The College does not discuss its omission in providing any definitions of payments periods for its various programs.

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[54] ED 3-9.
[55] ED 3-10.
[56] R-15.
[57] Resp. Notice of Appeal, at 14.
[58] Resp. Notice of Appeal, at 14-15.
[59] *Id*, at 15.

This tribunal reviewed the narratives provided by FSA describing the deficiencies in the files of Students # 2, 25, 26, 27, 30 and 33. It is clear from the information provided, which DeMarge does not specifically rebut, that the school employed payment periods of less than 15 weeks for five of the six students[60] in calculating either the aid disbursements or refunds. Indeed, for three of these students, the payment periods used by DeMarge ranged from seven to 12 weeks. For the remaining two students, the payment period was 14 weeks. Even taking into consideration the erroneous advice that DeMarge purportedly received from Department staff that the proper payment period should be 14 weeks, DeMarge does not explain the improper calculation of payment periods for the remaining students. The College merely makes the general statement that "The cited students all attended programs of one full academic year of 30-weeks and had two payment periods of 15 weeks for the award year."[61] The evidence provided by FSA demonstrates this statement to be untrue. Further, it should also be noted that with this statement, DeMarge contradicts its earlier explanation of why it used the 14-week payment period, advice allegedly provided by the Department.

After a thorough review of the submissions, this tribunal simply does not find DeMarge's assertions regarding the cited students to be credible. None of the College's claims or conclusions are supported by evidence in the record, and for that reason, the school cannot meet its burden of proof on this finding, especially given the specificity with which FSA makes its case. Furthermore, this tribunal concurs with FSA that the purpose of the file review was to identify errors in calculating payment periods and to determine if student aid funds were disbursed prematurely. For this reason, DeMarge's contention that it was not required to submit a full file review because it adequately addressed the issue of student eligibility is without merit. Thus, the College had the obligation to submit a full file review as requested by FSA. It did not. As stated earlier, the close-out audit report is insufficient as a substitute. Finally, DeMarge also failed to provide the written definitions of payment periods for its programs, as required by FSA. These two omissions render DeMarge's response incomplete.

For the above reasons, I find in favor of the Department on this matter and assess liability, as determined by FSA, at its estimated financial loss from the loan amounts improperly certified and delivered to the students, for a total of $129,806.75.

Finding # 7: Returns Calculated Incorrectly

When a recipient of Title IV funds withdraws from school during a payment period or period of enrollment in which the student matriculated, the school must calculate the percentage of the payment period or enrollment period completed as of his/her withdrawal date to determine the amount of Title IV funds that have been earned by the student. 34 C.F.R. § 668.22. For schools with programs measured in credit hours, as in the case of DeMarge, this percentage is calculated by dividing the total number of calendar days in the payment period or period of enrollment into the number of calendar days completed in that period, as of the student's withdrawal date.[62] 34 C.F.R. § 668.222(f). If the amount of Title IV funds earned by the student is less than the funds

[60] All except Student # 30.
[61] Resp. Notice of Appeal, at 14.
[62] Thus, in a fraction representing the student's completion percentage, the number of calendar days completed by the student would be the numerator, and the total number of calendar days in the period would be the denominator.

disbursed, the difference in these amounts must be returned to the Title IV program. If, however, a student completes 60% or more of the payment period, no refund is due.[63]

Under this finding, FSA states that the College "incorrectly calculated tuition refunds for 11 students in its sample for various reasons, to include incorrect payment periods, incorrect leaves of absence, and incorrect institutional charges."[64] In the FPRD, FSA specifically identifies the following students' files as containing deficiencies: # 1, 6, 11, 25, 26, 27, 28, 29, 30, 31, and 33.[65]

In its Notice of Appeal, DeMarge concedes that errors were made in calculating the return of Title IV funds by providing revised calculations. The school concludes that using the proper calculations resulted in an additional $5,816 in refunds being owed to four of the 11 students.[66] Additionally, the College asserts that any error in calculating the return of Title IV funds was based "on a good faith attempt to comply with regulations and guidance provided by ED and was not an intentional attempt to improperly retain Title IV funds."[67] DeMarge provides revised calculations for Students # 25, 27 and 29 and states that 100% of the Title IV funds disbursed were earned by the students. It also submits revised calculations for Students # 1, 6, 26, and 33 but does not include any analysis or narrative explanation of the revisions. Finally, the College states that it could not identify any errors for Students # 11 and 31.

