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

In the Matter of

Docket No. 08-17-SA

COLUMBIA BEAUTY COLLEGE,

Federal Student Aid Proceeding

Respondent.

Appearances: Lawrence V. Nguyen, of Lynnwood, Washington, for Columbia Beauty College.

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

Before: Judge Ernest C. Canellos

DECISION

Columbia Beauty College (Columbia) of Cayce, South Carolina, operated as a vocational institution that offered postsecondary programs in cosmetology, and participated in Federal student financial assistance programs, which are authorized under Title IV of the Higher Education Act of 1965, as amended, (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq*.

On February 26, 2008, the Federal Student Aid (FSA) office of the U.S. Department of Education (Department), issued a Final Audit Determination (FAD) that contained a "final close out audit determination" for the period January 1, 2006 through September 26, 2006.[1] The FAD

[1] During the period at issue, Title IV, HEA student financial assistance programs included the Federal Pell Grant and the Federal Family Education Loan (FFEL) Programs. FSA selected the period at issue based on its determination that the institution was no longer eligible to receive Title IV funds after September 26, 2006.

indicates that during the process to resolve findings of an audit, Columbia failed to respond to a number of requests for documentation concerning the institution's compliance with Federal student financial assistance program requirements. As a result, FSA determined that it had "no other recourse but to require the institution to return all Title IV funds disbursed during the audit period." On this basis, FSA issued its FAD requiring Columbia to return $63,949 in Title IV funds.

This proceeding is governed by regulations promulgated under Subpart H of the general provisions setting forth the rules for participating in various aspects of student financial assistance programs authorized by Title IV. It is well established that in Subpart H -- audit and program review -- proceedings, the institution carries the burden of proof. To sustain its burden, the institution must establish, by a preponderance of the evidence, that the (1) "expenditures questioned or disallowed were proper" and that the institution (2) "complied with program requirements."[2] For reasons fully developed, *infra*, the tribunal finds that Columbia failed to meet its burden of proof showing that, for the period January 1, 2006 through September 26, 2006, Title IV funds were properly disbursed.

I.

As an initial matter, Columbia raises a procedural issue concerning whether this case should proceed to decision on the merits of the FAD. More precisely, Columbia asserts that it is entitled to entry of default judgment against FSA because FSA did not file a brief in accordance with the tribunal's briefing schedule as established by the June 4, 2008 Order Governing Proceedings. This motion is denied.

FSA's brief was due August 6, 2008. On August 20, 2008, Columbia submitted an electronic message requesting that the tribunal "rule on the case with [sic] the default of plaintiff party." In Columbia's view, FSA's failure to file a pleading on or before August 6, 2008 should result in a ruling in favor of Columbia.

On August 21, 2008, along with the pertinent brief, FSA filed a motion for an extension of time to file its brief from August 6, 2008 to August 21, 2008. In its motion to support its request, FSA, without explaining why it missed its filing deadline, argued that the submission of an untimely brief does not prejudice Columbia's interests. According to FSA, "rather than conflicting with the institution's position," FSA's brief "supplements the facts in the record" by providing support for the "well-settled principle that the institution must account for Federal student aid funds it has received." Taking its argument a step further, FSA argued that Columbia's submission is not sufficient to decide this case in Columbia's favor because the submission "does not contain any exhibits that will assist the Tribunal in evaluating the liability now at issue, even though Columbia bears the burden of proof."[3]

[2] 34 C.F.R. § 668.116(d); Subpart H, Part 668, of 34 C.F.R.

[3] Columbia's submission consisted of a two-page electronic message filed on July 7, 2008.

Although the Department has not adopted formal rules or regulations governing entry of default judgments, the tribunal has often addressed such motions.[4] In response to a motion for default judgment by FSA,[5] the tribunal has required Respondent to show cause why an Order For Default Judgment should not be issued based upon an institution's failure to further pursue its appeal, or, as the case may be, the institution's failure to comply with the tribunal's orders.[6] In fact, it has become the common practice of this tribunal, pursuant to the authority to regulate the conduct of parties in Subpart H proceedings, to order a party to *show cause* why the tribunal should not terminate the hearing process, issue a decision on the merits, and enter judgment against a party, if that party does not meet established time limits or otherwise fails to request more time to file a submission.[7] In doing so, the tribunal routinely provides the party against whom judgment by default is sought an opportunity after an omission to explain the omission and remedy the defect; this practice supports a core objective of administrative adjudication, which is to resolve disputes on the merits based upon a full record.

