



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

Docket No. 09-28-SA

PHILANDER SMITH COLLEGE,

Federal Student
Aid Proceeding

Respondent.

ACN: ED-OIG/A06F0018

Appearances: Eric F. Walker, Esq. General Counsel, for Philander Smith College, Little Rock, AK, for respondent.

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 I. Slippen, Administrative Judge

DECISION

Philander Smith College (PSC) is a private, non-profit, liberal arts college located in Little Rock, Arkansas. Since 1999, PSC has been granted a provisional certification to participate in Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* (Title IV). On March 20, 2009, the Federal Student Aid (FSA) of the U.S. Department of Education (Department) issued a final audit determination (FAD) that stated that PSC had not complied with the program requirements of Title IV for the fiscal years 2004 to 2006.

FSA seeks recovery of \$3,461,610.00 based on its determination that PSC failed to comply with the following Title IV program requirements: (1) not maintaining a proper accounting for Perkins Loans, 34 C.F.R. § 674.19 ; (2) improperly disbursing Title IV aid to ineligible students who have not met or maintained satisfactory academic progress (SAP), §

668.32(f); (3) failing to calculate and return Title IV funds when students officially and unofficially withdrew from the school, § 668.22(a)(1); (4) neither monitoring nor verifying student aid applications, § 668.60; (5) not remitting student credit balances, § 668.164(e); (6) improperly administering the Direct Loan program, § 685.102(b)(3); (7) not reporting the change of status in student enrollments, § 685.309; and, (8) demonstrating an overall inability to meet the Title IV administrative standards, § 668.16. PSC filed a written Request for Review on May 11, 2009, to challenge FSA's findings above before this Tribunal. Pursuant to my May 22, 2009 Order Governing Proceedings, PSC subsequently filed its brief on August 21, 2009, and FSA filed its brief on September 21, 2009¹.

All institutions receiving Title IV funds must comply with regulations set forth in 34 C.F.R. Part 668, Subpart H. In audit and program review proceedings under the Subpart H, the Department bears the initial burden of production that Title IV funds were improperly distributed. *See In the Matter of Demarge College*, Dkt. No. 04-39-SP at 2, U.S. Dep't of Educ. (July 31, 2009). After the Department's initial production, the institution must carry the burden of proof that Title IV funds in question were lawfully administered through a preponderance of evidence. 34 C.F.R. § 668.116(d). To establish this burden, the institution must submit "relevant and credible evidence," *In the Matter of Du Quoin Beauty College*, Dkt. No. 06-51-SP at 3, U.S. Dep't of Educ. (May 14, 2009), relating to "the period of time covered by the audit or program review," 34 C.F.R. § 668.116(e)(1). All other evidence outside the period of time covered by the audit is deemed "irrelevant and immaterial" unless there is "a clear showing of probative value." 34 C.F.R. § 668.116(e). If the institution fails to establish the correctness of its expenditure of federal funds through relevant and credible evidence, the institution must return all such funds to the Department. *In the Matter of Academy of Cosmetology*, Dkt. No. 09-29-SP at 2, U.S. Dep't of Educ. (September 23, 2009); *In the Matter of Quality College of Culinary Careers*, Dkt. No. 08-36-SA at 2, U.S. Dep't of Educ. (June 10, 2009). Upon a close and through inspection of the record, I find that the FSA has satisfied its burden by submitting evidence in support of each finding contained in the FAD. PSC has failed to meet its burden with a preponderance of

¹ In its brief, PSC requested oral argument. Under 34 C.F.R § 668.116(g)(1), the tribunal may exercise its discretion to hear an oral argument if it is necessary to clarify the issues presented in parties' written submissions. However, I do not find that oral argument is necessary in this case. Accordingly, PSC's request for an oral argument is denied.

evidence to convince me that it had acted lawfully within the Title IV requirements when distributing the funds.