FSA argues that DeMarge's concession that refunds were incorrectly calculated constitutes a party admission as to the need for the mandated file review, stating: "Respondent cannot escape such an obligation when it acknowledges its widespread shortcomings in such a small sample of its withdrawn student body."[68] Further, FSA addresses specifically the issues of concern for the following students: # 1, 6, 11, 25, 26, 27, 28, 29, 30, 31, and 33. After thoroughly reviewing the Department's submissions regarding the deficiencies in these students' files, I am persuaded that FSA has laid out sufficient facts to support its findings.

It is incumbent upon the College to rebut the Department's findings with factual and legal arguments. DeMarge does not provide a specific response for any students but Students # 25, 28 and 30.[69] By not providing any analysis or explanation along with the revised calculations for Students # 1, 6, 26, 27, 29 and 33, the College has given this tribunal no context by which to assess the new calculations or basis on which to assess FSA's findings. Moreover, the revised calculations constitute an admission that DeMarge calculated refunds for these students incorrectly. Accordingly, the College has failed to meet its burden of proof in this matter for

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[63] For a general explanation of 34 C.F.R. § 668.22 (the return to Title IV regulation), *see*, *In re: Vernon's Kansas School of Cosmetology*, Dkt. No. 04-24-SP, U.S. Dep't of Educ. (January 11, 2006).
[64] FSA Brief, at 23.
[65] ED 3-11, 3-12.
[66] Resp. Notice of Appeal, at 17.
[67] Resp. Notice of Appeal, at 15.
[68] FSA Brief, at 23.
[69] This tribunal recognizes that FSA identified but did not provide specific details of the deficiencies in the files of Students # 1, 6, 11, 26, 27, 29, 31, and 33 in the FPRD. It was in FSA's Brief that it provided a detailed narrative about problems with these students' files. This does not exempt DeMarge from addressing the deficiencies identified. The College had the opportunity to submit a reply brief to respond specifically to the allegations. It failed to do so.

Students # 1, 6, 26, 27, 29 and 33. Similarly, DeMarge's assertion that its calculations are correct for Students # 11 and 31, absent any explanation or support in the record, is neither determinative nor persuasive. By not providing specific responses to FSA's findings for these two students, DeMarge again fails to meet its burden of proof in this matter. For these reasons, I find in favor of FSA for Students # 1, 6, 11, 26, 27, 29, 31 and 33. This leaves three students for whom DeMarge has provided a response to FSA's findings: # 25, 28 and 30.

For Student # 25, DeMarge relies on a payment period of February 17, 2003 to June 9, 2003 to argue that the student completed 60.4% of class time and therefore earned 100% of the Title IV funds disbursed.[70] However, the record shows that this student was enrolled as an evening student, which would make her payment period 24 weeks to complete 12 credit hours.[71] Further, FSA argues that DeMarge failed to adjust its calculations to take into consideration the eight days that students were on Spring Break (March 16 through March 23), which would have reduced the overall completion rate for this student.[72] Based on the above and given that this student's last day of attendance was April 21, 2003, it is clear that this student did not complete sufficient credit hours to earn 100% of the Title IV funds, and DeMarge's calculation for the return of Title IV funds is incorrect.

Regarding Student # 28, DeMarge asserts that this student was enrolled in an evening Administrative Computer Specialist program, which runs 45 weeks with a 19-week payment period. According to DeMarge, because the payment period was 19 weeks, all students in this program satisfied the minimum 15-week requirement before the second disbursement was made.[73] Thus, DeMarge concludes that its calculations were correct, and no liability exists. FSA responds that DeMarge's argument was incorrect because an evening student in this program would need to complete 22.5 weeks to earn the necessary credits.[74] I concur with FSA's finding that DeMarge used the incorrect payment period in its refund calculation, and therefore its return of Title IV funds calculation is also incorrect.

For Student # 30, DeMarge concedes that it failed to account for the summer break in its return of Title IV funds calculations and that a refund of $2,194.74 was in fact due.[75] FSA responds that, in addition to the error above, the College also used a falsified last date of attendance ("LDA"), one that was fully one month later than the student's actual last date, to determine the revised refund amount. Because an inaccurate LDA was used in the revised calculation, DeMarge's revised refund amount remains in error.[76] I note that DeMarge has conceded that it erred in its original calculations and find that its revised calculations are based on an inaccurate LDA and therefore also incorrect.