In the case at bar, issuance of a show cause order was unnecessary because FSA filed a brief, albeit untimely, on August 21, 2008, after receipt of Columbia's August 20, 2008 request for default judgment. If Columbia's request for default judgment was considered prior to or without the benefit of an immediate response from FSA, Columbia's motion would still fail. As noted, *infra*, it is not consistent with the tribunal's common practice to enter default judgment merely upon an *ex parte* request.[8] Moreover, there is no evidence that denial of Columbia's request for default judgment would be unduly prejudicial to the interests of Columbia. First,

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[4] *See, e.g., In re Spencer College,* Dkt. No. 93-27-ST, U.S. Dep't of Educ. (June 19, 1995). In accordance with Rule 55 of the Federal Rules of Civil Procedure, entry of default judgment is appropriate when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." Fed. R. Civ. P. 55(a) (2007) (Rules). As a general matter, the law disfavors default judgments because of the policy of encouraging dispositions of claims on their merits. *See, Tazco Inc. v. Director, Office of Workers Compensation Program, U.S.*, 895 F.2d 951 (4th Cir. 1990).

[5] To some extent, this is a case of first impression for the tribunal in that Columbia is seeking default judgment against the Federal government.

[6] Given that Rule 55 includes within its scope claims as well as defenses, the tribunal assumes, without deciding, that a prevailing Respondent, carrying the burden of proof, nonetheless, would be entitled to an appropriate remedy.

[7] 34 C.F.R. § 117(c) (3); *In re Nationwide Beauty School,* Dkt. No. 02-63-SP, U.S. Department of Educ. (January 15, 2003).

[8] It is worth noting that under the Federal Rules, in cases in which an appearance has been made, Rule 55(b)(2) provides that "the party against whom judgment by default is sought shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." Fed. R. Civ. P. 55(b) (2). Here, FSA filed a notice of appearance. Hence, even under the rather exacting standards of the Federal Rules, FSA would be entitled to come forward to argue against imposition of a default judgment. *See, e.g., Pioneer Inv. Serv. v. Brunswick Assocs. Ltd. Partnership,* 507 U.S. 380 (1993) (noting that under the Federal Rules, a party may escape imposition of default judgment by showing that an omission or late filing was caused by inadvertence, mistake or carelessness).

Columbia knew FSA intended to pursue this action. What is more, Columbia has not shown that that the delay in filing FSA's brief is inexcusable or that a late filing would have an adverse impact on its ability to defend against the allegations raised by the FAD. More broadly, even under the Federal Rules, in deciding the matter of default judgment, a tribunal need not focus narrowly on the negligent act that caused the default, but, instead, may consider whether the act was itself in some sense excusable when taking into account all relevant circumstances surrounding the party's omission.[9] Accordingly, FSA's motion for an extension of time to file its brief is granted.

II.

On the merits, as FSA argues, Columbia's submission does not directly contest the findings of the FAD or otherwise account for the Title IV funds it received in 2006. Indeed, the institution's submission is largely impertinent to the issues raised by the FAD. Columbia's submission provides an account of an incident in which the institution's president, Lawrence Nguyen, was shot by a former student; the incident left Nguyen disabled and unable to oversee the institution's operations. Shortly after the incident, the institution closed and Nguyen's disability and financial circumstances, it is urged, precluded Columbia from obtaining student records in compliance with the findings of the FAD.

A Subpart H proceeding affords an institution the opportunity to submit a written statement, whereby it may elaborate upon and further substantiate the arguments made within its request for review.[10] Consequently, to satisfy its burden of proof, an institution must present evidence that not only rebuts the allegations in the FAD, but also otherwise accounts for the institution's expenditure of Title IV funds during the period at issue. Columbia makes no evidentiary showing accounting for the institution's expenditure of Federal funds in 2006.

At bottom, Columbia raises equitable concerns regarding its ability to defend itself, but such concerns are not directly applicable here. Indeed, equitable concerns are not novel to Subpart H proceedings and most have been resoundly rejected by an abundant number of previous cases.[11] Notwithstanding the unfortunate predicament that led to the institution's ultimate closure, Columbia offers scant explanation of how or why its circumstances necessarily excuse its obligation to account for the expenditure of Federal funds. To this extent, Columbia points to no helpful statutory, regulatory, or precedential authority to support and the tribunal knows of none. Accordingly, the tribunal must review the record as it is.