PSC's appeal of the FAD does not dispute any of its findings. Without any evidence disputing the Department's findings, PSC cannot establish that it had maintained a proper accounting for Perkins Loans, properly disbursed Title IV aid only to students who met satisfactory academic progress (SAP), returned Title IV funds when students withdrew and verified the student aid applications during the period in question. In addition, PSC has not presented any evidence to dispute the correctness or unreasonableness of the liability accorded to each of above findings in the FAD. PSC merely notes that full payment of liability attached to each finding will cause substantial financial distress and seeks "a compromise and/or a negotiated settled amount" to reduce what PSC terms is an "excessive" amount (Respondent's Brief at 3). PSC does not propose a specific amount by which it wishes its liability be reduced nor does it provide any identifiable provision in the regulations or case law that allows this Tribunal to grant such request. Rather, it pleads for a general reduction of liability for equitable reasons. The crux of PSC's position is to seek equitable relief from this Tribunal and have it reduce the FAD's stated liability. In support of its request for equitable relief, PSC claims the following: (1) its financial aid management and staff during the period in question are no longer employed; (2) it has complied fully with Title IV program requirements after the audited period including the proper disbursement of Title IV aid only to students who met SAP; and, (3) it will experience a precarious financial situation as a result of repayment of Title IV funds in the FAD. These claims, however, are not supported by any evidence. Even assuming that PSC's claims are true, these claims cannot provide equitable relief in the instant case.

PSC, by arguing that new financial aid management is in place since the issuance of FAD, attributes blame to its past employees for improperly administering Title IV funds. However, an institution is fully responsible for the conduct of its employees. This Tribunal has consistently held that an institution is subject to liability arising from the conduct of its employees in administering Title IV expenditures even if the conduct is criminal. *In the Matter of Huston-Tillotson College*, Dkt. No. 99-2-SP at 2, U.S. Dep't of Educ. (February 10, 2000); *see In the Matter of Birmingham, The Shakespeare Institute*, Dkt. No. 99-83-SP, U.S. Dep't of Educ.

(March 30, 2001). The argument that PSC's financial aid management and staff have been replaced does not excuse PSC from its liability.

PSC's Title IV compliance *after* the period in question is immaterial and irrelevant to its compliance *during* the audited period. PSC's asserts that it has properly administered Title IV aid only to students who met SAP and complied with other Title IV requirements after the audited period. However, the evidence of compliance after the audited period is presumed to be immaterial and irrelevant. 34 C.F.R. § 668.116(e)(1); *see also In the Matter of Howard Community College*, Dkt. No. at 4, 08-21-SP, U.S. Dep't of Educ. (December 4, 2008) (holding that long history of compliance with Title IV requirement before the audited period is irrelevant). The evidence of compliance after the audited period may be considered material and relevant only if there is clear showing that the evidence is probative in determining the factual findings in the FAD. 34 C.F.R. § 668.116(d)-(e). The Respondent has not made such a showing. Additionally, PSC does not dispute the factual findings in the FAD, and any evidence of its administration of Title IV funds after the audited period cannot be probative when no factual dispute exists. *See In the Matter of Clark Atlanta University*, Dkt. No. 93-106-SP at 4, U.S. Dep't Educ. (December 22, 1997). Therefore, I shall not consider PSC's current compliance including the proper administration of Title IV aid to students who met SAP as part of evidence. Even if PSC had disputed the findings in the FAD, PSC's Title IV compliance after the audited period is merely a prerequisite for the present continuation of the receipt of Title IV funds, and it does not excuse PSC from its improper disbursement during the audited period.

Rather than dispute the reasonableness of the liability detailed in the FAD, PSC requests equitable relief from this Tribunal because of the possible financial distress it will cause the institution. PSC's request for equitable relief is misplaced. Just as the proper administration of Title IV funds before or after the audited period is not relevant to the FAD's findings, PSC's alleged financial distress that may result from repayment of liability is also not a consideration in the present case. *See In the Matter of Howard Community College*, Dkt. No. at 4, 08-21-SP, U.S. Dep't of Educ. (December 4, 2008). The possibility of PSC's financial distress in the future does not absolve PSC from the Department's recovery of improperly administered Title IV funds. Therefore, in view of PSC's failure to prove the proper disbursement of Title IV funds, the Department's assessment of \$3,461,610.00 liability is sustained.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Philander Smith College, pay to the United States Department of Education the sum of \$3,461,610.00, consistent with the determinations contained in the FAD.

Richard I. Slippen
Administrative Judge

Dated: November 16, 2009

SERVICE

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

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