As discussed above, I find that DeMarge conceded that numerous errors existed in its return of Title IV funds calculations when it submitted revised calculations. I concur with FSA that the existence of so many errors in such a small sample supports the necessity of a full file review to

[70] Resp. Notice of Appeal, at 16.
[71] FSA Brief, at 27.
[72] *Id*, at 28.
[73] Resp. Notice of Appeal, at 16.
[74] FSA Brief, at 30.
[75] Resp. Notice of Appeal, at 16-17.
[76] FSA Brief, at 31.

determine the extent of the inaccurate calculations. The College argues that it made a good faith attempt to comply with the regulations, but this tribunal believes that the school's efforts are not sufficient to meet its obligations to its students or the Department. The College had the obligation to submit a full file review as requested by FSA. It did not. As stated earlier, the close-out audit report is insufficient as a substitute, and therefore, the College's response to this finding is incomplete. For these reasons, I find in favor of the Department on this matter and assess liability, as determined by FSA, at the full amount of Title IV funds for 2002-03, for a total of $1,628,728.00.

Finding # 9: Improper Clock/Credit Hour Conversion[77]

"Clock/credit hour conversion" refers to the regulatory formula that mandates how a school translates the scheduled classroom time for any program into the number of credits earned through that program, for the purposes of Federal student aid calculations. The conversion calculations impact educational institutions in three important ways. First, they determine program eligibility. The school must use the clock/credit hour conversion formula to determine if the program offered provides sufficient credit hours within the specified time frame. For example, a semester or trimester-based program must provide at least 16 credit hours over 15 weeks of instruction time to meet the eligibility requirement. To convert class time to credit hours for a semester or trimester-based program, the course's total number of clock hours (instruction time) is divided by 30 to determine how many credits a student would earn.

Second, the clock/credit hour conversion requirement may affect the amount of Federal financial aid funds a student enrolled in that program may receive.[78] Finally, the clock/credit hour conversion determines the payment periods for Federal student aid, that is, the period during which the funds must be drawn down and disbursed. If the eligible program is an academic year or less in length, the first payment period equals the period when the student completes the first half of the program, as measured in credit or clock hours. Accordingly, the second payment period is when the student completes the remainder of the program.[79] Thus, the clock/credit hour conversion determines the payment periods, and an incorrect conversion might allow a student to erroneously receive his/her funds early or in excess of that permitted by the regulations.

Under this finding, FSA alleges that DeMarge did not make the required clock to credit hour conversion[80] or that the formula was improperly applied.[81] The Department identifies 15 students[82] where second payments of Federal student aid funds were disbursed before the students earned sufficient credits to complete the first half of their programs. The Department

[77] Note that the regulations for clock/credit hour conversions were amended for the 2008-2009 award year; however, this decision is based on the regulations in effect at the time of the program review.
[78] While important, this particular aspect of the clock/credit hour conversion calculation is not relevant to the instant proceeding.
[79] Within each payment period, however, a school may exercise discretion as to the timing of the payment, but in all cases, the full amount due to a student for a payment period must be disbursed before the end of that payment period. 34 C.F.R. § 690.76(a). *See generally*, 2002-2003 Federal Student Financial Aid Handbook, Vol. 2, Ch. 2.
[80] ED 3-14.
[81] ED 3-15.
[82] Students # 2, 6, 8, 9, 10, 11, 14, 15, 18, 20, 24, 28, 31, 32 and 33.

seems to attribute these early disbursements to errors in the clock/credit hour conversion calculations, that is, the funds were disbursed early due to a mistake in applying/calculating the formula. As a result of the error rate in the sample examined being in excess of 10%, FSA also required the College to perform a file review of all students who received second or subsequent disbursements of Pell Grants or FFEL program funds during the 2002-03 and 2003-04 award years.