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[9] *See, Union Pacific R. Co. v. Progress Rail Services Corp*., 256 F.3d 781, 782 (8th Cir. 2001).

[10] 34 C.F.R. § 668.116.

[11] *See, e.g., In Re Macomb Community College*, Docket No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993) (recognizing the Department's ability to seek liabilities for misuse of Title IV funds); *In Re Beth Jacob Hebrew Teachers College*, Docket No. 96-77-SP, U.S. Dep't of Educ. (March 17, 1997) (the government cannot be estopped from collecting misspent funds); *Tiger Welding Institute*, Docket No. 97-39-SP, U.S. Dep't of Educ. (July 2, 1998) (safe harbor rights do not apply when published regulations are clear).

In this respect, a review of the record, including FSA's submission, compels the tribunal to find that Columbia failed to carry its burden of proof. The FAD and the report issued by Columbia's independent auditors are demonstrably convincing that FSA has made a *prima facie* showing that Columbia failed to make proper and timely refunds to students during 2006. Therefore, the tribunal finds that Columbia failed to carry its burden of proof. The institution is liable for its expenditure of Title IV funds.

III.

What remains at issue is the appropriate measure of liability for Columbia's failure to account for whether additional refunds were owed for students who withdrew from the institution during the period at issue. For purposes of calculating Columbia's liability to the Department, the FAD proposed that the institution repay all Title IV funds disbursed to students during the period at issue.[12] There is no question that the institution has not come forward with evidence or argument regarding the calculation of its liability; it does not follow, however, that FSA may require the institution to return *all* Title IV funds awarded or disbursed during a period at issue, if that measurement of recovery is not a reasonable basis for the computation of damages. Pure speculation as to the calculation of damages is insufficient to justify recovery.[13]

FSA seeks the return of all Title IV funds expended during the period at issue because Columbia failed to respond to FSA's requests that the institution provide documentation concerning students who withdrew from the institution in 2006. This request followed the findings of Columbia's independent auditor, whose conclusions in the audit directed the institution to implement a corrective action that included performing a file review of Title IV recipients to determine the full extent of unpaid or late refunds occurring during the audit period. For example, the auditor's report identified that in "5 of 6 dropped student files sampled there was a problem with refunds." The report also disclosed that out of 31 students receiving Pell grants, 15 withdrew, and out of 30 students receiving Federal student loans, 12 withdrew. In addition, the report indicated that Columbia owed $6,344.67 in refunds for students 14, 16, and

[12] The audit report noted other matters requiring corrective action, but those matters were unrelated to the recovery of funds.

[13] Under the theory of recovery that Subpart H cases embrace, FSA is not entitled to recover damages that are remote, contingent, and speculative in character. This follows from the well-settled rule of *Hadley v. Baxendale,* wherein the court held that damages may be awarded for harm that is foreseeable or within the contemplation of the parties and which is caused by the breach of contract. *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Rep. 145 (1845). Following this well-regarded doctrine of contract law, the tribunal's cases have never embraced the notion that a Subpart H proceeding is an appropriate forum for "punishing" an institution for regulatory failures by requiring the return of all Title IV funds expended. Instead, the tribunal has noted that since FSA elects to bring a case pursuant to the procedures set forth under Subpart H, it is restricted to the remedies available therein, which are contractual in nature and allow only for recovery of damages. *See, e.g., In re Selan's System of Beauty Culture,* Docket No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994).

17, but does not identify why refunds were not owed by the remaining two students in the sample. Nor is there a precise measure of the amount of funds disbursed to the one sampled student whose refund presumably was correct. These factors, alone, render it doubtful that the precise measure of liability constitutes the recovery of all Title IV funds disbursed during the period at issue; likewise, it is also clear that the record does not provide a basis to determine a more precise measure of the Department's actual losses.

Given that the institution's failure to comply with FSA's requests for further documentation of Title IV expenditures confines FSA's capacity to come forward with a more precise measure of the Department's loss, the tribunal finds FSA's calculation of liability reasonable.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Columbia Beauty College pay $63,949 to the U.S. Department of Education.

Ernest C. Canellos
Chief Judge

Dated: April 7, 2009

SERVICE

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

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