In its response, DeMarge objects to the finding generally. The College argues that FSA misapplied the regulations and should not have directed the school to conduct a 100% file review. Because DeMarge believes the finding to be without merit, it declined to conduct the review. The school seemingly further asserts that its position is supported by the close-out audit which did not find any deficiency with DeMarge's compliance with disbursement regulations.[83]

DeMarge also argues that it fully complied with the clock/credit hour conversion requirement to determine the number of semester credit hours in each of its programs and for Title IV purposes.[84] It then properly applied the number of credit hours to determine the amount of Title IV aid that students enrolled in eligible programs could receive based on the number of credit hours in the program.[85] The College further claims that, as a credit hour institution, it is not required to track a student's actual attendance to determine when a student is eligible for second and subsequent Title IV disbursements.[86] Finally, DeMarge states that six[87] of the students cited in the finding received only the first of their Title IV funds disbursements[88] and contends that the Department's demand of a file review is without merit.

First, it should be noted that the programs offered by DeMarge are subject to the clock/credit hour conversion requirements. The school does not offer undergraduate programs that are at least two years long and lead to an associate's, bachelor's or professional degree, nor does the school qualify for any other exception to the clock/credit hour conversion requirement. Second, as outlined above, the clock/credit hour conversion regulations serve three purposes in regard to Federal student aid: program eligibility, amount of student aid and determination of payment periods for loan disbursement. At issue in this finding is only the question of whether funds were disbursed based on a proper determination of the payment period, which is in turn based on a proper clock/credit hour conversion calculation.

For all 15 students identified in the FPRD, FSA lists the courses in which they were enrolled during the period under scrutiny; states the date when DeMarge drew down the students' second loan or grant payment; and calculates whether each student had, at the time of the second payment, made sufficient progress in his/her program (earned enough credits under the clock/credit hour calculation) to qualify for that payment. In all cases, FSA found that DeMarge had drawn down the funds prematurely, leading to the conclusion that the College improperly calculated the clock/credit hour conversion.

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[83] Resp. Notice of Appeal, at 20.
[84] Resp. Notice of Appeal, at 19.
[85] Resp. Notice of Appeal, at 20.
[86] Resp. Notice of Appeal, at 19.
[87] Students # 2, 6, 11, 28, 31 and 33. DeMarge fails to address FSA's findings for the remaining nine students (# 8, 9, 10, 14, 15, 18, 20, 24 and 32).
[88] Resp. Notice of Appeal, at 18.

After a thorough review of the record, it is clear that DeMarge disbursed Federal student aid funds before they were earned by the students listed in the finding. DeMarge does not present any evidence to refute FSA's finding about the timing of the second/subsequent payments. Instead, the College relies on the argument that it was not required to track the actual attendance of the students in determining the timing of second/subsequent payments.[89] While this is true, the school fails to recognize that the clock/credit hour conversion formulas are instrumental in assessing students' progress in their programs, which in turn determines when second/subsequent financial aid disbursements can be made. Thus, the improper clock/credit hour conversions – or the school's failure to make the conversion calculations before drawing down financial aid – allowed students to benefit from funds that they had not yet earned. The fact that DeMarge does not recognize its responsibility to draw down Federal student aid in accordance with the regulatory formulas prescribing when second/subsequent payments have been earned gives credence to FSA's finding that the College made improper clock/credit hour conversions.

Accordingly, for the reasons stated above, I find that FSA met its burden on this finding, and DeMarge provides no evidence to support its position. Further, the College had the obligation to submit a full file review as requested by FSA. It did not. As stated earlier, the close-out audit report is insufficient as a substitute, and therefore, the College's response to this finding is incomplete. For these reasons, I find in favor of the Department on this matter and assess liability, as determined by FSA, at its estimated financial loss from the loan amounts improperly certified and delivered for the award years of 2002-03 and 2003-04, for a total of $224,560.00.

Finding # 10: Improper Disbursement without Valid SAR/ISIR

Under program guidelines, before a student may receive a Federal Pell Grant for an award year, that student must submit certain information in the Student Aid Report ("SAR") to his/her educational institution, or the institution must obtain a valid Institutional Student Information Record ("ISIR") by the deadline established by the Secretary. 34 C.F.R. § 690.61(a), (b). In the FPRD, FSA determined that DeMarge had disbursed Title IV funds to two students prior to obtaining a valid SAR/ISIR, in violation of the regulations. DeMarge acknowledged this finding and conceded the liabilities assessed.[90] Accordingly, I find in favor of the Department on this matter and assess liability at the full amount of the Title IV funds for 2003-04 for both students, as determined by FSA, for a total of $8,486.89.[91]

Finding # 12: Incomplete Verification

Prior to disbursing Title IV aid to students, educational institutions must verify items on students' financial aid applications with acceptable documentation. Thus, a school must establish that the integrity of the information it collects with supporting documentation and also ensure that the supporting documentation is proper. 34 C.F.R. § 668.57 If the school does not

[89] Actual attendance is not a factor in measuring a student's progress except to the extent that absenteeism interferes with that student's ability to meet administrative attendance requirements and/or complete coursework.
[90] Resp. Notice of Appeal, at 20.
[91] In Resp. Init. Brief, DeMarge concedes liability for the two students identified, but calculates the total amount due to be $ 6,406.43. DeMarge seems to have failed to include in this total the FFEL funds for Student # 10.

verify information reported by the students, it cannot establish students' eligibility to receive Title IV assistance.

During the initial program review, FSA determined that DeMarge did not complete verification for four students, so the College was asked to perform a full file review. DeMarge responded with additional documents for the four identified students and asserted that it refuted all of FSA's allegations, rendering unnecessary the full file review.[92] FSA found DeMarge's response to be deficient. After a review of the materials submitted by both parties, I concur with FSA's conclusion that the verification process was incomplete for all four students. In each case, DeMarge failed to reconcile discrepancies between verification worksheets and supporting documents, thus rendering the information unreliable, and/or failed to remit the supporting documentation in accordance with regulatory requirements, *e.g.*, properly signed.

For these reasons, DeMarge's contention that it was not required to submit a full file review because it adequately refuted the Department's charges is without merit. The College had the obligation to submit a full file review as requested by FSA. It did not. As stated earlier, the close-out audit report is insufficient as a substitute, and therefore, the College's response for this finding is incomplete. Accordingly, I find in favor of the Department on this matter and assess liability, as determined by FSA, at $38,942.00.

Finding # 15: Admission Eligibility Requirement Not Followed

In order to be eligible to receive Title IV, HEA program assistance, a student must meet certain criteria, including having earned a high school diploma or its equivalent.[93] In the program review, FSA determined that Student # 22 did not possess the required credentials and was therefore ineligible for funding. In response, DeMarge submitted an ATB (Ability to Benefit) test score for the student that was dated approximately six years prior to the student's matriculation.[94] Although current regulations do not require that a student pass the ATB test within the previous 12 months before receiving Title IV, HEA program assistance, the regulations in effect at the relevant time did contain that restriction.[95] Accordingly, FSA rejected the test score as insufficient to satisfy the then-existing eligibility requirement. In its appeal, DeMarge argues that the spirit of the new regulation had been satisfied and that the student was ultimately eligible for the funds.[96]

The facts here speak plainly, and DeMarge's argument is without legal basis. Accordingly, I find in favor of the Department on this matter and assess liability, as determined by FSA, at $1,860.08.

[92] Notice of Appeal, at 22 and Resp. Init. Brief, at 6.
[93] *See generally*, 34 C.F.R. § 668.32.
[94] R-20.
[95] *See*, 67 Fed Reg 67073 (Nov. 1, 2002). The language regarding the validity and acceptability of the ATB test scores was amended November 1, 2002 with an effective date of July 1, 2003. The student in question here received Title IV funds in May 2003, prior to the date when the new law went into effect.
[96] Resp. Init. Brief, at 23.

Conclusion

As discussed above, regarding the permissibility of substituting the close-out audit report in lieu of the requested full file reviews, I find that DeMarge failed to carry its burden as to the adequacy of the close-out audit. The close-out audit report also provides no basis for reducing the liabilities assessed against the College by FSA. Given that the close-out audit report is insufficient to serve as a replacement for the file reviews, DeMarge's failure to submit the requested file reviews renders it liable for the full amounts assessed by FSA on each of the five findings where a review was requested.[97] DeMarge conceded liability for Finding # 10, and for Finding # 15, where no file review was requested, I find in favor of the Department.

Order

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is HEREBY ORDERED that DeMarge pay the full amount assessed, $6,080,373.00, which represents the Title IV funds that were drawn down and/or disbursed by the school in the 2002-03 and the 2003-04 award years.

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Judge Richard I. Slippen

Dated: September 15, 2011

[97] Findings # 4, 6, 7, 9, and 12.

SERVICE

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

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